E Q U I T Y

I N

S C O T S L A W

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"The more the law is looked into, the more it appears founded in equity, reason and good sense."

Lord Mansfield in James v. Price, 1773, Lofft, page 221.

1952

To My Mother

C O N T E N T S

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PREFACE

The purpose of this study is to examine the truth of the assertion frequently made that the Court of Session is a court both of law and of equity; to determine what foundation there is for this statement, what the scope of the equitable jurisdiction is at the present time, to ascertain to what subjects it extends and what effects it has on legal doctrines; and lastly, to suggest at least tentatively the possible sources of this jurisdiction and to compare it in outline with Equity as understood in England.

No attempt has been made to consider all the legal doctrines in detail or to cite authority, except in so far as it bears on the influence of equity.

TABLE OF COMPARATIVE HISTORICAL DEVELOPMENT OF EQUITY IN ENGLISH AND SCOTS LAW

England	Scotland
	1124-53 David I
1187 Glanvil	
1154-89 Henry II	
1215 Magna Charta	
1258 Bracton	(?) 1250 Regiam Majestatem (pub. 1609)
1295-1314 War of Independence: beginning of conspicuous divergence between laws of England and Scotland (P and M, I, 223)	
- Equity in the Common Law courts	
1485 Beginning of formative period of English Equity	
1523-30 Doctor and Student	
1529 Sir Thomas More, Lord Chancellor	1532 College of Justice founded
1536 Statute of Uses	
1596 Lord Chancellor Ellesmere	1570 Balfour's Practicks (pub. 1754)
1603 - Union of Crowns -	
- Conflict of Equity and Common Law	1603 Craig's Jus Feudale (pub. 1655)
1617 Lord Chancellor Bacon	1637 Spottiswoode's Practicks (pub. 1706)
	1646 Hope's Minor Practicks (pub. 1726)
	1655 English judges usurpation
1660 Equity becomes a consistent and definite body of rules	1660 Beginning of full development of Scots law

(contd)

HISTORICAL DEVELOPMENT (contd)

	England	Scotland
1667	Sir Orlando Bridgeman, Lord Keeper	
1673	Finch, Lord Nottingham, Lord Keeper	
1681		Stair's Institutions
1684		Mackenzie's Institutes
1698		Dirleton's Doubts
1707	- Union of Parliaments -	
1737-57	Lord Chancellor Hardwicke	
1751		Bankton's Institutes
1756-88	Lord Chief Justice Mansfield	
1760		Kames's Principles of Equity
1768		Erskine's Institutes (pub. 1773)
-	Equity becomes stereotyped and body of fixed rules	
1778	Lord Chancellor Thurlow	
1800		Bell's Commentaries
1801-6) 1807-27)	Lord Chancellor Eldon	
1813	Vice-Chancellor appointed	
1829		Bell's Principles
1836	Story's Equity Jurisprudence	
1851	Court of Appeal in Chancery	
1875	Judicature Act merges law and equity courts	

PART I

INTRODUCTORY

Chapter I
The General Nature of the Principle of Equity

In any discussion of legal principles in Scotland, equity plays a comparatively small part. There are no text-books bearing that title, nor is equity a rubric recognised in the Digests of cases. Only one book has appeared in Scotland discussing the Principles of Equity as applied in Scots law , and that one nearly two centuries ago (Kames, Principles of Equity, published 1760). Hence there is a view fairly generally held, even among lawyers, that there is little or no element of equity in the law of Scotland. Such a view might be more readily anticipated from a jurist trained in the legal system of England; he might well point to the absence of a Court of Chancery from the agencies of development in Scottish legal history, and to the absence of equitable rights and remedies as distinct from legal in our law, and hence conclude that there was no equity in Scots law. The view has even been expressed (Lawson, The Field of Comparative Law, 1949, 61 Jur. Rev. 16) that a conspicuous feature of the law of Scotland is its "failure" to develop an equity jurisdiction; and Lord Chan-

cellor Eldon thought that, until a division between law and equity was established, the House of Lords could not properly cope with Scottish appeals (Turberville, 52 L.Q.R. 189, 205). Moreover this misapprehension has extended among persons conversant with the legal system of this country, and the very mention of equity in Scotland tends to excite disapprobation.

Yet it may be that these views are fallacious and the present essay seeks to ascertain to what extent the basic principles of Equity have permeated the jurisprudence of this country, to define the scope of equitable influences on our legal doctrines and to estimate their importance, and, where possible, to indicate at least tentatively the sources of these influences and to suggest comparisons with acknowledged equitable doctrines. The law of Scotland is somewhat peculiar and individual in that it is neither wholly a branch of the system of law developed in what are usually called the "common law" countries, nor yet wholly one of the branches derived entirely from the civil law of Rome (Cooper in 1950 Harvard L.R. 468; Levy Ullman, 37 Jur. Rev. 370). Scotland is in an anomalous and intermediate position; she derives some doctrines of her law from each of these systems. Hence the approach to this problem is partly historical, partly comparative, and

partly analytical.

Traces of equity must first be sought in the law of Rome, as the foundation of many of our legal principles and the school of our institutional writers and judges during the formative period of the law; for it would be strange if some equitable elements had not been transplanted into Scotland with the general reception of Roman law, either directly or through the medium of the canon law. Moreover a preliminary sketch of the place of equity in Roman law is necessary, for subsequent comparison and analogy.

For more than a century now the most potent influence on our common law has been that of the law of England, and borrowing or unconscious adaptation from this source may again reasonably be anticipated in the field of equitable doctrines. Further, the legal system of England provides the classic instance in jurisprudence of the influence of Equity, for there Equity grew up into a separate system with its own courts rivalling and at times overpowering the common law. The accidents of legal history which gave rise to this development account very largely for the disproportionate importance of equity in the English as compared with the Scottish legal system, because in England the development and application of equitable doctrines were for centuries

effected openly by a separate court, so that its operation and influence were clearly distinguishable from those of the common law. Hence in England Equity is better known, and also instances of its action and effect are readily distinguishable; while in Scotland the importance and the very existence of Equity as a guiding principle in the determination of certain questions have very generally been ignored, because a different course of historical development has led to the growth and application of equitable principles not distinct from but within the framework of the common law.

In Scotland, then, the growth and nature and effect of any equitable principles discernible have been obscured; only with difficulty can they be disentangled and studied apart from the rules of common law. Furthermore, analysis of past cases is hardly conclusive in this connection in that judges have not always accurately discerned an equitable influence even when applying it, nor do they always describe it as such. The general failure to appreciate the influence of equity in Scots law is only part of the neglect which, with occasional exceptions, has until recently attended the investigation of the origins and growth of the principal doctrines of Scots law. There are tantalisingly few indications in judgments or authoritative

writings of the origins or the historical, philosophical or jurisprudential bases of the rules of our law, and of the hints that exist some are not beyond doubt or criticism. The progress of modern research may in time lay bare the roots of kindred problems, but many conclusions tentatively put forward in subsequent chapters must be taken as provisional pending the results of such studies.

The objection may be raised to the whole of the present study that, as Equity has never formed a substantive and separable part of the law of this country, it is inappropriate to essay its examination in a separate study; whereas in England, despite the "fusion" of law and equity effected in modern times, the subject is still sufficiently integral and distinct to render possible and justify, and even in some eyes to demand, separate treatment as a branch of law with its own textbooks (Holdsworth, Essays, 165, 184; Maitland, Equity, 21). While it could never be suggested that Equity should be studied in Scotland separately from legal rules, the case in answer may be put that manifestations of Equity as a basic principle underlying various branches of the law are sufficiently distinguishable to justify separate examination, though always with the basis and background of the rules of common law. This

approach enables the common factors of various equitable rules to be appreciated and facilitates their comparison one with another and with the comparable though better-known doctrines developed in English Equity. It further enables us to imagine our common law as a primitive system of strict law, stripped of its modifications and complications, as a separate subject for historical and juristic analysis. The aggregation of instances of equitable influence on legal rules tends to show that equity is a material formative influence in Scots law, a fact which hitherto does not seem to have been generally realised. Maitland (Equity, 19) emphasised that Equity in England was supplementary law and not self-sufficient. This is even more true of Equity in Scotland, but it nevertheless justifies examination. Without rules of law Scottish equity would be meaningless, and indeed non-existent: without equity Scots law would still subsist, though as a crude and inadequate system.

Meanings of the term Equity

It is essential, before proceeding any further towards the examination of equitable doctrines, to arrive at the true significance of the term Equity. Story observed (Story, § 1) that an improper notion of what constituted equity jurisprudence in England was not only common among those not bred to the profession but had often led to mistakes and confusion in professional treatises on the subject. This remark applies even more strongly to Scotland. To a lawyer, particularly if he be trained in the conceptions of the law of England, the connotation of the word which at once rises to mind is the peculiar technical significance acquired by the term through the accident of its development in that country, to a peculiarly high pitch and very largely independently of the common law, by a special court devoted to equity. But the different circumstances which have prevailed in Scotland render this meaning largely inapplicable, and it is necessary to examine de novo the conception which lies at the foundation of this branch of law. It is symbolic of the general legal attitude to Equity that the only use of the term discussed at length in standard works of reference (e.g., Encyc. Britt., s.v. Equity; Encyc. Soc. Sc., s.v. Equity) is

this highly specialised and technical manifestation of the principle which was developed in the course of centuries by the English Chancellors into a system which rivalled and in some measure superseded the Common Law. For many students of the law, both in Scotland and in the country of that development, the jurisprudence of the Chancery is the only meaning of the term recognised; whereas the general philosophic conception which underlies it, in which it originated, and which falls to be distinguished from its technical offspring, is more akin to the meaning of the term in Scots Law. In fact it might be said that Scotland has never known Equity but has long had equity in her legal system.

Notice must then be taken in the first place of the etymological and every-day meaning which makes equity equivalent to justice in the abstract (Salmond, Jurisprudence, 83) - to aequalitas, the impartial allocation of good and evil. Aequus had a physical reference in Latin, meaning level as well as equal (Miller, Data of Jurisprudence, 382). So Blackstone says (3 Bl. Comm. 429), "Equity is the soul and spirit of all law: positive law is construed by it, and rational law is made by it. In this sense, equity is synonymous with justice." This meaning extends to the principle of natural justice, the spirit or reason which underlies the whole of law,

all its general rules and particular decisions. No system of jurisprudence which aims at achieving substantial justice, rather than merely sanctioning administrative and executive action, can possibly ignore equity in this sense: the reason which it signifies is an essential constituent of fair judgment and the impartial judicial mind.

Story (§ 1) remarks that in the most general sense we call that equity "which in human transactions is founded in natural justice, in honesty and right, and which properly arises ex aequo et bono", and goes on to note that in this sense it answers precisely to Justinian's definition of justice or natural law. "Justitia est constans et perpetua voluntas ius suum cuique tribuendi. Jus pluribus modis dicitur. Uno modo, cum id quod semper aequum et bonum, ius dicitur; ut est ius naturale. Juris praecepta sunt haec; honeste vivere, alterum non laedere, suum cuique tribuere." (Dig.I, i, 10, 11), and elsewhere we find Jus est ars boni et aequi (Dig.I, i, 1; Bracton I, 4, 3).

In fact, however, the equitable jurisdiction has never extended in any country so widely as to comprise the ill-defined principles of natural justice (Snell, Equity, 1). A jurisdiction based on such nebulous concepts would be as variable and subject to current fluctu-

ations in customary morality as the doctrine of public policy is subject to current social and economic trends of thought. Equity in Scotland, as well as in England, does not extend and never has extended, so widely as to confer on judges an arbitrary power to decide according to what is fair and reasonable, however the law may be. Even the Roman law, which dealt to a considerable extent in matters ex aequo et bono, left many matters of natural justice outside its rules (Story, § 2, and authorities cited there).

This sense of the word possesses no special juridical significance beyond the popular application of the term and requires no further attention.

Equity as Natural Justice and Reason

The second sense of the word equity is not unknown outside jurisprudence. It is more restricted than the former; it signifies a special aspect of natural justice, justice as opposed to the rigour of inflexible rules of law, and as contradistinguished from strictum et summum ius. It is of the essential nature of law that it should lay down general rules and principles, which of necessity take no account of the special circumstances of particular individual cases where such a generality may work injustice; where, in fact, summum ius is summa

injuria. Equally, the possible eventualities of the actings of men are so manifold that any rule devised by human foresight must prove defective on occasion by having omitted to provide for the case which has arisen, and therefore supplying no remedy to the aggrieved party, although justice demands that no wrong shall be without a remedy. In such cases it becomes necessary, for the sake of avoiding injustice, to go beyond the law, or even contrary to the strict letter of the law, and to administer justice in accordance with the dictates of natural reason. This is what is meant by administering equity as distinct from law. So far as any tribunal possesses the power of thus supplementing or rejecting the rules of law in special cases by admitting pleas founded on reason and justice, it is, in this sense of the term, a court of equity as opposed to a court of law (Salmond, Jurisprudence, 83), and it is in this sense, as will be seen later, that the Court of Session is a court of equity as well as of law.

This sense of the term was well known in classical juristic theory. Aristotle defined equity as the correction of the law, where it is defective by reason of its universality (Nic. Eth. V, 10. 3.). His definition is constantly repeated with approval by later writers, in Cicero (Refs. in Salmond, 84; Holland, 71) and the Roman jurists (Refs. in Salmond, 84; and Story, § 3), in the

traditional jurisprudence of the Middle Ages (Refs. in Salmond, 84; Holland, 71) and the great European Post-Reformation jurists (Story, § 3). There were traces of this doctrine in the Roman jurisprudence to supply the defects of the customary law and to correct and measure the interpretation of the written code (Story, § 4). The jurisdiction of the Praetor doubtless had its origin in part in this application of equity as distinct from strict law. "Jus praetorium est quod praetores introduxerunt, adiuvandi vel supplendi, vel corrigendi iuris civilis gratia propter utilitatem publicam" (Dig., I, 1, 7). Despite the wide terms of this citation, the Praetor's power did not extend to disregarding the positive law: he had to adhere to it, whenever applicable.

This mode of equity was also well known to the early lawyers who laid the foundation of English legal doctrine and hence it passed into the English courts of the Thirteenth Century, when the judges were not so confined by statute and precedent as to be unable to do justice beyond the law upon occasion (P and M, I, 189-90; Holdsworth, II, 250-2, 335-6; Salmond, 84). Only later when the common law had hardened into strictum ius did aequitas become associated particularly with the Chancery (for Chancery development, vide infra Ch. III).

Equity of this kind is an essential constituent of every rational system of jurisprudence. No statute or code or rule, however detailed, could possibly foresee and provide for the infinite variety of human affairs and furnish rules to govern them all fairly (Dig., I, 3, 10; Story, § 7). Every law and legal system must to that extent be defective; cases will inevitably occur to which the existing rules cannot be applied without injustice, or to which they cannot be applied at all. The judge may be faced with circumstances in which he must choose which of two contradictory rules to apply, or which of two possible interpretations to put on a writing. There may be circumstances where no rules apply: he must choose what principle is to govern the case or utilise a close analogy to an existing rule, if the party is not to be left without a remedy.

From this arises the equitable interpretation of laws according to their nature and operation, whether remedial or penal, restrictive of general right or in advancement of public policy, private and limited or public and universal; and of documents according to the intention rather than the strict significance of the words (Story, § 6, quoting Blackstone).

Equity consequently demands that a measure of discretion be entrusted to a judge or arbiter, either

impliedly or by express provision of law. Equity as discretion, the arbitrium boni viri, is equally with its supplementary function an essential factor in any system of justice (Story, § 13). Justice without equity would be mechanical application of rules to facts. This sense of equity has been repeatedly referred to by text-writers of all nations and ages, both civilians and common-law writers, in England as frequently as anywhere else; but it is not a true picture of English equitable jurisdiction, at least since the Restoration.

This sense has been called general equity as distinct from the particular equity recognised by the municipal laws of a particular country (Story, § 9; Allen, 307). The former is a liberal and humane interpretation of laws in general, so far as possible without antagonism to law itself, while the latter comprehends such a liberal and humane modification in exceptional cases which do not fall within the ambit of the general rule. In any system of law the generalisation which strict law aims to establish for an indefinite number of particular cases, having the essential qualities of uniformity and universality, may conflict with the exceptional case, the casus improvisus, and the limitations of human reason, to produce a result antithetic to the purpose of the generalisation.

The Equity of the Chancery

The third main significance of the word Equity is peculiar to the nomenclature of English law. In this sense equity is not opposed to law but is itself a particular kind of law. It is the body of law which was formerly administered in the Court of Chancery (and still is to a large extent in the Chancery Division of the High Courts of Justice), as contrasted with the other system of rules of law administered in the common law courts (Salmond, 85; Story, § 13-4; Pollock, First Book of Jurisprudence, 257, and in Essays in Legal History, 1913; Maitland, Equity, 1). In this meaning, unlike the others, equity is not equated with law as a modifying influence, but distinguished from it and in some measure acting separately from it, modifying and correcting it. Equity is Chancery law as opposed to the common law.

Austin (II, 614) contended that in this sense equity was peculiar to Rome and England; but in fact the separate administration of law and equity is not an essential, and in Scotland and other countries where no separate system of equitable jurisdiction has ever existed, a similar, though in many respects less extensive, equitable power has been exercised in courts which

administer both law and equity. As will appear subsequently, equity in Scotland is rather more than vague principles of natural justice, though not quite rising to the status of a separate system. Moreover since 1875 the dual administration of law and equity has ceased even in England, though the fusion of the two systems is not complete, and the distinction of law and equity remains more a matter of professional training, technique and practice than a substantive distinction of importance. Even in England there are said to be cases where equity is applied in exactly the same way as in a Continental system of law which does not know such dualism; and to some extent equity is understood in Scotland essentially in the Continental sense, meaning, as it did for Aristotle, the application of equitable principles to correct and mitigate the harshness of legal rules (Friedmann, 304-5). So too, on the Continent, equity, so far as it operates at all, is a force working through and not in opposition to the law (Paton, 50).

Story was at pains (§§ 10-24) to refute the "inaccurate or inadequate notions, which are frequently circulated, as to equity jurisprudence" that the peculiar duty of a court of equity is to supply the defects of the common law, and next, to correct its rigour or injustice.

But it may be observed in passing that his strictures in this matter upon Lord Kames (§ 16) are not entirely deserved; Kames did not profess to describe the equitable jurisdiction of the English Courts as does Story, the scope of whose work is limited to equity administered in countries governed by the common law. It is essentially the difference between the wider second meaning of the word (in Kames, who had in mind the law of Scotland) and the third, exclusively English, meaning (in Story), and the notion is not so inaccurate in its application to Scotland.

The scope of equity in the technical sense of English law is narrowed by the fact that the greater part of that natural justice which is enforceable by any court by means of legal sanctions is in fact embodied in rules of common and statute law. "In the main, the common law is as much founded on a basis of natural justice and good conscience as is equity ... and statute law too embodies and gives legal sanction to many of those principles of natural justice, which though capable of being administered by courts of law were not originally so administered" (Snell, p. 2). "The distinction between law and equity is not so much a matter of substance or principle as of form and history" (ibid.) So too in such a modern matter as the liquidation of a company, the Companies Act,

1948, says (sect. 222 (f)) that a company may be wound up by order of the court if the court considers it to be "just and equitable" so to order. Moreover to an increasing extent in modern times statute law adopts and builds upon equitable as well as legal foundations. The trust, for instance, which is supremely an equitable creation, is now regulated in great measure by statutory provisions.

Story further affirmed (§ 14) that the proposition is untenable that everything which happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief in equity. There are many cases, he says, against natural justice, "which are left wholly to the conscience of the party and are without any redress, equitable or legal. And so far from a court of equity supplying universally the defects of positive legislation, or peculiarly carrying into effect the intent, as contradistinguished from the text of the legislature, it is governed by the same rules of interpretation as a court of law; and it is often compelled to stop where the letter of the law stops. It is the duty of every court of justice, whether of law or of equity, to consider the intention of the legislature. And, in the discharge of this duty, a court of equity is not invested with a larger or a more liberal discretion than a court of law".

Of course it is the case that any court possessing the unbounded jurisdiction of correcting, controlling, moderating and even superseding the law on the ground of natural law and justice would put everything subject to the arbitrary will of the judge, even though acting ex aequo et bono. Such an authority would deserve the famous rebuke of Selden (Table Talk, title Equity) that the Chancellor's conscience was as variable a standard as the length of the Chancellor's foot. Justice would depend on the whim of the particular judge.

In fact, of course, equity in English law has long been administered according to fixed principles and by reference to precedents. "There are certain principles, on which courts of equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided; and may thus illustrate, or enlarge, the operation of those principles. But the principles are as fixed and certain as the principles on which the courts of common law proceed." (Bond v. Hopkins, 1 Sch. and Lef. 428,429 per Lord Redesdale. See too Hardwicke's Letter to Kames on the subject of equity, quoted in Holdsworth, H.E.L., I, 468, and Woodhouselee's Memoir of Kames, I, 242.) This

statement is even more truly applicable to the state of equity in Scots law where the equitable principles are woven into the texture of the law. Even in the case of the nobile officium or extraordinary equitable jurisdiction of the Court of Session, the Court has for years displayed the greatest reluctance to exercise its power in cases for which there is no precedent; while the more ordinary instances of equitable moderation of law known in Scotland are no less confined. Consequently there is to-day practically no question of the arbitrary exercise of a jurisdiction founded on principles of equity.

In a famous passage in his Lectures on Equity (Equity, 18-19), Maitland described Equity in England as a gloss on the common law, and pointed out that equity was not, like the common law, a self-sufficient system, but rather a collection of appendices to, or glosses upon, various branches of the common law. It has further been pointed out that not all parts of the text of the common law were equally heavily glossed; parts are quite ignored, while others are fully glossed. If we may adopt this classic description and apply it to describe Equity in the law of Scotland, we may say that we have a text heavily glossed in places and left blank in others, and add that, owing to the circumstances attending the transmission of the text down through the centuries by a judiciary undivided into

courts of law and equity, the gloss has been absorbed into and become largely indistinguishable from the text of the common law.

We are here seeking to pick out and scrutinise the glosses apart from the text, though they can never make sense of themselves, nor can they be studied without reference to the basic text of the common law. This may, however, help to show that the unglossed narrative, the common law without equitable modification of its rules in places, would be a bald, crude and harsh affair, inflexible and at times unjust: in fact, strict law in its less desirable aspect. Such a system would be ill-adapted to function as the law of a civilised community.

The philosophical conception of equity

The general conception of fairness or equity in the administration of justice was fully and repeatedly discussed by the Greek orators and philosophers and was characteristic of much Greek legal and political writing (see Voigt and Calhoun, passim). Among well known passages which expound the conception, we may cite Plato's Politicus (294a: quoted in full in Allen, 310), where we find the Stranger telling Socrates that "the differences of men and actions and the endless irregular movements of human

"things, do not admit of any universal and simple rule. No one can lay down any rule which will last for ever - .... but this the law seeks to accomplish; ...." While Plato in this passage deals rather harshly with the conception of ius strictum, he expresses clearly the essential root of the Greek ἐπιείκεια, that a legal rule is necessarily an imperfect generalisation which requires a supplementary element to suit it to the particular case, what Maine called the "supplementary residuary jurisdiction" essential to the full growth and effective functioning of a legal system.

As in many other branches of human thought, the fundamental notion of equity was examined by Aristotle and expounded in a manner still substantially valid (Eth. Nic. V, 10, 1137a: quoted at length in Allen, 311). He observes shrewdly that equity is neither the same as nor generically different from justice, and that while both justice and equity are good, the latter is superior. Such is the view which finally found expression in § 25 of the (English) Judicature Act, 1873. The reason he gives is that all law is universal and about some things it is not possible to make a universal statement which will be correct. The whole passage is epitomised in a sentence which is still of very substantial validity - "The nature of the equitable /is/ a correction of law

"where it is defective owing to its universality".

In the Rhetoric, too (I, 13, 1374a. See also Voigt, 372 et seq.), he speaks more generally of equity and mentions among its characteristics that of looking to the spirit and not to the letter, to the intention and not to the action, to the whole and not to the part; and other generalisations still not inapplicable to the conception.

The Aristotelian view of equity and the ideal of natural law had some considerable influence on Scottish legal thought, and it is substantially in the Aristotelian sense that we have always understood equity (Friedmann, 306; Lorimer, Institutes of Law, passim): it likewise had the approval of many later jurists such as Grotius (De Aeq., I, 2), and Pufendorf (Law of Nature, V, 12,21).

The conception of equity was a real indispensable factor in the Greek conception of the administration of justice (Vinogradoff, Hist. Jur., II, 66), particularly in the interpretation of wills and the preservation of good faith in contracts, and in the liberal interpretation of archaic statutes. There was as well a general residuary justice or prerogative which resided in the sovereign people as represented by the higher Athenian Courts. "The notion of equity was scarcely less important than the conception of natural law as an element in the development of Greek law, the emphasis placed

"on the latter concept by the Stoics being in turn a factor of importance in the development of human law. The importance of ἐπιείκεια emerges distinctly in the writings of Gorgias and is connected by Aristotle with the unwritten common law which is in accordance with nature and unlike codes, permanent and immutable. So the doctrine of equity served as a practical means of ameliorating the law and accommodating it to particular situations, as well as a theoretical link between the imperfection of human legislation and the perfection of the absolute unwritten law of nature." (Calhoun, 74). The principles of equity, then, were something more than counsels of perfection in Greek law. While advocates in default of better material probably appealed to equity, there is evidence that, despite rhetorical exaggeration and forensic artifices, the general principle of equity was an integral and valuable part of the Athenian administration of justice. Equity was a well recognised part of the unwritten law which was one of the recognised divisions of Greek jurisprudence.

The distinction between law and equity was adopted from the Greeks by the Romans, principally by the orators, as the practical lawyers were positivists rather than philosophical jurists and originated little; it has been pointed out in the legal phraseology of the republican

period aequum est means no more than iustum est (Schulz, Roman Legal Science, 74 et seq.). Much more important in Roman and subsequent law are the conceptions of ius naturae and ius gentium which had penetrated to Rome by the time of the Republic. Not till the time of Constantine was the Greek antithesis of aequitas and ius met with in Roman jurisprudence (Schulz, Roman Legal Science, 296), though before this the distinction had long been familiar to Roman students of Greek philosophy. Moreover the name aequitas was never given to the jurisdiction of the Roman praetor. But the Roman lawyers by giving a legal content to the Greek philosophical conception of what was just by nature made it natural law (Pound, Interpretations, 28). By the time of Justinian Roman law had become a universal system; the distinction between ius civile and ius gentium had disappeared with the coalescence of the ius civile and the ius honorarium; there had been a great decrease in formalism and rigidity as compared with the classical law. The principle of aequitas in the sense of abstract justice came into prominence as distinct from the classical identification of the term with the process of interpretatio, possibly due in part to an infiltration of Christian ethical ideas (Schiller, Encyc. Soc. Sc., XIII, 425).

The principal force, so far as equity was concerned, in the transmission of Greek philosophy to Rome was the Stoic philosophy which held up an ideal of reasonableness and equity as a means of criticising law at a time when it tended to be narrowly customary. The Stoics clearly conceived of a perfect law of nature as a general rule of right distinct from the law of the state (Sabine, 151). Stoicism profoundly affected the earliest students of jurisprudence at Rome and gave them the conception of humanitas while their ideal law translated into Roman terms became ius naturale (Sabine, 157).

The Law of Nature

In considering the philosophical basis of the principle of equity it is essential to examine more closely the idea of the law of nature. Few philosophical doctrines have exercised greater influence on subsequent political and legal thought than the conception of the law of nature, or natural law, which has appeared in one form or another in various contexts for over two thousand years. The term has always been vague and inconsistencies in its explanation have abounded. Natural law was conceived by its exponents as that law which, grounded in the innermost nature of man or society, was independent of legislation, convention or other institutional device.

It reflected "the antinomy of the ideal as opposed to the real, apriorism contrasted with empiricism, the stability of the established order with the dynamic of moral progress, justice with security, or ideal with social necessity. It might be used to designate the ethical justification of law as a whole; as the a priori element antecedent to all law; as the ideal source of law and the criterion for testing the positive law emanating from this ideal; as the invariant rules of law in contrast with the changing; as autonomous law deriving its validity from its own inherent values; as spontaneous law differentiated by its living and organic properties from the law promulgated in advance by the state or its agents." (Gurvitch, Encyc. Soc. Sc. XI, 284. Bodenheimer, 103).

The conception may be traced back to the time of the Sophists in Greece. In Plato the theory was given a metaphysical foundation by the consideration of justice, the highest criterion of natural law, as an eternal idea. Plato identified natural law with the moral ideal and conceived it not only as an a priori antecedent of all law but as an ideal criterion for correcting existing law. In Aristotle natural law became identified with the established order of the existing society and constituted one element in the positive law. With the Stoics natural law became fused with the general law of the universe. This universal law, conforming to the law of nature and

identical with physical laws, was conceived as applying to all creatures and animals and thereby as establishing order and unity among them. This law rightly interpreted meant nothing more or less than right reason diffused through the universe (Schulz, 136).

The Roman jurists sought to bring greater precision into their theory of natural law and hence introduced many subtle variations. It has been suggested that the term ius gentium was introduced to designate the natural law peculiar to the rational nature of man as distinct from that common to all animals. Generally, however, natural law signified an ideal justice with which positive law should so far as possible be brought into harmony, and the declaration that a particular determination was consonant with the law of nature conveyed that it appeared just and equitable. Hence Paul said, Id quod semper aequum ac bonum est, ius dicitur, ut est ius naturale; and this is "the same thing as what English lawyers call equity, when they use that term in its general sense, and not as meaning a definite set of rules." (Walton, 359).

The idea of natural law conveniently expressed in one form the general belief that certain legal principles and institutions are so firmly rooted in the general scheme of things that they represent something which is inherent in all ordered social existence. Hence it was both a source of law and an ideal which law might seek to

attain. According to Justinian, every rule of private law was derived from one or other of the three sources ex naturalibus praeceptis, aut gentium, aut civilibus. Natural law was grounded in the innermost nature of man and society and independent of convention or legislation (Jones, 98). It was a fiction of a superior body of legal principles, existing in reason, of which the actual body of law was an imperfect reflection and by which, therefore, the actual law might be corrected and supplemented. Hence it was a great agency of juristic development (Pound, Interpretations, 133). The highest object of human endeavour was in the Stoic view to order one's life according to this law of nature, and human laws and institutions came to be regarded from this point of view as an approximate realisation, however imperfect and partial, of the law of nature, which stood behind them and provided rules by which men should regulate their actions (Jones, 98). The idea of the law of nature as a rational ordering of men's actions received much attention when the Romans adopted the work of the Greek philosophers, and in Cicero ius naturae or lex naturae and kindred phrases mean primarily some sort of objective and universal order, emanating from divine reason; and also partly legal, partly ethical rules expressing the principles of human justice with special regard to the relations of men in society. It was not disputed that

positive law might conflict with the law of nature, but the acceptance and application of the Greek conceptions was a means of legal reform at Rome to which may be traced some of the significantly equitable ideas of Roman law (Haines, Revival, 10: Jones, 99).

From Voigt's elaborate study of ius naturale as understood by the Romans, certain conclusions have been reached:- In the first place, it was capable of application to all men, and made no distinction between slave and free. Secondly, it extended to all peoples, and treated equally the citizen and the alien. Thirdly, it was timeless and the same in every age and time in identical circumstances. Lastly, it corresponded with the innate conviction of right in men.

The same learned writer concluded that the jurists from their conception of natural law eventually came to recognise the claims of natural blood relationship - of cognation - while the early lawyers had considered only agnation. It was out of regard for this principle that the praetors were led, probably quite early in the principate, following the dictates of natural law, to place emancipated children on the footing of equality with their unemancipated brothers and sisters in the matter of succession to their father. Similarly they came to rank collateral kindred through females alongside those related through males, whereas by the old law, an

emancipated child or a relative on the mother's side was looked upon as an absolute stranger. Again in deference to this, they induced the senate in the reigns of Hadrian and Marcus Aurelius respectively to give the mother a preferred right of succession to her children, and *vice versa*.

In the second place the later lawyers came through natural law to feel the duty of faithfulness to engagements, even though not entered into with due regard to legal form. Consequently they were led to recognise, and to give effect to, what they called natural obligations; that is, such as were unenforceable by the strict *ius civile* from some defect of form or on account of the relative position of the parties, and yet were morally binding and, though incapable of being made the ground of an action for enforcement, were given effect to indirectly by other equitable remedies. The jurists did not go the length of saying that a man might base an action on a natural obligation, but they said that he might at least be allowed to found on a natural obligation as a defence against an unjust claim.

The third main category to which recognition was accorded was nothing new: it had already been admitted as a principle under the Republic that no man must be allowed to enrich himself unjustly or unjustifiably at the cost of another. It was a dictate of natural law

that gains and losses should be apportioned according to equity. Under the Empire, the jurists gave this conception a wider application than before and utilised it as the solution of many questions in the sphere of contracts.

Furthermore, natural law enjoined the supremacy of the voluntatis ratio over the words or form in which the will was manifested, so that in the interpretation of any declaration, oral or written, the guiding rule was to discover, if possible, the intention of the party. The judge should not be bound to slavish adherence to the letter, but should attempt to penetrate behind to the true mind of the party. But this had to be applied with delicacy, for the voluntas could not be preferred to its written manifestation to the prejudice of other parties who in good faith had acted upon the letter (Voigt, I, § 52-64, 89-96; Maine, Anc. Law, Ch. iii; Muirhead, 269 et seq; Walton, 359 et seq; Jones, Ch. IV passim; Salmond, 26 et seq.).

Under the influence of natural law conceptions progress was made in rationalising the Roman law. More and more procedure was freed from the bonds of formality; contractual relations came to be based on agreement rather than on the stereotyped rigidity of the stipulation; the absolute paternal control over the property and persons of the children came to be undermined; married women

came to be the full equals of their husbands in the control of their property and children: and finally progress was made in throwing legal safeguards about slaves, partly by way of protecting them against cruelty and partly by making their manumission as easy as possible. These reforms were not due to Christianity, for the effective humanising influence was Stoicism. It was only later under Constantine and after that Christianity exerted an influence on the law, and even then it was not in these precise directions, but to secure the legal position of the Church and to aid the execution of its policies. (Sabine, 171. Cf. Jolowicz, 103-4; Girard, 639).

The Jus Gentium

The second main source of law recognised in the Institutes is the ius gentium. It is defined by Gaius (Inst., I, i) as that law quod naturalis ratio inter omnes homines constituit, id apud omnes populos per aeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. The conception assumes the identity of certain institutions or rules of law everywhere, and that this identity is based on naturalis ratio, in that they accord with their true nature, or are in harmony with the order of the universe. Gaius identifies the ius gentium with the ius naturale but this is not consistent with

the views of other jurists (e.g., Ulpian: see Carlyle, I, 39; Sabine, 169. Buckland, Textbook, 53; Jones, 101. Jolowicz 105). In fact universal identity of principles had not been and could not be established by the Romans. For instance, slavery was sanctioned by the ius gentium but was contrary to the ius naturale (Inst. I, 3, 2). To Gaius the ius gentium was the body of principles or laws which men have learned from reason to recognise as useful and just. It is primitive, universal, rational and equitable (Carlyle, I, 37). The doctrine grew up at Rome not by the conscious study of comparative law and the deduction of simple basic rules common to all systems, but slowly and unconsciously, due to the growth of foreign trade and acquaintance with the law of foreign peoples. The praetorian edicts, particularly that of the praetor peregrinus, were the vehicle of its development. The strict Roman ius civile could not be applied to a transaction with a foreigner for many reasons, and the praetor in a case involving a foreign element did not demand that the forms of the ius civile be complied with, but only demanded that its spirit be satisfied. This spirit developed gradually as the occasion presented itself. The praetors, observing that simpler forms of contracts had been devised by other peoples, especially the Greeks trading in the Mediterranean, were encouraged in their introduction of freer and more equitable forms, though

the Edict does not all originate in the ius gentium (Buckland, Textbook, 55). Sometimes a foreign piece of law was taken over bodily, as in the case of the Lex Rhodia de iactu or the law of hypothec; but more often Roman law was modified in the Greek spirit of equity as opposed to formality. "Broadly speaking the ius gentium was home-grown law worked out at Rome by Roman magistrates." Only later was it applied to foreigners.

After the praetorian edict had been fixed by the Julian compilation, the jurists of the classical period improved and developed the ius gentium. The philosophy of Stoicism had leavened the whole thought of the educated Roman world: the jurists were anxious to find principles which seemed to flow from natural reason and to accord with the universal fitness of things, consonant in fact with the Law of Nature; and these doctrines they found in the ius gentium (Walton, 367 et seq). The jurists sought in some measure to approximate existing law to the ideal and perfect law of nature.

The greatest scope for the new doctrines was in the field of contract and to it may be attributed the relaxation of the stipulation and the recognition of the real and consensual contracts as creative of obligations which were independent of formalities by word or deed: it also made a mark on the law of family and of succes-

ion. (Muirhead, 215-7).

The spread of literature and philosophy at Rome from the time of the later Republic, and the spirit of critical inquiry aroused and fostered by these studies, substantially influenced the new departure in jurisprudence to which praetors, judges and jurisconsults all contributed a share: the subordination of form to substance, the word to the will it purported to manifest, and the abstract rule to the individual case to which it was proposed to be applied. This was the first effort of what was then called equity to temper and restrain the rigour of the ius strictum. The praetors were not the only contributors to this, but the form and publicity of the Edict gave to its applications by the praetors a more prominent and enduring record than was found in the decisions of private iudices or the opinions of counselling jurisconsults (Muirhead, 222-3).

The ius naturale and ius gentium always had a tendency to coalesce, or at least to be confused. The categories signified indifferently principles generally recognised and therefore common to the law of different peoples, and also principles inherently right and reasonable. But in time the jurists saw reason to distinguish the two conceptions and this, besides adding precision to legal definition, signified a more penetrating ethical

criticism of the law; and the existence and validity of a higher law, which the positive law must live up to as best it can, were taken for granted throughout the Middle Ages and well down into modern times (Sabine, 169-170: Carlyle, I, 38; Pollock, 'History of the Law of Nature').

The conception of equity contributed to the fusion of ius naturale and ius gentium. The regard for substantial as opposed to formal and technical justice, for conduct which would deserve the approval of a man of honour and conscience, added to the natural innate sense of justice in men, completed the idea of the higher kind of law prescribed by God or Nature (Bryce, The Law of Nature, in Studies, II, 556, 581). The blending of natural law as an ethical standard with the usages approved by the common practice of all nations satisfied both the philosophical and historical instincts of the jurists.

Later Development of the Law of Nature

A full discussion of the later development of the theory of the law of nature lies beyond the scope of this study. It is sufficient to mention that in the Middle Ages legal thought, like political and theological, was coloured throughout by a belief in the existence of a

Law of Nature which was based on reason and held sway over all men of whatever station. The schoolmen naturally brought the law of nature into close contact with the divine law and it was a matter of agreement that the source of the law of nature was in God. The conception was thus a familiar one to the clerics and scholars in canon law who assisted the mēdieval Chancellors in England, while later the same idea provided Grotius with a basis for the modern law of nations. In later thought the conception became associated with the doctrines of natural rights and social contract, with the American Declaration of Independence and Rousseau, until more recently fresh attempts to formulate a new law of Nature as a juridical postulate have been made by modern jurists (Salmond, The Law of Nature; Jones, 110 et seq.; Bodenheimer, 165 et seq.; Sabine, passim; Gierke, Political Theories, 74; Carlyle, I, 102; Friedmann, 59 et seq.)

The problems of the Law of Nature, the ius gentium and the divine law were of course agitated in the revival of Roman legal studies in the law school of Bologna in the Eleventh Century (see generally Vinogradoff, Roman Law in Medieval Europe; Meynial in Legacy of the Middle Ages). The medieval civilians thought of law in the largest sense as the expression of the principle of

justice. To them ius is derived from justice and aequitas, though some distinguish between aequitas and justice. An anonymous fragment, possibly earlier than the school of Bologna (quoted in Carlyle, II, 7), defines aequitas as "rerum convenientia quae in paribus causis paria iura desiderat" and adds that God is aequitas itself; while this temper is fixed in a man's soul and will, it is called iustitia, while justice expressed in the terms of law, written or customary, is called ius. This definition of aequitas is related to Cicero (Topica, 23), is found in Irnerius and in the work of Azo which was so well known to Bracton.

In the ordinary civilian theory of Bologna justice is regarded as a quality of the will to secure and maintain aequitas, and it is primarily a quality of God's will. Bulgarus, in his comment on Paul's phrase, "In omnibus quidem, maxime tamen in iure, aequitas spectanda est", says that a judge must prefer equity to strict law, so that, while law enacts that all agreements be kept, equity declares that such as are made under false pretences, through fear or violence, or with minors, are not to be kept, and the judge must decide such cases on the ground of equity (Carlyle, II, 15). It is interesting that Azo understood by the aequitas which was to override written law a written aequitas and not vague principles

a judge may find in his heart.

It is clear that aequitas or theory of justice was immensely important to the civilians both as a source and as a test of law. The Law of Nature was still an important source of law to the civilians but, while all concur in holding it immutable and superior to any other system of law, it is variously described as ius commune or equal to the ius gentium or the Mosaic Law or that which is aequissimum or even equal to the Civil Law (Carlyle, II, 30).

Beyond this it is hardly necessary to go (see generally d'Entrèves, and authorities there cited); nor need we go into the relationship of the doctrine to Christian thought (Brunner, 80 et seq.). It is sufficient to mention the influence of Azo and the school of Bologna on Bracton (Pollock and Maitland, I, 207), on the canon law and the whole revived Roman law which flowered on the Continent in the late medieval and early modern period; and it will be seen that here is a root of the stem which bore fruit as Equity in England and Scotland.

Natural Law Ideas in England

The two major problems in English law, in which the influence of natural law ideas has been strongest, are: the supremacy of law; and the introduction of equity in

the Aristotelian sense of "justice between man and man", correcting in individual cases the severity and rigidity of the justice achieved by the general law. In this sense its influence in various phases of the development of English law has been very great. These ideas operated on common law courts in the earlier period, before the rise of the Chancery and before the common law had become so rigid as to make the existence of Chancery jurisdiction a necessity.

On Equity itself, as a separate and substantive system, the influence of natural law ideas was less, in that Equity was conceived as a matter of conscience between individuals; but Maitland was of opinion (Equity, 9; cf. Holdsworth, H.E.L. V, 216) that ideas of natural law borrowed from canonists or civilians were of considerable importance. The use of the term "law of nature" seems to have been avoided in the development of English Equity (Holdsworth, H.E.L. II, 602). But the most profound and enduring influence exercised by those ideas was as guiding principles in law-making. Lord Mansfield openly invoked natural justice, but generally in the common law less philosophic expressions such as "reasonable" and "fair" were used (Friedmann, 51).

In Moses v. Macferlan ((1760) 2 Burr. 1005) Mansfield made his famous attempt to introduce a general equitable doctrine of "unjust enrichment" into English

law, by attempting to deduce an obligation of restitution from its roots in natural justice. Though subsequently repudiated, the doctrine has been revived in our own day in a theory of quasi-contract founded in aequum et bonum (Winfield, Province of Tort, Ch. VII; Cheshire and Fifoot on Contracts, 471 et seq.).

Further, the conception of reasonableness in English law savours of Aristotelian equity, and it may be said that the whole notion of the "reasonable man" which is at the foundation of the modern law of negligence is an application of principles of natural justice to the standard of behaviour required of the individual, though in such uses the term "reasonable" is relative and not rigid and absolute as in the older theories of natural law (Haines, 39). Yet this is sufficient to show that natural law is a material influence on English law too. Its influence on Scots law is examined later (infra, Ch. V). In recent times principles of natural justice have again come to be openly invoked in both England and Scotland, particularly with reference to the testing by the Courts of the validity of administrative acts (Friedmann, 51; Robson, 385).

Equity as a Source of Law

There exists among jurists a substantial measure of unanimity in assigning to Equity a place among the

principal formative influences of the law. Allen brackets it with Custom, Precedent and Legislation (Law in the Making): Maine, in his most famous work, interposed it between Fictions and Legislation as a factor in development (Ancient Law, Ch. 3). He saw it as a body of rules, founded on more or less distinct principles, existing side by side with the original civil law and claiming to supersede it by virtue of an inherent superior sanctity or ethical quality.

Recently there has been a revival of interest among modern jurists in the doctrine of natural law which has played a great part in equity (Friedmann, 59 et seq.) In England and those parts of America under the common law, equity is more than a source of law: it is itself a major part of the law. In Scotland the law of nature finds mention in an appraisal of the sources of our law (Stair Socy., Vol. I, Sources and Literature) and Stair (Inst. I, i, 10) says that our customs have arisen mainly from equity. At the present day, however, equity in Scotland is so secreted in the interstices of the common law that its existence and influence are apt to be overlooked, particularly as there has never been a separate administration of law and equity in this country. In this respect the law of Scotland reveals its affinity, derived from its historical connections, with the

countries of the Continent rather than with those of the common law, with those where the dualism of law and equity characteristic of Anglo-American systems is unknown and equity is a technique of interpretation applied to a legal question rather than a distinct body of law (Friedmann, 282). This affinity of legal method with Continental systems is due in no small degree to the decisive influence of the reception of Roman Law in this country (Friedmann, 281), an influence which has not yet been accurately assessed, or even estimated, but which is patently and admittedly great. Though its supplementary and persuasive influence was for long very great, it never amounted to complete adoption in place of our indigenous common law. Roman Law did not become a constituent of English law though it did exercise a potent influence on the formation of legal doctrines during the critical Twelfth and Thirteenth Centuries, and Equity (in England) has even been described as Roman to the backbone (Scrutton, Influence of Roman Law, 152, 162). The Chancery was much influenced by Roman Law in the form and matter of Equity, largely indirectly and through the canon law. The subjects of the Chancery jurisdiction, with the conspicuous exception of the trust, are frequently of Roman origin although the details have been worked out by successive Chancellors on English lines (Scrutton, Influence of Roman Law, 152,

162), and there are many instructive parallels to English equity in the equitable jurisdictions of the Roman Law (Buckland, Equity, passim), though analogy may sometimes be mistaken for origin.

It is inappropriate until a later stage to consider fully the possible advantages and disadvantages of a self-sufficient system of equity as compared with a legal system where equity is administered in and through common law rather than alongside it. But when considering equity in general as a source of law it is material to note that a self-contained and separate system of technical equity is not a necessarily characteristic source of law. Equity is a frame of mind so essential as an adjunct to strict law as to be an indispensable source of legal institutions, more so than morality, religion, or economics, however it be administered (Allen, 338). An element of discretion judicially exercised having regard to an inherent sense of natural justice and reasonableness is and always has been an essential of the efficient interpretation and application of principles of law to sets of facts and circumstances (Allen, 349). In some quarters to-day dislike of strict law has led to a reaction in favour of free law which may go so far as to allow each judge to decide every case by relying on his subjective sense of justice; but this freedom goes far beyond any principles of equity and its lack of restraint

by legal rules may be as dangerous as undue restriction thereby (Paton, 173; Friedmann, 224).

The Necessity of Equity

In the workaday modern world the essential connection between law and justice is often forgotten. Our minds are so occupied with the rules applicable to the case that we fail to see the blind goddess Justice enthroned above the Courts. But this was not always so: in earlier times no medieval political theorist would have considered law as other than an approximation to ideal or natural justice. Law was then more than the mechanical regulations of nearly all the social and economic functions of mankind. So at Rome the one word Jus signified both Law and Justice, and this is found equally in other languages to-day (Holland, Jurisprudence, 14 seq.). There was always a straining to identify the positive law of a state with the concept of natural law, which was considered to be the nearest possible approximation to the absolute ideal, with its idea of a universal standard of right behind and above the laws of any particular political society (Allen, 305; Carlyle, I, 112, 172; III, 183). After suffering an eclipse in more materialistic and empirical ages when practical lawyers grew to distrust such vague general-

isations as "justice between man and man" and "natural justice" (Local Government Board v. ~~Coe~~Ar~~l~~idge, /1914/ 1 K.B. 160, 199; Sinclair v. Brougham, /1914/ A.C. 398, 454-5), there has been in more recent times a revival of interest in the conception of natural law and increasing regard paid to it (Haines, Revival, passim). In the past, then, the constant striving after unattainable perfect justice played a supremely important part in legal development.

In Plato's Republic the theory of the state culminates in the conception of justice, although the discussion of the subject in that work is rather of social than juristic justice. In Roman legal theory positive law was an approximation to perfect justice and right (Sabine, 170). Stammler regarded this belief in justice as the crowning glory of Roman jurisprudence, the universal significance and permanent worth of the classical Roman jurists. "They had the courage to raise their glance from the ordinary questions of the day to the whole. And in reflecting on the narrow status of the particular case, they directed their thoughts to the guiding star of all law, namely the realisation of justice in life." (The Theory of Justice; Eng. tr. (1925) p. 127.)

But it is apparent that justice is a philosopher's concept and there is no ready yardstick by which it can

be measured: arguments on the nature and attributes of justice have been endless so long as men have been reasoning beings. There is nevertheless a general feeling in any particular circumstances as to what is or is not just and the jurist must face the awkward question, if justice - vague though it be and defying definition - be the aim of positive law, why cannot the law itself suffice for this task, without extraneous assistance?

The answer lies in this nebulous character of the unattainable justice coupled with the infinite variety of human circumstances. An experienced lawyer knows full well the immense possible permutations of eventualities. How seldom do we find an exact precedent for the circumstances of any particular case: how very often is there no remedy quite applicable to a case. Any legal rule, like every other kind of rule, aims at establishing a generalisation applicable to an indefinite number of individual cases of the particular matter it relates to. Its essential qualities are uniformity and universality. There can be no exceptions to its universality, else it ceases to be a rule; and if the different forms and expressions it may take have different meanings, it ceases to be uniform. The essential meaning and intention of the rule must be uniform in all cases. There may however be at least apparent exceptions to the principle of

universality, as in the case of laws applicable only to, say, employers or mariners, although the exception is only apparent, as the laws in question are generally applicable but do not affect the interests of other categories of the community equally. But no generalised legal rule can be completely and entirely general and subject to no exception, as the ideal justice which is the aim and object of the generalised rule may vary slightly with the changing circumstances of several cases, however similar in salient facts they may be; or over a period of time, with a developing social conscience. In some cases the application of the generalised rule to the determination and regulation of the rights and duties applicable in the circumstances of a particular case, may then produce results directly antithetic to the idea of justice which supplied the purpose of the generalisation (Allen, 307; Paton, 171-2).

For this reason equity is a necessity in a mature legal system: a discretionary or moderating influence is superadded to the rigour of formulated law to abate the evils of a binding rule and to narrow the gap between law and justice. How this is done will appear subsequently. In earlier stages of legal development fictions played a part in adapting rules of law to changing environment and social needs: to-day legis-

lation accomplishes it in some degree in at least parts of the law (Maine, Anc. Law, Ch. iii).

The natural sense of justice to which an approximation is made by positive law is a vague but not meaningless term; but despite infinite variations of subjective opinion as to its content "it needs no subtle dialectic to demonstrate that there is in man at least an elementary perception of justice, as a form of the right and good, which no law dare flagrantly transgress" (Allen, 309). Customary law can only establish the rule and leave the contingencies unprovided for, and one of the first necessities of the lawgiver is to administer law in the spirit of humane interpretation which is characterised as equitable.

Equity as a Stage in Legal Development

Maine has described the three classic stages in legal development as fictions, equity and legislation (Ancient Law, Ch. iii). Equity is then an intermediate means utilised to modify rules of strict law and adapt them to conditions which have changed since the rules were formulated. The growth of legislation as a means of adapting law to changed conditions does not entirely supplant equitable influence in that in many circumstances equitable modifications and standards continue to

be applied and are even enacted and strengthened by statute, as witness the statutory enactments relating to trusts which are only superimposed on pre-existing equitable rules.

Pound has suggested (Outlines, 40) another series of stages in legal development in which also equity figures as an intermediate stage. It is preceded by the stages of primitive law and strict law and succeeded by those of the maturity of law and the socialisation of law. The place of equity as a middle stage will be illustrated in later pages, but it does not follow from this that the value and importance of equity come to an end when a country's jurisprudence has advanced to a later stage: on the contrary, its influence remains potent though possibly less obvious, for no stage of development is completely obliterated by subsequent stages.

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Chapter II
Equity in Roman Law

From the time of the Twelve Tables onwards there is manifest in Roman Law the influence of Greek philosophy, and some knowledge of this cultural heritage was possessed by the lawyers who were the founders of the tradition of classical Roman jurisprudence. Some at least of these are known to have studied under Stoic teachers and the persistence of the philosophic influence is shown by the Greek hallmark borne by many of the established conceptions of law and justice. The Romans took more kindly to the ethical than to the metaphysical part of the Greek philosophy and philosophical study had a distinct influence on Roman jurisprudence in an equitable direction and in checking the rigour of strict law. In this movement praetors, judges and jurists all played a part though most prominence attaches to the equitable spirit visible in the praetorian edict. By the time of Cicero the desire had become very marked to subordinate form to substance, the spoken word to the intention it set out to manifest, and the abstract rule to the particular case in which it was to be applied (Muirhead, 222). Though the word aequitas appears in juristic writing it has no clear sense beyond "fairness": only in post-classical texts is it used to justify modification of law in favour of a weaker party (Buckland, Textbook, 55).

Towards the end of the republican period Rome had

become a city of great importance conducting a large volume of commerce with countries abroad. In consequence, numbers of strangers visited and settled in Rome. For the regulation of their affairs the ius civile was inapplicable as being peculiar to Rome and her citizens; hence there gradually developed a ius gentium as a kind of international private law regulating relations between peregrines, or between peregrines and citizens. It was built up empirically rather than by comparative legal analysis or the adoption of one doctrine or institution after another which was found to be generally current elsewhere. Later in the early Empire it was extended by the jurists by a combination of comparative jurisprudence and rational speculation (Muirhead, 216). Probably the flexible formulary procedure was first introduced in these courts (Jolowicz, 101). It was Roman law in origin, stripped of formal elements and influenced by foreign, particularly Greek, ideas. About 242 B.C. a special praetor was appointed to deal with disputes involving foreigners. He enjoyed, like the urban praetor, the power of publishing an edict on taking up office, and this was utilised in time as a means of legal development.

Owing to the excessive rigidity of early Roman procedure, it was essential, if an action were to be relevantly laid, that it should be fitted into one of the

classes whose terms were fixed by the Twelve Tables. The old forms of conveyance and contract were so formal that no equitable considerations or questions of intention could receive effect (Walton, 244; Buckland, Textbook, 625).

The praetor's powers were greatly widened by the Lex Aebutia of about 148 - 125 B.C., which seems to have given the parties to an action the option of employing the old procedure or of applying to the praetor for a formula; and by the Leges Juliae (16 B.C.) the formulary procedure almost entirely supplanted the older legis actiones. Under the formulary system the praetor's duty was to settle a formula or issue in writing, if the case appeared prima facie to be relevant, and remit the matter for trial to a judex chosen from a panel of private citizens (Walton, 246; Buckland, Textbook, 627).

After the Lex Aebutia the praetors realised the value and importance of following general rules publicly known. That lex seems to have been intended to empower the praetors to adapt existing remedies to altered circumstances and to fashion new actions based on the ius civile for the use of peregrines to whom the older procedure was incompetent; further it may have authorised the insertion in the styles of formulae of clauses which would give protection against claims well founded

in law but in fact inequitable (Muirhead, 220). Certainly the result of the general adoption of the new procedure was that the issue was now formulated as an instruction to a judge to investigate and consider and with power to condemn or acquit according to his finding. Under this system the magistrate acquired greater importance, as he could refuse a formula or sanction an unprecedented one.

The praetors then took to publishing an edict at the commencement of their year of office announcing that in certain stated circumstances they would grant a formula and send the case for trial before a judex, thereby indicating the principles on which they intended to act during their term of office (Jolowicz, 97; Buckland, Textbook, 8). Successive praetors habitually adopted the edicts of their predecessors, if they had proved beneficial, and reissued them, possibly adding new provisions; and in time the greater part of the annual edict was transmitted with only such minor alterations as practice and experience had shown to be necessary. The edict had probably attained considerable dimensions by Cicero's time: it contained moreover an appendix of styles of formulae which the praetor sanctioned. (On the relation of the ius gentium and the Edict, see Buckland, Textbook, 55.) At first the

provisions of the edict were not binding even on the praetor who issued them, but in 67 B.C. the Lex Cornelia enacted that praetors should abide by their first edict. Among the actions granted by the praetorian edict were some of major importance for the development of the law, such as the rule that the praetor would not treat as binding an obligation shown to have been extorted by violence or threats, or that an innkeeper or carrier would be held liable for goods destroyed or lost while in his charge unless he proved damnum fatale.

Thus a regular system of praetorian law grew up additional to the statute and customary law already in force and the edict became the principal means of legal development. The peregrine praetor also issued an edict; and as he was concerned with non-Roman parties his edict contained more of the ius gentium and accordingly was probably rather in advance of the urban praetor's edict in avoiding formalities competent only to Roman citizens and thus in simplifying procedure (Muirhead, 219). In time the urban praetor, appreciating the simplicity and justice of the new rules introduced for the benefit of foreigners, began to borrow them, and hence new forms and doctrines came into the ius civile. So too a certain amount of borrowing was done from the edicts of provincial governors and of the

aediles (Walton, 251).

The cardinal difference between litigation under the system of legis actiones and under the formulary system was that under the latter litigation was carried through by framing an issue in words adapted to the circumstances of the action and the matter in dispute as distinct from insistence on strict adherence to the unalterable forms of words characteristic of the legis actiones. The exact formulation of the issue in a particular case was a matter of no small importance and the praetor, having the last word in its composition, exercised a great influence on the development of the law; and the invention of this both flexible and precise instrument of procedure is a sign of the Roman genius for law as well as a cause of the success achieved by the Roman jurists (Jolowicz,209).

The praetorian edicts proceeded upon grounds of equity to a greater extent than did early legislation, and their whole tendency was against the strictness and formalism of the Twelve Tables. This was however the tendency of the times, and the praetors are not the special exponents of equity as distinct from law though the publicity of the edict gives their work in this direction greater prominence.

A material source of the praetors' influence on the development of the law was the power of authorising

exceptiones in a formula. The effect of this clause was to direct the judge not to condemn if certain facts were found to exist which excluded the pursuer's *prima facie* claim and lost him the case even though his right were perfectly good by civil law. It was a plea in defence: in form it was a product of the Edict though the defence to which it gave effect was not necessarily praetorian (Buckland, Textbook, 654; Manual, 397).

Some of these *exceptiones* were clearly equitable while some were not. In *bonae fidei iudicia* only, the defences based on equitable grounds, the *exceptiones doli*, *metus*, *pacti*, etc., might be raised therein without being claimed in the formula (Buckland, Textbook, 678 *et seq.*). When the pursuer applied for a formula, the defender was entitled to have inserted in it an instruction to the judge that condemnation was conditional on his failure to establish a plea in defence which precluded condemnation on grounds of equity or public policy, even when the pursuer had clearly established the questions of fact and law given in the *intentio* of his formula. So where it was alleged that the money promised was in repayment of a loan which in fact had never been advanced, or that a promise had been induced by fraudulent misrepresentation or extorted by duress or granted under excusable error in fact, or that the

matter had been compromised, and so on - in all these cases the exception formulated by the praetor was the assertion of the equity of the praetorian ius honorarium in derogation of the strictness of the ius civile which permitted no such defences.

Alternatively, if a defender, instead of pleading any particular fact which might have entitled him to a specific exception, considered it more advantageous he might ~~to~~ secure the insertion in the formula of general words which reserved to him the right to plead any unfair dealing on the part of the pursuer which disentitled him in equity to demand decree: this was the exceptio doli (generalis) which was held to be implied in all bonae fidei actions; the phrase in the intentio, quicquid dare facere oportet ex fide bona, entitled the judge, without any exception having been formally pleaded, to take into consideration any suggestion by the defender of unfair conduct on the part of the pursuer (Muirhead, 332; Jolowicz, 218; Buckland, Textbook, 654).

The power of authorising such exceptiones which would result, if substantiated, in the pursuer's losing his case although his right was perfectly sound by the strict civil law was itself a source of the praetor's influence on the development of the law, as much as the power of granting actions; though it must be

remembered that not all *exceptiones* were due to praetorian influence, for in many cases rules introduced by a *lex* or *senatus consultum* were made effective by means of an *exceptio* (Jolowicz, 213-4).

While the *ius gentium* ultimately extended to most branches of the law of Rome it was in origin a body of principles of mercantile law of general application administered by a court with wide equitable powers, a system which had regard to intention and not form as in the *ius civile* (Walton, 255). It was the source of the whole mercantile law of Rome including hiring, deposit, mandate, sale, partnership and agency, and Sohm has pointed out that the law of obligations and particularly consensual contracts is Rome's most permanent contribution to jurisprudence (Sohm, 74. Cf. Bell, Com., Preface).

Influence of the Jurists in the Republic

In considering equitable developments at this stage the influence of the jurists cannot be overlooked. From early times they were influential in developing the law by *interpretatio* and shaping *legis actiones* (Jolowicz, 87), and later probably assisted parties to settle a formula before the praetor for the trial of the action, as well as advising the *iudex* on points of law in the case.

They sometimes acted as assessors to iudices and practically dictated the judgment. It seems likely too that the edict itself and the modifications thereof made from time to time were settled in consultation with jurists (Buckland, Textbook, 22). The time of their most open and avowed influence was later, however (Jolowicz, 92-4).

Equity in the Classical Age of Roman Law

Reference has already been made to the infiltration of doctrines from Greek philosophy and Greek sources of law into Roman law during the republic and early principate, particularly in the matter of the ius gentium. The influence of continuing contact with more mature Greek systems, which were considerably more free from formalism than was Roman law, assisted natural development in this direction in the classical period. The principal instrument for the modification of the law was the combination of the praetorian system with juristic interpretation. While the main lines of the praetorian edict had been defined by the end of the republic, its importance was vastly extended during the principate. "As, in Maitland's phrase, Equity was a gloss on the common law (Maitland, Equity, 18), so the praetorian system was a gloss on the civil, but the sphere of Roman 'Equity' was considerably wider than that of its English

"counterpart" (Jolowicz, 420).

While the praetorian edict was of great importance, the part of the jurists must not be neglected. They developed the rules as to what constituted fraud, such as to justify invoking the exceptio doli granted by the edict; the rules for the granting of in integrum restitutio when the praetor restored a right which had been lost in law but not in equity, as when a detrimental transaction with a minor had been alleged. The praetor would grant it if the loss had been due to fear, fraud, innocent mistake, a change of status, necessary absence or infirmity of age. These were cases for which the ius civile had no adequate remedy or none at all, as the damages it allowed would not restore the person to his previous position. These circumstances are grounds of equitable relief equally in English and Scots as in Roman law. It was on the authority of the jurists too that actiones in factum were granted in cases where neither the civil law nor the edict had already provided a remedy and these appear to have been among the most fruitful methods of development (Jolowicz, 420 Buckland, Textbook, 686). Juristic interpretation, moreover, applied to the civil law as well as the praetorian, so that the two tended to draw together so as to become a coherent whole, a process which reached com-

pletion in the codification and fusion effected under Justinian.

The classical period of the law is marked particularly by a decrease in formalism and by increasingly abstract methods of thought as compared with earlier times. Before the establishment of the principate, the distinction between the principle of rigidity which made for certainty, and that of flexibility, making for justice in the individual case, was well known to the Romans. Jus as compared with aequitas was familiar. Aristotle had discussed it and the Greek rhetoricians who had enjoyed considerable influence in Rome had developed it, and the ancient rigidity had already suffered some defeats before the end of the republic. But of more influence than devotion to a philosophic ideal of equity was the elaboration of a masterly technique of interpretation by the classical jurists, wherein their superiority over the Byzantines is perceptible (Jolowicz, 424; and in 48 L.Q.R. 171, 181). Many instances could be quoted to illustrate the extent to which the classical law had freed itself from antique fetters, and it is also important to appreciate how much flexibility it had attained by use of standards rather than rules, standards which have a timeless validity, though their precise content may

vary at different ages. Rules could be deduced from these standards while leaving them unexhausted for the resolution of future difficulties. Of these bona fides is the most notable example, and only in this period were the potentialities of the bonae fidei actions realised (Girard, 592; and see Schulz, Principles, 228). Dolus received a similarly wide extension to include any act which did not conform with the requirements of bona fides. Other evidences in the classical period of the developing maturity of the law in an equitable direction are the growing tendency to abstract methods of thought and legal analysis, and the increased use of writing in the constitution of obligations (Jolowicz, 428), though the continuing clumsiness and backwardness of the forms of procedure hampered the analysis of legal situations on the basis of rights and tended to confine it to a consideration of remedies and forms of action. Examples of these tendencies are Gaius' classification of rights and the conception of obligatio.

Equity in the Post-Classical Law

The law of Rome reached its final form in the codification and multifarious amendments associated with the name of Justinian. After this stage the law,

like other forms of knowledge, declined into the Dark Ages before emerging again as the background and basis of much of the law of medieval and modern Europe.

While the Corpus Juris gives a system of law differing in spirit and in detail from the law of classical times, it is not always easy to give an account of the contrast, the difficulty lying largely in the reconstruction of the process whereby the development was effected (Jolowicz, 517). Nevertheless certain characteristics are clear. The system of law had become universal and the distinction between ius civile and ius gentium had become one solely of historical and antiquarian interest. This was an inevitable consequence of the system where in effect every man was a citizen, and in fact it was the ius civile which had disappeared, ousted by the universality of the ius gentium.

One cannot but remember in this connection that in England in 1875 it was decreed that equity should prevail over law in case of conflict when the two systems were amalgamated.

Mancipation and the literal contract, res mancipi and Italic land, had all vanished with the growths of antiquated formality which had encrusted them.

The system of intestate succession established by

the Novels takes no account of agnation only: that principle had long been undermined by praetorian and imperial legislation and had ceased to be of importance. The distinction between civil and praetorian had disappeared almost entirely. There was really only one system of inheritance, although the titles of hereditas and bonorum possessio still had separate titles in the Digest and the Code, and that system was founded on the praetorian rather than the civil rules. Justinian himself did away with the distinction between Quiritarian and praetorian ownership and in general there is much less formalism and rigidity. Oral formalities such as the stipulation, and set forms of words have disappeared, wills are simplified, legacies fused with fideicommissa.

Even at the cost of certainty, the rule that the intention of parties was to prevail was that generally insisted upon, particularly in wills and contracts. This is a distinctively equitable doctrine. It had become a general rule that a simulated transaction was void and the principles applied were those of the real transaction which the parties had in mind. (Cf. the Scottish attitude to attempts to create securities over moveables without possession.) "There is throughout an insistence upon equity as opposed to 'strict' law, no longer in the restrained manner of the classical jurists who conceive

"of aequitas as the principle of justice pervading the whole law, but with an arrogant impatience of legal subtleties" (Jolowicz, 519-20 and note 1; Pringsheim, 56 L. Q.R. 229, 239). In fact the Byzantine lawyer was not always able to replace an inequitable rule by an appropriate modified principle, but merely reversed the inequitable rule.

Parallel with this tendency to favour the equitable, legislation of this period was wont to protect the reputedly weaker against the stronger, as for example the wife against her husband, ward against guardian, and debtor against creditor. The generally humane attitude extended even to cases of bad faith. To some extent this is accounted for by the introduction of Christianity, but much is natural evolutionary development of principles known to the classical jurists (Jolowicz, 520-1; Schulz, 297). Equity was not a new development peculiar to this age, for even by classical means many cases of unjustifiable enrichment had been remediable; formalism and the agnatic family system had been under attack and giving way before praetorian law in classical times. Hellenic and Oriental influences were profoundly important in this late law, and Greek philosophical methods and conceptions and classifications, foreign to the native Roman spirit, were common (Jolowicz, 522).

Contract had become generalised to include agreements enforceable by praetorian actions as well as those on which civil actions lay, so as to include depositum and commodatum, emphyteusis and even donatio, while a theory of innominate contracts had arisen. These, though not specifically mentioned in the Corpus Juris, are clearly distinguished from the agreements which are actionable as falling within one of the recognised categories (Jolowicz, 530). Furthermore, as insistence was now placed on consent as the distinguishing feature of contract, obligations originally included under the head of contract and not clearly distinguished therefrom despite their lacking the element of consent, came to be clearly segregated into the new category of quasi-contract. This compartment of the law housed obligations arising out of negotiorum gestio and tutela, where the relationship was analogous to that of mandatum but there had been no agreement between the principal and the agent (Jolowicz, 531).

In the formation of contracts and acts in the law, stress is laid in Justinian law more than ever previously on the animus of the parties rather than merely the facts of the case. Examples are societas and negotiorum gestio (Jolowicz, 532-3). The classical jurists had written of animus and voluntas, but only in this period are the circumstances regarded subject-

ively and with greater emphasis on intention than in the rather objective approach of earlier times.

With the disappearance of the formulary system and the levelling of the population the distinction between ius civile and ius gentium had no foundation, and there was no obstacle to the pervading influence of the flexible, modern and equitable elements in the law which had been developed by the Roman jurists more particularly in the praetorian system but previously restrained by the necessities of the formulary system. These elements were assisted in the later law by the Christian principles of charity and humanity and were the work not only of jurists but of practitioners (Jolowicz, 535).

In the final codified version of Roman law then the conceptions of aequitas and aequum et bonum are to be found firmly embedded, while the words utilitas, humanitas and benignitas also appear with a similar significance. The word aequitas by itself is not of great significance in Roman law and it had a variety of meanings (Encyc. Soc.Sc.V, 582). The importation of the principle never seems to have been discouraged and indeed it was expressly enjoined by imperial legislation of 314 A.D. as a positive duty of the judge. By the Fifth Century Roman law had developed to the extent of having accepted equitable principles and rules which

showed some remarkable anticipations of and parallels to many of the doctrines later worked out by Equity in England, not being confined to wide generalisations but extending to the growth of many doctrines with a peculiarly technical significance (Buckland, Equity in Roman Law, passim). The Roman doctrines cannot, however, always be pointed to as the true origin of the later development.

At Rome, as in Scotland, there never was a system of rules of equity gradually developed and built up into a harmonious and comprehensive system by a permanent tribunal whose guiding function was to give relief in hard cases which fell outwith the scope of the general law. The praetor is commonly regarded as the main source of Roman equity (e.g. by Austin), but this view is not strictly accurate. He presided over all the ordinary civil courts: there was no such thing in Roman Law as an Equity Tribunal, no rule of Equity acting in personam on the conscience of the individual defender, and no subpoena to enforce his attendance - all cardinal features of Chancery Equity - nor was there any special duty on the praetor to deal with persons who worked injustice under the cover of legal right (Buckland, Equity, 6). Nevertheless the texts show that the praetor was regarded as having and indeed

bound to have a special leaning towards Equity (e.g. Ulpian in Dig. I, 18, 6, 2). Some notable doctrines of modern English Equity have no parallel at Rome; conversion and the trust concept are probably the most obvious of these (Buckland, Equity, 14), although the fideicommissum, which was long erroneously believed to be the origin of the trust, has a certain superficial resemblance to it. So too the double ownership involved in the Roman system of Dos provides a distant analogy to the English trust (Buckland, Equity, 18).

Manifestations of Equity in Roman Law

There are certain general principles of equity which exercised a profound influence on many of the branches of Roman Law. These principles appear almost everywhere, not only under the style of aequitas or aequum et bonum, but as utilitas, humanitas, benignitas, ratio naturalis, and to a very large extent bona fides, just as principles of an equitable nature may be concealed under the title of public policy in modern law. But there are certain developments in which the principal influence of the conception on Roman law may be discerned.

The first of these which merits separate attention

is the triumph of the natural idea of blood relationship over the artificial idea of agnation (Allen, 317). The Roman society in its earlier days was profoundly patriarchal in origin and structure, and the rules of succession as found in the Twelve Tables (Buckland, Textbook, 367) excluded all relatives not agnatically connected. These harsh rules remained in operation till late in the republic when praetorian intervention established a more equitable and rational order,by the admission of cognates to share in the succession immediately after agnates. The S.c. Tertullianum improved the position of a mother married sine manu and the S.c. Orfitianum that of kin of a woman in succession to their mother on the same principle (Muirhead, 321; Buckland, Manual, 231). Finally the entirely new system of succession promulgated by Justinian in the Novels (Buckland, Textbook, 375) shows the complete triumph of the natural order of succession over all the older ideas of agnation, potestas and so forth. The modernity of the system is patent and its influence on modern systems considerable (Buckland, Manual, 231-2). Nor was the importance of equitable modification of the law of succession confined to intestate succession: the Lex Falcidia secured the heirs a legitim of one-fourth, however much might be bequeathed to legatees; the

Lex Voconia and the Furian testamentary law both restricted legacies (Jolowicz, 258).

But far more significant than these was the effect of the praetorian action in the introduction of bonorum possessio, which was really a grant of the beneficial enjoyment of the estate of the deceased without the legal title of inheritance, a reform like English Equity as being the work of a succession of praetors (Muirhead, 260; Buckland, Textbook, 370-381; Ledlie's Sohm, 515-527).

Justinian observes of this (Inst., iii, 9, pr. and § 1) that the praetors' object in some cases was to facilitate the application of the rules of the ius civile, sometimes to amend their application according to what they believed to be the spirit of the Twelve Tables, and in other cases to set these aside as inequitable. The praetor based his action on the neglect of unnecessary ceremonial in will-making and promised possession to the heir nominated in a validly attested document despite other defective formalities - i.e., one which satisfied praetorian requirements (Jolowicz, 259 et seq.). This was bonorum possessio secundum tabulas. Then it could be applied contra tabulas - in opposition to the terms of the testament. And the third main variety of this remedy was bonorum possessio ab intestato, which paved the way for the revolution in

the law of intestate succession effected by Justinian (Muirhead, 261-3; Buckland, Textbook, 374) by having a long list of cases in order of priority.

The idea of bonorum possessor has been described as having its counterpart in the English equitable ownership and the Scottish beneficial ownership (Mackay, Encyc. VI, § 558).

Good Faith

The second notable manifestation of equitable influence is the principle of good faith in contractual obligations. Ulpian based the whole conception of a pact on aequitas naturalis (D., 2. 14. 1. pr.) and the recognition of consensual obligations, forming a large class of importance in daily life and commerce is symbolic of the whole trend of Roman contract from the formalistic to the consensual. A discretionary element was added to the judge's function, which was similarly exercised in applying the exceptio doli to actiones stricti iuris, dolus and aequitas being natural antitheses (Allen, 317; Sohm, 106). In the classical law the four consensual contracts were sale, hire, partnership and agency. In later law the recognition of consent as the material element of contract broke down the old classification and the general category

of contract embraced agreements enforceable by praetorian as well as civil law actions. Naturalis obligatio became an accepted conception, and the fundamental requirement of good faith came to override any question of causa. In sale the vendor was liable for dolus and culpa and had to take care of the thing sold until delivery, and to give a warranty against secret defects (Buckland, Manual, 278 et seq.), all matters of bona fides. Another similar example is transfer by delivery. Traditio was the commonest of the modes of acquisition of property usually described as iure gentium or naturali (Buckland, Manual, 135). Such a iure gentium mode of transfer gave quiritarian ownership, except in the case of res mancipi, and the final disappearance of res mancipi under Justinian probably extended this mode of transferring ownership to all articles. In the classical law traditio of a res mancipi gave only bonitary or equitable ownership which could be protected by praetorian remedies such as the actio Publiciana; but this vanished by Justinian's time (Buckland, Manual, 137; Textbook, 226).

The protection of equitable ownership was another major praetorian achievement. The principles of this are the same as in the case of the grant to a successor on death who has only an equitable right to the estate (bonorum possessio) or the buyer of a bankrupt estate

(bonorum emptor). Where a res mancipi had been transferred by delivery the new possessor required praetorian protection in two circumstances, to defend his right against another, and to recover the property if it fell into the hands of another. The first was achieved by the exceptio rei venditae et traditae, which was extended with modifications of form to cases of alienation other than sale (Buckland, Textbook,191). The other was the actio Publiciana whereby the bonitary owner could recover, although the ordinary vindicatio was not open to him as not being dominus; it proceeded on the fiction that the period of usucapio by which dominium would be acquired had already run, and as the bonitary owner would have been dominus in such a case, he would be entitled to recover the thing under the praetorian formula on proof of the facts. The bona fide possessor still had this form of action under Justinian although the case of bonitary ownership was obsolete (Buckland, Manual, 114).

The notion of natural obligations rooted in that of the ius naturale and closely allied to the ius gentium may be traced in legal texts of the First Century A.D. Obligatio naturalis was a civil law concept and owed nothing to the Edict (Buckland, Manual, 336), but was rather a juristic development of the law. It was the jurist who worked out the doctrine that a trans-

action which was not directly enforceable as not having satisfied the strict legal requirements might yet claim to be recognised so as to have some legal effects. For example, a payment made under such conditions was irrecoverable: a plea of *obligatio naturalis* was a defence to a claim of *condictio indebiti*, without the necessity of an *exceptio*.

It was not every moral obligation which gave rise to a *naturalis obligatio* in Roman law. It appears that the earliest application of the idea was to transactions to which a slave was a party which became operative upon his attaining freedom. The destruction of one obligation by another by means of *litis contestatio* left a natural obligation surviving and ready to revive if the case were abandoned. There were various possible effects of such an obligation, but the one common to all was that it provided an answer to a claim of *condictio indebiti*, and there is evidence that in some cases *obligatio naturalis* might be pleaded as set-off in an action (Buckland, Manual, 336).

Fraud

Fraud in a contractual transaction could always be raised by the insertion of the *exceptio doli* in the formula, or could be noticed by the judge *ex proprio*

motu in a iudicium bonae fidei. Where the transaction had been completed the actio doli lay. There was a complicated system of praetorian remedies against any craft or deceit and some of the special cases had special remedies (Buckland, Manual, 330; Jolowicz, 292). In this connection it may be mentioned that, while under the formulary system a judge had no alternative but to condemn a defender in money, in some cases, particularly actions for restitution or exhibition of a thing, pecuniary damages might not be appropriate, and the judge was empowered to determine what in fairness would be sufficient satisfaction. In actions of restitution or exhibition, specific performance, if not voluntarily made, would be ordained under conditions decreed by the judge. The list of actions in which such a discretionary power was entrusted to the judge is exclusively praetorian (Muirhead, 330; Inst., iv, 6, § 31; Sohm, 196).

Unjust Enrichment

Probably no equitable principle appears more frequently in Roman or modern law than the prohibition of the unjust enrichment of one person at the expense of another. A person who has had possession of another's property, be it acquired by mistake or accident,

is under obligation to restore it. This conception lies at the root of the important praetorian remedies of restitutio in integrum and condictio indebiti; it is the corollary of suum cuique tribuere, and occurs repeatedly in the Digest. Probably the most concise definition is that of Pomponius (D. 50. 17. 206; Girard, 539): "Jure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem".

Restitutio in integrum permitted the praetor to avoid an inequitable result of law by restoring a party to his original position; e.g. a mancipation induced by threats may be avoided. Of great importance is the rule that a minor entering into a disadvantageous transaction through inexperience may claim to be restored in integrum (Jolowicz, 238; Sohm, 294; Buckland, Textbook, 719-721).

In the classical law several cases were recognised of unjust enrichment, of which the classic example is that of money paid under the mistaken belief that it is due (Buckland, Textbook, 541 et seq.). For this condictio indebiti lies, and is paralleled by other circumstances where the consideration for the payment has failed, also remediable by condictiones. The error of payment remediable must have been reasonable, and one of fact, not of law, except in certain cases, e.g. women and children. The application of the condictio

was to the transfer and receipt in good faith of property, in discharge of an obligation which did not in fact exist. For the purposes of this rule a naturalis obligatio was a debt, whose subsistence barred the condictio (Buckland, Manual, 314). The condictio was akin in spirit to mutuum, both being rooted in the denial of unjustifiable enrichment. The principle that such enrichment should be recoverable was early recognised and indeed attributed to the republican jurists, and its extension took place through the formulary system (Jolowicz, 298).

Intention and Form

The equitable dogma of interpretation, that whenever possible the intention of the maker of a deed is to be regarded rather than the literal form in which that intention comes to be expressed, was as well recognised in Rome as it is in England or Scotland. It is inherent in consensual obligations (Gaius, Inst., iii, 137), just as much as the requirement of bona fides, and might not be ignored in the performance of a juristic act such as the transfer of property (D.41.1.9.3), as well as safeguarding against inadvertence or innocent mistake in the release of a debt (D.20.6.8.16) or in a verbal contract (D.45.1.36), and particularly, of

course, in the interpretation of testamentary writings (D.28.2.13.pr.).

The Lex Aquilia affords examples of benevolent development both by interpretation and by praetorian action (Jolowicz, 290).

Interdicts

Interdicts were probably the oldest and most important of praetorian remedies (Buckland, Textbook, 729 et seq.). Though usually set out in the Edict the right protected by this magisterial order was not necessarily praetorian. They are commonly classified into: Exhibitory - orders to produce a person or thing which is the subject of legal dispute; Restitutory - orders to restore or undo something done contrary to law; and, most commonly, Prohibitory Interdicts forbidding some act or interference with a right. Interdicts were of considerable importance as being the primary remedies in connection with the acquisition or retention or rights of possession. In their provisional and ex parte character they resemble the modern interdict though their applications are different (Roby, II, 441).

The last specific manifestation of equity in the law of Rome which will be mentioned is the antithesis of aequitas and dolus malus. This is repeatedly found in the authorities. It was undoubtedly the duty of the judge to take cognisance of the motive of a party who attempted to derive an unscrupulous advantage by zealous adherence to his rights at strict law. In modern law this is known as abuse of right, but its scope in England and Scotland is less well defined than on the Continent (Allen, Legal Duties, 95), (Gutteridge, 5 Camb. L.J. 204) where it is a recognised application of legal doctrine. The nimia subtilitas of the inflexible old Roman forms of legis actiones and their misuse caused their own downfall (Gaius, Inst. iv, 30), while liberal interpretation gave rise to the praetorian utilis actio, and this liberal and equitable understanding is found in many forms (Allen, 319-20 with examples).

Such examples illustrate the wide scope of influence of the principle of equity in Roman law. They are professedly not exhaustive, nor do they cover all those Roman manifestations of equity to which parallels can be traced in our own law, for Roman equity is probably nowhere more completely adopted than in Scots Law (Mackay in Encyc. VI, § 559). To complete the picture mention may be made of the fact that in Rome, as in Scotland to-day, there were not lacking those who pro-

tested strongly against equitable liberties taken with express provisions of the laws. But, as Allen points out (Law in the Making, 321), there was in reality no fundamental antinomy between safe, certain law and humane interpretation of it: and in the Roman system the two principles of law and equity were equally settled and equally salutary. So too in England it was found that there was no real conflict between law and equity.

Equitable Influence of the Jurists

Professor Buckland noted (Equity, 5-8; also Mackay, Encyc. VI, § 560) that it was natural to consider the praetor the chief source of Roman equity but that in fact the chief source was the commentary of the jurist rather than the praetorian edict, and that the intervention of the Emperor himself was not to be disregarded (vide post.). The jurists took a prominent part in the extension of existing remedies although the actual introduction of new types of legal procedure was the work of the legislature or the magistrates, and the lasting fame and influence of Roman law depend in no small degree on the work of the jurists of the principate (Jolowicz, 384). They exercised on the law something of the influence wielded in England and Scotland by a judge, and in fact the Roman jurist sometimes was

a judge, but it is not from his ex cathedra pronouncements that we derived authoritative law. Under the republic and empire the jurists advised the magistrates on the composition of their edicts, although this function diminished, and many of their responsa were addressed to magistrates (Jolowicz, 371. See also Schulz, 117).

It was a jurist no doubt who drafted a party's formula, a jurist on the consilium of the magistrate who really decided whether a new formula should be accepted, or a new application of an existing formula be permitted; and much of the imperial legislation was in reality the work of the jurists. Like the modern Bench, the jurists' work was practical and not philosophic or analytic: they dealt with cases, actual or hypothetical, and seldom touched on abstract statements of legal principle.

The granting of the ius respondendi by the authority of the Emperors from Augustus onwards gave authoritative character to an opinion of a patented counsel, so that the judge, unlearned in the law himself, to whom it was presented, was bound to adopt it. The beneficial consequences of this system were considerable, particularly in an equitable direction. These quasi-legislative powers enabled the jurist to influence current doctrine positively as well as speculatively and to leaven his

interpretations of the ius civile and ius honorarium with suggestions of natural law so as to give a new complexion to the system (Muirhead, 282).

Equitable Influence of the Emperor

From the first the influence of the Emperor on the development of the law was considerable and in the Second Century his law-making powers were acknowledged by the jurists (Buckland, Equity, 8; Jolowicz, 374; Encyc. Soc. Sc. V, 582). The growth of the imperial legislative power was gradual and the Emperor's interference with existing law became more apparent with the consolidation of the imperial sovereignty. It came to be regarded as binding since no one could dispute his authority.

The principal forms Gaius mentions (Inst. I, 5) are edicta, decreta and epistulae. Edicta were originally oral proclamations valid only during the giver's term of office; decreta were decisions of the Emperor acting as judge of appeal or even of first instance. As supreme authority in the state, he was not rigidly bound and allowed himself considerable freedom of interpretation, extending on occasion to the introduction of definitely new principles. These were followed in future and quoted by the jurists.

Epistulae, rescripta and subscriptiones were written

answers from the Emperor to questions or petitions for direction. Some were purely administrative; but many later ones require a decision on a point of law, and an imperial decision on the matter settled the law as much as a responsum though with even greater authority (Jolowicz, 374-383; Walton, 278). It was an epistula of Hadrian that introduced the benefit of division amongst co-sureties (Inst. iii.20.4).

Sometimes imperial edicts were transformed into senatusconsulta, and adoption of edicts by successive Emperors confirmed their in fact legislative force. After Diocletian the Emperors had a monopoly of legislation: their edicts were adjusted in the consistory which always comprised a proportion of jurisconsults and probably only effected minor modifications in the general law, as distinct from particular personal concessions.

Roman and English Equity

The stimulating work of Professor Buckland on Equity in Roman Law suffers, at least for the Scottish lawyer, from having an ambiguous title. For Equity is not conceived in the Aristotelian and Scottish sense but in the peculiarly English signification of the term. Yet this book performs an invaluable function in pointing to and illustrating the numerous parallels to and anticipations

of English Equity doctrines which are to be traced in Roman law. With this caution in mind, we may look briefly at the major matters of Roman Law which present such a resemblance to English doctrines. The list is not exclusive for not all equitable matters come within the jurisdiction of Chancery Equity.

In the first place, as compared with England there was no Court of Equity, no subpoena and no rule of Equity acting in personam, nor was there any special duty on the praetor to deal with persons who acted unconscionably under the cover of a legal right; that is, remedies were not necessarily in personam (Buckland, Equity, 3), effected by putting pressure on the conscience of the wrongdoer. While this is factually accurate, it is not an essential constituent of equity that it should be administered independently of the common law. The merits on either side of this argument are touched upon later; but it is notable that, even in countries which have "received" the Common Law but not the Roman Law, equity is not always administered in courts apart from the common law, nor is it for that matter in England since 1875.

The principal Roman sources of equitable development were the jurists and their commentaries on the law, and secondly the praetorian edict. In England the development was by a series of Chancellors through the

medium of case-law. The praetorian influence on the law in the direction of equity was legislative in character, like other Roman legislation introducing equitable conceptions, and like some English and Scottish legislation. There was no close analogy between the praetors' legislation and the gradual action of the Chancery in granting equitable remedies. Moreover praetorian action analogous to Chancery was found even outside the Edict, as, for example, in the granting of an actio utilis for which there was no rubric in the Edict, such as the extensions of the actio Aquilia. (Buckland, Equity, 7). In his approval of new formulae the praetor's discretion was not hampered by the opposition and jealousy of a rival jurisdiction such as troubled the earlier Chancellors in England (Buckland, Equity, 7.)

Some of the doctrines which have played an important part in the development of English Equity have no analogies in the Roman law, such as the distinction of real and personal or heritable and moveable property: in particular the enormously important and influential conception of the trust was not known as a general institution in Roman Law. The fideicommissum (Buckland, Textbook, 353) was not unlike the trust but the English notion shows a great advance on the Roman (Buckland, Equity, 19; Maitland, Coll.Pap.III, 337; Kerly, Ch.IV). The

consensus of modern opinion is against the derivation of the English from the Roman conception, but sees it rather as an indigenous growth (Potter, 529. For Scotland, vide Chap. IX). The few and unimportant attempts in Roman law to create inter vivos trusts were hardly trusts in our sense and there was no question of any effect on third parties or their rights: that was a later development (Buckland, Equity, 20).

However, other Roman conceptions have parallels in later law. Fuller consideration of the Scottish parallels and derivatives will be deferred till the chapters dealing with the separate subjects of equity jurisdiction in Scotland and only analogies with the Chancery Equity are here pointed to. The Roman interdict bears a considerable resemblance to the ihjunction which was a most powerful Chancery weapon and its scope is rather narrower than that, while there never occurred at Rome the struggle of jurisdictions which enlivened the history of the English common injunction. Yet it was of great importance in the protection of public interests and private rights (Buckland, Textbook, 729; Equity, 25). It did not deal with defamation; and some of the widest fields for its modern application did not exist at Rome, such as patents and copyright. The possessory interdicts resemble interlocutory injunctions in that they presuppose an outstanding question of fact, and are issued

on an ex parte statement without inquiry. Similarity is rather less in questions of the means by which these orders were enforced, and Roman action seems to have been rather ineffectual as compared with the Chancery power of committing to prison until the contempt inferred by non-observance was purged.

Restitutio in integrum was an important head of praetorian action which permitted the re-establishment on certain equitable grounds of a status quo altered at law. The chief grounds were absence while a period of prescription was running, mistake, fraud, duress, minority and lesion. The ground of undue influence is not separately mentioned unless it is comprehended in dolus. In the absence of special written contracts there was no necessity for the existence of special praetorian powers of amendment to meet cases of mistake of expression comparable to the Chancery rectification, though error of expression in wills could be corrected by extrinsic evidence. There was no civil law remedy for deceit and only praetorian intervention by the actio doli and the actio metus relieved from this, while the praetor might further give restitutio in integrum (Buckland, Textbook, 719; Equity, 31). Much the same effect might also be achieved by denegatio actionis, i.e., refusing a formula to an applicant (Buckland, Equity, 37).

Among equitable rights specific performance is the most important Chancery development (Buckland, Equity, 40. See Fry on Specific Performance, § 6 et seq.). In the classical Roman law every judgment was for a monetary penalty and there was little sign of specific enforcement in the ordinary contractual actions such as sale. It was only obtainable in cases where it necessarily had to be the remedy if the transaction were to be more than a farce, and generally then only by the intervention of the supreme legislature. In the later law under the system of cognitiones extraordinariae (Buckland, Textbook, 662; Jolowicz, 406) a judge could condemn for damages or for actual fulfilment of the obligation undertaken and an order for restitution or delivery was enforceable by seizure of pledges or by delivery by officers of court. There seems to be no evidence that at this stage in the Roman law specific performance was in any way an ancillary relief: the judgment to be given was the one most convenient and appropriate to the particular case. In this latter respect the resemblance to Scots law rather than English is plain.

Limitation of actions by the lapse of time did not appear in Roman law till late so that frequently a failure to take steps to secure performance of an obligation was held to infer waiver of the right: the maxim

vigilantibus ius civile scriptum est is frequently mentioned, recalling the Equity doctrine of laches. So too what may be called estoppel by acquiescence is common from an early period, corresponding to what is known in Scotland as rei interventus and as part performance in England (Buckland, Equity, 56).

In the rules of pledge and lien, the Roman hypothec, which was derived from Greek law, has a close affinity to the rules of equitable lien. A noteworthy equitable development in this sphere is the floating charge, to-day usually existing over a company's stock-in-trade, and unknown to Scots law, though applicable to a wider range of cases in Roman law (Buckland, Equity, 63). The old Roman mortgage which involved transfer of possession was superseded by Justinian's time by pignus, where ownership did not and possession need not pass, and this was in effect the same as that of the creation by the Chancery of the equity of redemption. The English law on these matters is largely derived from Roman law (Buckland and M'Nair, 208), and subsequent development in each system follows similar lines.

The rules of collatio bonorum created by the praetorian edict required emancipated children claiming a share in their father's estate on intestacy, or in opposition to his will, to bring into the division their own

property at least so far as their claims injured those of the unemancipated children (Buckland, Textbook, 325; Equity, 72). Such rules are analogous to those of advancement and hotchpot, while the exceptions of such elements as peculium castrense recall our own exceptions in respect of sums paid for remuneration or education. The absence from Roman law of the distinction between real and personal or heritable and moveable property with distinct lines of descent on intestacy makes impossible the other modern application of the principle in Scotland, that an heir-at-law must collate as a condition of claiming a share in the moveables.

Also important in the law of succession is the equitable principle of election, to the effect that a person accepting benefit under a deed must accept it wholly and renounce rights inconsistent with it; otherwise he can take nothing without compensating those whom he disappoints. The idea of this rule too is to be found in Roman law though the circumstances of its application are different (Buckland, Equity, 95).

Such are some of the principal equitable conceptions the root idea of which appears also in the Equity of the Chancery and in the law of Scotland, and these references may serve to indicate both the fundamental source of some of our equitable doctrines and the persistence with which

they manifest themselves in developed systems of law.

Both in Roman and in English law Equity was unsystematic and originated in the need to supplement the Law to which it paid lip-service. But their modes of development differed and only in England did Equity come to be regarded as a separate system. (See further, Hibbert, 113, 126.)

The Later Roman and Common Law

To complete the background it is necessary to mention the later history of the Roman law and particularly the canon law as the channel through which some of the ideas percolated into modern rules of equity. The Corpus Juris was almost entirely lost and forgotten during the Dark Ages, though it survived to some extent in Italy (Muirhead, 391; Meynial, 365 et seq.; Hazeltine in Camb.Med.Hist.,V,697; Scrutton, Roman Law and English Law, passim; Plucknett, 263; Amos, 422). In the Twelfth Century, however, a revival took place in the University of Bologna under Irnerius; the texts were studied by the Glossators and their notes collected and analysed by Accursius about 1260, while in the following century Bartolus and the Post Glossators carried on the study, applying more and more casuistical tests and producing masses

of commentary on the text (Vinogradoff, Roman Law in Medieval Europe, 137-40; P. and M., 23). The interest in and study of the Roman law spread out all over Europe, having less effect in England than elsewhere owing to the existence of an independent body of law (Potter, 624 et seq.). In France the tradition was carried on by Cujas, Domat and Pothier through whose work much Roman law was received into the law of France (Walton, 335). Similarly in Holland the writings of Voet and Heineccius make Roman law the basis of their country's legal system.

The early wave of Roman Law influence reached England in the Twelfth Century when Vacarius taught Roman Law at Oxford (Pollock and Maitland, 118), and when Bracton studied the Roman Law in the writings of Azo (Potter, 270; P. and M. 207). It probably overflowed into Scotland almost immediately (Meynial, 375), though the major reception of Roman law into this country did not take place till the Fifteenth and Sixteenth Centuries. The Regiam Majestatem contains a good deal of Roman law but much is derived through the canon law and indirectly through Glanvill (Reg. Maj. (Stair Socy.) p. 27; Sources and Literature (Stair Socy.) 187. See also Craig, J.F. I, 2).

Contemporaneously the system of canon law had been developing. It consisted of the rules of government of the Roman church founded on Holy Scripture and Apostolic

tradition with the addition of custom, papal and conciliar decrees. Many of the problems arising in the Eleventh Century concerning status and property of persons, though determined by ecclesiastical courts, had been solved by the application of principles of Roman Law and the rediscovery of the Digest gave an impetus to this trend. About 1140 Gratian collected and sought to harmonise the great mass of material in the Decretum Gratiani, which was subsequently added to and commented upon by canonist scholars (Le Bras, 322 et seq.; P. and M. 112 et seq.; Hazeltine in Encyc. Soc. Sc. III, 179). The importance of this system was that matters of marriage and status, property and contract were regularly subject to the jurisdiction of the ecclesiastical courts (P. and M., 124-30). The relation between Roman and canon law was close and the canon system borrowed very largely from the Roman (P. and M., 116); it is clear that both were being studied in England from the time of Stephen onwards (P. and M., 120).

While the influence of the church on the law of marriage and of wills and succession was profound, its contribution was most notable in the field of contract, where the Christian conception of good faith was employed to great effect. Furthermore, the church made every attempt to free contract from formalism and even declared finally that a simple promise was enforceable, against the

authority of the Roman Law (ex unde pacto non oritur actio) and of the nascent Common Law of England, which insisted on the necessity of consideration (Plucknett, 271; cf. Holmes, Early English Equity).

Scotland was in an exceptional position prior to the Reformation in that she was independent and directly subject to the Apostolic See with the privilege of holding her own Provincial Councils (Statutes of the Scottish Church, ed. Patrick, Introd.). Canon Law had come in with the establishment of a vigorous national Church under David I. Nevertheless while the general Canon Law more or less common to Europe was not strictly applicable in Scotland, the Scottish clergy were in general satisfied with it and drew on it and English models for their enactments so that the statutes made were not numerous or original (Maitland Thomson, in Mylne's Canon Law, Introd.; Fraser, Husband and Wife, I, 23 et seq.; I, 224 et seq.). It is probable that most of the Roman infiltration at this period was through the medium of the canon law as every canonist had some knowledge of Roman law and there is evidence of a manual of Roman canon law, redacted in England, in use in Scotland in the Twelfth Century (Patrick, Introduction to Statutes of the Scottish Church, p. xxvi). Both were taught in the Scottish Universities from an early period (Sources and Literature, 186).

After the Reformation the principal sphere of canon

law influence, marriage and status, was transferred to the Commissary Court but the law administered was not radically altered and this branch of our law still shows the greatest signs of canonist influence. But prior to 1532 a great deal of the legal business of the country, both lay and ecclesiastical, was done in the courts of the Bishops' "Officials" (Innes, Scotch Legal Antiquities, 238).

The Roman law which finally made its way into Scotland was that of the later commentators such as Baldus and Bartolus, which had accommodated itself to practical needs (Pollock and Maitland, I, 223), and that was derived from the practice of study at French and later, more particularly at Dutch, Universities, so that much of the Roman law was taken at second hand by Scots from French and Dutch studies of the subject (Sources and Literature, 176-8, 185-6).

More important to the subject of this study is the fact that a large part of the legal business of the country was conducted by clerics and this was not confined to ecclesiastical courts. The Scottish clergy, with a background of Roman and Canon Law knowledge, played a prominent and formative part in the judicial business of Parliament, and as Lords Auditors and later as members of Council and Session and as arbiters. With

such a background it is impossible that ideas from the Roman and canon law should not have penetrated the law of Scotland (Sources and Literature, 185; Craig, J.F. I,3). Lord Normand has said (F. v. F., 1945 S.C. at 208), "the canon law, while not of binding authority .... will receive due weight in our law if it appears to be secundum aequum et bonum".

The Praetor and the Chancellor

In view of the many points of similarity between the equitable jurisdiction of the Praetor and the development of Equity in England in the Courts of the Chancellors, it is as well to summarise the features distinguishing the two systems. In the first place, the Praetor professed to be guided by a set of supposedly fixed principles announced beforehand in his edict, while the Chancellor originally had a discretion to decide a case according to natural justice; the Praetor was nevertheless considered as having a special leaning towards equity in its vaguer and wider sense because of his function. In the second place, Roman equity was not developed and administered by a separate tribunal, as it was in England down to 1875: it was, as it has always been in Scotland, dealt with in the same courts as matters of the strictest law. In the

third place, it will appear in the next chapters that a conspicuous feature of Chancery equity is that it always claimed to act in personam, to address its orders to the defendant and act upon his conscience. Fourthly, as has been mentioned already, some of the most important branches of English Equity have no real counterpart in the law of Roms; in particular this is true of equitable conversion and the enormously important subject of trusts (Encyc. Soc. Sc., V, 582; Buckland, Main Institutions,7).

In short, the equity of the Praetor is an interesting analogy to that of the English Chancellors, but not a source from which it is derived (Holdsworth, Essays, 197, citing Lord Hardwicke's Letter to Lord Kames on the administration of equity in England), and direct descent of English principles and rules from classical Roman law can rarely be shown. The scope and form of English equity was determined to a greater extent by the defects of the common law and the gaps in it than by the Roman law, and the precise content of the rules in England was largely determined by the practice of the Court of Chancery. Nevertheless the conception of equity and its relation to strict law was derived from Aristotle through the canonists and they and the civilians undoubtedly contributed something to equity pleading and procedure, while Roman rules and civilian writings were doubtless utilised

to indicate what would be a fair and reasonable rule to apply to a given state of facts (Kerly, 189). It remains to be seen at a later stage what conclusions can be drawn with regard to Scotland.

Roman Influence on English Equity

The greatest influence of the Roman law on the development of the system of equity jurisprudence in England was exerted during the infancy of that system in the late Fourteenth and early Fifteenth Centuries, and particularly through the agency of Chancellors and their officials who were ecclesiastics and canonists (Holdsworth, Essays,190). In the Dialogue of the Doctor and Student (Plucknett,247) the equitable doctrines voiced by the Doctor start from scholastic philosophy and canon law: the definition of equity and the justification for its existence alongside law are derived from Aristotle through Gerson, and the application of conscience in individual cases is borrowed from two Fifteenth Century Summae Confessorum concerned particularly with moral problems of this kind (Vinogradoff, 24 L.Q.R., 374-8).

Yet civilian and canonist influence did not remain a permanent force in equity, despite such analogies as those between Praetor and Chancellor and fideicommissum and trust, for analogy does not necessarily signify

derivation of the later conception from the earlier. Doubtless, however, equity took over Roman concepts from the ecclesiastical courts when it assumed the jurisdiction over legacies and administration of assets formerly exercised by those courts, and the citations from Roman law in such connections are numerous (Holdsworth, Essays, 191; Kerly, History of Equity, 189). Yet the debt of English equity to Roman law is not large and the borrowings from the Institutes and Digest were usually taken from textbooks of ecclesiastical law rather than from the original (Kerly, ibid.). In fact, such Roman doctrines as were adopted from Gerson and the canonists and civilians were assimilated into the distinctive and insular English system of equity, so that the recourse to foreign authority was in time rendered unnecessary by the growth of purely English rules (Holdsworth, Essays, 192). It developed dependent on the law of the State, called into existence by the imperfections and hardships caused by the human law of the State, and always in England remained a distinct system dependent on the common law, a gloss pre-supposing the existence of the common law (Maitland, Equity, 18-19); while its insular development was assisted by the course of English legal history whereby common lawyers became Chancellors and Masters of the Rolls from the time of More onwards (1529).

"No doubt the conception of equity and its relation to the law was derived from Aristotle through the canon lawyers; and no doubt the system of equity procedure and pleading owed something to the civilians and canonists. But since the underlying theory as to the occasions when equity could modify the law made it in a sense a satellite to the law and since the common law was, to use the words of Holt, C.J., 'the overruling jurisdiction in this realm' (Shermaylin v. Sands (1697) 1 Ld. Raym. 272), it followed that the contents of its rules were determined far more by defects of, and lacunae in, the common law, which made its interference necessary, than by the Roman or any other system of law. Though Roman rules, and, as Maine indicated, the speculations of foreign writers on Roman law and jurisprudence, might be referred to in order to indicate what was the fair and reasonable rule to apply to a given state of facts (Kerly, History of Equity, 189), the main current of the development of equity was determined by the need to add to, or to render more efficacious, the rules of the common law; and since that development was made by a separate court, the contents of its rules were elaborated mainly by the practice of the court, and through the agency of that system of case law, which in the course of the Seventeenth Century, it followed the common law in adopting." (Holdsworth, op.cit. 197.)

Chapter III

Development of Equity in English Law

A distinction has already been drawn between the general acceptation of the term equity and the technical significance which tends to attach to it in law and especially the particular shade of technical meaning which pertains to the term in the Law of England. For there it has an entirely specialised meaning. "It includes technically only certain rules which were developed in the Court of Chancery. The basis for its creation may have been the desire to do right between men according to the moral law of the time, but it was always limited and has now become a fixed body of principles of a like character to, though different in many respects from, the Common Law. It is no longer possible to claim redress simply upon moral grounds: it is now necessary to show some principle recognised by the system of Equity before a remedy can be granted, just as some rule of the Common Law must be prayed in aid to support an action at law." (Potter, 550. Cf. Re Diplock, [1948] Ch. 465, 481.)

The present chapter accordingly deals with the origin and rise of this department of English Law. Equity is often spoken of in Maitland's words as a gloss on the Common Law and while in a way gloss and text are a unity,

it does not follow that there will be a logical and systematic distribution of material between them, nor that conflict and contradiction between text and gloss will be absent, particularly where the two are virtually the works of separate branches of a profession. Hence equity is a fragmentary thing and lacks a general theory: it becomes an enumeration of the historical heads of equity jurisdiction (Plucknett, 603).

Equity in the Common Law

It is misleading to associate equity exclusively with the Court of Chancery in which its later development took place. At an early stage in English legal history the King's judges gave many kinds of relief which were subsequently only obtainable from the Chancery (Holdsworth, H.E.L., II, 245, 334): they had a wide discretion to do justice according to moral law and as they were frequently ecclesiastics they held the moral law in special veneration. In the last resort every man might go to the King to receive justice, though prior to the Norman Conquest there was not much encouragement to do so (Potter; Plucknett, 606).

Glanvil said that equity should be considered where no precedent existed (P. and M., I, 189-90), which reveals royal justice being administered on a basis of

"right reason" failing any better defined course; and Bracton remarked that Equity required in equal causes an even-handed justice and true equality in all things, a passage apparently derived from Azo (Maitland, Azo and Bracton, 23) Down to Bracton's time there was, too, a greater elasticity in the remedies obtainable from the royal judges than was the case in the later developed common law, where damages were almost universal; and there was a great similarity between these remedies and those ultimately awarded by the Chancery. For example, there was something like specific performance (Holdsworth, H.E.L., II, 246-9; Potter, 551), anticipating by two hundred years the earliest similar decree of the Chancellor (Hazeltine, Early Hist. of Eng. Eq. in 1913 Essays, p. 269; Holdsworth, 26 Yale L.J., 1); and the early common law writs of prohibition anticipated the Chancery injunction as a process in personam whereby parties were commanded to do or refrain from a particular thing, e.g., to prevent waste on the part of a tenant for life or for years (Hazeltine, 270; Potter, 551). In fact those remedies were based not upon the fundamental Equity rule later developed that the defendant's conduct was contrary to conscience and inequitable, but upon the fact that an acknowledged wrong should be prevented or remedied.

The early common law judges also recognised rights as to property not unlike those which Equity alone later enforced, such as the Equity of Redemption and the Trust (Hazeltine, 263-5; Potter, 552). Apparently from the middle of the Thirteenth Century this corrective jurisdiction declined rapidly, but as late as Edward III a new writ gave equitable relief on the ground of matter arising after judgment (Potter, 553).

Bills in Eyre

A form of equitable relief administered in the Thirteenth and Fourteenth Centuries by the common law judges was by Bills in Eyre presented to the King's Justices. The Justices in General Eyre seem to have accounted themselves more direct representatives of the King than his Justices in the Common Law Courts and appear to have claimed to exercise the King's plenary powers. The bills were humble petitions to the Justices in Eyre by complainants for a remedy frequently on the ground of poverty, and frequently concluding with a plea for justice (Holdsworth, H.E.L.I,265,449). In many violence and arms are alleged, and recovery of money owed is also common. The bills were apparently dealt with by remit to a jury and by ordinary common law procedure unlike that later evolved by the

Chancery (Potter, 556).

Equity in Eyre is not the ancestor of the equity of the Chancellor though it may foreshadow it, for the procedure was different and the Justices never dealt with wrongs for which the common law had provided no remedy, nor did they develop special remedies: the Chancellor too altered the basis of liability from external acts to the moral obligation on the defendant's conscience. The Eyre has been likened rather to the Star Chamber equity than that of the Chancery, relief against overpowering strength rather than as a result of the deficiency of the common law. At this stage equity was still natural justice (Holdsworth, Makers, 92).

The increasing separation of the Justices from the King's Council diminished the importance of equity through common law forms and this development did not outlive the Fourteenth Century, so that by the Fifteenth Century the development of a system to supplement the common law was essential as it had by then lost all its discretionary powers (Potter, 557; Plucknett, 610-1).

Equitable Jurisdiction of the King's Council

After the Norman Conquest the Curia Regis took a more prominent part in the administration of justice. It was the principal administrative body of the country concerned

especially with finance and branches gradually split off to deal with different kinds of business, and from these the Common Law Courts were born.

Henry II firmly established the Curia Regis as a court exercising both the feudal jurisdiction of the King and the general residuary justice inherent in the kingship, with the design of centralising justice in royal hands (Potter, 99 et seq.; Holdsworth, H.E.L. I,485). The King's Council, however, retained jurisdiction after the Common Law Courts had broken away from it and had a superior cognisance over judicial matters (Potter, 135). In the earlier Middle Ages the Council had an absolute jurisdiction over all the proceedings in the courts below. A litigant who felt himself aggrieved applied for redress to the Council just as he would have applied to the King before the latter committed his prerogative of distributing justice and equity to this Council. Application was made to it when from the enormity of the offence, or the rank or power of the party, or any other cause, there was likely to be an impediment to a fair trial or to the attainment of appropriate redress in the ordinary tribunals. So when by force or fraud or prejudice justice was being prevented from taking its ordinary course, the Council took the matter into its own hands, or gave specific directions in regard to it according to the circum-

stances of the case (Spence, Equitable Jurisdiction, I, 330). The Council consisted of a body of permanent officials, the most important being the Chancellor, who presided and directed its business. It met daily and periodically had associated with it lords and eccleiastical dignitaries specially summoned to attend its meeting, in which case it sat as the Great Council distinct from Parliament but which blended with it when Parliament was sitting. The Great Council ultimately merged into Parliament and the permanent council became distinct and separate, receiving the name of Privy Council.

At this time the authority of the Council embraced the origins of all the jurisdictions sprung from it, based on the residue of justice in the royal hands. Its jurisdiction extended to all the cases which could not be remedied by reason of the defects of the Common Law, to matters outside the Common Law such as maritime and ecclesiastical law, cases where the Common Law remedy was not forthcoming owing to the disturbed character of the age, and to ministerial procedure in matters affecting the King's interests (Holdsworth, H.E.L. I, 486). The Council could use its executive authority to compel attendance of a defendant to answer before it on the matter of complaint by a writ of subpoena or of quibusdam de certis causis, to the former of which a penalty was adjected for failure.

The procedure before Council tended to take ministerial form with Roman pleading and process. The parties were liable to be subjected to a very severe examination and the Council's interference and rough justice in the times was both essential and popular (Potter, 137).

During the Fifteenth Century the Court of Chancery became distinct as a court from the Council and this relieved the Council of much of its civil business, though much remained and was handled by the Star Chamber and Court of Requests, so that by the Tudor period the Council had become a Court primarily responsible for the suppression of disorder and with adequate machinery for that purpose (Potter, 138).

Equity in the Exchequer

The Exchequer was the first tribunal to break away from the Curia Regis and as early as the time of Henry I it became a separate department, though mainly concerned with finance. The jurisdiction of the Exchequer in litigation arose from the decision of disputes which occurred in the course of tax-collecting. In due course the appointment of lawyers to perform the judicial functions followed, and by the time of Edward I the Exchequer was dealing not only with purely fiscal disputes but with any lawsuits arising in their course, though there was no real

separation of fiscal and judicial functions (Potter, 114). In the earlier period petitions for what would now be regarded as equitable relief outside the Common Law were made to the Exchequer. This equitable relief remained a feature of the Exchequer and in theory the Chancellor presided over its exercise. The equity side of the Exchequer became limited in the Fourteenth Century as petitioners preferred to apply to the King or the Lord Chancellor and Council; but it revived again in the Fifteenth Century and in the Sixteenth Century the Exchequer appears to have enjoyed a general equitable jurisdiction. The Judges rested their decisions on natural justice and did not limit them to the Common Law, though Equity was to some extent administered through Common Law forms at this time. Yet the Exchequer retained this general equitable jurisdiction, after the traces of it in the Common Law system of the other courts of Common Law had disappeared, until it was transferred to the Chancery in 1842. It even seems in the Sixteenth Century to have assumed the right to enforce Equity by the writ of subpoena (Potter, 116-7; Plucknett, 166).

Rise of the Courts of Equity

Intereference in the name of the King as the fountain of justice became inevitable as the jurisdiction of the Courts of Common Law became confined and restricted to

the narrower forms of actions (On these see P. and M., II, 558). At first this was undertaken by the King's Council acting on petitions to the King or his Council praying that he would do justice since none could be had from his Judges. To this jurisdiction the Courts of Equity and particularly the High Court of Chancery were the legitimate successors.

While the infinite diversity of human circumstances renders a measure of discretionary judicial interference inevitable, the claim to apply an ill-defined moral law would render the transactions of ordinary business uncertain; and the development of civilisation, giving room for varying interpretations of moral right, made inevitable the transition from discretionary judicial functions of Council into normal court activities separated from its executive functions. In this transmutation, new Courts and the new system of Equity developed parallel to the Common Law and its Courts (Potter, 149; Cf. Lord Ellesmere in The Earl of Oxford's Case, 1 Wh. and T.L.C. 617).

The indefinite nature of the residuary royal justice and the vagueness of the fundamental moral conceptions made the distinction of Chancery from Council slow and variable. The separation in fact arose from the gradual acquisition by the Chancellor of the power to sit and act independently of the Council in judicial

matters, instead of at first one of the Council and latterly their delegate for these purposes. Even after the Chancellor had acquired the right to sit alone, the Council still retained the authority to dispose of similar causes, although its interference with what came to be regarded as Chancery matters gradually diminished. Apparently, too, the earlier Chancellors sat alone to deal with petitions on matters not within the scope of the ultimate Chancery jurisdiction; yet this tended to develop that function into a court of justice.

The first decree known to have been made by the Chancellor alone as a Judge is of the year 1474 though almost a century earlier the Chancellor heard and dismissed, apparently without consulting the Council, a petition addressed to him alone (Potter, 150). He certainly came to exercise judicial powers independently of the Council in those cases where the Common Law would have left unredressed a wrong contrary to conscience, there being no adequate remedy. In the earlier period there were cases, too, where the uncertainty of the times, poverty and the petitioner's status made petition to the Council the only real remedy, although one did exist at Common Law; but by the Tudor period this secondary jurisdiction had ceased (Potter, 150).

The fact that the Chancery came to have this extraordinary jurisdiction was due to the Chancellor's being

closely related to the administration of law, to his being himself a leading member of the King's Council, and having in the Chancery an efficient department of state (Holdsworth, H.E.L.I, 400).

Originally, then, the Chancellor's jurisdiction did not exist by virtue of his office, nor had it any connection with his post as keeper of the King's conscience, but only later did the Court of Chancery develop a jurisprudence based upon that idea. Originally the position of the Chancellor was that of a delegate of the Council to whom that body, overburdened with work of every description, delegated certain matters, as the Chancellor was of all the superior royal officials the most constantly in attendance (Holdsworth, H.E.L. I, 401). Furthermore, he had an organised staff which had for long exercised the power of issuing judicial and administrative writs to the King's officials and so was situated at the head of the legal system. Hence it was a natural step for the Council to transmit the petitions addressed to it to the Chancellor, sometimes with an endorsed instruction how to proceed, as the Chancellor commanded the machinery which could give redress to the petitioners (Plucknett, 162; Holdsworth, H.E.L. I 402).

The theory underlying the action of the early Chancellors was different from that of earlier times: it was not natural justice but the idea of the Court

compelling the litigant to fulfil duties of reason and conscience. The equitable jurisdiction of the Fifteenth Century was based on the application of the current ideas of the canonists regarding the moral government of the universe to the administration of law in the state. Equity on these lines was loose and liberal, yet so popular as to require a separate court (Holdsworth, Makers, 92).

Reasons for the Development of the Chancellor's Jurisdiction

The main reasons which have been suggested to account for the jurisdiction of the Chancellor are the existence of the "Latin side" of Chancery and the practice of delegation by the King's Council to the Chancellor with whom the Chancery was so closely connected. The Chancery was not only the Chancellor's office but the writ office for the Common Law Courts, and this gave great power to the Chancellor (Holdsworth, H.E.L. II, 512). The Provisions of Oxford limited his right to seal new writs without consent of King and Council. But the Chancellor soon reasserted his authority to issue writs in circumstances akin to those covered by an existing writ, where the facts were in like case but there was no writ to cover the plaintiff's complaint. This was authorised by the Statute in Consimili Casu of

1285 (Potter, 151; Hanbury, 2); the Chancery authority possibly extended also to framing other new writs. This power was of a semi-judicial nature owing to the necessity of bringing an action within the scope of a writ to have it relevant. The result was that the Chancery had a limited and miscellaneous Common Law jurisdiction which became known as the "Latin side", though it was only after the development of the equitable jurisdiction that it became clearly distinguished from the Chancellor's other functions. It was the outcome of the Chancellor's executive office to issue writs, in which he had a limited exercise of discretion (Holdsworth, H.E.L. I, 398, 450; Kerly, 50-52). It followed that the major part of the legal jurisdiction concerned the issue of certain writs and the procedure thereon.

From the close connection between Chancellor and the King and his Council, it was natural that he should have cognisance of pleas affecting the King or grantees of rights from the King (Potter, 151; Holdsworth,H.E.L. I, 452). So too petitions of right were dealt with in this department of Chancery.

The last form of jurisdiction was to deal with personal actions brought by and against officials of the Court, which was one inherent in all superior Courts (Holdsworth, H.E.L. I, 453). This however had little

connection with equitable principles: it was only about the middle of the Fifteenth Century that the distinction between the Latin and the English or equitable side of Chancery was established (Holdsworth, H.E.L. I, 451). The two sides were distinguished by the languages in which their proceedings were conducted. It seems beyond doubt that the exercise of judicial powers in the Chancery paved the way for the growth of a separate Court there.

But more important were the numerous petitions to the King or the King and Council for redress of grievances. (For examples showing reasons for applications to Chancery, see Baildon's Introd. to Sel. Cas. in Chancery, xxii.) The Chancellor had succeeded the Chief Justiciar as the principal officer of state, at the head both of the executive and of the only organised State department, which was also the office from which legal proceedings originated. The Chancellor himself was, furthermore, very commonly an ecclesiastic or occasionally a lawyer and more suited by training to administrative and judicial operations than the general run of Privy Councillors of the period (Potter, 152; Hanbury, 4; Holdsworth, H.E.L. I, 401-2).

It is apparent that the greatest vice of the administration of the Common Law throughout the Thirteenth, Fourteenth and Fifteenth Centuries consisted in its

failure to give redress when the injured party was poor and unable to pay the requisite fees for obtaining the writs to originate an action, and in 1402 the Chancellor was given power by statute to appoint a commission to try a charge on the bare complaint of the party (Kerly, 41-2.

Petitions to the King were naturally referred by him to the Council as in the Thirteenth and Fourteenth Centuries that was the legal tribunal of greatest importance (Holdsworth, H.E.L. I, 399). But the Council were unfitted for such work and were not unwilling that the Chancellor should hear and consider these cases by himself. Originally the Chancellor would report to the Council, and decision would follow a discussion of the report. In the course of time the discussion would become more a formality and probably a recommendation in the report would be accepted. Certainly in 1474 the Chancellor dealt with a case on his own initiative; he probably did this in those cases which fell clearly outside the province of the Common Law Courts. Thence he proceeded to the decision of other petitions brought before him, the precise speed and nature of the widening jurisdiction depending on the eminence and inclination of the individual Chancellors (Potter, 153; Snell, 2-3).

Kerly has pointed out that in earlier times the work falling to the Chancellors arose not so much from the insufficiency of the Common Law, which in fact accounts for a very small part of the Chancellor's work down to the Fifteenth Century. His power was at first called in far more often to remedy or prevent a breakdown or miscarriage of the ordinary system of justice than to supply omissions which it contemplated or recognised (Kerly, 12). A liberal construction of the statute in consimili casu would not have obviated the necessity for the extraordinary jurisdiction of the Chancellor, as Austin (Jurisprudence, 635) and Blackstone (Comm. III, 51) suggested.

Early Stages of Chancery Jurisdiction

Down to the times of the Tudors there was in general close co-operation between the Chancellors and the Common Law Judges. In the Fifteenth Century it appears that the determination of petitions was frequently done with the consent of the Justices of the Common Law Courts, as they were frequently summoned to the Council and the Chancellors' jurisdiction had not yet diverged from this, and for several centuries yet the judges were regularly called in to advise on questions of common law and occasionally even on matters of pure Equity.

There was no formality in the nature of a complaint to the Chancellor, nor was he bound by rules in adjusting the parties' rights though the Chancery had a fairly settled procedure utilising the subpoena. He administered natural justice interpreted in canonical texts to the parties in name of the King, although he tended to follow a consistent practice which in time tended to define the limits of Chancery jurisdiction. Yet the wide latitude and the personal character of the proceedings emphasised the personal nature of the remedy and the moral duty of the respondent, which was further marked by the fact that the Chancellor was normally an ecclesiastic (Potter, 154; Hanbury, 6).

In the period between the middle of the Fourteenth Century, when the Common Law had first tended to become rigid, and the Reformation under Henry VIII, the growth of Equity differs from its earlier development connected with the royal discretion as the basis of equitable modification of the law, in that it was caused and largely conditioned by the rigidity of the Common Law which had by now lost the equitable principles it possessed at an earlier period. The defects of the Common Law and the disturbed state of the country required the growth of equitable principles outside and even opposed to the Common Law. Secondly, the interference was more direct than if it had been developed by the Common Law Courts

themselves. And thirdly, the theory of equity on which the ecclesiastical Chancellors based their jurisdiction was different from that of Bracton - it was reason and conscience, rather than natural justice (Holdsworth, H.E.L. V, 215). In the first quarter of the Sixteenth Century friction between the Chancery and Common Law Courts which had arisen earlier, principally on account of the Chancellor's action in issuing an injunction whereby a plaintiff would be ordered to discontinue proceedings in the Common Law Courts under pain of imprisonment, became acute.

During the early development of the Chancery, the Chancellor had to administer justice over a wider field than fell ultimately within the province of Equity. He had jurisdiction over cases falling entirely outside the Common Law, such as those concerning aliens or maritime matters. He had much to do in righting wrongs which were due to the disturbed state of the country or to the failure of the Common Law to redress wrongs within its own jurisdiction (Holdsworth, H.E.L. I, 405). Probably expediency rather than any legal principles governed the exercise of the jurisdiction, though it seems that the fundamental characteristics of Chancery equity were already being recognised and laid down (Potter, 557; Holdsworth, H.E.L. I, 405).

There was an emphasis on conscience with an ecclesiastical Chancellor, a petition praying aid in the name

of God and charity, and an inquiry into the defendant's personal conduct, as distinct from the Common Law attitude where an external act of wrongdoing was the criterion. Early procedure was borrowed from canon law. There is, too, a constant reference in the petitions to a moral standard of right and reason, good faith and conscience (Potter, 558).

While the early equity of the Common Law Courts was wide and indefinite and included such ideas as justice and analogy (Vinogradoff, Reason and Conscience, 24 L.Q.R. 373), the Chancellors were more influenced by ideas derived from the canonists, depending on the theory of Divine law ruling the world and predominating over State laws (Holdsworth, H.E.L. IV, 279-86). This is particularly noticeable in St Germains' two Dialogues between a Doctor of Divinity and a Student of the Common Law, published in 1523 and in 1530. This work is of particular importance for the ideas underlying medieval equity (Holdsworth, H.E.L. V, 266): discretion based upon conscience was held bound to enter into any adequate legal system, and conscience, a typical conception of canon law, was the supreme principle of equity. Also, the work appeared at a critical time, as with the Reformation the line of ecclesiastical Chancellors was ending and the setting out of the fundamental doctrines upon which they had acted was essential to the continuance of

the system by lay chancellors who were ignorant of the ancient doctrine of conscience (Plucknett, 247-8; Chrimes, 203). The work also put into popular and intelligible form the current learning of the canonists with regard to the fundamental legal conceptions, such as the nature and objects of law and the different kinds of law. Thus was the author enabled to explain similarly in an intelligible way the principles underlying the canonist view that the reason and necessity for the existence of equity lay in curing the injustice caused by the generality of law, and it is the emphasis on conscience that differentiates the equity administered by the ecclesiastical chancellors of the Fifteenth Century from that administered by the Common Law Courts in the Thirteenth and Fourteenth Centuries. Furthermore, the appearance of an English version of the Dialogues facilitated the development of equity on native lines (Holdsworth, H.E.L. V, 266; Vinogradoff, 24 L.Q.R. 373).

In pursuance of such theories, then, the Chancellors assumed the right to interfere with the course of justice as administered by the Courts of Common Law in cases where, although the general rule was just, it would work against the law of God in the particular instance. Hence the administration of Equity by the Chancellor was involved as part of a universal scheme of government, though not as yet a legal system distinct from the Common

Law (Potter, 559).

Fifteenth Century Equity was conditioned, principally, by three factors: the rigidity of the Common Law and its deficiencies, partly of lack of remedy and partly of method; the development of Equity outside the Common Law with direct and avowed interference with the Common Law in consequence of its rigidity and defects, foreshadowing Equity as a distinct system of law; and lastly, the recognition of the basis of conscience wide enough to admit a miscellaneous collection of cases. The cases falling within Chancery jurisdiction covered relief on account of defective machinery of the Common Law and of defective substantive law, the former comprising specific relief instead of damages, and account and administration of assets, the latter covering trusts, the recognition of a general principle of enforceability of contracts, fraud and mistake and the recovery of chattels (Potter, 561-3; Barbour, 108; Holdsworth, H.E.L. I, 405, 454). The process of Common Law was both dilatory and expensive, as well as being highly technical. The system of pleading had become so technical and rigid that a plaintiff with a good claim might well be defeated over a matter of words. The methods of evidence were most rudimentary and the machinery of the law was abused by the great and powerful to cover their acts of violence and fraud. In these matters the procedure of the Fifteenth

Century Chancery was strong just where the Common Law was weak (Holdsworth, H.E.L. V, 279 et seq.)

The Formative Period - 1485-1660

During the times of the Tudors and earlier Stuarts the Court of Chancery was finally established and its organisation set firmly on foot; the jurisdiction of the Court became established, its amount of business increased, and it successfully resisted the attacks of the Common Law Courts (Holdsworth, H.EL. I, 409; V, 215-338). Its authority during this time was enhanced by its close connection with the Council, then at the height of its power, and by the splendour and power of the Chancellors who presided in the Court. In this period the modern rules began to be developed though only afterwards were the principles fully formulated (Potter, 155).

After Wolsley the majority of the Chancellors were lawyers; the first of these was Sir Thomas More (Holdsworth, H.E.L. I, 410). The succession of trained lawyers tended to emphasise the continuity of Chancery practice (Kerly, 94 et seq.), and the tendency to deal with questions less on purely ethical grounds of natural justice and more on a settled course of practice opened the way for the creation of rules of equity framed on lines not wholly dissimilar to another system of law.

While there seems little reason to suppose that the early Chancellors restrained their discretion by the rules of the Civil law, yet they doubtless referred to it as a repertory of moral principles common to the western world. But they clearly attached much force to the practice and usage of their own court (Kerly, 107).

During the greater part of this time an intermittent struggle was being carried on, the Common Law judges striving to suppress, or at least to circumscribe and limit the authority and jurisdiction of the Court of Chancery (Kerly, 107 et seq.; Holdsworth, H.E.L. I, 459 et seq.). In an increasing number of cases the Chancery was interfering with the course of actions at Common Law and the common lawyers were jealous lest their authority be eaten away. The Chancery had got into the habit of issuing injunctions to prevent parties from suing in a Common Law Court, or enforcing a judgment of a Common Law Court. The controversy had become acute by the end of the Sixteenth Century, and under James I, Coke, the pillar of the Common Law, denied the legality of imprisonment for failure to obey Chancery injunctions. In the Earl of Oxford's Case ((1615) 1 Ch.Rep.1; 1 White and Tudor, 615) the matter came to a head, and Ellesmere laid down that when a judgment was obtained by oppression, wrong and a hard conscience, the Chancellor would frustrate and set it aside, not for any error or defect

in the judgment but for the hard conscience of the party.

Bacon, then Attorney General, and other counsel were called in to advise the King (Kerly, 114 et seq.; Potter 157; Plucknett, 173) and they reported that there were ample precedents for injunctions and also that on occasion the Common Law judges had advised recourse to the Chancery. Accordingly, James supported a Court which was more favourable to his prerogative claims and issued an edict that the Chancery was not to cease giving relief in Equity according to the justice of the cause and the former Chancery practice (Holdsworth, H.E.L. I, 463). Equity in fact could not function properly unless it could interfere with the unfair use of legal rights (Holdsworth, Makers, 99). Thus the supremacy of Chancery in its own sphere, and its continued existence, were assured, though a further challenge was made by the Long Parliament and again in 1688. Bacon as Chancellor consolidated Ellesmere's victory. Possibly this is partially the origin of the Chancery respect for the Common Law and for the rule that Equity follows the law when there is no reason to depart from it. Also the function of the Chancery was thus determined as that of a supplementary remedial Court whose place it was to supply deficiencies, such jurisdiction being in fact limited and the Court bound by its own precedents.

The controversy did not end with this Chancery victory, though; jealousy rankled much longer, due to the steady expansion of the capacity of the Common Law courts, but no later attempts were made to overthrow the Court, as Equity was being harmonised, reduced to principles and developed into its due place in the English legal system (Potter, 157).

It remained a defect of the Chancery that the organisation developed in a haphazard manner and was unsuited to further legal business without delay and expense, and this later lay at the root of the most serious complaints against the Chancery (Holdsworth, H.E.L. I, 424). Bacon tried with little effect to regulate the course of proceedings, and during the Commonwealth the system was severely attacked but reverted to its old ways on the Restoration (Potter, 160; Holdsworth, H.E.L. I, 428). Furthermore, in the early Sixteenth Century force and coherence had been given to the Chancellor's jurisdiction by the writings of St Germain in the Doctor and Student, which, though they possibly tended to emphasise the medieval doctrine, yet provided a firm basis in the guiding rule of conscience which was accepted both by Chancellors and by common lawyers and which was the fundamental principle of equity for two centuries and preserved continuity between medieval and modern

Equity (Potter, 564; Plucknett, 613).

Some interest attaches to the proposed reforms of the Court of Chancery in the time of the Commonwealth. Little improvement was actually effected and little of that survived the reaction of the Restoration; but the diseases of the Court which persisted far into the Nineteenth Century were diagnosed and the remedies pointed out. The need for the Court and the relief it gave were recognised but its practice and procedure were scrutinised. The business of the Court was very great but the procedure very dilatory. Barebones' Parliament debated the matter in 1653, and Cromwell attempted to put into effect ordinances reforming the procedure. In the end nothing substantial was done, but the disorders, chaos and maladministration were made public, though it was not for two centuries that the demand for reform became irresistible (Kerly, 154 et seq.; Potter, 160; Holdsworth, H.E.L. I, 423, 463).

It was in this time and the next few years that the scope of Equity was fixed to a large extent and the foundations were laid on which the formulation of the great principles of Equity might proceed in the next century and a half (Kerly, 129 et seq.; Holdsworth, H.E.L. V, 251). The lines which development was to follow were laid down though that development and systematisation were still to come. Some matters ceased

to come within Chancery jurisdiction, for the Council and the Star Chamber dealt with much of the lawlessness of the times and the effectiveness of the Common Law Courts became greater and the intervention of the Chancellor was less needed. The Common Law, too, remedied many of its own deficiencies and began to enforce many transactions formerly unenforceable; the Chancery developed specific relief to meet those cases where the Common Law remedy of damages was unsuitable. Then by the use of fictions the Common Law Courts extended their jurisdiction to some matters, principally mercantile, which had previously been handled in the Chancery, and the introduction of newer and less technical forms of pleading and procedure extended the scope of the Common Law, so that Chancery interference based on the deficiencies and injustice of the Common Law became less necessary and was confined to a smaller number of cases (Potter, 572; Holdsworth, H.E.L. V, 299 et seq.; Kerly, Ch. viii-ix).

In consequence Equity became more limited and more defined, and so more readily systematised though it was rather the procedure than the law administered which was systematised. Apart from trusts and special specific remedies, Equity tended to develop rules dependent upon the rigidity of the Common Law, and also the more

elastic machinery of the Chancery, whereby it could deal with facts too difficult and complicated to be ascertained by the more elementary Common Law procedure. Among these may be noted relief against penalties and forfeitures, and fraud, accident, and mistake in conveyances and contracts. It also extended to the administration of assets of deceaseds' estates, the Chancery having succeeded in large measure to the jurisdiction administered prior to the Reformation by the Ecclesiastical Courts (Potter, 573 et seq.), and to matters involving accounts, such as partnership, which the Chancery was better suited to investigate (Holdsworth, H.E. L. I, 454 et seq.)

In this period the Statute of Uses had been enacted (in 1535) and the general effect on the law of trusts was decided by the Chancery, although only later were trusts put on a firm foundation (Potter, 577-8). Other property rights which received recognition were the equitable right of a married woman to compel her husband to hold the legal interest in her property conferred upon him by the Common Law for her benefit and to her direction, which became known as the married woman's separate property; the relief granted to the borrower under a mortgage developed into the mortgagor having conferred on him an equitable interest in the land; and lastly, the transferability of choses in

action, unassignable at common law, came to be fully recog-nised in Equity.

Nevertheless in this formative period, Equity was still a court of conscience and it lay in the discretion of the judge to grant relief. It was however becoming a more settled system by the limitation of jurisdiction and the increased certainty of practice, ready for the systematisation of its principles in the succeeding century (Potter, 577-8).

The Period of Systematisation - 1660-1800

From the Chancellorship of Nottingham in 1673-82 to that of Eldon in 1801-27 is the period in which the general principles of equitable jurisdiction were laid down within the limits and on the lines marked out in earlier cases (Holdsworth, H.E.L. IV, 640; XII, 178-330, esp. 237 on Hardwicke). The Chancellors of that period consolidated the grounds on which the Chancery would interfere with the application of strict legal rights, under the various heads which are the basis of modern equity. Thus "natural justice" disappeared though the system remained based on proceedings in personam and the defendant's "hard conscience" became an "equitable" one. The Chancellors elaborated the rules governing the jurisdiction of the Court over the matters peculiar to it and in so doing, they came to accept if not the binding rule,

at least the persuasive influence of precedent. The matters over which the Court had already achieved jurisdiction were chiefly trusts, relief in contracts, fraud, investigation of accounts, and remedies where the Common Law was defective, and on all these subjects the rules became systematised. (Plucknett, 618-9; Hanbury, 15; Holdsworth, H.E.L. I, 435 et seq., 467) The Chancery also acquired jurisdiction over persons of unsound mind, delegated to it from the Crown.

Reorganisation of the staff and machinery of the Court did not, however, keep abreast of the systematisation so that the Chancery became infamous for delay. Only in the Nineteenth Century did the machinery of the Court receive attention and alteration to fit it for its task (Potter, 161; Holdsworth, H.E.L. I, 465).

The boundaries between Chancery and Common Law had become fixed and the relations of Law and Equity could now be ascertained. There was, too, a spirit of progress in the Common Law, particularly under Lord Mansfield, and it tended thereby to become less dependent on outside assistance for the provision of substantial justice in cases beyond its jurisdiction. Consequently the auxiliary jurisdiction of the Chancery had less need to innovate and the Chancery judges were conscious of the uncertainty attendant on too great discretion and were inclined to limit it accordingly, by showing regard for consistent practice and precedent, so that by the

time of Eldon the doctrines of Equity were almost as settled and uniform as those of the common law (Potter, 579 et seq.).

Of particular interest to the Scots lawyer is the attempt by Lord Mansfield, as Chief Justice, to introduce something of the equitable principles of the Chancery into the administration of the Common Law (Holdsworth, 43 L.Q.R.1;1H.E.L. I, 467; Kerly, 180; Fifoot, 187. But Mansfield rarely relied on Scots law: ibid., 188). Mansfield had been deeply impressed by the flexibility of the principles of Chancery justice but his attempts were disapproved by succeeding Judges. In fact he did not fully appreciate the distinction of Law and Equity as not only historical and a matter of machinery, but as a fundamental difference of attitude. He disliked the separation of law and equity and, if he had had his way, the future relations of the two systems would have been very different. The substantive principles of law and equity would have gradually approximated to one another and the Judicature Acts might have effected a fusion both of substantive and adjective law (Holdsworth, Essays, 171; H.E.L. I, 467). The decrease in rigidity in the common law, however, had its influence on equity too in this period as had the progress of commerce (Hardwicke's Letter to Kames).

After the Restoration a certain improvement in the practice and doctrines of the common law had developed, and to some extent Equity had to keep pace with this. New methods of settling and encumbering landed property had arisen, and the equitable jurisdiction had become chiefly concerned with the adjudication and administration of proprietary rights; and the multiplication and extension of trusts greatly increased the business in the Equity Courts (Kerly, 166).

It was under Philip Yorke, Lord Hardwicke, who became Lord Chancellor in 1736, that the full development of the jurisdiction of Equity was attained and most of the great branches were mapped out. Much fuller definition and working-out was done by his successors, particularly Thurlow and Eldon, but authority on most of the important questions of equity is to be found in the pages of his reporters (Kerly, 175).

In 1759, after he had resigned the Chancellorship, he wrote a lengthy letter to Lord Kames (printed in the Appendix to Parkes' History of the Court of Chancery, p.506, and in Tytler's Life of Lord Kames, I, 235) describing the development and present position of equity. This, it should be observed, was just the year before Kames' own Principles of Equity was published (vide infra, Chap. V). In that letter he gives his views on the important question of how far equity still remained discretionary in his time. His views were that general rules must exist to

avoid uncertainty,"but yet the Praetor must not be so absolutely and invariably bound by them, as the judges are by the rules of the common law; for if he were so bound, ... he must sometimes pronounce decrees which would be materially unjust, since no rule can be equally just in the application to a whole class of cases, that are far from being the same in every circumstance. This might lay a foundation for an equitable relief even against decrees in equity, and create a kind of superfoetation of courts of equity." This distinctly foreshadows the later state of affairs when equity under Eldon became almost as rigid as common law.

Hardwicke then established the general rule that a Judge in Equity should follow existing principles and provided the material on which his successors founded their elaboration of Equity by the clarity and generality of his judgments and his clear appreciation of their relation to the common law: definition and limitation of Equity doctrines was the current trend of his judicial legislation, yet united with a recognition that changing circumstances must be faced and doctrines suited to those cases (Potter, 583; Holdsworth, H.E.L. I, 468).

At the beginning of the Nineteenth Century the long Chancellorship of Eldon (1801-27) completed the process whereby Equity had developed into a settled system of jurisprudence only little less rigid than the Common Law.

While Eldon's patience and care made his reported decisions the foundation of modern Equity and the modern rules are frequently strict deductions from his decisions, the decisions were not always lucidly and broadly stated. Moreover, his long deliberations caused delay in the work of the Court and the Chancery became a synonym for dilatory justice (Cf. Dickens' Bleak House). Hence during his time there arose an outcry for reform which produced the not altogether satisfactory expedient of appointing a Vice-Chancellor, and the later history of the Court was a struggle to avoid the delays of the past which sometimes amounted to almost a denial of justice, and to overtake the arrears of business (Potter, 587; Allen, 340; Snell, 4; Holdsworth, H.E.L. I, 468).

Since the Restoration the place of Equity had changed and it had become the partner instead of the rival of the Common Law, filling the gaps in the administration of justice left by the Common Law and other Courts. It had become a system of case-law wherein judicial precedent had binding influence, and it ~~it~~ had become a defined and limited system of law without the elasticity of unfettered judicial discretion or the uncertainty of natural justice or large-scale judicial legislation. Equity was ready to receive legislative extension and reform and then to take its place in the English legal system not so much as a gloss on the Common Law, but as an integral part

thereof, though not as a complete and finished system.

The practice and procedure of the Court had not kept pace with the development of the substantive law and this gave rise to the demand for reform which led eventually to the Judicature Act. The classic division of equitable jurisdiction had by now become apparent: the division into exclusive, concurrent and auxiliary jurisdiction brings out the functions Equity had come to fulfil (Potter, 588). Some rights of major importance, such as trusts and the equity of redemption in mortgages, were the exclusive province of Equity and the Common Lawyers neither recognised them nor had any hand in their development. There were other rights in which Equity played a part: the modification of contractual obligations, as where Equity relieved against penalties or recognised the force of innocent misrepresentation; it introduced many rules into the administration of the estates of deceased persons and thereby greatly affected the rule that such assets could be classed as either legal or equitable. This was the substance of the concurrent jurisdiction which was much affected by the Judicature Act. The auxiliary jurisdiction which no longer exists since the Judicature Act assisted the defective procedure of the Common Law, as, for example, by enabling parties to obtain disclosure of documents in the hands of the other side. Moreover,

in the provision of equitable remedies such as specific performance and injunction, it transformed the effectual character of some legal rights (Potter, 589).

The Period of Reform - 1800-1875

The Nineteenth Century down to the Judicature Act was one long series of reforms in the Chancery. Alterations reduced the burden on the judicial staff and reformed the clerical, and some modification was also made in the relation between the Chancery and Common Law Courts; the Equity jurisdiction of the Exchequer was absorbed and a Court of Appeal in Chancery created. But despite all these piecemeal changes, the reforms left the Chancery too incomplete in its jurisdiction and too cumbersome in procedure to provide adequate remedies for all the cases brought before it (Potter, 163; Kerly, Ch.XIII, 264 et seq.; Holdsworth, H.E.L. I, 442; Bowen, Sel. Ess. I, 523). Substantial reforms were gradually introduced during the century, avoiding, for instance, recourse to both Chancery and Common Law Courts for the determination of issues in the same cause. In 1858 damages could be granted in lieu of certain equitable remedies, such as specific performance and injunction. And about the same time the power to issue injunctions and award specific performance was conferred on the Common Law Courts together with powers associated with the auxiliary juris-

diction. Thus the way was prepared for the eventual union of Chancery and Common Law. The rationalisation and simplification of the law of real property and conveyancing went far to simplify the Common Law and the relation of equitable to legal rights (Potter, 592).

Parliament, too, began to interfere more frequently in Equity, particularly in a series of Acts affecting the law relating to trustees.

This trend of reform culminated in the Judicature Act, 1873, which aimed at destroying finally the delay and expense of separate tribunals, with the hope that the law might be simplified by the unification of Law and Equity. The Act effected an amalgamation of existing superior Courts into a Supreme Court of Judicature and the fusion of the administration of the two bodies of principles of Equity and Common Law. The former Equity court was perpetuated in the name of the Chancery Division, to which division business of formerly equitable character was largely assigned (Potter, 164, 226).

Apart from the amalgamation of competing jurisdictions, the Act provided for certain changes in substantive Law to bring it more into harmony with Equity. It provided that Judges of every Division of the new High Court were to give full effect to all rules of law and equity which might arise in any case before them, and while certain matters were assigned to the particular

Divisions, any Judge of any Division had full jurisdiction over any case which might be brought in the High Court (Judicature Act, 1873, now replaced by Supreme Court of Judicature (Consolidation) Act, 1925, ss. 36-44).

Certain equitable rules were accepted by the Act and so became, in effect, rules of the Common Law and created rights enforceable at law as well as in Equity. But while law and Equity may be administered by the same tribunal, the rules of law and Equity still remain distinct. The Judicature Act, 1873, s. 25, also provided that where Law and Equity conflicted, Equity should prevail. It was formerly thought that this so-called fusion extended beyond the mere concurrent administration of the several systems and affected cases so as to entitle the applicant to what had formerly only been equitable relief although the wrong for which redress was sought was one where the Common Law alone had granted a remedy. But the modern view is that equitable remedies are granted only in cases where equity formerly would have granted them and only upon equitable principles, while legal remedies are granted only for the infringement of a legal right upon legal principles (Potter, 229; Snell, 6-7). Maitland has pointed out that in fact there was and is practically no conflict between the rules of law and equity, as the latter

was a supplementary gloss on the common law and not an attempt by the Chancellor to supersede or overrule it (Maitland, Eq., 16-20, 153-6). The relations of law and equity had been those of partnership and not of conflict. Such was the theory on which the Chancellors proceeded. The Doctor and Student emphasises repeatedly that the law is the starting-point of equity rules and their foundation (Holdsworth, Essays, 167). Bacon admitted the "kind of rule and survey" the common law had over the Chancery (Works, ed. Spedding, vii, 415), and Norburie in the early Seventeenth Century said that "Law and Conscience are so linked together that they are hardly to be severed, and conscience must always be founded on some law." (Quoted in Holdsworth, op.cit.167).

It may be convenient to summarise here the principal work equity performed in English law down to this time. It comprised: (i) New rights which the courts of common law failed to enforce. The cardinal example of this is the protection of uses and trusts, which has gone on since the Fourteenth Century. (ii) New remedies developed in equity and additional to those provided by the common law ~~rights~~, including specific performance of a contract, an injunction to restrain the repetition of an injury, an order for account, and the appointment of a receiver to prevent a defendant destroying property before trial (for other instances, see Snell, p.4). (iii) New procedure: equity took a more

liberal view than the common law of procedure, particularly in allowing a defendant to give evidence and by transgressing the common law limitations of the inquiry to the parties to the action, however greatly other persons were interested in the outcome of the action (Snell, pp. 4-5).

Prior to the Judicature Acts the customary division of the jurisdiction of equity was by reference to its relation to the common law: it was classified under the heads of Exclusive, Concurrent and Auxiliary Jurisdiction, a grouping which originated in Story. The first of these contained the cases where the Common Law Courts gave no relief at all and the right enforced and the remedy were both purely equitable, as in the case of breach of trust. The concurrent jurisdiction comprised such matters as specific performance and injunction where the right was recognised but no complete and adequate remedy granted at common law. The auxiliary jurisdiction covered those cases where Equity gave assistance, as by compelling discovery of documents, to the common law courts for the enforcement of a legal remedy for a legal right where there was a deficiency of administrative power or machinery.

With the Judicature Acts the division became obsolete, although it still can be found in such older textbooks as Story. The auxiliary jurisdiction was abol-

ished as unnecessary and the exclusive became concurrent, although as a matter of convenience and practice certain matters are always assigned to the Chancery Division (Snell, p. 9).

The Effect of the Judicature Acts

At first lawyers were inclined to over-emphasise the so-called fusion of law and equity effected by the Acts. This persisted to some extent till the publication of Maitland's Lectures on Equity in 1909 (Holdsworth, Essays, 166-7). But in a few years the Courts had arrived at the conclusion that the Acts had not done away with the distinction between legal and equitable rights and legal and equitable remedies. For though being administered in separate courts the systems were not susceptible of fusion such as Justinian effected in the case of Roman law where law and "equity" were administered in the same court. The Acts only amalgamated the courts and rationalised their procedure but of necessity left the dualism characteristic of English law and still so marked as in the alternative remedies for breach of contract, damages being the old common law remedy and specific performance the old discretionary equitable remedy. But generally the courts may be taken to have worked out the principle that the Judicature Acts' main operation was on the

courts themselves and the procedure for giving effect to legal and equitable rights, and that they did not generally affect the substance of legal and equitable rules, so that that salient feature of English law, the development of equity as a separate system, has been preserved.

Holdsworth points out, too, that the Acts were only the logical culmination of earlier reforms and when the inconveniences resulting from the separation of the courts of law and equity had been removed and their procedure reformed, the development of equitable principles could continue just as could the legal, so that it is incorrect to speak of a fusion of law and equity (Holdsworth, Essays, 171-2).

Chapter IV

Equity in Modern English Law

It would be the height of presumption to attempt to state the principles of modern English Equity in a chapter of this work: that has already been very adequately done at much greater length elsewhere. But an outline sketch is necessary here to complete the picture of the development sketched in the last chapter and to provide a basis, without inquiring into the complexities, technical rules and authorities, for the comparisons later to be drawn in the study of equity in Scotland. In attempting to distinguish the equitable glosses from the legal text of Scots Law, reference to other glossed texts is sometimes enlightening and always of comparative interest, particularly in view of the great influence exercised in modern times by the law of England on that of Scotland.

Despite anything in the Judicature Acts, Equity still exists as an independent subject of study. But since that time the development of Equity in the whole period has been dominated by the Acts. They determined the conditions under which Equity has been developed by the legislature and the courts. It took some time, however, for the implications of that legislation to be appreciated, and as the courts have worked out the

principles, it appears that the Judicature Acts have not, in most cases, affected the substance of legal and equitable rules: their main operation has been upon the tribunals and upon the procedure by which legal and equitable rights are enforced, so that they made no breach in the continuity of the development of equitable principles and the salient feature of the development of English Equity as a separate system has been preserved (Holdsworth, Essays, 170-1).

While Equity is not a self-sufficient system but a series of glosses on, or appendices to, various branches of the common law, only held together by a jurisdictional and procedural bond which has now been dissolved, it does not follow that it has ceased to be a separate whole. For while the matters were disparate, the jurisdictional bond ensured a similar technical approach to all these matters and gave a unity to many of the principles which underlie them, the true meaning of which requires that equity should still be regarded and studied as a whole. (Holdsworth, Essays, 185). Nevertheless Equity is a miscellany of doctrines which at times seem almost mutually unrelated (Hanbury, Essays in Equity, 23), and its influence is not equally distributed over the various branches of the law (Cf. Maitland, p. 19). There is little in criminal law, and similarly in the law of tort which is closely related to the field of criminal law; while equity has left hardly a mark on the substantive law of

tort, on the adjective law the injunction has exercised an influence. But the trust is the mainspring of equity and its greatest achievement. In the law of contract "the influence of equitable doctrines has been profound. Equity played a big part in rendering choses in action capable of assignment. The old jurisdiction over fraud, accident and breach of confidence endowed equity with enormous influence in the domain of mistake and misrepresentation, and in addition to these was evolved the doctrine of undue influence. Most important of all are the equitable remedies for breach of contract on which the whole of the equitable doctrine in relation to the law of contract may be said to depend, for the intrusions of equity into the sphere of contract are inseparable from these remedies. Large parts are played by injunctions, cancellation, rectification, and most of all by specific performance, and its overgrown child, the doctrine of part-performance." (Hanbury, Essays in Equity, 27.) The jurisdiction of equity also extends to partnership, companies, bankruptcy, and administration of estates whence sprang the doctrinesof ademption, satisfaction, conversion, marshalling and election (Hanbury, ibid.; cf. Maitland, Equity, 22).

The effect of the Judicature Act has been expressed by saying that the two streams of jurisdiction, Common Law and Chancery, "though they run in the same channel, do not mingle their waters. The distinction

between legal and equitable claims, between legal and equitable defences and between legal and equitable remedies has not been broken down in any respect." (Ashburner, Equity, 18.) The Act, too, completes the Chancery process of influencing the common law in an equitable direction by the famous Section 25 (11) which runs, "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." In fact the direct influence of this provision has been small, as in very few cases was the relation one of conflict (Maitland, Equity, 16; Hanbury, 74). It is impossible in this connection to forget the way the praetorian remedies and the rules of the ius gentium consumed the rules of the ius civile.

While the old Court of Chancery disappeared with the passing of the Judicature Act, its name was perpetuated in one of the Divisions of the new High Court and to this division was assigned by Section 34 of the Act the majority of the matters which had formerly fallen within the purview of the older court as predominantly equitable. These matters comprised:-

(a) Administration of the assets of deceased persons;

(b) Dissolution of partnerships or the taking of partnership or other accounts;

(c) The redemption or foreclosure of mortgages;

(d) Raising of portions or other charges on lands;

(e) Sale or distribution of proceeds of property subject to any lien or charge;

(f) Execution of trusts, charitable or private;

(g) Rectification, setting aside, or cancellation of deeds or other written documents;

(h) Specific performance of contracts between vendors and purchasers of real estate, including contracts for leases;

(j) The partition or sale of real estates;

(k) Wardship of infants and care of infants' estates.

Other matters have subsequently been assigned to the Chancery Division by various statutes (Story, § 55a; Snell, 10), while a limited equity jurisdiction has also been conferred on the County Courts.

The Subjects of Equity Jurisdiction

Lord Coke said that three things were to be judged in a court of conscience or equity: covin, accident and breach of confidence (4 Inst. 84; Story, § 59), which Story interpreted as fraud, accident, and trust; but these categories are not exclusively equitable, and many of their forms are cognisable in strict law, and again some forms of these neither law nor equity will relieve or mitigate. Where, too, the law had determined a matter, equity could not intermeddle against positive rules of law in such cases despite accident or unavoidable

necessity (Story, § 61). The true boundaries of the jurisdiction exercised by courts of equity naturally divided it into three great heads - the concurrent, exclusive and auxiliary jurisdiction (Story, § 75). The auxiliary jurisdiction was entirely done away with by the Judicature Acts, and in a sense all equity is now concurrent, as has been pointed out; but the theoretical branch of exclusively equitable matters remains and is in fact handled by the Chancery Division as the successor of the old Court of Chancery.

The four most important heads of Equity jurisdiction however demand individual examination. These are uses and trusts, the equity of redemption, specific performance and injunctions.

Uses and Trusts

The most characteristic and important subject of Chancery jurisdiction was and still is the trust, a juristic development peculiar to Anglo-American law and until recently not fully understood in Continental systems of law based on Roman Law. The apparent duality of ownership has been ascribed to the recognition by the Common Law of one set of rights in the trust property, and by the Chancery of another set (Potter, 596). The origin has long been a matter of dispute and the principal theories may be summarised as follows.

(i) The old view that the Roman usus or fideicommissum was the source of the trust, although accepted by all earlier scholars, is now discredited (Holdsworth, H.E.L. IV, 410). While there is some analogy between the cases, the origin of the term use is ad opus, not ad usus (Maitland, Coll. Papers, II, 403).

(ii) The Germanic treuhand or salman, who was the executor of early times, was favoured by Holmes (1 L.Q.R. 162) who claims that the origin of trusts can be traced through the action of ecclesiastical courts in England, which acquired after the Conquest the jurisdiction over the administration of a deceased person's property. On the Continent the salman could hold property, transferred usually inter vivos, for certain purposes after the truster's death. This view has the support of Holdsworth (H.E.L. IV, 410-6).

(iii) Ames (Origin of Uses) considers the use indigenous in English law and the natural outcome of the practice that Equity acts on the conscience, and Holdsworth agrees that the peculiarly English development of the law in this matter is an outcome of the Chancellors' equitable jurisdiction (H.E.L. IV, 418, p. (1)).

(iv) Maitland concluded from the use of the term ad opus that the trust was based on the Common Law of agency (Coll. P. III, 321-404).

(v) Potter (597) considers the trust notion inherent in human nature and thinks that the Chancellor in adopting and enforcing trusts was compelling the fulfilment of a moral obligation, a task peculiarly congenial to an ecclesiastic in a court based on conscience. So too Pollock (Contracts, 167) considered trust sui generis and peculiar to English-speaking peoples. It will be necessary at a later stage to consider various views as to the origin of the trust conception in Scots Law.

Till 1535 the development of uses fell peculiarly within the province of the Chancellor though the Common Law judges recognised their existence from early times, and even advised suitors at their courts to have recourse to the Chancery (Potter, 598).

The principal reason for the growth of uses lay in the desire to avoid feudal casualties and to enable the owners of real property to dispose of it by will, which was not permitted by the early Common Law (Hanbury, 9; Plucknett, 515-21). The power of avoiding burdens which amounted to taxation was welcomed by all except the King who was the loser in the long run. The practice of uses had become so common before 1535 that a body of Chancery rules had grown up determining the existence and nature of a trust, such as the rule implying a use in the case of a contract to sell land (Holdsworth, H.E.L. IV, 421).

There was legislative control of uses directed against their fraudulent use as early as 1377 (Potter, 601) and against evasions of the Statute of Mortmain, but the most important was the Statute of Uses forced on Parliament by Henry VIII in 1535 (27 Henry VIII, ch. 10, repealed L.P.A. 1925), which operated to transfer the use into possession and to make the beneficiary absolute owner of the lands in law and equity, and thus subject to the incidents of tenure, which thereby tended to swell the royal revenue. But it did not abolish or even purport to abolish uses: it did not in terms apply to all sorts of uses, though it did for a time check the development of trusts (Potter, 602; Story, § 970; Hanbury, 15 et seq.). Then the disturbances of the Civil War period stimulated the creation of trusts again, and the width of the exceptions to the statute rendered it inevitable that the Chancellor should be compelled to give effect to transactions similar to the old uses, but now known as trusts (Potter, 604; Plucknett, 536). Yet trusts probably did not immediately resume an important place in Equity, although there may have been some development.

After the Restoration Nottingham first gave the modern classification of trusts when he laid down in Cook v. Fountain ((1676) 3 Swanston, 591) that "All trusts are either, first, express trusts which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law;

"again, express trusts are declared either by word or writing; and these declarations appear either by direct or manifest proof, or violent and necessary presumption."

From this time onwards it is generally true that Equity decisions tended to approximate the rules governing equitable interests to those governing legal interests, with certain exceptions. True to the principle of giving effect to intention, no special form of words was required to create a trust, and in some cases the "officious kindness" of the Court of Chancery sought to draw a declaration of trust from any expression of desire or wish on the part of the donor, which despite affirmations that its application was restricted to cases of necessity was carried to considerable length and formed the doctrine of precatory trusts (Potter, 609).

Two aspects of the trust conception deserve mention: the fact that, as was natural from the Chancellor's jurisdiction being based on conscience, Equity regarded trusts as creating a personal relationship between trustee and beneficiary; and also the fact that the rights and duties of trustees were and are onerous, and the scrutiny of the good faith of their conduct was strict (Potter, 611).

The Equity of Redemption

An equitable department of considerable importance concerned the treatment of mortgages, which are comparable generally to the Scottish dispositions of land/ in security of the repayment of a loan. By the Common Law the lender had the right to take the estate conveyed by the borrower in security for the repayment of the debt. But Equity regarded the conveyance only as a security and required the reconveyance to the owner so long as the money was repaid. The Common Law judges tended to enforce the conveyance strictly and the forfeitures of land through inability to repay on the due date doubtless soon amounted to hardship, so that from about the middle of the Fifteenth Century petitions are met with praying relief from forfeiture if the money were repaid later. By the end of the Sixteenth Century the Chancery, which had acquired by now a jurisdiction over mortgages recognised even at Common Law, was beginning to accept that the borrower had a right to redeem the land even after the due date of repayment, and the Chancery came soon to look on the interest of the mortgagee as merely a security and on the mortgagor as having a right, even after the date of repayment had passed, entitling him in equity to an interest in the land (Potter, 612-14. See also Turner, Equity of Redemption, *passim*; Story, § 1013 *et seq.*; Snell, p. 312 *et seq.*)

Until the mortgagee obtained a decree of foreclosure he was not a true owner of the land. Though a mortgagor lost his legal right to redeem, he yet had an equitable right to redeem on payment within a reasonable time of principal, interest and expenses.

As the common law judges stuck rigidly to the doctrine of forfeiture, the law relative to mortgages fell almost entirely under equity jurisdiction. The mortgagor's right to redeem constitutes, with his other rights in the property, his "equity of redemption". At first a mere right, this was later held to be an equitable estate in the land, amounting to ownership of the property subject to the mortgage (Snell, 313-4; Potter, 614). It became, too, a settled rule of equity that any agreement directly barring the mortgagor's right to redeem was ineffectual and even stipulations tending indirectly to make the mortgage irredeemable were also bad (Snell, 315). As the right of redemption is equitable it may only be exercised on equitable grounds (Snell, 318).

Specific Performance

The developed Common Law gave no remedy for breach of contract save damages, and there was no means whereby a defendant could be compelled to implement his bargain. But even at an early period in Common Law Courts specific performance was administered (Hazeltine, Early Eng.Eq.,

p. 261). In some cases it would not be reasonably practicable to compel actual fulfilment and in other cases payment of money is quite adequate recompense; but in a limited class of contracts money alone would not recompense, as in an agreement for the sale of land, and in such cases Equity could give a remedy by directing the defendant to perform his obligation specifically (Snell, 533). It appears that any remedy granted during the Fifteenth and Sixteenth Centuries was very vague and indefinite, and not until the Eighteenth Century were the modern rules of specific performance laid down. This remedy, too, has involved the growth of other equitable rules reflecting its peculiar equitable character, such as the defence of misdescription not amounting to fraud.

Of more importance is the decision in Lester v. Foxcroft ((1701) 2 Wh. and Tu., 410), that while a contract relating to land had to be evidenced in writing, yet when it had been partially performed, Equity had jurisdiction to decree specific performance even in the absence of writing. This is founded on the defendant's fraud in failing to fulfil his contract (Potter, 620. See Story, § 712 et seq.).

In general equity will not interfere where damages at law will give a party full compensation and will place him in as beneficial a position as if the agreement had been specifically performed. But in England as

distinct from Scotland, specific performance is a discretionary remedy (Snell, 535), which is however exercised on well settled principles. In Scotland on the contrary, as will be seen later, specific implement is the general rule (Stewart v. Kennedy, (1890) 17 R.(H.L.) 1. English law is contrasted by Lord Watson at p. 9), subject to the discretion of the Court to refuse it when it would cause exceptional hardship (Grahame v. Mags. of Kirkcaldy, (1882) 9 R.(H.L.) 91). In England the contract is most commonly specifically enforced when it relates to land (Snell, 533) and to articles of peculiar nature or rarity, not otherwise readily obtainable (Snell, 534), or in fact, as the Scots lawyer would put it, such as have a pretium affectionis. Nowadays the Chancery Division may award damages in lieu of specific performance equally with the King's Bench Division. There are, of course, a number of actions in which specific performance will not be decreed, as e.g. immoral contracts (Snell, 537 et seq.), or contracts of personal service.

Injunctions*

The injunction is an order, formerly issuing from the Court of Chancery, forbidding the person named to do the act specified (prohibitory injunction), or occasionally, ordaining him not to leave something undone (mandatory injunction). Its application covers miscellaneous cases of prevention of wrongs. The Chancery

* Generally, Snell, Chap. 25; Kerr on Injunctions.

apparently early took to issuing injunctions and from the middle of the Fifteenth Century injunctions came to be issued to prevent a plaintiff pursuing an action at law which the Chancellor considered to be contrary to conscience. This "common injunction" brought the Common Law Courts into conflict with the Chancery, and the Judges of the former refused to accept it as lawful (Kerly, Equity, 89; Potter, 621; Story, § 861 et seq.; Snell, 574. Abolished in 1875).

The categories of cases in which an injunction issued were settled before the Restoration (Holdsworth, H.E.L. V, 323-5). The prevention of waste by a limited owner of land such as a tenant for life, and the prevention of threatened wrongs, particularly in the case of an injury interfering with the enjoyment of land, were the principal cases. But only since Eldon and particularly since the Judicature Act has the injunction become common. Its scope and use have now become greatly extended.

Injunctions are interlocutory or perpetual, corresponding roughly to Scottish interim interdict and permanent interdict, and the jurisdiction to issue them is exercised on fixed legal principles. The Chancery Division has power to award damages in lieu of injunction, at the discretion of the Court (Snell, 572-3).

The categories of cases in which remedy by injunction is available are generally three, of restraining (i) judicial proceedings, (ii) breach of contract, and (iii)

the violation of some legal or equitable right apart from contract (Snell, 574). In questions of contract, the natural mode of enforcement of a negative contract is by injunction, as that of a positive is by specific performance (Snell, 576-84). In other matters it may be invoked to restrain a threatened breach of trust, or waste and trespass, or nuisances of various kinds such as loss of lateral support and pollution of streams. It extends to anticipated defamation, trade disparagement and threats of actions for infringement of patents and designs. Equity also habitually interfered to secure by injunction the rights of inventors, manufacturers, and the like, and copyright (Snell, 584-604).

In earlier times the Court of Equity had no power to award damages in lieu of an injunction, which led to hardship and multiplication of actions, so that the Courts were later enabled to give damages in lieu of injunction though the wrong complained of was equitable and not recognised at law (Potter, 623).

The Maxims of Equity

In the literature of English equity there is much attention devoted to the consideration of these dozen or so maxims round which it is possible to group much of the subject-matter of equity. They do not all go to the root of the matter and many of them have no long history (Pound, Cambridge Legal Essays, 274), but the ideas which

they enshrine are older than the expression and are rather the fruit of observation of developed equitable doctrines. Hanbury (Modern Equity, 42. See also Holdsworth, H.E.L. XII, 188 et seq.) considers their practical value in a scheme of arrangement of equity immense, and they have been expounded in detail in America. In Scottish legal doctrines similar maxims have never played an extensive part though we are familiar with the Latin maxim as a terse but not always strictly accurate expression of legal doctrine, and Lord Kames listed some similar brocards at the conclusion of his work on the Principles of Equity.

The number of maxims has varied at different times and in various authorities, though there has been little difference in substance. They are a mixture of old rules of law derived from Roman law and the principles of ethics, as transferred and applied to the law and practice of the Chancery, though they cannot pretend to provide a logical or philosophical arrangement of equity. Equity cannot be said to have been built on their foundation though they are useful enough as memoria technica and provide a key to many of the decisions of the Chancery Court. To some extent they overlap and it would not be difficult to reduce them all under the heads of the first and last. They are of two kinds - traditional proverbial ways of putting the results of equitable doctrines, and secondly, of expressing certain

policies of the courts in the exercise of equity jurisdiction (Pound, op. cit. 259; Snell, 12). But for all that each embodies some peculiar function of equity and they accordingly merit separate enumeration.

(1) Equity will not suffer a wrong to be without a remedy (Snell, 13; Hanbury, 42). This is similar to the common law maxim "No wrong without a remedy" and expresses the motive which early impelled Equity to translate moral into legal wrongs, and to overrule the common law courts when they gave effect to what the Chancery judges held to be merely technical objections. This principle really underlies the whole jurisdiction of equity and to this maxim Snell (13) traces the whole auxiliary jurisdiction, the third branch of the tripartite division of equitable jurisdiction, which has now lost most of its importance since the Judicature Acts made such auxiliary relief as discovery of documents an aid competently given by all Divisions of the High Court as a step in an existing action. While the failure of the Common Law Courts to give a remedy led to the rise of the equity courts, it must not be supposed that every moral wrong was redressed by the Court of Chancery. The maxim refers to rights capable of judicial enforcement, but not enforced owing to a technical defect. It is on this maxim that the Court of Chancery based its enforcement of uses and trusts, so that while its more particularised applications have lost

much of their importance, this remains an unsurpassed general expression of equitable doctrine. Kames cites the maxim as among the principles he founds on.

(2) Equity follows the law (Snell, 14-15). This expresses the proposition that the Equity Courts never claimed to override those of Common Law, and in certain cases the courts of equity would do nothing to give relief against certain harsh rules if they were definite rules of common law, such as the old rules as to intestate succession. Story (§ 64) expresses the significance thus: "Where a rule, either of the common or the statute law is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it. If the law commands or prohibits a thing to be done, equity cannot enjoin the contrary, or dispense with the obligation."

All a court of equity could do was to prevent a legal owner making unconscientious use of his legal rights (Blackstone, Comm. III, 429; Maitland, Eq. Ch.II). Furthermore, Equity acted on an analogy with legal rules with regard to equitable estates, rights and interests, where such existed, though recent property legislation has left little of this part of the maxim effective (for former significance, vide Hanbury, Essays, 46-7). In short, Equity will not interfere with a man's legal rights

unless it would be unconscientious for him to utilise them. The same principle is found implicit in Scottish equitable forms.

(3) Where there are equal equities, the first in time prevails (Hanbury, 440; Story, § 64d; Snell, 15). This maxim was well known to the civilians in the form Prior tempore potior iure and as such appears in Scots law too (Trayner's Latin Maxims, 469; Balfour, Practicks, 166, 449), as expressing the rule whereby rights of preference in competitions are decided, as for instance in the recording of deeds in the Register of Sasines; in England it may be illustrated by the priorities of mortgages.

(4) Where equities are equal, the law prevails (Story, 64c; Snell, 15; Hanbury, 440). This is generally true, signifying that if the defendant has an equal claim to the protection of the court for his title as the plaintiff has to the court's assistance to enforce his title, the court will not interfere on either side. In such circumstances the rule applies, "In aequali iure melior est conditio possidentis" (Trayner, 252). The equity is equal between persons who have been equally innocent and equally diligent and in such cases the law must be allowed to take its course. Again in Scotland the principle is known, even if the maxim is foreign.

(5) He who seeks equity, must do equity (Snell, 16; Hanbury, 45). The principle underlying this maxim was expressed by Sargant J., (Re Peruvian Rly. Constr. Co. /1915/ 2 Ch. 144, 150, affd. ibid. 442), as: "Where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed to participate unless and until he has fulfilled his duty to contribute." The rule is usually illustrated by the wife's equity to a settlement (Snell, 16,403). It also calls to mind the rules of compensation and set-off, estoppel, collation and in the field of mortgages consolidation, marshalling of securities, and the obligation incumbent on a mortgagor seeking to enforce his equity of redemption to deal fairly with the mortgagee; it also covers election or approbate and reprobate (Hanbury, 45-8. See also Story, § 64(e)). Not dissimilar rules apply in Scots law in several spheres, and the maxim is cited by Kames.

(6) He who comes into equity must come with clean hands (Snell, 16; Hanbury, 53). This maxim is akin to the last though rather wider, for it prevents a claimant who has come to court with a preconceived plan of fraud in his mind from perpetrating that fraud, as where an infant obtains benefit by representing himself as of full age. It also looks to the past rather than to the future, as in the previous case: the plaintiff must not

only be prepared to do now what is right and proper but his past record in the transaction must be honest. Kames mentions the maxim, "No man is suffered to take benefit by his own fraud or wrong."

(7) Delay defeats equities. Again this is a maxim known to the civilians and in Scots law in the form Vigilantibus non dormientibus iura subveniunt (Trayner, 617; Hanbury, 54). Hence preference is given to rights first completed or diligence first executed. On this, too, is based, at least partly, the conception of prescription whereby a right not enforced is nullified by lapse of time, or a right of objection and reduction barred; and also such a plea as mora, taciturnity and acquiescence. As Lord Camden said (Smith v. Clay, (1767) 3 Bro.C.C.640 n.) "Nothing can call forth this Court into activity but conscience, good faith and resonable diligence; when these are wanting, the Court is passive and does nothing." (See further Snell, 18).

(8) Equality is equity (Story, § 64f; Snell, 19; Hanbury, 59). While this does not find mention in Trayner's collection, it is just another old Latin moral precept - Aequalitas est aequitas. According to Bracton, it constitutes equity itself: its applications extend to contribution between joint contractors and sureties, the presumption for equality in partnerships, in abatement of legacies, in case of deficiency of assets and the marshalling and distribution of equitable assets and

their application proportionally in payment of debts without reference to priority at law.

(9) Equity looks to the intent rather than the form (Hanbury, 63 et seq.; Snell, 21, 202). This now constitutes the rule of all courts which have to consider and interpret documents though it has come to be hedged about and restricted by rules of interpretation defining the circumstances in which extrinsic evidence is admissible to explain or qualify ambiguity in a deed. In England this maxim has been held to cover the whole attitude of equity to mortgages, penalties and forfeitures and towards the Statute of Frauds.

(10) Equity looks on that as done which ought to have been done (Story, § 64g; Snell, 21; Hanbury, 69). To this may be ascribed the doctrine of conversion and others of greater technicality. Its most frequent application is in the field of contract though it is not confined to that. Equity is held to treat the subject-matter as to collateral consequences and incidents as if the final acts contemplated by the parties had been done exactly as they should have been at the time when, by the tenor of the agreement, they should have been done and not as the parties might have executed them. So money covenanted or devised to be laid out in land is treated as real estate in equity, and conversely. In Scotland it is met in the form, Quod fieri debet infectum valet while the doctrine of conversion is also familiar.

(11) Equity imputes an intention to fulfil an obligation (Snell, 22 and Chap. 8; Hanbury, 70). This comprises the doctrines of performance, satisfaction, and ademption as well as relief against the defective execution of a power of appointment. As it is right to put the most favourable construction on a man's acts, he will be presumed to be just before he is generous; when he is under obligation to do an act and does something else which may be construed as a fulfilment of his obligation, it will be so considered.

(12) Equity acts in personam (Snell, 22-5; Hanbury, 70). This is the widest of all the maxims and in a sense comprises the whole of Equity. It is descriptive of the procedure in Equity and emphasises that the original Chancery jurisdiction operated on the conscience of the individual defendant. By it the Court of Chancery arrived at a jurisdiction over land and other property in other countries, provided it could effect service on the person of the legal owner, or on one of the legal co-owners in the case of trustees (as in the Orr-Ewing case ((1885) 13 R. (H.L.) 1; 10 App.Cas.453)). Although today Equity is not confined to acting in personam, its jurisdiction is still primarily over the defendant personally, and it is immaterial that the property in question is not within reach of the Court provided that the defendant himself is within the jurisdiction or can be served and that there is some equitable right which the

plaintiff could have enforced against him had the property been in England. In the Orr-Ewing case there was a conflict of jurisdiction between the Chancery Division and the Court of Session and the latter interdicted trustees from taking out of the jurisdiction the administration of a Scottish trust. Lord Fraser said ((1884) 11 R. 600, 620): "The Court of Chancery .... acts in personam. Now this is a power which is not peculiar to the Court of Chancery. It belongs to all courts of equity, and the Court of Session has recognised it in the same manner as the Court of Chancery, with reference to cases in which it would be equitable to exercise the jurisdiction."

Conscience

The philosophical and almost theological conception of conscience is the one general principle which underlies and influences all Chancery equity, and there is much more mention in the Common Law Courts in earlier times of conscience and reason than of equity (Allen, 330). This connection with canonical influence is evident in the Doctor and Student which had such an important influence on and material consequences for English Equity. Consequently when Equity came to be systematised it was under the influence of this pervasive moral force, which despite occasional arbitrary vagaries was usually more constant and permanent than capricious.

The principal forms which this principle took in England were summarised by Sir Thomas More as "fraud, accident and things of confidence" (Allen, 333; Spence, I, 413). The head of fraud covered unconscionable dealing which fell short of the actual deceit actionable at Common Law. Equitable fraud was not pure morality but resolved itself to cases of undue influence and bargains in which there was some special relationship of trust or confidence between the parties. Accident may be held to cover those undefined circumstances in which an obligation might well be overturned by some unforeseen event, a mis-statement or omission, provided the defect was purely accidental and not reasonably foreseeable by a prudent man. To come within it, a man must have had some disadvantage or disability exploited: it does not relieve from his own slackness. To this head of doctrine may be ascribed the equitable jurisdiction in regard to mistake and the rectification and rescission of documents as a corollary thereto. Things of confidence covered uses and trusts, always the most important part of Chancery jurisdiction, all obligations dictated more by conscience than by a bond of positive law, and possibly even in opposition to the law. The equity of redemption in mortgages and the equitable sharing of obligations between partners and between principal and surety fell within this as well as the rule of general average. While these are bilateral,

there were also unilateral obligations imposed in the very stringent duties of executors and administrators. Other matters which have a root in confidence are the technical doctrines of conversion, powers of appointment and joint ownership.

Other matters again were the giving of effect to expressions of intention which were dubiously or imperfectly expressed, a guiding principle in interpretation particularly of wills and settlements though now overlaid with a superfluity of authority and technical rules of construction which may obscure the central idea of penetrating to the intention underlying the words, and the tutelary jurisdiction over those in need of protection, infants and married women, persons subject to harsh penalties and formerly the poor and insane too. So, too, the Chancery with the same spirit of humanity had a benevolent attitude to charitable trusts (Allen, 333-6).

Yet in 1903 Buckley, J., said: "This Court is not a court of conscience." (Re Telescriptor Syndicate, [1903] 2 Ch. 174, 195). This does not signify that the Chancery Division as successor to the Court of Chancery had abandoned the notion of conscience but rather that an equity judge will not now decide every case by searching for the particular conscientious principles applicable thereto but will follow precedent (see Winder, 57 L.Q.R. 245; Re Diplock, [1948] Ch. 465, 481), just as Lord

Eldon said he desiderated that the rules of equity be as well settled and almost as uniform as those of the common law. Conscience remains of importance in equity though now it has crystallised, and it is still true that Equity acts in personam.

The position of equity to-day may be noted from a recent case (Nelson v. Larholt. /1948/ 1 K.B. 339,343) where, speaking of the right of an owner to recover money taken from him by fraud, Denning L.J. said:-

"This principle has been evolved by the courts of law and equity side by side. In equity it took the form of an action to follow moneys impressed with an express trust, or with a constructive trust owing to a fiduciary relationship. In law it took the form of an action for money had and received or damages for conversion of a cheque. It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect .... Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution, if the justice of the case so requires."

Chapter V

Equity in Scots Law

To complete the introductory matter it remains to consider generally the place of equity in the law of Scotland. It is necessary to examine the views of the principal Scottish writers on the place of equity in this country's jurisprudence, before considering in detail the particular branches of Scots law in which equitable influence can be discerned. The influence of equity on Scots law has not been so obvious as in England and it has consequently received inadequate attention and appreciation from text-writers and judges. But the influence of the law of nature and principles of equity and justice based thereon has not been entirely ignored and dicta bearing on the influence of equity in our law have fallen from high authorities. Initially only a few need be mentioned.

In 1855 in the House of Lords, Lord St Leonards said, "The Court of Session is a Court of law and equity." (National Exchange Co. v. Drew, (1855) 2 Macq.103,148). Lord President Inglis said, "We administer an equitable as well as a common law jurisdiction; and we are in the exercise of that mixed jurisdiction of law and equity when we try a cause before a jury just as much as when we are sitting here. It is quite competent to a Judge

presiding at a trial of issues in this Court to address to the jury principles of equity as well as rules of law." (Forrest and Barr v. Henderson, (1869) 8 M.187,195). Lord Dunedin remarked in Allen v. M'Combie's Trs (1909 S.C. 716, 717), "Now in our Courts we have never had a distinction between equity and common law jurisdiction, and yet, I think, unknown to us, the same ideas have run through our jurisprudence"; and there are other statements to a similar effect (e.g. Lord Watson in Grahame v. Mags. of Kirkcaldy, (1882) 9 R.(H.L.) 91). In recent years Lord Young and Lord M'Laren particularly have frequently referred to equity.

It is unfortunate that research into Scottish legal history has not yet proceeded far enough to enable us to dogmatise with any confidence about the law or the administration of justice in this country prior to the Seventeenth Century, but certain trends are plain even from existing knowledge. The monarch originally possessed and occasionally exercised down to a comparatively late date a personal supreme jurisdiction, and the Scottish Kings regularly manifested a lively interest in the administration of justice (e.g. David I: Hume Brown, I,86. Cf. Mackinnon, 258). Questions coming before the King would come naturally before him in his great council, the council which came to branch into two main modes or forms - the smaller secret council which became the

King's Privy Council and the larger, which came to include burghal representatives, to have primarily legislative functions, and so to become the Parliament.

From its first mention in Scotland Parliament was a Court of Law and the word was at first associated with this supreme jurisdiction rather than with legislation (Rait, 452). The Lord Chancellor of Scotland was Keeper of the Great Seal and the King's chief legal adviser, and he normally presided over the Estates of the Realm and acted as the King's assessor when he sat in person on the bench (Innes, Scotch Legal Antiquities, 76; Mackinnon, 122). He was a member of the Privy Council and after the foundation of the Court of Session was empowered to take the seat of the President (Rait, 470; Mackay's Practice, I, 5.) Many of the men who held the office of Chancellor were clerics acquainted with Roman and canon law; many were men of outstanding ability who made a considerable impression on the government of the country.

In Scotland, as in England, the supreme civil courts developed from the King's council, and the Court of Session is founded on judicial committees of Council and Parliament. The details of the development must be sought elsewhere (Hannay, Antecedents; Idem, College of Justice; Neilson, Introduction to A.D.C. II; Rait, 452 et seq.) but it originated at least in part from the tendency of the subjects to seek redress by direct resort to the Crown, and certainly numerous bills of complaint were

presented to Parliament in the Fourteenth and early Fifteenth Century (Hannay, Antecedents, 89). Even after the College of Justice was set up in 1532 the Lords were treated as being of Council as well as of Session and a clear separation of Session and Privy Council is long in appearing - certainly not before 1626. Similarly the relations of Parliament and Session were close till a late period (Rait, 471).

A few points of similarity to the evolution of the Chancery in England are evident in this development but the important differences are that the Chancellor in Scotland never appears to have sat alone or in a court peculiarly his own to administer remedial justice in the exercise of the King's conscientious office, nor is there any trace of cases being remitted from the Council to him, nor are there clear indications that cases coming before the Council after 1532 had any special connection with equitable relief (cf. Hill Burton, Intro. to R.P.C. II).

The state of Scotland continued troublous practically down to the Union of 1603. The superior Courts were comparatively late in being set up and had not had the time to establish themselves firmly and develop a system of law common to the whole country, centralised, and so rigid and fixed as to demand reliefs in hard cases, as had happened in England from the time of Henry II. The continuing jurisdiction of Chancellor and Curia Regis in Scotland

down to and even after 1532 (Hill Burton, Intro. to R.P.C. I, 13) was due in part to the weakness of the ordinary courts and was concurrent rather than auxiliary and remedial. It is quite possible that if the ordinary civil courts in Scotland had been established earlier and had built up a strong jurisdiction and body of law, they would have required the assistance of Council not to aid but to moderate their powers as in England. But at the middle of the Sixteenth Century, the courts in Scotland were still comparatively young and weak, and the law they administered flexible, so that equitable intervention was not necessary as a general practice. A further compelling reason is that Scots law was never shackled by forms of action. The earliest brieves from Chancery were few and adaptable, and this persisted and thereby obviated much of the need for equitable interference (Cooper, Introd. to Register of Brieves). The change from brieves (which Stair (IV, 3, 4; but he is in error in this) says were copied from the English Chancery) to summonses about 1532 opened the way for the application of equitable principles free from the confines of forms of actions without need for the intervention of a court of equity (cf.Kames, H.L.T. 228; Balfour, 644).

The close and entangled relations of Privy Council and Session even after 1532, and the frequent references in the Register of the Privy Council after 1545 to the fact

that the Privy Council retained the judicial powers of the old Lords of Council and assumed a position of relative superiority over the Court of Session, make a comparison inevitable with the early Chancellors and the courts of common law in England. But while the Council after 1545 frequently refer a question to the Session as a matter for determination by a legal tribunal, there seems to be no foundation for saying that the Council administered equity and the Session law (cf. Hill Burton, Introd. to R.P.C. I, 13). There is a tendency for matters of greater concern to the State to be dealt with by Council and lesser questions affecting ordinary individuals to be referred to Session. There would not appear to be any foundation for making the distinction one of law and equity, and the Council as time went on abdicated judicial functions, declaring themselves "in no wise competent judges in civil actions" (R.P.C. IV, 91 (1586)), and saying that "The Lords of Session are supreme judges in civil causes" (R.P.C. IV, 723 (1591)).

An interesting case came before the Privy Council in 1565 (R.P.C. I, 431-2) where there was an arrestment in the hands of the Master of Maxwell of sums due to certain Englishmen and this was ordered to be made forthcoming in settlement of sums due to other Scots under a decree of the English Court of Admiralty for the spoilation of their ship and goods in Northumberland. This was resorted to

only because the Scots were wearied by delays in obtaining payment. They had sought relief and got decree in the English Court of Chancery in the name of "equity and justice" and now sought to recover from the arrested funds for the sake of "equity and good conscience". Even then the Chancery was dilatory.

There are other references to equity in the Privy Council records but no suggestion that it means any more than natural justice. For example, in 1561 there is a complaint that few holders of benefices have produced their rentals in accordance with the ordinance of Council, "express against reason, equity and justice" (R.P.C. I, 199); and in 1565 a summons for removing of kindly tenants is described as "against equitie, conscience and the lovabill custum of the cuntre" (R.P.C. I, 432).

Traces of Equitable Jurisdiction prior to 1600

The Acta Dominorum Concilii so far as printed, and the Register of the Privy Council, contain a number of cases of a substantially equitable nature where an equitable remedy is given, but there is no suggestion in any of them that such is the basis of the decision. These early records, however, being in the nature of decrees rather than reports, afford little basis for the confident deduction of legal principles. Several points, however, are clear. There is no evidence that the

Chancellor of Scotland ever sat as sole judge or had judicial functions deputed to him by the Council, nor is there any evidence that the Council sitting judicially ever considered their function to be to give a remedy where strict law might not, or where no known remedy at law existed, or that they sought to rectify imperfections in decrees of the Session. There is nothing to suggest that their conduct was dictated by other considerations than giving the remedy which was just in the circumstances. Nor do the Registrum Magni Sigilli or Registrum Secreti Sigilli show any traces of equitable relief being granted in manner comparable to the Chancery. From a very early period the rule was that judges were not to put into execution any command to them which was "contrary to law equitie and justice" (Balfour, Pr. 281; cf. 333). They were to admit or repel objections "conform to the law and equitie" (Kinhilt v. Kirkdaw, 1563, Balf. 346).

There are however instances of the exercise of jurisdiction in matters which are now recognised as equitable. Where complaint was made against a judgment imposing a penalty for hurting a woman, the Council modified the penalty to a fine of £20, a penalty being novel to the laws of the realm "expres aganis equitie and justice" (Hamilton v. Henderson (1565) R.P.C. I, 442). Parties are interdicted from dilapidating or alienating property (Elphin-

stone, (1553) R.P.C. I, 140; Lady Pharnyhurst, (1564) R.P.C. I, 305), or exercising the rights of hereditary Sheriffship (Hamilton v. Livingston, (1573) R.P.C.II, 257), or from withdrawing water from a mill (Cochrane, (1494) A.D.C. I, 345), or intruding on land (Turrell v. M'Kay, (1501) A.D.C. III, 115).

Restitution in integrum for minority and lesion is mentioned frequently in Balfour's Practicks (179), which cites cases from 1458 onwards. In an interesting case before the Council in 1542 Trinity College sought reduction of a tack, within four years of the grant on the ground of lesion, and on the analogy of minority (A.D.C. in Pub. Affairs, 579 (1542)). In 1499 an apprising was quashed for minority and lesion and the pursuer ordained to be "restorit in integrum" (Kennedy v. Kennedy, (1499) A.D.C. II, 326).

Reductions of other kinds figure too in the roll. In 1578 the Privy Council reduced a bond granted by Marion Crichton of Cluny to Adam Crichton of Ruthven as granted through fear of the violation of her daughter, who had been abducted by the latter, and ordered the Session to let a suspension of the charge brought thereon lie till the defender be found clear of the charge of abduction (R.P.C. III, 201). Also found are reductions of tacks (Rex v. Culane, (1491) A.D.C. I,216) and of deeds in fraud of creditors (Ramsay v. Wardlaw, (1492)

A.D.C. I, 238) and several other instances (Lauder v. Ker, (1498) A.D.C. II, 234; Gray v. Moncur, (1500) A.D.C. II, 486), as well as many reductions of decrees (see, e.g., A.D.C. III, Index s.v.). In 1591 there is an instance of the penalty decreed for assythment being modified at the sight of the Session (R.P.C. IV, 695).

As distinct from English common law practice, decrees for implement are quite common and are not specifically matters of equitable relief. Early examples are:- to quit lands, deliver a tack, or pay damages (Mondwell v. M'Culloch, (1489) A.D.C. I, 5); to implement a decree-arbitral (Lawson v. Preston, (1492) A.D.C. I, 263); to implement a marriage-contract (Somerville v. Douglas, (1492) A.D.C. I, 247); to give sasine of land, or pay money (Ahannay, (1493) A.D.C. I, 318; Dunbar v. Dunbar, (1501), A.D.C. III, 115; Archbishop of St Andrews v. Ker, (1501) A.D.C. III, 57); to find a priest to sustain a chaplainry for the soul of Robert Bruce's father, or pay 200 merks for failure (Bruce v. Monteith, (1496) A.D.C. II, 8); to implement a charter-party (Mags. of Aberdeen v. Young, (1497) A.D.C. II, 88). An interesting pair of cases is Ker v. M'Dougall ((1498) A.D.C. II, 265), where damages were awarded for breach of a contract to marry, and Crichton v. Kinnaird of Skelbo ((1499), A.D.C. II, 385. Cf. Craig v. Sinclair, (1628) Mor. 10034), where decree for the implement of an obligation to marry was

granted, to be performed by the next Whitsunday! Decrees for delivery are also found (Lord Seton v. Oliphant, (1492) A.D.C. I, 284; Lady Rothes, (1494) A.D.C. I, 347).

There are several instances of relief being granted from caution (Murray v. Carruthers, (1498) A.D.C. II, 235; M'Dowell v. M'Dowell, (1501) A.D.C. III, 4; Erskine v. Abircrumby, (1501) A.D.C. III, 167).

There are also one or two hints of the trust doctrine. In 1497 the Lords decreed £40 damages for intromission with goods handed over by one "quhilk ressavit the sadis gudis fra hir sade fadir to hir utilite and profittis" (Innes v. Gordon, A.D.C. II, 131).

Two cases of proving the tenor are found in 1496 (Ruthven v. Seton, A.D.C. II, 54; Vicar of Innerochty v. Duncan Forbes, A.D.C. II, 48. Cf. Quon. Att. c. 55, and Hope, VI, 7).

Peculiarly interesting is a case of a remit to "conscience" in an ecclesiastical court, superseding civil proceedings (Duke of Ross v. Prior of Restenneth, (1497) A.D.C. II, 87).

To hazard a conclusion from these records of Council and Session prior to 1600, it may be asserted fairly confidently that there is no evidence of equitable interference by Chancellor or Council in the manner of the English Chancery, but there are clear traces and frequent instances in both Council and Session of the application of legal remedies which have a foundation in principles of

equity. This conclusion is entirely consonant with later descriptions of the Court of Session as having a mixed jurisdiction of law and equity, and with the contention of the present study that in Scotland equity, administered through common law forms, has always been a material factor in the law.

Equity in the Institutional Writers - Craig

The earliest Scottish text-writer entitled to a place in the select band of Institutionalists is Craig (1538-1608) (See Stair Socy. Sources and Literature, 61), and his Jus Feudale, first published in 1655, is at once a textbook on the law of land rights and a learned disquisition on a great social system. But his book has little to interest the student of Scottish equity Recognised that the law of Scotland is founded on principles of equity in its widest sense, he observes:- "The law of Scotland is compounded of the law of nature, the law of nations and native civil or municipal law" (J.F. I, viii, 6; Clyde's edn. I, 105; cf. Balfour, 1). The Law of Nature he defines as:- "those ideas of right which we derive from our own consciousness and which we acknowledge equally with Jews, Turks, and Pagans. Such are the fear of God and the duty of reverence for His Supreme Being, the love of well-doing, the hatred of wickedness and the punishment of misdeeds, the duty to repress

"violence by its own means and to defend ourselves and our country against unjust attacks at all cost, the right to live in peace and quiet with our neighbours, the duty to give each his own, to do no wrong to our fellows and to do hurt to no man (cf. Justinian, Inst., I, 1) ..... Because they spring from instinctive reason and justice, the precepts of the law of nature are spoken of as those of good sense and equity."

To Craig, the law of Scotland preserved the spirit of the Feudal,Canon and Civil laws - the common legal heritage of Western Europe - modified and adapted to Scottish conditions and sentiment by natural equity, reason and good sense (J.F., Clyde's Introd., xxi). He also mentions (J.F., I, 7, 21) the court of conscience existing in England to mitigate the effects of a strict administration of the common law, though he hints that this is criticised by some as carrying clemency to extremes, and thereby defeating the object of its institution.

It is apparent then that Craig discerned an element of ius naturae vel gentium in the Scots Law of his time but his only conception of equity is in the shape of general principles of reason and natural justice. There is no mention of any remedial influence or any distinct principles of equity modifying rigid law.

Stair's View of Equity

(On Stair generally, vide Sources and Lit. 63, and Preface to More's edition.)

The views of Stair deserve particular attention for not only is his work the supreme classic of Scottish legal text-writing, but he discusses equity more fully than any others of the institutional group of writers. He begins his Institutions with a discussion of common principles of law, justice, divine law and reason, and mentions that the divine law is also called conscience; and under this head he mentions judicial modification of exorbitant penalties. Natural law is derived from these principles (Inst. I,i,5. More says (Preface, xi) that his great object was to explain and illustrate the principles of natural justice, with reference chiefly to the law of Scotland.). He goes on:- "This law of nature is also called equity, from that equality it keeps amongst all persons: from that general moral principle, Quod tibi fieri non vis, alteri ne feceris ..... But equity is also taken for the law of rational nature, whereby nothing is to be done, which is not congruous to human nature .... This law of the rational nature of man is not framed or fitted for the interest of any, as many laws of men's choice be: from the rigour whereof, recourse ought to be had to this natural equity. For though men's laws be profitable and necessary for the most part, yet being the

"inventions of frail men, there occur many casus incogitati wherein they serve not, but equity takes place, and the limitations and fallencies (sic), extensions and ampliations of human laws are brought from equity. And though equity be taken sometimes for the moderation of the extremity of human laws, yet it doth truly comprehend the whole law of the rational nature: otherwise it could not possibly give remeid to the rigour and extremity of positive law in all cases." (Inst., I,1,6). He then equates the law of nature with the moral law (ibid.,I,1,7) and goes on to distinguish human law as written and unwritten. "It is true the law is sometimes strictly taken in opposition to custom,as it comprehendeth equity or the natural law, and the edicts and statutes of nations and their lawgivers. And sometimes more strictly as in the vulgar distinction of law, statute and custom, in which law signifieth equity or the common law, as statutes and customs do the peculiar recent laws of several nations. And though that be only the law of man, which is voluntary and positive, constituted by man; yet equity and the natural law, in so far as it is allowed, declared, and made effectual by man is, in so far, accounted among the laws of men." (ibid.,I,1,10). He says, too, that the laws of nations are, for the most part, nothing else but equity, and the law of nature and reason, though in part also there be positive laws (ibid.,I,1,11). He mentions the

civil law's affinity with the law of Scotland, "even though it be not acknowledged as a law binding for its authority, yet being, as a rule followed for its equity" (Inst. I,1,12).

Three paragraphs later he continues that there is a "block in the way of all human laws that, seeing as hath been said, equity and the law of nature and reason is perfect and perpetual, then all laws of men's constitution seem not only to be dangerous .... but also useless and unprofitable .... This reason is so pressing that if the law of nature and of reason were equally known to all men .... it would not only be a folly but a fault to admit of any other law .... so men's laws are nothing else but the public sponsions of princes and people: which therefore, even by the law of nature, they ought and must perform. And therefore they are introduced First, for clearing and condescending on the law of nature and reason. Such laws can none quarrel, because they do not alter, but declare, equity: and that very necessarily because though equity be very clear in its principles, and in thesi, yet the deduction of reason further from the fountain, through the bias and corruption of interest, may make it much more dubious in hypothesi when it comes to the deduction of particular cases in all their circumstances. And therefore it is necessary that it be so fixed and cleared by statutes and customs suitable thereto, that the people may be

"secured.

Secondly. There be many points of right competent to men in equity, as it may be more profitable for the people to forbear the pursuance of them than to be at the trouble and the expenses of the pursuit, (as when human laws do cut off matters of less concernment) and in them rather take themselves to the honesty of their party, than to compulsion by remedies of law ....", and he instances gratitude and affection.

Stair instances, thirdly, the use of writing, delivery, sasine and intimation for security and the avoidance of error and fraud.

"Fourthly .... by law of nature, the right of succession doth belong to all .... Yet surely they are most happy whose laws are nearest to equity, and most declaratory of it, and least altering of the effects thereof .... But in statutes, the lawgiver must at once balance the conveniences and inconveniences, wherein he may, and often doth, fall short; and there do arise casus incogitati wherein the statute is out and then recourse must be had to equity." (Inst.I,i,15).

He goes on:- "Our customs, as they have arisen mainly from equity, so they are also from the civil, canon and feudal laws .... and therefore these (especially the civil law) have great weight with us .... But none of these have with us the authority of law,

"and therefore are only received according to their equity and expediency, secundum aequum et bonum (Inst.I,i,16). The law of Scotland (as of all other nations) at first could be no other than aequum et bonum, equity and expediency ..... Next unto equity, nations were ruled by consuetude, which declareth equity and constituteth expediency. And, in the third place, positive laws of sovereigns became accustomed, customs always continuing and preceding ..... In like manner, we are ruled in the first place by our ancient and immemorial customs, which may be called our common law, though sometimes by that name is understood equity, which is common to all nations, or the civil Roman law, which in some sort is common to very many .... Where our ancient law, statutes and our recent customs and practices are defective, recourse is had to equity, as the first and universal law, and to expediency whereby the laws are drawn, in consequence, ad similes casus. But if it appear that such cases have been of purpose omitted by the Parliament, the Lords [sc. of Session] will not sustain the same .... The law of Scotland in its nearness to equity, plainness and facility in its customs, tenors and forms, and in its celerity and dispatch in the administration and execution of justice may be well paralleled with the best law of Christendom which will more plainly appear, when the proportion and propinquity of it to equity shall be hereafter demonstrated." (Inst.I,i,16).

Among reasons for thinking it fit that law should be formed into a rational discipline, Stair mentions:- "First, equity or the law of nature, standeth wholly in these practical principles, which are created in, and with, the soul of man .... so that law is reason itself. Thirdly, for seeing positive law is only to declare equity, or make it effectual .... so equity is the body of the law and the statutes of men are but as the ornaments and vestiture thereof"; and the best demonstration of this will be, he says, the delineation of equity and positive law together (Inst.I,i,17). Then Stair enumerates three principles of equity and three of law. The former three are that God is to be obeyed by man, that man is a free creature having power to dispose of himself and of all things in so far as by his obedience to God, he is not restrained, and that this freedom of man is in his own power and may be restrained by his voluntary engagements, which he is bound to fulfil, or to take them up more summarily, the first principles of right are obedience, freedom and engagement. (Inst.I,i,18). The three principles of positive law are society, property and commerce. "The principles of equity are the efficient cause of rights and laws; the principles of positive law are the final causes or ends for which laws are made and rights constituted and ordered." (ibid.)

Such are the principal general remarks Stair makes on the place of equity in the law of Scotland. What appears from it all is that he conceives of equity as natural justice and reason, permeating the whole of our law, drawn largely from the civil law and materially influencing the law of Scotland where there is no custom or positive enactment to the contrary. That Stair should be alive to the influence of natural law is not surprising in view of his earlier career as a Professor of Philosophy, and this attitude is apparent elsewhere in his work when he treats of specific equitable doctrines which are mentioned hereafter.

Mackenzie (1656-91)

The Institutions of Mackenzie are a slight work as compared with those of his predecessors and successors, and contain little of note from our point of view. In his Pleadings (Works (1722),vol.I, Pleadings, 29) he writes that our law has deferred very much to Equity and to the principles of the Civil Law. In the Institutions (Works, vol.II, 278) he mentions the civil law as founded on the principles of equity and justice and having much respect and influence in Scotland. Later (Inst., IV,1) he distinguishes between "actiones bonae fidei in which Equity is followed, as Actions upon Mandates, Depositations, Emption, Location, etc. In which the judge considers what in Equity is to be done by one Party

"to another. And some Actions are ~~are~~ stricti iuris, in which the Judge is to follow the strict Prescript of the Contract upon which the Action is raised, as in a Declarator of Redemption ...." This distinction however is purely a Roman one and of little real significance in Scots law. Beyond these few vague references Mackenzie does not discuss equity and his conception of it, so far as can be gathered therefrom, is of natural justice derived from the civil law.

Bankton

Bankton's Institute, published in 1751-3 (Vol.II of which is dedicated to Lord Hardwicke), has much to say of Equity. Part of the interest of the work is that, subjoined to each title, are observations on the law of England on the same subject, which are frequently enlightening. He says, speaking of the law of nature or the law of reason, that "the law of nature often comes under the name of equity, because positive laws and contracts receive an equitable interpretation from natural reason, when the strict and rigid sense of the words interferes with its principles", and then goes on to equate natural law with moral law (Inst.I,i,24). Later (Inst.IV,xlv) in the collection of rules of the civil law illustrated from Scots law, he quotes the maxim, "In omnibus quidem, maxime tamen in iure, aequitas spectanda est", and says that, "This rule is thus

"enforced by the Emperor Constantine the Great, 'Placuit' (says he) 'in omnibus rebus praecipuam esse iustitiae aequitatisque, quam stricti iuris, rationem', i.e. there is in all matters greater regard to be had to justice and equity, than to strict law. It concerns in the first place, all the negotiations and transactions of men; so that as equity ought to be respected by the parties in their covenants, so it ought by the judges in explaining them, and applying the law thereto. But chiefly it is to be regarded in the construction of statutes, of which we have many instances in the civil law. Hence it is sometimes said, 'Hoc aequitas suggerit etsi iure deficiamur.' Equity makes way for such judgment though in strict law, it would not be competent. And, on the other hand, it is a common proverb, that Summum ius est summa iniuria. The rigour of the law is high iniquity.

"Equity is interposed in judging upon the deeds of parties, not so as by giving relief to any of them, the right of the other shall be prejudiced", and he quotes the case of the Duke of Norfolk against the Annuitants of the York Building Company in 1752.

"Equity ought likewise to be interposed in judging upon crimes, and adjudging the punishment .... penal statutes are to be interpreted rather in the mild sense, than in the more rigid .... But where the law is express the judge must follow its prescription (Inst.IV,xlv,147). (Cf. Equity follows the law.)

"Equity therefore is the favourable temperament of the law, whether it be the law which the parties limit to themselves in their covenants, or the general law of the nation. It is twofold. 1. That which may be called Intrinsic, arising from the law itself, and the circumstances of the case; which is the equity intended here, whereby the judge adhibits an equitable construction to moderate the rigour of the law. 2. Extrinsic, which is where the prescription of the law is clear, and yet happens to fall very hard in any particular case, ... and then the judge must follow the line of the law, Durum est, sed ita lex scripta est (cf. also Inst.I,i,64) .... and in such case, it belongs only to the sovereign power to give relief, according to the dictate of the same Emperor Constantine, Inter aequitatem iusque interpositam interpretationem nobis solis oportet et licet inspicere .... for otherwise it were a dispensing with the law, which is not in the power of judges; and to give way to what is commonly termed Cerebrina aequitas, a pretended equity, feigned by the judges, without foundation in the law (Inst.IV,xlv,149).

"The equity recommended in this rule, is what the judges and others conversant in the laws, ought to have always before them, in order rightly to apprehend the same, according to the suggestion in the law .... Scire leges non hoc est verba earum tenere sed vim ac potestatem .... and it is the same equity that guards us against the

"evils and chicanery by which the insisting upon the words might elude the true intention of the law, Salvis verbis legis sententiam eius circumvenire which the lawier (sic) justly terms, In fraudem legis facere ..... Both the above kinds of equity are concisely set forth by the Roman lawier, who, after taking notice that a law cannot comprehend all cases that may occur, lays down the rule, Et ideo de his quae primo constituuntur, aut interpretatione, aut constitutione principis certius constituendum ..... That [sc. function] of interpretation belongs to the judges, as is mentioned in the subsequent law, to which again is added, That, in such case, the law may likewise be supplied by the jurisdiction of the judges ..... Where the law defines one case or two, it is a good occasion for the judges to supply it as to the rest that tend to the same utility, either by Interpretation, or certainly by their Jurisdiction. By this last, the court is said to supply what is wanting in the law, Supplet praetor in eo quod legi deest, as by introducing an action to make the law effectual, as the lawier there explains it. Upon this foundation the nobile officium of a superior court seems to be grounded (Inst. IV, xlv, 150).

"The extraordinary Court of Chancery in England, called the Court of Equity, proceeds by the rules of equity and conscience, and abates the rigour of the common law, by considering the intention of the law, and exerts its

"power in cases where the subject is without remedy in the courts of common law, and in that respect, its jurisdiction and power is of vast extent. And the court of session as a court of equity and vested with a nobile officium, is of the nature of the foresaid extraordinary court of equity in the Chancery of England, ... and both are eminent and strong exemplifications of the rule before us." (Inst. IV, xlv, 151).

"As the House of Peers is the highest court, so it is invested with the equity, intended by this rule in the highest degree. But not with the other kind of equity, which I termed Extrinsic ...." (ibid., 152).

Writing of the Court of Session as a court of review, he says that it has an eminent jurisdiction, "and in that, and other respects, is Vested with the like powers as the Court of Chancery in England", instancing the suspension and reduction of decrees of all inferior courts in civil cases. (Inst. IV, vii, 19).

Elsewhere he observes that the Court of Session is a court of both Law and Equity in one. "Thus when the party wants relief in equity, to which at common law he might seem not entitled, this Court in virtue of its mixed jurisdiction can give it.", and he instances relief from penalty in a bond, citing by comparison the praetor's actiones utiles and the English double-bond. There are "infinite other cases where the Court of Session gives relief in equity when in strict law there seems to be none; as in redemption of wadset limited to a precise

"term after which the lands were declared irredeemable. This Court allows the equity of redemption, notwithstanding the irritancy incurred." (Inst. IV, 7, 23).

Bankton then proceeds to draw a distinction between the officium ordinarium, of the Lords of Session and their officium nobile, founded in their being a superior court, to both of which reference must again be made later (vide infra and Chapter XIV). Bankton's conception then was that the Court of Session had generally the same equitable capacity as the Court of Chancery, in addition to its common law jurisdiction.

Erskine

(Sources and Literature, 66.)

Erskine's Institute (1773) is singularly sterile on the subject of equity which may be accounted for by the increasing development of the law in its Scottish municipal form free from philosophic and civil law conceptions. He affirms (I,3,22) that "the session is a court of equity as well as of law; and as such may and ought to proceed by the rules of conscience, in abating the rigour of the law, and in giving aid in the actions brought before them, to those who can have no remedy in a court of law", and then describes this as the nobile officium of the court: but that is not the modern understanding of the term, which restricts the nobile officium to more extraordinary cases. In the next section Erskine comments

on the ministerial powers of the Court, proper to the Privy Council while it subsisted; "and if they were not now transferred to the Court of Session there would be a defect in that part of our constitution and many wrongs would be without a remedy. For which reason the author of Historical Law Tracts /Kames/ reasonably conjectures that it will be soon considered as part of the province of the Court of Session to redress all wrongs for which a peculiar remedy is not otherwise provided." (I,3,23). It is conceived that the view that powers have been inherited from the Privy Council is erroneous and that these powers were not properly exercised by the Court. Furthermore it is submitted that not all abatement of the rigour of law is to be ascribed to the nobile officium.

Bell

(Sources of Literature, 67.)

Bell, as befits a Professor interested primarily in mercantile matters and questions of practical law, plunges in medias res at once in his works and neglects the discussion of abstractions of jurisprudence. But he cannot but notice instances of equitable influence, such as the doctrine of stoppage in transitu (Pr. § 1307; Com.I,223) and the control over penalties in bonds (Pr.§ 71; Com.I, 700), which will be discussed more fully in their proper place. His omission to mention the foundation of many principles in equity is however rather noteworthy in that

the Principles grew from the lectures he delivered as Professor in Edinburgh. It suggests a neglect of the broad principle of equity underlying those particular instances. On the other hand he repeatedly cites Kames's Equity as an authority.

Academic Writings

To complete the conspectus of the views of Scottish writers on the place of Equity in Scots Law, mention may be made of the Lectures of Baron Hume, the institutional writer on criminal law, who preceded Bell in the Chair of Scots Law in Edinburgh (Ed. Paton, 2 vols., Stair Socy., 1940-49), and of More, the editor of Stair, who succeeded Bell (Ed. M'Laren, 2 vols., Edin., 1864). Both note that certain principles are founded on equity but give no exposition of equity in general. More mentions that the law of Scotland is elastic, being founded on principles of natural justice and right reason (Lect. I,6).

The absence of any general doctrine of equity from these more modern writers similarly suggests that a general conception of equity in Scots Law had been lost by the Nineteenth Century, although it was still admitted that various doctrines were equitable.

Lord Kames

Apart from the Institutional writers, a Scottish jurist whose views on Equity cannot be ignored is Lord Kames. (See generally D.N.B. XXVII sub nom. Home; Tytler's "Memoirs of Lord Kames"; W. Forbes Gray's "Some Old Scots Judges"; H. H. Brown, "A Master of Equity", 20 L.Q.R.308.) He must be the more regarded because he was one of the first lawyers in England or Scotland to essay a treatise on Equity, and the only Scottish lawyer yet to do so. (For others, see Holdsworth, H.E.L. XII, 179)

Henry Home was the son of a country gentleman and was born in Berwickshire in 1696. At first, apparently, he was destined for the other branch of the profession, but in 1724 he was called to the Bar. He was a scholar of wide attainments in Philosophy and History as well as in Law and published from 1728 onwards a series of still useful books on various aspects of Scots Law, antiquities and philosophy. These include the Remarkable Decisions of the Court of Session from 1716 (1728), Essays upon Several Subjects in Law (1732), Dictionary of Decisions of the Court of Session (1741), Essays on Several Subjects concerning British Antiquities (1747). In 1752 he was raised to the Bench as Lord Kames and in 1763 was appointed a Lord Commissioner of Justiciary as well. Dr Johnson had a poor opinion of him, though later critics have rated him as a man of acute understanding as well as one

thoroughly acquainted with the jurisprudence of Scotland. Certainly his published writings were in advance of his time and their value is not yet exhausted. In 1757 he published The Statute Law of Scotland Abridged with Historical Notes, and Historical Law Tracts. About this time he was in correspondence with Lord Chancellor Hardwicke with regard to his idea of introducing uniformity of principle into the jurisprudence of Scotland and England to counteract the inconvenience of having two separate systems of law in Great Britain. In pursuance of this line of study the folio first edition of The Principles of Equity appeared anonymously in Edinburgh in 1760. (Subsequent editions were the second, corrected, 1767; third, two volumes, octavo, 1778; fourth, 1800; "new" edition, 1825; D.N.B. omits mention of the fourth, and Sources and Literature (Stair Socy.), p. 249, omits the last. The present writer has collated them and is satisfied that they are independent. In Miller v. Baird in 1749 (Mor. 12721) Home (Kames) was of counsel and equity bulked largely in the argument.)

Kames sought to treat Equity as a Science and reduce it to principles, to examine its nature and define its boundaries and to settle the provinces of a court of law and a tribunal with equitable powers. He discusses inter alia the origin of the English Chancery jurisdiction and the question whether equity should best be administered

through a separate court or a united one. Lord Hardwicke wrote (Tytler, I, 237) expressing "approbation of the ingenuity and industry of your researches and reflections".

The Principles of Equity enjoyed considerable popularity and was frequently cited in cases for some time, as well as being noticed by Blackstone and Story. Bell cites Kames repeatedly. Opinions as to the authority of the work have varied. In Cassels v. Lamb ((1885) 12 R. 722, 755) Lord Rutherfurd Clark said that Kames's authority stood very high, though Lord Fraser in the same case (759) was more doubtful. In Kennedy v. Stewart ((1889) 16 R. 421, 430) Lord President Inglis said in the course of the debate, "The principles of equity as systematised by Lord Kames I look upon as the equity law of Scotland." In the Gordon Peerage case (1929) Lord Dunedin said, "He is an authority, though rather a wild one." Though not infrequently referred to (e.g. Allan Steuart and Coy. v. Stein's Creditors, (1790) M.4949; Brough v. Jolly, (1793) M.2585; Strother v. Reid, (1803) Mor. Forum Competens, Appx 4; Holdsworth v. B.L.Co., (1850) 13 D.376; Goodman v. L.N.W.R., (1877) 14 S.L.R. 449,451; Stewart v. Steuart, (1879) 6 R. 145; Robertson v. Balfour, 1938 S.C. at 211; Kelly v. Murphy, 1940 S.C. at 107,118,122.), the work is possibly over philosophic and insufficiently practical and has not been of great influence. Kames tends to ascribe to Scots law

equitable jurisdiction in respects known only in moral theory or in Chancery equity, and persistently overstates the actual equitable powers of the Scottish courts. He repeatedly cites only Chancery authority for his propositions.

The Principles of Equity owes much of its interest to having been the first attempt in English at a complete survey of equity jurisdiction, and it is still the sole Scottish work on this subject. In his general treatment of equitable principles Kames resembles Story rather than the modern English writers, who are more occupied with the rules and details of those subjects which in England fell within the Chancery jurisdiction. When considering Blackstone's and Story's criticisms of Kames, it is well to bear in mind that he wrote from the Scottish point of view, having in mind the Court of Session primarily. Nevertheless it must be conceded that his lack of precision lessens the value of the work and he runs into trouble in the conflict of justice and utility. He sought to determine pure equity, i.e. universal rational principles of goodness and justice. Moreover he was inclined to accept Scottish decisions as fundamental principles of equity. The list of maxims quoted at the end of the work as "principles founded on" illustrates his weakness. Some are maxims known to English equity, others vague moral platitudes, and some ordinary legal maxims. One or two are probably not the law and possibly

never have been, as for example, that "Justice will not permit a man to exercise his right where his intention is solely to hurt another", which is at the basis of the disputed doctrine of abuse of rights. (See Paton, Jurisprudence, 316, citing authorities.)

Kames's Equity

Some further analysis is necessary of the attitude of Kames's Equity, our sole Scottish book on the subject. Kames's views on particular topics of equity will be noticed more fully in the discussion of the particular manifestations of the principle in Scots Law; at present only his general remarks on the subject are referred to.

It is not without significance that the dedicatory letter to the second edition, dated August 1766, is addressed to Lord Mansfield, for the latter was a Scot, though he attained the rank of Lord Chief Justice of the King's Bench, and he is famous in English legal history not only for his great development of the embryo commercial law of England, but for his gallant though unavailing attempt to influence the common law of England in an equitable direction and thus to some extent to anticipate the Judicature Act, by making equitable remedies available in a court of common law. His attitude to equity within the common law has been observed as characteristic of the Scottish attitude to equity (Friedmann, 304. See also Fifoot, 187). In his preface to the second edition

(1767) Kames remarks apologetically that "the attempt to digest equity into a regular system was not only new but difficult", an expression with which the present writer sympathises. The work, after a lengthy introduction, falls into three books, the first covering the powers of a court of equity derived from the principle of justice, the second the powers of a court of equity founded on the principle of utility, while the third deals with the application of the principles of equity and utility to several subjects, such as conventional penalties.

The first book is subdivided into two parts: the former, comprising more than half the whole work, relating to the powers of a court of equity to remedy the imperfections of common law with respect to pecuniary interest, by supplying what is defective, and correcting what is wrong; and the latter relating to such remedial powers with respect to matters of justice that are not pecuniary.

Introduction

The Introduction opens with the challenging remark that "Equity, scarce known to our forefathers, makes at present a great figure." Kames claims that courts of equity have already acquired such an extent of jurisdiction as to obscure, in a great measure, courts of law. The cause of such an extension of jurisdiction must accord-

ingly be sought. In fact, the learned author would seem to be considerably exaggerating the influence and importance of equity. Neither in Scotland nor England did the gloss on the Common Law ever overwhelm and submerge the text. As has been pointed out already, much of the text always was and still remains practically unglossed by equity.

Kames next proceeds to delineate a "clear idea" of the difference between a court of law and a court of equity. "The former, we know, follows precise rules; but does the latter act by conscience solely, without any rule?", to which his answer is that this would be unsafe "while men are the judges, liable no less to partiality than to error", and that no court without rules could ever have attained the height of favour and the extent of jurisdiction enjoyed by courts of equity; and yet, he complains, writers have neither aimed at a system of equity nor even defined with accuracy what equity is, nor its limits and extent. This criticism of lack of system is somewhat unfair in that equity in its very nature was and is a concatenation of miscellaneous matters, which hardly yields to any attempt at systematisation (cf. Hanbury, Essays in Equity, 23). A universally acknowledged operation of equity is "to remedy imperfections in the common law, which is sometimes defective and sometimes exceeds just bounds." (Introd. p.2).

He states that "as equity is constantly opposed to common law, a just idea of the latter may probably lead to the former", and this ascertainment of the meaning of common law he proposes to effect by historical deduction. This opposition of equity and common law seems rather verbal than functional, as it is amply apparent to-day from the study of English equity, and it is emphasised by the authoritative writers thereon, and is still more evident from the study of equity in Scotland, that the function of equity is supplementary and corrective: it is only in jurisprudential analysis that the terms are opposed for the sake of distinction, but this does not correctly describe the function equity is called on to fulfil in any legal system.

In pursuance of this design of historical treatment he sketches briefly the original institution of courts of law in newly organised communities, "to compel individuals to do their duty", the gradual extension of their jurisdiction to every obvious duty arising in ordinary dealings between man and man. But causes of an extraordinary nature, requiring a singular remedy, were appropriated to the King and Council, and he cites as examples of this actions of proving the tenor, the causes of pupils, and the Pleas of the Crown (Introd., p.3).

Such extraordinary causes became too great a burden for the King and Council and extraordinary causes of a civil nature were, in England, devolved upon the Court of Chancery. In Scotland, Kames says, there was not the same necessity for this innovation, as our Kings neglected in great measure their privilege of being judges, and suffered causes peculiar to the King and Council to be gradually assumed by other sovereign courts: modern historical research does not really bear out this explanation. He continues, explaining that in opposition to the Common Law, the extraordinary branch of law devolved on the Court of Chancery was termed Equity, "the name being derived from the nature of the jurisdiction, directed less by precise rules, than secundum aequum et bonum, or according to what the judge in conscience thinks right. Thus equity, in its proper sense, comprehends every matter of law that, by the common law, is left without remedy; and supposing the boundaries of the common law to be ascertained, there can no longer remain any difficulty about the powers of a court of equity", but these boundaries vary at different times and places (p. 4). Kames here rather overstresses the discretionary and conscientious element in equity and also exaggerates its scope. Even in 1760 these statements were inaccurate and they are still more so to-day. But he goes on in the same strain, "The more refined duties of morality were, in the early period, little

"felt and less regarded. But law, in this simple form, cannot long continue stationary: for, in the social state, under regular discipline, law ripens gradually with the human faculties; and by ripeness of discernment, and delicacy of sentiment, many duties formerly neglected, are found to be binding in conscience. Such duties can no longer be neglected by courts of justice; and as they made no part of the common law, they come naturally under the jurisdiction of a court of equity." (p. 5.)

He instances duties of benevolence as falling within the purview of a court of equity, becoming a matter of conscience in many cases formerly disregarded by the progress of society. But this is beyond the bounds ever sought to be covered by any court, and his illustrations of cases of salvage, recompense, negotiorum gestio, retention and general average do not rest wholly on quite such a philosophic basis as the duty of benevolence (p.7). Stair, too, has reminded us that "we cannot poind for unkindness" (Inst. I,1,15). It is not possible then entirely to accept Kames's concluding sentence, that "a court of equity .... enforces benevolence where the law of nature makes it our duty. And thus, a court of equity, accompanying the law of nature in its gradual refinements, enforces every natural duty that is not provided for at common law" (p.8). This is the first province of a court of equity.

Kames goes on to discuss duties arising from covenants and promises (p. 8). After pointing out that a court of law considers nothing but declared will, ignoring ultimate purpose and unforeseen circumstances, he continues, "Hence the powers of a court of equity, with respect to engagements. It supplies imperfections in common law, by taking under consideration every material circumstance, in order that justice may be distributed in the most perfect manner. It supplies a defect in words, where will is evidently more extensive: it rejects words that unwarily go beyond will; and it gives aid to will where it happens to be obscurely or imperfectly expressed. By taking such liberty, a covenant is made effectual, according to the aim and purpose of the contractors; and without such liberty, seldom it happens that justice can be accurately distributed." (pp.8-9). Here again this states the equitable function broadly and as it existed in theory; but in fact rules of interpretation have long hedged about any equitable freedom of interpretation, and the ascertainment of the intention of a deed does not depend entirely on the arbitrium boni viri.

After a reference to the extension of the function of a court of equity to undertaking to "correct or mitigate the rigour, and what even in a proper sense may be

"termed the injustice, of common law" (p. 10), Kames proceeds to consider a class of cases into which utility rather than justice enters, which expediency requires should be under the cognisance of a court of equity. He instances agreements *contra bonos mores*, or the *pactum de quota litis* as being avoided by equity in the public interest, and the extension of equitable influence to supplying curators where estates are left without management, or the authorising of sales by minors when necessary. These magisterial powers, assumed by our courts of equity are, he says, in effect, "the same that were assumed by the Roman Praetor, from necessity, without any express authority - *Jus praetorium est quod praetores introduxerunt, adiuvandi vel supplendi vel corrigendi iuris civilis gratia, propter utilitatem publicam.*" Such complete equation of Scottish equitable powers to Roman praetorian powers is again open to challenge.

After this historical excursus Kames proceeds to a "question of the greatest moment, whether a court of equity be, or ought to be, governed by any general rules?" (p. 13), and points out that, while determining every case on its particular circumstances, having regard to justice and equality, is the ideal of perfection, judges are but human and liable to err and cannot safely be trusted with unlimited powers. So

it is necessary in equity as in law to establish rules to preserve uniformity of judgment, possibly even more necessary because of the variety and intricacy of equitable circumstances. Consequently a judge, he holds, should not interpose equity, unless he can found his decree upon a rule equally applicable to all cases of the kind. In short, following precedent in equity is preferable to the inconvenience and danger of arbitrary judgments. (p. 14). Subsequent history entirely endorses this conclusion. Hardwicke's letter to Kames (Tytler, I, 248) agreed in this but expressed the view that "the Praetor (sic) must not be so absolutely and invariably bound by them as Judges. If so, he must sometimes pronounce decrees materially unjust."

Kames notes that the connections regarded by a court of equity arise generally from duties founded on material interest, while the more conscientious duties are left alone (p. 15). This is to be ascribed, he says, to the fact that such duties as charity defy regulation under general rules and consequently must be left unregulated from the difficulty of a proper remedy (p. 15). Moreover equity must, in case of conflict, yield to utility when it regards the whole society.

Then he states a principle which lies at the heart of the present work (p. 17): "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: thus the actio negotiorum gestorum, retention, salvage, etc., are in Scotland scarce now considered as depending on principles of equity. But by cultivation of society, and practice of law, nicer and nicer cases in equity being daily unfolded, our notions of equity are preserved alive; and the additions made to that fund, supply what is withdrawn from it by common law." (p. 18).

Thus Kames expresses concisely the state of much of Scottish equity, and the rest of this essay is largely an elaboration and exemplification and modern justification of this text. It is a testimony to Kames's perspicacity that he analysed the situation of Scottish equity so accurately. To-day, as will be shown, this analysis is still valid, but the merger of equity in law has now proceeded so far that the existence of equity in Scots Law is almost entirely ignored, apart from the extraordinary equity of the nobile officium.

He discusses the question whether equity is better administered jointly with or separately from common law, and not unnaturally expresses his preference for a joint jurisdiction (p. 19 et seq). Hardwicke in his letter (Tytler, I, 235 et seq., 242) admitted the force of Kames's contentions in favour of an undivided Court, though he not unnaturally adhered to Bacon's preference for division, so as to keep the rules of law entire and not to leave it in the power of the judges insensibly to blend law and equity together. The common law of England, Hardwicke believed, would have been lost long ago if the two had been mixed. On this matter Hardwicke's fears have proved to be groundless and Kames's contentions have supervened. On the other hand pure equitable doctrines have been more fully developed by a separate court than they would have been in a court of mixed jurisdiction.

Kames then mentions that equity was originally confined to the supreme court and excluded from inferior courts, but as equitable rules became incorporated in common law, inferior courts acquired cognisance of such cases too, and he instances negotiorum gestio and recompense.

Such is Kames's general view of his subject. Then in Book I he discusses powers of a court of equity to remedy the imperfections of common law under the heads

of (1) protecting men from being harmed by others; (2) protecting the weak of mind from harming themselves; (3) with respect to the natural duty of benevolence; (4) with regard to imperfections in deeds and covenants; (5) with respect to statutes; (6) with respect to actions at law, and execution; (7) mitigation of punishment.

Book II discusses the powers of a court of equity founded on utility, such as preventing a trustee from making a profit from his fiduciary office, or voiding a pactum de quota litis or a contract contra bonos mores, in abridging lawsuits by the rules of retention and compensation, and the plea of bona fides.

The third book treats of the application of the principles of equity and utility to several important subjects, such as conventional penalties; and the work concludes with a list of equitable maxims, stated as being the principles founded on.

Factors in the Development of Scottish Equity

The first major factor to be considered in the examination of Scottish equity is that the Scottish lawyers were accustomed from a very early time to look to the Roman law for their legal and equitable principles and particularly to the trichotomy of equitable sources therein, namely the historical (ius gentium), the philosophical (ius naturale) and the practical (ius

praetorium). The Roman law was never, in spite of some apparent dicta to the contrary, regarded as the common law of this country: the principles of the civil law are part of the law of Scotland only so far as they have been imported therein, and adopted as equitable in circumstances not covered by statute or custom (Ersk.I,i, 41). The adoption of civil law principles either direct from the Corpus Juris or through the influence of the canon law was considerable, and in either form these principles brought elements of equity with them. Craig says (J.F. I,ii,14) that we use the Roman law so far as it appears to us to be consonant with "natural equity and reason".

It should be borne in mind that prior to 1532 the administration of justice was much decentralised and there was no effective court of appeal; still less were there reported decisions and a settled course of practice. The long history of troubles internally and the comparatively isolated position of Scotland on the fringe of the European Continent had made the development of a definite body of general customs slow and retarded the acquaintance with and possible adoption of the customs of other nations. In this respect Scotland lagged very markedly behind England.

When in 1532 Scotland did acquire a permanent Supreme Court, its origin was at once parliamentary,

conciliar and ecclesiastical. The presence of ecclesiastics on the bench necessarily imported an element of Roman and canon jurisprudence, and the jurisdiction was from the first legal and also equitable. When the paucity of native custom made borrowing necessary, it was to the civil and canon laws that the early Court of Session naturally turned for the principles it sought; and from the first the Court was accustomed to supplement its native statutes and customs from the equity of the Roman Law. (The present writer found evidence of the presence of Scots among the students in the old University of Bologna, where the revived Roman law flourished in the later Middle Ages and early modern times, before spreading north.) Furthermore, down to the Sixteenth Century the traditional friendship of Scotland was with France and the Continent rather than England and it was to France, and after the revocation of the Edict of Nantes, to Holland, that Scots went for their advanced legal education, and there they imbibed the law and equity of Rome as expounded by the civilian teachers.

A second factor which assisted the general equitable nature of the development of Scots law is the Scottish inclination towards the study of philosophy, theology and abstract reason. Many of the older judges such as Kames and Lord President Forbes were philosophers

and theologians as well as lawyers. Hence, until recent times at least, the emphasis was always placed in Scotland upon principle rather than on precedent: the binding force of precedent as distinct from the merely persuasive influence of a series of concurring decisions, or even the single decision of an equal or higher court, is a comparatively modern development. Even Erskine (I,1,47) accepts the position as such, and only recently and partly under English influence has the binding nature of precedent come to be admitted, possibly sometimes to the detriment of the logical development of the law. This general philosophic attitude is evident in the institutional writers, who set out broad principles and digested the statutes and customs of the realm into a system, and, to take the greatest of these, Stair, himself a former Professor of Philosophy, always makes an exposition of the equitable principles underlying the rules of our positive law. "Equity though it be taken sometimes for the moderation of the extremity of human laws, yet it doth truly comprehend the whole law of the rational nature, for otherwise it could not possibly give remeid to the rigour and extremity of positive law in all cases" Inst.I,i,6). This view of Stair's was influential until well into the Nineteenth Century.

Possibly a more material contributory factor to the non-existence of a separate court giving equitable remedies in Scotland is the fact that the forms of action in

use in the Scottish courts were always flexible and adaptable (cf. Cooper, Intro. to Register of Brieves) and the various conclusions of summonses could be easily altered and moulded to suit the particular circumstances of a case. (See, e.g., Juridical Styles, Vol. II, 1st edn, 1790. Kames, Historical Law Tracts, 3rd edn, 228.) In consequence remedies were not in Scotland cramped within the confines of forms of actions each restricted to a particular state of facts; and this limitation, which was a material factor in the development of English equity, never existed in Scotland to require a remedy from outside the legal system.

It is noteworthy in view of the long connection between Scotland and the Continent of Europe that in Continental systems of law equity has a more modest function than in England. The separation from common law is unknown, but the provisions of the various codes are yet subject to certain overriding principles which may and often do have a material effect in modifying the complexion of codified rules to a marked degree. These principles however are fluid and susceptible to influences outside the law, such as the current ideas of morality, and economic and political changes in the structure of society, so that they must be applied with caution to avoid superseding the basic rules.

There are many references to aequitas in Continental codes, but no definition and it remains a concept with a vague and undefined sphere of application. Pothier

regarded Équité as furnishing a basis for the declaration of rights and duties. The nearest equivalent in our law would be natural justice, frowned on as that "vague jurisprudence" in some older cases (e.g. Baylis v. Bp. of London, /1913/ 1 Ch. 140), although it is regarded as rather more than that (Gutteridge: Comparative Law, 94 et seq.). The correspondence is rather to the Scottish than to the English conception of Equity, and reflects the identity of sources.

Divided or United Law and Equity

Stair refers to the Court of Chancery as a distinct Court of Equity and then says, "Other nations do not divide the jurisdiction of their courts but supply the cases of equity and conscience by the noble office of the Supreme ordinary courts as we do." There are a number of reasons for the united jurisdiction in Scotland as compared with the divided in England. They are historical rather than justifications by expediency or on the grounds of conscience, just as the division of the English administration of justice between law and equity is explicable historically. Among these reasons may be noted the adoption of so much of the equity of the Roman civil and canon laws, and the acceptance of these as supplementary and subsidiary to the indigenous customs and statutes; the moral and ecclesiastical tone of the early semi-clerical

Court of Session with the Chancellor, usually an ecclesiastic, present; the study abroad of the developed equitable civil law taught in France and Holland by the professors of the civil law, and in the works of the civilians; the speculative nature of the Scottish intellect, and its penchant for mental philosophy and systematic reasoning; and lastly the quotation and following of English equity decisions and principles, after the decline of the Roman law, as an authority in the common law courts. The flexible and adaptable forms of action established in this country enabled the Scottish Courts to provide a suitable remedy for every case requiring one in a way the rigid English writs could never do. Their inadaptability demanded a remedial system: the Scottish forms of action had the remedy inherent in their flexibility.

Scotland then had the benefit of strong equitable influence in the law and yet avoided the obvious disadvantages of English practice prior to the Judicature Act in having a dual system of justice.

Kames's view was that the distinction whether a particular case should be governed by law or equity is a matter of difficulty, and it is harder still to draw the line between legal and equitable jurisdiction. Furthermore, to us in Scotland "it appears extremely uncouth that a court should be so constituted, as to be tied down in many instances to pronounce an iniquitous judgment." (i.e., by

adhering to the rules of law and ignoring equity.), and he says this "will always happen where a claim founded on common law, which must be brought before a court of common law, is opposed by an equitable defence which cannot be regarded by such a court." The Judicature Act in England met this criticism, by making all courts cognisant of both common law and equitable pleas; but till then, and particularly when Kames wrote, this was a noticeable fault of the English divided jurisdiction. He admits the sole inconvenience of an undivided jurisdiction, that it tends to blend common law with equity, yet concludes that the preponderancy of advantage lies with the united jurisdiction, while frankly confessing his own bias derived from custom and established practice (pp. 19, 20).

It probably must be conceded that the real advantage of the separate jurisdiction as in England was that equitable remedies were developed particularly strongly and to a particularly high pitch by the Chancellors. Equity acquired a theory and internal coherence unknown in Scottish practice, where it has never been separately studied or practised. It must remain a matter of dispute whether this outweighed the complications of duality from which our law has remained free.

In 1759 Lord Hardwicke agreed with Bacon in preferring separation and disagreed with Kames (Tytler, Memoirs of Kames, I, 235). Subsequent developments in America

tended to show that there was no basis for Bacon's view that law and equity ought always to be administered in separate courts (see Wilson, Courts of Chancery in American Colonies, Sel. Essays in A.A.L.H. II, 779; Fisher, Equity Through Common Law Forms in Pennsylvania, ibid. II, 810; Woodruff, Chancery in Massachusetts, 5 L.Q.R. 370). The changes wrought in England by the Judicature Act seem to concede the superiority of unified administration so that the question is now purely academic. It will be long, however, before English law has fully harmonised the duality of the various legal and equitable rights and remedies, if that is indeed possible.

Ordinary and Extraordinary Equitable Jurisdiction of the Scottish Courts

It has already been remarked that a feature of equity in Scots law is that it has always been administered through common law forms and that consequently in the course of time the equitable nature and origin of many of our rules of law have been forgotten. To appreciate the influence of equitable principles on the modern rules of law it is therefore necessary to examine seriatim many of the main branches of the modern developed common law in an attempt to segregate those rules or modifications of rules which can be ascribed to the influence of equity from those whose justification and theoretical ancestry

can be put down to rules of strict law.

Every branch of law need not be examined with equal care, for equitable influence is distributed unequally over the law. By anticipation the conclusion may be briefly given, that Hanbury's statement with regard to English law (Essays in Equity, 23, quoted ante Chap. IV) is very substantially true also of Scots law. Generally speaking, those subjects which in England fell partially or entirely within the jurisdiction of the Chancery, in Scots law also will be found to show most clearly in their statement and application a regard for aequum et bonum and principles of natural justice.

A difficulty in this connection is that to the student of English Equity a simple historical criterion is always available to decide whether or not a particular matter is equitable. He has merely to ascertain whether the matter in issue was one dealt with in the Court of Chancery prior to the Judicature Act, or is one appropriated to the Chancery Division since then. If so, it is equitable in the peculiarly English sense and it may reasonably be assumed that its classification as a Chancery matter springs at least to some extent from an original connection with equity in the Aristotelian sense. But in Scotland no such simple touchstone lies ready to hand. The decision whether a branch of law is or is not founded on equitable principles can only be reached after a prolonged examination of the cases on

the chosen branch of law, of the reasons given by the judges for their decisions, and of the statements made by text-writers of authority on the fundamental bases underlying the rules. Consequently it may well be a matter of doubt and difficulty in individual cases to say yea or nay, and the interpretation to be placed on judicial or professorial dicta may be disputed. And, as neither judges nor text-writers are in the habit of considering or of expressing views on the remotely philosophic bases of the doctrines from which spring the precise points of law under discussion, the difficulties increase. The suggestion may also be hazarded that a writer on equity, in his anxiety to discover equitable subjects in Scots law, may well have observed traces of equitable influence where none truly exists.

The following chapters, however, attempt to collect the principal branches of Scots law where equitable influence is fairly discernible and to quote some of the principal statements thereon and cases exemplifying the equitable nature of these categories.

It is noteworthy that with the conspicuous exception of the law of trusts, equity does not in Scotland so much add distinct subjects to our law as rules modifying and amending fundamental principles of common law. This is entirely consonant with the supplementary and moderative influence, the trend towards refinement in

cases otherwise of hardship, which is always deemed a characteristic of equity. So, to take the case of succession, equity does not attempt to supplant the rules of succession laid down by law but provides for the cases where otherwise one person might have an excessive share or another be the victim of unintentional disinherison.

Something may also be interjected here as to the distinction implicitly drawn by entitling Parts II and III of this study as the Ordinary and Extraordinary Equitable Jurisdiction respectively of the Court of Session. Part III deals with the nobile officium, which is very generally recognised as an extraordinary equitable jurisdiction inherent in the Court of Session derived from powers implicit in its constitution. This jurisdiction is moreover the only place where in Scots practice equity is openly and avowedly acknowledged. But the error has sprung up of regarding this as the only place where equity exercises an influence in our law. It is sought here to show that this is not so: furthermore the very name extraordinary suggests that there is or was an ordinary equitable jurisdiction. It is the contention of the present work that this is in fact so, and that the ordinary equitable jurisdiction is widespread in Scots law though concealed and not apparent unless expressly sought for, the more hidden because there has been no court specially to develop these principles of equity in our law, and hence such phrases as "equitable claims" are

absent from indexes, digests of cases and rubrics.

It is submitted that this contention for a distinction derives force from a passage in Bankton's Institutes (IV,7,§ 23 *et seq.*). The author there states: "The Court of Session is both a court of Law and Equity in one. Thus where the party wants relief in equity, to which at common law he might seem not entitled, this court in virtue of its mixed jurisdiction can give it...."; and he instances a case of relief from the penalty contained in a bond, and compares the powers of the praetor and of the English courts. "There are infinite other cases where the Court of Session gives relief in equity when in strict law there seems to be none; ...." and then (*ibid.*, § 24): "Besides the *officium ordinarium*, or ordinary jurisdiction which the Lords of Session are vested with, there is competent to them what may be termed '*officium nobile*'", which Bankton then proceeds to describe in detail, and which is quoted later (*infra*, Chap. XIV). Now by *officium ordinarium*, the author can mean only the mixed jurisdiction in law and equity in ordinary cases, apart from the *nobile officium*, which is purely equitable. And this *officium ordinarium*, administered in the combined court of law and equity, must be made up of the rules of common law with those modifications and extensions derived from equity which are ordinarily administered in the court and called cumulatively common law, the fact of the incorporation of

equitable elements being overlooked. Hence in attempting to separate the equitable elements from the common law, it is not unreasonable to call the branches of law affected collectively the ordinary equitable jurisdiction of the Court of Session.

This proposition is rather affirmed by Bankton in his Observations on the Law of England at the end of the chapter from which citation has been made (page 519). He refers to the twin courts in England, of law and Chancery, and says: "This last is called Court of Equity or Court of Conscience, and three things are chiefly to be judged in it, (1) Covin, vizt, all frauds, covins and deceits, for which there is no remedy at common law; (2) Accident, as where a party is prevented by an intervening accident from fulfilling a condition; (3) Breaches of trust and confidence." Then (p. 520) he says: "The Court of Session is invested with the same powers as this Court of Equity in the Chancery. And likewise in giving remedy in point of equity or otherwise, they are subject to the same limitations; for under that colour, or by virtue of their nobile officium, they cannot contravene the direct ordinance of the law ...."

Bankton then clearly conceived of an ordinary equitable jurisdiction exercised in and through and with the common law jurisdiction, and this provides the explanation and justification for the title of the second part of this study. Stair, too, groups under

nobile officium (Inst. IV,3,1) several matters not now regarded as falling under this head, which further tends to support this distinction.

In the succeeding chapters no division on the lines of Kames's book is attempted, but consideration is made of the common law under modern heads.

PART II

ORDINARY EQUITABLE JURISDICTION

Chapter VI
Equity in Contract

I - Retention

Retention is an application of the equitable principle of mutuality of contract and may be stated in the form that the obligations undertaken on either side in a contract are complementary and fulfilment by either party of his due part is impliedly conditional on counter-fulfilment by the other (Ersk.III,3,86). "The equality essential to mutual contracts requires that the mutual contractors be bound effectually to one another. If either of the parties can, by any defect in the contract, shake himself loose of the obligation, equity will not suffer the other party to be fettered." The elementary justice of this rule of mutuality is patent. Retention then amounts to the right of one party to withhold performance of the obligations he has undertaken under a contract until performance is effected of the counter-obligations in which he is creditor (Gloag, 623; Ersk.III,4,20). Kames (p.344) describes it as an equitable device to abridge lawsuits.

Strictly speaking, the right is one of security founded on possession of corporeal moveable property,

but equity has extended it to debts too (Bell, Pr., § 1410). Under English influence the tendency has been to utilise the name lien in the application of the principle to property and to keep the name retention for pecuniary obligations.

The right of retention as applicable to debt may be regarded as an equitable extension of the principle of compensation, as the latter was established by the Act of 1592, c. 141 (Harper v. Faulds, 1791, Bell's Oct. Cas. 440). Under this Act, before one claim may be set off against another, both must be of the same kind and both liquid, i.e., of ascertained amount. A plea of retention, however, may be advanced though the debts be of different substances, or in respect of liquid and illiquid debts. While the application of compensation serves to extinguish the lesser debt and diminish the greater, retention only delays settlement by withholding a security for final performance (Bell, Pr. § 1410).

The origin of retention is controverted but probably it is derived with modifications from the civil law; and it was recognised in Scotland as common law prior to the regulation of the allied principle of compensation by the Act, 1592, c. 141 (supra). That that origin is basically equitable seems never to have been doubted. In Harper's case Lord Monboddo spoke of "the ground of equity", Lord Eskgrove of "founded on a principle of common justice between man and man", and the Lord

President of "retention, taken as an equitable extension of the right of compensation to illiquid debts". Kames (p. 344) calls it "an equitable exception resembling compensation".

(a) Retention on Property Title

Distinct from the right of retention or lien founded on possession of moveable property under a contract, is the right of retention recognised where one person holds an apparently unqualified title of property to a subject, yet is under a personal obligation to transfer it to another in certain circumstances. The most notable examples of this are where an agreement to sell has been entered into but the property in the thing sold has not passed to the buyer; or alternatively, where a conveyance of property has been on ex facie absolute terms but subject in fact to a separate or latent obligation to reconvey. In each of those cases it is recognised as a general rule that the party holding the title to the property may retain and is under no obligation to convey or transfer it until all the obligations due to him by the other party have been satisfied. There is, in other words, an equitable claim to which effect can be given only when counter-equities are considered. This right, it will be seen, is more extensive than a right of even general lien in that it extends to all claims, whether or not they have any connection with the contract under

which the obligation to convey was incurred. In such circumstances the whole series of relations between the two parties is looked upon as if they formed one undivided contract, and performance of the obligation to convey or transfer is consequently conditional on the due fulfilment of all the counter obligations. This right of retention is not founded on possession of the subject over which the right is to be exercised but is inferred by law from the absolute character of the title, and so can be founded on in respect of property not in possession of the party asserting the right (Gloag, 638-40; Gloag and Irvine, 331 citing cases; Bell, Comm., I, 724).

Stair and Erskine (Stair, I,10,16; Ersk., III,4,20) do not appear to have contemplated this kind of security-right under the head of retention, despite its appearance in a case of 1662 (Earl of Bedford v. Lord Balmerino, M. 9135). Bell (ut supra) deals with it under the head of right in security.

The distinction between retention arising from a property title, and retention (or lien) founded on mere possession was drawn in Melrose v. Hastie ((1851) 13 D. 880) where the de quo was the right of retention over goods sold but not delivered and the property in which, consequently, had not passed (decided prior to the Sale of Goods Act, 1893). Lord Moncreiff said (p. 900):

"It is no case of lien that is maintained by /the defenders/ but a case of retention under the existing law of Scotland. The nature of this right of retention is explained very clearly in a few sentences in Mr Erskine's work (III,4,20). It arises in varying circumstances, and is quite separate and distinct from any right of compensation, and it is recognised in many cases precisely where compensation cannot properly be pleaded. The right in the plain sense and equity of it, consists simply in this, that when one man has goods in his possession which he is bound to deliver to another, but that other is debtor to him, whether for money or goods, he cannot demand delivery of the particular goods in the possession of the first, until he shall pay the debt due by him to that party. It is not necessary that these counter obligations should arise out of the same contract. If the obligations exist, it is a matter of plain equity that the one cannot demand delivery until he shall pay the debt due by him to the other, who holds the goods. It is a right of retention not merely for payment of the price of the particular goods, but for payment of any general balance existing between the parties at the time when the demand of delivery is made."

The right flows from the form of title and so may even be sustained when it is against the good faith of the contract between the parties (Hamilton v. Western Bank, (1856) 19 D. 152,162, per Lord Ivory), yet

nevertheless it may be subject to equitable limitations (Gloag and Irvine, 337).

(b) Lien

The right of lien is a special application of the general doctrine of retention founded on the mutuality of contractual obligations, to the case of contracts of sale and employment. Bell defined it (Prin.,§ 1410) as "a right to retain a subject legitimately in one's possession until a debt shall be paid, or an engagement performed, the ius exigendi of which is in the possessor". Professor Gloag's statement of the law may be adopted (Gloag, 630): "Where A places his property in the hands of B for the purpose of work which B has undertaken to perform, A .... may withhold payment of the sum he has agreed to pay for the work if the defective character of the work vests him with a claim of damages. He is not bound to perform his obligation of payment until B has fulfilled his obligation of adequate performance of the work undertaken. B in such a case has a correlative right, if he has duly fulfilled his contract so far as the character of his work is concerned, to withhold delivery of the article until the counter-obligation of payment is fulfilled. He has a right of retention or lien over the article on which he has performed work in security of his claim for payment." (See also the

elaborate notes and argument in Harper v. Faulds, 1791, Bell's Oct. Cas. 440, in which Kames's Equity is cited at length.) "Retention .... is a mere personal exception founded on equity, which forbids a man to demand payment of what is due to him, while he himself refuses to pay"(Harper v. Faulds, supra, 447). Again in the same case, after considering decisions of Hardwicke and Mansfield, the report goes on to say that so strongly founded on natural justice is this plea of retention that the English judges have made it as wide and general as they could. The Scottish authorities show that this right, founded on the consideration of the concurrent and complementary conditions in the contract of employment, to return the article with the work duly done on the one part, and on the other, to pay the agreed sum, infers a right only of special lien, that is, to retain the article only for work done on or in relation to it, as a security for the counterpart, and not a general lien, which infers the more extensive right to retain the subject in security of a balance due on prior transactions. There are however exceptional cases where a right of general lien is recognised in Scots law (Gloag, 633; Bell, Pr.,§ 1411).

A right of special lien or retention is on principle competent in any case of a contract with mutual prestations: it has been expressly admitted in such cases as retention of a ship for repairs or work done,

in carriage both by land and sea, and as a right of innkeepers (Bell, Pr. § 1420 *et seq.*). It exists too for average loss and for payment of salvage reward, and these rights are themselves founded on equity (*infra*, Chap. IX), so that the extension to them of a right of retention in satisfaction of the equitable claims is hardly surprising. The latter is described by Bell (Pr. § 1427) as "a most natural and equitable right" and this view has long been established (*Hartfort* v. *Jones*, (1698) 1 Ld. Raym. 393). It is further established that a right of retention may only be founded on possession obtained fairly, and not by fraud or error (Gloag and Irvine, 343; *Laurie* v. *Denny's Tr.*, (1853) 15 D. 404, 409; Bell, Pr. § 1413). In other words, the party who seeks to claim the equitable right must come to equity with clean hands.

In *Anderson's Trs.* v. *Fleming* ((1871) 9 M. 718) an attempt was made to constitute by notice a general lien: it was held that custom of trade had established a general lien for one year only which was "a just, reasonable and equitable extension of the common law principle" (723, *per* Lord Ardmillan). It was added that on this matter the Court had "the authority of Lord Hardwicke and Lord Mansfield .... and, on a question of equitable right in the department of commercial jurisprudence, no higher authority can be desired."

The exceptional right of general lien (Gloag and Irvine, 349; Bell, Pr. § 1431 et seq.) rests not so much on mutuality of contract as on an implied term in certain contracts of employment that such a right of security shall exist, which may vary in scope and extent according to the particular trade, though always extending to the balance arising consequent on a previous course of employment. It is based, too, on usage of trade and will not be admitted in the absence of proof of trade custom. But in practice, the right is acknowledged in certain cases, such as that of a solicitor. Nevertheless, the right is not unlimited as, resting on an implied term in a contract inferred from usage of trade, it can cover only debts incurred in the course of dealings in the trade in question and extends only over property which has come into the possession of the person asserting the lien in the course of that trade or business.

The right of lien depends on possession and is lost with the loss of possession of the article: it may furthermore be nullified by an express term in the contract. A salvor's lien probably rests on custom (Otis v. Kidston, (1862) 24 D. 419: Merchant Shipping Act, 1894, s. 544).

The controversy whether the general rule of the law of Scotland permitted general or only special lien as a

general principle in ordinary cases, was elaborately discussed by the whole Court in Harper v. Faulds (1791, Bell's Oct.Cas.440), and finally decided against the general admission of the principle of general lien. It was argued in that case that retention or lien was not native to any country but was introduced from considerations of equity, and that in Rome this happened through the agency of the praetor in iudiciis bonae fidei, and that it was not extended to iudiciis stricti iuris prior to a rescript of the Emperor Marcus Aurelius. Lord Eskgrove rested his judgment on the civil law and the general principles of equity, remarking that retention and compensation "are founded on a common principle of justice between man and man; not the creature of statute. They must have been recognised in our law long before the statute 1592, which only allowed the principle [sc. of compensation] to operate by way of exception." Certainly the cases of retention go back to the earliest reports.

Whether or not the origin is truly to be found in the civil law, the influence of equity is prevalent.

In Laurie v. Denny's Trs. (15 D. 404 at pp. 408-9, approving Harper v. Faulds, and examining other prior authorities), Lord Cuninghame said, with regard to a contention for a right of general retention or lien, that "the principles of common law and equity are strongly opposed to retention in such a case as the

"present", and later again, "the civil law sanctioned no such policy /of absolute and unlimited right of retention/. On the contrary, from the pervading influence of the rules of equity and good faith, which in general so remarkably characterised the civil law, it was held that the possession given for a special and temporary purpose, could not be inverted or misapplied for the security of other, especially pre-existing claims, on the plea of retention."

Lord Cockburn in Brown v. Somerville (6 D. 1267, 1283) maintained "that the doctrine of retention, in the law of Scotland, rests on broad principles of equity of very old establishment", and later spoke of the application of the principle of special lien "to a case which is distinctly within the rule of law and equity."

In Borthwick v. Scottish Widows Fund ((1864) 2 M. 595, 607), a bankruptcy case, Lord Justice-Clerk Inglis refers to the rule of retention as modified in cases of bankruptcy as "founded on a very clear ground of equity".

Furthermore the exercise of a right of lien is subject to the equitable control of the Court to prevent possible abuse of the right. This was noted at least as early as 1831 in the case of Dobbie v. Scales (18th May, 1831, F.C.), while in Ferguson and Stuart v. Grant ((1856) 18 D. 536, 538) Lord President M'Neill thought that the Court had, and had frequently exercised, the right to check abuse of a law-agent's right of lien

over title-deeds; this was approved by Lord Ardwall in the case of a lien over a ship (Garscadden v. Ardrossan Dry Dock Co., 1910 S.C. 178, 180), while Lord Fullerton in Graham v. Gordon ((1843) 5 D. 1207) stated that the Court would consider the circumstances of each particular case in questions of lien, and this statement has been subsequently approved and acted on. It is not, then, an absolute legal right.

As illustrating further the equitable nature of this right it may be mentioned that the possession founded on must be bona fide and not acquired by fraud, accident or mistake (Bell, Pr. § 1413. Glendinning's Crs. v. Montgomery, (1745) M.2573. But see Bell, Com. II, 89); otherwise it would be contrary to equity. "He who seeks equity must do equity." Furthermore, though lien falls with loss of possession, it will subsist if possession were given up by error or mistake (Bell, Pr. § 1415, quoting Ex p. Morgan, (1806) 12 Ves. 6 (Lord Ch. Erskine)).

(c) Retention of Debts

The fundamental position in this case may be stated briefly; failure of performance on one contract cannot be justified by the other party's default on another separate contract, and a liquid debt which is admittedly due and payable cannot be withheld on the plea of retention in respect of a claim of damages

unless that claim arises directly out of the same contract (Ersk.,III,4,15; Bell, Pr, § 573; Nat. Exchange Co. v. Drew, (1855) 2 MacQ. 103, 122). So a claim for payment cannot be met by an unconnected claim for damages, nor any contractual claim by any delictual, nor does it make any difference if the claims arise from two distinct contracts which may be said to be in the same course of dealing between the parties.

By the principle of compensation later discussed mutual liquid debts arising between parties who are both solvent may be set off one against the other with the result that if equal both are extinguished, and if unequal the greater is diminished pro tanto and the lesser extinguished. Retention of debts has been ascribed to an equitable extension of this principle to the case where one debt is illiquid, such as a claim of damages, or is contingent or as yet unproved, provided always of course that the claim and counter-claim arise from the one contract (Per L.P. Campbell in Harper v. Faulds, Bell's Oct.Cas. 440,473; Lord M'Laren in Asphaltic Co. v. Glas. Corpn., 1907 S.C. 463, 474.) The justification of the equitable extension is not hard to seek. If the position in law is that a contract requires some service to be done by one party and due payment to be made by the other for the work done, and the performance of the work turns out to be defective, rescission of the contract may be a useless remedy as where the work was done on

property belonging to the employer. It would be unsatisfactory and unjust in such a case to compel the employer to pay the contract price and then attempt to recover damages for the faulty performance. Much more just and reasonable is the solution found in the law of Scotland, which, by extending the principle of compensation, declines to compel the employer in such a case to perform his part while the counterpart has in effect not been performed. The employer's obligation to pay is not extinguished but suspended by his exercise of the right of retention of the payment due in security of his claim of damages (Ersk.III,4,20, approved in Borthwick v. Scottish Widows Fund, 2 M. 595, at 607, per L.J.C. Inglis). Thus an illiquid claim is exceptionally set up against a liquid, and when the damages are liquidated, compensation may properly operate and only a balance will be payable by or to the employer. Such a plea has been recognised in cases of carriage and storage, where claims for freight and storage dues have been met by pleas of retention founded on claims for damages for injury done to the goods, and frequently in cases of employees' claims for remuneration, countered by claims in respect of failure in performance of their duties (see cases cited in Gloag, 627).

But it has been laid down in a number of cases that a claim of retention, even where ex facie competent in respect that both claims arise out of the same

contract, is not the assertion of an absolute legal right, and the Court may refuse to give effect to it in a case where the result would be inequitable, or if the conclusion is arrived at that the plea is merely dilatory. In Ross v. Ross ((1895) 22 R. 461, 464), Lord M'Laren said: "There is also the principle of retention and that, not being subject to the conditions of any statute, must be regarded as an equitable right to be applied by the Court according to the circumstances of each case as it shall arise."

The prindiple of retention of debts just discussed is applicable to leases, in cases where the failure is not sufficiently material to justify the other party in rescinding the lease. The basis of the doctrine in these cases is the same as in other contracts, that one party to a contract cannot insist on performance unless he is prepared to perform himself. The usual case in which the plea is put forward is a claim for rent by the landlord, met by a claim for abatement of rent in respect of partial eviction or the landlord's failure to make the whole subjects available, or, by extension, in respect of a claim for abatement in respect of the landlord's failure to put the subjects of let in a tenantable state of repair. It is only in the more modern cases that retention of rent has been definitely founded on the principle of mutuality of claims under a contract as in other contractual cases (see cases

cited in Gloag, 628-9). The claim being founded on fairness and equity is not absolute, nor always admitted to the same extent but is regulated by the Court having regard to the justice of the circumstances (Bowie v. Duncan, (1807) Hume, 839).

In Stobbs v. Hislop (1948 S.C. 216, 223) Lord President Cooper described retention of rent as "one of the many instances of the general equitable rule of Scots law that reciprocal obligations arising under a mutual contract are the counterparts of each other and that under suitable circumstances a party to such a contract will be permitted to withhold performance of his obligations unless or until the other party has performed his ....", and he repeatedly emphasises the equitable nature of the rules and the discretionary control asserted by the Court in allowing or refusing retention in mutual contracts. Lord Russell (at p. 228. So too Lord Keith at 230) calls retention "an equitable remedy sanctioned by the general law and regulated by the Courts under appropriate safeguards". The Lord President said that the source of the tenant's right to retain rent was "not his contract of lease but the common law and equity administered by Scottish Courts", and he declined to treat it as simply an implied term of the contract.

In the same case (229) Lord Russell called it "an equitable remedy conferred by the common law". The last words are noteworthy as revealing the extent to which

Scottish equity has been absorbed into the common law.

The recognition of the equity of the principle of abatement is not new either. Lord Redesdale in Bayne v. Walker ((1815) 3 Dow, 233) said: "The justice of the matter amounts to no more than this, that the tenant should have an allowance equal to the diminution in the value of the subject by the loss of the house during the term".

Hunter on Landlord and Tenant (II, 451, and authorities in note) calls it an "equitable doctrine, recognised by the laws of Rome (Dig. 19.2.15, etc.), of the Continent and of England" as well as of Scotland. (So, too, Rankine, Leases, 327.) Lord Shand in Muir v. M'Intyres ((1887) 14 R. 470,473) said: "The principle on which the tenant is entitled to an abatement is founded on the highest equity ....": so to allow retention for a claim for abatement of rent is superadding equity on equity.

In Earl of Galloway v. M'Connell (1911 S.C.846,852), also a case of retention, Lord Salvesen thought that the Court had an equitable power to assess the amount of rent which a defender might retain, provided application were made for that purpose to them. This also illustrates the equitable and discretionary control by the Court.

Reference has been made to the importation of the name lien from England where it generally corresponds with the Scottish retention of moveable property in security. Liens in England fell under Chancery jurisdiction partly as giving rise to questions of account which required resort to a court of equity (Story, § 506), and partly as constituting a class of implied trusts (ibid., § 1215). The equity courts also recognised liens unknown at common law arising from constructive trusts (ibid., § 1217).

In the case of bankruptcy the strict rules of retention are equitably extended, so that a creditor may retain in respect of a future or contingent claim when himself debtor in a liquid claim due to the bankrupt (Bell, Com. II,122). Such a claim is subject to the conditions that the concursus of debtor and creditor must have been established prior to the bankruptcy, and that the future or contingent claim must have been acquired in bona fide. So too it was held in Borthwick v. Scottish Widows Fund ((1864) 2 M. 595) that when a debtor in a liquid debt went bankrupt, the creditors who were indebted to him in an illiquid debt were entitled to retain and set off the present value of their claim against his, so as to have to rank only for the balance.

II - Compensation

When two parties are mutually indebted, it is expedient, Bell says (Com.II, 118; cf. Stair,I,18,6), to prevent multiplication of lawsuits, that the one debt should be held as payment of the other, both the debts being presently due and both liquid. "It is not only expedient, but required by the plainest principles of equity, that where one of the parties becomes unable to pay his debt to the other, he should not be entitled to require payment from that other of an equal debt that is due to him." Lord Mansfield put it thus: "Natural equity says, that cross-demands should compensate each other, by deducting the less sum from the greater; and that the difference is the only sum which can be justly due." (Green v. Farmer, (1768) 4 Burr. 2214,2220). This process of compensation, or set-off, as it is known in England, rests on the two principles of the expediency of abating lawsuits and the avoidance of injustice (Bell, Pr.,§ 572). Modestinus defined it as debiti et crediti contributio (D. 16.2.1) but this is inadequate: the modern requirements are that the two debts must be of the same nature, both presently due, both liquid, and the two parties mutually debtor and creditor each in his own right, before there can be a true concursus debiti et crediti. Those conditions are virtually identical with the requirements of the process in Roman law which bore the same name.

In Roman law compensation was a similar reciprocal extinction of debts between two persons, each of whom was indebted to the other, founded upon natural equity, mutual interest and convenience (Story,§§ 1439, 1442-44). Even in the Roman law compensation did not operate entirely ipso iure: it had to be pleaded by the defender by way of exceptio doli and sustained by the judge (Buckland, Manual, 405-6; Textbook, 703). Stair's dictum that compensation operated ipso iure (I,18,5 and More's Notes thereto) has not been followed and in Scotland too compensation has always to be pleaded before decree and sustained and does not operate ipso iure though when sustained it dates back to the time when concourse of debtor and creditor took place (Ersk.III,4,12; Bell, Com.II, 124). In the Roman law the exceptio doli was used in its function of mitigating the harshness of ius strictum to give effect to counter-claims by way of retention where claim and counter-claim were not eiusdem generis or by means of compensation where they were so,and thus the exceptio doli became in the hands of the Roman jurists a weapon which enabled the ius aequum to defeat the ius strictum at every point (Leslie's Sohm, 280-1).

In view of the distinct similarity between the Roman rules and the existing rules of Scots law, together with the "prevalence of the Roman jurisprudence in Scotland, one should not expect to find a period in her law where the doctrine of compensation was unknown" (Bell, Com. II,

120). It appears probable that down to nearly the end of the Sixteenth Century, when persons were mutually indebted recovery required an action and counter action (as at Rome in earlier times: Buckland, Textbook,703), and legislative intervention took place to permit a counter-claim being stated in defence, instead of only in a cross-action (Ersk.III,4,12. Cf. Kames, 257). The Act, 1592, c. 141 (A.P.S.III,573) enacted that "onie debt de liquido in liquidum instantly verified by writ, or oath of party, before the giving of decree, be admitted be all judges within this realm by way of exception, but not after the giving thereof in the suspension, or in reduction of the same decree."

It is sometimes observed that this Act introduced the doctrine into our law and in The Queen v. Bishop of Aberdeen (Balfour, Prac. 349) in 1543 compensation seems to have been denied. Bell however (Com.II,120) from an examination of the original record observes that there is no evidence of such plea or judgment.

Further, in Fowler v. Brown (1916,S.C.597) Lord Salvesen admitted that the first part of the Act of 1592 may have been merely declaratory of the common law. It is submitted that there is probably much truth in the view expressed by Lord Justice-Clerk Braxfield in Harper v. Faulds (1791, Bell's Oct.Cas. 432,470) that the 1592 Act was introduced merely to save the trouble of bringing two actions as had been required previously: prior to

1592, he says, when there was a counter-claim the matter resolved into a count and reckoning, which was then competent wherein the one claim could offset the other. On this view the Act of 1592 was merely declaratory of the previously existing law except as to the words "by way of exception" which, with a view to avoiding extra expense and unnecessary litigation, permitted a plea of compensation to be taken by way of counter-claim made before decree in the original action. Bell, in his Principles (§ 572), only says that the right is "established and regulated" by statute, and there seems no clear indication that it was in fact "introduced" thereby.

The requirement that both debts be liquid was soon equitably extended to cover cases where a debt, though it could not be instantly verified in terms of the Act of 1592, might be proved quickly according to the rule, Quod statim liquidari potest, pro iam liquido habetur. This has been uniform practice for long and seems based on the Roman law, according to Erskine (III,4,16), and in such cases sentence is delayed ex aequitate till the debtor can substantiate his ground of compensation. This seems to have been refused in earlier cases (Linlithgow v. Airth, (1616) M.2564. See also Fisher v. Geddes, (1829 7 S.704, per Lord Corehouse) and was first admitted in 1683 (Seton, M.2566), after which it was regularly admitted. In Ross v. Magistrates of Tain ((1711) M.2568) the report narrates the requirement of the Act

that the debts be liquid, and continues "But, in latter practice, the Lords have got over this rigorous interpretation, by adopting the maxim Quod statim ...." The proof desiderated is generally restricted to writ or oath but exceptionally parole has been allowed (Muir v. Kennedy, (1697) M. 2567). Although the Court will not allow compensation where the ascertainment of the illiquid debt would require a lengthy inquiry, it has a discretion and may exceptionally sist a cause based on a liquid claim, pending the liquidation of a counter-claim, provided the latter was raised first (Ross v. Ross, (1895) 22 R. 461). The Court has an equitable discretion in questions as to the applicability of the maxim and the circumstances must be regarded in each case. "It is always a question of circumstances, and of sound judicial discretion and equity, in what cases /delay to permit liquidation/ should be allowed" (Logan v. Stephen, (1850) 13 D. 262,267, per Lord Cuninghame). The tendency of the practice of the Court is to allow an illiquid claim to be sustained as a dilatory plea where either there is material for its instant or easy verification or the Court comes to be of the opinion that the ends of justice would be defeated if it were repelled. In Munro v. Macdonald's Exors ((1866) 4 M. 687, 688) it was agreed that there might be exceptions to the strict rule of the Latin maxim, and Lord Curriehill said that the word statim implied some discretion

on the part of the Court. On such an equitable view statim would appear to mean "readily" rather than "immediately".

Another equitable trace is the rule that a debt acquired in mala fide will not ground a claim of compensation (Ersk.III,4,18. Finlayson v. Ross's Trs.,(1829) 7 S. 698; Lawson v. Burman, (1831) 9 S. 478), and this is particularly so in bankruptcy.

A further equitable extension of the rules is that though debts to be compensated must be of the same kind, yet if they be by consent or decree reduced to terms of money they can be set off though the compensation only dates from the time when they were thus made commensurable (Murray v. M'Guffog, (1711) M. 2687).

Furthermore, to be compensable both debts must be presently exigible, so that a future or conditional debt cannot be pleaded (Ersk.III,4,15), nor can one which has prescribed (Carmichael v. Carmichael, (1719) M.2677): the mutual debit and credit must also on grounds of equity exist before bankruptcy (Bell, Com. II, 123).

Though the Act of 1592 makes no special provision for such cases, in bankruptcy, further wide equitable extensions of the principle of compensation are there admitted. Where one party becomes bankrupt and both debts are already payable, he who remains solvent is not bound to pay his debt in full and to accept a dividend in

respect of the debt owed to him. The plea of compensation may be stated after bankruptcy dating back to the period of concourse, so as to extinguish the lesser debt. No concourse however can take place after sequestration. Furthermore, the rule against compensation by a future or contingent debt would be unjust in bankruptcy as exacting full payment and giving only a right to a dividend; the solvent party is entitled in such a case "in equity to retain till the illiquid debt be constituted or in security of the future or contingent debt" (Bell, Pr. § 573). These rules Bell (Com. II, 119) distinguishes as the Balancing of Accounts in Bankruptcy "not merely an arrangement of convenience, but an equitable adjustment of mutual debts and credits to avoid gross and manifest injustice".

Bell's view was that the Act of 1592 was not exclusive of the operation of equity in cases naturally falling under its rules; and in Scotland, he says, the insolvency of a party has always been admitted as a ground for administering an equitable remedy unknown to the ordinary course of law (Com.II,121). Hence a creditor may resort to the equitable remedies of inhibition or adjudication in security to avoid the injustice of losing his remedy against heritable estate even if the debtor be only vergens ad inopiam. This principle too is the equitable ground for extending retention to mutual debts and credit, which would not fall under the ordinary rule of compensation.

So in bankruptcy a creditor may plead an illiquid claim in compensation, or a future or contingent debt with a term of payment after the bankruptcy, or a debt not of the same species or quality. Bell observed, too, (Com.II,119) that in England the Chancery permitted set-off in bankruptcy and on grounds of equity before it was admitted in ordinary cases. The Bankruptcy Act, 1913, (secs. 48 et seq.) gives statutory sanction to the set-off of future and contingent debts by providing for valuation of such interests and compensation.

These doctrines of our law seem conveniently summed up in an obiter remark, "Compensation and retention and balancing accounts in bankruptcy are all equitable pleas and are available only when founded in equity"; hence it was held that a lien could not be asserted over goods acquired in bad faith (Shepherd's Trs. v. Macdonald, Fraser and Co., (1898) 5 S.L.T. 296).

An exceptional matter which may be mentioned here is reconvention. In Thompson v. Whitehead ((1862) 24 D. 331,340) Lord Justice-Clerk Inglis said, "reconvention is nothing but a more unrestricted application of the principle of equity, which is the foundation of the law of compensation"; reconvention was also a principle of canon law (Van Espen, II, 264).

III - Balancing of Accounts in Bankruptcy

Balancing of accounts in bankruptcy was the name applied by Professor Bell (Com.II,119) to the extension of the doctrines of retention and compensation which operates in cases of bankruptcy. The right of compensation as originally given effect to in Scots Law in terms of the Act of 1592 allowed the balancing of mutual debts between two persons who were reciprocally debtor and creditor to each other in money obligations, to the effect of extinction of one, the balance on the other being what was due. The right was limited to mutual debts of the same nature, and both being liquid and presently exigible. The right was originally given to avoid unnecessary actions. "The provision for setting mutual debts against one another", Lord Mansfield said,"is highly just and reasonable at all times." (Baskerville v. Brown, 2 Burr.1229, 1230). Bell describes it as "not merely an arrangement of convenience, but an equitable adjustment of mutual debts and credits to avoid gross and manifest injustice" which ought to form a part of every system of jurisprudence (Com.,II,119). He describes how in England mutual debts were allowed to be set off by the Court of Chancery in bankruptcy and on grounds of equity prior to any statute and before set-off was admitted in English common law. Then after describing the regulation of compensation by the Scots Act of 1592 which allowed mutual debts to be set

against a demand for payment by way of exception, "This statute", he says (Com.,II,121), "is in no degree exclusive of the operation of equity in cases naturally falling under its rules; and in Scotland, the insolvency of a party has always been a ground for administering an equitable remedy unknown to the ordinary course of law."; and he cites the allowance of the equitable remedy of inhibition or adjudication in security allowed when a debtor is _vergens ad inopiam_, though a creditor is entitled to diligence in execution only when the debt is actually due, and the same principle "serves as an equitable ground for extending a remedy in the shape of retention to mutual debts and credit, which would not fall under the strict or ordinary rule of compensation" (Bell, Com.,II,121). Goudy describes this broader sense of compensation by retention as "based on a principle of equity, viz., to prevent the hardship of a debtor who is also a creditor being forced to pay in full, while he only receives a dividend for his debt" (Goudy, 551), and he ascribes the extension of the doctrine of compensation so as to entitle the creditor of a bankrupt to set off illiquid debts against the bankrupt's claim as being effected by the "operation of equity, following the principles of the civil law" (_ibid._).

In _Ross_ v. _Ross_ ((1895) 22 R. 461, 465) Lord M'Laren explained the development as follows:- "The doctrine /of retention/ has received much extension in cases of bankruptcy and insolvency, where it is practically settled that

"any one who has a claim against an insolvent estate is entitled to keep back money which he owes to the estate, and cannot be compelled to pay in full while he receives only a dividend."

The extension of the normal rules in compensation that the debts must be of the same nature, due at the same time and readily ascertainable, is to the effect that in bankruptcy every kind of claim may be set off provided it can be ranked for (Goudy, 553); claims of damages, future or contingent debts (provided they arose before bankruptcy), can be set up in defence to a claim for payment of a due debt. Bell characterises it as: "The immediate necessity for payment of the liquid debt is taken away by the bankruptcy, and there is no impediment to the equity which holds the one debt an extinction of the other" (Bell, Com. II, 122).

It is of course necessary that the concourse of debit and credit must have existed before bankruptcy and this too, Bell says, is provided on the ground of equity (ibid., 123; Goudy, 554-5, similarly), and he further remarks that a debt acquired in mala fide to gain an undue advantage, will not ground compensation, which is an equitable right (Bell, Com.,II,124). The concourse of debtor and creditor furthermore stops the running of interest on both claims which Erskine describes as the "highest equity" (Ersk.,III,4,18).

The extension of the principle seems to be so wide in bankruptcy that any claim may be pleaded in defence unless

it depends on a contingency so remote as to render estimation of its present value impossible (Gloag, 626). There seems however to be no case in which a claim of damages for an alleged delict committed by the bankrupt has been allowed to be set off against the claim for a debt admittedly due and payable to the bankrupt.

In Borthwick v. Scottish Widows' Fund ((1864) 2 M. 595,607) Lord Justice-Clerk Inglis described compensation and retention in bankruptcy in a way which deserves quotation:- "Compensation at common law can take place only between debts of the same quality and which are due and demandable at the same time. .... The only modification of this rule which the Bankrupt Acts have made is that creditors in future or contingent debts due by the bankrupt may claim in a sequestration for the present value of their debts and may in like manner defend themselves against a demand made for a debt presently due by them to the bankrupt by setting off against that defect the present value of the future or contingent debt due to themselves. This rule of bankrupt law is founded on a very clear ground of equity; for it would be unreasonable and unjust, either in the one case to carry off the whole estate of the bankrupt and divide it among his other creditors and discharge him of his obligations, leaving the creditors in future and contingent debts absolutely unprovided for, or in the other case to make the creditor in a future or contingent debt pay up the whole amount he is presently due to the bankrupt,

"without leaving him the slightest prospect of ever obtaining payment of one shilling of his future or contingent debt when the term of payment arrives. Plain as this equity is, it requires the force of statute to give it effect. But the statutes have gone no further, and have made no provision for a case like the present where the debtor claims in the sequestration as a debt presently due and is at the same time debtor in a future and contingent obligation. Certainly the same equity does not apply to the latter case. And whether there may be other principles of equity which would justify a statutory interference with the principles of the common law, so as to introduce compensation in such cases, it is idle to inquire, for no such statutory interference has yet taken place."

A further equitable principle observed in bankruptcy is the prohibition against double ranking in cases where several obligants are bound for a debt, and this is so whether the several obligants are all principal debtors, or principal and cautioners. In Anderson v. Mackinnon ((1876) 3 R. 608), Lord Ardmillan (p. 617) and Lord Mure (p. 618) both held that double ranking was contrary to equity. In Mackinnon v. Monkhouse ((1881) 9 R. 393,401) Lord President Inglis explained the principle as follows:- "This is the foundation of the doctrine of double ranking. The debt being paid to the creditors by the bankrupt estate, the circumstance that the debt was secured to the

"creditors by a subsidiary obligation or another party who has relief against the bankrupt to the extent to which he has contributed to satisfy the creditors cannot be allowed to affect the bankrupt estate, because equity intervenes to protect the other creditors against the demand that the estate shall pay the debt, in the form of dividend, first to the proper creditor and then to the surety claiming in relief. But for this equitable rule the other creditors would not receive their proportionate share of the bankrupt estate." In the same case Lord Shand said (p. 406; also at 408. See too Bell, Com.II, 420): "The rule applicable to cases of this kind - questions of double ranking - is not a statutory rule. It is a rule introduced on principles of equity, and the purpose of the rule is really to secure that justice shall be done as between a body of creditors who are in the same position, in the dealings of the two estates with each other." Again in Royal Bank v. Commercial Bank ((1881) 8 R. 805,815; affd. (1882) 9 R.(H.L.) 67), Lord President Inglis declined to import into Scots law an English principle "of which we have never found the need, because the class of cases to which it is applied in England are with us settled without difficulty on the much more simple and equitable principles of our own bankruptcy system .... We may safely seek light in developing and applying the principles of equity which underlie our bankruptcy system from the laws of Holland or of France,

"because these are founded on the same general principles with our own." Lord Shand said too (p. 819): "... it is the aim and end of the system of bankruptcy jurisprudence existing in this country to do justice and give effect to principles of equity in the distribution of bankrupt or insolvent estates." This case was taken to the House of Lords on the ground that the English rule not followed in the Court of Session was not a special rule of English bankruptcy, but was founded on equitable principles and equally applicable to both countries. But the House of Lords nevertheless affirmed the Court of Session's judgment: Lord Chancellor Selborne laid down that though the rule had been long established in England, "this cannot be a sufficient reason why your Lordships should also hold it to be the law of Scotland, unless it can be shown that its application to the circumstances of such a case as the present .... is required by those principles of equity which are common to the jurisprudence of both parts of the United Kingdom." (9 R. (H L.) 67, 68) .... "So far as it is a positive rule of administration, and not the necessary result of equitable principles, it cannot be held to be of force in Scotland merely because it is so in England." (p. 70).

As regards set-off in England, Lord Eldon said that the Court of Chancery was in possession of the doctrine of set-off as grounded upon principles of equity, long before the law interfered (Ex p. Stephens, (1805) 11 Vesey Jnr.27).

Story's view (§ 1434), based on Lord Mansfield's speech in Green v. Farmer ((1768) 4 Burr. 2220), was that courts of equity did not exercise any jurisdiction as to set-off, prior to the statutes relative thereto, unless some peculiar equity intervened, independently of the fact of mutual, unconnected debts. Until the time of Queen Anne no set-off of one debt against another was allowed by English common law except where the debts were mutual connected debts. A right of set-off in bankruptcy was conferred by statutes of Anne and George II. Then the statutes of set-off of 1729 and 1735 provided that in all cases of mutual debts a right of set-off should exist in the case of debts only, even if neither party were bankrupt, but a claim for unliquidated damages could not be set off, in law or equity, unless arising from the same transaction. Apart from the statutes, then, it is doubtful whether any right of set-off existed in Equity, but the Chancery adopted the statutes and applied them to cases where one or both of the demands were purely equitable. The jurisdiction conferred by the statutes of set-off still exists, though now under the Judicature Act, 1925, whereby the defendant may set up a counterclaim for damages to the same effect as a claim in a cross-action and the Court may pronounce a final judgment on both claims in the same action. No set-off is allowed unless the claims exist between the same parties and in the same right. In bankruptcy a very wide right of set-off exists,

extending to a claim for unliquidated damages arising out of or in connection with a contract (Snell, Equity, 522. Cf. Bell, Com. II, 119).

As regards liens, the law of England distinguishes between legal and equitable liens and the former only correspond generally to the retention or liens of Scots law; the latter exist independently of possession (Snell, 262 et seq.), and are therefore not comparable to anything in Scots law. Yet nevertheless, while our retention corresponds to the legal and not to the equitable liens of the English law, that does not necessarily take them out of the category of rights equitable sua natura. Kames, for example (344), described retention as "an equitable exception resembling compensation, ... introduced by the Court of Session without authority of a statute. .... It would be hard that a man should have the authority of a court to make his claim effectual against me, while he refuses or delays to satisfy the claim I have against him. So stands however the common law, which is corrected by a court of equity for the public good. Supposing parties once in court upon any controversy, the adjusting, without a new process, all matters between them that can at present be adjusted, is undoubtedly beneficial, because it tends to abridge lawsuits. This good end is attained by bestowing on the defendant (sic) a privilege to withhold performance from the pursuer, till the pursuer, simul et semel, perform

"to him." Kames sees retention as founded solely on utility and the preventing a multiplication of lawsuits and in support of this he instances the Chancery practice as evidenced by Baxter v. Manning ((1684) 1 Vern. 244).

Compensation, on the other hand, is founded in Kames's opinion on the principle of equity supported by utility (p. 7). It remedies the injustice of the common law in ordering payment without considering a counter-claim (p. 258), by "ordering an account (Matters of account in England, similarly, were peculiarly for the Chancery) in place of payment , and the one debt to be hit off against the other." Kames's view was that the Act of 1592 gave authority to compensation as a defence "which the court itself could have introduced had the statute never been made."

IV - Stoppage in Transitu

The doctrine of stopping goods when in transit to the purchaser is a qualified extension on grounds of equity of the rule of mutual contract, by which either party may withhold performance, on the other being unable to perform his part (Bell, Com.I, 223; Pr. § 1307). The doctrine was rejected in Prince v. Pallat in 1680 (M.4932) but finally introduced into Scots law in 1790 by the decision of the House of Lords in Allan, Stewart and Co. v. Stein's Creditors ((1788) M.4949, (1790) 3 Paton 191. Kames's Equity was cited in the Court of Session.), replacing the

doctrine, which also applied on the Continent, of allowing restitution of the goods to the seller on the ground of presumptive fraud within three days of the bankruptcy of the buyer (e.g., Inglis v. Royal Bank, (1736) M.4936), on the ground that the impending bankruptcy must have been known secretly to the buyer and that he was guilty of a fraud in not communicating it, which puts the onus of proof on the buyer to show fairness in the transaction. This rule seems to have been founded on Roman law (Inglis v. Royal Bank, supra) and is first met in 1680 (Prince v. Pallat, (1680) M.4932). Lord Thurlow said that the rule of stoppage in transitu had been introduced in the last century from the customs of foreign nations, and he explained the triduum of the former doctrine as having been only one circumstance tending to show fraud and not conclusive.

Bell (Com. I, 226) considered the true principle of the rule doubtful, whether the seller was exercising legal rights, or whether it was an equitable interposition for the purposes of justice to prevent goods coming into the hands of a man who cannot pay for them. In M'Ewan v. Smith ((1857) 6 Bell, 340, 355) Lord Campbell described the right as "a most equitable doctrine. It has been introduced into our commercial law, and I would by no means circumscribe it."

The doctrine seems to have been founded originally on Snee v. Prescot ((1743) 1 Atkyn, 245; cf. D'Aquila v.

Lambert, (1761) 2 Eden 77), a decision of Lord Hardwicke in the Court of Chancery, based on the maxim, "he who seeks equity, must do equity", and bearing to proceed "from the justice of the case, and from the evidence on the custom of merchants" ((1743) 1 Atkyn, 250). This in turn proceeded on the earlier equity suit of Wiseman v. Vandeputt in 1690 (2 Vern. 203). The equity principle was adopted by the courts of law in England, by Mansfield in 1759 (Burghall v. Howard, quoted in Mason v. Lickbarrow, (1790) 1 H.Bl. 366n.) and this was justified in Tooke v. Hollingworth ((1793) 5 T.R. 215, 229) by Buller, J., who said that "the mercantile law of this country is founded on principles of equity" and that no distinction between legal and equitable rules should exist therein. In Lickbarrow v. Mason ((1794) 2 H.Bl.211; 1 Sm.L.C.703) the same judge reviewed the authorities and remarked that "they have been founded merely on principles of equity, and have followed up the principle of Snee v. Prescot ((1743) 1 Atkyn, 245); for, if a man has bought goods and has not paid for them, and cannot pay for them, it is not equitable that he should prevent the consignor from getting his goods back, if he can do it before they are in fact delivered", and later, "The right of stopping in transitu is founded only on equitable principles, which have been adopted in courts of law". (Cf. also Ellis v. Hunt, (1789) 3 T.R. 464, 469, per Buller, J., and the reviews of the history of the principle in Booth S.S. Co.

v. Cargo Fleet Co., [1916] 2 K.B. 570, L.C.J. Reading at 579, Scrutton, J., at 597, and by Lord Abinger in Gibson v. Carruthers, (1841) 8 M. and W. 321, 337).

The rule is now undoubted law in Scotland, if only by virtue of the Sale of Goods Act, 1893 (sec. 44 et seq.) and may be regarded as an equitable extension of the right of lien (Bell, Pr. § 1307) which the unpaid seller has while the goods are still in his possession (Sale of Goods Act, ss. 31, 39). While regularly applied, subsequent cases on the principle in Scotland appear devoid of comment on the essential nature of the right, apart from a bare mention of "the equitable remedy of stoppage" by Lord President Inglis (Black v. Incorporation of Bakers, (1867) 6 M. 136, 140; cf. More's Lectures, I, 151.) Hume's Lectures (II, 33) describe stoppage as "an equitable plea, grounded on the hardship of letting goods pass into the hands of one who cannot pay for them - grounded, also, on the feeling of natural justice that the seller of the goods, who finds that the buyer is not to pay - is not to implement his side of the contract - should be allowed to recall and abandon his consent to sell as from the first - and to maintain any hold, how slender soever, he has of them, or can without violence get of them."

Kames, writing before the doctrine was introduced into Scotland, does not mention it but condemns the previous doctrine of Prince v. Pallat ((1680) M.4932) as inequitable, and says that a court of equity should decree

restoration of the goods sold to the seller (p. 290). He would doubtless have approved of the remedy of stoppage Certainly after its introduction the doctrine rapidly took root in Scotland and instances of its application are common.

V - Rescission and Rectification

Rescission and rectification are traditionally equitable remedies, though this division of Chancery jurisdiction falls more naturally for discussion under the heads of fraud and mistake. The contingencies giving rise to these remedies are not peculiar to English law and problems of a similar kind arise in Scotland. It remains to be seen whether the Scottish Courts base their remedies on the same fundamental principles as the English Courts. The intervention of equity in cases of mistake or error is justifiable on the basis that, while it might be possible to both parties to a bargain to enforce it in terms of law, it would be unjust and unreasonable to do so if it be shown that it was entered into under error in a material respect. Hence in England such cases fell under the jurisdiction of the Court of Chancery which gave relief by avoiding the contract, refusing specific performance, or rectifying a written document.

Kames remarks sweepingly (p. 179) that equity will afford relief against rashness, ignorance and error in deeds and covenants, but this is too general and in the

subsequent discussion he admits that in many cases contracts are void for error even at common law, nor is it the case that equity will relieve from every case of deeds granted in error. More (Lect. II, 286) says, "A court of equity may give redress against fraud, but cannot substitute for an agreement actually made another essentially different."

Error

The invalidating effect of mistake or error affecting the mind of a party to a transaction has traditionally been associated with equitable relief. "In such cases the agreements or acts are unadvised, and improvident, and without due deliberation; and therefore they are held invalid, upon the common principle adopted by courts of equity, to protect those who are unable to protect themselves, and of whom an undue advantage is taken. Where the surprise is mutual, there is of course a still stronger ground to interfere; for neither party has intended what has been done. They have misunderstood the effect of their own agreements or acts; or have presupposed some facts or rights existing, as the basis of their proceedings, which in truth did not exist. Contracts made in mutual error, under circumstances material to their character and consequences, seem, upon general principles invalid. Non videntur, qui errant, consentire is a rule of the civil law (Dig. 50.17.116.2); and it is founded in common sense and common justice." (Story,

§ 134). Again the same author says that in general "an act done or contract made under a mistake or ignorance of a material fact is voidable and relievable in equity .... The rule applies not only to cases where there has been a studied suppression or concealment of facts by the other side, which would amount to fraud; but also to many cases of innocent ignorance and mistake on both sides"(Story, § 140. See also Kames, 182 et seq.)

Error in Expression

Treating first of error in expression, Story says that "equity will give effect to the real intentions of the parties, as gathered from the objects of the instrument" although it may be drawn up in inappropriate language (§ 168). The basic reason is that to allow the contract to operate in its literal terms would be "to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice ...." (ibid., § 155).

Error may affect a contract so as to prevent its being allowed to have effect in its terms as written down where the contract as reduced to writing does not accurately represent the intention of the parties. Obviously in a system which knew strictum ius only the parties would be held bound by the terms of their written contract, but such a position in developed law is intolerable.

It remains to be seen what equity can do to relieve parties in such a predicament. It is clear law in Scotland that where an agreement is embodied in a document intended to be obligatory, such as a bond or lease, and where per incuriam it is incorrectly drawn up or executed, the Court has a very wide equitable power to rectify the document and give effect to the real intention of the parties (Gloag, 435).

Bell (Pr. § 11) observed that obvious mistakes and omissions could be corrected in written agreements, and there is authority for this in Scotland, so far back as 1758 (Coutts v. Allan, M. 11549), while in Sword v. Sinclair in 1771 (M.14241) a clerical error as to price was treated as avoiding the contract. In Blair ((1849) 12 D. 97) it was said on the basis of a citation of equity authorities, including Kames, that it was a function of a court of equity to correct a mistake in a will.

When both parties admit the error there is no difficulty and the power of the Court in such cases is old-established. Erskine (III,3,87) says that in such cases the Court have exercised their "praetorian power" of correcting the clause. The principle of this is that no person can in reason and justice be allowed to profit from a clause in a deed which he admits is a mere clerical error. Even if the error is not admitted but is manifest on inspection of the document, the Court in Scotland may undoubtedly rectify it, e.g., the word "not"obviously

included by mistake (Glen's Trs. v. Lancashire Insce., (1906) 8 F. 915). It is immaterial in such a case that the party who proposes to correct the mistake was the party responsible for it (Johnston v. Pettigrew, (1865) 3 M. 954). But the Court's power of amendment will not extend to supplying formalities of execution which are lacking, even if obviously the result of mere carelessness, nor words essential to the efficacy of a deed of entail (Gloag, 435).

While more trouble may arise where one party does not admit the mistake, it is competent in Scotland to lead any evidence to prove from extrinsic sources anything of the nature of a clerical error in the document. (M'Laren v. Liddell's Trs., (1862) 24 D. 577; Comm. Bank v. Rhind, (1857) 19 D. 519, revd. 3 MacQ. 643).

In Jamieson v. M'Innes (15 R. 17), and Wilkie v. Hamilton Lodging House Co. Ltd (4 F. 951), errors in calculation of amounts in building tenders were not allowed to prejudice claims for the sums which would have been due on an accurate calculation. A ground of decision at least remotely present in the minds of the judges was that a denial of this would simply be unfair as giving the work for nothing, which had not been in anyone's contemplation.

The English equity rules on the matter of rectification in such a case are similar. It is an established rule in equity that where a contract has by reason of a mistake common to both the contracting parties been drawn

up so as to militate against the intentions of both, the Court will rectify the contract so as to carry out properly such intention (Chitty, 458, quoting Cooper v. Phibbs, (1867) L.R. 2 H.L. 149; Snell, 449; Cheshire and Fifoot, 187). The contract must have been concluded and reduced to writing. It has been accurately observed that "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts" (Mackenzie v. Coulson, (1869) L.R. 8 Eq.368, 375). As a general rule the mistake must be one of fact and not of law. Lord Romilly described clearly in Murray v. Parker ((1854) 19 Beav. 305, 308) the manner in which the Court proceeds: "In matters of mistake, the Court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised in all cases where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence, whether parol or written; .... if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to express it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument." The power will not be exercised to the extent of substituting a new agreement for that which the parties subscribed unless "upon

"evidence of a different intention of the clearest and most satisfactory description"(Fowler v. Fowler, 4 De G. and J. 250, 264; Pollock, 415), and the Court cannot act on proof of what was intended by one party only.

It is similarly established that the Scottish courts have no power to alter and rectify a contract so as to bring it into line with the alleged intention of parties. "There is no such process in Scotland. An agreement must be either upheld altogether or set aside altogether. No action will lie for having it set straight, or reformed, as we call it, between the parties" (Inglis v. Buttery, (1878) 5 R. (H.L.) 87, 96, per Lord Hatherley). The jurisdiction, that is, is confined to rectifying the verbal expression of a contract the intention of which may be gathered aliunde. Parties cannot be heard to say that they intended entirely other than their contract bears.

This equitable jurisdiction may be compared with the established rule in the construction of wills that falsa demonstratio non nocet dummodo constet de persona (M'Laren on Wills, I, 359; Broom's Legal Maxims, Ch. VIII), and with the tendency of the Court to adopt an interpretation of a contract favourable to validity rather than the reverse, as expressed in the maxim, ut magis valeat quam pereat (Chitty, 147; Broom's Legal Maxims, Ch. VIII).

Gloag has discussed (437, n.2.) the possible distinction between the powers of the English and Scottish Courts with regard to the rectification of contracts. It is manifest that the Court of Session and the Chancery Division will both rectify an instrument or conveyance where both parties admit the clerical mistake in drawing it up. Further, while the English Court in general restricts its action to cases of mutual error (Snell, 449), and only exceptionally in some cases of unilateral mistake has put the defendant to his election of accepting rectification or submitting to rescission of the contract, in Scotland, Krupp v. Menzies (1907 S.C. 903) and Waddell v. Waddell ((1863) 1 M. 653) rather indicate that the Court will go further, in permitting proof of a mistake which one party does not admit, contrary to the English practice.

In Krupp v. Menzies, Lord M'Laren laid down these principles (p. 908):- "... a misnomer is always subject to correction, for on proof of the true name of the person or thing effect is always given to that proof. Then in deeds of conveyance arithmetical errors are subject to correction when it appears on the face of the deed that they are arithmetical errors (cf. M'Laren v. Liddell's Trs., (1862) 24 D. 577). In such cases we do not vary the terms of the contract at all, but merely seek to give expression to the true contract as agreed to by the parties."

Erskine (III,3,87) phrased the matter thus:- "Where a clause in a contract obliges one of the parties to a fact which appears impossible, and where the alteration of a single word or two will bring it to a meaning which was obviously the intention of the contractors, our supreme court have presumed that the mistake proceeded from the inaccuracy of the writer and have therefore exercised their pretorian power of correcting the clause accordingly." (Cf. also Bankton, I, 23, 63.)

Lord Young described the court's power of rectification as follows:- (Glasgow Feuing Co. v. Watson's Trs., (1887) 14 R. 610, 619.) "Equity is part of the Common Law, accompanying and qualifying the administration of it by appeals to just and equitable considerations in every department of it. So also the equitable jurisdiction of the Court is simply part and portion of its Common law jurisdiction and not distinguished by a special name. The terms equity and equitable are nevertheless convenient and useful in our practice as common words of the language without technical meaning. The equitable rules and considerations, or, in one word, the equity which is part of our Common Law is none the less real and valuable, perhaps the more real and valuable, that with us equity has never degenerated into a technical system. When, therefore, I speak of equity on the one side or the other, or of equal equities, I desire to

"be understood not as expressing any technicalities, but merely as referring more briefly and pointedly to considerations of equity and justice (in the ordinary meaning of the words) which the Common law requires us to recognise and take account of in given circumstances." And later (ibid., p. 621), "the question of rectifying a satisfactorily proved mistake in a written instrument is a question of real and substantial justice and equity .... If through the blunder of a copying clerk .... an instrument fails to express what the parties to it intended - the mistake will be rectified unless there be good reason to the contrary."

It is settled however that the Court's power of rectification will not extend to making a new contract for the parties other than that which they have made for themselves. In Steuart's Trs. v. Hart (3 R. 192), the Inner House reversed the Lord Ordinary (who had refused reduction of a contract entered into in error on the ground that restitutio in integrum was impossible, and had modified the terms of the contract) and Lord President Inglis said: "I am humbly of opinion that it is not competent to reform the contract of parties in the way which has been done by the Lord Ordinary. It is not in the power of the Court to alter the contract of parties, or the terms of a conveyance in implement of a contract of sale", and this is fully in accordance with the English practice. Professor More (Notes to Stair, lix; citing Lisk v. Her

Husband's Creditors, (1785) M. 4865) says: "though a court of equity may give redress against frauds either by annulling what has taken place, where that is practicable, or by enforcing the agreement, according to the meaning which the injured party was led to put upon it, it is impossible to substitute, in the place of an agreement actually made, another essentially different." To this we may add the dictum of James, V.C., in Mackenzie v. Coulson ((1864) L.R. 8 Eq. 368, 375), that "Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for the plaintiff to show that there was an actual concluded contract, antecedent to the instrument which is sought to be rectified and that such contract is inaccurately represented in the instrument." The reference to an "actual concluded contract" would appear to restrict the power to cases where both parties admit the error, as, if only one does so, there would appear to have been no true consensus in idem and hence no truly concluded contract but only a purported agreement. (See further May v. Platt, [1900] 1 Ch. 616; Craddock v. Hunt, [1923] 2 Ch. 186.) In neither country, as Gloag observes (437 n. 2), can a party profit from what he admits is a clerical error, and in neither is the party whose interests are affected by the error rigidly restricted to the strictly legal courses of affirming the contract and

accepting it as it stands mistakenly expressed, or rescinding it and treating it as a nullity.

Rectification of a document is still competent even though the error is not discovered until third parties' interests are concerned, unless they can rely on the law of negotiable instruments or on the Register of Sasines in the case of purchases of heritage. So a singular succes - sor can insist on his right to subjects as they appear on the record, though any clerical error could have been rectified as between the original parties (Mansfield v. Walker's Trs., (1833) 11 S. 813; affd. (1835) 1 Sh and M'L 203). It would be inequitable to permit an innocent third party's right to be prejudiced by an error affecting his author.

Similar considerations arise in the case of offers made in error, where a wrong figure is accidentally inserted in an offer, and it is conceived on the whole that a man is not bound by an inadvertent offer (Gloag, 439) provided he notifies the other of his mistake as soon as he becomes aware of it.

In Steuart's Trs. v. Hart ((1875) 3 R. 192)heritage was sold, the seller being under essential error as to the feuduty while the purchaser knew of the true state of affairs. In the Inner House the sale was reduced on the seller's offering to make restitution in integrum, on the ground of essential error. The Lord Ordinary's remedy of reforming the contract was disapproved strongly

there. The decision seems contrary to the ordinary principle that a man selling too cheap, with full means of knowledge, and without misrepresentation on the part of the buyer, must abide by his bargain.

Error in expression which arises in the transmission of the offer incorrectly will lead to the contract being held void if the error has prevented consensus in idem (Verdin Bros. v. Robertson (1871) 10 M. 35).

Error in Intention

More material cases of error are those where error affects the intention of parties, as distinct from merely the expression of that intention. Essential error may be said to be present in contract when it can be shown that one of the parties would not have entered into the contract but for that error, or that he would not have agreed to the particular terms. Cases in which the error has been induced by a misrepresentation as to the facts made innocently or fraudulently by the other party are ignored for the present, to be considered separately in a subsequent section. Here we treat only of cases which cannot be ascribed to any such influence.

It is now well settled in Scotland that error by one party, even though essential, is not sufficient to nullify a contract. It must be common to both parties or induced by the misrepresentation of the other party, innocent or fraudulent (Menzies v. Menzies, (1893) 20 R.(H.L.)

108, esp. Ld. Watson at 142). But the error may be so fundamental as to render the purported agreement of parties illusory and their contract void, and this may be in respect of error as to the subject-matter of the obligation, or the person (if that is material), the price, the quality of the thing, or the nature of the contract (Bell, Pr. § 11, approved Stewart v. Kennedy, (1890) 17 R. (H.L.) 25). In such cases the mistake is so essential as to prevent any real consensus in idem and the contract is consequently void.

Those grounds for reduction of the contract are recognised in English law equally (Snell, 442 et seq.; Chitty, 234 et seq.).

In Scotland however the recognition of any equitable foundation for the rescission of a contract for essential error which excludes consensus in idem has not been traced. Stair says, "Those who err in the substantials of what is done, contract not." (I,10,13). Erskine merely echoes this (III,1,16), and both are directly founded on the maxim of the civil law, Non videntur qui errant consentire. The civil law is indeed the substantial foundation of practically all the Scottish rules and dicta on error, and in the subsequent development of the law reduction for essential error which vitiates consent does not seem to have been regarded by the Court as an equitable rule. Lord Hatherley however remarked in Buchanan v. Duke of Hamilton ((1878) 5 R. (H.L.) 69) that the same principles are ap-

plicable in England as in Scotland on this point and "common-sense dictates" that where there is essential error the contract should be reduced. Beyond that there seems to be no recognition of this ground of reduction as equitable. In Roman law the contract was held to be avoided (Buckland, Textbook, 417) and Kames (182) is probably correct in submitting that in Scotland, a contract without true agreement was void at common law, and there was no occasion for equity to interfere.

There is similarly little scope for the intervention of equity in cases of mutual error. When parties have contracted both under a mistaken assumption of the state of facts, the contract may be void. "In cases of mutual mistake going to the essence of the contract, it is not necessary that there should be any presumption of fraud. On the contrary, equity will often relieve, however innocent the parties may be." (Story, § 142). But Story adds (§ 146, citing Dig. 22.6.9.2)that no relief will be given in equity if reasonable diligence would have revealed knowledge of the facts, and further that it is not every case that ignorance of a material fact will relieve, for if known to one party and not to the other, relief will not be given if it operates as a fraud on the ignorant (§ 147). A contract thus entered into under circumstances of mutual error is held void and, like those voidable on other grounds of error, may be reduced. Parties cannot equitably be held to

bargains which they would not have entered upon had they been in full possession of the relevant facts. But a specifically equitable foundation for reduction in those conditions need not be traced as such contracts would appear to have been reducible at common law.

Accordingly it appears that there is a general similarity in the way in which mistake or error has been regarded at law and in equity in England and Scotland. In both countries essential error or mistake was regarded as a vitiating factor even at common law; in both the rectification of deeds whose expression of the agreement concluded is defective is the most notable equitable interference. The most important other equitable doctrine with regard to mistake was the refusal in some cases of unilateral or mutual mistake of an equitable remedy such as specific performance (Cheshire and Fifoot, 186).

VI - Misrepresentation and Fraud

Consideration of the scope and influence of the principles of equity in Scotland in relation to cases of misrepresentation may most conveniently be approached from consideration of the English law to which the Scottish bears so great a resemblance to-day. Generally speaking, prior to 1875 the Court of Chancery used the term fraud in a more extended meaning than the courts of common law. The common law meaning was settled in Derry v. Peek ((1889) 14 App.Cas. 337. See Chitty, 525) as depending

on the absence of a genuine belief in the representation made which induced the contract. Fraud in equity did not and does not necessarily require a fraudulent intention. Chancery and common law exercised a concurrent jurisdiction in fraud, and in addition the Court of Chancery had an exclusive jurisdiction in cases which, though classified in the Chancery as fraud, yet did not necessarily import the element of dolus malus. "A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression 'constructive fraud' came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have both for several centuries run the risk of the word fraudulent being applied to them." (Nocton v. Ashburton /1914/ A.C. 932, 954, per L. Ch. Haldane). Similarly in Merchants Insurance Co. Ltd. v. Hunt (/1941/ 1 K.B. 295, 318), Luxmoore, L.J., said "... in a case of positive misrepresentation the right to avoid a contract .... arises by reason of the jurisdiction originally exercised by the Courts of Equity to prevent imposition."

In Scotland the common law rule developed in a manner consonant with the rule of Derry v. Peek ((1889) 14 App.Cas. 337). Stair (I,9,9) bases it on the civil law, "because it is most equitable and expedient and therefore is generally followed by our custom" (I,9,11. See also Erskine, III,1,16; More's Notes, lix, and Lect.II,285; Bell, Pr.§ 14. For Roman law, Buckland, Textbook, 415.)

In 1878 in Brownlie v. Miller ((1878) 5 R. 1076, 1091. Affd. (1880) 7 R. (H.L.) 66. Cf. Dunnett v. Mitchell, (1887) 15 R. 131) Lord Shand said that to found a claim on fraudulent misrepresentation, it was necessary "to prove not only that the representation was false in fact, but that the person making the representation knew it to be false, or at least did not believe it to be true ..... If .... his belief be honestly entertained, I do not think his statement, though false, can be held to be fraudulent in law." Thus prior to Derry v. Peek (supra) the common law of Scotland was established on the same footing as that adopted by the House of Lords in that case, which settled the common law conception of fraud in England. What then of the more extended equitable conception of constructive fraud? While the term is foreign to Scots law the idea is not, and there will be found collected under that head (infra, Chap. VII) the numerous circumstances in which a Scottish court frowns on conduct as tending to savour of the fraudulent, and these will be found to correspond in large measure to the equitable

conception of constructive fraud as expounded in Chancery judgments.

The reason for this general identity must be sought in the common origin in the Roman law (Spencer Bower, Actionable Misrepresentation, Appx. C.), on which Stair frankly based our rules (I,9,9 et seq.). The Roman law also conveniently illustrates the position as it would be in an undeveloped system of law. In a Roman contract consent was consent none the less and the contract prima facie valid, even though obtained by fraud. To the time of Cicero fraud had, in stricti iuris transactions, no effect on liability (Jolowicz, 292). But thereafter a stricti iuris action would fail if the question of fraud were expressly raised by an exceptio doli and in bonae fidei transactions a question of dolus could always be raised without an express exceptio by the words ex fide bona in the formula. If the transaction had been completed an actio doli would lie for the fraud (Buckland, Manual, 252; Textbook, 415). Hence by classical times the law had attained substantially the modern view that a consent obtained by fraud was not true consent and the contract remained voidable as equity demanded that relief be given in such a case. In classical Roman law dolus acquired a wider meaning so as to include any act which did not conform to the requirements of bona fides, much more extensive than actual trickery, and this was a refinement which a more primitive system of law would not

have achieved (Jolowicz, 425).

Kames's Views as to Fraud

Fraud, Kames says (p. 57), "consists in my persuading a man who has confidence in me, to do an act as for his own interest, which I know will have the contrary effect .... As every attempt to deceive another to his prejudice is criminal in conscience, it is the duty of a court of equity to repress such deceit ...." "To restore the party injured to his former situation, where that method is practicable, will be preferred as the most complete remedy" (62). He recognises that "every covenant procured by fraud, will be set aside in a court of common law. But with regard to covenants or agreements disregarded at common law, there can be no relief but in a court of equity"(57).

Kames then recognised that direct fraud, by cheating or trickery, is a ground for rescission at common law (but only, it may be noted, a developed common law: a primitive common law would disregard even such fraud, as was the case at Rome in early times). He further recognised "double-faced circumstances without number, and other artful means, calculated to deceive, which do not involve any degree of treachery" (57). But these are criminal in conscience and repressed by equity, and he discusses cases of what would now be called constructive

fraud. Examples are taken from both Scottish and English Equity reports, though it is open to doubt whether the English cases he cites would be followed in Scotland.

In an early Scottish case on fraud, Kincaid v. Lauder in 1629 (M.4857), the plea was that "of reason and equity he ought not to reap the benefit by his crafty and subtile carriage". In Lisk v. Her Husband's Creditors ((1785) M.4865) a woman induced by fraud to marry an insolvent sought to withdraw her property from his ius mariti. Despite the citation of Kames's Equity and the plea that it was the province of equity to annul the effect of fraud on the pecuniary interests involved, the Lords refused the plea for reduction. But reduction of marriages for fraud is very strictly limited.

In Abercromby v. Peterborough ((1745) M.4894) a bond taken in England for more than double the sum lent on the condition of the death of the granter's grandfather was restricted to principal and interest. The decision proceeds entirely on a citation of numerous Chancery cases relating to post-obit bonds and it shows that even prior to Kames's time deference was paid in Scotland to such authority (See Story, § 342: Chesterfield v. Janssen, (1751) 2 Ves. 125).

There appears therefore to have been a recognition of the fact that rescission for fraud is rooted in bona fides and substantial justice but that the remedy is

primarily a common law one: the influence of equity is most to be noticed in its extension to cases of constructive fraud.

Innocent Misrepresentation

Turning to the consideration of innocent misrepresentation, where the statement relied on is false though believed to be true, the remedy of rescission was invoked in such a case by the Court of Chancery prior to 1875 as down to that time the common law could only invalidate a contract if it were induced by fraud or the misrepresentation was a term or condition of the contract (Chitty, 539; Cheshire and Fifoot, 199). By the Judicature Act of 1875 the more elastic doctrine of equity with regard to innocent misrepresentation was applied to common law actions and the former rule there was replaced by the broader equitable principle that innocent misrepresentation would invalidate any class of contract (Redgrave v. Hurd, (1881) 20 Ch.D. 1,12, per Jessel, M.R.). This rule has subsequently been repeatedly recognised, notably by the House of Lords in Adam v. Newbigging, ((1888) 13 App. Cas. 308), and Derry v. Peek ((1889) 14 App.Cas.337, 347, 359), and in the Court of Appeal (Lagunas Nitrate Co. v. Lagunas Syndicate, /1899/ 2 Ch. 392, 423.

In Scotland the distinction between fraudulent and innocent misrepresentation was not early drawn. In Oliver v. Suttie ((1840) 2 D. 514) and Campbell v. Boswall ((1841) 3 D. 639) it was held that misrepresentation was no ground for reduction of the contract in the absence of averments of fraud. The first cases in which innocent misrepresentation was held relevant as a ground of reduction appear to be Adamson v. Glasgow Waterworks ((1859) 21 D.1012) and Wilson v. Caledonian Railway ((1860) 22 D. 1408). The distinction has subsequently become fully recognised and the locus classicus now is probably Lord Watson's famous judgment in Menzies v. Menzies ((1893) 20 R. (H.L.) 108, 142. Cf. Stewart v. Kennedy, (1890) 17 R. (H.L.) 25), where he said: "He cannot rescind unless his error was induced by the representations of the other contracting party .... 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."

The older Scottish attitude then appears to have corresponded rather to the English common-law than to the English equitable conception and the changed attitude is contemporaneous with the recognition in the Chancery that innocent misrepresentation justified rescission (Re Liverpool Borough Bank, (1858) 26 Beav. 268, per Romilly, M.R.). The derivation of the Scottish attitude may then be at least in part the English Equity rules. Yet so

late as 1899 the learned editor of Bell's Principles ((10th edn) § 14, note (e)) said that innocent misrepresentation does not invalidate a contract, and so it is only comparatively recently that reduction for innocent misrepresentation has been fully recognised in Scotland. The older authorities ignore it.

The Remedy of Rescission

Ignoring the penalty of damages which the Court will inflict on a party guilty of fraud in making a misrepresentation, in recognition of the delictual nature of the deceit, the remedy of rescission of the contract tainted by the misrepresentation is equitable. In Houldsworth v. City of Glasgow Bank ((1880) 7 R. (H.L.) 53. 64) Lord Blackburn said, "though the deceived party may rescind the contract and demand restitution, he can only do so on the terms that he makes restitution. If either from his own act or from misfortune it is impossible to make such restitution, it is too late to rescind." Hence in Boyd and Forrest v. Glasgow and South Western Railway (1915 S.C. (H.L.) 20,30,37) the impossibility of restitution barred the right to rescind the contract for innocent misrepresentation.

This plainly proceeds on the principle of equity that he who claims equity must do equity. In Erlanger v. New Sombrero Phosphate Company ((1878) 3 App.Cas.1218, 1278) Lord Blackburn said, "It is, I think, clear on

"principles of general justice, that as a condition to a rescission there must be a restitutio in integrum. The parties must be put in statu quo", and he approves Lord Cranworth's opinien in Western Bank of Scotland v. Addie ((1867) 5 M. (H.L.) 80, 89.) where this passage is found: "Restitutio in integrum can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into. Indeed, this is necessarily to be inferred from the very expression restitutio in integrum; and the same doctrine is well understood and constantly acted on in England."

In England the equitable rule was that a right of rescission might arise from even an innocent misrepresentation (Redgrave v. Hurd, (1881) 20 Ch.D.1) but this might be barred by acquiescence, or election by the party not to elect rescission but to affirm the contract, by the impossibility of restitution in integrum, and by the intervention of third parties who have acquired rights thereunder for value (Snell, 459-60).

The possibility of restitution in integrum is an essential of rescission as only thus can the parties be remitted to their former position and the inability to do so would infringe another equitable principle, that neither party must be unjustly enriched at the expense of the other. Hence rescission involves a mutual giving and taking back of whatever has passed in terms of the

purported contract. Consequently the impossibility of this will preclude rescission (Boyd and Forrest v. Glasgow and South-Western Railway, 1915 S.C. (H.L.) 20). So, while reduction or rescission of the contract is the remedy generally available when a contract is voidable, it may be precluded in that, though rescission be equitable, certain other parties may have acquired rights which have an equal equitable claim to consideration, and where equities are equal the law will prevail and take its course to prevent rescission.

Thus, if third parties have in bona fide acquired rights under the contract which would be affected by the reduction, it cannot as a rule be carried through (Gamage v. Charlesworth's Tr., 1910 S.C. 257, 266, per Lord Kinnear). This is statutory in the case of corporeal moveables (Sale of Goods Act, 1893, s. 23; see Bell's Com., I, 261). Parties who have obtained a real right in goods are not affected by latent defects in the title of their author, but not so long as the third parties' right is only personal. But acquisition of a real right, as by recording a disposition in the Register of Sasines, precludes such reduction (Gloag, 535). In Gamage v. Charlesworth's Tr., where a contract was induced fraudulently and bankruptcy supervened, Lord Johnston said, "The remedy of rescission and recovery of the property is an equitable remedy, and, though as between seller and buyer a brevi manu operation may be effectual, it requires,

"where the other interests are concerned, the interposition of the Court" (p. 267) .... "The remedy is an equitable remedy and the Court is bound, I think, to look around, and to consider whether there are not counter equities" (p. 268), and in consequence he held that the sellers were defrauded partly by their own folly and disregard of reasonable business precaution, and so could not be heard to rescind the contract, since their interest conflicted with those of other general creditors. He mentions too the equitable maxim, vigilantibus non dormientibus iura subveniunt, as justifying the refusal of the equitable remedy to a pursuer who had been defrauded to a considerable extent by his own carelessness.

VII - Specific Implement and Interdict

It is an essential of a contract that an obligation is undertaken by one of the parties to do or refrain from something. It seems never to have been in doubt in Scotland that where a debtor fails or delays to implement that obligation, the creditor has a right to a decree for specific implement, ad factum praestandum, if the obligation is to do something positive, or to a decree of interdict if the obligation is negative (Stair, I,17,16; Ersk. III, 3, 86; Bell, Pr. § 29; Gloag, 655). Instances have already been quoted showing that specific implement is an old remedy in Scotland, and is even wider in old cases

than to-day (supra, Chap. V). But when circumstances justify it, the Court may undoubtedly decline to pronounce decree of specific implement and substitute one of damages.

In this respect, the law of Scotland differs notably from that of England although in modern practice the result in given circumstances under the two systems is very similar. In England the primary right at common law was to damages for breach of a personal contract and there was no legal right to demand specific performance of an obligation. But it was one of the major modifications introduced by Equity that such a decree could be substituted where circumstances made it a more appropriate and just remedy than a decree for damages. The two views of the law are conveniently set out by Lord Herschell in Stewart v. Kennedy ((1890) 17 R. (H.L.) 1 at 5): "Specific performance was not a remedy to which a party was entitled at common law in England. To obtain it he was compelled to resort to the separate jurisdiction of the Court of Chancery, which at times refused its assistance, even where a legal right was established, leaving the party who invoked it to his ordinary legal remedies. In Scotland, on the contrary, specific implement is one of the ordinary remedies to which a party to a contract is entitled where the other party to it refuses to implement the obligation he has undertaken. And no authority has been cited to shew that such considerations as it is suggested would

"induce the Court of Chancery to refuse specific performance have ever been regarded as material where the ordinary remedy of specific implement is sought in an action in the Scottish courts." Similarly Lord Watson at page 9: "I do not think that upon this matter any assistance can be derived from English decisions; because the laws of the two countries regard the right to specific performance from different standpoints. In England the only legal right arising from a breach of contract is a claim of damages; specific performance is not a matter of legal right but a purely equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it. .... Even where implement is possible, I do not doubt that the Court of Session has inherent power to refuse the legal remedy upon equitable grounds, although I know of no instance in which it has done so"; and Lord Macnaghten at page 11: "In England the remedy of specific performance is an extraordinary remedy. It is always a matter of discretion, and defences are admitted in a suit for specific performance which are inadmissible according to the doctrines and practice of the Courts of Scotland, where specific performance is part of the ordinary jurisdiction."

In some cases at least, the remedy is in the discretion of the Court (L.P. Inglis in Moore v. Peterson, 9 R. 337, 348). Lord Shand in that case (p. 351) said:

"The general rule of our law is that when a party has it in his power to fulfil an obligation which he has undertaken the Court will compel him to do so. But it must always be in the discretion of the Court to say whether the remedy of specific implement or one of damages is the proper and suitable remedy in the circumstances." While in theory this discretion is unfettered, in practice it is bound by considerations of convenience and suitability.

In Beardmore v. Barry (1928 S.C.101; affd. 1928 S.C. (H.L.) 47) L.J.C. Alness, after quoting Lord Watson's judgment in Stewart v. Kennedy, said (p. 109): "There are in this case no special facts and circumstances averred which, as a matter of equity, would exclude the remedy which prima facie is within the pursuer's rights." (i.e., specific performance). So too Lord Ormidale (p. 113) and Lord Hunter (p. 115). It appears then that equitable considerations must be taken into account as possible reasons for withholding decree of specific performance - almost exactly the converse of the English practice, where equity has to justify the granting of that remedy. Lord Alness also said that there was a presumption in the law of Scotland that "when an obligation is against anyone, it may in the absence of reason for refusal of the remedy on equitable grounds, be enforced by decree for specific performance."

In Grahame v. Magistrates of Kirkcaldy ((1882) 9 R. (H.L.) 91, 97) Lord Chancellor Selborne, after adverting to the undivided jurisdiction of law and equity in Scotland, said that "the natural result of that union is that strict legal rights ought not (in certain cases) to be enforced without regard to the discretion which from the nature of the subject-matter, and of the interests of all these concerned in it, ought to be exercised by a court of equity." This passage was quoted and applied by Lord Kinnear in Winans v. Mackenzie ((1883) 10 R. 941, 945) where he found equitable reasons for refusing a decree of specific implement. So too in Moore v. Paterson ((1881) 9 R. 337. See too Aurdal v. Estrella, 1916 S.C. 882, 890) damages were given in lieu of specific implement on a balancing of convenience and equity.

Specific Performance in England

In England the jurisdiction in specific performance was founded on the inadequacy of the common law which gave damages as the sole remedy for a breach of contract, and equity will still not interfere where damages at law will give a party the full compensation to which he is entitled and put him in as good a position as if the agreement had been specifically performed (Story, § 714. Snell, 533 et seq.). As in Scotland, the Court almost invariably decrees specific performance of a contract regarding land.

But specific performance remains a discretionary remedy exercised in accordance with well settled principles of judicial discretion. Formerly the Court of Chancery had no power to award damages for a breach of contract, failing specific performance, but by the Chancery Amendment Act, 1858, (Lord Cairns's Act) the Chancery might award damages in lieu of or in addition to specific performance. The list of contracts not specifically enforceable in England corresponds closely to the Scottish list, except in the English refusal to enforce voluntary contracts, which is not the law of Scotland (Snell, 538; Burn Murdoch, 167); and the English Courts regard many obligations as specifically unenforceable on grounds which have not been formulated in Scotland.

The specific performance of contracts in England was probably not a clerical invention of ecclesiastical Chancellors but certainly received great development through equity jurisdiction (de Rossi, 134). There are traces of the doctrine in English courts prior to the practice becoming settled in the Chancery jurisdiction and Fry's conclusion was that the practice was only a revival by and not an invention of the ecclesiastical Chancellors (Fry, 5 L.Q.R. 235, and Treatise on Specific Performance, 3 et seq.) The doctrine is indeed at least as old as the award of damages (P. and M., II, 595. Cf. Pollock, Contract in Early English Law in 1893 H.L.R.; Hazeltine,

Early History of Specific Performance of Contracts in English Law, cited in 1913 Essays, 269, note; Holdsworth, H.E.L. I, 450). The ultimate origin may well be in the Germanic respect for oaths and faith (de Rossi, 139), to which canonical processes added fresh weight and strength.

Specific Implement in Roman Law

It is clear that in the classical period of Roman law every judgment was for money and specific implement had no place; although the clausula arbitraria (Buckland, Equity, 29) may have provided a means of escape in the actio ex empto, generally speaking there was no such thing as specific implement in the classical law (Buckland, Equity, 45). Roman law was not, however, entirely opposed to the principle of specific performance, as witness the rules of manus iniectio and so on (de Rossi, 48 Jur. Rev., 129, 130). It was different, however, in later law as under the system of cognitio extraordinaria the judge had power to condemn for damages or the actual fulfilment of the obligation undertaken: his order for restitution could be enforced by seizure of pledges, or by seizure and delivery by officers of court (Buckland, 48; Textbook, 669). Buckland came to the conclusion that there is nothing to show that specific performance was in any way in an ancillary position, but the judgment, for

damages or specific implement, was the one most convenient in the given case.

This accords very much with Stair's doctrine (I, 17, 16. See too Kames, 208 et seq.; Hope, Major Pr. II, 1, 16) that if the obligation be not performed at the due time and in the due manner "it is in the creditor's option to pursue for performance, or for damage and interest", and it would appear that only subsequently has judicial discretion tended to limit and define the cases where one remedy or the other is more appropriate.

The earlier Scottish decisions seem to have followed this principle of giving whichever remedy was more appropriate in the circumstances and there are instances too of implement being decreed where it would not now be, such as to implement an obligation to marry, which was to be done before next Whitsunday (Crichton v. Kinnaird, 1499, A.D.C. II, 385. Also Craig v. Sinclair,(1628)Mor. 10034), though in the previous year damages were decreed for breach of a contract to marry (Ker v. M'Dougall, 1498, A.D.C. II, 265).

There are a number of instances of other forms of decree ad factum praestandum, e.g., to quit lands and deliver a tack or pay damages (Mondwell v. M'Culloch, 1489, A.D.C. I, 137); to implement a decree-arbitral (Lawson v. Preston, 1492, A.D.C. I, 263); to implement a marriage contract

(Somerville v. Douglas, 1492, A.D.C. I, 247); to deliver goods (Lord Seton v. Oliphant, 1492, A.D.C. I, 284; Lady Rothes, 1494, A.D.C. I, 347; Countess of Crawford v. Achilmore, 1482, A.D.C. II, cvii); to give certain land in tack (Seton, 1492, A.D.C. I, 293); to give sasine of land or pay money (Ahanney, 1493, A.D.C. I, 318; Dunbar v. Cumnock, 1501, A.D.C. III, 115); to infeft the pursuer heritably (Auchinleck, 1495, A.D.C. I, 428; Archbishop of St Andrews v. Ker, 1501, A.D.C. III, 57); for implement of a charter-party (Magistrates of Aberdeen v. Young, 1497, A.D.C. II, 88). There is even in 1496 a decree for implement for the non-payment of money to sustain a chaplainry for the soul of Robert Bruce's father and the failure to find a priest therefor, with a penalty of 200 merks on failure (Bruce v. Monteith, 1496, A.D.C. II, 8).

The limits of the application of specific performance have never been exactly defined. It is however a general rule that the obligation to pay a sum of money will not be specifically enforced with a possible exception in the case of an obligation to hand over a specific sum of money to be disposed of, or that the right to it may be determined by process of law. Apart from this, specific implement may be refused in cases : (i) where from the nature of the contract performance cannot really be enforced, such as a contract of service; (ii) where performance is not possible; (iii) where there is no pretium affectionis

in the subject of the contract; (iv) where enforcement would result in greater hardship to the defender than the benefit to the pursuer would justify (See list of contracts held to be enforceable specifically, Gloag, 656, and contracts not so enforceable, Gloag, 657. Compare with these, Snell, 537).

In Davidson v. Macpherson ((1889) 30 S.L.R. 2, 6), Lord Young said: "Frequently the Court will not order specific performance. Indeed, as a rule it will not order specific performance where that would be hard on the party who is required to perform, and where complete justice would be done to the other party by damages. ..... But then if it is a particular article - anything to which a peculiar and special value attaches, and where complete justice cannot be done by damages - the Court will order specific performance. ..... But that is where justice would not be done by damages, and therefore specific performance is ordered."

The refusal of a decree ad factum praestandum on the ground of hardship to the defender disproportionate to the benefit accruing to the pursuer is within the equitable discretion of the Court. In Grahame v. Magistrates of Kirkcaldy ((1882) 9 R. (H.L.) 91. Cf. Snell, 556, which shows that the English Equity rule is the same), Lord Watson said: "It appears to me that a Superior Court, having equitable jurisdiction, must also have a discretion, in

"certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course. In order to justify the exercise of such a discretionary power there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights." In Rollo's Trs. v. Rollo (1940 S.C. 578) specific performance of a contract to execute a power of appointment was refused largely on English authority.

In the ultimate result, then, there is little substantial difference between the modern attitude of English and Scots law to the specific implement or performance of a contract, as the progress of decisions has limited the discretion of a judge in either country to apply either remedy to recognised categories of cases which generally correspond. The fundamental distinction is that a purely equitable and discretionary remedy in England has always been a general remedy in Scotland justified by equity, justice and convenience.

Interdict

Interdict is the means of process adopted for stopping any act which constitutes an actual or threatened breach of obligation. Hence it is on the one hand the counterpart of specific implement in that it is the means whereby the creditor in an obligation of a negative

character may compel his debtor to desist from action in contravention of that obligation (cf. Doherty v. Allman, (1878) App. Cas. 720, per L. Ch.Cairns). Further, it is a preventive proceeding against the commission of a legal wrong. An obligation to abstain may generally be enforced by interdict (Bell, Pr., § 29).

While interdict has been referred to as an "old Scotch remedy" (National Exchange Co. v. G. and S.W. Rly Co., (1845) 11 D. 571), there seems little foundation for this and the remedy seems to have developed principally from the process of suspension which goes back much further and is found from the earliest times as a method of reviewing judgments and stopping execution. The earliest reference to the use of suspension for the purposes of interdict is in Erskine in 1773 (Inst. IV, 3, 20) and the modern process of suspension and interdict is first mentioned in 1790 (Juridical Styles, 1st edn., II, 199). Nevertheless there are traces of what are substantially interdicts of the modern type from very early times. Thus in 1494 a party was ordained to desist from withdrawing water from the pursuer's mill (Cochrane, 1494, A.D.C. I, 345); and again in 1497 defenders were ordered to cease molestation (Chalmer v. Seton, 1497, A.D.C. II, 125) or from vexing and troubling the complainers (Stirling v. Buchanan, 1497, A.D.C. II, 163); or against intrusion on land (Terrel v. M'Kay, 1501, A.D.C. III, 644). There are a number of

cases, too, where, though the word interdict is not used, the substance of the remedy is given, as in actions of ejection and intrusion based on alleged wrongful dispossession from heritage (see e.g. A.D.C. III Index, s.v. Ejection and Intrusion). It seems at least possible that the interdict as we know it is derived from the canon law.

Suspension was originally confined to execution and interdict seems to have been added when the diligence had proceeded beyond the stage of a charge to stop a poinding or sale (Mackay, Practice, II, 210). Walter Ross's Lectures ((1792) I 360) expressly equate suspension with the English bill in equity on which the Chancellor granted an injunction commanding execution to cease till the bill was inquired into. Thus the Chancellor "upon due consideration of the case, ... mitigates the severity and supplies the defects of the judgments pronounced in the court of law." In Scotland "redress in equity was applied for to the King who granted it by the assistance of his Chancellor and Council", and these equitable powers, Ross says, were assumed by the Court of Session from its institution. "The suspension then is the writ by which the equitable powers of our Court are exercised; and by which every error in the decrees of inferior judges, or in the decrees of the Supreme Court itself, is ultimately corrected"(ibid. I, 361-2). Ross also mentions that the idea of a suspen-

sion is by some found in the *inducíae moratoriae* of the Roman law, and certainly the idea of exacting caution is taken thence (*ibid.*, 365, quoting Act of Sederunt, 25 Oct. 1577).

The injunction to which Ross refers was and is the comparable English process whereby the Court restrains the commission or continuance of some wrongful act, or the continuance of some wrongful omission (Snell, 509. Cf. generally Kerr on Injunctions). It was a development of the Chancery and its use to restrain proceedings at common law precipitated the clash with the common-law courts in the Seventeenth Century. It is interesting to note that this jurisdiction was invoked against an action in the Court of Session in 1818 (*Kennedy* v. *Earl of Cassilis*, (1818) 2 Swans. 313. See also *Campbell* v. *Houlditch*, cited in note to Story, § 899), when Lord Chancellor Eldon, who cited Erskine (Prin.I,3,29) in support of his admission that the Court of Session was a court of law and equity, dissolved the injunction. He also proceeded on the view that under the Act of Union, which he called "sacred", he had no jurisdiction, and because one court of equity never granted an injunction against another, as then the Court of Session might in turn have interdicted the Chancery! Beyond this the injunction may be utilised generally to restrain judicial proceedings, to restrain

breaches of contract and enforce negative covenants, or to restrain the commission or continuance of a tort, such as nuisance, infringement of patents, etc. (Snell, 574. Cf. Story, § 872-3). The grant of an injunction is in the discretion of the Court and a grant will not be made when damages would not be an adequate remedy (Doherty v. Allman, (1878) 3 App.Cas.720).

Story (§§ 865-8) observed that injunctions partook very much of the nature of interdicts according to the Roman law. In the Roman law interdicts were forms of words commanding or prohibiting something to be done, principally when matters of possession were in controversy (Ind. 4.15. pr. and § 1). They were probably the oldest praetorian remedy. The interdict played an important part in the protection of public interests and also of private rights although the field of application is narrower, but they were not used to give a remedy for breach of contract, except so far as the possession they protect may have originated in contract (Buckland, Equity, 26). There are, however, interdicts comparable to mandatory injunctions, mostly for the restoration of property, or of interference with public and private rights of way, where damages would not be an adequate remedy, and these cases approach near to decrees of specific implement (ibid., 27. See too Buckland, Textbook, 729). The

interdict commonly was a provisional remedy granted on an ex parte application regulating the status quo. In this it resembles the modern remedy.

While then the Scottish interdict bears in some of its uses quite a distinct similarity to the praetorian possessory interdict, the derivation is not direct, though it is hard not to believe that the introduction of the word interdict was made with the Roman law in mind. It may be that the reception of the Roman law in the Seventeenth Century prompted the adoption of the name in view of the apparent similarity of the remedies.

Interdicts in Scots Law

Turning now to the attitude to interdict in modern cases, it has been laid down that in the absence of a clear negative duty it does not follow that interdict will be granted against conduct which is merely inconsistent with the contract, and even where there are clear negative stipulations, it is a matter of discretion of the Court whether to grant or withhold interdict. Lord President Dunedin said (MacLure v. MacLure, 1911 S.C. 200, 206): "I do not think that this Court is ever bound to exercise an equitable jurisdiction (which it always does when it deals with interdict) without being sure that the result of its own judgment is not necessarily to cause another wrong."

Similarly in Ben Nevis Distillery v. N. B. Aluminium Co. (1948 S.C. 592), a plea was expressly taken that in the circumstances interdict was inequitable and should be refused. Lord President Cooper, in refusing the plea, said: "It is well established that this Court in exercising the equitable jurisdiction which it applies in dealing with interdict can and should, as many examples show, have a very careful regard to the consequences ...." and he adopted the statement by Lord M'Laren in Clippens Oil Co. v. Edinburth Water Trustees ((1897) 25 R. 370, 383) that delay of interdict was justifiable where it would be more damaging to the respondent than the wrong or where public convenience required, and on that basis he felt that "all considerations of justice and convenience" pointed to ascertaining the facts before determining whether interdict should be granted or refused.

Equitable considerations are of less importance where the Court is asked to enforce a definite contractual relation, but of greater importance in such cases as buildings erected in defiance of building restrictions (Gloag, 662. Cf. Snell, 578), and here too the element of discretion is of importance. "It is inseparable from the principles of equitable jurisdiction that its exercise may be withheld where on the balance of conflicting considerations the reasons against the interference of a Court of equity are found to preponderate. In England before the Judicature Acts the result in such circumstances would generally have been to leave the parties to

"their rights and remedies at law. But in cases of public or charitable trusts (and the present case is one which in England would be deemed of that nature), the English Court of Chancery would always have felt itself bound to pay regard to the general benefit of those interested in the trust, and might on that principle have given its sanction on proper terms, to any arrangement which might appear on the whole to be beneficial under the actual circumstances, even when that which was in strictness illegal and unauthorised might have been done by the administrators of the trust. In Scotland the legal and equitable jurisdictions have always been united, and the natural result of that union is that strict legal rights ought not, in such a case as the present, to be enforced without regard to the discretion which from the nature of the subject-matter, and of the interests of all those concerned in it, ought to be exercised by a Court of equity." (per Lord Chancellor Selborne in Grahame v. Magistrates of Kirkcaldy, (1882) 9 R. 91, 96).

In the same case Lord Watson said: "It appears to me that a superior Court, having equitable jurisdiction, must also have a discretion in certain exceptional cases to withhold from parties applying for it that remedy to which in ordinary circumstances, they would be entitled as a matter of course", and he goes on to discuss the three prior cases (Macnair v. Cathcart, Mor. 12832;

Sanderson v. Geddes, (1874) 1 R. 1198; Begg v. Jack, (1876) 3 R. 35) in which the Court in the exercise of its equitable discretion declined to grant an equitable remedy of interdict (Grahame, supra, at p. 91).

In Begg v. Jack (supra, at p. 43), the case of a mutual gable wall, Lord Gifford said: "in all such cases there is an equitable power vested in the Court, in virtue of which, when the exact restoration of things to their former condition is either impossible or would be attended with unreasonable loss and expense, quite disproportionate to the advantage which it would give to the successful party, the Court can award an equivalent - in other words they can say upon what equitable conditions the building shall be allowed to remain where it is, although it has been placed there without legal right. This equitable power has often been exercised by the Court when slight encroachments have been made by a builder upon his neighbour's property, it being unreasonable in such cases to insist on the demolition of the whole building", and he refers to the earlier case of Sanderson v. Geddes (supra) in which he himself as Lord Ordinary allowed "equitable modification" of the rule as to common gables and sanctioned "equitable deduction" from the contribution payable by the pursuer in respect of the defenders' appropriation of part of the solum of the old gable into his house when he erected the new and thinner gable (at p. 1200).

Further expressions of the views of the Court as to the equitable nature of the judgment in such interdict cases may be traced in Campbell v. Clydesdale Bank ((1868) 6 M. 943), in which the Court founded largely on the judgment of Lord Chancellor Eldon in Duke of Bedford v. British Museum Trustees ((1822) 2 My and K. 522). Lord Cowan said: "No doubt some cases which come before us require the application of equitable principles only, while others require the stringent application of rules of law. But the great mass of cases in which this Court adjudicates are to be decided on a combined view of equity and law, and to this category the present case, in my apprehension, belongs" (supra, at p. 947), and he quotes from the judgment of the Master of the Rolls in the Duke of Bedford's case (at p. 949).

This discretion in the Court to refuse the remedy was also illustrated in Wilson v. Pottinger (1908 S.C. 580), where enforcement would have caused exceptional hardship and loss to the defender grossly disproportionate to the damage sustained by the pursuer. Acquiescence in a building encroachment may be sufficient to bar an action for removal of the building and yet not an action for damages (Shand v. Henderson, (1814) 2 Dow, 579, Ld.Ch. Eldon), thus illustrating the place of this form of interdict as the negative counterpart of specific implement. Similarly in England, damages may be given in substitution

for an injunction (Shelfer v. City of London Electric, /1895/ 1 Ch. 287, 322. Mayne on Damages, 640.) and probably more freely than in Scotland. The remedies are of course substitutional and not cumulative.

Generally speaking, interdict will only be granted to restrain an ~~in~~appreciable injury on the basis of the maxim de minimis non curat praetor, but the judicial discretion of withholding interdict is very rarely exercised if there is permanent encroachment on property, however trifling in extent (Wilson v. Pottinger, supra). In England the defence of triviality is probably of wider application (Grahame v. Magistrates of Kirkcaldy, (1882) 9 R. (H.L.) 91,97,99).

Interim interdict is very much a matter of discretion but that discretion is exercised in the light of certain guiding considerations, such as the balance of convenience of the parties (Clippens Oil Co. v. Edinburgh Water Trs. (1897) 25 R. 370,382). On the other hand final interdict is rather different and in certain circumstances the pursuer's right may be almost absolute, as where operations have been definitely found to be illegal, though probably always subject, as Lord Dunedin said, to the overriding consideration that an equitable jurisdiction is not bound to be exercised when there is danger of causing another wrong (MacLure v. MacLure, 1911 S.C. 200,206).

Recognition has frequently been made in Scotland of the equitable nature of the jurisdiction in interdict (e.g. MacLure, supra; Tatnall v. Reid, (1827) 5 S. 277) or of the exercise of praetorian power (Mansfield v. Stuart, (1839) 2 D. 246, per L.J.C. Boyle), but it seems that in questions of encroachment on property interdict may be claimed as of right while the English injunction is more discretionary.

VIII - Penalties and Irritancies

It is not uncommon for parties to a contract to foresee the possibility of one or other party's failure to implement his due obligations and accordingly to provide beforehand by an express stipulation in the contract for the rights which are to accrue to the innocent party on such an eventuality arising. But it is patent that the recognition and enforcement by the Courts of such provisions are not always possible, as many persons would take advantage of such rights to impose grossly unfair and leonine bargains and to visit a slight failure in performance with ruinous penalties. But, on the other hand, while the law has developed rules for ascertaining what recompense should be made by the party failing to perform his contractual obligations to the party aggrieved, it does not entirely exclude private agreements contained

in contracts as to the satisfaction to be given for a specified breach. It is apparent that the Court exercises a control over such clauses and will not tolerate or enforce unfair conditions, and this is undoubtedly one of the equitable functions of the Court.

Such clauses may take the form of specifying a penalty payable on failure, or of an irritancy or right to one party to cancel the contract on the other's failure, or of both penalty and irritancy clauses combined. An irritancy is the right to put an end to the contractual relationship and to any rights which depend on the continuance of that relationship (Gloag, 664).

Irritancies may be legal, such as are imported into certain contractual relations by force of law, or conventional, which are expressly imported into that particular contract, though in the latter case the clause may and frequently does merely express the irritancy which the law would imply, or it may purport to give a right for which there is no provision in law.

In the case of feu-contracts the Scots Act of 1597, cap. 250, provides that if a feu-duty shall remain unpaid for two whole years together, the vassal shall amit and "tyne" his feu, just as if his charter had contained a clause to that effect; and in practice a feu-charter commonly does contain such a clause with the additional provision that "it shall not be competent for the vassal

"to purge this irritancy by payment at the bar in any process of declarator or removing" (Wood's Lectures on Conveyancing, 165. Ersk., II,5,26), because it has long been a recognised principle that, if a person incurred a legal irritancy, it could be purged by payment before decree passed in an action raised to enforce it (Gloag, 665. Stewart v. Watson, (1864) 2 M. 1414, 1419, per L.J.C. Inglis. Cases in Morison, p. 7235 et seq.)

In the case of leases the usual clause provides for irritancy of the lease on a term's or a year's rent remaining unpaid for a given period, or on such events as the bankruptcy of the tenant (Wood, 438. M'Douall's Trs v. MacLeod, 1949 S.C. 593). At common law there was a legal irritancy on default of payment of rent for two successive years (Rankine on Leases, 532 et seq.)

This has been subsequently modified by Act of Sederunt and legislation (see Gloag, 665 n.2), but the rule of purgation applied to all these legal irritancies and payment could be made until the decree of declarator was extracted. But after extract purgation could not be made.

A conventional irritancy on the other hand is one expressly provided in the contract, and may give a right for which there is no other legal provision, or, as in the case of feu-contracts or leases, may merely express the irritancy which would be implied by law. The Court certainly has and regularly exercises a power to control the

enforcement of proper irritancies, which it has never had in the case of options to terminate the contract on a particular event taking place or date arriving.

It is evident that the irritancy of a feu-right incurred by two years' non-payment of rent is founded by analogy on the rule of Roman law that a *dominus* could resume possession of land let on the tenure of *emphyteusis* if the annual payment were three years in arrears (Code, iv,66,1: Buckland, Textbook, 275), and the phrase *ob non solutum canonem* is directly transferred from *emphyteusis* to modern feu-rights. It seems at least probable that the Act of 1597, cap. 250, was merely declaratory in part of earlier practice, as a provision for a feuar of church-lands being removed on failure of two years' feu-duty is found in *Regiam Majestatem* (R.M. (Stair Socy. edn),3,14,5, quoted in Hope's Major Practicks, 3.1.19). The Roman period of three years had passed into feudal law (Craig, J.F. I, 418) and was reduced to two years by the Act of 1597: two years had been the period in Roman law if the right was derived from the Church (Nov. 120.8). The development of the law in Scotland as regards feus is considered at great length by Lord Fraser in *Cassels* v. *Lamb* ((1885) 12 R. 722, 762 *et seq.*), and by Lord Watson in *Sandeman* ((1885) 12 R. (H.L.) 67, 72).

There was nothing similar to an irritancy in the Roman law of *locatio* but the common law rules of irritancies in leases were probably founded on the analogy of

feu-rights (Rankine, Leases, 533 citing authorities) and were authoritatively declared by Act of Sederunt in 1756.

Kames on Irritancies

Kames states as "a rule in daily practice, That however express the words may be, a court of equity gives no force to a deed beyond the will of the granter" (p.144. Kames was cited on irritancy in Campbell v. Scotland (1794) M.321. See also p. 236 on the Act of 1597), and cites as examples the rule that general clauses in discharges and assignments (sic) are limited by equity where the words are more extensive than the will, and also the case of a variety of irritancies contrived to secure an entail against acts and deeds of the proprietor (p.148). He then cites "an example of a conventional irritancy, an irritancy ob non solutum canonem in a lease or feu-right. Such a clause, expressed so as to make the right voidable only upon failure of payment, is just and equal; because by a declarator of irritancy, it secures to the superior or landlord payment of what is due to him, and at the same time affords to the vassal or tenant an opportunity to purge the irritancy by payment. And even supposing the clause so expressed as to make failure of payment an ipso facto forfeiture, it will be held by a court of equity, that the words go inadvertently beyond the will; and a declarator of irritancy will still be necessary, in order

"to afford an opportunity for purging the irritancy" (p. 149. But see Rankine on Leases, 546. Cf. Lord Kinnear in Cassels v. Lamb, (1885) 12 R. 722, 777). He cites as a further example the transaction of a claim when a less sum is accepted on condition it be paid at a date certain, otherwise the transaction to be void, and he thinks there is an equitable ground for relief here, whether the clause be suspensive or resolutive. But on rather similar facts the House of Lords enforced the strict provision in Gatty v. Maclaine (1921 S.C. (H.L.)1).

It has long been admitted that in the exercise of its equitable jurisdiction the Court of Session may interfere to stop gross abuse or oppression. "The severe consequences of irritancy have induced the admission of the equitable doctrine of purgation" (Hunter, Landlord and Tenant, II, 137). "It is true that the right to purge is an equitable remedy, and that it might only be allowed on more onerous terms" (Maxwell's Trs. v. Bothwell School Board, (1893) 20 R. 958, 964, per Lord Rutherfurd Clark). "The Lords, being a Sovereign Court having nobile officium, they may ex nobili officio modify and retrench the exorbitancy of penal agreements" (Aberdeen v. Northesk, (1675) Mor. 7230). From an early date the distinction was drawn between legal and conventional irritancies. In Duncanson v. Giffen ((1878) 15 S.L.R. 356) Lord Curriehill outlined the history of the law relating to the purgation

of irritancies in feu-rights and he points out that Stair drew no distinction between the purgation of legal and conventional irritancies in his third edition of 1693 but only did so in Book IV (IV,18,3) which was not part of the original work, that the practice became general by the middle of the Eighteenth Century to hold that all irritancies rendered the right only voidable, and this seems supported by Erskine's reference to the "old practice" (II,5,27) whereby the vassal could not purge a conventional irritancy without excuse, and he finally concluded that a conventional irritancy in a feu-right or contract of ground-annual is purgeable at the bar as being of the nature of a penalty. In leases it is now settled that a legal irritancy may be purged but not a conventional one (M'Douall's Trs v. MacLeod, 1949 S.C. 593).

There seems to have been a tendency in the later Eighteenth Century to hold all irritancies purgeable on grounds of equity (Lockhart v. Shiells, 1770 M.7244; Campbell v. Scotland, 1794 M. 321) but subsequently the view has prevailed that parties may make their own terms in a contract and if they are lawful the Court will enforce those conditions. It is certainly recognised that the Court has an overriding equitable jurisdiction to permit purgation of an irritancy in exceptional circumstances. So in Stewart v. Watson ((1864), 2 M. 1414,1422), a case of

a conventional irritancy, Lord Benholme said: "it is a reasonable one; and if it be fairly carried out, without undue harshness or catching, I do not think this Court can interfere .... I am far from saying that this Court will never interfere even in cases of conventional irritancies." Lord Neaves said: "In a lease .... the parties may stipulate for any conventional irritancies they please, provided they are not contrary to law. .... In cases of judaical construction, or the oppressive use or abuse of irritancies, the Court may interfere." Lord Kinnear said in Cassels v. Lamb ((1885) 12 R.722,777) that the true ground of this equitable interference, in violation of the letter of a clause of irritancy, was that in substance the condition was a stringent remedy for non-payment or non-performance. "The Court, therefore, interferes to carry out the true intention of the contract, by allowing the irritancy to be purged when its purpose of compelling performance has been effectuated." This is of course only true of a legal irritancy.

In Old College of Aberdeen v. Earl of Northesk (1675, Mor. 7230), which related to a conventional irritancy in a tack of teinds, it was pleaded that "the Lords being a Sovereign Court, having officium nobile, they may may ex nobili officio modify and retrench the exorbitancy of penal agreements, as they every day do in the cases of liquidated penalties of parties .... yet if they be grievous and exorbitant far beyond equity and the interest

"of parties, the Lords may and do modify and restrict them secundum bonum et aequum," and the Lords found the irritancy purgeable on the ground of justifiable ignorance. A similar plea was made unsuccessfully in Finlayson and Weir v. Clayton (1761, Mor. 7239).

Most recently the equitable jurisdiction was recognised by the Court in M'Douall's Trs. v. MacLeod (1949 S.C.593). "It is open to a tenant to invoke the equitable jurisdiction of the Court and to plead that there has been a misuse or an oppressive use of the powers conferred on the landlord by the contract" (per L.J.C. Thomson at p. 599-600). So too Lords Mackay (615) and Jamieson (617) admitted the continued existence of an inherent power in the Court to allow purgation on equitable grounds in cases of hardship. While the decision was that a conventional irritancy had been incurred and could not be purged, mention was made of the fact that no appeal was made to equity to permit purgation: it is clear that such an appeal would in some circumstances have been competent.

In 1587 in Bishop of Orkney v. Sinclair (1587, Mor. 7227. Cases in Morison (7179 et seq.) go back to 1517. See also Hope, Major Practicks,III,23) a tacksman was allowed to purge at the bar on the plea "de aequitate potuit purgari haec mora" and it was a hard manner, et summum ius, quae fuit summa injuria to reduce a nineteen years' tack

for non-payment of one term's rent."

Where the only right involved in the irritancy clause is that of ending the contractual relations, without imposing any penalty on the other party, it would appear that there are no general restrictions on the freedom of the contracting parties,and they may specify that the right shall exist in respect of any trifling act or omission. It has been laid down that it is incompetent for the Court to consider whether or not a landlord has made a hard bargain with his tenant (Moncrieff v. Hay, (1842) 5 D. 249, per Lord Moncrieff, 259-60. Edinburgh Corpn. v. Gray, 1948 S.C. 538). Yet though considerations of hardship may be irrelevant, the terms of the agreement will be construed fairly and not in a judaical spirit, and an equitable view can hardly be taken directly in face of the express words of the clause under construction (Moncrieff v. Hay and Edinburgh Corpn. v. Gray, supra) if the intention of parties is clear.

In Cassels v. Lamb ((1885) 12 R. 722,757. Kames's Equity was cited on another point in this case. See also Sandeman v. Scottish Property Investment Coy, (1885) 12 R. (H.L.) 67) Lord Fraser said that the rule, that judges have nothing to do with the hardships of the case but must apply the law as they find it, was misleading and largely inaccurate. "The whole of our rules of equity proceed upon a contrary assumption, and one-half of our law would be blotted out if it were not so. Equitable consider-

"ations are allowed to come into play - to control, to mitigate, and sometimes altogether to evade a legal rule which carries with it intolerable hardship, and when the right too rigid hardens into wrong", but he held that on the facts of that case no violence need be done to the common law by refusing the claim of the pursuer. Lord Kinnear said (ibid. 777): "I see no ground of equity on which the Court can interpose to deprive the superior of his remedy. There is a well established rule of equity by which the operation of irritant conditions is controlled, so that the estate may be saved from forfeiture by payment at any time before judgment has been pronounced in an action of declarator. But the true ground of this equitable interference, in violation of the letter of a clause of irritancy, is, that in substance the condition is a stringent remedy for non-payment or non-performance. The Court therefore, interferes to carry out the true intention of the contract, by allowing the irritancy to be purged when its purpose of compelling performance has been effectuated (sic). But I am not aware of any ground upon which the Court, upon equitable consideration, can interfere to defeat the intention of the contract, by denying effect to a clause of irritancy in spite of non-payment", for this involves reading the words of the irritant clause in an unnatural sense.

Control of Penal Clauses by the Court

"It is a general principle that the Court may, on equitable grounds, refuse to give effect to a clause in a contract imposing a penalty, even though it may be clear that it has been incurred, and purgation of the act by which it was incurred may be impossible, or may not be offered." (Gloag, 671). This attitude is particularly noticeable in the case of contracts providing for liquidate damages in case of failure of performance but is not so confined. Lord Shand suggested that a provision in a contract of co-partnery for forfeiture of capital contributed by a partner in the event of his incurring an irritancy by bankruptcy would be unenforceable (Hannan v. Henderson, (1879) 7 R. 380), and enforcement was refused of a penalty clause incurred by a sea-captain for insobriety (Watson v. Noble, (1885) 13 R. 347) on the ground that it would be "contrary to every rule of equity to order the forfeiture ...." (per Lord Rutherfurd Clark at p. 352).

The commonest cases however in which the question of enforcement of penalty clauses arise are those of contracts making provision for payment of stated sums as penalty or liquidate damages on failure to fulfil some term of the contract. Professor Gloag remarks, moreover, that despite certain general dicta relating to the obligation to implement unambiguous contractual provisions in leases

a party cannot be held free to enforce whatever penal provisions he can secure the assent of the other to, and that the Court's equitable jurisdiction might be invoked in cases where the penalty stipulated was unnecessarily stringent (Gloag, 672-3). Similarly a penalty in a bond of caution ad factum praestandum will be modified to the actual damage sustained (M'Gregor v. Wright, 9 Feb. 1826 F.C.).

The common provision in written contracts for a fixed sum to be payable by the party who defaults in respect of certain specified conditions is always subject to the scrutiny of the Court, which proceeds on the principle that parties may competently assess beforehand the compensation or damages to be payable to the other party on failure, but may not penalise each other; such clauses are generally upheld and enforced according to their terms, without regard to the wording of the contract, so long as the amount fixed is not outrageous and bears a reasonable relation to the loss likely to be sustained by the breach of contract (Gloag, 673). The Court will not however enforce what they consider to be a penalty, however it may be expressed. "If the penalty be truly a penalty - this is, a punishment - the Court will not allow that, because the law will not let people punish each other. They may contract that the one will be bound to reimburse the other for any loss caused, but not for punishment"(per Lord Young, Robertson v. Driver's

Trs., (1881) 8 R. 555, 562). "Where the penalty is manifestly exorbitant, and a penal forfeiture rather than estimated damage, a court of equity does interfere" (Bell, Com. I, 699). This view was given effect to in M'Intosh v. M'Donell ((1798) Mor. App. Tack No. 4), and Wright v. M'Gregor (9 Feb. 1826 F.C.).

In Forrest and Barr v. Henderson ((1869) 8 M. 187) Lord Barcaple, who quoted Story's Equity in his judgment, held that a stipulation was a penalty and that it would not exclude the intervention of the Court to modify it. On reclaiming, it was held that even if the provision were for liquidate damages, equity could prevent the claim being maintained to an exorbitant or unconscionable amount (L.P. Inglis at 193; Lord Deas at 196; Lord Ardmillan at 199; Lord Kinloch at 201; Lord Neaves at 202).

The basic equitable influence on this branch of the law consists in the application of the rule that equity looks to the substance and not to the letter of the agreement. So it is not material whether a payment be described as penalty or liquidate damages. "Both in England and in Scotland it has been pointed out that the Court must proceed according to what is the real nature of the transaction, and that the mere use of the word 'penalty' on the one side or 'damages' on the other would not be conclusive as to the rights of the parties" (Clydebank Engineering Co. v. Castaneda, (1904) 7 F (H.L.)

77, per Ld Chancellor Halsbury). In this case and in Cameron-Head v. Cameron and Co.(1919 S.C. 627) a sum fixed as "penalty" was sustained as liquidate damages. The Court will look into the true circumstances of each case (Robertson v. Driver's Trs., (1881) 8 R. 555, 562, per Lord Young).

The difference is material, because a stipulation for pactional damages cannot be modified by the Court but must be enforced according to its terms, whereas a penalty may be modified.

In Craig v. M'Beath ((1863) 1 M. 1020, 1024), Lord Benholme considered the case, which related to breach of contract of affreightment, as "an instructive example of the application of equity in the enforcement of legal rights. The adjection of a penalty to a bond may be considered in two points of view .... In one view it is a punishment to be inflicted on the violator of the obligation. In the other view it is damages assessed and agreed to by the parties in a certain event; and in this view it is no punishment. Where it is truly penal - where the parties have not had in view a mere statement of liquidated damages - the penalty is to be modified and reduced to the amount of the damage actually sustained .... I think it is the right of the pursuer to bring his action for the penalty without alleging the amount of damage, and without anticipating that it may be subject to modi-

"fication. It is for the defender to set out his equitable plea for modification." The Lord Justice-Clerk (Inglis) said: "properly speaking a penalty is a punishment, and nothing can be clearer than this, that parties are not entitled to make punishment the subject of agreement", and, after holding that the sum in question was in no proportion to the damage and was accordingly not liquidate damages but an acknowledgment that a money payment should be made to the extent of the damage caused by the breach of contract, he goes on to say that the true question is whether the penalty should be reduced "in an equitable point of view. That would be done in the exercise of the equitable jurisdiction of the Court ...."

The precise words used may however be of importance particularly when the phrase "by and attour performance" is added (Dingwall v. Burnett, 1912 S.C. 1097); but apart from that the Court will consider whether the sum specified has a reasonable relation to the loss likely to be sustained, and whether one sum is payable for one or more or all of the breaches of contract though the consequences may be different (see Lord Watson in Elphinstone v. Monkland Iron Co. ((1886) 13 R (H.L.) 98, 106) and Lord Dunedin in Dunlop Tyre Co. v. New Garage Co. (1915 A.C.79)). Exorbitancy in general points to penalty. The modern view is that while a clause held to be a penalty is not enforceable by either party, it is not to be considered, as was formerly the rule, a limit beyond which no damages

could be recovered even though loss in excess be proved. But this former view has now been disapproved and the penalty sum will not limit the defender's liability (Dingwall v. Burnett, 1912 S.C. 1097); and it is always, it is conceived, subject to equitable modification, if the pursuer cannot prove damages comparable with the magnitude of the penalty. If the clause is upheld as liquidate damages, proof of actual damage is incompetent (Clydebank, supra).

The equitable function of the Court, then, consists in determining whether the clause in question is reasonable independently of its name, and secondly, if it is held to be a penalty, in modifying that penalty to a sum equitable in the circumstances. So far back as 1664 (Brown v. Wilson, Gil. and Falc. 87) it was pleaded that an exorbitant penalty in all justice and reason should have been restricted.

Penalties and Forfeitures in English Equity

It may be instructive lastly to look at the English equitable rules relating to penalties and forfeitures, as the equitable substratum of the modern law does not differ materially in the two countries though the working out of the rules does. "The attitude of equity towards penalty clauses is that wherever the clause is inserted merely to secure the performance of some act or the enjoyment of some benefit, the performance of the act or the enjoyment

"of the benefit is the substantial intent of the instrument and the penalty is only accessory." (Snell, Equity, 372, quoting Sloman v. Walter, (1784) 1 Bro. C.C. 418; 2 Wh. and Tu. L.C. 221). The rules laid down for distinguishing penalties from liquidate damages are not peculiar to either country (Snell, 374, founded principally on Lord Dunedin in Dunlop Tyre Co. v. New Garage and Motor Co. /1915/ A.C. 79, 86). To the same effect is Story's explanation of the principle (§ 1314). "In every such case", he says, "the true test by which to ascertain whether relief can or cannot be had in equity is, to consider whether the parties have agreed to treat the sum mentioned as a complete satisfaction for the breach; if they have, courts of equity will refuse their peculiar remedies. If it is to secure the performance of some collateral act or undertaking, then courts of equity will grant relief, on the defendant paying the damages which, to the court, seem to meet the necessity of the case"; and again (§ 1316), "The true foundation of the relief in equity is, that, as the penalty is designed as a mere security, if the party obtains his money, or his damages, he gets all that he expected, and all that, in justice, he is entitled to." .... "In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he

"omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party." "It is not improbable that courts of equity adopted this doctrine of relief, in cases of penalties and forfeitures, from the Roman law, where it is found regularly unfolded, and sustained upon the clear principles of natural justice" (§ 1317), and the learned author expounds further at considerable length the largely equitable basis of the relief the Courts will grant in such cases, and such general statements of principle are conceived to be fully applicable to Scots Law too, and were indeed adopted by Lord Barcaple in Forrest and Boyd v. Henderson ((1869) 8 M. 187, 190). In modern law the attitude of English and Scottish courts to clauses providing for penalties or liquidate damages is practically identical.

Penalty Clauses in Bonds

A similar equitable influence is found at work in modifying penalty clauses in bonds and money obligations. The ordinary Scottish form of personal bond provides for repayment of the sum lent "with a fifth part more of liquidate penalty in case of failure", but as Bell says (Comm. I, 700), in the event of failure "it would be unjust to permit the creditor to reap so exorbitant an advantage as the recovery of the whole penalty." .....

"In England a remedy is to be had in equity, and with us, the Court of Session, as the supreme court of law and equity, has the power of mitigation." So since the case of Home v. Hepburn in 1550 (Mor. 10033. Cf. Semple v. Semple, (1622) Mor. 10033) it has been held that such conventional penalties were no further exigible than the amount of the real damage sustained and interest, and this practice has the approbation of Stair (IV, 3,2) as a manifestation of the nobile officium. In Paisley v. Buchanan ((1507), Balfour, 97) a penalty clause in a marriage contract was sustained.

It seems probable that the first intervention of equity in England as to relief from penalties was in the case of the money bond where the object was merely to secure repayment of principal and interest (Snell, 372). In Scotland too the practice of modification of exorbitant penalties has been ascribed to equity in many cases (e.g., Allan v. Young, (1757), Mor. 10047; Macadam v. Campbell's Creditors, (1787), Mor. 10051). In Henderson v. Maxwell in 1802 (M. 10054) Kames's Equity (p. 378 et seq.) was cited to the Courts in support of the practice. Kames (p. 46) compares the penalty in a bond to the Roman lex commissoria in pignoribus, forbidden by Constantine (Buckland, Textbook, 477), and says that "as it is a hard and rigorous condition, a court of equity will interpose to give relief." Later (p. 378) he discusses the whole question, laying down that the penalty is a modification

or liquidation of the damage the creditor may suffer by delay in payment and hence equity will not interpose if the penal sum corresponds to the damage that may ensue from the delay. Kames cites for comparison the case of the English double-bond, which was an obligation to pay double the sum in the debt if repayment were not made at the due date (Bell, Com. I, 352), and which was wont to be modified in equity. So too in Scotland a penalty is in equity restricted on performance to the damage sustained.

Chapter VII
Constructive Fraud and Fiduciary Relationships

I - Constructive Fraud

"By constructive frauds are meant such acts or contracts as, although not originating in any evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud and therefore are prohibited by law, as within the same reason and mischief as acts and contracts done malo animo" (Story, § 258). The cases which fall under this head are principally so treated because they are contrary to some general public policy, while others grow out of some special confidential or fiduciary relation between the parties which is watched with special solicitude by the law. The rule of equity which frowns upon a man, who fills a position of a fiduciary character, taking a benefit from the person towards whom he stands in such a relation, rests upon a motive of general public policy, irrespective of the particular circumstances of the case. The rule is founded on considerations as to the difficulty which must, from the condition of the parties, generally exist of obtaining positive evidence as to the fairness of transactions which are peculiarly open to fraud and undue

influence. The policy of the rule is to shut the door against temptation. (Kerr on Fraud and Mistake, 4th edn, 146.)

The considerations which prompted the Court of Chancery to scrutinise so closely transactions falling within those categories have impelled the Court of Session, as a court of equity, in the same direction though not in every case nor always to the same effect. In the Chancery, transactions contrary to the policy of the law, such as marriage brokage contracts and contracts in restraint of trade, fell under this head, whereas in Scotland they are classed as pacta illicita (Snell, 465). The main similarity is in the class of cases which constitute an abuse of a fiduciary relation. But even here the Chancery view tends more strongly to the protection of the presumptively weak by recognising a presumption of undue influence in these cases which must be rebutted to sustain the contract, and despite some attempts to acclimatise this doctrine in Scotland (Ewen v. Mags. of Montrose, (1830) 4 W. and Sh. 346; Tennent v. Tennent's Trs., (1870) 8 M. (H.L.) 10; Smith Cunninghame v. Anstruther's Trs., (1872) 10 M. (H.L.) 39), it has not generally been taken to that length. (Morrison's Dictionary has however a section entitled "Undue Influence" (p. 4932), and the presumption was accepted in Gray v. Binny, (1880) 7 R. 332; Carmichael v. Baird, (1899) 6 S.L.T. 369). "The doctrine of undue influence 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 mind of the person protected is not coerced, still less is it mentally impaired. The facility of Scots law, on the other hand, implies that there has been a weakening of the faculties on account of illness, old age, intoxication, or some such cause. There must be general debility of mind and .... it must also be shown that his consent was improperly obtained by fraud or circumvention." (Winder, 56 L.Q.R. 97, 99.) Moreover English equity uses the phrase "undue influence" in two senses; in certain cases of relationships where one party may be influenced to act against his interest, undue influence is presumed. In the case of wills, however, undue influence requires coercion similar to the Scottish facility and circumvention, which applies to wills and agreements alike. (Parfitt v. Lawless, (1872) L.R.2 P. and D. 462, 469. Non-appreciation of this leads to confusion in Ross v. Gosselin's Exors., 1926 S.C. 325.)

Facility and Circumvention

As distinct from actual fraud, facility and circumvention may in Scotland found a reduction of a contract or will. In the institutional texts Stair (I,9,9; cf. Ersk.IV,1,27; Bell, Pr. § 13) does not distinguish it

from fraud. It has been called "legal or constructive fraud" (M'Kellar v. M'Kellar, (1861) 24 D.143) or "a course of deception which is fraud in grain, but not fraud perpetrated by a single specific act" (Love v. Marshall, (1870) 9 M. 291, 297). It is not necessary to prove specific acts of deception to establish a case of circumvention but the party alleged to have been misled must have been in a state of facility due to illness or old age, and the contract or agreement must have been obtained improperly by taking advantage of that weakness. On proof that the deed has been thus unfairly obtained it is reducible; in Alison v. Bothwell in 1696 (Mor., 4954) rectification was permitted without reduction, but the competency of the actio quanti minoris has subsequently been doubted (M'Kirdy v. Anstruther, (1839) 1 D. 855).

Where the parties stand in a fiduciary relationship to one another the contract is subject to particular scrutiny and the plea of undue influence may lead to reduction. The theory of undue influence, as of all equitable fraud, is that when one person stands in such a relation to another, it behoves him to maintain a high standard of behaviour, or lose the countenance of equity which will facilitate the reduction and revocation by the other of any benefit conferred by him on the former party (Hanbury, 713). The admission of intimidation into the issue of facility and circumvention shows that

the Scottish rule does not suffer from the undue rigidity of strictum ius (M'Dougal v. M'Dougal's Trs., 1931 S.C. 102). As compared with English equity however Scots law demands positive actings to obtain consent improperly. English equity will protect from innocent bias. The relationships in which this form of equitable fraud may usually be perpetrated are in the cases of persons standing in a fiduciary or quasi-fiduciary relation to others, for example, solicitor and client, parent and child, guardian and ward, and trustee and beneficiaries.

In M'Kirdy v. Anstruther ((1839) 1 D. 855), which was a sale by an heir-substitute of entail of a contingent reversionary liferent interest in part of the entailed estates and was held valid in the circumstances, both parties relied largely on English Equity, citing Select Cases in Chancery, Brown's Chancery Cases, and cases from Vernon, Vesey and others, as well as Kames's Equity. Lord Gillies said there (p. 863): "A sale is never set aside on the mere ground that the price has been inadequate. There must be a combination of the elements of facility, lesion and circumvention, to render a sale reducible. .... Lesion of itself affords no ground for reduction." Lord Mackenzie (p. 866), in rejecting the doctrine that a contract super haereditate viventis was avoided by an inadequacy of price, remarked that "the doctrine is not admitted in Scotland; and it certainly

"does not seem to rest upon any such principle of natural equity as that it ought to be introduced into every system of jurisprudence." In Mackie v. Maxwell (1752, Mor. 4963) a disposition was reduced though there was no fraud or circumvention proved, and it is not clear on what ground the Court truly proceeded.

Force and Fear

It does not appear ever to have been in doubt in Scotland that an obligation or contract induced by threats of injury by one party, or by the reasonable apprehension of it from the other, is void by the law of Scotland. The civil law was to this effect (Dig.iv,2; Code,ii,20), so was the canon law (Van Espen,I,592). Stair affirms it (I,9,8); Erskine explains (Ersk.,III,1,16) that violence or menace of violence excludes consent, while Bell (Pr. § 12; Com.,I,314) takes the view that force and fear annul engagement. The principle is exemplified in many cases (see cases in Mor. s.v. Vis et Metus pp. 16479 et seq.) but there is no noticeable tendency to ascribe this ground of reduction to equity, or to found it on a presumption of undue influence. It is a common law ground for avoiding a contract and was admitted in Roman law (Buckland, Textbook, 416). Kames, while dealing with kindred matters, does not treat force and fear separately. It is as much common law as equity in Scotland.

Extortion

Even in a case where no fiduciary relationship between the parties exists to impose a duty on either, nor where there is improper practice, nor yet defective legal capacity, it is conceived that a grant from one person to another, being not designed as a gift, may be so inequitable in terms as to justify reduction (Gloag, 492). Stair (Inst. I,10,15), proceeding on the narrative that promises and contracts are morally binding, says that if a party "hath disadvantage by fraud or guile, it ought to be repaired ", and he instances the reduction of a sale, or its adjustment on equitable terms, if the seller has withheld the article to cause a dearth, or if the buyer takes advantage of the ignorance and simplicity of the seller, it is at least against honesty and charity. In Young v. Gordon ((1896) 23 R. 419, followed in Gordon v. Stephen, (1902) 9 S.L.T. 397) an extortionate transaction by a moneylender was characterised by the Lord Justice-Clerk (Macdonald) as "most unconscionable and a most disgraceful transaction altogether", and the Court suspended a charge on certain promissory notes. Equity was not expressly founded on but there can be no doubt in view of the expressions of the judges that that was their justification. Lord Westbury in Tennent v. Tennent's Trs. ((1870) 8 M.(H.L.) 10) commented on inadequacy of con-

sideration and viewed the transaction in that case as extremely unfair. Yet the Court were unable to find grounds for reducing the agreement whereby the pursuer had relinquished his share in a partnership, though the view was expressed that inadequacy might be such as to be proof of fraud. And Lord Gillies in M'Kirdy v. Anstruther ((1839) 1 D. 855, 863) said that a sale is never set aside on the mere ground that the price is inadequate. There is ample authority for the proposition that parties sui iuris and free of any fiduciary relationship are bound by their bargains whether they are fair or not, and it is only very exceptionally that the Court will interfere solely on the ground of gross unfairness (A.B. v. Joel, (1849) 12 D.188; M'Lachlan v. Watson, (1874) 11 S.L.R. 549); and objection has been taken to the use of the word "inequitable" with reference to a contract between parties standing on equal terms (Caledonian Ry v. N.B. Ry, (1881) 8 R.(H.L.) 23, 31, per Lord Blackburn). Hence unfairness is not per se a ground of general equitable interference. Kames says (p. 45) that "every benefit taken indirectly by a creditor, for the granting of which no impulsive cause appears but the money lent will be voided as extorted", and despite the authority he cites it is conceived that this is too broadly expressed.

Bargains with Expectant Heirs

In England a bargain with a person who hopes to receive a benefit under the will or intestacy of a person still alive will be set aside in equity unless the purchaser can show that a fair market price was paid (Perfect v. Lane, (1861) 3 De G.F. and J. 369), and even the knowledge and consent of the living relative on whose death the expectancy depends will not validate the transaction (Savery v. King, (1856) 5 H.L.Cas.627), though it may tend to rebut the presumption of oppression and extortion (O'Rorke v. Bolingbroke, (1877) 2 App.Cas.814).

Erskine (III,1,16) was of the same opinion, but in M'Kirdy v. Anstruther ((1839) 1 D.855) the Court held that there was no authority for the extension of the English principle (which was fully canvassed) to Scotland, on the basis that lesion without facility and circumvention was no adequate ground for reduction of the agreement. So too Kames (p.53) says that such bargains are "not always set aside in equity". This head of undue influence is not then acknowledged in Scots law, and circumvention must be proved (cf. Ballantyne v. Neilson,(1682), Mor. 4891; Hume, Lect. II,26).

Similar considerations apply to what are known in England as post-obit bonds, when equity was wont to give relief on payment of principal and the interest to which

the lender was ex aequo et bono entitled (Chesterfield v. Janssen, (1750) 1 Atk. 301). This principle was applied in Scotland too where the sum repayable was similarly restricted (Abercromby v. Peterborough, (1745), Mor. 4894; Kames, p. 55).

Transactions with Moneylenders

In such cases the Court has statutory power to intervene, when, inter alia, "the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief" (Moneylenders Act, 1900, s. 1 (3)). In spite of the fact that in its application to Scotland, the last clause is to be omitted, the powers of the courts in each country are virtually the same, but Lord M'Laren has expressed the view that there must be "some want of fairness in the transaction for which /the moneylender/ may justly be held responsible" before a loan comes within the purview of the Act (Midland Discount Co. v. Macdonald, 1909 S.C. 477, 484), so that the Scottish attitude to such bargains may well be less indulgent than that of English equity.

II - Abuse of Fiduciary Relationship

A very important head of constructive fraud is that involving the abuse of relationship when one of the parties stands in a fiduciary relation to another, such as parent and child, solicitor and client and so on. In England such transactions will be set aside if not entered into with scrupulous good faith and the onus is on the party claiming the benefit (Vinter, 223). The interposition of equity occurs to prevent the result of the influence from benefiting the party who wields it, even though that influence is beneficent. Hence equity will intervene in England where it will not in Scotland, where such a contract is reducible only if it is proved that material facts were concealed, or the result has been that a gratuitous advantage has been obtained by the use of the influence. Thus the English presumption of undue influence in such cases is only represented in Scotland by a strict scrutiny of the transaction against possible unfairness (English cases collected in Vinter, 17 et seq.)

In Ewen v. Magistrates of Montrose ((1830) 4 W. and Sh. 346), a case of parental influence, Lord Wynford said that "the Court of Session, and your Lordships reviewing the decisions of the Court of Session, are Courts of Equity" and, acting on the assumption that English and Scottish equity were identical, gave "undue influence" as

a ground for allowing the appeal. Yet repeatedly, despite relationship and detriment to the child, contracts between parent and child have been sustained in Scotland (Tennent v. Tennent's Trs., (1870) 8 M.(H.L.) 10; Menzies v. Menzies, (1893) 20 R.(H.L.) 108), though odd dicta favour the adoption of the English equity rule (e.g. Lord Ardmillan in Tennent, supra, at 6 M. 866. See too Smith Cunninghame v. Anstruther's Trs., (1872) 10 M.(H.L.) 39,47). But in Gray v. Binny ((1879) 7 R.332) the English equity doctrine of undue influence was substantially accepted though there was some concealment of material facts. The Lord Ordinary's judgment, based on English decisions and particularly on Huguenin v. Baseley ((1807) 14 Ves. 273 (L.Ch.Eldon)), was affirmed. Lord Shand said that Scots law would be "lamentably defective" if it did not include the English rules based on "reason and justice", but Lord Deas's dissent is more consonant with the previous trend of Scottish authority. It is conceived that the true position in Scotland is that the presumption of undue influence is not accepted, but influence flowing from relationship, reliance on parental protection, absence of independent advice and lesion render the onus of justifying reduction lighter, so that any concealment or misrepresentation will justify intervention by the Court.

Similar conditions apply where the influence springs from position rather than relationship, as in the cases of clergymen, doctors, nurses, relatives or guardians. In such cases the laws of Scotland and of England appear roughly to agree (Snell, 469; Gloag, 528). Both have taken their basic principles from the Roman law (Vinter, 4-5). Scots law does not, however, apply the English presumption of undue influence in all the cases English law does.

Solicitors

The fiduciary relationship also exists between a solicitor and his client and extends beyond the professional relationship to any case where the solicitor deals with his client ostensibly as an independent party. The fundamental idea is not undue influence, but abuse of confidence. So the purchase of property from the client without disclosure that he is in fact the purchaser himself renders the contract voidable (Macpherson's Trs. v. Watt, (1877) 4 R.601, revd. (1877) 5 R.(H.L.) 9, where the law of Scotland was said to be largely founded on English decisions). In Aitken v. Campbell's Trs (1909 S.C. 1217) Lord President Dunedin spoke of the "confidential relationship" which accordingly demanded that any transaction inter se "must be scrutinised in a way that a contract between two third parties would not be" (p. 1225)

and the test comes to be whether another law agent would have advised it "or if the proposition had been made by a third party, would this same law agent have advised it to his own client" (p. 1227). It does not follow that reduction will be made of a transaction because it turns out profitably for the agent, but it will be sustained by the Court only if after due consideration, it appears to have been reasonable and fair when entered into. In the same way a gift to an agent by the client is always revocable and a bequest to the agent who draws up the will is looked upon with disfavour. The opportunities for undue influence and inequitable dealing in such cases are sufficiently obvious to justify a court of equity in scrutinising and if necessary rescinding contracts and obligations deemed offensive to the conscientious discharge of the duties of legal adviser. In these cases the abuse of confidence is the central notion. Similarly in England a solicitor must show uberrima fides in bargains with clients, and a gift to a solicitor cannot stand, unless under independent advice and if the inference can be drawn that the influence due to the relationship no longer exists (Wright v. Carter, [1903] 1 Ch. 27). In Scotland a gift to a solicitor is always revocable, though not ipso facto void. Hence it appears again that English equitable protection for the weaker party is more extensive than

Scottish. In the case of gifts the presumption of undue influence applies in England and it has been applied in Scotland too (Anstruther v. Wilkie, (1855) 18 D.405; Logan's Trs. v. Reid, (1885) 12 R.1094). It would appear that only in this case and the case of parent and child is the English presumption of undue influence generally accepted in Scotland. In other cases the Scots law does not go so far as a presumption but requires proof (Winder, 56 L.Q.R. 105).

Trustees

The disabilities of a trustee with regard to transactions with the trust estate or with the beneficiaries thereunder proceed on the general principle of preventing a conflict of interest between the fiduciary duties and the trustee's personal interests. These rules have suffered an equitable extension to other circumstances where a person's dual interests might conflict and they have been applied to a judicial factor, to trustees and commissioners in bankruptcy, to a trustee for creditors, to the common agent in a judicial sale, to the director of a company and, in some respects, to partners, agents, and company-promoters, who are all in a position analogous to trustees.

Transactions between trustee and trust estate are voidable though not illegal, even though the transaction is perfectly fair and no advantage has been taken. But

the principle of preventing conflicts of interest vitiates such transactions all the same (Aberdeen Ry. v. Blaikie, (1854) 1 Macq. 461, 471, per L. Ch. Cranworth). It extends too to the trustee's firm, and may even extend to the period after the trustee's resignation.

These rules are not applicable with the same stringency to transactions between trustee and beneficiary, and for reduction it is necessary to show that the bargain was unfair or that there was non-disclosure of material facts. But a Court of equity will scrutinise such transactions and the onus of proving fairness is on the trustee (Thomson v. Eastwood, (1877) 2 App. Cas. 215, per L. Ch. Cairns; followed in Dougan v. Macpherson, (1902) 4 F.(H.L.) 7). These rules correspond closely to similar doctrines firmly established in English equity, which are similarly applicable to the extended class of persons whose position is equated to that of trustees. It has indeed been pointed out that there is no distinction in such questions between the laws of the two countries (Dougan v. Macpherson, supra).

Company Directors

A director is regarded as to some extent a trustee for the company and in some cases his position is equated to that of trustee, though his office is fundamentally lucrative and a business rather than gratuitous. But he

is also in other senses an agent of the company.

In 1742 Lord Chancellor Hardwicke found that directors of a chartered corporation who had misapplied its funds were liable for "breach of trust" (Charitable Corporation v. Sutton, (1742) 2 Atk. 400), and in 1853 Lord Romilly, M.R., described directorship as "an office of trust" (York and North Midland Ry. Coy. v. Hudson, (1853) 16 Beav. 485), while Lord Chancellor Cairns held directors liable in a Chancery action as "being in the position of trustees" (Ferguson v. Wilson, (1886) L.R. 2 Ch. App. 77, 90. For further examples, see Palmer on Companies, 165. See also Jacobus Maler Estates v. Maler, 1916 L.J.P.C.167 per Lord Parker), and similar statements are made by many of the most distinguished Chancery judges.

For most purposes it is sufficient to say that directors occupy a fiduciary position. So a director contracting as an individual with his company cannot enforce the contracts even though no unfairness or concealment be alleged and his position well known. Lord Chancellor Cranworth in Aberdeen Ry. Coy. v. Blaikie ((1854) 1 MacQ. 461) pointed out the conflict of interest inherent in such a contract. "A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal.

"And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."; and he refers to York Buildings Co. v. Mackenzie ((1793), M. 13367; revd. (1795) 3 Paton 378) and to the similar principle in the Digest (Dig. xviii,1,34,7) forbidding a tutor or other manager to buy the ward's property; and finally to the fact that the rule was a mere equitable rule and that the whole question, equitable as well as legal, was before the Court of Session.

In Henderson v. Huntington Copper Co. ((1877) 4 R. 294; affd. (1877) 5 R.(H.L.) 1, at 7 per Lord O'Hagan) Lord O'Hagan said: "The principle is very clear that a man cannot traffic on his trust - he cannot make a commodity of that which he holds for the good of others; and it is a clear principle of law that a trustee or a director of a company cannot for himself and for his own benefit do work for that company which he can employ anybody else to do. The reason of the principle is clear, viz., that the law will not permit a man to enter into an arrangement which will cause a conflict between his duty and his interest."

In Harris v. Harris (1936 S.C. 183, 202) an action for the reduction of a company resolution, Lord Murray said: "An action at the instance of a minority of shareholders against a majority vote is an appeal exclusively to the equitable jurisdiction of the Court, albeit with us common law and equity are fused and administered by one and the same court. .... The common law can deal with cases of illegality or of actual fraud; for actual fraud is a wrong, and the common law provides a remedy for fraud, but that remedy is truly an action of damages directed against the wrongdoer. It is in England an action of deceit. But the true basis of all such actions as the present is some breach of fiduciary duty .... Actual fraud is, in short, only an extreme case of some abuse of power or breach of a fiduciary duty"; and he quotes at length from Lord Haldane's speech in Noctan v. Ashburton (/1914/ A.C.932. Cf. Lord Dunedin at p. 963) where he said: "In Chancery the term 'fraud' thus came to be used to describe what fell short of deceit, but imported a breach of a duty to which equity had attached its sanction." He also cited Lord Chancellor Eldon.

Company Promoters

While a promoter is not an agent, nor yet properly a trustee for the unborn company, and the language of trust law is only remotely applicable (Edinburgh Northern Tramways v. Mann, (1896) 23 R.1056,1066, per Lord M'Laren), he

undoubtedly stands in a fiduciary position (Erlanger v. New Sombrero Phosphate Co., (1878) 3 App.Cas. 1218, 1236 per Ld. Ch. Cairns. So too Lord Blackburn), and hence may not make, directly or indirectly, any profit at the expense of the company he promotes without its knowledge and consent, and must account for any he does make in defiance of this rule (Mann v. Edinburgh Trams Co., (1893) A.C. 69, 20 R.(H.L.) 7).

On the other hand a promoter, unlike a pure trustee, may claim payment for services, and there is nothing illegal in the sale of property to the company by a promoter, provided he discloses all material facts, and that too not merely to the directors, who may be his nominees, but to the allottees of the shares in the company (Erlanger, supra). Moreover the disclosure required is a full and fair one not concealing or minimising in any particular, and if the promoter should fail in these obligations, the sale may be reduced at the instance of the company (Gluckstein v. Barnes, /1900/ A.C.240).

In Edinburgh Northern Tramways v. Mann ((1896) 23 R. 1056, 1066) Lord Kincairney and Lord M'Laren likened the position of a promoter to that of a trustee, and the former agreed with Lord Mure's opinion in Huntington Copper Coy. v. Henderson ((1877) 4 R. 294, 306). In this case the Lord Ordinary (Young) expressed the rule, in a way which was quoted with approval by ~~the~~ Lord President

Inglis (308), as follows:- "Whenever it can be shewn that a trustee has so arranged matters as to obtain an advantage, whether in money or money's worth, to himself personally through the execution of his trust, he will not be permitted to retain it, but be compelled to make it over to his constituent."

Partnership

It is a principle of law of ancient lineage that the relations of partners are fiduciary in the highest degree, and in consequence a partner must disclose all material facts when dealing with a co-partner, and he may not make a secret profit out of his transactions. In Justinian's Code we find the phrase, "In societatis contractibus fides exuberet" (Code, IV,37,3). "The law expects and requires that the conduct of the partners towards each other shall be characterised by the most scrupulous good faith, that they shall zealously act and co-operate for the common good, and that they shall not place their individual interests before those of the company." (Clark on Partnership, I, 182). These principles were early recognised in Scotland. Erskine says that equality is the great characteristic of partnership (Ersk., III,3,19): this is reminiscent on the one hand of the maxim of equity that equality is equity, and of the rule of the Partnership Act, 1890, s. 24, that partners' shares are equal in the

absence of agreement. Erskine continues by saying (III,3,20) that "it arises from the good faith implied in partnership, that a partner, when he purchases even with his own money, or at his own expense, a right which is naturally connected with, or falls under the copartnery, is, like a tutor with respect to his pupil, presumed to purchase, not for himself but for the company". He further reprobates leonine partnerships, where a party is liable for outlays without a chance to share in the profits, as being "irreconcilable to equity" (III,3,19). The obligation on a partner to communicate any profit made by him in the firm's business was affirmed by the Court in 1624 in the case of Inglis v. Austine (Mor. 14562) wherein the contract of partnership was described as contractus bonae fidei. Similarly Voet's definition is (Comm. ad Pand., xvii, 2, Pro Socio, § 1), Societas est contractus iurisgentium, bonae fidei, consensu constans, semper re honesta, de lucri et damni communione.

The rules relating to Partnership codified in the Partnership Act of 1890 represent substantially the previously existing equitable rules on the matter.

Partners are treated in law as agents for the firm in regard to their dealings with third parties and consequently the equitable rules applicable to agents apply to partners also (Pollock on Partnership, 95. Story on Agency, § 210-1). Moreover, in consequence of the

exuberant trust reposed in partners, by virtue of which they are regarded as trustees of the partnership property for the benefit and uses of the partnership, they cannot employ that property for their own private advantage (Gardner v. M'Cutcheon, 4 Beav. 534). Nor may a partner utilise the influence he enjoys by being a member of his firm to secure advantage for himself which he should in conscience have obtained for his firm (Russel v.Anstwick 1 Sim. 52). The provisions of s. 29 of the Partnership Act, 1890, now cover substantially this field of law and the principles have been illustrated by many decisions decided both on the equitable rules and on their codified expression. In Thomson v. Campbell's Trs ((1831) W and Sh. 16, 25), a case of partnership, Lord Chancellor Brougham said that there appears to be no distinction in principle between Scots and English cases in such matters and that deference is due to the authority of English Courts, whether of common law or of equity; and he made much reference to English equity practice in the matter before the Court.

Agents

The fiduciary position of an agent was authoritatively expressed by Story (Agency, § 211) as follows:- "In all cases where a person is either actually or constructively an agent for other persons, all profits or advantages made by him in the business, beyond his ordinary

"remuneration, are to be for the benefit of the employer." In Neilson v. Skinner ((1890) 17 R. 1243, 1251), Lord Young approved this passage and agreed that the rule was not confined to cases where the relation of agent and principal, or of trustee and beneficiary, or, cestuique (sic) trust, is formally and technically established.

The justification of such an equitable rule is once again that the law will not permit an agent as such to enter into any transaction where his personal interest may conflict with his duties to his principal, unless the principal, in full knowledge, consent. In Neilson, supra, the Lord Justice-Clerk (Macdonald) stressed the necessity for guarding against abuses in the giving of commissions to agents, when the latter are joint adventurers with the principals in giving out the contract. "Therefore", he said "in ordinary circumstances any such commission must in equity be dealt with as a discount given by the contractor upon price, and whoever receives it is bound to share it with those who along with him have entered into the contract to which it relates. Any other principle would not only be inequitable in itself, but would be a premium upon underhand and fraudulent dealing."

On the same principle of equity is based the reprobation of secret commissions, the retention of which is strictly forbidden by the law. Moreover, should such a commission be shown to have been received by the agent from a third party, the principal has not only the

equitable remedy of rescission of the contract (Henderson v. Huntington Copper Coy., (1877) 4 R. 294, 301 per Lord Young; affd. 5 R.(H.L.) 1. Bowstead on Agency, p. 112), but he may recover the amount of the commission from the agent.

In the same way and on the same principle an agent may not utilise his position and any information he derives from it to obtain for himself any profit which he should in equity have made for his principal (Graham v. Paton, 1917 S.C. 203; De Bussche v. Alt, /1878/ 8 Ch.D. 286). So too though a solicitor may purchase his principal's property, he must disclose his personal interest; otherwise the transaction is reducible, fair or not, and must show that the transaction was fair, though possibly the standard demanded of a mercantile agent is not so high.

Moreover an agent may not transact with his principal as an individual if he is employed to bring the principal into contractual relations with third parties. Such a transaction is reducible as being a breach of the duties of an agent, and also on the ground of conflict of interest (Bentley v. Craven, (1853) 18 Beav. 75).

Uneducated Persons

It is an old rule of the Chancery that the contracts and bargains of an improvident character made by poor and ignorant persons acting without independent advice will be set aside in equity unless the other party discharges the

onus incumbent on him to show that the transaction is fair and reasonable (How v. Weldon, (1752) 2 Ves. Sen. 516; Fry v. Lane, (1888) 40 Ch. D. 322). But in Scotland there is probably no rule that a man is bound to act in a quasi-fiduciary position and disclose all material facts when dealing with a person who has not the advantages of education, experience or advice (Gloag, 529). The duty of the Courts seems to be no more than to bear in mind the health, inexperience and lack of advice of the pursuer and to watch carefully for misrepresentation or positive sharp practice, so that the Scottish attitude to these cases has not gone nearly so far as the English in seeking to protect the weak. On the other hand the Court has frequently shown favour to a pursuer in such cases as a workman seeking to reduce a discharge of claims to compensation for inadequate consideration.

III - Reduction for Minority and Lesion

Very early law seems to have made little provision for the fact that persons under age could not manage business affairs unaided without detriment to themselves. Provision for tutela impuberum appears in the Twelve Tables but it was only later that attention was given to the interest of the ward rather than to the protection of the property. Systematic protection of minors was

negligible at Rome until the period of the classical law when the praetor introduced the machinery of restitutio in integrum (Paul, 1.7.2. In Scotland see Barnbugil v. Hamilton, 1567, Mor. 8915). He thereby permitted transactions to be set aside by minors if it were shown, not only that they were bad bargains, or fraudulent, but such as the minor would not have made but for his inexperience. The praetor moreover retained a discretion in the matter. A curator might be appointed who served till the minor reached twenty-five. The minor could still act without the curator and whether he did or not, there existed the right of restitution, though this was probably more difficult to obtain if the curator had consented to the transaction (Buckland, Manual, 105).

The law of Scotland with regard to minors is founded on and closely resembles that of Rome (Ersk., I,7,34; Fraser on P. and Ch., 498 et seq., and references there). The minor may claim to have transactions set aside and restoration effected on proof that it was to his lesion, at any time within the quadriennium utile - four years from attaining majority, provided the consideration received by him is immoderately disproportionate to what he might have received (Gloag, 84 et seq.). Scots law seems to have founded on this Roman equitable provision for protection of the young and inexperienced at a very early date, as the doctrine is stated in all the institutional writers

(Stair, I,6,44; Ersk., I,7,34; Bell, Pr. § 2098; Balfour, Pr. 179; Bankton, I,7,77; Dirleton and Stewart, 289; Hope, Major Pr. IV,9,10; Hume, Lectt.,I,295), and numerous cases are collected in the older reports (Mor. 8978 et seq.; Creech v. Walker, 1624, Spottiswoode's Pr.211). Kames states the law as being that a reduction upon the head of minority and lesion, unknown in the common law, is an action sustained by a court of equity for setting aside any unequal transaction done during nonage (p.67), and he describes it generally as being among the powers of a court of equity to remedy the imperfection of common law, protecting the weak of mind from harming themselves by unequal bargains and irrational deeds.

In England on the other hand, an infant's contracts are at common law voidable at his option, to be exercised before or within a reasonable time of attaining majority; exceptionally they are void (Pollock, Contracts, 13th edn., 48). Hence equity need not be specially called in to give relief. The greater contractual power permitted in Scotland to minors renders provision for their protection essential and this was naturally found in the Roman law rules on the matter.

Equitable Basis of the Reduction

It is probable that no general rule can be laid down to determine whether or not any given transaction constitutes lesion; it will always remain a question of fact

having regard to the circumstances of the case. The rule of the Roman lawyers was "Ubi aequitas evidens poscit, subveniendum est" (Dig. iv,1,7), and this reveals the justification for the remedy as well as supplying a general rule for the application of the remedy.

It is further apparently the law on the basis of the equitable maxim that he who seeks equity must give equity, that a minor is barred from claiming restitution if he has fraudulently induced another person to contract with him or has been guilty of fraud after a fair contract has been entered into (Fraser, P. and C. 527). Fraser further states that in the case where two minors contract and one of them seeks to be restored on the ground of minority and lesion, the law of Scotland has adopted the equitable rules of the Roman law (Bankton, I.7.92; Ersk.,I,7,40), and the plea will be open so far that the creditor cannot recover unless he show that the money lent was expended to the advantage of the debtor.

As in other manifestations of the principle of reduction, the general rule is that restitution must be mutual and the minor cannot expect to derive any profit from the reduction save ridding himself of a damaging transaction; he must make allowances for, say, improvements done to his property by the other party before the sale has been reduced (Fraser, 540, quoting Erskine,I,7,41, and Thomson v. Stevenson, M.8983. See Rose v. Rose, (1821) 1 S.154).

In Graham v. Graham (1780, Mor. 8934), it was argued that "wherever there is a suspicion of imposition on the minor, it is competent for the court ex officio to prevent undue influence, to sequestrate the person of the minor...."

IV - Cautionry

A cautionary obligation is a contract whereby one person binds himself to discharge the obligation undertaken by a second party in the event of that second party's default. (See Bell's Prin. § 245.) In Scots law, the principles of this, as of so many other branches of the law, are derived from the Roman law, the branch of fideiussio (Gloag and Irvine, 644, quoting Inst.iii,21; Dig.46.1; Code 8.41; Story, § 500 et seq.; Hewitson, 27, 130. Cf. Fountainhall, 1671, 2 B.S.565). The obligation is essentially an accessory one and an essential prerequisite is the existence of a lawful obligation by a principal debtor to a creditor (Dig. 46.1.16; Lakeman v. Mountstephen, 1874 L.R. 7 H.L. 17, 26, per Ld Ch. Selborne). Accordingly when the principal obligation comes to an end the cautioner's liability also ceases, as for example, when the debt is allowed to prescribe (Halyburtons v. Graham, 1735, M. 2073). This rule is however modified, again following the Roman law, to the extent of admitting as a sufficient foundation for a contract of cautionry the fact that the principal debtor is bound by a natural obligation, incumbent on him morally

though not legally exigible by process of law (Bell, Pr. § 251; Ersk.III,3,64; Dig.46.1.1; 46.1.8.6; 46.1.16.4. See also Nimmo v. Brown, 1700, Mor. 2076; Johnstoun v. Laird of Romano, 1680, Mor. 2076). In such a case a cautioner may be sued though the pursuer cannot enforce payment from the principal debtor. This goes rather beyond the law of England.

Cautionary obligations may expressly bear that some parties are cautioners and another principal, or ex facie all may equally appear co-obligants. But the Court will apply the equitable principle of having regard to the intent rather than the form to determine the matter (Paterson v. Bonar, (1844) 6 D. 987; Scottish Prov. Insce. Coy. v. Pringle, (1858) 20 D. 465). Furthermore it is well established that a cautioner has certain equitable rights. In the first place, a proper cautioner was entitled at common law to insist on the creditor calling upon or "discussing" the principal debtor first, unless this right had been dispensed with; this rule has however been abrogated by statute (Mercantile Law Amdt Act, 1856, s. 8). Secondly, any cautioner has always a right of relief or indemnification against the principal debtor to the full extent to which he has been made answerable for him, which rests partly on "an equitable right to require the creditor to communicate the full benefit of his contract and partly on an obligation ex

mandato of the principal, so that on making payment to the creditor in full, he is entitled to an assignation of the debt and diligence against the principal, and he now may proceed as principal creditor" (Bell, Pr.§ 255; Com.I, 369; Ersk.,III,3,61; Stair, I,17,4. Cf. Thow's Trs. v. Young, 1910 S.C. 588, 596 per L.P.Dunedin). Thirdly, a proper cautioner is entitled to the benefit of division and is liable only for his own proportion of any call paid on behalf of the principal debtor, and has a rateable claim for contribution by any co-cautioners on paying more than his share.

The second and third rights correspond respectively to the beneficium cedendarum actionum and the beneficium divisionis, two equitable rules of the Roman law (Bell, Pr. § 268; Ersk., III,5,11; and III,3,63 and 65). The first, now abolished, represented the Roman beneficium ordinis (Ersk.,III,3,61). The Scottish rules are obviously derived from the Roman models which they follow closely (Hewitson, 27, 130).

Story refers to the case of principal and surety as a striking illustration of what he calls constructive fraud (§ 324). "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the

"surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract. Upon the same ground, the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety (Smith v. Bank of Scotland, (1813) 1 Dow 272). If any stipulations therefore are made between the creditor and the debtor which are not communicated to the surety, and are inconsistent with the terms of his contract, or are prejudicial to his interests therein, they will operate as a virtual discharge of the surety from the obligation of his contract (Bonar v. Macdonald, (1850), 7 Bell, 379). And, on the other hand, if any stipulations for additional security or other advantages are obtained between the creditor and the debtor, the surety is entitled to the fullest benefit of them." Story then explains that any act inconsistent with the surety's rights or prejudicial to him will liberate him, such as giving time, and that a surety is entitled to relief from the debtor on making payment. These general principles of equity are equally applicable to Scotland as to England.

The rule of contribution between sureties he describes as "equally well founded in equity and morality" (§ 493). The entitlement to the benefit of all securities taken by any one of them to indemnify himself against liabilities is similarly equitable.

The Chancery jurisdiction in questions affecting sureties is long-established. The chief kinds of equitable relief consisted in: (i) setting aside the contract for fraud or misrepresentation; (ii) giving the surety a right to compel the principal debtor to pay; (iii) giving a surety who pays more complete remedies than were allowed at law; (iv) releasing the surety from liability in certain cases (Snell, 483).

The principle of contribution between sureties is equally known in Chancery Equity (Dering v. Earl of Winchelsea, (1787), 1 Cox 318: 2 W. and T.L.C. 488). In the leading English case (ibid.) it was held that the doctrine was founded not on contract but was the result of general equity, on the ground of equality of burden and benefit. Professor Winfield moreover describes it as establishing a head of quasi-contractual liability quite definitely detached from liability on contract (Prov. of Tort, 163). Story says (§ 493) that "the claim certainly has its foundation in the clearest principles of natural justice; for as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all upon the maxim Qui sentit commodum, sentire debet et onus. And the doctrine has an equal foundation in morals: since no one ought to profit by another man's loss where he has himself incurred a like responsibility ..... and the cred-

"itor is always bound in conscience though he is seldom bound by contract, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound"; and he goes on to remark that in the Roman law analogous principles existed though developed under different modifications (Story, § 494); and in the notes to that passage Bell and Erskine are cited as well as Domat, Pothier and the Digest. In effect the principles governing suretyship in England and cautionry in Scotland are practically identical (Bell, Com.I, 364. Grant v. Campbell, (1818), 6 Dow's App. 239, 252 per Ld Ch. Eldon) and the principle established in Dering v. Winchelsea ((1787) 1 Cox 318) has been recognised as equally a principle of Scots law (Stirling v. Forrester, (1825), 3 Bligh, 575, 590, 596, per Lord Redesdale: see also Thow's Tr. v. Young, 1910 S.C. 588; Union Bank v. Taylor, 1925 S.C. 835).

Cautioner's Right of Relief against Principal

While several persons, being bound as improper cautioners, are liable for the same debt, each is liable in solidum to the principal debtor, but is liable only for a proportionate share in a question with his co-debtors and has a right of relief against them if he should be made to pay more (Stair,I,8,9; Ersk.,III,3,74; Bell,Pr.§ 62). The rule is proportionate equality of burden: in Lord

Redesdale's words, this rule of equity depends "upon a principle of law which must be applicable to all countries, that where several persons are debtors, all shall be equal" (Stirling v. Forrester, (1821), 3 Bligh 575, 596: 1 Sh. App.77). But liability for relief does not extend where the payment has been made in satisfaction of a natural though not a legal obligation (Henderson v. Paul, (1867) 5 M. 628). This would appear to be explicable on the maxim that where equities are equal the law prevails.

But when parties, though all equally bound as regards the principal debtor, are inter se principal debtor and cautioners, the law, looking at the substance rather than the form, consequently allows the cautioners an equitable claim to total relief against their principal, just as if they had been bound expressly as principal and cautioners. The rule is then not equality of burden but total relief (Gloag, 206; Stair, I,17,4; Ersk.,III, 3,61; Bell, Pr.,245; Balfour, 192). In Paterson v. Bonar ((1844) 6 D. 987) it was decided that "a party is entitled to the equities of a cautioner wherever it appears clearly from the transaction set forth in the deed that he is such, though by subscribing as a principal obligant and the technical term cautioner not being used he has not the benefit of discussion and other legal privileges which are conferred on cautioners ...."

It is undoubted that when parties are bound jointly and severally, any one who has paid the whole debt or more than his pro rata share may recover from the rest payment of the excess over that share together with any expenses properly incurred. But no question of relief can arise if the obligation is for a definite sum and is fully exacted, as in that case no one has paid more than his share. If the amount is indefinite the right of relief certainly applies in England (Dering v. Lord Winchelsea, (1787), 1 Cox 318, 2 W. and T. L.C. 488; Ellesmere Brewery v. Cooper, [1896] 1 Q.B. 75). Each cautioner pays a share proportionate to the total for which he was liable and can recover the excess just as if the creditor had allocated the amount due equitably among the cautioners. The law in Scotland has been stated to the same effect (Bell, Com.,I,367; Brodie, Notes to Stair, 943) despite contrary authority (Lawrie v. Stewart, (1823) 2 Sh. 368). The right of contribution "is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it" (Dering, supra). "One substantial reason for it seems to lie in a feeling of natural equity in thus distributing the loss" (Hume, Lectt.II,218). "This equitable law of mutual relief has long been settled with us, and .... being mainly founded in equity the law of mutual relief is ruled throughout .... by considerations of the like equitable nature" (ibid.,219. Cf. Kames, 76).

Inter se cautioners have as well as a right to mutual relief for payments made in excess of their pro rata shares, a right to benefit by any security or relief which one of them may have obtained from the principal debtor (Ersk.,III,3,70; Bell,Com.I,367; Kames, 75). "It is equitable, seeing that there is an equality of the burden, that there shall be also an equality of the benefit" (Gloag and Irvine,819). So each cautioner must put into the common pool every security he holds so that the ultimate burden may be equally or proportionally distributed (Milligan v. Glen, 20 May, 1802 F.C. wherein Kames's Equity cited; Steel v. Dixon, (1881) 17 Ch.D.825).

But a cautioner need not thus throw into hotchpot if he had stipulated for the particular security and the other cautioners knew (Hamilton v. Freeth, (1889) 16 R. 1022,1027. Cf. in England, Berridge v. Berridge, (1890) 44 Ch.D.168). In Hamilton, Lord Rutherfurd Clark said: "The obligation to communicate the benefit of such a security does not arise from the deed by which the co-cautioners are bound which does nothing more than fix the proportions of the debt for which they are respectively liable. It depends on an equity to which the Court in the absence of agreement to the contrary will give effect", and Lord Lee said of the general principle: "This rule is founded on principles of equity which are too obvious to need explanation and implies that no-one

".... is entitled to obtain from the principal debtor and therefore to the prejudice of his co-obligants' rights of relief, a collateral security for himself alone."

A cautioner has a right to total relief against the principal debtor, whether the cautionry be proper or improper, to the full extent to which he has been made to answer for him (Davies v. Humphreys, (1840), 6 M. and W., 153 per Parke B.), and this right arises de iure without any formal assignation by the creditor (Ersk.,III,3,65; Snell, 487; Bell, Com.,I,367; Brodie, Note to Stair,943: But see Morgan v. Smart, (1872) 10 M.610: (no claim of relief where each bound for definite sum and full amount exacted)). Any payment is recoverable as having been made under an implied mandate by the principal debtor to pay, and if there be several cautioners, each has a claim, and if there are several principals the cautioner may recover all from any one (Pothier, Obligations, I,280 (tr. Evans)). Accordingly, following the Romah law, on making full payment, a cautioner is entitled to be substituted as creditor in the debt by way of assignation (Dig. 46.1.17 and 36). The cautioner is entitled also to recover from the debtor interest, as well as the expenses of the assignation of the creditor's security and the amount of any loss he may have sustained directly through the default of the principal.

Moreover, although the Scottish cautioner has not now the right to insist on the principal being discussed first, he may take steps to compel the debtor to fulfil his obligation and thereby avoid having to try to obtain relief only after himself paying the debt. The principle of equity on which this is founded is stated by Erskine as follows (Ersk.,III,3,65):-

"The Roman law, most equitably, allowed action for relief to the cautioner against the debtor, where the debtor shifted the payment of his debt from day to day for a considerable time together, especially if the cautioner's circumstances at the time disabled him to make payment of the debt himself, by which he might be entitled to a proper relief. Upon a similar ground of equity, the Court of Session admits adjudication to pass at the suit of cautioners in conditional obligations (unless these may be long pendent) without any previous distress, under this quality, that no execution shall be used on the decree till distress." So a cautioner can have security transferred before he is called on to pay, and may use precautionary diligence if the principal debtor is vergens ad inopiam. He may also exercise a right of retention over funds in his hands belonging to the principal debtor when the debt is due, but not if it be merely future or contingent.

As it is implied by law on principles of equity, relief applies also where the cautioners are bound at different times and by different deeds (Stirling v.Forrester, (1821) 3 Bligh 575; Duncan Fox and Co. v. North and South Wales Bank, (1880) 6 App.Cas. 1). "It is no doubt in general true", said Lord Kilkerran in Pollock v.Pollock ((1745) M.2125), "that the equity on which the relief among cautioners is founded (for as nullum negotium gestum est between them there is none in strict law) obtains no less where they are bound in different deeds, and at different times, than where they are bound in the same deed."

Benefit of Securities

On making full payment, the cautioner may require the creditor to communicate the full benefit of his contract, to the effect of subrogating the cautioner in place of the creditor by an application of the general privilege known as the beneficium cedendarum actionum and thus can demand assignations of the debt and any securities (Bell, Pr.§ 255, Erskine v. Manderson, (1780) M.1386; Lowe v. Greig, (1825) 3 Sh.543).

In Sligo v. Menzies ((1840) 2 D.1478), a case of cautionry for the interest on a heritable security, Lord Moncreiff referred several times to Kames's Equity as authority for the proposition as to ranking of catholic and secondary creditors, or with cautioners, and said (ibid.

1483), "But by a rule of equity, the cautioner on paying the debt, may demand an assignation to the debt for her relief .... And it being another principle of the law, that a creditor having a cautioner bound can do nothing emulously or negligently to prejudice the cautioner's interest for her relief, such a creditor, after having a separate security for the debt which, if preserved, he would be bound to assign, cannot lawfully discharge or renounce the security without payment." He goes on to discuss the equities arising where as in this case a second bond had been granted later without any cautioner. "A creditor is not bound to assign his security to a cautioner to the prejudice of his own interest in other lawful rights. If he holds the subjects in security of another debt, he is not bound to assign it to the prejudice of that debt."; and he cites Erskine (III,5,11): "But if such assignation tend to hurt the granter, equity interpones on the other part with this rule that no creditor can be compelled to assign a right to his own prejudice. Hence, though a creditor who has got a pledge from his debtor in security of his debt, may be forced to transmit his right of pledge to the cautioner, upon payment made to him of the debt, yet if the creditor hath the same individual subject impignorated to him in security also of another debt, in which the cautioner is not bound, equity will not compel him to transfer it", which he describes

as an illustration of the general rule of equity. Kames was again cited in the Inner House, when the case was laid before the whole judges, when Lord Moncreiff, with the concurrence of Lords Gillies and Cockburn, mentioned "the general rule of law or rather of legal equity" justifying the action. The Court in the end held that the creditor could not postpone the prior bond so as to draw payment out of the later and thereby throw the burden of any deficiency on the prior bond on the cautioner. The cautioner in the first bond, it was held, was entitled to have the security assigned to him and any act of the creditor which impaired that security liberated the cautioner pro tanto. Erskine's rule is inconsistent with the decision in Sligo v. Menzies and with the English authorities.

Extinction of Cautioners' Liability

The influence of equity is felt also in various provisions for the release of cautioners from their obligations in certain circumstances, apart from their formal discharge, or the lapse of their period of liability, or by payment. Compensation in respect of a debt due by the creditor to the principal debtor may be pleaded by debtor or cautioner and extinguishes the liability if sustained (Pothier, Oblig. 595 (Evans Tr.)). This was laid down in an English case on the authority of the Digest (xvi,

2,4) that where debtor and creditor are mutually indebted equally so that the debtor has a good defence in law and equity, a surety who would on payment be entitled in equity to exoneration from his principal has also a defence against the creditor's claim (Bechervaise v. Lewis, (1872) L.R. 7 C.P. 372).

But a more general rule justifiable on grounds of equity is that a cautioner is discharged by any acts on the part of the creditor whereby his position as cautioner is prejudiced (Bell, Pr. § 262; Snell, 491). Story expresses the rule as follows (§ 325: approved frequently, e.g. by Pollock C.B. in Watts v. Shuttleworth, (1860) 29 L.J. Ex.229, 234):- "If a creditor does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act, where required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him in equity." In general, then, any positive act, as distinct from passive inactivity or neglect contrary to the conditions on which the cautioners undertook their engagement and which prejudices them, will liberate them from their obligations (Biggar v. Wright, (1846) 9 D.78; Durham v. Fowler, (1889) 22 Q.B.D. 394.) In Biggar v. Wright (p.96) Lord Cuninghame referred to a demand as being "inconsistent with the principles of

"equity and common justice applicable to the case."

Giving Time to the Principal Debtor

In Polak v. Everett ((1876) 1 Q.B.D. 669,674. Bell's Pr. § 262. Snell, 492) Blackburn J. said:- "It has been established for a very long time .... that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by doing so he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if his right be suspended .... it is established that this discharges the surety altogether."

This rule was applied in Scotland in Johnstone v. Duthie ((1892) 19 R. 624,629), where Lord Kinnear, affirming the general rule and practically quoting Lord Eldon (Samuell v. Howarth, (1817) 3 Mer. 272,278), said: "This right in the cautioner is one which in its origin perhaps may be founded upon equity, but I think it is strictly legal in its effect ...." It applies moreover whether the cautioner has sustained any loss or not and however trifling the extension of time granted (Polak v. Everett, supra). But the rule of giving time probably does not apply in the case of co-obligants not bound as principal and cautioner. The other rules, that a cautioner is

discharged if a creditor gives up his securities, or neglects to take measures to make them effectual, or discharges one co-obligant, appear to be applicable to all cases of co-obligants with claims of relief. The discharge of a cautioner which is effected by giving time to the principal debtor is absolute like every discharge whichresults from a variation of the original contract (Gloag and Irvine, 899), unless the creditor reserves his right against the cautioner, in which case the cautioner's right of relief is preserved, so that he is in no way prejudiced.

Release of One Cautioner

A discharge or release of one cautioner by the voluntary act of the creditor operates as a discharge of the other cautioners. "It would be against equity", observed Lord Redesdale in a Scottish appeal, "for the creditor to exact or receive payment from one and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always by conscience, as far as he is able to put the party paying the debt upon the same footing as those equally bound" (Stirling v. Forrester, (1821) 3 Bligh, 575, 590. Approved by Lord Blackburn in Duncan v. N.S.W. Bank, (1880) 6 App. Cas. 1,19). The statutory rule on this point to the effect that the discharge is complete

has replaced the rule of the Scottish common law (Bell, Com. I, 376) that the co-cautioners were only discharged of the share which the discharged cautioner should have borne and remained liable for their own previous shares (Mercantile Law Amendt. Act, 1856, s. 9). This was the English legal rule which had no application where the sureties were liable severally and not jointly, but even in that case, on equitable principles, absolute release of one effected partial release of the others as it did in Scotland (Snell, 495). In Stirling's case it was emphasised repeatedly that the rights of sureties are founded in equity and the case was likened to one of General Average in respect of its equitable obligation to contribute equally, and that release of one alters the contract by taking away the right of relief against him competent to the others. It was further observed that this doctrine of Dering v. Winchelsea "proceeded upon a principle of law which must exist in all countries, that where several persons are debtors, all shall be equal" ((1821) 3 Bligh, 575, at p. 596).

Release of Principal Debtor

If the creditor releases the principal debtor without the assent of the cautioner, by an act or omission on his part, the cautioner is discharged. "This rule is founded

"founded on the clearest equity; for the cautioner's right of total relief, in reliance on which he is presumed to have contracted, is cut off if the principal debtor is absolutely discharged" (Gloag and Irvine, 904; Bell, Com. I, 377; Snell, 493).

Unauthorised Variation of Terms

A surety or cautioner will be released if the creditor modifies the contract between himself and the principal debtor without the surety's consent, or interferes with his rights against the principal debtor (Bell, Pr. §§ 259; Com. I, 374. Bonar v. M'Donald, (1847) 9 D.1537; affd. (1850) 7 Bell's App. 379). This is equally the English rule (Snell, 491) and Lord Loughborough stated the rule as follows: "It is the clearest and most evident equity not to carry on any transaction without the knowledge of the surety, who must necessarily have a concern in every transaction with the principal debtor" (Rees v. Berrington, (1795) 2 Ves. Jun. 540,543; 2 W. and T.L.C. 521).

Giving up Securities

As a cautioner is entitled on payment to an assignation of any securities the creditor held to enable him to work out his relief, the cautioner is held to be released pro tanto if the creditor has relinquished or lost any of

the securities or failed to obtain an effectual title to them, or if he appropriates a security to another purpose (Sligo v. Menzies, (1840) 2 D. 1478; Fleming v. Thomson, (1826) 2 W. and Sh. 277). In such a case the cautioner is released only in so far as he is prejudiced, so that, if there be an agreement that the creditor shall avail himself of a particular security before calling on the cautioner, he is released only to the value of that security given up.

Separate Security

When one of several cautioners holds a separate security over the estate of the principal debtor, he is, in the absence of special agreement to the contrary, bound to communicate the benefit of the security equally to his co-cautioners; and if he loses or parts with it, the others are pro tanto discharged. He must in fact treat it as the creditor must with regard to all the cautioners. But this will not apply if he only agreed to become a cautioner on condition of having that security and the co-cautioners agreed (Hamilton v. Freeth, (1889) 16 R. 1022, 1027 per Ld Rutherfurd Clark). "The obligation to communicate the benefit of such a security does not arise from the deed by which the co-cautioners are bound .... It depends on an equity to which the Court in the absence of agreement to the contrary will give effect. But the rule cannot be

"applied so as to defeat a special agreement." Lord Lee affirmed the foundation of the general rule on principles of equity (Hamilton v. Freeth supra, at p. 1028).

Changes in Firm

A cautioner for a firm is discharged as to the future by a change in the composition of the firm, on the principle that cautioners' obligations cannot be extended to persons other than those expressly or impliedly included in the original contract. The previously existing common law rule of both England and Scotland on this point was enacted by s. 18 of the Partnership Act, 1890, but evidence of contrary intention may elide this rule.

V - Securities

In English equity jurisprudence the subject of mortgages has consistently occupied a prominent place, and similarly in the common law of Scotland equitable principles have influenced the constitution and enforcement of rights in security. The principal aspects in which this equitable influence is seen are in the characteristically equitable checks put on penalties and unconscionable conditions, and on restrictions on the right of redemption. The commonest form of heritable security is constituted by a personal bond acknowledging receipt of a sum of money on loan, and obliging the debtor to repay with interest

and penalties on failure and to this is annexed a disposition of a heritable property to the creditor in security of the loan, with power to him to sell it on the debtor's failure to repay, and reserving the debtor's right to redeem the property and claim a discharge on repayment of the loan. As this form of security expressly bears to be a security and to be redeemable, no questions can arise on these matters. But in the bond the debtor binds himself to repay the principal "with one-fifth part more of liquidate penalty in case of failure", and also for an additional fifth of the due interest in the event of failure in the punctual payment thereof. It is to be observed that these provisions expressly bear to be penalties and it is well established that a Court of Equity will relieve from penalties. This provision has always been equitably and not literally construed. It is always restricted to the amount of expenses incurred by the creditor in enforcing payment, and does not authorise the charging of interest on interest, nor the expenses of a successful action at the creditor's instance against the debtor where the Court found no expenses due to the creditor (Gordon v. Maitland, (1761), Mor. 10050; Young v. Sinclair, (1796), Mor. 10053.) It was found as early as 1549 in Home v. Hepburn (Mor. 10033) that conventional penalties were only exigible so far as damage had been suffered. In Allan

v. Young in 1757 (Mor. 10047) the argument was to the effect that "the Lords do sometimes modify exorbitant penalties; but in so doing they act ex nobili officio and take every equitable circumstance under consideration ...." To this the answer was that "conventional penalties have been always considered as highly unfavourable, so that both law and equity have concurred in restricting them. Though due ex obligatione, yet they have been confined to the reparation of that damage which the creditor appears to have truly sustained by non-performance."

Moreover, the obligations of the debtor to repay and of the creditor to reconvey the security-subjects are each indivisible and the counterparts of each other, so that the creditor may not do anything to the security-subjects to prejudice the debtor's position. He must restore the security intact, and not merely still as valuable though altered (North Albion Property Investment Coy. v. M'Blain's C.B., (1893) 21 R. 90). And conversely the debtor may not prejudice the position of the creditor by entering into contracts which fall outside the ordinary management of the security-subjects. It is noteworthy that in the North Albion case (ibid., 96), the Lord Ordinary (Wellwood) proceeded largely on English Equity authority which, he said, proceeded not upon specialties of English law but upon "broad principles of equity which are

"equally applicable to a kindred question in Scots law", and he goes on to discuss the similarity of the Scottish heritable bond and the pre-1925 English mortgage.

Walter Ross (Lectures, I, 58) mentions the restriction of such penalty clauses to the amount of actual expenses and points out that it was not till the Eighteenth Century that the present conventional fraction came to be fixed. The customary "fifth part" he traces to the diligence of adjudication, being given to the creditor as compensation for having to take land instead of money, and then adopted in all cases. "These conventional penalties being evidently of that class, which the Roman magistrates were accustomed to reduce to the real damages of the party, the Courts of Equity in England followed their example in the case of the double bond (cf. Story, § 1313; see too Evans's Pothier on Obligations, II, 98); and our Court of Session, exercising the mixed power of law and equity, have made penalties the subject of what is termed the nobile officium of the Court. Lord Stair expresses himself upon this subject in a plain perspicuous manner (IV, 3, 2). 'The Lords of Session (says he) modify exorbitant penalties in bonds and contracts, even though they bear the name of liquidate expenses, with consent of parties, which necessitous debtors yield to. These the Lords retrench to the real expenses and damages of parties.'" Ross remarks too that the Court will not adject a penalty

where it is omitted (e.g. Leslie v. Ogilvie, (1705), Fountainhall, II, 256) and comments that even Lord Kames, "the great advocate for the Praetorian power of our Supreme Court and for the prevalence of equity over law", admitted (p. 42) that to supply a defect in words is above the power of any court.

Catholic and Secondary Securities

Where one creditor holds a security right over two or more subjects, heritable or moveable, and a second creditor has a postponed security over one of these, these are known as catholic and secondary securities. While a security-holder may realise his securities in any order he pleases without consulting mere personal creditors of the debtor, he may not do so in the case where there is a postponed bondholder. He may not lay the whole burden of his debt on one subject but must have regard to the interests of the other bondholders in accordance with certain equitable rules of law. The catholic creditor must so utilise his security-rights as to leave the largest possible margin for the postponed creditor, or to apportion the burden fairly between the postponed creditors if more than one (Gloag and Irvine, 59; Goudy, 508; Ersk. II, 12, 66). Bell notes (Com.,II,417) the kinship of this principle with the benefit of discussion and of division in the cases of cautioners. He expresses

the principle thus (Com.II,417): "Where there are secondary creditors on the two estates, the right of the catholic creditor to demand his debt must suffer the same qualification as if the estates belonged to several proprietors. Thus, if A have an heritable bond over two estates belonging to B, and C have an heritable security over the one estate, and D an heritable security over the other, A cannot capriciously prefer the one to the other, by claiming his debt from one of the estates, leaving the other free, but must in equity assign his security", and he cites Kames' Equity (79) as his authority for this proposition.

Where only one estate is doubly burdened the catholic creditor must exhaust the singly burdened estate first, or otherwise assign his security over the other to the second bondholder. The passage from Bell "carrying out the doctrine as he finds it in Lord Kames' remarkable work on the Principles of Equity" is quoted with approval by Lord President Inglis in Nicol's Trustee v. Hill ((1889) 16 R. 416, 419), who described the principle as an equity "well established in the law" and applied it to a case where each creditor held security over both heritage and moveables. In Littlejohn v. Black ((1855) 18 D. 207, 212), Lord President M'Neill described the protection of the secondary creditor against the exhausting the subject otherwise burdened, "a proceeding contrary to equity". He continued to the effect that the right to demand

assignation or prior exhaustion of the security-subject not doubly burdened "is an equitable right, which our law recognises as belonging to the secondary creditor similar to the beneficium cedendarum actionum of the Roman law..." Where both estates are doubly burdened, the right of the secondary creditor is to insist that the two estates should bear the burden of the catholic debt rateably, in proportion to their value, or if the subject of his security is first exhausted, to obtain an assignation of the preferable security over the other estate to the extent of the share of the catholic debt which that other estate should have borne.

But the principle, being founded merely on equity, will not extend, according to Erskine, to compelling the catholic creditor to act against a conflicting interest of his own (Ersk., II, 2, 66. Pitcairn v. Haliday, (1710) M. 3371; Preston v. Erskine, (1715), M. 3376). Apart from this exception, the modern tendancy is to look upon the claim of a secondary creditor to the assignation as being a legal right. In Nicol's Tr. v. Hill ((1889) 16 R. 416, 419; cf. argument in Gardiner v. Agnew, (1771), Mor.3385) Lord President Inglis said, "It appears to me that this is just the situation to which the equity does apply. It is precisely where the first bondholder has it in his power injuriously to affect the second bondholder that he is bound so to act as to cause the least prejudice to the second bondholder consistently with payment of his own

"debt in full, or if he chooses to act otherwise, that he must assign to the second bondholder the security which he has not used." But there is possibly still an equitable discretion in the Court to refuse to apply the rule in special circumstances.

The English Equity lawyer knows the same principles under the name of marshalling of securities. Story expresses the rule as follows:- "The general principle is that if one party has a lien on or interest in two funds or properties for a debt and another party has a lien on or interest in one only of the funds or properties for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction if that course is necessary for the satisfaction of the claims of both parties, wherever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund"(Story, § 633). Lord Hardwicke expounded the principle in Lanoy v. Duchess of Athol ((1742) 2 Atk. 444. See also Notes to Aldrich v. Cooper, (1803), 8 Vesey, 381, in I W. and T.L.C. 29). He said: "It is the constant equity of this court, that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien." Story (§ 635, quoting Pothier, Domat, Voet and Digest, 20,4,16 and 17) considered it not improbable that the doctrine of marshalling was derived from the

Roman law where the principle was known as subrogation or substitution. He states the distinction as being that the English equity courts arrived at the result by administrative process, while the Roman substituted the second creditor to the rights of the first by a cession of these rights on payment of the debt. Kames' expression of the principle (79) is quoted and approved by Story (§ 637). "Another connection of the same nature [as sureties and joint and several debtors] is that between one creditor, who is infeft in two different tenements for his security, and another creditor who hath an infeftment on one of the tenements of a later date. Here the two creditors are connected by having the same debtor and a security upon the same subject. Hence it follows, as in the former case, that if it be the will of the preferable creditor to draw his whole payment out of that subject, in which the other creditor is infeft, the latter for his relief is entitled to have the preferable security assigned to him: which can be done upon the construction above-mentioned. For the sum recovered by the preferable creditor out of the subject on which the other creditor is also infeft is justly understood to be advanced by the latter, being a sum which he was entitled to, and must have drawn, had not the preferable creditor intervened, and this sum is held to be purchase money of the conveyance. This construction, preserving the preferable

"debt entire in the person of the second creditor, entitles him to draw payment of the debt out of the other tenement. By this equitable construction matters are restored to the same state as if the first creditor had drawn his payment out of the separate subject, leaving the other entire, for payment of the second creditor. Utility, also, concurs to support this equitable claim."

Kames has also been quoted in several cases on this subject (Weir's Creditors v. Robertsons, (1793), Mor.3403; Gardiner v. Agnew, (1771), Mor. 3385; Sligo v. Menzies, (1840) 2 D. 1478, 1481; Nicol's Trs. v. Hill, (1889) 16 R. 418, 419; Ferrier v. Cowan, (1896) 23 R. 703. Several other cases on this subject were argued on the basis of equity: Mann v. Reid, (1705), Mor. 3370; Ker v. Scot, (1714), Mor. 3373), and in other authorities (Goudy, 508; Erskine, II, 12, 66), and the principle appeared to be well established in his time. In Gordon of Park's Creditors ((1761) 5 Bro.Supp.881) it was argued that the demand for an assignation was "founded upon this principle of equity - that if I take my payment out of a subject to which you have right, and thereby lessen your fund of payment, I should, in recompense, assign to you any right I may have to any other fund of the debtor."

In Ker v. Scot (supra. Cf. Preston v. Erskine, (1715), Mor. 3376, 3378) it was argued that the necessity of assignation was introduced by the civil law "approved by the universal consent of all the judicatures of

"Europe and opinion of the doctors, ... and founded in material equity and justice." The institutional writers do not seek to deduce the principle from Roman law but it seems a possible source. The cases grouped under the doctrine in Morison's Dictionary go back to 1672 (Mor. 3365).

The Equity of Redemption

The greatest contribution of the Chancery to the law of mortgages was the "equity of redemption", an equitable provision whereby the debtor might still redeem although the date for repayment of the loan was past. As developed in the Chancery it became by the time of Hardwicke an estate in the land and the duality of law and equity was represented by a co-existent dual ownership in law and equity of the mortgagee and the mortgagor. By the old common law of England the mortgage was an estate with a condition that re-entry should be lawful upon repayment of the loan: if the condition of repayment on the due date were not purified, the mortgagee became absolute legal owner and the legal right of redemption was lost for ever. But the Courts of Equity, leaving the legal effect of the transaction unaltered, declared it to be against conscience and unreasonable that the mortgagee should keep what was intended as a mere security, and they held that the breach of the condition should be relieved against, so that the mortgagor, though he had lost his legal right to redeem,

yet had an equity to redeem on payment within a reasonable time of the principal, interest and expenses. Since 1925 the form of mortgage has been altered but is still in point of law irredeemable after the expiration of the time specified. In equity, however, the mortgagor is allowed to redeem even after he is in default under the provisions of the deed.

Again it has long been an equity principle that equity looks at the substance of the transaction and not at the form to ascertain whether a particular transaction is a mortgage or, say, a sale with an option to re-purchase.

An extension of the conception of penalties in bonds may also be seen in this practice of introducing clauses in conveyances in security which seek to limit the rights of the debtor to a reconveyance of the property on repayment of the loan. In the older English mortgage there was a conveyance of the land under a condition as to repayment and if this were not performed the legal right of redemption was lost for ever. Equity however intervened and declared that a breach of the condition should be relieved against (Snell, 312. See also Bankton's Observations, II, 10). The equity of redemption then is the right of a mortgagor to recover his security by discharging his obligations under the mortgage, although the time fixed for the performance of these obligations has expired. Mortgagees sought then to defeat the intervention of

equity by special provisions in the mortgage deed, so as to "clog" the equity of redemption and such provisions in turn the courts of equity held void (Howard v. Harris, (1683) 1 Vern. 190. 2 W. and T.L.C.1). Moreover the English equity courts regard the equity of redemption as an equitable interest in the property, that is, a title to the beneficial ownership of the mortgaged property during the continuance of the mortgage, with which the mortgagor may deal in any way subject only to the mortgage. The ownership of the land remains, in equity, in the mortgagor (Casborne v. Scarfe, (1738) 3 Atk. 603, per L.Ch.Hardwicke).

While the Chancellor's intervention in mortgages may be explained on the principle that equity looks to the intent rather than the form, that fairness demanded relief, and that unjust enrichment should be prevented (Turner, Equity of Redemption, 23), historically it arose from the desire to extend his jurisdiction (Turner, 42); partly, too, it sprang from the fact that mortgagors in the Sixteenth and Seventeenth Centuries were usually financially embarrassed and required protection from unscrupulous creditors, or from the doctrine that relief should be given to a debtor prevented from repaying by mistake, accident or hardship. For the same reasons the Chancellor relieved against penal clauses in bonds. In the Seventeenth Century, however, relief against penal

conditions began to be given in all cases (Turner, 32). The phrase "equity of redemption" seems to appear first in The Duchess of Hamilton v. Countess of Dirlton in 1654 (1 Ch.R.165). The doctrine was not a direct borrowing from Roman law, though later development was much influenced by the knowledge of the civil law prevalent among Chancery lawyers. Once it was established rules were applied to it of a similar nature to those found in Roman precedents (fiducia and hypotheca) with the difference that the mortgagee does not have the legal estate, whereas in the Roman hypotheca there was no dominium in the creditor at all (Turner, 114 et seq.).

Lord Bramwell's definition of the equity of redemption is as follows (Salt v. Marquess of Northampton, (1892) A.C.1, 18):- "It is a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities given by a borrower to a lender .... on payment of principal and interest at a day after that appointed for payment, when by the terms of the agreement the securities were to be the absolute property of the creditor."

In the ordinary Scottish security constituted by bond and disposition in security the disponer's right to redeem is expressly reserved by a clause in the bond and there is no need to call equity in aid. But in a security constituted by an ex facie absolute dispositinn

no such clause appears. The back-bond, if there be one, revealing the true character of the disposition as a security does not usually appear in the Register of Sasines, and the disponee under such a disposition may deal with the subjects as his own, but in a question with the original disponer, the parties are creditor and debtor in a security and the back-bond regulates their relations. The original debtor and disponer has a personal ius actionis or right to demand a reconveyance on the fulfilment of the conditions, express and implied, upon which the reconveyance depends (National Bank v. Union Bank, 14 R. (H.L.) 1, 4 per Ld. Watson).* Such a right is transmissible and may be cut off by the long negative prescription: further the Court may interdict any sale by the creditor (ex facie proprietor) if the debtor can show that no prejudice can arise to the creditor by delay and that prejudice may accrue to the debtor from an immediate sale (Lucas v. Gardner, (1876) 4 R. 194). The rule expressed in England in the catch-phrase "once a mortgage, always a mortgage" in effect applies so that a provision that the right of redemption shall expire after a certain period will not receive effect. In Smith v. Smith ((1879) 6 R. 794) it was held that a reconveyance could be demanded on payment even after twenty-six years and a declarator of expiry of the legal ~~period~~ would have had to be brought before the right of redemption was lost.

* See also Aberdeen Trades Council v Shipconstructors and Shipwrights Association, 1949 S.C. (H.L.) 45

Again, while the right of redemption may competently be postponed (Morgan v. Jeffreys, [1910] 1 Ch. 620; Ashburton v. Escombe, (1892) 20 R. 187), it cannot be so postponed as to preclude the return of the security subject (Faircloud v. Swan Brewery Co., [1912] A.C. 565). For it is another cardinal rule of equity that any agreement which bars the debtor's right to redeem is ineffectual and stipulations tending even indirectly to make the mortgage irredeemable are bad and unenforceable as being, in the English phrase, a "clog on the equity of redemption". There is no rule against the mortgagee stipulating for any collateral advantage provided it is not (a) unfair and unconscionable, (b) in the nature of a penalty clogging the equity of redemption, or (c) inconsistent with or repugnant to the contractual or equitable right to redeem (Kreglinger v. New Patagonia Meat Coy., [1914] A.C. 25).

Stair (II,10,6. Cf. Ersk. II,8,14) refers to irritant clauses in reversions to wadsets, known in the civil law as pactum legis commissoriae in pignoribus and thereby rejected as an usurary paction. The lex commissoria in pledge was a condition attached to the contract cutting off the right to redeem on failure to do so within a certain time. They were declared illegal by Constantine in A.D.326 (Trayner, Latin Maxims, 433. Buckland, Textbook, 477). Such clauses were held purgeable as otherwise the wadsetter got more than his

just interest as a penalty, and there are several cases in Morison illustrating the proposition (s.v. Irritancy, 7202 et seq.; Craigie, 296; Nicolson MS, 303). Bankton says (IV,7,23) that "there are infinite other cases where the Court of Session give relief in equity, when, in strict law, there seems to be none; as in redemption of wadsets limited to a precise term, after which the lands are declared irredeemable; this court allows the equity of redemption, notwithstanding the irritancy incurred." In Bradley v. Carritt (/1903/ A.C.253, 270. See Gloag, 577-8) Lord Robertson said obiter that by Scots law there was no restraint on free contracts in the matter of mortgages. This does not necessarily infer that the Court will enforce every contract literally. Cases can be figured where it would surely not.

In the modern Scottish heritable bond, corresponding to the English mortgage, the property is conveyed "heritably but redeemably" and power of redemption is expressly reserved so that it is only in the case of security by disposition, ex facie absolute qualified by a back-letter conferring the right of redemption, that a question of the right to redeem can arise. This form of security replaces the old wadset which in its later form was a mutual contract in which the creditor granted a right of reversion or redemption. There might also be an irritant clause precluding redemption if incurred and this was effectual unless held to be penal (Menzies, Conveyancing,

864. Duffton Deeds, 258. Dallas Stiles, 709). Bankton says (II,10,9. Cf. Nicolson MS. fol. 303) that a conventional reversion may or may not be limited in time, or may be declared to become void ipso facto without declarator, and this, termed pactum legis commissoriae in pignoribus, is not favourably received in our law "for, notwithstanding thereof, the debtor may still redeem the lands, after expiration of the term, before declarator, which is always competent, though renounced; and even in an action of declarator of the irritancy's being incurred, it may be purged by payment at the bar, or a short time will be granted to purge the same before extract of the decree of declarator; but after the decree is regularly given and extracted, the reversion is cut off, and the lands become irredeemable."

It appears from the older cases and is confirmed by Erskine (II,8,14. So too Hope, Minor Pr. 245. See also Maitland, fol. 90; Craigie, fol. 293; Sinclair, fol. 73) that conventional irritant clauses in reversions were strictly construed and only when the clause was penal was an equitable modification allowed to the effect of permitting purgation and redemption any time before decree of declarator. An Act of Sederunt of 1592 demanded literal interpretation and only later did the Court modify the rigour of this in penal irritancies (Tullibardine, (1667) Mor 7206. Kames, p. 48, calls this A.S. a "mistake" in

being inconsistent with the Court's function as a court of equity. But see Stair, IV, 5, 8.) Walter Ross (Lectures, II, 340) mentions irritant clauses in case of non-payment of the debt at the time specified, which were countered in an Act of 1617 which prorogated the terms of redemption for five years. He explains the requirements of the law to protect the debtor in the case of a creditor's sale, commenting that "our old law was truly equitable"; and he goes on to say that the equity established by these old acts not only disappointed the contrivances of avarice but led the judges to relax their ideas about the strictness of reversions, forfeitures and irritancies which led to a revolution in our decisions from 1661 onwards.

It is noteworthy that the English phrase "equity of redemption" occurs in Bankton (II,10,7. Cf. Kames, 243) when he is discussing the necessity for a declarator of redemption to prevent lapse of time inferring expiry of the legal and cutting off the right to redeem an adjudication; and again (II,10,13) where he says of adjudications that "if the debtor delay to redeem, for forty years after expiration of the term, he will be foreclosed, and no equity of redemption allowed, which he ought to have claimed before prescription was run; for though a perpetual reversion is saved from such prescription, yet a temporary one is cut off in strict law by lapse of that term:

"and the party is only indulged in equity still to redeem, by suing an action for that purpose." In his observations on the Law of England annexed to this chapter he explains the English mortgage and the equity of redemption, which, he holds, was not allowed after twenty years from the time of the forfeiture; but later he explains that if there is a covenant that the mortgagor shall enter and hold the lands till he is satisfied no length of time excludes the redemption. Later (IV,7,23. Cf. cases in Morison, 7202 et seq.), discussing the jurisdiction of the Session as a court of equity, he expressly cites the allowance of an equity of redemption in wadsets despite the incurring of an irritancy as an example of the court's equitable power. Erskine also uses the phrase (III,1,33) when, speaking of pledge, he says it has the same equity of redemption as wadsets of land (II,8,14).

It is apparent from Thomson v. Threshie ((1844) 6 D. 1106) and Smith v. Smith ((1879) 6 R. 794) that even in the case of an ex facie disposition there must be a decree of declarator of expiry of the legal before the creditor in possession can acquire an indefeasible right quoad his debtor and that until that is achieved redemption remains open to the debtor, on payment of principal, interest and expenses. To that extent the equity of redemption exists in Scots law, but it does not extend to a co-existent equitable ownership concurrent with the disponee's possession. Further, unless there is notice, actual or

constructive, as by a recorded back-letter, the creditor may treat the security-subjects as his own and sell them freely to any bona fide purchaser for value.

Nevertheless, despite the ex facie absolute ownership, the Court may exercise a measure of equitable supervision over a creditor's exercise of the powers vested in him by the disposition. So in a case of damages for selling the security-subjects too cheaply, where the question was raised whether a creditor in right of an ex facie absolute disposition had the right to sell the property by private bargain (Baillie v. Drew, (1884) 12 R. 199,202), Lord Justice-Clerk Moncrieff said, "In regard to the limitations of the creditors' right, it has been well settled that, in the first place, an absolute disposition will give the purchaser under it - where the sale is by virtue of powers to the granting of which the debtor has been a party - an absolute right, and that it will not be in the power of the original proprietor, the debtor, to quarrel that disposition, if the powers of the creditor have been duly and properly exercised. It is another matter where the question is between the debtor himself and the creditor, for if the creditor has not exercised this right - absolute as it is where third parties are concerned - in a fair, reasonable and equitable manner, the Court will give a remedy, and that remedy will not be by setting aside the sale, but by giving the

"pursuer, the debtor, an opportunity of proving damage, arising from reckless or inequitable use of the powers which the disposition gave him." Similarly in Shrubb v. Clark ((1897) 5 S.L.T. 125) Lord Kincairney awarded damages where a sale had been carried out with a "want of fair reasonable and equitable regard for the pursuer's interests."

The principle of the equity of redemption may however be discerned in the rules applicable to apprisings and adjudications, where it has long been recognised that a debtor may yet redeem his lands within a period, "the legal", after his creditor has adjudged them for debt (Graham Stewart on Diligence, 654, citing authorities). An adjudication has, Kames says (245), during the legal, sunk down to be a pignus praetorium or a judicial security for debt. "Yet the rule which, with relation to a wadset, affords an equity of redemption after the stipulated term of redemption is past, has never been extended, directly at least, to relieve against an expired legal" (244); but though the Court of Session "has not hitherto sustained an equity of redemption after expiry of the legal, yet that same thing is done indirectly, through the influence of equity. Some pretext or other of informality is always embraced to open an expired legal, in order to afford the debtor an opportunity to redeem his land by payment of the debt." (248).

Kames also (244) noted how apprisings originally had a legal of seven years and equity could not support an extension of this period: but later the nature of apprisings was reversed by the dishonest practice of apprising great portions of land for the payment of small sums, and when it became customary to apprise or adjudge the whole land for any debt, equity, he says, required a declarator of expiry of the legal, just as it permitted a debtor to purge a penal irritancy. In Nasmyth v. Samson ((1785) 3 Paton 9) an adjudication was reduced in so far as it exceeded the principal and interest as at the date of the adjudication, and a penalty was thereby disallowed; the argument for the respondents disclosed considerable reliance on the powers of the Court of Session as a court of equity to refuse a penalty.

However, the conclusion necessarily is that the equity of redemption as known to the Chancery was not recognised in bonds in Scotland and the only relief granted was against penal provisions in accordance with the general Scottish attitude to such conditions, which is much more limited. Much more important is the fact that there does not seem anywhere to be a suggestion that the equitable rights of redemption of the granter of the bond or wadset were an interest or estate in the land. In this respect the Chancery development has gone far beyond the rules ever admitted in equity in Scotland. Only in

adjudications is the position nearer to that of English equity.

The development of security rights ex facie redeemable in Scotland has rendered equitable intervention to secure a right of redemption to the debtor less necessary than in England and the heritable bond (Duff's Feudal Conveyancing, 266) and the modern bond and disposition in security (ibid., 286) contain clauses reserving rights of redemption. If however a modern security were taken by ex facie absolute disposition, and no back-letter were granted disclosing the true nature of the transaction, would there be an equitable right of redemption on proof by writ or oath of the fact of security? Certainly where there is a back-bond the property may be redeemed at any time before declarator of expiry of the legal (Smith v. Smith, (1879) 6 R. 794. See too Gloag and Irvine, 541 et seq.) There is very little Scottish authority on the question whether a lender can restrict the borrower's rights so as to clog the equity of redemption. Brown v. Muir ((1737), Mor. 9464) indicates that such a restriction is unlawful, Stewart v. Stewart ((1899) 1 F.1158) the contrary. The applicability of English authorities on the matter is doubtful and Lord Robertson indicated obiter (Bradley v. Carritt, /1903/ A.C. 253, 271) that they were not applicable. The modern English position is that a bargain for a collateral

advantage is admissible and enforceable even after repayment of the loan, so long as it does not amount to an obstacle to redemption (Kreghinger v. New Patagonia Syndicate, [1914] A.C.25). There seems no reason why this statement of principle should not be equally acceptable in Scotland, too, though much necessarily depends on the terms of a particular security.

VI - Married Women

The law relating to the disabilities formerly attaching to married women and the means adopted to circumvent these restrictions are now only of antiquarian interest, yet the subject deserves mention for its illustration of a branch of equity which social progress and legislation have rendered obsolete. At common law a Scotswoman's moveable property vested in her husband. Despite opinions that the Court of Session, as a court of equity, could compel the husband to make a provision for his wife out of any funds to which she succeeded, and counter-opinions (Stevenson v. Hamilton, (1838) 1 D. 181. Cf. Lowson v. Young, (1854) 16 D.1098), and a vague reference in Bankton (I,5,88), very little advance was made in this direction and it has been decided in England that a woman had no equity to a settlement by the law of Scotland (Hitchcock v. Clendinen, (1850) 12 Beav. 534; M'Cormick v. Garnett, (1854) 5 De G. M. and G. 278). The Conjugal

Rights Act of 1861 required provision to be made for the wife from any funds to which she succeeded and thus foreclosed any equitable developments. But much earlier the practice of marriage-contracts had mitigated the rigour of the common law and bequests to women were commonly made exclusive of the ius mariti (for details, see Fraser, H. and W. I, 778 et seq.), and similarly the right of administration of the wife's heritable property might be excluded. In such a case she had a separate estate. The various Married Women's Property Acts have now put her on the same footing as her husband as regards acquiring and owning property. But it is apparent that equity played little part in the emancipation in Scotland, and apart from legislation the most potent influence was the habit, in the majority of cases where the wife was possessed of independent funds, of vesting them in trustees for her benefit. (See the development discussed in Macfarlane's Trs. v. Oliver, (1882) 9 R. 1138, 1162.)

In England the common law position was similar but courts of equity long admitted the doctrine that a married woman could, in equity, take real and personal estate to her own separate use and dispose of it. Though the intervention of trustees was usual, it was not indispensable, and a wife's interests in property would be protected. Her husband was deemed a mere trustee for

her (Story, § 1378 et seq.) The equity courts too interposed to ensure that while her property passed to her husband, he had to make a suitable provision for her out of it (Story, § 1402 et seq.) Legislation has similarly abrogated all these rules, but it is clear that the intervention of the Chancery to secure the wife's rights was far more positive and widespread than the Scottish approach, where any result of a similar nature was achieved by the parties' actings, as by a marriage contract, rather than by the Court.

Chapter VIII
Restitution, or Unjust Enrichment.

The four heads of restorative obligations known as restitution, repetition, recompense and negotiorum gestio are generally grouped together inasmuch as they comprise broadly the modern equivalents in Scots law of the Roman law obligations quasi ex contractu (Buckland, Textbook) which were founded on "something resembling a contract" (Ersk. III,1,9) and grounded neither in contract nor in delict. The name quasi-contract is traditional in Scotland as in Roman law, though unsatisfactory. Stair grouped these cases under the title of Restitution (I,7, 1 et seq.) and attributes such obligations more "to the law of God written in our hearts than unto any other conjecture or supposed consent. To this agreeth the Roman law, which holdeth these obligations not to be ex contractu, sed quasi ex contractu, neither doth account them obligations ex lege."

Bankton (I.4,25) describes quasi-contract as "an obligation which arises from a presumptive contract" when "the law imposes an obligation, as if a contract had really intervened." Elsewhere (I,8,5) he enumerates under such natural obligations restitution and recompense and includes salvage and general average. Erskine (III, 1,4), quoting the instance of a void written obligation, says:- "Obligations merely natural are those by which one

"person is bound to another by the law of nature or equity only, but which positive law does not support by any action that may render them effectual", and among natural or obediential obligations he cites those arising from the natural duty of restitution. Bell (Pr., § 526), similarly ignoring the Roman classification, says that the law gives an action of restitution against one in possession of the property or goods of another without his consent, or who has, in consequence of error, received payment of money not legally due to him.

The modern view is that such cases proceed not so much on the basis of an implied contract as on the ground of equity. So in Brook's Wharf and Bull Wharf v. Goodman (/1937/ 1 K.B.534), Lord Wright, M.R., said: "The obligation is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties." So too Winfield thinks that the action is based on the idea of unjust benefit (Holdsworth, 55 L.Q.R. 37, 45 citing authorities). The Scottish use of the condictio achieves a similar result and the crucial question is whether it is equitable in the circumstances that a condictio be allowed (Holdsworth, supra, 49).

The quasi-contractual obligations differ from properly contractual obligations in that the nexum arises by force of law and is not voluntarily assumed and entered into by the parties. Yet on the other hand, they cannot

be grouped with delictual or quasi-delictual obligations, which are also imposed ex lege, but which involve making reparation for some damage done by an act or an omission which the law considers a wrong or breach of a legal duty. Broadly, they are cases where obligations, analogous to those undertaken by the promisor in a contractual obligation, are imposed by force of law for reasons of convenience or equity on a party who has not made any such promise.

The obligation is similar to, but distinguishable from the concept of implied contract, where in certain circumstances the law presumes consent, while in cases of quasi-contract consent is not presumed, nor is it necessary. In addition to the subjects dealt with hereunder, the obligations involved in salvage (Winfield, Prov. of Tort, 156) and general average may be classed under this head (as, for example, by Bankton, I,8,5; I, 9,29). Normally however the subject extends in Scots law to restitution and repetition, recompense and negotiorum gestio (Bell, Pr. § 525). It will accordingly be dealt with under those heads.

In the civil law the term quasi-contract had a wide significance (Ledlie's Sohm, § 83; Buckland, Textbook, 536). The traditional quadripartite division of obligations was into obligations arising ex contractu, quasi ex contractu, ex maleficio and quasi ex maleficio. Gaius included under the second head the reciprocal

obligations of tutor and ward, the obligation of an heir to pay a legacy, the obligation to repay money paid by mistake, and the rights and obligations of a negotiorum gestor (Dig. xliv,7,5). To this list Justinian added the obligation resulting from property held in common (Inst.,iii,27); the obligations to restore property given on a consideration which had failed (Dig., xii,4), or for illegal consideration, or one extorted by violence are also mentioned in this connection (Dig.,xii,5). In Scots law, while this division of obligations is rejected (Stair, I,3,2; Bell, § 525; Allen v. M'Combie's Trs., 1909 S.C.710), the name has been retained for that intermediate class of obligations recognised by the law on equitable grounds and not amenable to classification under either of the main heads of contract or delict. Were recognition not given to the relationship involved in quasi-contractual obligations one party might derive benefit from the actings of another done with no intention of gift and without any consideration being given therefor, and the policy of the law must be against such unjust benefits. The law must as a matter of natural justice seek to redress the balance of advantage and detriment and assist parties to an equitable adjustment of their mutual liabilities.

It is probable that a more suitable name for this category of obligations would be restitution (which is Stair's title) (approved by Lord Wright in Fibrosa v.

Fairbairn, /1943/ A.C.32), but this already has a more limited significance in Scots law. In England the law was formerly much restricted, though Lord Mansfield tried to lay down a broad doctrine depending on aequum et bonum (Moses v. Macfarlan, (1700) 2 Burr. 1005. Fifoot, 118 et seq.); but more recently the idea of unjust enrichment has been admitted to a certain extent (Paton, Jurisprudence, 327. Cheshire and Fifoot on Contracts, 488). Mansfield said that the whole basis of quasi-contract was equitable (Allen, 229). Winfield (Province of Tort, 119) defined quasi contract as "liability not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit" and he conceded that there are many instances of genuine quasi-contract in English law which is all the poorer for its inbred reluctance either to adopt the term quasi-contract or to recognise it as a necessary and separate department of the law (ibid., 63). The fact remains that the only satisfactory ground on which unjustified enrichment can be said to exist is that of the moral idea of natural justice (Gutteridge, 5 Camb.L.J.204,211), and equity has widened the scope of English common-law doctrines on this matter (Hanbury,728; cf. Winfield, 64 L.Q.R. 46).

Restitution

In a wide use of the term this obligation may include that of repetition or may even be used as a general term for all obligations founded on unjust benefit; but in the narrower sense its meaning is restricted to the obligation "whereby men are holden to restore the proper goods of others" (Stair, I,7,1). Its equitable basis is expressed by Stair in his classification of it among natural or obediential obligations (so Bankton, I, 8,1, "commanded ... by the law of nature.") "because they are not by contract or consent, nor have they their original from positive law; for, though there were no positive law, those obligations would be binding; and they are obligatory among persons who are not subject to one positive law", and "of necessity they must have their original from the authority and command of God ..." (Stair,I,7,1). The foundation in equity is expressly accepted in More's note (Note F) to the passage, where the editor notes that bona fide consumption provides the chief defence to a claim of restitution. "This defence rests on the equitable principle of not requiring a person who bona fide believes the property to be his own and who has spent or consumed the article, or its fruits or profits, to account for these to the true proprietor", and for this there is ample authority.

Erskine similarly (III,1,10) describes restitution as a "natural duty", saying that "whatever comes into our power or possession which belongs to another, without an intention in the owner of making a present of it, ought to be restored to him.

Bell (Prin.,§ 526 et seq.) does not condescend on theoretical abstractions but proceeds directly to the circumstances in which the law gives an action of restitution. He says (§ 530): "One who by mistake has received anything (as from a carrier) is liable to restitution: and so one to whom a thing has been transferred or an obligation undertaken or fulfilled, on a consideration which has failed, is also liable in restitution under the condition causa data causa non secuta."

Bankton's view (I,8,21) is similar to Stair's:- "Where the cause of the delivery ceases, the thing must be restored to the giver: hence were introduced, by the law, the several condictions, sine causa, causa data causa non secuta, etc., as things given in contemplation of marriage which does not follow; a bond given in hopes of getting the money which is not delivered, and every deed or grant that depends upon mutual consideration, not given or performed, must be restored to the granters."

Stair has enumerated (I,7,3-9) the circumstances in which the obligation arises as: (i) things straying, or (ii) lost, or (iii) belonging to others and come into possession without delinquence, as for example, pledges,

(iv) things recovered from thieves, robbers or pirates, subject to an obligation of recompense on the part of the owner, or (v) things recovered from enemies. Stair holds that equity requires restitution upon satisfaction and gratification for the favour received. Restitution extends further to (vi) things in possession, the contemplated purpose of which has failed, "whence are the condictions in law, sine causa and causa data causa non secuta which have this natural ground." Such are wedding presents, which are returnable if the wedding does not take place (Dig. xii,4: Ersk. III,1,10). But this does not extend to things given for an unjust cause, ob turpem causam, where there is no restitution for potior est conditio possidentis. Lastly restitution covers (vii) indebitum solutum, when a person delivers or pays in error, what he believes due or belonging to another. This is the category of repetition which deserves separate treatment (further illustrations, Gloag, 58).

Stair points out too (I,7,10) that, while restitution extends in general to the unconsumed fruits of the thing as well as the principal, for the sake of utility and common quietness, a person who has possessed bona fide is not obliged to restore the fruits, even though he has profited and been enriched thereby.

More recently Lord Mackenzie (Cantiere San Rocco, 1922 S.C. 723,737) described the condictio causa data as "a particular example of the general rule of equity

"that no one should be enriched without sufficient consideration."

The Scottish Courts seem to have recognised restitution for a long period, as there is a decree for restitution found in 1496 (Seton v. Thomson, A.D.C.II, 49). The classic exposition of the principle in modern Scots law is that of Lord President Inglis in Watson v. Shankland ((1871) 10 M. 142,152; affd. 11 M.(H.L.) 51), repeatedly quoted with approval (Davis and Primrose v. Clyde Shipbuilding Co., (1918) 56 S.L.R.24 (O.H.); Cantiere San Rocco v. Clyde Shipbuilding Co., 1922 S.C.723, and especially when reversed on appeal, 1923 S.C.(H.L.) 105) and expressed as follows:-

"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 practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of juris-

"prudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts. If a person contract to build me a house and stipulate 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."

This statement of the law, as well as the passages from the institutional writers, was cited with full approval by the Lords in the Cantiere San Rocco case (1923 S.C.(H.L.) 105), which is the leading modern Scottish authority. It was there observed that, so far as concerned the recovery of advance payments, the decisions in Chandler v. Webster (/1904/ 1 K.B.493) and other "Coronation" cases were not in conformity with the law of Scotland. Chandler v. Webster was, however, overruled in Fibrosa v. Fairbairn Lawson (/1943/ A.C.32), where Lord Macmillan noted (at p. 59. See also Buckland in Harvard L.R.XLVI,p.1281) that the law of Scotland, following in

this respect the Roman law, had fully accepted the principle of restitution. The difference between English and Scots law on the matter was discussed in that case and the House, overruling certain prior English cases, admitted the principle of restitution of unjust benefit in English law. "Unjust enrichment, i.e. enrichment by reason of the thing being received and the consideration and return failing - the principle of preventing that underlies as a reason the doctrine of restitution". (Cantiere San Rocco, supra, 117, per Lord Shaw.)

Repetition

The recovery of money paid under the mistaken belief that it was due is effected in Scotland by the action still often called by its Roman name of condictio indebiti (Buckland, Textbook). This may be regarded as a special instance of the obligation of restitution and it is so classified by Stair (I,7,9). Bell (Pr., §.531) lays down the general rule that "whatever has been paid on an erroneous conception of duty or obligation may be recovered on the ground of equity; provided the person receiving it has no reason, on natural right, implied donation, or compromise, to rely on the acquisition as his own." Erskine (III.3,64) points out that the obligation arises, "not from any explicit consent or agreement of parties but solely from equity", and that

view has been affirmed in many judgments. Masters and Seamen of Dundee v. Cockerill ((1869) 8 M. 278) is one instance. In Henderson v. Turnbull (1909 S.C.510,517) Lord Low said: "The pursuers' claim .... is a condictio indebiti, which is a purely equitable remedy, and the person claiming repayment can only recover if he proves that the payment was made in ignorance or error", and Lord Ardwall (ibid., 521): "Now the condictio indebiti is an equitable remedy and will not be granted by the Court unless it clearly appears that it would be inequitable for the party to whom a payment has been made to retain the sums alleged to have been paid in error."

In Roman law the condictio indebiti was a well known form of action: it was an actio stricti iuris but would be excluded by a naturalis obligatio and the error probably must have been one of fact and not of law, except in special cases (Buckland, Textbook, 542). Pothier (I, 141) noted that the right of repetition is "wholly founded on equity, haec condictio ex bono et aequo introducta, and on the rule of equity which does not allow that one man shall enrich himself at the expense of another .... The action, called condictio indebiti, is an entire restitution which equity affords against an erroneous payment. Now it is the nature of all restitutions against any act, to place the parties in the same situation as they were before" (ibid., I,143).

The Scottish action closely follows the Roman counterpart and, as in that system, "though positive law could not have forced the payment of a sum due by an obligation merely natural, yet being once paid, it cannot be again recovered by him who made the payment; for as the action for repayment is introduced merely from equity, it cannot be admitted where the said sum paid was due in equity" (Ersk.III,3,54; similarly Bell, Pr. §.532). This provision was founded on in Carrick v. Carse ((1778), Mor. 2931) where a cautioner paid, in ignorance of the septennial limitation of his obligation, and sought to recover the money: it was pleaded that the money was due iure naturali, yet repetition was ordered.

A point of some interest is whether the error which allows of repetition is only error of fact or whether it extends also to error of law (see discussion in Gloag,62). But even in cases of error of law "a party will be relieved against such a payment, if in the circumstances it be inequitable for the party receiving the money to profit by the mistake of the other" (Bell,Pr.§.534). In Dickson v. Halbert ((1854) 16 D.586. Reference was made to Story and Chancery authority) the Court did not treat the case, which was a reduction of a discharge granted sine causa in ignorance of legal rights, as one of proper condictio indebiti but recognised that "the mere form which the demand happens to take does not alter the

"substantial equity between the parties and the whole doctrine on this subject is rested on equity, and nothing else" (ibid., 591, per Ld. Robertson), and held the discharge reducible. Lord Ivory said: "But if, on the part of the person receiving, there be no ground of claim, there is no equity that he shall keep that to which on no conceivable footing had he any legal right." In Armour v. Glasgow Royal Infirmary (1909 S.C.916. Cf. Ministry of Health v. Simpson, /1951/ A.C.251,270) repetition of money paid under a mistake of law seems to have been allowed without question. Bankton (I,8,23) has no doubt, and the contrary authority is unconvincing (Gloag, 62, note 4).

More (Note F) goes on to say that as repetition is founded on equity it will be barred where by negligence misconduct or delay on the part of the individual making the mistake, injury would accrue to the other party. Negligence in general is not a bar (Gloag,62), but there is some old authority for More's proposition and it seems consonant with abstract equity that recovery should be barred if the creditor has altered his position on the faith of payment.

Kames treats of the subject under Errors in Deeds and Covenants (p.197) and it is apparent that this head of quasi-contract has long been accepted in Scotland with cases going back to at least the Seventeenth Century (Mor.2923 et seq.)

Recompense

"The obligation of remuneration or recompence is that bond of the law of nature, obliging to do one good deed for another" (Stair, I,8,1). Erskine defines the obligation as that "by which a person who is made richer through the occasion, or by the act of another, without any purpose of donation, is bound to indemnify that other ..." (III,1,10), and from this Bell derived his definition (Pr. §.538). He goes on "As this obligation is strongly founded in equity, the laws of all civilised nations have adopted it, even in the case of pupils though they cannot be bound by any contract." But it has been pointed out that these definitions are too wide and cover cases of merely incidental advantage where no loss has been suffered and the essence of a claim is recompense for one's profit from another's loss. In fact the essential elements of loss and profit are expressed in the maxim, nemo debet locupletari ex aliena iactura, which is found in Scotland as early as 1541 (Somerville v. Hamilton, Mor. 8905. Cf. Balfour, 333-4), and which Lord Dunedin described in Sinclair v. Brougham (/1914/ A.C.398,434) as "supereminent equity". It is clear that there is no obligation to recompense where a man reaps an occasional or consequential benefit from another's action (Burns v. M'Lellan's Crs., (1735), Mor. 13402) and Kames (p. 90) instances the possibility of one person

profiting by the better price he obtains in a limited market when a competitor's goods are destroyed by accidental calamity, which gives no ground for a claim of recompense. The benefit in such a case is purely incidental and neither party willed the detriment nor the benefit.

The equitable nature of the obligation has been judicially affirmed in many cases. In Buchanan v. Stewart ((1874) 2 R. 78,81) Lord Neaves said: "The claim to recompense is an equitable claim, and our law is favourable to equitable claims." In Stewart v. Steuart ((1878) 6 R. 145, 149), Kames's Equity was referred to, and Lord President Inglis said: "Now, recompense is a remedial obligation well known to the law, but that obligation is founded on the consideration that the party making the demand has been put to some expense or some disadvantage, and by reason of that expense or disadvantage there has been a benefit created to the party from whom he makes the demand ...." In Yellowlees v. Alexander ((1882) 9 R. 763), Lord Young thought the case was "within the equitable doctrine of recompense, and that it would be inequitable and contrary to that doctrine to allow the trust-estate to benefit ...."

Lord Dunedin in Edinburgh Tramways v. Courtenay (1909 S.C. 99, 105. Similarly Lord Anderson in Newton v. Newton, 1925 S.C. 715, 723) said, after criticising Bell's

definition, "... 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 iactura. 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." Trayner (p. 377) has noticed the maxim Lord Dunedin mentions in the alternative form, nemo debet ex alieno damno lucrari, and he calls it a maxim of the Roman law, founded upon equity, the principle of which has been adopted by the Scotch law, and he instances negotiorum gestores.

Under the heading of recompence Stair includes negotiorum gestio (I,8,3) and general average (I,8,8), but these special cases are best treated separately. The typical cases where there may be a claim for recompense in modern law are three:- expenditure on a property in the bona fide belief of ownership founds a claim of recompense on divestiture in so far as it has proved beneficial to the true owner; a claim may be made under recompense for the price of goods when for some reason a direct contractual claim for the price is bad; and lastly, when a party doing work under a contract has departed so far from the terms of the contract that a claim for the price is excluded, he is entitled to be recompensed for the work done if accepted by the other party.

In Graham v. Fletcher's Exor. ((1870) 9 M. 298, 302) an agent who had voluntarily advanced money for insurance premiums was held entitled to recover on the basis of equity, and the analogies of negotiorum gestio and salvage were quoted.

Recompense has no application as between parties to an express contract; the remuneration must be regulated by the contract: nor does it apply to a claim for payment for extra work done under a contract. But if there is no express provision for payment a claim of the nature of recompense may be brought more properly on the basis of quantum meruit, i.e. the value of the goods or services, than on quantum lucratus, i.e. the benefit conferred.

While expenditure may have been made in circumstances which might afford a claim of recompense, it is also essential that the person against whom the claim is preferred has been enriched, so that the receipt of a debt lawfully due will not subject to liability to a person from whom the debtor borrowed the money. As Kames puts it, equity will withstand an attempt to obtain a gain at another's expense, by giving a claim to recompense, but will not come between two parties striving to escape the loss threatened by the insolvency of the common debtor (Kames, 99).

Any claim for recompense is limited to the amount

expended, and it must be shown that the value of the subject has been enhanced by the expenditure (Gloag, 331). But exceptionally a sacrifice made by one to avert a threatened danger to himself and others may subject to contribution, a variant form of a claim of recompense. In its fully-developed form this appears in maritime law as the lex Rhodia de iactu or general average. But in certain cases, not fully within the principle of general average, a claim of the nature of recompense is competent, as, for example, where the owners of cargo in a ship held to ransom by a privateer were held bound to contribute (Lord Saltoun v. Ritchie, (1710), M.13421. Kames,98. See also Leslie v. Logan, M.13317.)

Kames' View of Recompense

Kames treats the subject of recompense under the general heading of benevolence, and the powers of a court of equity to remedy the imperfections of common law, with respect to that natural duty (p. 89). He cites the typical case of the bona fide possessor and notes the applicability of the maxim, nemo debet - observing pertinently that the gain must arise by means of the loss (pp. 91-2) and that it extends not only to action directed positively to benefit the other's property, but also directed to the prevention of loss or damage, as in the repair of a flood-bank (p. 98). Nevertheless he thinks the general maxim

may be too comprehensive and misleading (pp. 91-2), a view which has since been justified, as not every gain from another's loss will found a claim to recompense.

Implied Contracts and Quantum Meruit

Circumstances may arise when a claim may be made and there is doubt whether the remuneration is attributable to the obligation of recompense or to the kindred conception of implied contract. Such are cases of the supply of goods or services without any agreement as to the terms of the contract which is in fact being executed. While it is plain that justice demands that the party obliged should make a fair payment for the advantage thereby conferred on him, this may be justified theoretically on either ground although in practice the decision of this point may well not arise, and in decided cases of this nature, judicial opinion has favoured both views (e.g. Landless v. Wilson, (1880) 8 R. 289 (architect's plans); Hardinge v. Clarke, (1854) 18 D. 612 (tutor); Mellor v. Beardmore, 1927 S.C. 597 (employee's invention used by master); Anderson v. Anderson, (1869) 8 M.157 (farm manager).) But despite this, as Gloag points out (p. 328), a decision one way or other may be of importance as the basis of calculation of the rate and amount of reward varies according to which theory is adopted.

A claim based on recompense, as has been seen, involves a claim measured by the benefit conferred on the recipient and irrespective of the precise cost of that benefit to the doer, provided always that he has sustained some loss thereby. The claim is commonly said to be quantum lucratus. On the other hand, a claim based on an implied contract is measured quantum meruit, by ascertaining a fair and reasonable remuneration for the work done, just as if the matter had been expressly regulated by contract. In each case it is probably true that the only means of ascertaining the measure of benefit a man enjoys by another's action in such circumstances, is to ascertain the ordinary rate which he would have had to pay to obtain the same benefit by express contract, and this result renders the distinction possibly an academic question. Yet there may be circum - stances where the one explanation is appropriate and not the other, as where it was held that an architect had neither express nor implied authority to order plans, but that any used had to be paid for on the principle of recompense (Knox and Robb v. Scottish Garden Suburb Co., 1913 S.C. 872.)

A claim for recompense is in general excluded where there is a contract regulating the relations of parties: it is available only where there is no contract, or where action upon the contract existing is precluded in some way.

But the existence of a contract does not always preclude a claim for payment quantum meruit. The most obvious instance of this is where the contract contains no provisions for remuneration. It is not difficult to discover in such a case an implied term in the contract to pay a reasonable rate for the work done (Gloag, 291). The justification of such implications has been variously described as "presumed intention of the parties, and .... reason" (Bowen L.J. in The Moorcock, (1889) 14 P.D.64) and public policy (Gloag, 289). But in at least the older Scottish cases the Court seems to have acted as much on grounds of equity as on evidence of general practice in analogous cases which appears to be the more modern rule. So it is suggested that the implication of immediate entry where a lease contains no provision relative thereto was first arrived at on the ground that it seemed fair and reasonable to the judicial mind (Seton v. White, (1679), M.15173). And it is submitted that the equitable justification is still the theoretical basis of such rules, and that evidence of similar and analogous cases cannot be more than evidential and persuasive (see Gloag, 294). The Court would not adopt a rule even if of inveterate practice, if in conflict with justice and reason.

Winfield has suggested (Province, 157) that only one application of quantum meruit is truly quasi-contractual: that is where on breach of contract the injured

party may sue for what he has done under the contract or for damages for the breach. The contract is at an end and this is to be distinguished from the case where quantum meruit is taken as a basis of remuneration when that is not fixed by the contract itself.

Negotiorum Gestio

The obligations involved in negotiorum gestio have been included by Stair (I.8,3) under the head of recompense though elsewhere it is treated separately (Ersk.III, 3,52; Bell,Pr.§.540). "The ground of this obligation is, because it is frequent for men to go abroad upon their affairs, supposing quickly to return, and leave no mandate for managing of anything .... Those who interpose themselves in such cases, do necessarily and profitably for the good of the absent, and so are under no delinquence; neither are they presumed to gift their pains and expenses; nor have they any conventional obligation upon their part: and yet, though there were no positive law for it, the very light of nature would teach us, it ought to be recompensed; and therefore can be no other than an obediential or natural obligation, by the authority of God, and our obedience to him. Grotius doth not own this obligation as natural, but as arising ex lege civili .... But the contrary appeareth, not only from what is said, but by the testimony of the law itself, which

"reckons obligationem negotiorum gestorum, not among contracts or obligations, or actions ex lege, but among those which are quasi ex contractu."

Bankton explains it briefly (I,9,24): "Negotiorum gestor, that is, a Doer or Agent in another person's affairs, deserves a recompense, at least must be refunded his expenses." Erskine defines it (III,3,53) as the "management of one's affairs in his absence, by another, without a mandate from the owner", and Kames (p.118,note (a)) would add to this that "Equity accordingly holds the mandate as granted."

The relationship has frequently been held to proceed on the basis of implied mandate (More's Lectures, I,295, citing older cases) and it imposes the same duty to complete what he has begun, to take reasonable care (Kolbin v. United Shipping Co., 1931 S.C. (H.L.)128), and to account for all his management, as if he had acted under an express mandate. The cases where the relationship has been admitted fall broadly into the categories of acting spontaneously for an absent person or for an incapax (see cases in Gloag, 334). In such a case the gestor has a claim against the principal for the reimbursement of his expenses bona fide incurred even though they should not have proved beneficial. In this respect the claim is wider than one for recompense: but if the expenditure has not proved beneficial the gestor must probably show

that there was something of the nature of an emergency to justify his action.

That such an obligation and its consequential obligations are equitable appears undoubted. In Fulton v. Fulton ((1864) 2 M. 893) a party intervening on behalf of a pupil was designated a pro-tutor but Lord Neaves pointed out that it was merely a form of negotiorum gestio and an equitable obligation.

As Kames points out (p. 118), the fundamental justification for implying the mandate to the gestor to act is equitable, very much as the Court originally implied an immediate entry in a lease when no term was specified, because that seemed just and reasonable (Seton v. White, (1679), Mor. 15173).

In the Roman law this quasi-contractual relationship was first recognised by the praetors utilitatis causa and later extended under the influence of the jurists to include services of every kind, and enforced by the actio negotiorum gestorum directa (Dig. iii,5; Code,ii,18), and from that source it has been adopted into Scots law proceeding on the basis that unjust enrichment should not be countenanced (More, Note G). Nevertheless there are comparatively few early references to the doctrine; there are mentions in Spotiswoode (p. 224), Nicolson (fol.266 (1621)), and Hope (Major Pr.II,18,4), and of the half-dozen cases in Morison (9273 et seq.), the earliest is 1676.

Kames treated negotiorum gestio under the general duty of benevolence (p. 117). He says that when "effects are left without proper management, and where ruin must ensue, if no person of benevolence be moved to interpose", friendship and goodwill have an opportunity, and "when a proprietor is benefited by such acts of friendship or benevolence, justice and gratitude claim from him a retribution, to the extent of at least the benefit received." This is not quite a statement of the law in accordance with the authorities, for it seems to imply that the gestor is to receive the value of the service done. In fact this is not so. But the next sentence corrects this misapprehension, by considering the possibility of the destruction of the benefit. "Service undertaken by a friend upon an urgent occasion, advances gratitude from a virtue to be a duty; and binds me to recompense my friend so far as he has laid out his own money in order to do me service."

Later (p. 120) he cites the case of the master of a ship ransoming the cargo from a privateer, and entitled thereby to recover from the owners of the cargo. This seems to refer to the case of Salton v. Ritchie ((1710) Mor. 13421).

The English law on the matters covered in this chapter is so different from Scots that no useful purpose would be served by discussing it. It is sufficient to

say that until recently quasi-contract or restitution has been practically unknown as such in English law and its scope is practically confined to the recovery of money paid in error or for a consideration which has failed (Fibrosa v. Fairbairn, [1943] A.C.32). But it is noteworthy that the action of assumpsit, the English equivalent of repetition, was not devised by the Court of Chancery but was a common-law remedy; but Lord Mansfield in the leading case of Moses v. Macfarlan ((1760) 2 Burr. 1005) described it as equitable in the Scottish rather than the Chancery sense. This case was the beginning of the modern development of quasi-contract in England (see Lord Sumner in Sinclair v. Brougham, [1914] A.C. 378, 454, and Chitty on Contracts, 76 et seq.)

Chapter IX
Maritime Equities

Having considered the means whereby the law of Scotland equitably provides for the recompense of certain voluntary services and the avoidance of unjustified enrichment of one particular party at the expense of another, it is necessary to examine two kindred conceptions peculiar to maritime law yet not fundamentally different from the cases of quasi-contract already considered. These are the obligations of Salvage and General Average.

Salvage

The term salvage is applied both to the services performed by persons who act, though under no contractual obligation, in saving property or life (life salvage was added by statute: see now Merchant Shipping Act, 1894, s. 544, and Carver, § 329-31: it was not recognised by the general maritime law. For the subjects of salvage see The Gas Float Whitton (No. 2), /1896/ P.42.) in danger at sea, and also to the monetary reward given to such persons for their services. It will be seen at once that the service is akin to that for which recompense is due by Scots law under the quasi-contractual heading of negotiorum gestio (The Liffey, (1887) 6 Asp.M.C.255:

so too Winfield, Prov. of Tort, 156, treats salvage as quasi-contractual.) And it appears that, by a natural extension of that principle, a salvor has an undoubted right at common law in Scotland to recompense for his action (Stair, I,8,3; Bankton, I,8,3 and 4; Bell, Pr. § 538-41), whereas in England salvage reward would not appear to be due at common law but only in the maritime law (Falcke v. Scottish Imperial Insce. Coy., (1886) 34 Ch.D.234,248. Carver on Carriage by Sea, § 323.) In this matter the maritime law administered in the English Court of Admiralty has been declared the same as the maritime law administered by the Courts in Scotland (Currie v. M'Knight, (1896) 24 R.(H.L.) 1), and it partakes more of the nature of international law than any other branch of jurisprudence (Bell, Com.,I,497.) In Currie Lord Chancellor Halsbury, affirming that proposition, stated the reason as being that both countries' maritime law was derived from the same source which he describes as the laws of Oleron, supplemented by the civil law. Lord Watson, agreeing, referred to Professor Bell's dictum (Com.,I,497) and certain older cases bearing out this view of the matter (Wood v. Hamilton, (1788), Mor. 6269, 3 Paton App.148; Boettcher v. Carron Coy., (1861) 23 D. 331, per Ld. Pres. Inglis.), and it is clear that salvage is recognised in the maritime law of Scotland too. Bell defines salvage (Prin.,

§ 443) as "a reward or recompense given to those by means of whose labour, intrepidity, or perseverance, a ship or goods .... have been saved from shipwreck, fire or capture .... It rests on plain principles of equity, and a right of lien." This definition is echoed, in part in the same words, in the Commentaries (I,638), the author adding that in Scotland the regulations respecting salvage form part of the common law.

To qualify as salvage the services rendered must have been rendered in rescuing the property from impending danger at sea and have appreciably contributed to effect that rescue (Carver, § 332. See also Clan Steam Trawling Co. v. Aberdeen Steam Trawling Co., 1908 S.C. 651, per Lord Justice-Clerk at 657, Lord Ardwall at 658.) The determination of the amount of salvage by the Court depends on the nature of the services rendered, the degree of danger, the value of the property saved, the risks run by the salvors, their enterprise, endurance and skill, and the severity and duration of their labours, which must all be taken into consideration (Carver, § 344; Abbott, 965.)

The origin of the right of the salvor was ascribed by Sir Christopher Robinson in The Calypso ((1828) 2 Hagg. 209,217) to the Roman law principle of negotiorum gestio. "It will be found, I think", he said, "that both these forms of salvage (civil and military) resolve

"themselves into the equity of rewarding spontaneous services, rendered in the protection of the lives and property of others. This is a general principle of equity, and it was considered as giving a cause of action in the Roman law; and from that source it was adopted by jurisdictions of this nature in the different parts of Europe. This is the account which Sir William Wiseman, who was judge of this Court, gives of the origin of salvage. Referring to the title in the Digest (Dig.,iii,5,De negotiis gestio), he says (Law of Laws, 90):- 'Upon the equity hereof is that proceeding in the Admiralty Court clearly justified, whereby, if a ship, being set upon by pirates or by enemies, shall be rescued by another ship seasonably coming to her rescue, it charges the ship that is thus redeemed with salvage money to the other that did so endanger herself to preserve her; that recompense being but in lieu of all damage thereby sustained, and for future encouragement to others to fight in the defence of those that they see assailed.' Considering all salvage, therefore, to be founded on the equity of remunerating private and individual services, a court of justice should be cautious not to treat it on any other principle." Salvage is then clearly a quasi-contractual conception (Winfield, Province, 139; Jackson, 124) akin to recompense and negotiorum gestio and only differing in being peculiar to maritime law. Bankton (I,8, 4 and 8) mentions it under the head of restitution, and again under

recompense (I,9,40) defines it as "a Recompense to those that were assistant in saving and recovering goods that were in hazard of perishing, upon a ship's being stranded, or having suffered shipwreck: the expense and pains the party was at upon the occasion, and the value of the goods saved, must regulate the amount of the same: if there was a previous agreement, that must be the rule for awarding it; .... and the goods may be detained till it is satisfied."

In The Gas Float Whitton No. 2 (/1896/ P.42, affd. /1897/ A.C.337) Lord Esher, M.R., quotes a number of descriptions and definitions of salvage, among them that in Kent's Commentaries on American Law (12th edn.,vol.iii, 245) to the following effect:- "Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss, in cases of shipwreck, derelict or recapture .... The equitable doctrine of salvage came from the Roman law, and it was adopted by the Admiralty jurisdictions in the different countries of Europe." The point at issue in that case was whether a floating boat-shaped gas cylinder carrying a light which had broken adrift could be a subject of salvage. The Court of Appeal held that the gas-float, not being a ship or part thereof, nor cargo or wreck, could not be the subject-matter of a salvage claim in the Court

of Admiralty. While this decision is acceptable in Scotland, it may be observed that in Scotland, differing herein from the law of England, a claim of recompense might possibly still have been competently made by the salvors, if they had sustained loss in effecting the service, or of negotiorum gestio otherwise. The measure of remuneration would however have been materially different, as salvage rewards are more liberal than those of recompense, or negotiorum gestio.

The distinction between the English common law, which knew nothing of negotiorum gestio, and Admiralty law was commented on by Bowen L.J. in the case of Falcke ((1886) 34 Ch.D. at 248; see too Kennedy on Civil Salvage, 3rd edn., 7): in Scots law the existence of other quasi-contractual doctrines minimises this distinction into one of merely measure of reward, though it may be doubted whether the salvor's lien over the goods saved has any counterpart in negotiorum gestio, but there seems no reason in principle why it should not exist.

The further element of liberal reward is however admitted in the maritime law for which the Roman law did not supply the foundation. Salvage, as Story said, is a mixed question of private right and public policy (cited in The Albion (1861), Lush.284. Carver, § 323, rests salvage entirely on policy), and stands on a broader basis than the "equity of remunerating private

"and individual services". The reward is assessed by the Court, neither as a compensation pro opere et labore, nor according to the measure of direct benefit conferred by the particular salvage service upon the ship-owner and the cargo-owner, who are chargeable with the payment of the reward. Indeed in the case of claims for the saving of life - the preservation of passengers or crew - the owners of ship and cargo often pay for that from which they have received no benefit at all. They are made to do so, because public policy and the interests of humanity and commerce require that they should (Kennedy, op. cit. 8.) So too in The Fusilier ((1865) Br. and Lush. 341,347), Dr Lushington said: "Salvage is governed by a due regard for the general interest of ships and marine commerce." Bowen L.J. justified the encouragement of salvage services by liberal or, at least, adequate reward in Falcke (34 Ch.D. 234,248) in these words: "The maritime law, for the purposes of public policy, and for the advantage of trade, imposes in these cases a liability on the thing saved - a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances", and he goes on to point out that the obligation is peculiar to ships and goods in perial at sea.

Normally to entitle to reward a salvage service

must be successful and confer some benefit on the owner of the salved property (Portland v. S.S. "Ahdeek" Shares Co. Ltd., (1900) 8 S.L.T. 81.) If, however, the service has been rendered at request, a reward in the nature of recompense may be given even if the salvage has not been completed (The "Tarbert", /1921/ P.372,376), and in the same way a payment in the nature of recompense may be given even in the event of entire lack of success (The "August Korff", /1903/ P. 166) and such would be in accordance with the common law of Scotland (Bell, Pr., § 538.) There are however singularly few statements of principle in the Scottish cases on salvage.

In The Liffey ((1887) 6 Asp.M.C.255,256), Sir James Hannen, P., said: "In this Court happily we deal with matters on equitable principles, and we are not tied down to the strict rules of the common law. It appears to me that, on every principle of justice, this man must be entitled to something in the nature of salvage .... It is perfectly plain that salvage does not depend upon any express contract because the whole thing could be done without the shipowner having any knowledge on the subject; but, once being done, then by reason of the facts the shipowner becomes liable to do that which is right and fair, viz., to make a compensation to the man who has restored to him property which but for his exertions would have been lost."

In The Five Steel Barges ((1890) 15 P.D.142,146) the same judge described the jurisdiction which the Court of Admiralty exercise in salvage cases as being "of a peculiarly equitable character. The right to salvage may arise out of an actual contract; but it does not necessarily do so. It is a presumption of law arising out of the fact that property has been saved that the owner of the property who had had the benefit of it should make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to a man who has had a benefit arising out of the saving of the property."

Salvage Agreements

While salvage is essentially quasi-contractual and independent of any contract, it is quite competent for the salvors and those on the salved ship to come to an agreement as to the amount of salvage payable for a particular salvage service and such an agreement will be enforced by the Courts. An agreement does not, however, alter the character of the salvage service, which remains a salvage contract and one for salvage remuneration (Kennedy, 248). Dr Lushington stated the law on this matter in The Henry ((1851) 15 Jur.183) as follows:-

"When agreements are made at sea between salvors and masters of vessels, the Court will always be very desirous to confirm them, if it can do so consistently with equity and justice. The Court would be very reluctant, under ordinary circumstances, to disturb an agreement made between parties on account of the sum appearing too large or too small, but I do not say that there are not cases in which I should not hesitate for a single moment to pronounce against an agreement." Of course, the Court may also hold the contract avoided by fraud, misstatement or non-disclosure of facts material to the salvage service.

So where an agreement is sought to be enforced and the Court of Admiralty finds that the price of the salvage services is disproportionate to the nature and value of those services and the agreement was wrung from those in peril, the Court as a court of equity must disregard the agreement. The Court will have regard to the fact that the parties were not contracting on equal terms (The Mark Lane, (1890) 15 P.D.135. See also The Medina, (1876) 1 P.D.272; 2 P.D.5.) Story stated the duty of the Court to reduce such agreements in The Emulous (quoted in Kennedy, 259. See also Buchanan v. Barr and Shearer, (1867) 5 M. 973: The Hestia, /1895/ P.193,199), as follows:- "No system of jurisprudence purporting to be founded on moral or religious, or even rational

"principles, could tolerate for a moment the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings and disgrace human justice."

So in The Port Caledonia and the Anna (/1903/ P.184) a promise of salvage reward made by a master when in imminent danger of fouling another vessel was reduced because in the circumstances it was an "inequitable, extortionate and unreasonable agreement", and it is well-established law that the Court will set aside a salvage agreement,not only where tainted by fraud, or induced by innocent misrepresentation of a material fact, but where it appears to be exorbitant, unreasonable and altogether inequitable to give effect to it.

This appears to have been the rule of the general maritime law from the earliest times and is recognised in the Laws of Oleron (Black Book of the Admiralty, ed. Twiss,II,437) of the latter part of the Twelfth Century, and it was laid down as a fundamental rule of the administration of maritime law by Brett L.J. in Akerblom v. Price ((1887) 7 Q.B.D. 129, 132-3), founded on the fact that the parties cannot truly be said to be on equal terms. "The Court will try to discover", he said, "what,

"in the widest sense of the term, is, under the particular circumstances of the particular case, fair and just between the parties. If the parties have made no agreement, the Court will decide primarily what is fair and just .... If the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it, and decree what is fair and just." The salvors are as much entitled to the equitable jurisdiction of the Court as the owners of the salved property, and an agreement may consequently be set aside as being inequitable on account of the smallness, as well as of the exorbitancy, of the remuneration fixed (The Phantom, (1866) L.R. 1 A. and E. 58). The Court will carry an agreement into effect unless it is "totally contrary to the equity of the case" (The Helen and George, (1858), Swab. 368,369 per Dr. Lushington.) To warrant the Court's intervention the discrepancy between the amount fixed and that which the Court considers fair and reasonable must be considerable, nor will it suffice to show that one party or the other might have made a more prudent bargain. The Court may, further, intervene, if circumstances justify it, even after a payment has been made and a general discharge granted.

Equitable intervention by the Court may also take

place when an agreement has been entered into by those interested in the salvage reward as to its apportionment, either before or after the performance of the salvage service. Such an agreement will be enforced by the Courts but if it is vitiated by fraud, misrepresentation, or if the parties concerned are not in a sufficiently strong and independent position to defend their own interests, it may be set aside, and it may always be set aside if the Court considers it inequitable and tending to take advantage of the inferior position and ignorance of the seamen as against the master and owners (The Enchantress, Lush.93); but not merely on the grouhd that the Court might itself have arrived at a different apportionment. As in many other branches of equity, the policy of the law is to protect the persons placed in an inferior position from being overreached by those with greater knowledge and advantages. Similarly, where an alleged customary scale of apportionment according to the usage of a particular occupation or locality is averred, it will be upheld only when shown to be equitable in all respects.

Contribution to Salvage

As a general rule every interest in the property benefited by the salvage service must contribute to the salvage reward, and each part of the salved property must contribute rateably according to its value as salved, irrespective

of the degree of risk (Duncan v. Dundee Shipping Coy., (1878) 5 R. 742). The cargo is primarily and equally with the ship liable for payment of the reward though in practice the shipowner frequently pays the whole of the salvage and recovers a proportion from the cargo. Liability is on all "those who receive benefit and who would have suffered the loss from which the exertions of the salvors have saved them" (Bell, Com.,I,597). In consequence of the equitable nature of the jurisdiction, a person without strict legal title to the property, but indirectly benefited by the services, may be found liable to contribute (Five Steel Barges, /1890/ 15 P.D.142).

If however the necessity for the salvage services has arisen through a breach of contract or duty on the part of the shipowner or of his servants, he cannot look to the cargo-owner for any contribution towards salvage, and if the cargo-owner has been compelled to pay for salvage services, he is entitled to be indemnified by the shipowner for this expenditure. The principle was explained in The Ettrick ((1881) 6 P.D.127, per Cotton L.J.): "It would be against equity to say that the person who has himself done the wrongful act which caused the expenditure shall claim thereupon from anybody else", and a similar rule has been applied to the right to general average contribution in respect of a jettison rendered necessary by the negligent navigation of the

ship (Strang v. Scott, (1889) 14 App.Cas.601,608.) To bar the claim for contribution however the shipowner's fault must be actionable.

It is unfortunate that there are so few Scottish statements of principle acknowledging the equitable and quasi-contractual foundation of salvage awards and the place of equity in adjudicating upon salvage agreements, but the identity of the maritime law of the two countries has led the Scottish courts to accept the English Admiralty cases without reserve. Early Scottish cases on salvage are also lacking. One is Lutwidge v. Gray in 1735 (Mor. 13422) which Kames criticises adversely (p. 112), as having been decided on common law principles to the exclusion of equity.

General Average

The other quasi-contractual obligation connected with maritime law is that generally accepted among maritime nations and called from its origin the lex Rhodia de iactu, or more commonly to-day, general average. The term signifies the act of sacrificing part of the ship's cargo and apparel to avert total loss, the loss sustained thereby, and also the contribution levied on the joint-adventurers to recoup the losers (Maclachlan on Merchant Shipping, 5th edn.,732, quoting M.I.A. 1906, § 66.)

This principle of law was adopted by all the maritime peoples of Europe from the ancient sea-law of Rhodes through the medium of the Roman law (Dig.xiv,2,1). "This law was not only received among the Romans but likewise holds by our custom and is become in effect the law of nations, being founded in natural equity" (Bankton, I,9,29.) Maclachlan describes it as introduced and justified by expediency and sanctioned by the principles of natural equity (p.734). In England at least for a time it was regarded as based on implied contract (Abbott, 14th edn.,751, note. Winfield, Province, 139, 182), but Lord Esher, M.R., repudiated this view in 1883, saying that it was "not as a matter of contract but in consequence of a common danger, when natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved" (Burton v. English, (1883) 12 Q.B.D. 220. Cf. Story, § 490.) Lord Watson in Strang v. Scott ((1889) 14 App.Cas.601,607) remarked that the basis of the rule did not differ from that of claims of recompense for salvage services. "But in any aspect of it, the rule of contribution has its foundation in the plainest equity." "The wisdom and equity of the rule", Abbott wrote (5th edn.,342; 14th edn., 752) "will do honour to the memory of the State from whose code it has been derived, so long as maritime commerce shall endure."

So from the maritime commerce of the Aegean is sprung this principle of the sea-law common to all maritime peoples. From the Greeks of Rhodes the principle was taken up by the Romans and the chapter of the Digest dealing with examples of the rule has prefaced to it the text: "Lege Rhodia cavetur ut si levandae navis gratia iactus mercium factus est omnium contributione sarciatur quod pro omnibus datum est." It survived the fall of the Roman Empire, as a tradition among seafarers, to reappear in the Laws of Oleron, of Wisby in the Baltic, and finally was revived and rediscovered after the rediscovery of the lost Pandects (see generally Lowndes and Rudolf on General Average, Introduction.) The word average seems to be of much later origin (see Maclachlan on Merchant Shipping, Ch. 14, Appx. on History and Etymology of the term Average.) The system of general contribution was adopted and developed by the great system of maritime commerce built up by the merchant cities of Italy in the Middle Ages. It seems probable that the rule was laid down as obligatory on grounds of natural equity, though in the Laws of Oleron and other mediaeval codes, the foundation of the rule is that of a bargain made at the moment of danger.

The accepted definition in modern law was given by Lawrence, J., in Birkley v. Presgrave (1 East 220,228. For other definitions see Lowndes and Rudolf, 17-19.

Mar.Ins.Act,1906, s. 66, and York-Antwerp Rules, 1924, Rule A) in 1801: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested. Natural justice requires this." The question however remains whether the right to general average is founded on the authority of Rhodian or Roman law, or custom or on other grounds. Older English writers base the right on natural justice (e.g. Abbott on Shipping, 5th edn., 344; 14th edn., 756; judgments in Birkley, supra) though the idea of implied contract received considerable support (Wright v. Marwood, (1881) 7 Q.B.D. 62,67. Maclachlan, 5th edn., 734 n.) Lord Blackburn in Aitchison v. Lohre ((1879) 4 A.C.760) based it on the Rhodian law. Two years later Watkin Williams, J., said that it was "founded on justice, public policy, and convenience, and rests .... upon reasons which are so obvious that it is not surprising to find that it is older than any other law or rule in force ...." (Pirie v. Middle Dock Co., (1881) 4 Asp. M.L.C. 388, 390.) Brett, M R., in Burton v. English ((1883) 12 Q.B.D 218) founded it on the requirements of natural justice, and Vaughan Williams, L.J., in Milburn v. Jamaica Fruit Importing Co. (/1900/ 2 Q.B. 540,550) affirmed that the liability to contribute existed independently of the

contract of carriage "by virtue of the equitable doctrine of the Rhodian law", while Scott, L.J., in Morrison S.S. Co. v. Greystoke Castle (/1945/ P.14, affd. 1947 A.C.265. See too Arnould, 13th edn., 838, n.7) described it as imposed by the common law of the sea. Story (§ 490) believed that the doctrine had its origin "in the plain dictates of natural law."

But the rules of general average are applicable only to the case of jettison or loss properly made in circumstances of danger. They do not extend to loss from the unseaworthy condition of the vessel or from the faulty navigation of master and crew: damage arising from these causes does not give rise to a claim for contribution. As Cotton, L.J., said in The Ettrick ((1881) 6 P.D.127, 137. Lowndes and Rudolf, 35, quoting Strang v. Scott, (1889) 14 App.Cas.601. See also Klein v. Lindsay, 1910 S.C.231), "It would be against equity to say that the person who himself has done the wrongful act which caused the expenditure shall claim thereupon from anybody else." The broad principle is accordingly that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of someone for whose acts the claimant has made himself, or is made by law, responsible towards the co-contributors.

To found a good claim for general average contribu-

tion there must be an extraordinary, real, and intentional sacrifice of some part of ship or cargo, made by the master in circumstances of danger, to avert a threatened more serious loss: the prime example is jettison of cargo to lighten a leaking ship to enable her to make port.

The dicta of Scottish authority are strongly in favour of treating general average claims as quasi-contractual founded on manifest equity and natural law. Welwod (Tit. 9-13) says of the Rhodian law and the laws of Oleron that "the singular skill of baith people sa commendit and equitie sa approvit" them that the Romans and most of the world adopted them. Stair (I,8,8) treats of the subject under the head of recompense and cites the Lex Rhodia as having become a law of nations and then remarks that it is "not declaratory of pure equity, but doth hold by custom". More's Note (p.lv) thereto instances this as "another illustration of that rule of equity by which those who are benefited by the loss, or expense, of another are bound to indemnify him." Bankton (I,9,29-39) says that the lex Rhodia was "not only received among the Romans, but likewise holds by our custom, and is become in effect the law of nations, being founded on natural equity." Erskine (III,3,55) also treats this branch of law under the head of quasi-contracts: this law, he says, "most equitably enacted

"that where goods or merchandise carried by sea were in a storm thrown overboard for lightening the ship, the owners of the ship and of the goods saved, should contribute for the relief of those whose goods were ejected ...." Bell (Com.,I,630) in the same way praises the rule as having that very character of manifest equity which most naturally recommended it to general adoption, and Arnould (§ 907) says that "the plainest principles of equity require that the sacrifices so submitted to should be made good and the expenses repaid by a general contribution from all those benefited by either one or the other, in proportion to the value of the property which those sacrifices have been instrumental in saving", and he quotes the passage in the Digest (xiv,2): "Aequissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt ut merces suas salvas habuerint." Kames (p.120) treated of the lex Rhodia as a consequence of the doctrine of negotiorum gestio but merely mentions the principle as having prevailed among all civilised nations ancient and modern, and he considers this "obligation of retribution" as depending on the principle of recompense founded on the maxim, nemo debet locupletari ex aliena iactura, and goes on to discuss whether the goods preserved should contribute according to weight or value. His deliberations on the matter of valuation were disapproved by Bell (Com.,I,637,note 7). Elsewhere Kames (pp.7-8)

cites average as a typical example of an equitable remedy, falling under the branch of jurisdiction which deals with acts of benevolence: under the same head salvage is cited as another example.

Several cases under the lex Rhodia are recorded in Morison's Dictionary under the title Recompense, notably Landale v. Thomson (Mor.13428) in 1763 and Robertson v. Brown in 1785 (Mor.13430; cf. Balfour 622.) In the former, the owners of cargo were decerned to contribute to the loss sustained by the vessel being necessarily run ashore to save the cargo and the lives of the seamen; it was pleaded that contribution was due in reason and justice. In the latter, damage sustained in an action against a privateer was held not to be made good by general contribution. Other cases under the same title are Leslie v. Logan ((1680), Mor.13417), where a claim for contribution for loss when boarded by a privateer was repelled, and Salton v. Ritchie ((1710), Mor. 13421), where it was held that the ransom of a supercargo taken by a privateer had to be made up proportionally by those whose goods were saved. Habbakuk Bisset also mentions both salvage and general average (II,242).

The adjustment of average loss and apportionment of the sum to be contributed to the loss by each party interested is based on the principle of natural justice embodied in the old equity maxim, "He who claims equity

"must render equity", and so from time immemorial the rule of adjustment has been that the property sacrificed for the general benefit shall bear its share no less than if it had been saved, and the contribution is to be so regulated that in result it is immaterial to each person, whose property shall in the first instance have been taken, whose money spent, or whose credit pledged for the safety of all (Arnould on Marine Ins., § 974.)

Bowen, L.J., pointed out in Falcke v. Scottish Imperial Insce. Coy. ((1886) 34 Ch.D.234,248) that in regard to salvage, general average and contribution, the maritime law differs from the common law, and that no similar doctrine applies to things lost upon land nor to anything except ships or goods in peril at sea. But in view of the other accepted quasi-contractual doctrines of Scots Law this statement is not strictly true for Scotland.

The unanimity with which Scottish authorities have treated the subject of general average as equitable is a strong illustration of the fundamental difference in meaning between equitable in Scots and in English law. The fact that average was not a subject dealt with in the Court of Chancery means that it is not equitable in the ordinary English legal sense but only in the general sense of the word (Story, § 490, appears to be the only English writer on Equity who treats of General Average.)

Chapter X
Trusts

A treatise on English equity commonly devotes fully half its length to a discussion of trusts. The trust was the principal subject exclusively appropriated to the jurisdiction of the Chancery in England and the development of the conception and the law of trusts is owed entirely to Chancery recognition. The origin of the idea of the trust has provoked much discussion and remains unsettled. Some see it in Roman Law conceptions, others in Germanic and others again in something purely native and English. In Scotland the question has not received much attention. Maitland (Equity,6,32) did not accept the common view (e.g., Story, § 965) that there was anything Roman about the trust, but considered it the natural outcome of ancient English elements. The early English use was seldom if ever the outcome of a last will, whereas the Roman fideicommissum belongs essentially to the law of testaments (Maitland, Coll.Pap.II,403,416.) Holdsworth (H.E.L.IV,407, quoting Holmes in 1 L.Q.R.162) considered that the shape the use took in England resulted from the manner in which it was protected by the Chancellor. In England it had become sufficiently common to convey land to another to the use of a third party for public attention to be drawn as early as the year 1401 to

the frauds resulting from the refusal of the common law to recognise uses (ibid.,419). By the first quarter of the Fifteenth Century the jurisdiction of the Chancellor had become well established (ibid., 420) and this and subsequent development of the equitable trust did some of the work done abroad by the adaptation of principles of Roman law to modern needs (ibid., 477). It appears too that as early as the time of Richard II the writ of subpoena had originated by which a trustee could be summoned to the Chancery to account for his intromissions with the trust property, thus reinforcing the natural obligations acting on the trustee's conscience.

In modern times the trust relationship arises where property is vested in a person or persons, which they are obliged to hold in continual dominion and stewardship for the accomplishment of a particular purpose or for other persons, according to their directions (Hanbury,117; other definitions in Hart, 15 L.Q.R. 294.)

The treatment of trusts in the earlier Scottish writers is vague and unsatisfactory. Craig (II,5,9: Lord Clyde's Trans., I,448) is the earliest to mention it, in the chapter dealing with conditional institution: he looks on a trust as essentially a burden on a feu and defines it in terms not dissimilar to those used by Coke (Co.Lit. 272b) and adopted by Lewin (15th edn.,p.2), though not followed by later Scottish writers. He says:

"There are yet other conditions which are in favour neither of the grantor nor of the grantee and still less in favour of them jointly. Thus it may be agreed that I shall grant you a feu on the condition that you shall convey it to a third party. In such a case the feu is properly said to be given in trust (fideicommissum dicitur). When it is impossible, for any reason, for the grantor to convey a feu immediately to the person he desires to benefit, he entrusts it to the fidelity of someone else on condition that the latter shall put the intended beneficiary in his own place." The Latin word obviously recalls the doctrine of fideicommissum in the Roman law. In that law trusts as we know them to-day did not exist but the fideicommissum was the nearest conception. It was classified as a medium of inheritance and was an informal kind of bequest whereby the testator imposed on another person a purely conscientious obligation in precatory terms to make over to a third party a benefit thus informally conferred on him (Ledlie's Sohm, 570; Buckland, Textbook, 353.) Girard describes these as originally "simples prières laissées à la bonne foi" (p. 776).

From the time of Augustus these became legally enforceable and under Justinian became merged with legacies. Kames says (p. 324) that Augustus supplied "a defect in common law" by giving the beneficiary a right to enforce

the trust for his behoof. It is tempting to see in the fideicommissum the origin of the Scottish trust, particularly in view of the Roman basis of so many of our older doctrines, but modern opinion tends against this, especially in England. Moreover if the fideicommissum had truly been the origin of the trust it is hard to explain how the modern German Roman law knew it not. Trust is truly sui generis though it may in Scotland have derived something from Roman ideas.

Stair treats trust as a combination of the contracts of mandate and deposit. "Trust", he says, "is also among mandates or commissions though it may be referred to depositation, seeing the right is in custody of the person intrusted" (I,12,17). Elsewhere he says: "Trust is also a kind of depositation, whereby the thing intrusted is in the custody of the person intrusted to the behoof of the intruster; and the property of the thing intrusted, be it in land or moveables, is in the person of the intrusted, else it is not proper trust" (I,13,7).

Under the head of Circumvention and Fraud, Bankton says: (I,10,68) - "All trusts are simulate rights, being in the name of one for behoof of another; and though, since the late statute (1696, c.25) trusts are not provable otherwise than by the oath or writing of the person in whose name the right is conceived, yet that does not exclude grounds of simulation .... and circumstances

"inferring fraud, ... which were always and are still, competent to be proved by witnesses, and from these the trust in a deed may be discovered

"Confidences of trusts, where no back bond is taken from the trustee, but the performance committed entirely to his conscience, are simulate rights, in a most proper sense: of this kind were fide commisses originally among the Romans"; and again later (I,18,12), writing of mandate, he says that a mandatory may acquire right either in the name of his constituent, "or in his own name in trust, or simply in his own name. In this last case, it is a tacit trust-right, as in every other case where one takes a right in name of another for his own behoof, without any declaration of the trust in writing. Before the statute (1696, c. 25), trust was inferred from presumptions, or proved by witnesses: by that act, all trusts thereafter can only be vouched by writing, or oath of the person said to be intrusted."

Erskine defines it in this way: "A trust is also of the nature of depositation, by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it may be applied to certain uses for the behoof of a third party" (Ersk.3.1.32). Bell's definition is: "In a deed of trust there is a combination of two contracts - deposit and mandate; the estate not being in the

"trustee for any use or purpose of his own, and the management being regulated by the directions given by the maker of the trust" (Bell's Com.,I,30). Bell is the first of the institutional writers to give a detailed treatment of trusts.

While there is undoubtedly a resemblance between trust and both deposit and mandate, there are also essential differences which make the analogy of less value. In trust the formal ownership is transferred, which does not happen in deposit or mandate. The mandatory or depositary holds property as agent, while the trustee holds as principal. Yet this view has the sanction of Lord President Inglis. In Cunningham v. Murray's Tr. ((1879) 6 R. 1333,1336) he said: "Scientifically considered, the position of trustees .... is this, that they are depositaries of the trust estate and mandatories for its administration. This is a combination of two well-known contracts in the civil law, and the character and quality of these contracts is perfectly well-fixed both in the civil law and in modern jurisprudence." Elsewhere he defined a trust as "a contract made up of the two nominate contracts of deposit and mandate. The trust funds are deposited for safe custody, and the trustees receive a mandate for their administration" (Creskery v. Gilmour's Trs. (1890) 17 R. 700). This is however an inadequate description of the trust function.

Moreover while there is an element of contract in trust, this does not suffice to make it contractual or quasi-contractual. Once the trust has been constituted it may not, except for administrative trusts, be modified or terminated, and a trust existing sui iuris does not fail by the death of a trustee; the trustee moreover dons a special legal capacity in his transactions, separate from that of himself as an individual, not liable to the claims of his creditors and not, unless exceptionally, descending to his heirs. The dictum quoted has however been disapproved by Lord Dunedin (Allen v. M'Combie's Trs., 1909 S.C. 710 at 716); but Lord M'Laren in the same case considered (718) that the principle of trust administration was the same in Roman law though worked out differently, while Lord Kinnear agreed with Lord Dunedin that we have derived the law of trusts, as now administered, more directly from the equitable administration of trusts by the Court of Chancery in England, than from legal deduction from the contracts of mandate and deposit. This is indisputable as regards many parts of modern trust law but it hardly helps us to ascertain the origin of the conception in Scots law. Elsewhere (Wills and Succession, II, 825) Lord M'Laren preferred to consider the trust relationship as quasi-contractual, distinct from mandate but closely allied to it, or as of the nature of a limited

fee (Trusts, I, 203; cf. Bell, Pr., § 1991.)

Despite the confident dictum of Lord Westbury (Fleeming v. Howden, 6 M.(H.L.) 113, 121. See also Rae v. Meek, (1889) 14 A.C. 558, 569, and Brinsden v. Williams, /1894/ 3 Ch. 188) that "The doctrine of trusts has the same origin and rests on the same principles, both in Scotch and English law; and it is desirable that it should be developed to the same extent in both systems of jurisprudence", it may be doubted whether there is such complete identity of origin, though there seems little reason to suppose that the root-idea of trust was a prerogative of the English legal mind.

The views of other Scottish writers are in general similarly unenlightening. More (Lect.,I,187) treats trust along with mandate while acknowledging that it differs in several respects from proper mandate. Hume (Lect.,II,145) barely mentions trust as a variant of mandate but without distinguishing it properly. Forsyth (Trusts, 9) ascribes Scottish trusts to Roman fideicommissa, saying that they were necessarily introduced along with the civil law on which the law of Scotland is based. He describes their use in an early period to secure estates against forfeiture, and to evade the effect of civil diligence by horning, when an estate was forfeited. Paterson (Compendium, 70) states that in Scotland trusts have existed from the earliest period, and the legislature

only interfered by the statute of 1696 to declare more clearly by what evidence trusts must be established. Howden likewise (Trusts, 5) ascribes Scottish trusts to a Roman origin and ventures the opinion that trusts in some form or another have existed from an early date in our history, possibly arising from times of civil strife. (He cites no authority for this.)

Turning to primary authorities, there is a hint of trust in Innes v. Gordon in 1497 (A.D.C. II, 131), where the Lords decreed £40 damages for intromission with goods handed over to one "quhilk ressavit the sadis gudis fra hir sade fadir to hir utilite and profittis." In Rollock v. Hamiltoun (Balfour, Practicks, 198) in 1560 there is mention of "gudis .... gevin in keiping to ony persoun to be furthcumand to the utilitie and proffeit of him that gevis thame." In Forrester v. Magistrates of Edinburgh ((1860) 22 D. 1222) there is reference to grants of land in trust for charitable purposes in 1461 and 1566, and in Trades of Edinburgh v. Heriot's Hospital ((1835) 14 S. 873) there is quoted the trust settlement of George Heriot of 1623. In 1623 an assignee "denied trust and took upon his conscience that the assignation was made to himself, and to his own proper use", yet the Court found it was given in trust and ordained retrocession (Williamson v. Law, (1623) Durie, 54). In 1624 in Stanipath v. Her Son's Relict (Durie, 141) the Lords

after proof found that a deed was "done upon trust or confidence" and granted decree. Several cases of the Seventeenth Century are mentioned by Stair and collected in Morison (16163 et seq. - 24 cases prior to 1700). Dallas (Stiles (1697, pp. 833 et seq. Cf. Habbakuk Bisset, II, 139) quotes three styles of mortifications or charitable trusts where heritable property is conveyed to persons as "trustees and fidecommissaries for the use of the poor." Dirleton's Doubts (1698, p. 177; see also p. 215, "in trust to the use of") mentions the King having a right of the estate of Argyle settled on three trustees "to the uses foresaid", and the familiar words of a trust disposition to trustees, "in trust for the ends uses and purposes aftermentioned", appear in the first edition of the Juridical Styles (1787, Vol.I, 70.)

It appears then from these instances that the trust was a familiar conception by the Seventeenth Century at latest and the language of the Act 1696 c. 25 confirms this, by stating that "Intrusting of persons without any Declaration, or Back-bond of trust in writing from the Person intrusted, are Occasions of Fraud, as also of many Pleas and Contentions" and that in future trust must be proved by writ or oath. This confirms Bankton's view that trust was previously known in Scotland but provable by parole and the Act merely restricted the mode of proof.

Kames (p. 324) founds on the Roman law and explains how a trust comes not under the cognisance of a court of common law and hence that in England such trusts must be made effectual in the Court of Chancery. But he does not explain at all how the Court of Session came to recognise trusts. Instead he diverges into a discussion of entails which played a not dissimilar part in Scotland. His discussion of the topic is shallow and unsatisfactory.

Trusts did not then receive a full treatment in Scots law till Bell's Commentaries appeared. Bell does not go deeply into the origin of the trust in Scotland but ascribes (Com.I.32; so too Forsyth, p. 10) their rise to times of rebellion and civil war when lands were entrusted to friends by secret compact (The progress in England, he says, was very similar during the Wars of the Roses) and equity afforded the only ground of judicial interposition. "In Scotland, without any general statute to declare the legal estate of the truster, the gradual operation of our combined system of law and equity .... has led to the establishment of a safe, clear and regular system of trusts ...."

M'Laren (Trusts, 2) rejected the theory that trusts arose from conveying estates to trustees by ex facie absolute disposition, during times of civil strife. He points out that there is evidence of the existence of trust conveyancing at a very early period in Scottish

history and there is reason to believe the interest of the beneficiary was just as fully recognised by ancient tribunals as that of any other class of persons. He points out that prior to the Reformation the interpretation of trust deeds would devolve upon ecclesiastical courts, as being of the class of subjects which the Church claimed as exclusive jurisdiction and which they enforced by spiritual censure. The Church, too, had a substantial interest in maintaining jurisdiction as to trust property and the assumption of equity jurisdiction by the ecclesiastical courts can be traced to two distinct and equally potent motives, the necessity of ensuring that property bequeathed to the Church should reach its appointed destination, and the necessity for protecting such property against encroachments on the part of individuals entrusted with its management. He goes on to point out that the Church had jurisdiction in all matters relating to wills and this was extended to trusts, as involving fidei ac iuramenti interpositionem and the principles of the canon law were applied in the Bishops' Courts and, after the Reformation, in the Commissary Courts.

Dicta in a decided case can hardly be unimpeachable authority for a point of legal history, yet it is of interest that in Allen v. M'Combie's Trs (1909 S.C.716) Lord President Dunedin described as historically true

the view of trust as a species of mandate or deposit which appears in the institutional writers and was sanctioned by Lord President Inglis in Croskery v. Gilmour's Trs (17 R.700), and he says that the origin of trusts may very well be taken to be a combination of these two contracts But Lord M'Laren in the later case (1909 S.C. at 718) said: "If you go back to the Roman law which is the source of the fundamental principles of trust administration, you find the property was given to the heir, who by the strict law of Rome was entitled to ingather the estate as if it were his own. But then it was given to the heir on condition that he should leave the whole or part of it to some other person. That was a fideicommissum to which effect was given not as a matter of strict law, but by the exercise of the praetorian power which recognised the justice of the beneficiary's claim in that matter that was not covered by the ancient law ...." Yet Lord Kinnear adds (ibid., 720) that in practice we have derived the law of trusts more directly from the English Chancery than by logical deduction from contractual principles, and there are wider consequences in the fiduciary relation it creates than can be referred to contract. There was certainly a distinct tendency in earlier cases to use the words trust and fideicommissum as interchangeable (e.g. Elchies, quoted by L.J.C. Inglis

in Marshall v. Lyell, (1859) 21 D.514, 523; also Dallas's Stiles, quoted supra; Kames, 324), and all the older Scottish books and cases on the subject found very largely on Chancery authority. A trace of Chancery influence may be seen in Easton v. Newland's Trs ((1822) 1 S.244), where a person directed debts to be paid for which he was "bound in law or equity or in conscience". In Buchanan v. Angus ((1862) 24 D.(H.L.) 5,6) Lord Chancellor Westbury equated the English equitable estate with the ius crediti of the Scottish beneficiary.

It is probable that there are elements of truth in all these varying and conflicting doctrines on the origin of trusts. Trust has analogies with bailment and Blackstone (Comm.,iii,432) spoke of bailments as trusts, while in Coggs v. Bernard ((1703) 2 Ld. Raym. 909), the leading English case on bailment, Holt, C.J., calls a depositee a trustee. Despite Lord M'Laren, the trust idea was certainly used in Scotland in attempts to evade the law. Drummond (Mor. 4874; see also cases of Blair (Mor. 4969) and Beaton (Mor. 1150)) is a case of a simulated deed, a transfer "in trust for the uses mentioned", designed to avoid forfeiture for the Rebellion of 1745.

Altogether Morison collects twenty-four cases on Trust prior to 1700, the earliest dating from 1639. Many of these relate to the proof of trust prior to the Act of

1696 which made writing essential. In Maxwell ((1667) Mor. 16166) there is mention of an "obligation in law or equity" and we have several examples of an altogether different equity principle when the Lords allowed witnesses to be examined "ex officio" /sc. nobili/ (Rule (Mor.16167), Annandale v. Young (Mor. 16168) and Gordon v. Learmonth, (Mor.16181)) with a view to proving trust. In Craig v. Carliston ((1677) Mor. 16174) it was found that an assignation in trust was a depositum. Later, in 1758, Drummond v. M'Kenzie (Mor. 16206) was a declaratory adjudication by the Court of Session "supplying the defects of the common law" relating to subjects to which Drummond had the "equitable title." Even earlier than these is a case reported in Spotiswoode's Practicks (s.v. Depositum,p.80) of date 1632 when Urquhart pursued Hay to be reponed to an assignation delivered in blank with the name of Kinnier inserted later, unknown to Urquhart. The defence was that an assignation delivered in blank "importeth as much as it is given to his use to whom it is delivered." The Lords found that the defender must prove by oath that it was given to him in his own right and not in trust.

Stair devotes an appreciable space (IV,6) to discussion of the declarator of trust, a form of action which must have been not uncommon before the Act of 1696 required trusts to be proved by writ, and this too indicates

that trust was a familiar concept by his time.

It appears that the early trusts were constituted by a simple deed. The Act 1617 c. 14 "anent Executors", proceeding on the analogy of the quarta Falcidia, allowed Executors to retain only one-third of the dead's part for themselves after payment of debts and legacies and provided no residuary legatee were named, as it was "contrary to law, conscience and equity" to take the whole profits of dead's part and it is argued (Howden on Trusts, 6) that this shows that trusts were then created by an ex facie absolute conveyance to the trustee.

It seems also to have been the common law rule that a heritable right constituted by sasine could not be modified by parole testimony. But the practice grew up in the Seventeenth Century of admitting parole so that the Act of 1696, c.25, was required to restore the common law position, of which it was merely declaratory. In Marshall v. Lyell ((1859) 21 D.514, 523), Lord Justice-Clerk Inglis said: "/The Act 1696, c. 25/ was passed for the very purpose - not of altering the common law - but of restoring it against a corrupt practice, which had crept in from feelings of compassion and equity in hard cases." A strict interpretation of the old common-law rule had been rejected ex aequitate (case of Duggan v. Wight,

(1797), Mor. 12761, as appears from Macfarlane v. Fisher, 15 Sh. 978; cf. Dickson on Evidence, s. 576.)

With regard to the creation of trusts by implication Lord Lyndhurst said (Crichton v. Grierson, (1823) 3 W. and S.329) that the law of Scotland was more favourable to the constitution of trusts by implication than the law of England. Kames, whom he cites, noted the general principles regulating the interpretation of implied trusts under the head of Implied Will (154). The earliest noted case seems to be Nasmith v. Jaffray ((1662), Mor. 5483).

The essentially equitable and fiduciary nature of the duties involved in the modern developed conception of trust, and also the general identity of Scottish and Chancery practice in modern times, are both revealed by an examination of some of the more important duties of the trustee. The fundamental general duties may be said to be: (1) to take care; (2) not to delegate the duty of trustee; and (3) not to be auctor in rem suam (Mackenzie Stuart on Trusts, 157 et seq.)

Dealing with these in succession, the duty of care may be described as the supereminent one for the trustee. As far as possible the standard demanded of him is objective and actings in good faith and to the best of his judgment are not enough if he has not reached the standard of due care which the law demands of him. The

standard is that which is reasonable in the circumstances of the case judged by reference to the care exercised by an ordinary prudent man, and while the Courts in both countries place this on a high level, they do not demand the highest possible degree of care. "As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs" (Lord Watson in Learoyd v. Whiteley, (1887) 12 App.Cas.727,733; cf. Lewin 228; Snell 157-8). So too Lord Blackburn said in Speight v. Gaunt ((1883) 9 App.Cas.1,20): "It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are." These principles have been applied in Scotland too (Buchanan v. Eaton, 1911 S.C.(H.L.) 40,45,54; cf. Rae v. Meek, 16 R. (H.L.) 31,33; Knox v. Mackinnon, (1888) 15 R.(H.L.) 83; M'Laren on Wills, § 2239 et seq.) While the diligence of the average man is sufficient, it is such diligence as trustee and not as an individual. He cannot be excused by proof that showed only that amount of care in his own affairs because that might well be below the standard attained by the majority of average reasonable men.

It has been suggested that, despite the judicial

dicta, a more objective formula would be that the standard of care required is such as a reasonably diligent or prudent trustee would show (Menzies, 285).

The identity of the modern Scottish rule and that of the English Chancery was affirmed by Lord Herschell in Rae v. Meek ((1889) 16 R. (H.L.) 31,33) when he said that "the law bearing on the liability of trustees has been recently considered in the cases of Whiteley v. Learoyd ((1887) 12 App.Cas.727) and Knox v. Mackinnon ((1888) 15 R.(H.L.) 83), the one coming from the English, the other from the Scottish Courts. The law in both countries requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs" (cf. Dougan v. Macpherson, (1902) 4 F.(H.L.) 7, 9).

The second major duty of a trustee is not to delegate his office. He may not surrender the control of the administration and management of the trust to co-trustees or an agent, but he is not prohibited from employing, and indeed must employ, such expert advisers and assistants as a reasonably prudent man of business would in his own affairs, so long as he supervises them and applies his own judgment and takes reasonable care in accepting their advice. A leading Scottish authority is Wyman v. Paterson ((1900) 2 F.(H.L.) 37), in

which Lord Macnaghten, himself a distinguished Chancery lawyer, after discussing the liability of trustees under English law and the English Trusts Acts of 1888 and 1893, said (p. 41) that these enactments must be taken to be a statutory declaration of the law in England and that "by analogy the law thus declared must be treated as applicable in the case of Scottish trustees." He then arrived at the conclusion that trustees were guilty of a breach of duty in allowing money to lie in bank in the name of their law-agent, who had absconded with it. Lord Shand (p. 45) agreed with the majority of their Lordships in holding that in questions such as that case raised there was "no real distinction between the common law (sic) of Scotland and that of England."

Lord M'Laren on this subject (§ 1675) refers to both Stair (Stair,I,12,6 and 7) and Erskine (Ersk. III, 3,24), the former of whom adverts to the maxim, delegatus non potest delegare, and the latter to the delectus personae inherent in mandate under which head both writers consider the topic of trust. The principle was acknowledged as undoubted law in Scotland in Freen v. Beveridge in 1832 (10 Sh. 727) and has been acted on frequently since. It is equally the law of England that, while a trustee may in general not delegate his duties, he may and must administer the trust through the instrumentality

of others when there is a moral or legal necessity to do so, or where prudent men of business would so so on their own behalf (Speight v. Gaunt, (1883) 9 App.Cas.1).

The third chief duty of the trustee is usually summed up in the saying that he must not be auctor in rem suam: he must in consequence act gratuitously. In Lord Gray and Others ((1856) 19 D. 1,5) Lord Justice-Clerk Hope expressly founded on English authority in holding that a trustee could not recover fees for his work as solicitor in the trust business. "There is no point more clearly established as a general rule by the case of Robinson v. Pett (3 P.Wms. p. 249) and other decisions than that an executor or trustee is not entitled to be paid for his trouble. If the accounts of the deceased are complicated, and the executor takes upon himself to settle and arrange those accounts, the principle of equity is that he is not entitled to compensation for his time and trouble .... The principle is this:- It is the duty of an executor and a trustee to be the guardian of an estate, and to watch over the interests of the estate committed to his charge. If he be allowed to perform the duties connected with the estate, and to claim compensation for his services, his interest would then be opposed to his duty, and, as a matter of prudence, the Court does not allow the executor or trustee to place

himself in that situation." (New v. Jones, (1833) 1 H. and Tw. 632, per L. Ch.Lyndhurst.) Throughout the judgments Chancery cases are founded on almost exclusively and Lord Ivory in an analytical quest for principle mentions the maxim that "if you demand equity on one side, you must give it on the other" (p. 26) when protesting against reducing the principle into a mere technical rule which might defeat the claims to recompense of a trustee who had saved the trust estate by his exertions.

The rule is founded in both countries on the conflict inevitable between the duty to the trust and the trustee's personal interest and it extends to all services rendered by the trustee, both general and professional. The difficulty of showing that a trustee's action in a question with the trust estate was unbiased leads to the rule of equity that any profit accruing to the trust must fall into the trust estate.

This principle has been repeatedly recognised in Scotland in the Nineteenth Century. The leading Chancery case is Keech v. Sandford in 1726 (Cha.Ca.61). In Scotland the rule was established by York Buildings Co. v. Mackenzie in 1795 (3 Pat.378), and applied to factors in 1841 (Home v. Pringle, (1841) 2 Rob.384) and agents in 1856 (Lord Gray, (1856) 19 D.1), though the germ is

discoverable in the Roman law (Dig. 18.1.34.7).

Another application of this rule is the maxim that a trustee must make no personal profit out of his trust. Any benefit acquired by him must be held for the benefit of the trust estate; it, in fact, raises a constuctive trust in him. Again the reason is that his duty is to protect and advance the interests of the trust, and not to do anything which might permit his duty as trustee and his interest as an individual to conflict. While in such a situation the majority of trustees would act fairly, it would be almost impossible to prove that, and the law adopts the simple course of holding that any profit is to be ascribed to the trust estate.

In Magistrates of Aberdeen v. University of Aberdeen ((1877) 4 R.(H.L.) 48,51) Lord Chancellor Cairns said ".... it is one of the first principles, founded upon no technical rule of law, but upon the highest principles of morality, that whenever a trustee, being ostensibly the owner of a property, acquires any benefit as owner of that property, that benefit cannot be retained by himself, but must be surrendered for the advantage of those who are beneficiaries under the trust." Similarly Lord Hatherley (p. 53) thought that there was "no difference between the law of Scotland and the law of England in this respect. The law rests on the broadest principles

"of justice, and it is well settled that a person who holds a fiduciary position cannot acquire an interest of any description in the trust-estate until he has entirely denuded himself from the trust ..."; and Lord O'Hagan (p. 54) - "The principle forbidding a trustee to traffic in his trusts belongs to the jurisprudence of all nations. In this case the law of Scotland, equally with the law of England, condemns the abuse of the fiduciary position, and declares that the advantage wrongfully gained by the trustee shall accrue - not to his benefit, but to that of the beneficiaries ....", and he approves (p. 55) the dictum of Lord Colonsay in Laird v. Laird ((1858) 20 D.981. See also L.P.Inglis in same case, at 3 R. 1087,1097) when he says that "the law will even presume that the trustee intended that the profits should go to the beneficiary, rather than presume that he intended his own aggrandisement, at the risk and expense of the beneficiary." Lord Gordon also observed that the law of Scotland had adopted the civil law restriction (Dig.18.1.34.7) upon any dealings on the part of trustees with trust property, though the letter of the civil law does not apply to trusts as we know them but only to persons such as tutors and curators similarly placed in positions of fiduciary capacity.

In York Building Co. v. Mackenzie ((1795) 3 Pat.378)

the House of Lords held, reversing the whole Court, that a common agent in a ranking and sale could not purchase the estates sold for his own account. In the Court of Session Lord Justice-Clerk Braxfield pointed out that there must be no clashing between duty and self-interest in a matter of trust. Lord Thurlow's judgment in the Lords was founded strongly on principles of equity and pointed out that the agent gained an advantage in the execution of his duty and hence "in point of conscience, he ought to be compelled to set that matter right."

In Dougan v. Macpherson ((1902) 4 F.(H.L.) 7) a trustee who was also a beneficiary purchased at a profit the interest of his brother who was not a trustee. The House of Lords held, affirming the Second Division, that as the trustee had failed to communicate to the beneficiary all the information he possessed as to the value of his interest, the sale fell to be reduced. Lord Chancellor Halsbury said that the "perfectly clear rule of equity which cannot be departed from" must apply in that case; Lord Macnaghten remarked that "So far as I am aware, there is no difference whatever between the law of England and the law of Scotland in relation to the duties and obligations of trustees when they are dealing with their cestuis que trust", and he approved Lord Chancellor Cairns' formulation of the law in Thomson v. Eastwood (L.R. 2 App.

Cas. 215,236) as follows:- "There is no rule of law which says that a trustee shall not buy trust property from a cestui que trust; but it is a well-known doctrine of equity that, if a transaction of that kind is challenged in proper time, a Court of Equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value, and that all information was laid before the cestui que trust when it was sold."

Lord Shand, concurring, said that "with regard to the law of Scotland, I have only to emphasise what has fallen from .... /Lord Macnaghten/. It has not been suggested that any distinction in the law of trusts applicable to such a case as this exists between the law of England and the law of Scotland. The fiduciary relation is the same; the duties and obligations of trustees in such cases are the same in Scotland as they would be in England."

The last main application of the rule against a trustee being auctor in rem suam is to the effect that the trustee may not transact with the trust estate, as again the conflict of duty and personal interest would at once be apparent, and such transactions are held by a court of equity to be invalid even though no prejudice can be shown to have been suffered by the trust estate. The question of the fairness or otherwise of the trans-

action may not even be raised, nor can there be inquiry even if the trust estate got as good or better terms than it could elsewhere. Again in this respect the laws of England and of Scotland coincide, both deriving from the civil law (Aberdeen Rly. Coy. v. Blaikie Bros., (1854) 1 MacQ. 461; Lord Dunedin in Wright v. Morgan, /1926/ A.C.788,797; Clauson J. in In re Thomson, /1930/ 1 Ch. 203), "itself bottomed in the plainest maxims of good sense and equity."

In Aberdeen Rly. Coy. v. Blaikie Bros., supra, it was held that a director of a firm was a trustee and as such precluded from transacting with himself, or a firm in which he was a partner. Here again reference was made to English equity decisions such as Keech v. Sandford (Sel.Cas. temp. King., p. 61). Lord Chancellor Cranworth remarked that the rule was a mere equitable plea so that the whole question, equitable as well as legal, was before the Court of Session, unlike an English Court of Common Law of that period. Incidentally, Lord Brougham expressed regret at the inconvenience of the split between Common Law and Chancery jurisdiction in England.

Reference was made to the earlier case of York Buildings Coy. v. Mackenzie ((1793, Mor. 13367; (1795) 3 Paton, 378. On this see the reporter's note in

1 MacQueen at 481), in which it is noteworthy that the authorities founded on included the Digest, Vinnius, Stair and several English equity cases such as Fox v. Mackreth (2 Bro.C.C. 420. See also Hamilton v. Wright, (1842) 1 Bell's App. 574.)

Exceptionally there may be a departure from the rule: in Coats' Trs (1914 S.C. 723) the Court in the exercise of its nobile officium granted power to the trustee to bid for and acquire trust property, but this cannot be taken as authority for a general practice contrary to the equitable rule.

The principle was applied in 1789 in the case of a tutor, who was treated without dispute as being a trustee (Wilsons v. Wilson, Mor. 16376; Kames's Equity was founded on, as also in the next case, Vere v. Hyndford,(1791) Mor. 16378): the germ is also seen in the Act of Sederunt of 25th December 1708 providing that factors on sequestrated estates must communicate any benefit they get to the common debtor, and in Ludquhairn v. Haddo in 1632 (Mor. 9503), while in Crawford v. Hepburn (Mor. 16208), reported by Kames and in which his Equity was cited, a trustee was held bound to communicate advantages derived from management.

In modern practice then the private trust in Scotland is substantially similar, and the duties of trustees

are very similar, to their English counterparts. That they have the same origin seems highly doubtful and it is not clear that the ownership of the trustee and the ius crediti of the beneficiary are truly equivalent to the legal and equitable ownership of the English trustee and cestui que trust.

M'Laren has pointed out (§ 1691. Approved, Anderson's Trs. v. Scott, 1914 S.C. 942, 955) that in Scotland the material distinction between charitable and ordinary testamentary trusts is not one of construction or principles of administration but one between private trusts in which determinate individuals are beneficiaries and public trusts in which a section of the public has an interest and can enforce it by an actio popularis. In Andrews v. Ewart's Trs. ((1886) 13 R.(H.L.) 69, 73) Lord Watson adverted to the distinction and to the different standard of liability of private trustees and of trustees administering a charitable trust for behoof of the public interest. He quoted with approval the rule as to the personal liabilities of charitable trustees expressed by Lord Chancellor Eldon in Attorney-General v. Corporation of Exeter (2 Russ. 54), to the following effect:- "With respect to the general principle on which the Court deals with the trustees of a charity, though it holds a strict hand on them when there is a wilful misapplication, it will not press severely upon them when it sees nothing but mistake. It often happens from the nature of the instrument creating the trust that there is great difficulty in determining how the funds of a charity ought to be administered. If the

"administration of the funds, though mistaken, has been honest and unconnected with any corrupt purpose, the Court, while it directs for the future, refuses to visit with punishment what has been done in the past. To act on any other principle would be to deter all prudent persons from becoming trustees of charities."

While the ordinary and familiar meaning of charity as the relief of poverty is acknowledged, such trusts are favourably considered by the law with a view to making them effective if possible, and cases are admitted within the rule when the purpose is not strictly the relief of poverty but the conferring of benefits on sections of the community for which their private resources were inadequate, and liberal treatment is extended to such trusts also. In Income Tax Commissioners v. Pemsel (/1891/ A.C.531,560) Lord Watson said, "Ever since its institution the Court /of Session/ has exercised plenary jurisdiction over the administration of all trusts, whether public or private, irrespective of the particular purposes to which the estate or income of the trust may be appropriated, and there has consequently been no room for these numerous questions, as to a trust being charitable or not, which have arisen in England under the Statute of Elizabeth. Whilst the Scotch cases cannot be said to afford any precise definition of what constitutes a charitable trust

"purpose, some of them do appear to point to a more liberal interpretation than that which was adopted by the Court in the case of the Baird trust" (Baird's Trs. v. Lord Advocate, 15 R. 682) (where it had been held that charity did not cover religious purposes) The ambit of charity in Scotland may, nevertheless, be narrower than in England (Macintyre v. Grimond's Trs., (1904) 6 F.285,293 per Lord Moncreiff, diss. (revd. (1905) 7 F.(H.L.) 90)).

Again Lord Watson said earlier in the same case (/1891/ A.C. p.558) that charitable in Scotland is a relative term and takes its colour from the specific objects to which it is applied. "Whilst it is applicable to acts and objects of a purely eleemosynary character, it may with equal propriety be used to designate acts and purposes which do not exclusively concern the poor, but are dictated by a spirit of charity or benevolence (cf. Act 1685, c. 18; Saltoun v. Pitsligo, (1700) Mor. 9948). In the latter sense the meaning of the term is practically, although not absolutely, coextensive with that which has been attributed to it by the Courts of Chancery"; and (at p. 561) "... it does appear to me to be a relevant observation that Scotch trusts which are eiusdem generis with trusts falling within the Statute of Elizabeth, are charitable in this

"sense, that they are all governed by the same rules which are applicable to charitable trusts in England." He held in the result that the Scottish authorities established positively that charity is not limited to relief of the physical wants of the poor but includes their intellectual and moral culture; and that purposes which concern others than the poor may nevertheless be charitable purposes in the sense of Scotch law.

In his judgment in the same case Lord Macnaghten (who referred incidentally (p. 579; see Kames' Elucidations, 1800 edn., p. 385) to Lord Hardwicke's letter to Lord Kames) said: "The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity."; and he goes on to outline the history of the Chancery jurisdiction in regard to charitable trusts, and though disapproving the view expressed in the Court of Appeal that "charity" had the same technical meaning in Scotland as in England, adopts the words of Lord Chelmsford in Magistrates of Dundee v. Morris ((1858) 3 MacQ. 134,154), where that judge said: "I cannot discover that there is any great dissimilarity between the law of Scotland and the law of

"England with respect to charities." This view is however not quite accurate, as the whole structure of charitable trusts in England is affected by the Statute of Elizabeth, and the English law of mortmain and perpetuities is unknown to Scots common law. The development of Scottish charitable trusts owes more to the Bishop's Officials and the Commissary Courts whose jurisdiction in the end sprang from the canon law. Hence it has been said that the jurisdiction of the Court of Session over trusts is radically different from that of the Court of Chancery (Wink's Exors. v. Tallent, 1947 S.C.466,476).

In Blair v. Duncan ((1901) 4 F.(H.L.)1,6) Lord Robertson said that the Scottish Courts have "as a matter of historical fact reflected, more or less, consciously or unconsciously, the bias which disposes everyone favourably towards charity; and this never appeared more plainly, or was avowed more frankly, than in the decision of your Lordship's House in the Morgan case"((1858) 3 MacQ. 134,154).

In Clephane v. Magistrates of Edinburgh ((1869) 7 M.(H.L.) 7,15) Lord Westbury said: "... The jurisdiction of the Court of Session, and the jurisdiction of a court of equity in England upon the subject of the administration of charitable trusts are one and the same. Undoubtedly, in England, we have had a greater number of

"cases, and therefore the principles have been more fully developed. The rules which have been laid down and the authorities in England are of course not binding upon the Court of Session. Yet as they are illustrations of the convenient mode of the application of the same principles of law, I dare say that, whenever an opportunity arises, the Court of Session will deem them entitled to great respect and attention.

"Now in both Courts this principle has prevailed, namely, that there shall be a very enlarged administration of charitable trusts. .... the means originally indicated may become inadequate to the end. And the Courts of Equity have always exercised the power of varying the means of carrying out the charity from time to time, according as by that variation they can secure more effectually the great object of the charity, namely, the benefit of the beneficiary.

"Now it is perfectly true that you cannot substitute one charity for another. You may substitute for a particular charity, which has been defined and which has failed, another charity eiusdem generis, or which approaches it in its nature and character; but it is quite true that you cannot take a charity which was intended for one purpose, and apply it altogether to a different purpose. .... But the power of a Court of Equity to alter

"the means so as to adapt them to the end, is undoubtedly not limited."

In Synod of Aberdeen v. Milne's Trustees ((1847) 9 D.745) the Court rectified a charitable bequest in a deed of trust to the effect of reading "Synod" for "City" as being merely an inaccurate description and lapsus calami, the deed having been extended in India by a native clerk. Chiefly on this ground the Court allowed the correction but Lord Justice-Clerk Hope proposed a special interlocutor "to guard against our decision being misused. There are many cases in which, while there may be no doubt of the testator's intention, the Court would not be justified in interfering to correct them. I would not wish it supposed that in this case we are proceeding on any supposed pretorian power we possess." Lord Moncreiff, concurring, said: "It must be understood that the Court are (sic) not exercising their pretorian power. They are merely adjudicating in a declarator brought for interpreting a deed."

Again in Ross v. Heriot's Hospital ((1843) 5 D.589, 609) it was taken as indisputable that "the Court of Session as the Supreme Court of Equity, has jurisdiction over all charities, in so far as to declare the powers of the administrators to correct all abuses and to enforce the will of the founder" and Chancery analogies were founded on (cf. M'Laren on Trusts,I,447).

Story says that the rudiments of the law of charities were probably derived from the Roman law, and that by the time of Justinian it had become a fixed maxim of Roman jurisprudence that legacies to pious uses were entitled to peculiar favour and were deemed privileged testaments (§ 1137). Furthermore other legacies, though not of a pious or charitable nature but yet of a public nature or for a general benefit, were deemed entitled to similar encouragement and protection (§ 1138, citing Dig. 30.1.117 and 122). Such testaments enjoyed a liberal construction and the legacies were never permitted to be lost, either by uncertainty or failure of the persons or objects for which they were destined.

Story is consequently of opinion (§ 1141) that the high authority of the Roman law, coinciding with the religious notions of the times, could hardly fail to introduce these principles of pious legacies into the common law of England; and the zeal and learning of the ecclesiastical tribunals must have been constantly exercised to enlarge their operation. Lord Thurlow (White v. White, 1 Bro. C.C. 12) and Lord Eldon (Moggridge v. Thackwell, 7 Ves. 36, 69; Mills v. Farmer, 1 Mer. 55, 94-5), he points out, were both of opinion that the doctrine of charities grew up from the civil law. This view seems even more applicable to Scotland where the Commissary Courts had for so

long the control of the administration of estates and mortifications to pious uses were common (vide A.P.S. Index s.v. Mortification).

Kames cites charity (p. 15) as the best example of duties firmly rooted in our nature which must be left to depend on conscience without any aid from a court of equity. He does not appear to have specially contemplated such institutions as a charitable trust, though many such must have been in existence in his time.

It appears from the case of the Magistrates of Dundee v. Presbytery of Dundee ((1861) 4 Macq. 228, 240) that a hospital founded in the Fourteenth Century was being administered virtually as a charitable trust by the Sixteenth Century and was so thereafter down to the date of that action. There is a form of mortification of an annual rent to a chaplaincy in Habbakuk Bisset (II,139) and what were essentially charitable trusts were doubtless common in the old tenure of mortification (Craig, I, 10.35; Ersk., II,4,10).

The jurisdiction of the Court of Session over charitable trusts has always been recognised as being equitable and is usually ascribed to the nobile officium (Mackay's Practice, I, 211). The jurisdiction of the Court in such matters does not, it has been said (not very accurately) differ from that of the Court of Chancery in England,

though that Court has more means and appliances for carrying out its powers (University of Aberdeen v. Irvine, (1869) 7 M. 1087, 1094). In Ross v. Governors of Heriot's Hospital ((1843) 5 D. 589, 609. Another old charitable foundation (1648) was Burnett v. King's College, Aberdeen, (1846) 5 Bell 409), which related to a charitable trust of 1623, Lord Cuninghame said that there could be no question that "this Court, as the Supreme Court of Equity in Scotland, has jurisdiction over all charities, in so far as to declare the powers of the administrators to correct all abuses and to enforce the will of the founder"; and Lord Cockburn referred to (617) "the equitable exercise of its controlling authority."

The Court will not allow a charitable trust to lapse when its object has been declared by the truster even though he has not provided for the mode of administration. In The Magistrates of Dundee v. Morris ((1858) 3 MacQ. 134, 154) Lord Chancellor Chelmsford said he could not discover that there is any great dissimilarity between the law of Scotland and the law of England with respect to charities, apart from the mortmain Act. He approved Lord Gifford's statement in Hill v. Burns (2 W. and Sh.80) that the law of Scotland was more liberal in the interpretation of bequests for charitable purposes than other bequests, and Lord Lyndhurst's dictum that the law of

England was stricter as to charitable purposes than the law of Scotland (Crichton v. Grierson, 3 W. and Sh.336). He then said: "Taking then as our guide the principle of a benignant construction of charitable bequests, let us see whether there is to be found in the language of the testator an intention manifested with sufficient certainty to enable it to be carried into effect." This is in effect an application of the maxim that the intention rather than the form shall be looked at.

Similarly Lord Cranworth (p.166): "There has always been a latitude allowed to charitable bequests, so that when the general intention is indicated, the Court will find the means of carrying the details into operation." Moreover it was held in Bruce v. Presbytery of Deer ((1867) 5 M.(H.L.) 20) that the latitude will extend to adopting the one of two alternative constructions which will make a charitable trust effectual rather than void. Lord Chancellor Chelmsford said: "It is quite clear that this was intended as a charitable bequest; and therefore it must be carried out if the general object of the testator can be ascertained. When it is said that charitable bequests must receive a benignant construction, the meaning is, that, when the bequest is capable of two constructions, one which would make it void, and the other which would render it effectual, the latter must be adopted."

In such a case the Court will adjust a scheme either at the hand of the judges (Presbytery of Deer v. Bruce, (1868) 6 M. 940) or by remit to a skilled person, and may depart from the literal terms of the trust, and subsequently vary the scheme. The case of University of Aberdeen v. Irvine ((1869) 7 M.1087) related to a trust of 1629 and the Court held (per L.P.Inglis at p. 1092) that it was "according to the principles of all equitable jurisdiction" that the will of the founder should be the regulating consideration. The Court will moreover not as a rule interfere with the administration of a charitable trust in so far as it has been left to the discretion of the trustees (but see Thomson v. Davidson's Trs., (1888) 15 R.719; Ritchie v. Davidson's Trs, (1890) 17 R.673) and they have never exercised a visitorial jurisdiction similar to that of the Court of Chancery (M'Laren on Trusts, I, 449).

M'Laren says (Trusts,i,428) there is "no reason to doubt that the Court of Session, as a Court of equity, has power to carry into effect a testator's intention, although it should be necessary, in doing so, to entrust the administration of his bequest to a society which may not exactly answer his description, but whose constitution enables it to carry his benevolent wishes into execution." Again in Merchant Coy. v. Edinburgh Magistrates

(1765,Fol.Dicty.III,349) it was said on the failure of a quorum of a charitable trust that the powers now belonged to the Court of Session "as a court of equity and vested with the same powers as the Roman praetor and the Chancellor of England."

A further distinction between ordinary and charitable trusts is to be found in the standard which the Court applies in judging whether trustees have been negligent in the performance of their duties to the extent of rendering them liable for loss arising from such negligence. As compared with an ordinary trust the trustees will only be held liable for "wilful misapplication" (Lord Watson in Andrews v. Ewart's Trs., (1886) 13 R.(H.L.) 69, 73).

The conclusion appears to be that English and Scottish charitable trusts have arisen from substantially different roots and are not co-extensive: so far as concerns equity, both the Court of Chancery and the Court of Session have exercised jurisdiction in a liberal spirit over charitable trusts on the basis of equity.

The Doctrine of Cy-près

Strictly speaking this is purely a doctrine of English law, but it is now well known in Scotland as the principle on which the Court deals with cases when owing to change of circumstances or lapse of time it has become

impossible to carry out a bequest for charitable purposes by adherence to the directions laid down by the testator for achieving his objects. In such a case the Court has for long exercised the power of varying the means to secure more effectually the testator's object under the changed conditions (Clephane v. Mags. of Edinburgh, (1867) 7 M.(H.L.) 7, 15 per Lord Westbury), and the Court may even substitute for an object which has failed another object eiusdem generis. The latter is properly speaking the doctrine of cy-près.

It appears that in Scotland the doctrine of cy-près is not limited in its application to charitable trusts but extends to trusts for purposes of public utility (Anderson's Trs. v. Scott, 1914 S.C. 942, 956). In practice the cases are divisible into the two categories of varying the method of applying the means at the disposal of the charity, and extending the benefits to new classes of persons.

In Mitchell's Hospital ((1902) 4 F.585,586) Lord M'Laren, referring to Lord Westbury's dictum already quoted, interpolated after the words "the Courts of Equity" the explanation "and in this jurisdiction he recognises no distinction between the English and the Scottish Courts of equity".

Again in Grigor Fund Trustees ((1903) 5 F.1143,1145)

Lord M'Laren said, distinguishing between the powers of the Court under the Endowments Commission and the powers of the Court under its ordinary (sic) jurisdiction, that he only knew of two cases for the exercise by the Court of its "common-law powers", namely, where the purpose was only generally expressed, and where it had failed.

Again in the case of Trustees of Carnegie Park Orphanage ((1892) 19 R. 605,608, approved in Anderson's Trs. v. Scott, 1914 S.C. 942, 953 per Lord Skerrington) he said: "It is a general principle of charity law and administration that, where it is not possible to carry out the intention of the testator in the precise manner directed by him, either from a failure in the objects of the charity, or from an increase in the trust funds beyond the sum required for the prescribed purpose, it is within the power of the Court to direct that the funds shall be applied to other purposes as near as possible to those prescribed by the testator. There are traces of the application of this principle in some of the older cases, but in recent times it has been applied unequivocally in more than one important case", and he refers to the Trinity Hospital case (Mags. of Edinburgh v. M'Laren, 8 R.(H.L.) 140 and earlier cases in the same litigation there cited).

In Anderson's Trs. v. Scott (supra) Lord Skerrington,

delivering the opinion of the Court, said: "Assuming, however, that a trust has once been validly constituted in which the public have an interest, there seems to be no reason why we should adopt the English rule that only a charitable trust can be administered cy-près .... As Lord Watson pointed out in Pemsel's case (/1891/ A.C.531, 561) there has been no occasion in Scotland to draw a hard and fast line between charitable and other trusts and I must decline the invitation .... to introduce such a distinction in the present case."

Resulting and Constructive Trusts

According to M'Laren (S.1885), resulting trusts (the phrase occurs in 1840 in M'Leish's Tr. v. M'Leish, 3 D. 924) may arise on the lapse of an interest under a testamentary disposition, under a charitable trust, or under an ex facie absolute conveyance. The doctrine is based on the presumed intention that property devised in trust should, if the object for which it was intended is unattainable, be applied for the benefit of the truster or his representatives. In the first case, the predecease of a beneficiary will cause a resulting trust for the testator's heirs and representatives (Sinclair v. Traill, (1840) 2 D. 694). In the case of charitable trusts a surplus will result to the trustees and if the trust purposes become impracticable, a trust will result in favour of the truster's heirs-at-law (Robbie's J.F. v. Macrae, (1893) 20 R. 358). As donation is never presumed, an ex facie absolute conveyance will be held to be merely a trust unless intention of donation can be deduced from it. The general doctrine may be summed up in the phrase of Lord Young (Edmond v. Provost of Aberdeen, (1898) 1 F.154, 163), "Where anyone creates a trust, and expresses no trust purposes, or the purposes which he expresses fail, then there is a resulting trust for himself if he continues in life, or, if not, for those who, after his death, come in his place."

The Scottish courts do not appear to have considered any of the cases of resulting trust as peculiarly equitable, but it is noteworthy how very often Chancery authority is cited and founded on in these cases.

Constructive Trusts

A constructive trust is one raised by contruction of equity, to satisfy the demands of justice and good conscience, without reference to the presumed intention of parties (Snell, 127. M'Laren, S.1926). The principal class of case falling under this head both in England and Scotland comprises examples of the rule that a trustee or other person in a fiduciary position may not take advantage of his position to make a personal profit where that might create a conflict between his duty as trustee and his personal interest. Any advantage gained in such a case the party holds as constructive trustee for the person to whom he owes the fiduciary duty. The leading Chancery case of Keech v. Sandford ((1726) Cha.Ca.61), where the trustee got a lease is paralleled and foreshadowed in Scotland in 1632 in Ludquhairn v. Haddo (Mor. 9503), and the general doctrine has since then been applied in both countries and extended beyond trustees to other persons clothed with a fiduciary character.

The general doctrine was finally laid down by Lord

Thurlow in the Scottish appeal, York Buildings Co. v. Mackenzie ((1795) 3 Pat. 378), where he stated it was clear that in certain circumstances a man might be liable to all the consequences applicable to an express trustee and that, having regard to the manner in which Mr Mackenzie purchased the property, in point of equity he should be compelled to reconvey it.

The doctrine had however been acknowledged at least as early as 1741 in Spreul v. Crawford (Elchies, Trust No. 1, discussed in Marshall v. Lyall, (1859) 21 D.521) when the Court held that the relationship of constructive trust was impressed on all transactions whereby an agent or trustee is enabled to gain an advantage at the expense of the beneficiary or principal.

Following Trust Property

Difficult cases of constructive trust are raised by the fact that trust funds may pass into the hands of other than the true beneficiary, either gratuitously or with knowledge of a breach of trust, and in such a case the transferee is a constructive trustee and the true beneficiary may follow the property in his hands. In England the equitable doctrine of tracing has a long history recently reviewed in re Diplock (/1948/ Ch.465, affd. /1951/ A.C.251). The Chancery position, stated briefly, is that an unpaid creditor or legatee may recover from an

overpaid beneficiary or a stranger to the estate who has received the trust funds: furthermore, one whose money has been mixed with that of another or others may trace his money into that mixed fund, even though the funds be held and the mixing be done by the innocent volunteer; so long as the money is identifiable, the claimant has an equitable proprietary interest, and the equitable remedy does not work injustice.

In Scotland the position is not so clear: the rules stated by Menzies (Menzies on Trustees, § 1270 et seq.) depend almost entirely on Chancery authority though these would doubtless be followed in such a question; but it is not at all clear that the fundamental subsumption underlying the rules is the same in both countries. In England an equitable claim in personam for recovery is based on the fact that it would be unconscionable for the recipient to retain the funds (Re Diplock, supra). In Scotland the claim seems to be simply one of repayment of money paid under error. In Armour v. Glasgow Royal Infirmary (1909 S.C. 916) legacies were paid to a hospital under a charitable bequest later declared void by the Court and repayment was decreed, apparently on the basis of repetition of a payment which was made in error, i.e. under a mistake in law, though the basis of the judgment is not readily apparent from the opinions.

On the other hand the two countries stand in much the same position with regard to claims in rem. When funds impressed with a trust have become mixed with other funds, in equity the trustee has never parted with the funds and they can be recovered so long as they can be distinguished. In England this depends on the doctrines as to tracing orders (cf. Dunlop's Trs v. Clydesdale Bank, (1891) 18 R. 751, "tracing money in law and equity"): in Scotland while the rule of Re Hallett ((1880) 13 Ch.D.696) is equally accepted (Jopp v. Johnston's Tr., (1904) 6 F.1028. Cf. Bell, Com. I, 286) no distinct principle has emerged but the justification for a claim of repetition is equitable.

English Influence in the Law of Trusts

The development of the trust concept is the greatest work of English equity and probably the greatest contribution of English jurisprudence to the science of law. Whether or not the trust concept was known in Scotland independently of English influence, we have built our modern law of trusts considerably on analogies from English law, and English Chancery authority has always been more highly regarded in this branch of law than in any other, albeit the principles have been worked out differently to suit the different legal background

against which they were set. But the influence has not been entirely in one direction and authorities such as Aberdeen Railway v. Blaikie Bros. and York Buildings Co. v. Mackenzie have found their way into English cases and textbooks. Yet, despite a certain general similarity, we have not imported English law. The Scottish Courts, for example, will not undertake the administration of a trust. Nor is the trust resorted to with such frequency in Scotland as in England as a regular legal expedient for the disposal of property. The former popularity of entails may have tended in the same direction.

In Muir v. City of Glasgow Bank ((1879) 6 R. 392, 405-8; affd. 6 R.(H.L.) 21. See also Lumsden v. Buchanan, 3 M.(H.L.) 89,91,98) Lord Deas remarked that the general law of trusts, as recognised and acted on in Scotland, has been far from identical with the law and practice in England. The register of a Scottish company, it was observed, unlike that of an English one, recognises trusts. But there is no authority for the proposition which appears to have been argued, that a body of trustees constitutes a quasi-corporation in Scots law. Yet Lord Westbury, in Fleeming v. Howden ((1868) 6 M.(H.L.) 113, 121), laid down that the law of trusts had the same origin and rests on the same principles in Scottish and in English law. While the first part of this statement remains open to doubt and argument, the second is not so

liable to criticism. For it can be seen that both systems are based on the broad conception of transferring the ownership and administration of property to a person or persons who remain under an equitable obligation to use it in conformity with the truster's directions, as for the benefit of some beneficiary and, possibly, ultimately to transfer it to someone. The obligations of care and diligence, the reliance on good faith and conscientiousness, apply in both countries. Scots law has not, however, tended to regard the relationship of truster and trustee as one of dual ownership, legal and equitable, but rather as of rights of dominium and ius crediti. The bifurcation of law and equity in England is responsible for this.

In the case of charitable trusts there is the fundamental difference that in England the words "charity" and "charitable" have been given an artificially extended meaning to bring certain classes of public trust under the Statute of Elizabeth and thus avoid their being found illegal as perpetuities, although, as Lord Watson pointed out in Pemsel (/1891/ A.C.531,560), some cases incline to give the word charitable in Scotland a wider meaning than simply relief of poverty. Later cases rather support this, emphasising that it is only for revenue purposes that "charity" in Scotland is as limited as in England.

Chapter XI
Equity in Succession

To the principle of equity must be assigned the fundamental justification for the existence, in the branch of Scots law relating to succession, of certain doctrines which have a modifying effect upon the strict rules of law in certain cases. The nature, extent and influence of these principles now falls to be considered.

Equity does not seek to overturn the expression of a person's last wishes in a testament, but yet recognises that such a writing may be defective in accidentally and unintentionally disinheriting a descendant of the testator. Where a testator dies leaving a will or general settlement which was executed at a time when he had no issue, and a child is afterwards born to him, it may be posthumously or within a short time before his death, there arises a very strong presumption that the disinheritance was unintentional (M'Laren on Wills, § 732; Ersk. III,8,46; Bell, Pr. § 1776). M'Laren goes on to note that for this reason, equity imports into the settlement the implied condition si testator sine liberis decesserit, said to be borrowed from the Civil Law and at least supported by an analogous rule thereof applicable to substitutions. Equity affords relief, according to Kames (p. 177), with respect to a deed which was made for an event which has failed.

The basis of the rule may be seen clearly in Watt v. Jervie in 1760 (M.6401), where a posthumous child was born but died shortly afterwards. The father's relatives claimed the estate as next-of-kin of the child on the basis that the conditio had operated to revoke the father's will in favour of the mother. The mother was assoilzied on the ground that "The settlement in her favour is effectual at common law. It was even effectual at common law against the posthumous child; and that child had no relief against it but in a court of equity. But a court of equity never declares void what is good by the common law. It only gives relief against such a deed as far as necessary to fulfil the rules of justice."

In Colquhoun v. Campbell ((1829) 7 S.709) the Lord Ordinary (Newton) thought that the benefit of the implication, si sine liberis, had been considered "an equitable remedy confined to the children themselves", and held that the time between birth of the child and death was too short to permit of an alteration of the father's will or to create any presumption that he meant to disinherit his only child. In the Second Division, Lord Glenlee stated that the general principle of law was that the condition was implied though the facts may be so strong as necessarily to import that the testator wished matters to remain on the settlement as it was, "... unless it is as plain as a pike-staff that the testator did not intend the succession to go to the child, the condition will apply."

The equitable basis of the doctrine was reaffirmed in Stevenson's Trs. v. Stevenson (1932 S.C.657), where the Lord Justice-Clerk (Alness) said that he "always understood that the doctrine of the conditio was founded on equity and that it operated for the amelioration of the hardship created to a post-natus by reason of the provisions of a settlement which was executed before his birth and which did not contemplate his existence. The theory underlying the doctrine, I apprehend, is that the testator would not have made the will he did had he contemplated the subsequent birth of issue." Lord Ormidale too described conditio as an equitable presumption founded on the doctrine of pietas paterna. Lord Hunter, referring to Bankton (I,ix,5) and the Civil Law, said that in Scots law "the maxim appears to rest on the view, not that the settlement is void, but that relief will be given in equity to the subsequently born child, on the view that his father cannot have intended to disinherit him." This case reaffirmed that the right to challenge the will was personal to the disinherited child.

The presumption underlying the conditio, being a mere presumption, is liable to be rebutted if circumstances clearly indicate an intention on the testator's part that the will is to remain good despite the birth of the child. Lapse of time was formerly considered to be material but in Milligan's J.F. v. Milligan (1910 S.C.58) the Court

took the view that mere lapse of time is not sufficient to overcome the presumption of revocation in the event of the birth of a child subsequent to the will. Stuart-Gordon v. Stuart-Gordon ((1899) 1 F.1005) shows that an actual change of settlement to provide for the child is not necessary when all the facts and circumstances show that the matter was considered and deliberately nothing was done, the child being already adequately provided for. Yet the presumption tends so strongly in favour of revocation that Lord Kinnear expresses it thus in Rankine v. Rankine's Trs. ((1904) 6 F.581, 584): "it is quite settled in our law that the birth of a child operates to revoke all previously executed wills, unless something is done by the parent to set up the will."

In M'Kie's Tutor ((1897) 24 R.526,528) Lord M'Laren commented on the fact that in the opinions of some lawyers the conditio was not founded on the best considerations of equity, and did not really represent the most probable intention of the testator; but he remarked that the rule had been long recognised in Scottish practice; and elsewhere (Elder's Trs v. Elder, (1895) 22 R.512) he himself refers to the "equitable rule". Again, he refers to the conditio as "an equitable extension of the will" (Neville v. Shepherd, (1895) 23 R.351,357).

The principle, however strong, is only an equitable presumption, and is not absolute; consequently it must

yield to contrary evidence provided that is convincing. "The implied will of a testator ought not to be superinduced upon what he has expressed, except in circumstances making it clear that his true intention is not thereby violated, and a settlement made for him which he would not have made for himself" (Blair's Exors v. Taylor, (1876) 3 R.362,368 per Lord Ormidale).

In Knox's Trs. v. Knox, (1907 S.C.1123,1129) Lord Dunedin said that the law of Scotland seemed to have adopted the doctrine from the law of Rome, and at the same time to have rejected the only strict logical basis on which the doctrine rested. By this he doubtless meant the rule that only the birth of a child to a testator hitherto childless absolutely revoked his will.

It is noteworthy that the only one of the older institutional writers who deals with the conditio si testator is Bankton and even his reference (I,227-8) is under the heading of "gift", while his statement is that "according to the dictates of the civil law, if one made a donation of all or the greatest part of his estate when he had no children and came afterwards to have them, the gift became void .... upon the presumption, that, if he had thought of having children, he would not have made it .... It is a doubt, if this would hold with us, there never having been an instance of it in donations perfected by delivery", and the rule being limited even in

the civil law; but he goes on to say that in mortis causa donations, he conceives that they become void in the event of children being born, and he refers to a case in 1681, and another in 1733 which was compromised. The reason for the doctrine, he continues, is plain, "because such settlement truly wants the determinate will of the granter, and must be presumed to have been made upon the implied condition of his dying without children."

Erskine (III,8,46) says that the rule, derived from the Roman Law, "arises from a presumption founded in nature itself that the granter would have preferred his own issue, if he had had their existence in view"; but he seems to have confused the two forms of si sine liberis as the cases he cites are examples of instituti and not testator (Bell, Pr. §.1776, similarly does not distinguish the cases clearly).

Kames, curiously enough, seems to ignore the conditio completely though he reported Watt in his Select Decisions (p. 228) and was probably present at the hearing.

Morison's Dictionary contains under the heading Condition - si sine liberis (Mor.2937 et seq.) a number of cases from 1605 onwards. The early ones deal with marriage contracts and the clause si sine liberis decesserit commonly was applied to require a reversion of the wife's tocher if she had no surviving children. In these cases

the condition was apparently an express condition of the marriage contract, and seems to have been quite common in the Seventeenth Century.

In Yule (Mor.6400) in 1758 a daughter founded on the conditio si testator in a vain attempt to override the destination in two bonds. The report bears that the authorities cited were Papinian, Voet and Bankton (I,227): yet the general nature of the conditio si testator appears from the argument to be well understood, and is stated therein to have been introduced by Papinian (Dig.35.1.102). In Oliphant v. Oliphant ((1793) Mor. 6603), where an heir of entail had granted a bond of provision in favour of his then existing children and made no provision for children subsequently born, it was pleaded on behalf of the younger children that the Court "on the same principles of equity upon which they had proceeded in similar cases, would have found them entitled ...."

These early cases reveal a tendency on the part of the Court to hold that the implication only applied in favour of posthumous children (Yule, supra; Oliphant, supra).

The original rule in Roman law was of course that exclusion of the sui heredes in a will must be express, and difficulty consequently arose if after the will were made a person came into existence of the dass requiring exheredatio, in which case the will was held void unless

that person died before the will operated (Buckland, Textbook, 319). Juristic interpretation and legislation, however, gave relief from the destructive effect of the strict rules avoiding the will (Buckland, Textbook, 320). The lex Junia Velleia, probably of A.D.26, dealt with the case of children born after the will and they might be instituted by anticipation. Under the praetorian law a posthumous heir could obtain the remedy of bonorum possessio contra tabulas to the effect of asserting his praetorian claim to the amount of his share on intestacy (Leolie's Sohm, 555).

Conditio si Institutus sine Liberis decesserit

The realisation that testators may fail to provide for the contingency which does actually happen includes the possibility that persons to whom certain property is destined under a settlement, with a destination-over in favour of certain strangers, may themselves have issue, and it is notorious that testators may well overlook the possibility of such issue when framing the destination of their property. So the common law of Scotland, adopting for reasons of equity the principle from the Roman law, admits a presumption which, unless rebutted by competent evidence, modifies the terms of the will in such a case. The application of the presumption has, however, been somewhat different in Scots law from Roman. M'Laren (§ 1288) expresses it thus: where a legacy is given by a parent to a child or grandchild, or to persons to whom he stands in loco parentis, without mention of the legatees' heirs, a presumption arises that the testator had overlooked the contingency of the death of the legatee leaving issue; and that, if he had contemplated that event, he would have made provision for it by substituting the children of the legatee to their parent. "On this ground equity holds the ulterior right of the residuary legatee, or of the conditional institute to whom the legacy may be given over, to be qualified by the implied condition, si institutus sine liberis decesserit. The

"same condition applies to the eventual right of succession of the testator's personal representatives, failing a residuary clause, or other ulterior destination." The presumption against the intentional exclusion of the testator's descendants is strong, though not absolute; it is weaker in the case of collateral relatives and does not apply at all to remoter relatives to whom the testator does not stand *in loco parentis*. "The *conditio* has been held to apply where the settlement is universal, where the beneficiaries are a class, and the provision is of the nature of a family settlement, and where the testator, if not a parent, is at all events *in loco parentis* to the beneficiaries." (*Per* Lord Moncreiff, in *Blair's Exors* v. *Taylor*, (1876) 3 R. 362; but see L.P. Normand in *Knox's Exor* v. *Knox*, 1941 S.C.532, 541, on this case.)

Such an implied condition or *praesumpta voluntas* (as it is called in *Dixon* v. *Brown*, (1836) 14 S. 938, and *Alexanders' Trs.* v. *Paterson*, 1928 S.C.371) is plainly founded in equity. "Provisions to children or grandchildren are presumed to spring from the *pietas paterna* and are supposed to be intended for the benefit of the grantee's family. Equity accordingly implies in such provisions an institution of descendants ...." (M'Laren, § 1290; cf. *Hamilton* v. *Hamilton*, (1838) 16 S. 478, and *Devlin's Trs* v. *Breen*, 1945 S.C.(H.L.) 27, 36 *per* Lord

Macmillan). Kames mentions this implied condition (p. 160) as one of the cases where a court of equity supplies an omission in a deed. The only ground he gives is praesumpta voluntas. Lord M'Laren too said that "the principleto be kept in view in applying the conditio is that it involves an equitable extension of the scope of the bequest to persons who have been altogether overlooked in the testator's scheme of settlement" (Carter's Trs v. Carter, (1892) 19 R. 408,411).

That the rule is originally derived from the Roman law seems beyond doubt. It is put shortly by Lord Corehouse (Greig v. Malcolm, (1835) 13 Sh. 607, 611):- "The doctrine, which we have borrowed from the Roman law, proceeds entirely on the presumption that the testator, having overlooked or forgotten the contingency of the institute having children, has left children unprovided if they come into existence."

In Baillie v. Neilson (4 June 1822, F.C.) Kames' Equity was cited in debate, and Lord Succoth put the rule: "Where provisions are given to children, there is a tacit substitution of their children." The Lord President (Hope) however doubted whether he would have given Papinian's answer to the problem, as affection for grandchildren is not so strong as for children; but he added that after the authorities, he was no longer at liberty to entertain these opinions. This indicates that at that

date the rule was regarded as fixed.

Lord Dunedin in M'Dougal's Trs v. Heinemann (1918 S.C.(H.L.) 6, 13; cf. Forrester's Trs v. Forrester, (1894) 21 R. 971) also described the doctrine as borrowed from the Roman law. It was, he said, "based on the view that the testator, if he had thought of it, would have preferred the children of the institute to the substitutes to whom the share of the institute was to go if he failed to survive the period of vesting." In Mair's Trs v. Mair (1936 S.C. 731, 739) Lord Mackay (dissenting) criticised the doctrine as illogical and having gone beyond the reasonable and proper limits it had when borrowed.

In the Roman law a person entitled under a will had to accept the inheritance, and on doing so stepped into the shoes of the deceased. In later law there were some cases admitted where, though a person entitled died without claiming the inheritance, his rights passed to a successor and in 450 it was provided that if issue were instituted and died before the will was opened their rights passed to their issue (Buckland, Textbook, 321).

The conditio si institutus has been characterised as "an equitable exception from the rules of strict construction" on the ground of presumed will (Wallace v. Wallaces, (1807), Mor. "Clause", Appx. 6), and it was supported in an early case as being "agreeable to natural

"equity" (Mags. of Montrose v. Robertson, (1738), Mor. 6398). It arises "from a presumption, founded in nature itself" (Ersk.,III,8,46). In several other instances the conjecture has been advanced, founded on the idea of pietas paterna, that the testator's true intention is carried out by the importing into a legacy of a legal implication that the legatee's children are to have his legacy if he die without taking a vested interest. This view was expressed by Lords Hermand and Succoth in Neilson v. Baillie in 1822 (1 S. 458; 4 June 1822 F.C.), by Lord Glenlee in 1838 (Hamilton v. Hamilton, (1838) 16 S.478), by Lord Brougham in Dixon v. Dixon, ((1841) 2 Rob.App.1), by Lord President M'Neill and Lord Deas in 1862 (Grant v. Grant, (1862) 24 D.1211), Lord Neaves (M'Gown's Trs v. Robertson, (1869) 8 M. 356), and Lord Ardmillan (M'Call v. Dennistoun, (1871) 10 M. 281), though since then judges seem to have refrained from discussing the theoretical basis of the doctrine. The justification of such an implication is purely considerations of equity.

The doctrine was recognised in Scotland at least as early as 1738 in Magistrates of Montrose v. Robertson (Mor. 6398; Kames, 160) and, as in that case, was originally applied in the case of parent and child. Later the scope was widened to nephews and nieces (Hall v. Hall, (1891) 18 R. 690). Recent authority however inclines to the view that further extension of this artificial rule

of construction is inexpedient (Travers's Trs v. Macintyre, 1934 S.C. 520, 531), and that the Scottish decisions have gone beyond the Roman law till the doctrine is now illogical (Mair's Trs v. Mair, 1936 S.C. 731, 739). In the Magistrates of Montrose case (supra) it was held that in a provision to children, the children of one who had predeceased should have their parent's share, "it being the implied or presumed will of the father that the substitution to the survivors should take place only si instituti sine liberis decesserint." And it was pleaded that there was not "anything more agreeable to natural equity than for a father when he gives a provision to a son, to give it, failing that son, to his children."

An early case is Glendinning v. Walker ((1825) 4 S. 237), where money was left to a woman in liferent and her children in fee with a clause of return if she should have no children, and it was held that the children of a predeceasing son of hers should take the fee. Neither this case nor any of the earlier authorities founded on in it appear to proceed on the modern basis of an equitable presumption. In 1836 the principle was clearly recognised in Dixon v. Dixon (14 S. 938, affd. 2 Rob App.1), where residue was left to an eldest son who had children, and the latter were held to take though the son predeceased his father. The Lord Ordinary sustained the children's claim "holding that the conditio si sine liberis to depend on the presumpta voluntas of the

"testator ...." (14 S. 938, 941). Lord Glenlee said, "The ground of the natural obligation under which a parent lies to provide for the issue of his children, has been taken in other cases ...." and he remarked that we go on the principle of the Roman conditio si sine liberis. Lord Medwyn agreed that it was not a case where the conditio proper applied but the pietas paterna was enough in the case.

In Thomson's Trs v. Robb ((1851) 13 D. 1326, 1330) Lord Cuninghame said: "The condition implied in bequests generally, by the Roman law, 'si haeres decesserit sine liberis', has, from its equity, and its accordance with the natural feelings of mankind, been liberally admitted in our practice"; while in Gould's Trs v. Duncan ((1877) 4 R. 691, Lord Ormidale speaks of the presumption as being "only natural and equitable".

In 1869 Lord Justice-Clerk Patton said (Douglas's Exors v. Scott, (1869) 7 M. 504, 508) that the doctrine was borrowed from the civil law but carried further in Scots law. "In the Roman law it seems to have been limited to the case of a testator dealing with his haereditas, and to have proceeded on the assumption that, while a testator when childless left his whole property to strangers, he was not to be considered as preferring those to his own children should he afterwards have any ... (This, observe, is our conditio si testator) But our law has

"undoubtedly extended its application further than the Roman law ...." Lord Benholme (ibid., 509) was "inclined to think that in the case of every legacy by one in loco parentis to the legatee there is a presumption in our law in favour of the legatee's children." Similarly Lord Neaves understood the original meaning of the conditio as being that"where a granter who was childless left his property to strangers, that bequest was not to take effect if a child was afterwards born to him .... It was afterwards extended at all events by our law to cases of substitution" (ibid., 510). One may respectfully doubt the "afterwards".

In Grant's Trs v. Grant ((1862) 24 D. 1211, 1220) Lord Kinloch said that in its primary application the doctrine of the conditio si sine liberis "was probably confined to the simple case in which a father without children makes a settlement in favour of a third party, and that settlement is held evacuated by the emergence of a child .... But for a long time past the scope of the maxim has been greatly extended; and it may now be said to be settled in regard to mortis causa deeds containing provisions for children, and, indeed also to those applicable to near relatives of a degree more remote, that the benefit of a provision conferred on any member of a family passes on his predecease to his children, though not mentioned, unless where the deed contains conclusive evidence that the benefit was intended to be

"strictly personal." This suggests that the conditio si institutus was looked upon as an extension of the conditio si testator. But the conditio si institutus is as old as Papinian (Dig. 35.1.102) and the rule was made a general one by Justinian (C. 6.42.30).

Moreover, in Scotland it was pleaded in 1794 in Rougheads v. Rannie (Mor. 6403) that it was "a general maxim of law that .... substitution takes place only si instituti sine liberis decesserint," and that rule goes back at least to Magistrates of Montrose v. Robertson (Mor. 6398) in 1738. Reference was made in that case to Murray v. Grant ((1662), Mor. 10322), where an heir was found to have the advantage of an obligation in a back-bond to reconvey, although heirs were not mentioned therein, when the omission appeared to be one of negligence; and also to the case of Powrie v. Dykes in 1667 (Mor. 11648), where heirs were found to have right to a bond of annualrent though the deed did not mention heirs: but while these two cases show readiness to admit heirs though not expressly designed in the deeds, they are not true instances of the conditio.

In Grant's Trs v. Grant ((1862) 24 D. 1211, 1221) Lord Kinloch said that an explanation of the conditio si sine liberis is to be found in earlier cases, the soundness of which was open to doubt. "It is said that the doctrine proceeds on the assumption of the testator

"having overlooked the contingency of issue in the particular case. This is not a satisfactory exposition .... The general principle deducible from the whole decisions is, that in family settlements implied will gives a predeceasing parent's share to his children, where the deed does not contain satisfactory evidence that the contrary of this was intended"; and Lord President M'Neill (ibid., p. 1226) thought that implied intention was the basis of the principle, and so did Lord Deas (ibid., 1230). Their views do not however detract from the fact that the reason for the implication is the demands of equity. A court will imply a condition only when it is fair and reasonable to do so.

In Young v. Robertson ((1862) 4 MacQ. 337, 340) Lord Chancellor Westbury said: "There is a very benignant rule in the law of Scotland originally derived from the civil law, although its application is somewhat different from the application which you make of that system, which has this effect, that if a legacy be given to an individual and he either predeceases the testator or dies before the period appointed for vesting, leaving children, the legacy does not lapse, but the children are substituted in place of the legatee."

In the recent case of Knox's Exor v. Knox (1941 S.C. 532, 535), Lord President Normand said that the conditio si institutus was "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 is justified either in principle or by expediency"; and he speaks later of collaterals claiming "the equity". The Lord President further pointed out (ibid., 541) that Lord Moncreiff's statement in the case of Blair (3 R. 362, quoted supra) was no longer adequate in that the settlement need not be universal, nor need the beneficiaries be the entire class of nephews or nieces, and they may be called nominatim; nor need the settlement be a family provision, and the requirement of the testator placing himself in loco parentis is so whittled down that "the mere fact of the relationship may suffice to bring the conditio into operation if the settlement contains no adverse indication."

Collation

The impact of feudalism on the native common law of Scotland was not without influence on the law of succession and, while primogeniture and undivided succession came to be the rule in heritage, equal distribution among the next of kin was the rule in moveables. This obviously left great scope for unequal division of a mixed inheritance and it came to be the function of equitable principles to modify the hardships thereby arising, by the doctrine of collatio inter haeredes, whereby, if the heir in heritage is also one of the next of kin, the whole succession, heritable and moveable, may be thrown into one mass and equally shared by the next of kin, including the heir. A similar equitable interference takes place, under the title of collatio inter liberos, in the adjustment and distribution of the legitim fund, whereby a child already provided for may claim a share of legitim only on bringing into the common fund all advances already received by him, so as to equalise the division, or where an heir-at-law claims legitim, in which case he must collate. This last instance is really a particular case of collation inter haeredes.

Collation inter Haeredes

In Anstruther v. Anstruther, an entail case ((1836) 14 S. 272), Lord Chancellor Brougham, in remitting the case back from the House of Lords to be heard by a Full Bench of the Court of Session, observed on the distinction between heritable and moveable succession; the preference of the heir in heritage "rests upon feudal principles, and may be unjust in itself, but upon the injustice an undeniable equity is grafted." In that case reference was made to the earliest recorded decision, Law v. Law in 1554 (Balfour, 233-4; Mor. 2365), but beyond that reference the consulted judges declined to speculate on the origin of collation, particularly whether it arose from the collision of the consistorial and feudal law. The consulted judges subsequently say (14 S. at 287) that "the common law of feudal succession uniformly resists the intervention of equity to temper or modify its rules .... the doctrine of collation itself affords many remarkable instances of the strict exclusion of equity in applying the rules of feudal succession ....", and point out how infeftment or failure to take it may send the succession in a way contrary to equity and natural justice. They instance other cases too where the principle does not apply strictly equitably, as where a younger son succeeds to heritage destinatione and yet need not collate.

Lord Medwyn, however, ventured on a discussion of the origin of collation (p. 299, approved by Lord Sands in Waddell's J.F. v. Waddell, 1924 S.C. 877, 899). He attributed the introduction of primogeniture to the feudal system prior to which land was equally divided among the sons to the exclusion of the daughters. Prior to the full recognition of the exclusive right of the eldest son, he, according to the Leges Burgorum, had the same share in moveables as the other children, with the addition of the heirship moveables. "But, when it came to be firmly settled that the eldest son took the whole heritage, custom seems to have introduced it as a reasonable and equitable consequence (for we have no statute either for the one or the other) that the moveables became the portion of the younger children .... the eldest son would sometimes find his a less lucrative succession than if he shared his father's succession equally with the younger children. To obviate such an inequality, the doctrine of collation was introduced by the Church courts, and perhaps first in the succession of churchmeh, from considerations of equity, in the same way as in other instances they adopted rules of equity to soften the strict provisions of the common law. For the churchmen, in their judicial capacity, were the great masters of equity in those times .... and hence it came to be a rule of law." The earliest use of the term collation in our law appears, he said, in a statute

of Robert III, c. 35. "Collation was originally consuetudinary and introduced by no statute" (ibid., 306) but certain extensions of the principle were made by the Intestate Moveable Succession Act of 1855.

It must be admitted that the rule of equity is not universally applied: for instance, the heir may collate but the next of kin cannot call on him to do so against his will, and it is only the heir-of-line who is bound to collate and a younger son succeeding to the heritage need not. Moreover collation inter haeredes is a privilege of an heir-at-law, whose primary right is to heritage only, and he cannot be compelled to exercise this right by any of the other children (Sinclair's Trs v. Sinclair, (1881) 8 R. 749, 755): it is not an equitable presumption as is collation inter liberos. It has been said too that it is according to the policy and equity of the law that a family heir should be excluded from the class of heirs in mobilibus unless he purchases his admission to that class by collating (ibid.,760), while in the same case Lord Young refers to the illustrations of the same rule in English law, "where they speak about equity requiring something to be brought into hotchpot if anything is claimed" (ibid., 762) and speaks of collation as "a reasonable and equitable doctrine" (ibid., 763).

In Anstruther v. Anstruther ((1835) 14 S.272,287) the Court pointed out various dangers in resorting to

equity in applying the doctrine of collation, and Lord Clyde in Waddell (1924 S.C.877,890) thought that there was no room at all for employing notions of equity to extend it. Lord Sands was equally positive in that case that the principle underlying the rule was one of equitable distribution (ibid., 900).

Collation Inter Liberos

The object of collation inter liberos is to ensure an equal division of the legitim fund, by making allowance for advances previously made by the parent to any of the children, such as a marriage portion to a daughter, or an endowment to enable a son to set up in a profession. It only operates among children entitled to claim legitim, and children need not collate with parent nor with children who have discharged their legitim. The principle, being based on the presumed intention of a father to treat all his children equally, may be excluded by evidence of a contrary intention, as by giving a praecipuum over and above a due share of legitim, as for example by testamentary provision.

The rule is plainly one adopted from the civil law and followed by us (Stair, III,8,45; Ersk.,III,9,24-5; Bell, Pr.§ 1588; M'Laren, I,162-7). When the praetor modified the rules of intestate succession and called emancipated children to the possession of goods by the

edict unde liberi, he required them to cast into the succession all their separate property which would have belonged to the paterfamilias had they not been emancipated, so as to place them on an equal footing with the brothers who had not been emancipated. Such was collatio bonorum: later it was extended to daughters too who, though emancipated, had to collate their marriage portion (Buckland, Textbook, 325). Justinian finally made the obligation of collation general to all children.

Lord President Dunedin described the basis of the rule of collatio bonorum in Young v. Young's Trs (1910 S.C.275, 283-4) as being "a simple equity and nothing else .... There is an equity in the case of collatio bonorum which enables one child to say to another - 'Inasmuch as you have had advances during our father's life, in the division of the legitim fund between us these must be taken into account ....' Consequently I look upon the doctrine of collatio bonorum really as a rider which is put upon the claims of the children, and a rider depending upon an old-time equity introduced from the very earliest times in our practice and recognised by Lord Stair and all the institutional writers since." .... "Collatio bonorum is a mere equitable right which only really exists in calculation, and only comes into being after the legitim has become vested, and after it is to be discovered how the vested shares shall be divided among the various children."

Similarly Lord Kinnear said (ibid., 287): "Collation of legitim is an equitable claim competent only to the children competing on the legitim fund, who are entitled to draw in advances which another child may have received in circumstances which give rise to that equity", and he then refers to "equitable consideration for creating an equality"; while Lord Johnston rejected a hypothesis (ibid., 293) as being "contrary to the equitable principles which were the foundation of these decisions", and talks of advances "only by equitable implication attributed to legitim."

Lord President Clyde defined the scope of the doctrine in Coats's Trs v. Coats (1914 S.C.744,748) and said: "It is an equitable doctrine introduced for the purpose of securing equality in the distribution of the legitim fund among the children who are actual claimants on the fund. It has no place among others than children. Its basis is a double fiction. It assumes that the father has paid a part or the whole of his indebtedness at a time when no relationship of debtor and creditor existed between the father and the child. It further assumes that the payment is made out of the legitim fund although confessedly the legitim fund is at the time non-existent. Now it is apparent that a doctrine which rests on a foundation so narrow and so purely artificial is not susceptible of what is called logical extension. The attempt to give it

"reasoned expansion will inevitably end in confusion. The subtleties and intricacies, such as they are, which have encrusted themselves upon the doctrine are due entirely to a failure accurately to observe the terms in which the doctrine is explained by Stair and Erskine."

Lord Mackenzie likewise - "An aliquot part /of the legitim fund/ vests at death, subject always to the equity which exists between children who may at a later stage come in to compete, by which a duty is imposed on each to collate the advances received during the lifetime of the father."

In that case the Court approved the older authority of Monteith v. Monteith's Trs ((1882) 9 R. 982) where Lord Justice-Clerk Moncreiff spoke (p. 989) of "the equitable obligation which the term collation imports" and quoted Voet's formulation of the civil law rule (Comm. in Pand. 37.6.25), "Cessat collationis necessitas si is, qui conferre deberet, abstineat ab hereditate eius a quo res conferendae profectae sunt", while Lord Young mentioned the "equity of collation" (p. 994; cf. Stair, III,8,28).

Collation was a conception of the Roman law modifying the rights of persons to claim praetorian bonorum possessio contra Tabulas as against a will. A person sui iuris might have received property when emancipated or might have acquired property as a filiusfamilias could not have, and if such persons claimed along with sui heredes

against the will they must bring in for division what they possessed (Buckland, Textbook, 322). A daughter who had received a dos or marriage-portion might have to make collatio of it if she claimed to succeed except ab intestato. The rules of collation did not apply to what even a filiusfamilias could acquire for himself and so not to peculium castrense and quasi-castrense (Leâlie's Sohm, 532). These rules were purely praetorian modifications of the law to secure equality and redress inequality which might have previously existed in regard to acquiring property, but in the later Imperial legislation the object came to be to ensure the distribution of the estate in such a way as to redress any inequality in the benefits previously derived from the ancestor (ibid., 565). The absence from Roman law of any such division as our rules for the inheritance of heritable and moveable property following two distinct lines of succession precludes any conception of collation inter haeredes and it may well be that this is itself a development of the conception of collation inter liberos which grew up to meet the common case where the liberi included the heir-at-law entitled to the heritage, the effect being the same if the heritage were looked upon as an advance or special portion. This however does not explain the undoubtedly anomalous rule that if the person taking the heritage be not the heir-at-law he need not collate. Moreover collation inter haeredes is a privilege

while inter liberos it is a presumption which requires to be rebutted if inequality is to hold.

The Roman idea of collatio bonorum is likewise the foundation of the English equity doctrine of hotchpot: equity always presumes that a father intended to preserve peace among his children by giving them portions as nearly equal as possible (Hanbury, 535, citing Buckland, Equity in Roman Law, 74-76), and consequently advances and marriage-portions paid over to children are to be held to be in satisfaction pro tanto of that child's share (Admin. of Estates Act, 1925, s. 47 (1).) The same idea is met with in the English equitable rule that, a parent or person in loco parentis giving a legacy to a child and afterwards a marriage-portion, the latter is to be ascribed in satisfaction of the former (Ex p. Pye. Ex p. Dubost, (1811) 18 Ves. 140; 2 W. and T.L.C. 314. But see Satisfaction, infra.)

Collation is early met with in Scots law and the case of Law noted by Balfour and Maitland is only the first of many quoted in Morison's Dictionary (Mor. 2365). Quite early too appears the recognition of the derivation from Roman law and the essentially egalitarian nature of the doctrine. So the argument in Murray (Mor. 2372) in 1678 includes the sentence: "Likeas by the ancient Roman law, which our customs follow, all tochers and other donations to children, were accounted as parts of their

"legitim, and if they had received the same, they behoved to confer and bring it back to the heritage .... to make them equal in their legitim. .... The parity of natural affection hath made both the Roman law and ours to equalise the children, so that as much must be laid by to the rest as to make them equal to the bonds of provision."

In 1787 in Balfour v. Scott (Mor. 2379) occurs this passage in the argument: "The rule of our law, that an heir who take a part of the succession as one of the next of kin must collate the heritage, being founded on the principle of equality .... The end and the essential principle of collation is, that a perfect equality among the successors may be effected ...."

Similarly in the case of Little Gilmour (13th December, 1809, F.C.) it was argued that the origin of collation "among the Romans was an equitable interposition of the praetor, who compelled a collation of every estate" but that a considerable alteration had taken place in the practice in Scotland.

Again in Sinclair's Trs v. Sinclair ((1881) 8 R. 749,760) Lord Young refers repeatedly to the "equity and policy" of the law which requires collation before an heir can share in moveables also. "/Collation/ is founded upon a principle which has received application under a variety of circumstances. It is well illustrated in

"English law as well as ours, where they speak about equity requiring something to be brought into hotchpot if anything is claimed", and he refers to collation as a reasonable and equitable doctrine.

Election

The principle of election has long been known in Scotland though that name is comparatively modern, being derived from the law of England. The more peculiarly Scottish name of Approbate and Reprobate belongs only to the Nineteenth Century. In both England and Scotland, however, the principle rests on the same basis. "It is against equity that anyone should take against a man's will and also under it. This rests on no artificial rule but on plain fair dealing." (Douglas-Menzies v. Umphelby, /1908/ A.C.224, 232 per Lord Robertson.) The principle, though part of the doctrine of homologation, is most frequently applied in questions of succession. Lord Eldon expressed the principle in Ker v. Wauchope (1 Bligh, 1,21. In England the doctrine goes back to Noys v. Mordaunt in 1706, 2 Vern. 581: see authorities cited in Dillon v. Parker, 1 Swanston 359, 403) in 1819 as follows: "It is equally settled in the law of Scotland as of England that no person can accept and reject the same instrument. If a testator gives his estate to A and gives A's estate to B, courts of equity hold it to be against conscience that A should take the estate bequeathed to him and at the same time refuse to give effect to the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his but by virtue of the

"disposition of the will and at the same time to keep what, by the same will is given, or intended to be given, to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift." Probably the most common instances of the principle are cases where persons, if taking provisions under a will, are debarred from claiming legal rights.

Story defines election (§ 1075) as "the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both", and this fully expresses the principle of Scots law too. It is attributed, in its origin, by Story to the civil law "like many other doctrines of equity jurisprudence" (e.g. Inst.2.20 and 24; Dig. 30.1.30.7; 31.2.67.8).

It makes an appearance in Scots law at least as early as 1680 in Anderson v. Bruce (Mor. 607), though in 1566 (Weir v. Lie, Mor 605) and 1671 (Ballagan v. Drumlanrig, Mor. 605) the Lords permitted approbate of part of a deed and reprobate of another part. Again in 1715 (Home v. Home, Mor. 612; cf. Fea v. Trail, (1731), Mor. 616) two parts of a document were held separable, which circumvented the principle. It rather appears that the principle was not clearly established till the latter part

of the Eighteenth Century. It is not mentioned in an institutional text prior to Erskine (III,9,10; see also Bell, Com.I,141) and even then but briefly.

The doctrine is still one of importance in Chancery equity, based on the presumed intention of a testator, that "there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions and renouncing every right inconsistent with it" (Codrington v. Codrington, (1875) L.R. 7 H.L. 854, 866 per Lord Chelmsford). In that case Lord Chancellor Cairns referred to the Scottish rule (ibid., p. 861-2). "By the well-settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate', and in our courts more commonly the doctrine of 'election', where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them." Lord Chelmsford further pointed out that Lord Redesdale in Birmingham v. Kirwan (2 Sch. and Lef. 449) put the English and Scottish doctrines on exactly the same footing. "The general rule", he said, "is that a person can accept and reject the same instrument, and this is the foundation of the law of election."

In Cooper v. Cooper ((1874),L.R. 7 H.L., 53, 67) Lord Cairns said that the rule "does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity ...."

In Crum Ewing's Trs v. Bayly's Trs (1911 S.C.(H.L.) 18) it was finally determined that the doctrine of election was identical with the Scottish doctrine of "approbate and reprobate". Hardwicke, Eldon and Chancery decisions were cited extensively, particularly Lord Eldon's judgment in Ker v. Wauchope ((1819), 1 Bligh 1, 21) which was described as resting upon "the broad equitable grounds on which the English doctrine of election is rested." The same view was taken in Brown's Trustees v Gregson (1919 S.C. 438, 448; 1920 S.C.(H.L.) 87, 90-1 per Viscount Haldane, 98, 100 per Viscount Cave).

It is apparent that a decision by a person who is put to his election may raise a question as to the disposal of the unclaimed estate: such questions are resolved by the principle of equitable compensation under which the unclaimed provision accrues to the person or dass of persons whose interests are diminished by reason of the mode in which the right of election has been exercised (M'Laren on Wills, I, 255). So the acceptance of a conventional provision in lieu of terce, courtesy, ius relicti or ius relictae, or legitim, operates as a discharge of the claim on the estate ex lege, and the amount of that is then available for the purposes of the settlement under which the provision was made. If, on the other hand, the legatee elects to accept his legal rights, the provision specially bequeathed to him must be applied in compensation to the persons, usually the residuary legatees, who have been injured by the displacement of the testator's settlement. The principle is noteworthy as one of the few places where an avowedly equitable doctrine is found in Scots law.

The doctrine appeared in Scotland in Ker v. Wauchope ((1815) 1 Bligh, 25. For English history see note to Gretton v. Haward, 1819, 1 Swans. 445.), where Lord Chancellor Eldon said: "In our courts we have engrafted upon this primary doctrine of election, the equity, as it may be termed, of compensation", which he then goes on to

exemplify: ".... if A refuses to comply with the will, B shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him." This passage was quoted by the Lord Ordinary (Curriehill) in Macfarlane's Trs. v. Oliver ((1882) 9 R. 1138, 1142), who also cited Story, Section 1082. There we find this: "In the actual application of the doctrine of election, courts of equity proceed upon principles, which are wholly incapable of being enforced in like manner by courts of law. ..... But the subject is contemplated in a very different light by courts of equity; for in the event of such an election to take against the instrument, courts of equity will compel the devisee to make up to the disappointed claimants the amount of their interest therein: for it is now definitely settled that the party claiming against the will does not forfeit his interest thereunder, but is bound to provide out of the property willed to him a pecuniary compensation for those disappointed by his election."

The Lord Ordinary in Macfarlane continued: "It appears to me that, as the doctrine of election which gives rise to the claim of compensation is based on equity only, it is inconsistent with absolute forfeiture. No doubt in most cases absolute forfeiture does take place, because the subject provided by the will is of less value

"than that to which the legatee is otherwise entitled; and so the question of total forfeiture rarely occurs. But I can see no ground in equity for holding that the 'disappointed devisees' to whom full compensation has been made are nevertheless entitled to claim that the benefit intended for the repudiating legatee shall be absolutely forfeited by him, and shall accrue to them to the effect of conferring upon them a benefit which the testator never intended for them. Equity appears to me to demand in such case compensation - full compensation - but nothing more, out of the bequest to the repudiating legatee, leaving him to benefit by the surplus." (Cf. Lord Mackay in Thomson's Trs v. Thomson, 1946 S.C. 399, 411).

Lord Young (p. 1154) said: "I think the doctrine is equitable and that the equity is satisfied by indemnity or compensation to those who suffer by the withdrawal or withholding." Compensation is effected in practice by accumulating the provision not claimed until the amount gained is equivalent to the excess taken by the person who elected to claim legal rights. The doctrine though equitable tends to be complicated in practice and its abolition has been recommended (Mackintosh Committee Report on Law of Succession, (Cmd. 8144 (1951), s. 19.)

It is in accordance with the equitable basis of the doctrine that it can only apply where a provision in favour of the claimant for equitable compensation has

been prejudiced by the election of another to take his legal rights (Snody's Trs. v. Gibson's Trs., (1887) 24 S.L.R. 493.)

In Russell's Trs v. Gardiners ((1886) 13 R. 996) Lord Shand said: "This doctrine of equitable compensation is, I think, founded on implied or presumed will. Part of the provisions made by the testator has been forfeited and, acting on the implied will of the testator, the persons who are injured take the benefit, on the view that as he has given part of his general estate to them, of which they have been deprived by the act of another beneficiary, it may be presumed that the testator would give, or has by implication given, the benefit forfeited to those whose provisions have been injuriously affected."

In Rose's Trs v. Rose (1916 S.C. 827, 841) Lord Johnston defined equitable compensation as "an equity accorded to the beneficiary who has suffered by the reprobatory act of another" and later, (p.847), "here may be noticed the two conceptions .... of the theory of equitable compensation, the one which bases it on the implied will of the testator, the other which bases it on equitable considerations merely, and hence the term equitable compensation borrowed by us from England. They also are, I think, really one and the same thing. For the equity which leads to compensation is not to be found in anything abstract, but merely in implying the will of the testator", and he refers to Ker v. Wauchope ((1819) 1 Bligh,1,25 per Lord Eldon).

Satisfaction and Ademption of Legacies

Questions not dissimilar to certain of the problems in collation inter liberos arise from the doctrine of satisfaction. This may be defined as the donation of a thing with the intention, expressed or implied, that it is to be taken, either wholly or in part, in extinguishment of some prior claim of the donee (M'Laren on Wills, I, 736; Jarman on Wills, II,1120). The English Chancery rule is that there is a presumption against double portions and consequently that a legacy is in satisfaction of and not additional to a portion previously given (Ex parte Pye, (1811) 18 V. 140; Story (§.1108) says that the Chancery doctrine of satisfaction was probably derived from the Roman law.) In Scotland this is equally true on the basis of the maxim, debitor non praesumitur donare, in the case where a testamentary provision is made to a person for whom the granter was under an obligation to provide. In other cases, as where provisions are given to persons subsequent to legacies, or advances made to legatees, there is no such presumption in Scotland that the later gift is intended to be in satisfaction of the former, though such may appear expressly or by necessary implication (Kippen v. Darley, (1858) 3 Macq. 203. See also Stuart v. Fleming, (1623), Mor. 11439.) There is no presumption in Scotland against double portions where the original provision is voluntary and

revocable. Where a legacy is given to a creditor there is a weak presumption against donation, which agrees with the law of England (Talbot v. Shrewsbury, 1714 Pr. Ch. 394; Chancey's Case, 1725, 1 P.W. 408.) This presumption has in Scotland (Balfour v. Balfour's Trs. (1842) 4 D. 1044 per Lord Medwyn, founding on Roman law, and Lord Moncreiff) been characterised as an equitable presumption founded on the natural probability of the debtor's intention, but liable to exceptions where there is a contrary inference from circumstances or direct evidence of a purpose of donation.

Lord Cottenham put the Chancery position in Thynne v. Earl of Glengall ((1848) 2 H.L.Cas.153) as follows: "Equity leans against legacies being taken in satisfaction of a debt, but leans in favour of a provision by will being in satisfaction of a portion by contract ...." The Scots view is the reverse in both cases.

While then since Kippen it is clear that the general presumption against double portions has no place as a rule of construction in Scotland, there is widely recognised the presumption, debitor non praesumitur donare, which is not dissimilar in its practical effects, particularly where there existed an antecedent obligation to make the later provision. The English rule as to satisfaction of debts by legacies is expressed as founded on this maxim (2 W. and T.L.C. Notes to Talbot v. Shrewsbury)

Ademption

Ademption is the rule which cancels a special legacy in a will when it is found that the subject of that special legacy no longer forms part of the testator's estate at the time of his death. In Roman law (Inst.II,20) the testator's intention, the animus adimendi, was a necessary element of ademption, but in both English and Scots law this has been discarded in favour of the factual test - whether the subject was still in the testator's possession at his death (M'Arthur's Exors v. Guild, 1905 S.C.743,746; cf. Macfarlane's Trs v. Macfarlane, 1910 S.C. 325,327.) This test was first laid down in the Chancery in Ashburner v. Macguire (1786, 2 Br. C.C. 108) and followed by Lord Chancellor Thurlow in Stanley v. Potter (1789, 2 Cox 180) who rejects the idea of proceeding on the animus adimendi as confusing. This view was fully adopted in Scotland, though in Anderson v. Thomson ((1877) 4 R. 1101), where Chancery authorities were extensively founded on, Lord Justice-Clerk Moncreiff thought it contrary to principle and yet applied it as established law. The Roman rule appeared to him to be "founded on the clearest grounds of equity and justice." The principle was accepted without question in Pagan in 1838 (16 S.383) while in Chalmers ((1851) 14 D. 57) the Court said they had no need to look to English law for the conclusion. The same result had, however, earlier been attained

independently in Scotland, for in Jack v. Lauder ((1742) Mor. 11357; cf. Paip, 4 B.S.228, and cases in Morison, 11439 et seq.) it was held that a testator receiving payment of a bill which he had bequeathed to a legatee had thereby adeemed the legacy.

In this particular then the law of Scotland and the equity law of England run parallel, both diverging from the Roman law whence the principle was originally derived (see Lord M'Laren in M'Arthur's Exors, 1908 S.C. at 748); but it cannot be said that there is anything conspicuously equitable about the rule. The Scottish practice has been said to have been adopted from that of England (Johanson v. Johanson's Trs, (1898) 1 F. 247, 249.) It appears no more than a presumption of revocation based on a state of facts and there is force in the criticism that too little attention has been paid to ascertaining the intention of the testator (Anderson v. Thomson, (1877) 4 R. 1101, 1110 per L.J.C. Moncreiff: see also Macfarlane's Trs, 1910 S.C. 325 per Lord Dundas.)

M'Laren (I,736) observed that in England the term ademption was also used in a further sense which tended to be confused with satisfaction. Jarman (II,1121. See also Theobald, 538, and I Wh. and T.L.C. notes to Ashburner v. Macguire) distinguishes two meanings of ademption, one where the legacy fails because the subject is no longer part of the testator's assets (which is the Scottish meaning) and the other where a general legacy is held

not payable because the intended bounty has already been satisfied by the testator. In both classes of case the equitable presumption against double portions is applied. Scots law properly speaking does not admit the latter meaning of ademption.

Satisfaction and ademption of legacies then fall within Chancery jurisdiction in England because the Chancery succeeded to the ecclesiastical control over testamentary matters, but in Scotland the doctrines show certain distinct divergences and do not appear to have been considered as particularly equitable in the Scottish sense of the word.

Donation Mortis Causa

Donation mortis causa is a head of law known equally to the Roman and the Scottish systems of law and to English equity. In Scotland the doctrine was recognised in several early cases though it did not receive its final formulation until defined by Lord President Inglis in 1867 in these terms: (Morris v. Riddick, (1867) 5 M.1036, 1041) - "Donation mortis causa is a conveyance of an immoveable and 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 granter so long as he lives, subject to his power of revocation and failing such revocation then for the grantee on the death of the granter. It is involved, of course, in this definition that if the grantee predecease the granter, the property reverts to the granter, and the qualified right of property which was vested in the grantee is extinguished by his predecease."

The doctrine as accepted in Scotland does not correspond precisely to any one of the three kinds of donation mortis causa distinguished by the Roman jurists and appears to follow more closely the definition contained in the Institutes (Inst.,ii,7,1. Cf. Dig. 39.5.6; Code 8.57.4).

There are three constituent elements in a valid donation mortis causa, namely animus donandi, actual de

presenti transference, and the fact that the gift was made in contemplation of death. In *Milne* v. *Grant's Exors* ((1884) 11 R.887) the contention for donation was repelled and Lord Young referred to the definition in Snell's Equity which he believed stated principles entirely the same with respect to the question at issue as our own principles The requisites are stated in that work (299 *et seq.*) to be that the gift was made in contemplation of death, conditional thereon, and perfected by delivery, all which conditions are equally requisite to donations *mortis causa* in Scotland (cf. L.P.Clyde in *Macpherson's Exrx* v. *Mackay*, 1932 S.C. at 513)

Donations *mortis causa* seem to have been long recognised in Scotland. Stair (III.2,12) and Erskine (III, 3,91) mention them briefly and cases occur from at least 1624 (Mor. 3591 *et seq.*). The first case in which the plea was sustained seems to have been in 1636 (*Bells* v. *Parks*, Mor. 3592), and there are other instances in *Irvine* v. *Skeen* (1707, Mor. 6350), *Whiteford* v. *Ayton* (1742, Mor. 8072), and *Mitchell* v. *Wright* (1759, Mor. 8082.)

In *Ward* v. *Turner* ((1752) 2 Ves.Sen.431; 1 W. and T.L.C. 341), which is the leading English case, Lord Chancellor Hardwicke discussed the civil law authorities from which the doctrine has been imported into the law of England. Cases of this kind fell within the sphere of

equity in England partly because of the general equitable jurisdiction exercised over personal representatives and the estates of deceased persons, and partly because the assistance of equity was sometimes required to perfect what would otherwise be an imperfect gift. In Scotland these traces of Roman influence have presumably been derived from the pre-Reformation ecclesiastical courts which retained for long the administration of testamentary and mortis causa questions and to which much of the equitable influence on Scots law may be traced.

It is noteworthy that the institutional writers speak very hesitantly about such donations: Erskine (III,3,91) says they are little known in our practice, though Bankton (I,9,16-18) and Stair (III,4,24; III,8,29) describe them in terms still applicable. The early authorities were reviewed in Blyth v. Curle ((1885) 12 R.674, 680) by Lord President Inglis and he pointed out that Scots law has adopted only the third of the three kinds of donation mortis causa mentioned by Julian in the Digest (Dig. 39.6.2), has made the condition thereof more stringent by demanding that it be made in apprehension of death, and has further adjected a resolutive condition in the event of the death not taking place, which was unknown in the Roman law. The doctrine accepted in Scots law then, as in the Institutes, distinguished from donation inter vivos on the one hand and legacy on the other and contemplation of death is

enough, though the donor be not in immediate expectation thereof.

The jurisdiction of the Court of Chancery in questions of legacies is treated as concurrent by Story (§ 590). It was not exercised in equity before the Seventeenth Century. The ecclesiastical courts had exclusive jurisdiction over probate of wills of personal property and incidentally thereto a partial jurisdiction over legacies which continued down to the establishment of the Probate Court in 1857, when legacies and the distribution thereof were assigned to the Court of Chancery. Donation mortis causa was not properly cognisable by the ecclesiastical courts as being intermediate between gift and legacy (Story, § 606). Story says further (§ 607c) that the ground on which courts of equity now support donations mortis causa " is not that a complete property in the thing must pass by the delivery; but that it must so far pass by the delivery of the instrument, as to give a title to the donee, to the assistance of a court of equity to make the donation complete. .... Courts of equity treat the delivery of an instrument as creating a trust for the donee to be enforced in equity." He adds that the notion of donation mortis causa was imported into English law from the civil law (§ 607). In all cases in which a donation mortis causa is carried into effect by a court of equity, the court has considered the interest so vested

that the donee has a right to call on a court of equity for its aid (see Duffield v. Elwes, (1827) 1 Bligh N.S. 497.)

While then both in England and in Scotland donations mortis causa are recognised on similar terms and both are derived from Roman law (Cf. L.P. Inglis in Blyth with Lord Hardwicke in Ward on the civil law rules), there is no trace of the development of the doctrine being ascribed in Scotland to equity or of peculiarly equitable considerations affecting it. In England the matter is equitable at least partly for historical reasons, Chancery jurisdiction having superseded ecclesiastical.

Before leaving matters of succession, it is noteworthy that neither in Scotland nor in England have any of these equitable doctrines sought to impinge upon the rules of intestate succession fixed by law. It is only on questions arising out of testate succession that equity has exercised a modifying influence. It is a salutary reminder that "Equity follows the law."

Chapter XII
Equitable Defences

Both in the law of England and of Scotland an equitable defence of great importance is the plea of personal bar in one or other of its many forms. It is founded on the idea, not dissimilar to that of approbate and reprobate, that no man may adopt a positive and then a negative attitude to any matter at different times or in respect of different portions thereof. A man's attitude must be one thing or the other and he must maintain his attitude once he has adopted it. So of personal bar, Lord Blackburn said in Buchanan v. Duke of Hamilton ((1878) 5 R.(H.L.) 82): "According to the law both of England and of Scotland, if the one has so conducted himself - has so spoken and so acted - that if he had been a reasonable man, he would have known that the other side believed that he did agree to certain terms, and if the other side did in fact, in consequence of his so acting, believe it, it matters not that the man did not really mean to do it .... The idea is the same in both countries, and is founded on perfect justice." Estoppel or personal bar is further "a principle equally of law and of equity. If a person makes any false representation to another and that other acts upon that false representation, the person who made it shall not afterwards be allowed to set up that what he

"said was false and to assert the real truth in place of the falsehood ...." (Jorden v. Money, (1854) 5 H.L.C. 210 per L.Ch.Cranworth). Professor Rankine (Personal Bar, 7) has observed that in Scotland there is little trace of derivation of the principle from Roman law, but that both in England and in Scotland the expansion and elucidation of the doctrine have been comparatively modern, particularly in regard to mercantile transactions. In Scotland moreover no doubt has ever been expressed as to the equity or expediency of the operation of personal bar, and while in England it has been said that the doctrine "looked at in its true light, will be found to be a most equitable one" (Ld. Blackburn in Burkinshaw v. Nicolls, 1878 L.R. 3 App.Cas.1026), yet it was not exclusively an equitable doctrine in England.

In the House of Lords in Cairncross v. Lorimer ((1860) 3 MacQ. 327) Lord Chancellor Campbell, in dismissing an action in which the pursuers objected to action taken with their full knowledge, said that "in this case .... the doctrine will apply, which is to be found, I believe, in the laws of all civilised nations that 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 might otherwise 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."

Rei Interventus

Reference has been made at an earlier stage to the distinction between the Scottish attitude towards specific implement and the English attitude towards specific performance, the latter being formerly purely an equitable remedy obtainable only in the Court of Chancery, while Courts of Law awarded damages, whereas in Scotland either remedy was available according to circumstances from the combined Court of Law and Equity (see Stewart v. Kennedy, 17 R.(H.L.) 1,5,10,11). Nowadays however the rules according to which the discretion of the Court, in relation to specific implement and damages, is exercised are very similar in the two countries. In certain circumstances however in both countries an agreement, particularly with reference to land, entered into in a form which per se would not justify a decree of specific performance, may be held to have been partially performed and the other party is thereby precluded from founding on any informality therein. So in Scotland rei interventus has been defined as being "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" (Bell, Pr., § 26). By the operation of this principle an agreement entered into, though lacking the formalities of writing prescribed by the law, may nevertheless be held as valid and binding if the other party has permitted actings on the faith of the agreement to take place which would make it inequitable to refuse effect to the agreement,despite any defect of form.

Similarly in England, where certain agreements require to be constituted by signed writing under sec. 4 of the Statute of Frauds, if partial performance of the obligations thereunder has been made, specific performance will be decreed notwithstanding failure to comply with the Act in the constitution of the agreement. The English doctrine has been thus described by Lord Chancellor Cottenham (Mundy v. Joliffe, (1839) 5 My. and Cr. 177): "Courts of Equity exercise their jurisdiction in decreeing specific performance of verbal agreements when there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into", and this generally describes the Scottish position too - "It is not in England only that such a doctrine prevails: a similar (perhaps even a larger) equity is also recognised in other countries whose equitable jurisprudence is derived from the same original sources as our own. By the law of Scotland ....", and he goes on to quote Bell's

definition and the Scottish rules of rei interventus. (Lord Chancellor Selborne in Maddison v. Aldeson, (1883) 8 Ap.Cas., 467, 476.)

This English doctrine has also been explained thus (Caton v. Caton, 1866, L.R.1 Ch. 148): "When one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as for instance by taking possession of land and expending money on building or other like acts, then it would be a fraud on the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act and expend his money."

The doctrine of rei interventus appears to be long-established in Scotland. In Scot v. Scot in 1587 (Mor. 8410) the plea was upheld, and it seems to have been the basis of A. v. B. in 1553 (Mor. 8410). In 1697 in Lawrie v. Maxwell (Mor. 8425) a sale of lands was upheld though there had been no writ but the price had been partially paid. In 1699 a buyer attempted to resile after taking possession though no writ had intervened and implement was decreed (Thomson v. Thomson, Mor. 8426. The words rei interventus appear in the report. So too in Graham v. Corbet, (1708), Mor. 8428). Hope (Major Pr. II,1,10. See further case in Bell's Illustrations, I, 27) instances a marriage contract subscribed by a notary contrary to statute being upheld where marriage had followed.

While the laws of England and Scotland differ the result is practically the same in that heritable or real property is the principal subject in regard to which the Courts will decree specific performance or implement, and in both countries writing is necessary to constitute a contract of sale of such subjects and in both countries effect will be given by the Court by means of a decree for specific implement to a parole bargain provided it has been partially performed or actings have taken place on the faith of the alleged oral agreement. Courts of equity, Story says (§ 759) "will enforce a specific performance of a contract within the Statute /sc. of Frauds/ provided it affects land, where the parol agreement has been partly carried into execution .... In order to make the acts such as a court of equity will deem part performance of an agreement within the statute it is essential that they should appear to be done solely with a view to the agreement being performed. For, if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement " (ibid., § 762). The leading English authority on the doctrine of part performance is Lester v. Foxcroft (1701, 2 W. and T.L.C. 410) which related to a parole agreement to grant a lease, specific performance of which was decreed in consequence of part performance on

the part of the lessee. It is instructive to compare Professor Bell's classic definition of rei interventus with the rules laid down by White and Tudor (II,415): "The acts of part performance relied on must be unequivocally referable to the alleged agreement .... There can be no part performance where there is no completed agreement in existence. It must be obligatory and what is done must be under the terms of the agreement and by force of the agreement." The similarity of phrasing is remarkable. (See also English cases cited in Rankine, 42.)

Homologation

Homologation involves more positive actings than the purely passive attitude of the obligant or debtor against whom the other forms of bar may be set up. Homologation involves doing some act which unequivocally adopts and approves and confirms some prior agreement not originally binding. Lord Moncreiff expressed the principle thus: "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." (Gardner v. Gardner, (1830) 9 S.138.) Bell defined it (Comm.,i,144) as assent or approbation inferred from circumstances. The doctrine would accordingly appear to rest upon the principle that when a man gives out and acts upon his deed as regular and binding, he is barred from taking exception to it on the ground of latent nullities for which he is responsible. Again it depends ultimately on the equity which forbids a man both to approbate and reprobate, to perform partially and then seek to resile, to acquiesce and then challenge, and such similar actings contrary to justice and the stability of affairs which requires reliance on a settled attitude and course of conduct.

In Mitchell v. Stornoway Trs (1936 S.C.(H.L.) 56,63)

Lord Macmillan describes rei interventus and homologation as "both personal exceptions which on equitable grounds the law permits to be pleaded in answer to the party seeking to disown his contract on the ground of its informality", and he approves Bell's definition (Prin.,§ 27), which runs: "homologation (in principle similar to rei interventus) is an act approbatory of a preceding engagement, which in itself is defective or informal, either confirming or adopting it as binding." Then, having pointed out that the principle underlying both rules is the same, Lord Macmillan says, "The essence of the matter is the occurrence, subsequent to the informal agreement, of acts on the part of either party which would render it inequitable to hold that there was still a locus poenitentiae."

Homologation was likewise early accepted in Scotland. It was accepted in Rires v. Rires in 1663 (Mor.5619) and Linton v. Dundas in 1729 (Mor.5624), though rejected in Bowie v. Johnston in 1613 (Mor.5629), and was argued in numerous cases of the Seventeenth and Eighteenth Centuries (cases in Bell's Illustrations,I,30. Mor.5619 et seq.) The institutional writers treat of it (Stair,I,6,44; I,10, 11; Ersk.III,3,47; Bell, Pr. 27; Com.,I,93,139; II,393,398.) It proceeds on the basis of actings implying approval and hence there is an element of choice between alternative courses (Scarf v. Jardine, (1882) 7 App.Cas.345), just as in approbate and reprobate, which likewise has a fundamentally equitable basis.

It is further interesting to note that the equitable claim of a minor for reduction of deeds granted during minority to his enorm lesion may be barred by the equitable counter-plea of homologation after attaining majority and in the full knowledge of his rights (Fraser, Parent and Child, 532.)

It is noteworthy that the doctrine of adoption, though it may lead to results similar to homologation, is not equitable. It does not depend on any presumption or inference from conduct, but requires unequivocal actings affirming an ultra vires act and constituting it a valid obligation.

Acquiescence

In some circumstances a party's acquiescence may be sufficient to infer acceptance of a contractual obligation where the circumstances are such that ordinary prudence and fairness should have impelled him to exercise the right to resile. Consequently a competent equitable defence to an action for reduction of the agreement is acquiescence by the other party. Acquiescence involves tacit representation and includes such conduct as would induce a reasonable man to take the representation to be true and to believe that it was meant that he should act upon it, and so to act (Rankine, Personal Bar, 54.) The circumstances where the principle may fall to be applied may be cases where the parties are under no antecedent contract with each other. Under this head fall the many cases where it has been held that contravened building conditions, if acquiesced in, cannot be enforced. To amount to acquiescence, the facts founded on must amount to tacit consent and require knowledge on the part of the person entitled to object, both of the acts founded on and of his own rights (e.g., D. Buccleugh v. Edinburgh Mags., (1865) 3 M.528.) Or acquiescence may be pleaded as between parties who are under a contractual relationship, such as superior and vassal, in relation to the contravention of feuing conditions. In Campbell v.

Clydesdale Bank ((1868) 6 M.943) a proprietor feued ground, inserting in all the feu-contracts the same conditions as to style of houses. Some of the feuars contravened the conditions without objection and it was held that the superior was barred from enforcing the conditions against a single feuar. It appears to have been maintained by the defender in that case that the case was to be decided solely on principles of equity. Lord Cowan's answer was that this case, like the great mass of cases in which the Court adjudicates, was to be decided on a combined view of equity and law. Nevertheless the judgment proceeded largely on a citation of English equity cases.

A dictum of Lord Chancellor Eldon is equally applicable to such a case. It comes from Roper v. Williams (1822, Tw. and Rus. 18), where he said: "If the landlord in some particular instances lets loose some of his tenants, he cannot come into Equity to restrain others from infringing the covenant, to whom he has not given such a licence .... It is not a question of mere acquiescence; but in every instance in which the grantor suffers grantees to deviate from a general plan intended for the benefit of all, he deprives others of the right which he had given them to have the general plan enforced for the benefit of all."

Acquiescence as effecting alterations in written contracts has been discussed in several important cases in Scotland but the equitable basis of the doctrine seems to be ignored by all the judges.

Numerous other instances relate to the waiver by a landlord of certain rights as against the tenant, such as the exclusion of subtenants, or his right to forfeit a lease on the ground that an irritancy has been incurred, may be barred by waiver or acquiescence in something contrary to the exercise of that right (Rankine, 82). So too a tenant's inversion of possession may be acquiesced in and thereby come to bind the landlord (Rankine, 81).

To be effective, acquiescence must come up to tacit consent and involves knowledge on the part of the person charged with it, both of his own rights and of the acts alleged to be an infringement thereof. "There can be no doubt that acquiescence, to operate as an equitable estoppel, must be with knowledge that the party acquiescing has a right which would be available against that which he has permitted to be enjoyed." (E. Beauchamp v. Winn, 1873,L.R. 6 H.L. at 234 per Ld. Chelmsford.)

Numerous cases illustrating points on acquiescence arise from the relationship of master and servant as, for instance, where a servant fails to claim extra remuneration till long past the time it was due, or a master delays to dismiss when he had sufficient grounds to do so; an

example is Mackison v. Dundee Magistrates (1910 S.C. (H.L.) 27), where delay in bringing a claim for forty years was held to have barred it by acquiescence. In these as in other cases on the point the rule clearly brought out is that a person becoming aware of cause to object must do so speedily or his objection may be held waived and so barred. Vigilantibus non dormientibus iura subveniunt.

Promptness in challenging another party's unwarrantable actings on discovering them is always a counter to the plea of acquiescence: failure to take such prompt objection is at the basis of the plea of mora frequently stated along with acquiescence. Taciturnity also has the same effect and is usually linked with mora. Strictly speaking, delay short of the prescriptive period can have no effect in cutting off claims, yet repeatedly it has been held that delay in objecting infers consent and where prejudice has been suffered by the other party by that delay it may be held that the claim has been passed from. In Assets Coy. v. Bain's Trs ((1904) 7 F. (H.L.) 104) the House of Lords declined to treat mora as a legal plea but held that lapse of time must be taken into account and the delay was such, coupled with change of circumstances, that it would have been unjust and virtually impossible to reopen matters which had been closed for twenty years.

To some extent the plea is based on the same idea as prescription: the latter is founded on the rubric, interest reipublicae ut sit finis litium, and the presumption that a defender would be prejudiced by having to defend a claim brought after a long lapse of time. In mora and taciturnity the same idea is met with to the extent that if it can be shown that prejudice has resulted to the defender from the delay in pressing the claim, it may be held barred by a shorter lapse of time than would finally cut it off by prescription. Delay of considerable length moreover tends to infer acquiescence (Cook v. N. B. Rly., (1872) 10 M.513.) "Mere delay", it has been said, "or the mere lapse of reasonable time is one thing, but an inordinate lapse of time is wholly different" (Pearl Mill Coy. v. Ivy Tannery Coy., [1919] 1 K.B. at 83 per M'Cardie,J.) In this branch of the subject it is necessary to bear in mind the maxim of equity, Vigilantibus, non dormientibus, aequitas subvenit, and the Courts of equity have consistently held that laches (mora) and acquiescence is a good defence to an equitable claim.

A notable example of laches and acquiescence was Allcard v. Skinner ((1887) 36 Ch.D.145), where a plaintiff, subjected to undue influence, delayed for six years after the cessation thereof to take steps to recover her property, and it was held that the equity raised in her favour by the undue influence had lost its force and would turn to

iniquity were it allowed to disturb vested rights. Laches, in English equity, applies only to equitable claims; it is a defence against a plaintiff who, though barred by no statutory bar, ought not to succeed by reason of his apathy (Hanbury, 57.)

In the Assets Coy. case ((1904) 6 F. 676. See too Lord Trayner at p. 740) Lord President Kinross said: ".... I do not doubt that where, coupled with lapse of time, there have been actings or conduct fitting to mislead, or to alter the position of the other party to the worse, the plea of mora may be sustained. But in order to such a plea receiving effect, there must in my judgment, have been excessive or unreasonable delay in asserting a known right, coupled with a material alteration of circumstances to the detriment of the other party."

Lord Davey ((1905) 7 F.(H.L.) 109) pointed out that mora was not a plea in law, but that lapse of time was a circumstance to be taken into account in the case. In other words, it is a matter for equitable consideration, and lapse of time without prejudicial change of circumstances is insufficient to make mora an adequate defence. The same is true of taciturnity. In Robson v. Bywater ((1870) 8 M.757,761: cf.L.J.C. Inglis in Moncrieff v. Waugh, (1859) 21 D.216,218) Lord Ardmillan said that "to mere lapse of time and non-assertion of right .... I would not give effect as sufficient, taken alone, to

"exclude or bar a demand for justice. But where, in addition .... you have conduct and transactions on the footing which excluded the idea of such a claim as this being contemplated, and where you have persons .... induced to make important arrangements which they would not have made and .... which cannot now be undone, that presents a very difficult question." Lord Kinloch (ibid., 765), agreeing, said that it would be "against all the principles of justice and fair dealing to come to any other conclusion."

There is therefore a certain amount of direct authority for the view that mora and taciturnity had their basis in equity, quite apart from the analogy of laches in England.

Lord Justice-Clerk Hope said in Thomson v. Smith ((1849) 12 D. 276, 280): "The effect of presumptions or taciturnity in extinguishing or barring claims of accounting founded on alleged strict legal rights at a remote period, of which no one at the time had either knowledge or suspicion and when the whole state of facts is altered and all the parties dead, is founded in substantial and most clear justice."

As early as 1672 in Stark v. Napier (Mor.12707) and 1681 in Mercer v. Aldie (Mor.12708), mora and taciturnity were being founded on successfully in Scotland.

The counter-plea of non valens agere is also equitable. (Campbell's Trustees v Campbell's Trustees, 1950 SC. 48, 57.)

Holding Out

This variety of personal bar is almost confined to agency and partnership and it involves preventing a party from setting up in evidence some fact on the ground that he has previously misled another party who has consequently changed his position. Where in fact there was no mandate or partnership equity steps in and feigns one on the ground that every man must be responsible for the natural consequences of his actings (Rankine, 215). The same principle is applied in the Factors Act, 1890, and in the Partnership Act, and appears in the common law doctrine of praepositura. The judicial acknowledgment of any equitable foundation for this branch of the doctrine of bar seems however to be non-existent and the principle is simply based on fairness and reasonable presumptions. (Cf. Ersk.III, 3, 43.)

Chapter XIII
Process

Certain forms of process are particularly to be ascribed to equitable considerations, their existence being due largely to the necessity of providing for a mitigation of the position which would otherwise have existed at strict law. Among these may be numbered interdicts. The interdict is essentially an order of Court whereby a person is enjoined to refrain from certain action which another party complains is injurious to him. In England the injunction was a notable and powerful Chancery weapon and was much used in the struggle with the common law courts and it was the use of the common injunction to prevent the courts of Law handling a case inequitably that to a large extent precipitated the struggle between the common law and Chancery courts under James I which was finally resolved by the advice of Bacon in favour of the Chancery. (See Earl of Oxford's Case, 1616, 1 W. and T.L.C. 615, and supra, Chap. III.) In Scotland the interdict has not played such a conspicuous part and the necessity has never arisen for forbidding a court of non-equitable jurisdiction to deal with particular cases; but apart from that, the interdict has been and is of vital importance and daily use in enabling the Court to inquire into the legality of many acts complained of, to stop

nuisances, infringements of patents and other rights, trespass, breach of contractual agreements, and generally every kind of threatened wrong which it is desired to prevent.

Interdict has been defined as being "a remedy by decree of Court either against a wrong in course of being done or against an apprehended violation of a party's rights, only to be awarded on evidence of the wrong, or on reasonable grounds of apprehension that such violation is intended." (Hay's Trs v. Young, (1877) 4 R. 398.) There are several judicial references to the equitable jurisdiction of the Court in dealing with cases of interdict: in Tatnall v. Reid ((1827) 5 S. 277) interdict was granted against a trustee in bankruptcy, Lord Justice-Clerk Boyle saying that he thought that "the Court is called on in equity to interfere to prevent any step being taken which will give one of the parties such an advantage ...." Interdict was referred to as an "equitable power" by Lord Pitmilly in Innes v. Innes ((1829) 7 S.762), and as a "praetorian power" by Lord Justice-Clerk Boyle in Mansfield v. Stuart ((1839) 2 D. 246), while Lord President Dunedin in 1911 (MacLure v. MacLure, 1911 S.C. 200, 206) said that the jurisdiction which the Court exercises in matters of interdict is always equitable.

In Grahame v. Magistrates of Kirkcaldy ((1882) 9 R.

(H.L.) 91, 96) Lord Chancellor Selborne said: "In Scotland the legal and equitable jurisdictions have always been united, and the natural result of that union is that strict legal right ought not, in such a case as the present, to be enforced without regard to the discretion which from the nature of the subject matter and of the interests of all those concerned in it ought to be exercised by a Court of equity."

In some matters, such as encroachment on property, interdict may be claimed as a matter of right (Clippens Oil Coy. v. Edin. Water Trs., (1897) 24 R. 370, 382) and not just as a matter of equitable discretion, whereas in Chancery practice injunction was primarily a discretionary remedy (Colls v. Home and Colonial Stores Ltd, /1904/ A.C. 179.) But in questions of interim interdict balance of convenience falls to be considered and the question is eminently one for judicial discretion (cf. Adams v. Glasgow Mags., (1868) 40 Sc.Jur. 524). An interesting exception to the rules of interim interdict is where it is refused to a petitioner because he is himself a wrongdoer in an associated matter (Colquhoun v. Lochlomond Steamboat Co., (1853) 2 Stuart 214). This principle is exactly paralleled in English equity (Blakemore v. Glamorganshire Canal, 1832, 1 My. and K., 154, 168 per Lord Eldon.) on the basis of the maxims "He who seeks equity must do equity" or ".. must come with clean hands into Equity."

It has been observed that there is little beyond verbal connection between the interdicts of Scottish and those of Roman law and the modern interdict seems to have evolved principally from the old process of suspension which was a method, competent from the earliest times in Scotland, of stopping all forms of execution of diligence (Broomfield v. Hately, (1583), Mor. 15138; Brown v. Kenmure, 1715, Bruce Dec. 55. Balfour, Prac. s.v. Sentence and Execution. Stair, IV, 52, 2. In Dumfries v. Nith Heritors, (1705), Mor. 12776, suspension was used to stop the building of a mill-dam.) In the canon law interdicts were prohibitory orders (Van Espen, II, 400; Patrick. 258; compare the mediaeval papal usage) and not dissimilar orders in civil matters are found in the Acta Dominorum (supra, Chap. V.) Interdict would appear to have been added to suspensions of diligence when it had proceeded beyond the stage of a charge (Mackey, Practice, II, 210) and it is only in Erskine that we find reference to the adaptation of suspension to the purposes of interdict (IV,3,20. See too Berwick v. Hayning, (1661), Mor.12772, a supplication to Parliament against river pollution where Roman law interdicts were cited as analogies.) Graham v. Graham in 1780 (Mor. 8934) bore to be a bill of suspension but prayed for interdict. There are however in the Eighteenth Century one or two references to simple suspensions in circumstances where a modern interdict would

be suitable, such as a liferentrix stopping the fiar cutting wood (Hamilton v. D. of Hamilton, 1723, Robertson, 443) or encroachment on a street by building (Mags. of Montrose v. Scott, (1762), Mor. 13175); but suspension and interdict against wrongdoing in general is quite common from the earliest volumes of the modern reports in 1822 (Jameson v. Hillcoats, (1800), Mor. voce Property, Appx. No. 5, bears to have been a bill of suspension and interdict against a nuisance but in the judgment the Lords "suspended the operation complained of." Cf. Wauchton v. Paterson, 1532, Balfour, 267.) The modern remedy is therefore rather indigenous than derived but nevertheless has distinct equitable characteristics.

Suspension

In Walter Ross's Lectures ((1792) I, 360) there is to be found a lengthy disquisition on Suspension which throws some light upon the equitable basis of that form of process. He begins from the proposition that in England and Scotland the King is the sole fountain of jurisdiction which, too heavy to be exercised in person, is committed to judges by writs or brieves issued from his Chancery, and narrates how as in Rome the Emperors acted by the ministry of a great officer of state with a general superintendance of executive writs who in this island got the title of Chancellor. It fell to him to devise and make out all writs, brieves and letters patent, and he had custody of the King's seal to give them authority. "When, therefore, any grants were improperly obtained from the Crown to the prejudice either of the Prince or his subjects, it was the Chancellor's business to enquire into the matter, to stop or suspend the execution of the writ, and to recall it if improper. When the Courts of law, proceeding upon the strict terms of the King's original brieves, were unable to give the redress to a party which his case required, or when by a rigorous application of the common law, the subject suffered real injustice, no other method was left to the injured party but an humble application to the King for relief. Upon these occasions,

"the Chancellor, who was presumed to unite in his person both piety and learning, was called upon to advise in what manner justice was to be reconciled with strict law. This was an appeal to the King's conscience; and as the Chancellor directed it that dignified officer got the title of the keeper of the King's conscience. From these beginnings and by slow degrees arose the power of the Chancellor of England and the grand distinction between the courts of common law, and the great court of equity in which that officer presides. Upon due consideration of the circumstances of the case, he mitigates the severity, and supplies the defects of the judgments pronounced in the courts of law .... Of old, all actions and suits proceeded by brieves issuing from the Chancery of Scotland which as in the South, was the officinum justitiae under the direction of the Chancellor of the Kingdom. Redress in equity was applied for to the King who granted it by the assistance of his Chancellor and Council. The ancient brieves .... went by degrees into disuse. Our inferior judges assumed the jurisdiction of causes upon complaints per modum querelae and summonses by their own authority. At the establishment of the Colleges of Justice, the power formerly exercised by the King and his Council, so far as regarded the civil business of the nation, was entirely devolved upon that body. The College of Justice became thenceforth the

"King's Court; the powers of the Chancellor were united to it .... Being thus invested with the powers of the judges of common law and the Pretorian or supreme jurisdiction of the King or his Chancellor, they issued writs of process by their own authority; summonses in the King's name, and under his signet, took the place of the ancient brieves issued by the Chancery; and the equitable powers which formerly resided in the King, his Chancellor and Council vested entirely in the new Court.

"This equitable, pretorian, or correctory jurisdiction came to be exercised by applications to the Lords and the writs for that purpose, from the Latin word, and ecclesiastical practice well known in France were termed suspensions. The injunction they called a sist and the subpoena was granted in the same writ, in the form of a summons .... The suspension then is the writ by which the equitable powers of our Court are exercised; and by which every error in the decrees of inferior judges or in the decrees of the Supreme Court itself, is ultimately corrected"; and he refers to Coke as bearing out the analogy pointed.

So too Balfour (Prac. 267) tells us that the Lords of Council may discharge or suspend any writing by the King directly contrary to the administration of justice, or hindering or postponing it.

It is certainly apparent that suspension is a very

old head of Sessional jurisdiction (Balfour, loc. cit., refers to cases of 1533). The right of the creditor to demand caution was introduced by Act of Sederunt in 1577 and there was legislation on the same head in 1584 (Balfour, 389. A.P.S. III, 300) while Ross mentions further regulation of the rights in 1599 and 1613 and subsequently on several occasions in the Seventeenth Century.

It is however rather more doubtful whether the development of equitable power and the position of the Chancellor was really so parallel in Scotland and England as Ross makes out. Stair (IV, 52, 11) gives as the justification for suspensions that "they were necessarily introduced by the Lords, especially to give hearing to those that were decerned in absence, because ofttimes the executions whereupon such decreets proceeded were not true ...." "Suspensions do pass for divers ends .... and that either upon the justice and verity of the reasons for suspicion .... or upon compassion and mercy to overburdened debtors incarcerated ...." (IV, 52, 22.) There is a flavour of equity about this.

In its modern form suspension is the means whereby the injury of rights is prevented as distinct from the remedies arising when the act complained of has been accomplished. It is further available as a means of review of a decree pronounced in absence or in inferior courts.

Suspension may be brought alone or in conjunction with one or both of Liberation and Interdict, and the modern process of Interdict has evolved chiefly from the older suspensions. Suspension as a means of stopping diligence or reviewing judgments is illustrated by examples from 1583 onwards in Morison's Dictionary (15135 et seq. Cf. Nicolson MS., fol. 149; Hope's MS Notes, fol. 9,16), while numerous instances occur in the Seventeenth Century. Stair (IV, 52, 2) refers to suspension as a stopping of execution but not to Interdict and it appears that it was added subsequently as an appendage to suspension of diligence (Mackay, Practice, II, 210.)

The earlier authorities (Balfour, Prąc. 393; Spotiswoode, Prac. 324; Hope, Minor Pr. 75; Bankton, IV,38,1) make no allusion to suspension except against decree or legal diligence but of these there is a sufficiency of examples to prove that suspension in these cases was frequent (Balfour, Prac. s.v. Sentence and Execution, 393.) Down to 1907 the Court of Session had exclusive jurisdiction in suspension as a stay of diligence, but the Act of that year conferred a limited jurisdiction on the Sheriff Court. While this fact and the discretionary nature of the remedy point to an equitable origin, modern judges have refrained from discussing the question. Bankton (IV, 38, 20) does, however, compare the jurisdiction to that of the praetor.

Adjudication

Adjudication for payment (or in execution) is the modern equivalent of the ancient process of apprising or comprising. This was originally a very summary proceeding in which a debtor who was not possessed of sufficient moveables was ordered by the Sheriff to sell his lands within fifteen days in order to pay the debt, failing which the lands were absolutely transferred to the creditor. (For history, see Juridical Styles (2nd edn. 1828), III, 324; Ersk. II, 12, 1; Bell, Com. I, 740. Apprising is said to have been adopted from Roman law, and was regulated by statute of Alexander II, c. 24. A.P.S. I, 735. See too Kames, Historical Law Tracts, Appx. 6.) In 1469 an Act (c. 36; A.P.S. II, 96) gave a power of redemption for seven years, extended by an Act of 1661 (c. 62; A.P.S. VII, 317) to ten years. In 1621 it was enacted that rents and profits so far as exceeding the interest of the debt should be imputed to the extinction of the principal. In 1672 however (Act 1672, c. 19; A.P.S. VIII, 93) adjudication replaced apprising and the Court was empowered to adjudge to the creditor the portion of the lands corresponding to the debt, interest, and expenses, together with one-fifth more to compensate for the inconvenience of taking land in payment of debt. This was a special adjudication and the period of redemption thereof was five years. If the debtor did not cede

quiet possession of the lands the creditor could use a general adjudication of all right vested in the debtor of those amounts excepting the one-fifth part more. Nowadays special adjudications are unnecessary and general adjudications are concluded for alone.

An action of adjudication for payment must proceed on a liquid document of debt or a debt constituted by decree and may be directed against all heritable estate. Even after decree the right of an adjudger is redeemable within the period of ten years known as "the Legal", and until then his right is merely a pignus praetorium and not a right of property, the debtor continuing vassal (Cochrane v. Bogle, (1849) 11 D. 908, affd. 7 Bell 65.) After the expiry of that period the creditor may raise an action of declarator of expiry of the legal, decree in which gives an absolute and irredeemable right of property (Campbell v. Scotland, (1794), Mor. 321); or the same effect may be attained by forty years' possession on a charter following on the decree of adjudication.

Stair mentions (IV, 5, 9) that declarators of redemption of apprisings were much assisted by the Lords ex officio (sc. nobili) "in respect of the exorbitant advantage apprisings had", and he goes on to describe how rents were imputed to the interest in the first place and the principal next where the appriser had entered into possession of the land before expiry of the legal. This

suggests another equitable interference in the interests of the debtor to restrain a rapacious creditor.

The influence of equity seems to have been felt in other ways for in Balfour v. Wilkieson ((1738), Mor.107. See also Kilkerran's report, Adjudication, No. 9, p. 2) an adjudication was led for more than was due and it was successfully contended that the Lords ex nobili officio might sustain it although a nullity rigore iuris. And this line was taken again in Ross v. Balnagowan ((1747), Mor. 112): "the Lords in respect of long practice /were wont/ to sustain them ex equitate as a security for what was truly due."

Kames praised adjudication as "an illustrious instance of the prevalence of humanity and equity" (Historical Law Tracts,181): the palpable injustice of the earlier rules had produced a remedy whereby the lands remained redeemable.

It may be interesting to mention that an ordinance was passed by Cromwell in 1656 designed to mitigate the operation of Scots law and "to moderate the rigour of comprisings and the severity of the proceedings by creditors" (A.P.S. VI (2) 759, 762.)

More conspicuously equitable is the fact that lands adjudged for debt remain redeemable for five (or now) ten years and until decree passes in a declarator of expiry of the legal. Till that decree passes the debtor may redeem (Campbell v. Scotland and Jack, (1794), Mor. 321.) In

Robertson v. Athole ((1815) 3 Dow, 114), Lord Chancellor Eldon compared this requisite to the English mortgagor's equity of redemption, which subsisted till foreclosed. Alternatively the long prescription may fortify possession after expiry of the legal. Bell observed (Com.I, 746) that as the debtor's right to redeem was founded on equity only it should be barred by personal exception, such as acquiescence in improvements made by the creditor, that is by a counter-equity.

Erskine also suggested (II,12,19) that the Court of Session might possibly "from their praetorian power, soften that rigour" and declare an apprising at an end when a debt is paid off to a trifle. Stair mentions (IV,5,10) that declarators of redemption of apprising "have been much assisted by the Lords ex officio, in respect of the exorbitant advantage apprisings had." In Oliphant v. Hamilton ((1677), Mor. 9049) it was observed that "though the Lords do sustain apprisings quoad their equitable effects to get the appriser's satisfaction, yet they do most severely and strictly consider them as to exorbitant advantage after expiring of the legal."

Adjudication in Security

This process is believed to have been "adopted by the Court of Session as an equitable remedy in cases where apprizing was not competent" (Bell, Com., I, 752; cf. Parker on Adjudications, 6; Shand's Practice, 720) before adjudication was generally substituted for apprisings. It was not introduced by the Act of 1672. It is admitted on grounds of equity where a creditor has future, conditional or contingent claims against a debtor and the latter is vergens ad inopiam or has other adjudications against him (MacLaren's Practice, 803-4.) It is purely a redeemable right. "As a praetorian remedy in equity, adjudication in security may be applied for where the debt is not yet due, or where it is contingent or where the creditor has it not in his power to establish the amount of it .... This remedy, however, will not be given in all cases, but only where there is a manifest call for it in justice ...." (Bell, Com. I, 752-3. Cf. Nisbet v. Stirling, (1759), Mor. 59 at 61.)

This form likewise does not come within the scope of the statute of 1672 and there is no legal, as the decree thereunder can never confer a title of property, but it entitles the pursuer to payment of his debt out of the subjects adjudged, or to a ranking on them in the event of bankruptcy.

"Adjudications, which are as truly transmissions of property as apprisings were, have been sustained by our supreme court, ex nobili officio, upon debts before their term of payment, in the special case where the debtor was vergens ad inopiam (Blair, (1711), Mor. 12908). But such adjudications, as they are grounded solely upon equity, subsist only as securities, and cannot, by any length of time, become irredeemable rights." (Ersk., II, 12, 42.)

Adjudication contra Hereditatem Iacentem

It was for long difficult to find a remedy against an heir who did not take up the inheritance of an ancestor liable for a debt. The Act of 1540, c. 106, allowed creditors to charge the heir to enter and to apprise the lands on his failure, but no remedy was provided where the heir renounced the whole estate. "This defect was supplied by the following expedient, which, being introduced by necessity, was approved of by our judges without a statute" (Ersk. II, 12, 47.) These adjudications were declared redeemable by the Act 1621, c. 7. Stair says (III, 2, 45): "Adjudication upon renunciation to be heir is remedium extraordinarium introduced by custom where apprising could have no place .... This remedy is introduced by the Lords who have ample power to administer justice in all cases and to make orders to that effect, to supply the defect of the law, or ancient customs, by such new remedies as such new occurring cases do require, amongst which adjudication is a prime one, which Craig testifieth to have been unknown to our predecessors."

This view was again expressed in Ker v. Primrose ((1709), Mor. 46. Cf. Kames, Historical Law Tracts, 405), that these adjudications were "introduced by the Lords of Session, ex nobili officio, for supplying the defects of the law."

Adjudication in Implement

Adjudication in implement is a form of action for specific performance of an obligation to convey heritable property where the granter of the obligation or his heirs refuse or are unable to give a valid disposition. This form likewise appears to have been introduced as a new remedy prior to the Act of 1672 by the Court of Session "interposing as a court of equity their authority to provide a remedy which the ordinary course of law did not supply" (Bell, Com., I, 782. Similarly Stair, III, 2, 45; Mack. II, 12 (p. 312); Ersk II, 12, 48.) Stair (IV, 51, 9. Cf. Campbell v. Stuart, (1675), Mor. 54) describes the principle as being: "It is an adjudication for perfecting dispositions of rights of the ground which require infeftment .... where the disponer is either expressly or impliedly bound to infeft the acquirer, and ofttimes to infeft himself for that effect, yet hath not performed the same. Justice requiring some legal remedy to make such dispositions and obligements effectual, ... therefore, the Lords did sustain process at the acquirer's instance against the disponer to fulfil, and against his superior to supply his place, and remove the acquirer in the same way as he might have done upon his vassal's charter of confirmation or procuratory of resignation." In this form of adjudication there is no legal and no redemption, decree carrying an irredeemable judicial title.

In the passage cited Stair likens the power of the Lords in extending adjudications to that of the Praetor, (ubi lex deest, Praetor supplet), and he describes it as remedium extraordinarium. Elsewhere (IV, 3, 4) he enumerates adjudications contra hereditatem or in implement as examples of the nobile officium of the Lords.

Proving of the Tenor

This is the form of action whereby the contents of a document which has been accidentally or fraudulently lost, cancelled, destroyed, or obliterated may be ascertained and restored. It is a declaratory action with the object of having the deed thus restored declared to have the same effect as the original would have had if it had still been in existence. While in the form of a declarator, this action involves the nobile officium of the Court of Session and is consequently excepted from the statutory extension of jurisdiction in declarators to the Sheriff Court. "It is impossible to say that an action of proving the tenor was ever regarded or spoken of, as an action of declarator .... When one inquires into the history of the action, one finds that it really began as an exercise of praetorian jurisdiction" (Dunbar v. Scottish County Investment Coy., 1928 S.C. 210, 213 per L.J.C. Scott Dickson.) "The history of the action gives the reason for this special code /of procedure applicable to such actions/ for it originated in an appeal to the nobile officium of the Court. Now the nobile officium of the Court can only be exercised by one or other of the Divisions of the Court of Session. Accordingly the procedure which has been followed from time immemorial up to 1907, when a change was made .... was that the case while

"originating in the Outer House, was transferred by an interlocutor - which must also have been of very ancient date, looking to the archaic form - by which the Lord Ordinary made great avizandum with the cause to one or other of the Divisions of the Court .... " (ibid., 217 per Lord Salvesen.)

Proving the tenor is certainly a very old head of sessional jurisdiction. Balfour cites a case in 1561, Gray of Shawes contra Laird of Essilmouth (Prac. 188), and states the rule in general terms:-

"Ane chartour, sasine, or uther evident, being be chance brint, singit be the fire, scrumpillit, or the seil thairof meltit and brokin in sic fort as it cannot perfectlie be red or kept in time cuming, as ane sufficient evident to mak faith to posterite, the tenour thairof and the chance forsaid beant provin be sufficient witnessis or be consessionn of the partie, aucht and sould be renewit and redintegrat be him, or his airis, quha gave and made the samin, in the samin form and of the samin date as they war of befoir, to be authentique and mak faith in all time cuming." (Even earlier are Coutts v. Forbes, 1496, A.D.C. II, 48, and Haillis v. Newbattle, (1549), Balfour, 376.)

Mackenzie (Works, ii, 333), writing of the various kinds of actions, says - "Some actions are called

"arbitrary actions, wherein the Judge is tied to no particular Law but proceeds ex nobili officio, that is to say, according to what he sees justly and fit, as an action for proving the Tenor of an evident .... And generally there being many Things with which the Law behoved to trust the Discretion and Honesty of the Judges, since all cases could not be comprehended under known Laws, it therefore invested the Judge with this eminent Power, which is called nobile officium, in Opposition to that officium ordinarium et mercenarium wherein he is obliged to follow the Will of the Contractors precisely; et hoc officium mercenarium judex nunquam impertit nisi rogatus."

It is certain that the action is peculiar to the Court of Session (L. Balnagown v. M'Kenzie, (1663), M.545, 15,790. Smart v. Ewing, (1673), 3 B S. 149) and formerly to the Inner House only (Shand, Practice, II, 828), and it was the subject of statutory regulation as early as 1579, cap. 94 (on the former procedure in these actions, see Shand's Practice, II, 839; Mackay's Practice, II, 325.) Its antiquity is well vouched by the number of old examples quoted by Morison, as well as the subsequent statutes on the matter, such as that of 1707, c. 9, relative to the decrees of the commission of teinds, burned in a fire in Edinburgh in 1700 (A.P.S. XI, 433 (c. 16). See also Alexander v. Oswald, (1840) 3 D. 40; Lynedoch v. Liston, (1841) 3 D. 1078), of 1721 and 1722 as to the records of

the Commissary Court of Aberdeen, burned or lost by fire, and of 1748 relative to title-deeds destroyed in the 1745 Rebellion. The institutional writers also treat the matter at length (Stair, IV, 32; More, cccIxxxiii; Bankton, IV, 29; Ersk., IV, 1,54 et seq.; Spotiswoode, 249.), while an embryonic form may be traced in the Quoniam Attachiamenta (c. 55). Morison's Dictionary contains almost seventy examples of the action (S.v.Tenor, 15783-15833), the earliest going back to 1541 (Dickson v. Veitch, (1541), M. 15783), so that it has long been well known in Scotland. Erskine (IV, 1, 54) refers to Roman precedent and also to Quoniam Attachiamenta (55, 7).

An interesting example of the same principle in England is provided by the case of Sugden v. Lord St Leonards (1876, 1 P.D. 154) which arose from the non-production of the will of Lord St Leonards, a former Lord Chancellor. Much of the evidence in the case consisted of oral evidence by his daughter and a transcript of the will made by her from memory. Jessel, M.R., said: "It was felt, at a very early period of the establishment of courts of equity, that it was a great grievance that by the then rules of procedure of the common law, a plaintiff could not recover on a lost deed; it was not a rule of the common law, but a rule of the procedure of the common law, which required him to make proof of it in his plea. But where the deed

"had been lost the court of equity interfered and allowed the plaintiff to produce secondary evidence of it" (ibid. 238). The reason for this was that it would be unjust to deprive a man of his rights by the accident of a lost deed. The same reasoning applies to the Scottish process.

Declarators and Reduction

"Declarator is one of those remedies unknown in England in which the good sense and adaptation of the Scottish law to the occasions and business of life is distinguishable." (Bell, Com., I, 785.) It consists in obtaining the judicial declaration of the existence of a right, or of a non-right, as in the case of a reduction. Declarators were originally peculiar to the Court of Session (More, Lect. II, 253) and those affecting status still are; reductions are still exclusively within the jurisdiction of the Court of Session. This exclusive reservation to the Supreme Court points to an equitable basis for those forms of action, as also the fact that they were originally exclusively Inner House processes (Shand's Practice, II, 736.)

The Court of Session has exclusive power to reduce its own decrees or those of inferior courts even though the statute which institutes or governs the procedure of that inferior court excludes all review. Hence any excess of jurisdiction or deviation from procedure may be checked by the Court of Session and this appears to be a power inherent in the Court.

A declarator is an action in which "the right of the pursuer is craved to be declared, but nothing is claimed to be done by the defender" (Stair, IV, 3, 47);

reductions are actions "for the voiding of deeds, services, decrees or other writings, or of illegal acts" (Ersk. IV, 1, 18), and such are deemed by Stair to be a form of declarator, because "rights are declared two ways - affirmative, declaring the right itself to be good and valid and sufficient to exclude any other right; or negative, by reducing and annulling any pretended right whereupon action or exception might be founded in prejudice of the pursuer's right." (Stair, IV, 20, 2.)

The action of declarator was the subject of a remarkable eulogy by Lord Brougham in Stewart and Earl of Mansfield v. Stewart ((1846) 5 Bell's App. 158) who expressed his "great envy, as an English lawyer, of the Scotch jurisprudence, and of those who enjoy under it the security, various facilities and conveniences, which they have from that most beneficial and most admirably contrived form of proceeding called a declaratory action."

The early cases of declarators relate to feudal rights in heritage. So in 1541 it was held that lands must be declared in non-entry before they could be comprised for past rents (Lord Borthwick v. -----, (1541), M. 3407), and other early examples relate to gifts of liferent escheat, recognition, and forfeiture. Stair deals at length (IV, 4 - IV, 19) with declarators of property, or redemption of wadsets and apprisings, of

trust, and various declarators relating to feu-rights and others which shows the prevalence of the form of action at that date. Stair also says that declarators of right proceeded of old by the brieve of right, described at length in the Regiam Majestatem (I, 6 (Skene).)

In England process for declarator was not originally a Chancery proceeding but a limited yet valuable power to make declaratory findings was conferred by the Judicature Acts and is now exercised by the Chancery Division. The various Matrimonial Causes Acts have given the Probate Division powers to grant decrees comparable to the Scotrish declarators in consistorial matters.

Intermediate between declarator and reduction Stair placed declarators of clauses irritant (IV, 18, 1), i.e. to the effect that the defender's rights have expired. He repeats that the Lords have power ex officio to modify exorbitant penalties, to qualify irritant clauses and allow them to be purged, and that custom in his time followed the Roman law in rejecting pacta legis commissoriae in pignoribus.

Reduction

The object of an action of reduction is to annul some deed, decree or other writing against which the pursuer alleges sufficient legal grounds for reduction. The cases in which reduction is resorted to may be resolved into: (1) essential error (see especially Stewart's Trs v. Hart, (1875) 3 R. 192); (2) fraud; (3) force and fear; (4) facility and circumvention; (5) undue influence (see supra, Chap. VII); (6) want of title or power to grant the deed questioned; (7) minority and lesion; (8) lack of solemnities of execution; (9) that the deed was granted to the prejudice of lawful creditors, whether under common law or based on the Acts 1621 and 1696. (See also list in Tennent v. Tennent's Trs., (1868) 6 M. 840, 876.) In effect, then, a reduction is a means of effecting restitution in integrum when an equitable reason can be alleged for not permitting the continuance of the later state of affairs. So in the older style of conclusion in an action of reduction, it is craved that the deed, act or decree should be "reduced, retreated, rescinded, cassed, annulled, decerned and declared by decree of our said Lords to have been from the beginning, to be now, and in all time coming null and void, and of no avail, force, strength or effect in judgment, or outwith the same in time coming, and the pursuer reponed and restored there-

"against *in integrum*" (Court of Session Act, 1850, Sched. A., No. 4.) It has also been pointed out that reductions of deeds or acts which are *ipso iure* void resemble closely declaratory actions (*Macmillan* v. *Free Church Assembly*, (1861) 23 D. 1336 *per* Lord Curriehill.)

It is obvious that many of the grounds of reduction are equitable, being founded on the gross injustice which would result from judicially upholding an *ex facie* valid deed which was in fact granted without real consent of the party, as in cases of forgery, fraud, or force and fear. As *restitutio in integrum* is sought this must be reciprocal and so, if this is impossible, reduction is incompetent.

Story lays down (§. 238-9) that the acts of persons of weak understanding or easily influenced or otherwise not a free agent will be voided in a court of equity. In a long note he cites the Roman authorities (Dig. 4. 2.) and remarks how closely the Scots law has followed the Roman (citing Ersk. IV, 1, 26; Bell, Com., I, 139.) Stair says (IV, 20, 8) that reduction and improbation was invented since the erection of the College of Justice. It is certainly common enough in the early records (e.g., *Lauder* v. *Ker*, 1498, A.D.C. II, 234; Maitland MS, fol. 84, 96; Sinclair, fol. 85, 151, 227; Nicolson, fol. 36. *Inglis* v. *Lindsay*, 1502, A.D.C. III, 193; Cooper, Sel.Cas. 35.)

Reduction of Agreements impetrated by Fraud

When an agreement is entered into between two parties, one of whom has been induced to enter into the agreement by the misrepresentation of a material fact by the other in the knowledge of its falsity or with reckless disregard of its truth or falsity, the party thus defrauded into concluding the agreement may rescind it or reduce deeds granted by him, by virtue of the Courts' equitable jurisdiction. "Any ground of fraud is a sufficient reason of reduction" (Stair, IV, 35, 19. Cf. Ersk. IV, 1, 27: "An obligation contracted by fraud will be annulled or restricted according to equity.") Many cases are cited in Morison (4857 et seq. Cf. Spotiswoode, 81; Balfour, 183) illustrating this. More recently, in Spence v. Crawford (1939 S.C. (H.L.) 52, 76. In that case the House of Lords took a more equitable view than the more strictly legal one which prevailed in the Court of Session. See also Brownlie v. Miller, (1880) 7 R. (H.L.) 66, 71) Lord Wright said: "The principles governing that form of relief /i.e. reduction/ are the same in Scotland as in England. The remedy is equitable. Its application is discretionary .... The Court must fix its eyes on doing what is practically just .... In the case of fraud the Court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant (sic) from enjoying

"the benefit of his fraud at the expense of the innocent plaintiff (sic)."

Reduction for Minority and Lesion

While by Scots law pupils are in a state of absolute incapacity (Bell, Pr. § 2067) as regards participation in legal acts and all such must be done by their tutors on their behalf, minors are capable of managing their own affairs and their deeds are as valid as those of majors, except that they may be reduced on the ground of minority and lesion within four years - the quadriennium utile - after attaining majority (Stair, I, 6, 32; Ersk., I, 7, 33; Bell, Pr. § 2088; Fraser, P. and Ch., 533.) It has further been held in accordance with principles of equity that a minor taking advantage of the right to reduce a contract must repay or restore anything he has obtained under it, thereby effecting restitution in integrum (Ersk., I, 7, 41; Fraser, P. and Ch., 540.)

This rule was manifestly adopted in Scotland from the Roman law (Dig. IV, 6: Gai. IV, 38) where it is a leading example of the praetorian power of granting restitutio in integrum for reasons of equity. This extraordinary remedy is only applied where the lesion is enorm on the basis of the rubric, De minimis non curat Praetor (Dig.

IV, 4, 9). It is similarly a rule of the canon law (8, X, I, 41.) No general rule can however be laid down to determine what constitutes lesion and Fraser (p. 509) says that the only rule which can be adopted is that of the Roman lawyers, "Ubi equitas evidens poscit, subveniendum est" (Dig. IV, 1, 7.)

Examples of this equitable intervention occur in all the Scottish authorities from Quoniam Attachiamenta (c. 41) onwards: Balfour (p. 179); Stair (I, 6, 44); Erskine (I, 7, 34); Bankton (I, 7, 74); Mackenzie (Works, II, 289); Dirleton and Steuart (p. 333); Spotiswoode (p. 301 and 211); Hope (Major Pr. IV, 9, 10); and there are numerous cases in Morison's Dictionary (Mor. 8978 et seq.)

Similarly equitable in basis are the rules that minors guilty of fraud or holding themselves out to be major do not enjoy the privilege. Throughout the influence of the Roman law is manifest (Fraser, 498 et seq. Cf. Story, § 240.)

An interesting variation of this head of action is the process for reduction of an arbiter's award on the ground of enorm lesion brought by the Bishop of Dunblane against Lindores Abbey in 1235 (Cooper, Sel.Cas.17), where the award was altered on averments of iniquitas although more than twenty years had elapsed since it was made.

The English Equity jurisdiction comparable to this head is that comprised under cancellation of deeds which is founded upon the administration of a protective or preventive justice (Story, § 694.) "Courts of equity will generally set aside, cancel, and direct to be delivered up, agreements and other instruments .... where they are voidable .... where there is actual fraud .... since it is manifestly a result of natural justice, that a party ought not to be permitted to avail himself of any agreement procured by his own actual or constructive fraud." (Ibid., § 695. See also § 242.)

Reduction of Decrees

The Court of Session has exclusive power to reduce its own decrees or those of inferior courts. Balfour (Innes v. Dunbar, (1534), Mor. 7320; Balfour, p. 268. Cf. Stair, IV, 52, 6; Ersk., IV, 3, 8) points out that without this power great inconvenience would follow and any person "enormlie hurt" would have no remedy. In modern times however reduction as a mode of review is reserved for exceptional circumstances (Philp v. Reid, 1926 S.C. 224.) In Elliot v. Riddel ((1663), Mor. 13505) the pursuer obtained a decree of reduction of a declarator obtained before the English judges that money in a bond had cut off the reversion. The Lords granted the decree of reduction, as the pursuer had been unable by sickness to defend the former action; "and it were against reason, that the defender by his calamity, should be under such disadvantage, the lands being near double worth the money." This would appear to have been decided purely on the basis of equity.

Reduction appears to have taken the place after 1532 of the old process of appeal by falsing of doom (Bisset, Rolment of Courtis, I, 279; Ersk., IV, 2, 39), though there are instances of reduction before that (e.g. Buchanan v. Menteith, 1500, A.D.C. II, 458; Fullarton v. Thornton, 1498, A.D.C. II, 199, and see Index to A.D.C.III.)

Custody of Children

Lord M'Laren has pointed out that petitions for the custody of children are not consistorial actions but appeals to the nobile officium, which is proved by the fact that they are Inner House processes (A.B. v. C.B., (1906) 8 F. 973. Cf. Stuart v. Moore, (1860) 22 D. 1504, 4 MacQ. 1.)

Proof before Answer

Under the heading of the Nobile Officium of the Lords (IV, 3, 2) Stair discusses the allowance of proof before answer as to the relevancy of the averments which is to-day such a common feature of our practice. "The Lords", he says, "do frequently make acts for probation before answer to the relevancy, which is only ex nobili officio and may alone be used, when there is imminent hazard to carry away most important rights by two picked-out witnesses; as when the question is of deeds done on deathbed"; and he describes how the Lords allow either party to adduce a certain number of witnesses to be examined upon the facts bearing on the capacity of the granter of the deed. The same, he said, is done "when the question falls, concerning deeds in confinio majoris aetatis, being questioned upon minority and lesion, and in such others. Upon the same grounds the Lords did prohibit the Judge of Admiralty to make any act before answer, in a process of adjudication of a ship*, for clearing who was the owner, and what was the port."

In the case of Stuart v. Owner of the Sealfish, ((1673), M. 11926) it was agreed that "by the general custome of nations, admirals being obliged to judge within

*(Gilles v. Owners of Bounder, (1673), M. 11907)

"two tides, could not protract processes by acts before answer, which are nobilis oficii and only done by the Lords when they allow a conjunct probation, which is not allowable in the ordinary form of processes, but ex nobili officio only."

The consequence of an allowance of proof before answer is of course that though the facts averred may be proved they may be held insufficient in law to support the conclusions of the summons and the pleas in law, whereas if no such reservation be made the question of relevancy is foreclosed by the allowance of proof.

The origin of this mode of allowance of proof is thought to be found in the canon law where the whole pleadings were written; in the procedure of that law the judge, after considering the pleadings, pronounced an "act" determining what proof should be allowed and on whom the onus of proof lay. Early Court of Session procedure did not allow proof until it was certain that the facts averred would, if proved, entitle that party to judgment (Mackay's Practice, II, 15). The custom had however prevailed before Stair's time whereby "the Lords .... ex nobili officio .... before answer for determining the relevancy, they have allowed either party to adduce so many witnesses, to be examined upon such points as the Lords found fit to be cleared for instructing of the cause .... These acts are therefore called acts before answer." (Stair, IV, 39, 4. See also IV, 40, 7, and

Smith v. Napier, (1697), Mor. 4955.)

Erskine (IV, 1, 69) puts the matter concisely as follows:- "Formerly no warrants were issued for the proof of any allegation, but what the Court had previously sustained as good or sufficient to infer the conclusion drawn from it according to the rule, Frustra probatur quod probatum non relevat; but by the later practice warrants have been equitably granted before fixing the relevancy allowing either party to prove such facts as in the opinion of the Court, tended to throw a clearer light on the cause."

Numerous cases attest this practice, and many expressly bear to proceed "ex nobili officio". (E.g., Ramsay v. Edgar, 1632, Spotiswoode, 70; Johnstoun, (1667), Mor. 12279; Ellis v. Cass, (1671), Mor. 12281; Scot v. Dishington, (1628), Mor. 12305; Chisholm v. Renies, (1668), Mor. 12314; Hadden v. Campbell, (1670), Mor. 12317; Napier v. Eglinton, (1671), Mor. 12318; Lawrie v. Drummond, (1673), Mor. 12320; Brown v. Lawrie, (1676), Mor. 12324; Stewart v. Blackhall, (1703), Mor. 12332; Grant v. Grant, (1683), Mor. 12433.) In 1757 there appears the modern phrase, "The Lords allowed a proof before answer." (Farquhar v. Shaw, Mor. 12341.) In other connections, too, such as cases of improbation, the reports bear that the Lords "will examine witnesses ex officio" (Maitland, MS, fol. 547.)

Proof to be In Retentis

The power to allow the examination on commission of aged, sick, and infirm witnesses and of those who, though at present within the jurisdiction, are likely to proceed beyond it before the trial comes on, to prevent the loss of their evidence through the death of a necessary witness or his inability to attend the trial, is certainly within the nobile officium of the Court of Session. In the former case the depositions lie in retentis and may only be used at the trial if the witnesses are unable to attend. This power was originally confined to the Inner House till an Act of Sederunt of 1828 conferred it on the Lord Ordinary and another of 1839 introduced it in the Sheriff Court (Mackay's Practice, II, 77-8.) Consequently the power is competent to all courts to-day.

Examples of this mode of taking evidence go far back, at least to 1501 (Innirmeith v. Maule, A.D.C. II, 245; Blyth v. Trotter, (1629), Mor. 12090), and Bankton (IV, 30, 27; see also IV, 7, 24) says that this too is derived from the canon law in which case older examples doubtless arose. Stair (IV, 41, 7; Ersk. IV, 2, 31) treats it as an "extraordinary diligence granted by the Lords in praesentia" as distinct from a diligence granted by an Ordinary in the Outer House. In Drummond v. Nicolson, (1697), Mor. 12329) the pursuer craved that "witnesses might be examined ex officio to lie in retentis."

Diligence to recover Documents

The procedure by commission and diligence to recover writings in the hands of the opposite party or of third parties has been called by Mackay (Manual, 241) the counterpart of the English motion for discovery. In the English courts a defect in the administration of justice was the lack of the power at common law to compel the production of deeds and writings in the custody of one party and material to the other's claim. This was remediable by the courts of equity which compelled the production of such writings (Story, § 1485). This is not dissimilar, Story says, to the Roman actiones ad exhibendum (ibid., § 1486-7) and it is noticeable that the early Scottish cases occur as actions of exhibition (e.g. Craigie, fol. 159; Bryson, (1662), Mor. 3977; Paton, (1668), Mor. 3963); and it is from this that the modern process has developed (see Stair, IV, 33, 3 and IV, 41, 4; Erskine, IV, 1, 52; Bankton, I, 8, 42; A.S. of 22 Feby. 1688.) The action of exhibition has now been superseded by a motion for diligence (Mackay's Prac. I, 365; Dickson, Evid., § 1381.)

PART III

EXTRAORDINARY EQUITABLE JURISDICTION

Chapter XIV
Nobile Officium

The present chapter treats of the peculiar and extraordinary equitable jurisdiction of the Court of Session. This jurisdiction has always been recognised both as extraordinary and as equitable. To a considerable extent it defies definition but it generally comprises the power under which the Court of Session "on the ground of necessity, in cases which require an extraordinary remedy, or which the statute law has omitted to provide for, affords the remedy or supplies the omission" (Mackay's Practice, I, 209.) The origin of this power is similarly vague and disputed. Ivory, writing in 1815 (Forms of Process, I, 39), says: "The Lords of Session act not only as a court of law, but also ex nobili officio, as a court of equity This nobile officium some of our most eminent authorities have supposed to be inherent in the supreme judicatory of every state .... (It is also claimed by the General Assembly - Cox, Practice in the Church of Scotland, 4th edn., 102).. A more natural explanation of the power assumed by the Court under a title so imposing, may perhaps be founded on the statute (1540, c. 93) authorising the Lords 'to make sik acts, statutes

"'and ordinances, as they sall think expedient for ordouring of process and haistie expedition of justice.' Under this statute, the Court has been led, by gradual steps, to assume an authority, which it is likely was neither originally inherent in it, nor even, perhaps, intended ever to belong to it. This usurped authority, however, in consequence of the benefit arising from the moderate and judicious manner in which it was exercised, was probably so long overlooked by those who might have checked it, that at last it has become so sanctioned by usage, as almost to be considered a necessary branch of the constitution of the Court."

It seems however the better opinion to hold with Mackay (Practice, I, 209) that while this explanation may account for the wide scope of many of the early Acts of Sederunt, it is not a true account of the origin of the equitable powers of the court, for which it is necessary to look elsewhere.

Stair deals with the question at length (IV, 3, 1): "The general difference between the Lords and the inferior courts," he says, "is to be observed, That the Lords have privilege ex nobili officio, which is competent to no inferior court. The distinction and import of nobile officium with us hath its rise from the Roman law, whereby all causes were judged by the Praetor, under whom there were not such inferior courts as we have, where causes might be first determined without the Praetor's

"authority, who could not possibly despatch all the causes, even of the city of Rome; though, when it increased to a great bulk, many Praetors were appointed, yet all these could not despatch the causes of the city personally; and therefore they delegated judges in such causes as they thought fit, reserving matters of the greatest import to themselves. These delegates were not arbiters; yet sometimes by consent of parties, they named arbiters, who had a greater latitude in judging according to equity than the judices dati, who being at that trouble and attendance, had a legal allowance from the parties for their pains, and therefore their office was called officium mercenarium; but the proper office of the Praetor was judicium nobile. This distinction hath been retained, under the same signification, where the Roman law hath any respect, but not under the same terms; and therefore with us, the proper terms are officium nobile and officium ordinarium; so that the jurisdiction of inferior courts is not mercenary, but yet hath not the officium nobile, which is extraordinary; and therefore they must keep their ordinary form of process, and if they do debord, their sentences do become null.

"The Lords of Session have both the officium ordinarium and nobile; for it is only in some cases, that they may proceed, not according to the ordinary forms, which custom hath determined for any cause which hath formerly occurred; but in new cases, there is necessity of new

"cures, which must be supplied by the Lords, who are authorised for that effect by the institution of the College of Justice. And if they might, in other cases, extend their officium nobile, it would render the subjects insecure and the power of the Lords too arbitrary. But, in many cases, it is necessary wherein they may have recourse from strict law to equity, even in the matter of judgment; and in more cases they may recede from the ordinary form and manner of probation, whereof there are many instances commonly known.

"Every sovereign court must have this power, unless there be a distinct court for equity, from that for law, as it is in England, where the judges of the court of Common Pleas judge all according to the rigour of law, and so they cannot modify the most exorbitant penalties, nor give remedy but by the tenor of their known brieves; which being found highly inconvenient, their Kings at first assumed to themselves to remedy the inconveniency, which they found the common law defective in, either by want of forms, or want of power to qualify these exorbitances, that were inconsistent with equity, and a good conscience: but these cases multiplying, and many pretending unwarrantably to them, the King could no longer dispatch them in his own person, but gave that power to the Chancellor, with the assistance of twelve masters of the Chancery. And there are since several courts of equity and conscience set up by authority of Parliament. Other

"nations do not divide the jurisdiction of their courts, but supply the cases of equity and conscience, by the noble office of their supreme ordinary courts, as we do.

"The Session comes nearest to the Praetorial power, which did supply what was wanting by their common law of the twelve tables, or by their recent law made by the suffrage of the people, or by the suffrage of the Plebeians, or of the Senate, or by their strict forms of actions at first, or thereafter by their strict observance of the kinds of actions, though not of the precise words; yea, they had power to correct the extremity of these laws, and so they accounted summum ius, summam iniuriam." The accuracy of this account may be measured by the correctness of the account of the English courts of equity; and the comparison is pointed by the fact that Stair served as a judge with the English judges of the Usurpation and doubtless learned from them how equity worked in England.

Stair then instances seven ways in which the nobile officium of the Lords of Session is exercised, which have already been considered in greater detail. He mentions the modification of exorbitant penalties in bonds and contracts, even though bearing the name of liquidate expenses, which the Lords "retrench to the real expenses and damage of parties", the strict judging of the advantages of legal execution, especially in apprisings and

adjudications and in questions of expiry of the legal, and, thirdly, attention to material justice in reductions of decrees rather than relying on petty informalities. Then he instances the supplying of a remedy to a creditor where the debtor's heir has renounced, by extension of the Act 1469, c. 36, anent apprisings (i.e. adjudication contra haereditatem iacentem), and the introduction of adjudication to supply defective conveyances (i.e. in implement.) The last two examples he gives are the examination of witnesses ad rimandam veritatem, i.e. to investigate the truth by admitting parole testimony in explanation of written, whence, he remarks, trusts and frauds are discovered (this was written prior to the Act of 1696, c. 25, which made trust provable only by writ or oath), and the allowance of proof before answer as to the relevancy.

Such is Stair's account of this jurisdiction. It is to be observed that he likens it to the praetorian and Chancery equitable interferences with strict law. But particularly notable is that the instances he gives are nowadays never considered as matters of the nobile officium at all and their connection with equity has been quite lost sight of, though as has been shown earlier, it is quite evident on examination. There is no mention here of some of the heads of jurisdiction which to-day fall under the nobile officium: charitable trusts,

judicial factors, sundry petitions and the like. Nor, it is to be observed, does Stair's account give any support to the later theory that the Lords of Session inherited their equitable jurisdiction from the Chancellor or Privy Council of Scotland. As More points out, in his notes to that passage (cccIxxiv), the nobile officium appears to have been exercised, particularly since the Union with England, on the assumption that the Court of Session had succeeded to all the powers formerly exercised by the Privy Council. (So too ~~Kerse, fol. 157~~ Hope, Major Practicks, II, 1, 28, says that "whatever cause was decided of old by the King and his Council pertains now to the knowledge of the Session.") He says, too, that formerly - i.e. prior to 1532 - the Privy Council decided litigated matters according to principles of equity. Certainly in 1741 in Hamilton v. Boyd (Mor. 7335) the Court of Session unanimously asserted jurisdiction in a case of the offence of importing Irish victual which had been conferred by Act of Parliament on the now abolished Privy Council. But the consensus of modern opinion is against the view that the Court actually inherited any such functions, and the published Register does not bear out the contentions for the Scottish Privy Council's equitable functions.

In Bryce v. Graham (1826, 2 W. and Sh. 481) the Court of Session appointed a curator to a lunatic and Lord Balgray (p. 496) spoke of the original right of the

Privy Council to interpose in all extraordinary cases and how their judicial powers came to be exercised by the Court of Session, and was of opinion that "when you are erecting yourself into an authority to remedy the common law", the common law must be looked at first and by this, he thought, cognition by a jury could not be dispensed with. The Lord President (Hope) said (p. 502) that the court was a Court of Equity and the jurisdiction to appoint curators devolved upon the Court on the abolition of the Scottish Privy Council as a matter of necessity, and was regulated by the Act of Sederunt of 13th February 1730. Reference was made to the fact that in England the Chancellor had care of persons afflicted with lunacy. This explanation may be true of the particular case but is not the general rule.

Bankton (IV, 1, 13) says that the chancellor with us never had by himself a judicative power to hold courts of law or equity, though he originally presided in parliament and in the higher courts, and presided in the Court of Session when present, according to the statute of its institution. Later he says (IV, 7, 23): "The Court of Session is both a court of Law and Equity in one. Thus where a party wants relief in equity, to which at common law he might seem not entitled, this court, in virtue of its mixed jurisdiction, can give it; as for example, one grants a bond of borrowed money, with a condition to

"repay it at a precise day, under a penal sum, besides performance, as the expences liquidated by consent of parties; upon failure of payment at the day limited, the penalty in strict law is forfeited to the creditor; but, if the creditor insist on it, and will not be satisfied with his principal sum, interest and expences, the court of session will give relief to the debtor. Among the Romans, the courts of ordinary jurisdiction behoved to follow the letter of the law, but the Praetor supplied what was defective in it. Hence the distinction frequent in that law between the actiones directae, founded directly in the law, and utiles or actiones in factum, given by the Praetor in point of equity, from the spirit and intendment of the law, on which occasion it is said, that Supplet praetor in eo quod legi deest. After which example the Courts in Westminster Hall (except the equity-side of the Court of Exchequer) are limited to the express deed of the parties, and can give no relief in equity. Thus in a similar case with the foregoing one, in the English double-bonds, the courts of common law, upon failure of payment of the sum in the condition, at the day, behoved to decree for the whole double sum but relief was competent upon a bill in Chancery; and now, in virtue of the late statute (4 and 5 Anne, c. 16) the courts of common law can give the remedy, and absolve the defendant, upon his bringing into court the principal sum, interest

"and costs. There are infinite other cases, where the court of session gives relief in equity, when, in strict law, there seems to be none; as in redemption of wadsets limited to a precise term, after which the lands are declared irredeemable: this court allows the equity of redemption, notwithstanding the irritancy incurred.

"Besides the officium ordinarium, or ordinary jurisdiction which the Lords of session are vested with, there is competent to them what may be termed Officium nobile. This nobile officium is founded in their being a superior court, and as such, they are entitled, in some cases, to interpose otherwise than according to the ordinary rules or forms of law, and even contrary to the form of ordinary proceedings, when the case requires it, in order to bring out the truth, which could not otherwise be done, or to interpose in points necessary for the public good of the society; or for making justice effectual in private cases, where the ordinary forms cannot reach the end, as where the court orders either or both parties to be examined, Ex nobili officio, without the one party's referring the point to the other's oath, or where, ex officio, they ordain witnesses to be examined ad rimandam veritatem. This is a supereminent power, founded in their high jurisdiction, in order to the discovery of truth, and cannot be said only to proceed upon their equitable powers. Equity is a favourable construction

"of the law, and may be prayed by either party; but no party is entitled to demand, as his right, an examination ex officio; he may suggest it, but he cannot ask it as a point of right. Of the like kind is the lords interposing to give warrants for administration of the estates of infants, having no person to take care of them, or of persons abroad. They likewise, by this power, supply the defects of ordinary forms of diligence, as they did by allowing adjudications Contra haereditatem iacentem, when the apparent heir renounces; for in that case the law had not provided a remedy. The same was the case of adjudication in implement, introduced by authority of the court of session, to complete a party's right to lands. To this power may be ascribed the lords authorising persons to supply the vacancy of commissariots for confirming testaments; or of sheriffships for expediting services; or such matters as cannot admit of delay, till the places be regularly filled; as likewise their ascertaining the quantum of burthens imposed by deeds of parties, where those authorised to do it have failed; as where the members of a tailie were allowed to grant such constant jointures and provisions to their wives and younger children, as certain friends named should appoint, who died without doing it."

Then, after referring to the occasion in 1725 when the court, by act of sederunt, ordered the brewers of

Edinburgh, who were on strike, to resume work, Bankton continues (IV, 7, 26):

"This nobile officium is plainly implied in the statute (1540, c. 93) which gives the lords of session power to make acts and ordinances for expedition of justice: for, in order to the same end, they may exercise the above, and other acts of jurisdiction having tendency to the like purpose. This is accomplished by the nobile officium of the court of session, in the same manner as things of the like kind are done by the court of chancery in England, which with us is supplied by that eminent power, and without which the administration of justice would be embarassed and, on many occasions, could not proceed. And, by the original institution, they had the same jurisdiction and authority that the lords of session of old had; and, except as to the liberty of appealing against their judgments, in manner above mentioned, their authority is still the same being settled by the articles of the union."

He then reiterates that the chancellor of Scotland might preside in the court of session when present, just as in the old court of the lords of session, which was a committee of parliament, but the chancellor himself never had any judicial power. "Wherefore", he continues, "since we had no court of chancery, it was justly ordered, that our superior court of justice, in civil matters,

"should be endowed with the high jurisdiction aforesaid. This nobile officium of a court is founded in an express text of the civil law (Dig. 13, de legibus.) In virtue of this nobile officium, or of their jurisdiction as a court of equity, the lords of session do not assume a power unsuitable to the character of judges, which is to interprete the laws by the rules of equity, where there is place for it. Thus the laws of the Romans were to be interpreted by the judges according to equity and from thence to be extended to similar cases; but if there was a contrariety between the words of the law and equity, it was the prerogative of the emperor to give the interpretation, Inter aequitatem iusque interpositam interpretationem nobis solis (says the great Emperor Constantine) et oportet et licet inspicere ...."

In the Observations on the Law of England which follow this passage, Bankton refers to the common law and equity courts of England and then observes: "The court of session is invested with the same powers as this court of equity in the chancery. And likewise in giving remedy in point of equity, or otherwise they are subject to the same limitations; for under that colour, or by virtue of that nobile officium, they cannot contraveen (sic) the direct ordinance of the law, as to repone a party against prescription, or the like."

Again in the Rules of Law Illustrated at the end of

the work under the rubric In omnibus quidem maxime tamen in iure, aequitas spectanda est, he discourses at length on equity and expressly equates the court of session vested with its nobile officium to the court of equity in chancery in England.

Erskine's statement on the nobile officium is brief. He says (I, 3, 22): "The session is a court of equity as well as of law; and as such may and ought to proceed by the rules of conscience in abating the rigour of the law, and in giving aid in the actions brought before them to those who can have no remedy in a court of law. This power, which is called the nobile officium of the judges, is inherent in the supreme judicatory of every state, unless where separate courts are established for law and for equity, as in England, where the Court of Chancery may be applied to for correcting or softening the strict proceedings of their courts of law. It arises from this nobile officium in the Court of Session that whereas inferior judges never exercise their office but at the suit of the litigants, the judges of the Court of Session may, in their inquiries into facts, direct things to be done, or steps to be taken which neither are nor can be demanded as a point of right. Thus they frequently ordain ex officio, a party to be examined, though his adversary who declines referring the matter in issue to his oath, has no title to insist for such examination." He also refers

to a ministerial power under which the Court makes interim appointments to public offices and says that these powers were proper to the Privy Council and it would be a defect if they were not transferred to the Court of Session, and he mentions Kames' conjecture that it would soon be considered the province of the Court of Session to redress all wrongs for which a peculiar remedy is not otherwise provided. It was recognised at least as early as 1780 that "the nobile officium of the Court ought never to be at variance with the law." (Graham v. Graham,(1780), Mor. 8934.) In fact, just as in the Chancery, aequitas sequitur legem.

Kames, as might be expected, deals with the nobile officium. In the Historical Law Tracts where he discusses subjects common to the laws of England and Scotland he says (231): "This extraordinary power of redressing wrongs, far from a novelty has a name appropriated to it in the language of our law. For what else is meant by the nobile officium of the court of session, so much talked of and so little understood? The only difficulty is, How far this extraordinary jurisdiction or nobile officium is, or ought to be extended. The jurisdiction of the court of session as a court of common law is confined to matters of pecuniary interest; and it possibly may be thought, that its extraordinary jurisdiction ought to be confined within the same bounds. Such is the case of the court

"of exchequer; for its extraordinary or equitable powers reach no further than to rectify the common law, so far as relates to the subjects that come under its jurisdiction as a court of common law. But the power to redress wrongs of all kinds must subsist somewhere in every state; and in Scotland subsists naturally in the court of session. And with respect to the wrongs in particular that come under the jurisdiction of the privy council, our legislature, when they annihilated that court, must have intended, that its powers should so far devolve upon the court of session; for the legislature could not have intended to leave without a remedy the many wrongs that belonged to the jurisdiction of the privy council.

"The rule I am contending for, appears to be adopted by the English court of chancery in its utmost extent. Every sort of wrong occasioned by the omission or transgression of any duty is redressed in the court of chancery, where a remedy is not otherwise provided by common or statute law. And hence it is, that the jurisdiction of this court, confined originally within narrow bounds, has been gradually enlarged over a boundless variety of affairs." (This is unduly general and not accurate.)

Then later (234), under causes proper to the court of session, he says: "These may be comprehended under one rule, that all extraordinary actions, not founded on common law, but invented to redress any defect or wrong in

"the common law are appropriated to the court of session, being in civil causes the sovereign and supreme court. Inferior courts are justly confined within the limits of the common law; and if extraordinary powers be necessary for doing justice, these cannot safely be trusted but with a sovereign and supreme court. Upon this account, the court of session only, enjoys the privilege of voiding bonds, contracts and other private deeds. For the same reason, declarators of right, of nullity and in general all declarators are competent nowhere but in this court. An extraordinary removing against a tenant, who having a current tack is due a year's rent, is peculiar to this court, as also a proving the tenor or contents of a lost writ. And lastly all actions between subject and subject founded solely upon equity belong to the court of session and to no other." This statement is again unduly general, for it is not every equitable claim to which the Court will give effect.

These institutional and other statements of the extraordinary equitable jurisdiction of the Court of Session differ in many respects from the modern extent of the power exercised by the Court. To-day the principal heads of their jurisdiction are classified as: (1) Applications by petition not founded on statute; (2) Applications for the appointment of public officers ad interim in the event of death or incapacity; (3) an equitable

jurisdiction with reference to charitable trusts, charities and schemes of administration; and (4) the occasional supplying of omissions in the provisions of statutes, and for casus improvisus in deeds (Mackay's Practice, 209 et seq.; MacLaren's Practice, 100.)

The first of these heads covers the appointment of judicial factors as officers appointed by and acting under the supervision of the Court to whose care custody and management estates and interests are entrusted when these are the subject of litigation or without any capable or legal guardian or administrator. It has been suggested (Thoms on Judicial Factors, 2) that the name originated in the sequestration of estates by the Court of Session who then delegated the management to a factor, but the case cited (Rattray, (1776) 5 B.S. 442) is doubtful authority for the proposition; further it is suggested that in the exercises of their equitable jurisdiction the Court have been in the custom of appointing judicial factors, not only where the estate has been sequestrated but in every case where such interposition seems to have been required.

In Bryce v. Graham ((1828) 6 S. 425; affd. 3 W. and Sh. 323), which was a petition for the appointment of a curator bonis to a lunatic, the House of Lords remitted to the Court of Session to consider whether they had power to proceed without a cognition. A majority of the whole

Court found that "soon after the abolition of the Scottish Privy Council, by which extraordinary remedies of this nature (brieve of cognition) used to be applied, the Court of Session was, of necessity, applied to for the appointment of curators bonis for managing the affairs of absent persons, who had not left any factory or power of attorney behind them, and of infants and minors who had no tutors or curators, or of persons who were stated and proved to them to have fallen into mental incapacity of any species; Find that, prior to the year 1730, these applications had become so frequent, that the Court in that year, found it necessary to pass an Act of Sederunt (13th February 1730) for regulating the duties and ascertaining the powers of these curators bonis."

Lord Cringletie said that the guardianship of all unprotected persons was formerly vested in the Crown (Craig, II, 20, 9; Balfour, 254), and the King had authority, through the Exchequer, to bestow a gift of tutory for the protection of a pupil, but the right to name protectors for imbeciles was limited by the Act of 1585, c. 18, which sanctioned the rule of the Roman law that the nearest agnate should be legal guardian (Fraser, P. and Ch.,651-2.) Lord Balgray referred to the power as one of "equitable and necessary discretion" and "equitable interposition" in appointing a curator bonis. In the House of Lords, Lord Eldon (p. 327) compared the Court of Session attitude

unfavourably with the Chancery attitude towards such questions, where the ward must first be found of unsound mind by a jury. But despite this criticism the Court in the exercise of its nobile officium has achieved a result not dissimilar to that effected by the Court of Chancery in England in protecting estates or property where the owner is incapacitated from doing so himself. "The power which the Court has exercised, and as to which there is no longer any doubt, that of appointing factors for the administration of estates, is a very comprehensive power. It would certainly apply to any case where there is an estate for which no owner can be found, or where the owner is not capable of administering his estate, and it also applies to cases where there is disputed possession, or where the owners are unable to agree in regard to the administration of their estate, as sometimes happens in cases of joint ownership." (Dowie v. Hagart, (1894) 21 R. 1052, 1057 per Ld. M'Laren.)

Originally all such applications to the nobile officium of the Court were made to the Inner House, until the Distribution of Business Act, 1857, transferred such petitions to the Junior Lord Ordinary; but the authority of the Inner House is not interfered with in cases not falling under that Act and still subsists as to all extraordinary petitions not founded on statute. The original equitable nature of all petition business may be seen from

the fact that all are equally addressed "Unto the Right Honourable The Lords of Council and Session", and the crave of the petition concludes "or to do further or otherwise in the premises as to your Lordships shall seem proper" in recognition of the equitable and discretionary power appealed to (Thoms on Judicial Factors, 1.)

In Smart v. Moore ((1860) 22 D. 1504; (1861) 4 MacQ. 1, 60) the Court of Chancery appointed guardians to the young Marquess of Bute and Lord Chancellor Campbell said: "The Court of Session had undoubted jurisdiction in this case. By their nobile officium conferred upon them by their Sovereign as parens patriae it is their duty to take care of all infants who require their protection." He seemed to regard the power as of similar extent to that of the Court of Chancery.

Application to the nobile officium is only appropriate where no other remedy is open to the parties: Central Motor Co. v Gibbs (1917 S.C. 490, 493.)

Nobile Officium in regard to Trusts

In connection with trusts the nobile officium has been exercised in two main respects: in regard to the construction of deeds and in regard to the grant or withdrawal of special powers, though in some cases the two run into each other. While the construction of deeds and instruments cannot in general be deemed a branch of equity or peculiar to the Supreme Court (Synod of Aberdeen v. Milne's Trs, (1847) 9 D. 745 per Ld Moncreiff), in certain cases particularly of charitable trusts, an extensive construction has been applied which may only be by the Court of Session, though not necessarily by the Inner House. In the Magistrates of Dundee v. Morris ((1857) 19 D. 918; (1858) 3 MacQ. 134) a testator left a settlement and codicils indicative of desire to found a charitable institution though the deeds were in places erased and obliterated. They were nevertheless held as probative and testamentary in the House of Lords. Lord Chancellor Chelmsford remarked that there was no great dissimilarity between the laws of England and Scotland with regard to charities, and that the principle of benignant construction must be taken to guide in the construction of charitable bequests; the expression of a wish he held was equivalent to a will to establish an hospital. Lord Cranworth held that there has always been a latitude

allowed to charitable bequests, so that when the general intention is indicated, the Court will find the means of carrying the details into execution. It is not however a rule that the Court will intervene to supply omissions in the provisions for the creation of trusts, for in some cases it will be held that such interference is beyond the power of the Supreme Court's equitable capacity. For example, the Court will not distribute funds or make a scheme for their application when the objects of a trust which is not purely charitable have failed. In the case of charitable trusts, however, the Court has power derived from its nobile officium and now recognised by statute to settle schemes for charitable trusts. In the case of Presbytery of Deer v. Bruce ((1865) 3 M. 402; affd.(1867) 5 M.(H.L.) 20; Sequel, (1868) 6 M. 940) it was affirmed that, as in England, indulgence was shown to charitable bequests, and that it was the duty and practice of the Court to create the machinery necessary to administer charitable bequests, even where it involves giving the trustees a discretion in the execution of the charity. In University of Aberdeen v. Irvine,((1866) 4 M. 392; revd. (1868) 6 M.(H.L.) 29; Sequel, (1869) 7 M.1087) the House of Lords remitted to the Court of Session to settle a scheme for bursaries, and it was held to be within the Court's equitable powers to adjust the scheme, increasing the number of bursaries and providing for a reserve fund.

It is noteworthy that a previous scheme was adjusted by the Court for the management of the same bursaries as far back as 1633. Lord Deas expressly equates this jurisdiction under the nobile officium to that of the Court of Chancery though the latter, he says, has greater means for carrying out powers of that kind.

There is also a jurisdiction under this general head to cover abuses, to declare the right of election or set aside improper admissions, though the latter are nowadays usually dealt with by ordinary action (Mackay, Manual, 85). In Ross (Ross v. Heriot's Hospital, (1843) 5 D. 589, 609 per Lord Cuninghame) it was treated as undisputed that the Court had jurisdiction over all charities, to declare the powers of the administrators, to correct all abuses and to enforce the will of the founder, and reference was made to the comparable English equity practice. The various Trusts Acts, now consolidated in the Act of 1921, have extended the powers of trustees beyond those recognised at common law and have conferred jurisdiction in petitions for special powers on a Lord Ordinary; but the equitable jurisdiction of the Inner House has not been abrogated and exceptional cases still require to be carried there. Lord Johnston described the jurisdiction in these words in Hall's Trs v. M'Arthur (1918 S.C. 646): "Of the nobile officium of the Court I do not think it is necessary to say more than that it is an extraordinary equitable

"jurisdiction, the exercise of which has always been scrupulously guarded, and rarely carried beyond precedent. In the matter of trusts, which are an important branch of its exercise, resort to it has been practically confined to cases where something administrative or executive is wanting in the constituting document to enable the trust purposes to be effectually carried out and such cases are now largely met by the provisions of the modern Trusts Acts. But, where no such executive or administrative provisions are wanting in the trust deed, the Court will not interfere, for the Court in Scotland does not undertake, as does the Court of Chancery in England, the administration of trusts." The other judges concurred, while Lord Skerrington added some observations regretting the Court's inability at the time to advise trustees on the exercise of their powers. "I should have thought that a primary purpose of a Supreme Court of Equity was to assist trustees and beneficiaries in circumstances of difficulty by aiding them in the exercise of powers which already belonged to them in circumstances where such assistance was desirable. I should further have thought that a Supreme Court of Equity should have jurisdiction to confer upon trustees powers which the testator had not conferred upon them, if the circumstances made that course desirable." These defects were remedied by the Trusts Act, 1921.

Later, in Anderson's Trs (1932 S.C. 226, 230) in 1931, Lord President Clyde said: "The nobile officium does not entitle the Court to make a will for a testator which he has not made for himself; although it does enable the Court to exercise wide powers for the rescue of a plan of testamentary disposal from inherent conditions which make it unworkable or which tend to defeat its own purpose."

As an instance of the drift away from the nobile officium, the fact may be mentioned that of old trust petitions as affecting the nobile officium had to be presented to the Inner House, but to-day they are in general Outer House petitions (Smith's Trs., 1939 S.C.489.)

The Court has also several times authorised advance payments to beneficiaries of parts of their shares. Such will only be authorised in the discretion of the Court where there is a casus improvisus and also necessity for the payment (Stewart v. Brown's Trs., 1941 S.C. 300.) As early as 1775 (Wotherspoon, Kames, Fol., Dicty. III, 349) the Court was requested ex nobili officio to name new trustees.

Power to remove Trustees

In Gibson's Trustees (1933 S.C. at 201) Lord President Clyde observes that "the removal of a trustee who holds office by virtue of a testator's own delectus personae is perhaps the most extreme case of interference with a settlement, but the use of the nobile officium for that purpose is only competent in cases of proved delinquency which makes the further tenure of office by the trustee inconsistent with the preservation of the estate and the execution of the trust." To justify this very exceptional step there must be more than mere irregularity or illegality, but in cases of serious misconduct the power has been exercised. The Trusts Act of 1921 now makes provision for removal in certain circumstances, in which cases the power under the nobile officium is superseded; but other circumstances would still require recourse to the residual equity power of the Court. In MacGilchrist's Trustees (1930 S.C. 635) Lord Morison refers to the reasons given by Lord Blackburn, delivering the judgment of the Privy Council in Letterstedt v. Broers ((1884) 9 App.Cas. 371, 386), for the existence of this jurisdiction as being that the matter is merely ancillary to the Court's principal duty to see that trusts are properly executed.

Story says (§ 1289): "But in cases of positive misconduct, Courts of Equity have no difficulty in interposing

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"to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity." In England as well as Scotland the Court may remove a trustee in such circumstances by virtue of its inherent jurisdiction, if express power under the trust or statutory power does not cover the circumstances, and in both countries the same rather extreme circumstances are required before the Court will feel justified in interposing in the interests of proper execution of the trust and the welfare of the beneficiaries (Lewin on Trusts, 432.)

Nobile Officium in regard to Charitable Trusts

The equitable jurisdiction of the Court in virtue of the nobile officium has always been wide on this side and a favourable interpretation is always sought and a benignant attitude manifested towards such foundations. In Gibson's Trustees (1933 S.C. 190; see also Wink's Exors, 1947 S.C. 466; Anderson's Trs., 1914 S.C. 942) the earliest authorities were reviewed and obiter comments made on this branch of the Court's jurisdiction. Lord President Clyde said: "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, in as much as our whole jurisdiction is nothing unless equitable. It may not be easy to trace historically the connection between what the commentators call the nobile officium of the praetor (Vulteius De Judiciis, II, iv, 431; Bartolus, ad Digestum, II, i, 12, De jurisdictione

"omnium judicium), 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." His Lordship then instances the unwillingness of the Court to allow a charitable bequest or trust to be held void from uncertainty; "Pious intentions, in short, are more favoured than the claims of the heir-at-law or of the Crown; which is an equitable principle or nothing." If there is an intention to devote the estate to charitable purposes, or to establish some specific kind of charitable institution, the settlement will be upheld, he continued, and the Court will if necessary create powers and machinery to enable the trustees to carry out the trust purposes, while a charitable endowment will not be allowed to fail as the Crown will intervene with the doctrine of cy près (cf. Pringle Trust, 1946 S.C. 353,364.) The second and third of these he instances as examples of the use of the "special and unusual function or instrument of jurisdiction .... indispensable if effect is to be given to what the Court equitably holds ought to be done." His Lordship then observes that in the second case, the rule of application of the nobile officium is that of the highest expediency, but in the third interference with the testator's expressed will is limited to what necessity

demands.

The Lord Justice-Clerk was of the opinion that expediency was sufficient to invoke the nobile officium and absolute necessity need not be proved, and he suggested that the exercise of the praetorian power should not be too closely fettered by precedent. Lord Sands pointed out the resemblance of the nobile officium to the powers of Parliament in that no constitutional authority can declare an exercise of the nobile officium invalid as ultra vires; but this, he adds, so far from encouraging laxity, prescribes extreme caution in the exercise of powers so uncircumscribed, and he concluded that the exercise of the nobile officium was justifiable when it was necessary to the carrying out, in the circumstances of the time, of the main object of the founder, and when it was necessary to effect modifications of particular instructions of an ancillary character which militated against complete fulfilment of the trust. Lord Sands also favoured an exercise of the nobile officium, modified by judicial adaptation of rules to modern conditions and by application of equitable principles to new conditions, as was done in England and Rome. The nobile officium must develop, that is, like other branches of the law, to accord with the changing times and not be tied to the power as known to Kames and Hailes. Lord Morison thought that this was a case where the Court should on equitable considerations

abate the rigour of the law where it may appear to operate harshly.

The principle of cy près regularly invoked in such cases is applicable where the Court can find a general charitable intention, which is in danger of failing for want of machinery to carry it out, and where the charitable intention is then diverted and applied in a manner similar to that intended by the truster (Tait's J.F. v. Lillie, 1940 S.C. 534, 546. See Story, § 1169 et seq., who derives it from the Roman law. And cf. Lewin, 471 et seq.) This branch of the law is identical with the law of England on the same subject and has derived much from reference thereto. In the Chancery great favour was shown to charitable trusts and the court was slow to let such a trust lapse or fail if it was capable of application within the scope of the overriding general charitable purpose.

Interim Public Appointments

This somewhat anomalous exercise of power is classified by Ivory (I, 40) as ministerial and it savours more of the wide administrative and ministerial powers exercised by the Court in earlier times than of an equitable and judicial jurisdiction. The majority of the reported instances date from the Eighteenth Century and the nature of this power seems more akin to the economic and governmental regulations made by Act of Sederunt in the earlier days of the Court's existence, as well as lending colour to the theory that the Court had in this respect absorbed the functions of the Scots Privy Council. Similar but not such wide powers have been exercised in relation to the various applications which have been presented to the Court with reference to the public records, which are under the protection of the Court in its general supervision of the administration of justice in Scotland.

Nobile Officium as to Statutes

The exercise of the nobile officium in regard to supplying omissions or defects in statutes or statutory procedure has been principally exemplified in bankruptcy questions. It is by no means the case that the Court will in every case supply defects but rather the other way (Borthwick Board v. Temple Board, (1891) 18 R. 1190.) In bankruptcy however there are numerous instances of the Court granting authority to make good an omission in following out the statutory procedure, or taking steps to continue or terminate bankruptcy proceedings where otherwise deadlock would ensue and no statutory provision is applicable to the circumstances.

In the case of matters other than bankruptcy a similar jurisdiction is exercised, though more rarely, and examples of these will be found in the books on Practice (MacLaren, 100 et seq.) The Court however nowadays does not view with favour the indefinite extension of this power and is inclined to restrict its exercise to cases for which a precedent can be quoted, or to cases clearly analogous. It is certainly established that the nobile officium, though required sometimes when supplemental machinery is necessary to effectuate the enactment itself, could not be appealed to in order to communicate a special statutory right to persons or classes of persons other than those for whom the statutory right is created

(Crichton-Stuart's Tutrix, 1921 S.C. 840, 844.) So too in Tod v. Anderson ((1869) 7 M. 412) Lord Justice-Clerk Patton said that it was no part of the proper province of the Court to substitute different provisions from those in the statute or to dispense with statutory powers; in Central Motor Co. v. Gibbs (1917 S.C. 490; cf. Craig, 1946 S.C. 19) Lord Skerrington emphasised that the nobile officium could only legitimately be invoked when it is clear that no other remedy is open. In Whyte v. Northern Heritable Securities Co. ((1891) 18 R.(H.L.) 37, 39) reference was made to the "praetorial power of the Court of Session" in a petition for the appointment of a new trustee in bankruptcy.

Chapter XV
The Present Position of Equity in Scotland

In conclusion, it seems desirable to sum up the argument and to seek to present concisely the present position of equity in the law of Scotland.

In the first place, it has been repeatedly laid down by the highest judicial authorities and the most influential text-writers that the Court of Session is a court of both Law and Equity. This contention is borne out by considering the many and varied subjects of law wherein equitable pleas and principles are evident, and it is not only the existence of the nobile officium which justifies the statement.

Secondly, it is a serious mistake to regard the nobile officium as the sole expression of equity in Scots law. That is the prevalent modern view but it ignores the historical development of our law and the fundamentally equitable basis of many other pleas which have been discussed in earlier chapters.

In the third place, there is no separate administration of or jurisdiction in equity in Scotland. The entire mass of evidence moreover shows that there never has been a divided jurisdiction as in England, as there is no clear case of either Chancellor or Council or other authority in Scotland exercising any corrective or remedial

jurisdiction over or parallel to the Courts of Common Law. There is, in other words, no parallel to the Court of Chancery. It is however submitted that the foregoing chapters show that the general philosophic conception of equity as a moderating and correcting influence has been for long recognised in Scotland and has provided the basis and justification for numerous rules and pleas distributed over a wide field of common law. In other places certain qualifications admitted and pleas recognised can only be ascribed to equity.

These instances lend strong support to the theory advanced by Kames nearly two centuries ago that "many actions, founded originally on equity, have, by long practice, obtained an establishment so firm as to be reckoned branches of the common law." The establishment and illustration of the continuing validity of that proposition have been essential to this work, though recognition of this truth is rare to-day.

If the fundamental basis of English Equity is conscience, the fundamental basis of Scottish equity is natural justice. The Court intervenes to allow an equitable remedy not so much because to take the contrary view would be unconscientious as because natural justice could not reasonably permit the contrary. Hence in many cases the reason for a doctrine is described in Scotland as the requirements of justice. From this it follows that the

basic meaning of the word equity in Scotland is the second, intermediate, meaning of the word, equivalent to the moderative influence of natural justice. It does not correspond at all to the modern developed meaning of the word equity as used in England, but only to the older meaning from which the modern English idea of Equity has developed. Hence too "equity" is so frequently conjoined in Scotland with such concepts as fairness, justice, reason.

The progress of the merging of old common law actions and equitable pleas observed by Kames has progressed further since his time. In some cases it has been shown that the jurisdiction in such pleas has been extended from the Inner House (whose former exclusive jurisdiction is frequently a sign of equity) to the Outer House, and even to the Sheriff Court. In others the equitable foundation of the rules appears to have been quite forgotten: at least they are applied to-day as rules of established law, according to precedent, and are not regarded as being in any way specially equitable. Even the nobile officium, now commonly (but wrongly) regarded as the sole expression of equity in Scots law, is to-day hedged about by precedent. But this trend of development corresponds not only to the development of equity in the Chancery down to Eldon, a process which can be described briefly as a transition from comparatively unfettered

judicial equity depending on conscience and discretion to regulated and systematised relief, - but also to the modern rules of Equity where precedent is sedulously followed (see Winder: Precedent in Equity, (1941) 57 L.Q.R. 245.) To-day cases founded on equity and those founded on common law are equally restricted by rules of practice and precedent. In England and Scotland equally the judge is not free to apply his own ideas of aequum et bonum.

It is worth observing that the subjects on which equity seems to have had most influence in Scotland are exclusively matters of common law, such as contracts and succession. Branches of law founded on statute are not subject to this control to the same extent at all. It has been pointed out that even the nobile officium will not be exercised contrary to statute (B's Executor v. Keeper of Registers, 1935 S.C. 745, 752.)

This submerging of fundamentally equitable pleas in common-law actions has also hastened the neglect of the existence of equity among Scottish judges and text-writers. Even of the nobile officium several branches have fallen away and are now regarded as matters of common law. This forgetfulness coupled with the increasing rigidity of precedent in Scots Law (Gardner: Judicial Precedent in Scots Law, passim) has severely limited in modern times the function which equitable doctrines can play. The

recognition that a doctrine is based on aequum et bonum should involve that the remedy may be refused if in the circumstances it would be contrary to substantial justice to grant it. This is in danger of being forgotten by the modern merger of equitable pleas and legal actions.

But that equity as a touchstone for a rule of law is not forgotten is seen from Drummond (1944 S.C. 298, 301) where a suggested presumption was criticised as having "no fundamental basis in principle or equity." In much the same way Lord Moncrieff in Johnstone's Trustees (1936 S.C. 766, 784) mentions that in considering the rights of a posthumous child regard must be had to equity as distinct from law, and he found "conclusive reason against the suggestion that equity can ever be resorted to for the purpose of depriving the party in whose favour it is pleaded of benefits which, apart from the equity, would independently have been conferred by law. It has been the kindlier operation of equity .... to confer benefits which, apart from equity, law would have withheld. It appears to me to be a complete misconception of the aim of resort to an equity to suggest that the mere profession of a deed that on an equitable construction it confers a benefit is to determine whether a benefit is equitably in fact conferred. Such a misconception would only render equity once again subservient to law." As

pointed out by Lord Macmillan in Elliot v. Joicey (1935 S.C.(H.L.) 57, 70), the equitable maxim, nasciturus pro iam nato habetur, was adopted in Scotland from the Civil Law (Dig. I, 5, 7. It is discussed at length in Mountstewart v. Mackenzie, (1707), Mor. 14,903) and is approved by all the institutional writers.

It was said formerly that the Court of Session had exclusive jurisdiction in equitable pleas but this is no longer so and probably never was quite accurate. The concurrent use from quite early times of legal and equitable pleas has resulted in the admission of many of the latter as well as the former in all courts equally, and in recent years statute had extended the jurisdiction of the Sheriff Court to matters formerly exclusive to the Court of Session (MacLaren's Practice, 123.) The only exclusive jurisdiction of the Court of Session, analogous to that of the English Equity courts, consists in certain forms of action, such as declarator, reduction, suspension, and adjudication (with certain exceptions) and the cases falling under the nobile officium (Mackay, Manual, 81.) All other cases are of concurrent jurisdiction of law and equity in all courts: while auxiliary jurisdiction in the English sense there has never been.

Equitable Discretion

A number of cases illustrate the discretionary attitude of the Court to the granting of a remedy and show that de minimis non curat praetor. Reference has already been made to the discretion present in the granting of interdict. So in Orr-Ewing and Co. v. Colquhoun's Trs. ((1877) 4 R. (H.L.) 116, 126, quoting Bannatyne v. Cranston, (1625), Mor. 12769), which related to the right of proprietors of the alveus of a non-tidal river to erect buildings therein when no perceptible damage or hindrance was done thereby, the House of Lords held that as no substantial injury had been proved decree for removal of the erections should not be granted. Lord Blackburn said: "Where any unauthorised erection is a sensible injury to the proprietary rights of an individual, there is injuria for which he might, in a court of law in England, recover at least nominal damages. A court of equity in England, or the Court of Session in Scotland, in the exercise of its equitable jurisdiction, would not order the removal of the erection if convinced that the damage was only nominal." Similarly in Grant v. Duke of Gordon ((1781), Mor. 12820, as explained in Orr-Ewing, supra. Cf. Hunter v. Aitken, (1880) 7 R. 510) the right of navigation and of floating timber down a river was not such an absolute right as not to be subject to equitable restrictions when in competition

with other rights. The most notable expression of equitable discretion was however in the interdict case of Grahame v. Magistrates of Kirkcaldy ((1882) 9 R.(H.L.) 91), where it was put as an essential corollary to an equitable doctrine that the Court could exceptionally decline to give the relief sought.

In some other respects, too, questions may be resolved by the Scottish courts on principles vaguely equitable which yet cannot be ascribed to any head of equitable principle, such as actings on a void contract (Gloag, 531. See too Gloag, 378, n.7; 407, 503), or a vassal's right to an assignation to enable him to recover the proportion of feuduty applicable to lands feued (Guthrie v. Smith, (1880) 8 R. 107, 115 per Lord Shand, diss.)

A point of purely academic interest is whether equity in Scotland might not have developed to a greater extent had there been an equity court to effect that development. The English exemplar shows that separation achieved a greater individuality and led to a higher pitch of development, but in England it had grave defects of conflict, multiplicity of actions, expense, delay, and a resulting duality of rules and conceptions not yet obliterated. Hardwicke, in his letter to Kames (Tytler's Life of Kames, I, 242), conceded that expedition, simplicity and expense weighed in favour of the united jurisdiction of law and

equity for which Kames argued, but he thought that the necessity of keeping the rules of law entire and of not leaving it in the power of the judge insensibly to blend law and equity was in favour of keeping them divided. The common law of England would have been lost long ago, he said, if law and equity had been mixed. He finally conceded (ibid., 249) that each system had advantages. There must be, he thought, a body of general rules and even in his day he thought that in trusts and redemption of mortgages the rules were pretty well settled; but these must leave a latitude for the arbitrium boni viri: "the praetor (sic) must not be so absolutely and invariably bound by rules as Judges" (ibid., 242).

It seems possible at least tentatively to account for the non-appearance of a Court of Equity in Scotland. In the first place the common law developed late and remained flexible in Scotland long after it had been confined by the forms of action within the bounds of strict law in England. It may be too that the right of appeal to King in Council and Parliament down to the Sixteenth Century, and the fact that the Supreme Court till 1532 was really a function of Council, did away with the need for equitable intervention. There is no clear case of the Council or Chancellor exercising a corrective jurisdiction over the Session after 1532. On the contrary, it

has been laid down that The Lords of Session had power to reduce hornings passed by the Secret Council ((1580) Colvill MS, 496. Cf. Hope, Minor Pr., 33 n.) But more significant is the fact that when Scots law did come to be systematised by Stair, the adoption of such a large content of equity in the Roman conceptions incorporated by him made an independent equitable court superfluous. Moreover, the Court of Session then and long after maintained an adaptability long since lost in England, and there would never appear to have been any real necessity for a court of equity such as had made the Chancellor's exercise of jurisdiction imperative.

Roscoe Pound (Outlines (5th edn) 42) has seen the development of law as falling into five stages of which the last two were respectively the maturity and socialisation of law, which succeeded the period when equity, natural law and discretion were needed to modify the over-rigidity of a system of strict law which developed out of primitive law. Accepting this analysis of historical stages of legal development, it would seem that when a system of law has matured it ceases to require express equitable intervention and must rest content with the equity and flexibility which have by then become inherent in its mature form. It seems then that Scots law has reached such a stage of maturity and is beginning to pass

into the stage which Pound calls socialisation. This necessarily leads to the conclusion that equity in Scotland has served its function. This is confirmed by the fact that no new heads of equity have been invented for long, nor have there been even major new applications of existing principles but only their application to different sets of facts, their accurate redefinition and so on. We may therefore probably not look for any new heads of equity arising in future. The adaptation of the mature law to changing social requirements will have to be effected now by legislation, which is a most imperfect instrument for the purpose, and so it is essential that the Scottish Courts should retain such equitable powers, discretion and reliance on natural justice as the maturing law has incorporated. Hence till the qualification of rights of ownership in the public interest has become more effectual by other means, the equitable discretion of the Court to grant or refuse interdict must remain the only effectual means of regulating conflicting interests (e.g. Ben Nevis Distillery v. British Aluminium Coy., 1948 S.C. 592, 598.) And in other respects too, equitable pleas of various kinds are given effect to (Beaton v. Beaton's Trs., 1935 S.C. 187.)

Scottish Equity and Roman Law

The debt of Scots Law to Roman law seems undoubted though hitherto its precise extent has never been fully assessed. The same is true of the principles derived from the canon law of Rome. Yet, as Stair pointed out, it is not that the Roman law was adopted as the law of this country: it was only followed for its equity, though not acknowledged as a law binding for its authority (I, 1, 12.) It is evident from the foregoing pages that repeatedly, in the reception of Roman law into Scotland, conceptions of that law of a fundamentally equitable nature and purpose were adopted, yet frequently modified. The older Scottish writers were alive to the praetorian equitable functions though they emphasised the praetor at the expense of the other equitable influences operating on the law at Rome.

It is difficult to estimate the contribution of Roman canon law to Scottish equity: it seems to be slight, apart from the fact that some of the civil law arrived here through the medium of the canon law. For Scotland derived her Roman law more from the Seventeenth Century Dutch civilians who had repudiated much of the canon law and gone back to the Justinianean texts, than from the early Roman study which influenced Bracton. Yet early judges were often canonists and cognisant of the conceptions of good faith and conscience, though these elements

have not played an outstanding part in Scottish equity. Repeatedly in these pages the derivation of an equitable principle of Scots law has been shown to be from the Roman law. Quasi-contract and succession provide notable examples. Trusts are the conspicuous exception though a Roman origin for these too was urged by earlier writers. In other cases there is insufficient identity to justify a confident assertion of Roman origin for Scottish equitable conceptions. It is hard to conceive of a legal system proceeding far before evolving rules for the voiding of contracts induced by fear or fraud and it is not clear that such rules were unknown before the Roman rules were adopted or founded on in Scotland. Nevertheless in such cases the knowledge of Roman rules can hardly but have influenced the development.

In Pirie v. Pirie ((1873) 11 M. 941) the Court regretted the declining influence of the Civil law in Scotland and applied its rules as being founded on equity "which we are bound to apply, on grounds of plain justice, independently of the authority which the civil law possesses with us."

Scottish and English Equity

When considering the place of equity in any legal system, it is inevitable that comparisons should constantly be made with the great system evolved by the Court of Chancery. In the last century and a half, since the Roman law ceased to be of such high persuasive influence in Scotland, the law of England has been the most important external source of development, apart from legislation. This has been as true of equitable principles as of legal and in this field English Chancery cases have been and are constantly being referred to and followed almost as much as native authority, and particularly where it is lacking. In particular, in trusts the Scottish doctrines have in modern times been enormously influenced by English practice. It seems very doubtful however to what extent the trust concept in Scotland is a borrowing from England, as it certainly existed in Scotland from an early period and has not developed on exactly similar lines. In view, however, of the substantially different basis and line of development in Scotland and England, it has not seemed profitable to seek to draw exact comparisons between the equitable conceptions found in the law of each of the two countries.

It is however noteworthy that very many of the leading cases of English Equity have been cited and followed

in Scotland. It is only those which proceed on the more specialised doctrines of English equity that are not so followed. Likewise in many instances judgments of such as Hardwicke and Eldon have been accorded the greatest respect in Scottish courts.

It should not however be thought that Scottish judges have always followed leading English authorities on equity to the detriment of native principle. For example, there is Lord Eldon's decision in ex parte Waring ((1815) 19 Ves. 345) that if a debtor deposits securities with his creditor the latter cannot insist on these being reserved to satisfy his claim. This rule was not, however, accepted in Scotland: Lord President Inglis preferred (Royal Bank v. Commercial Bank, (1881) 8 R. 805, 815; affd. 9 R.(H.L.) 67) to develop and apply "the equitable principles which underlie our bankruptcy system from the laws of Holland of or France." The Scottish principles he found "more simple and equitable", and this view the House of Lords sustained on appeal. English equity authority has never been more than persuasive, and accepted, like the Roman law, for its equity.

A further matter worthy of comment is the substantial identity of the subject-matter of English and Scottish equity. When one penetrates the screen of alien terminology, it is evident that the subjects which fell within the jurisdiction of the Court of Chancery correspond very

closely to the list of subjects of Scots law wherein equitable influence may most clearly be discerned. Moreover it is possible to take most of the subjects which form the chapter-headings of such a work as Snell on Equity and equate with them distinct equitable conceptions from the common law of Scotland. Hence it can hardly be questioned that accusations of the failure of Scots law to develop an equity jurisdiction have no substantial foundation as the developed common law is well able to afford equitable relief in circumstances comparable to those justifying it in England. The difference between the two systems is in the means used to achieve the end, and lies largely in the appreciation of the principle underlying the means which in Scotland is regularly overlooked and so often completely buried and lost. A comparison of the field of modern equity in England and in Scotland corroborates this. (See Hanbury: The Field of Modern Equity, quoted supra, Chap. IV.)

It must remain of small value to consider what the effect would have been of the rise in Scotland of an independent equity tribunal. It seems probable that the consequences would have been much the same as in England, a conflict of jurisdictions, the awkward and unjust necessity of a suitor being thrown from one court to another, the parallel development of twin conceptions of legal categories and a final amalgamation. It is probable

that Scots law has gained in the end from the avoidance of these complications. Certainly in England a stage was reached when a fusion of courts had to be effected and when legal and equitable remedies came to be obtainable equally from any Division of the High Court, and this is what has always been the case in Scotland. Moreover Scotland has avoided thereby the confusion of the co-existence of such conc epts as legal and equitable fraud, legal and equitable mortgages and so on, and there appears to be no ground for suggesting that our law has suffered thereby. There seems little doubt that if such conceptions had been really necessary the Lords would have invented them long ago.

Lastly, one may ask: What is there that the Court of Chancery, or the Chancery Division, could do to achieve a just solution, that the Court of Session could not do? The writer makes bold to answer: Very little. The means differ, the judicial reasons differ, but the result is broadly the same in most cases.

It is hoped that there has now been presented a true picture of the equitable jurisdiction of the Scottish courts to justify the contention that such exists, even apart from the nobile officium of the Court of Session, to reveal the extent of the influence of the principle of equity founded on natural justice in Scots law, and to

reveal the common thread linking some of those subjects of our law. Many of the conclusions must be tentative and may yield to further study as our knowledge of the sources and bases of Scots law grows, yet the concealed and half-forgotten doctrines of equity cannot be entirely ignored. They have long existed in our law, they still exercise potent influence in it and it will be much to the detriment of the Scottish legal system if by desuetude or pressure of legislation those equitable principles be obscured. In omnibus quidem, maxime tamen in iure, aequitas spectanda sit (D. 50. 17. 90.)

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