

AN
INSTITUTE
OF THE
LAW OF SCOTLAND,
IN FOUR BOOKS,

IN THE ORDER OF SIR GEORGE MACKENZIE'S
INSTITUTIONS OF THAT LAW.

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A NEW EDITION,

With Additional Notes.

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IN TWO VOLUMES.

VOLUME FIRST.

EDINBURGH:

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1824.

SINCE the Edition of 1805, this Work has been twice reprinted, under the date of 1812. But no notice was taken of the later decisions of the Court, nor were any changes made except the addition of references to Morison's Dictionary.

The object of the present Editor has been, to point out the principal decisions, since 1805, connected with the text. The later notes embrace a longer period than those which precede them; which arises from the publication having been carried on desultorily, amid many interruptions from professional avocations, and from the Notes being generally brought down to the time when they passed through the press.

No material additions have been made to the concluding title "Of Crimes;" and some parts of the former Appendix have been omitted, as they were found of little use in practice. The Notes of former Editions have been preserved. Those of the present Editor are distinguished by numerical references.

A new and enlarged Index is added, prepared by Mr C. G. Ferguson, whose skill and experience in that way are well known.

J. I.

15. Dundas Street, }
8. Dec. 1827. }

THE Principles of the Law of Scotland, first published in the year 1754, were meant only for the use of young gentlemen who attended the Author's public lectures.—The favourable reception given to that Essay, encouraged him to turn his thoughts to a larger work, which might be of greater use to the public. He accordingly employed the remainder of his days in reducing his prelections into the form in which they now appear, with a view to give them to the world.

The work had not received the finishing hand of the Author at his death. The Editor, aware of the disadvantages attending a posthumous publication, and unwilling to hazard any part of the reputation the Author had already acquired, declined to put it to the press till he had submitted it to the perusal of several gentlemen of the law, of singular knowledge and abilities in their profession, upon whose judgment he could rely. Encouraged by their approbation, he now offers it to the public.

Some inaccuracies observed in the language were corrected: No other alteration has been ventured on, though in some particulars the course of decisions has run contrary to the opinion laid down by the Author. A few Notes have been added referring to later decisions, which occurred to the gentlemen who took the trouble to revise the manuscript.

The reader will observe some references in the text to the last collection of decisions by a committee of the Faculty of Advocates, published some years after the Author's death. These decisions were quoted in the manuscript by their dates; but as they are now printed, it was thought proper to refer to them as marked in that collection.

A few original deeds are mentioned in the course of the work. These are added in an Appendix. To which are subjoined an abstract of the late act of Parliament concerning entails, and some clauses of the statutes relative to the personal estates of bankrupts, and to the Court of Justiciary, which have passed since the Author's death.

The Editor takes this opportunity of returning his grateful thanks to the gentlemen who so obligingly took the trouble to revise the manuscript copy of the text. If this work shall be of any use, it is to them the public is indebted for it.

It is hoped the reader will excuse any small inaccuracies he may meet with, as it is impossible to avoid them in a posthumous work, unless the Editor assume a greater liberty than belongs to him.

NOTE by ALEX. FRASER TYTLER, Esq. (now Lord WOODHOUSELEE,) upon the Second Edition of which he was Editor.

IN this Second Edition, it is hoped the Work is rendered more useful, by a much ampler Index; and by the addition of a Running Margin, containing the heads of each section. Many Notes are likewise added, referring to the later decisions of the Supreme Court, both where these confirm, and where they differ from the principles laid down in the Text.

A. F. T.

Edinburgh, 12th November 1784.

ADVERTISEMENT TO THE FOURTH EDITION.

THE high estimation in which the following Work has ever been held, as an authority in the Law of Scotland, is well known to the Profession. But, since its first publication in 1773, the many alterations which have necessarily taken place in the system, render Mr Erskine's INSTITUTE a much less satisfactory and secure guide to the student or practitioner than originally. It is the object of the present Edition to remedy these imperfections, without diminishing the authority of the principal work. Accordingly, the Editor has been careful to preserve the original Text without alteration; while, in the NOTES, he has adverted to every material circumstance in which our law or practice has, since the days of Mr Erskine, been modified or affected by special Statute, by Acts of Sederunt, or by the Decisions of the Supreme Court.

The present undertaking appeared to argue so much presumption, and was found upon trial to be so difficult in the execution, that the Editor would probably have abandoned the task in despair, had he not occasionally obtained access to superior information, which he is proud to acknowledge with respectful gratitude.

The concluding title of the Institute, "ON CRIMES," being comprised by Mr Erskine in a very small compass, and the late publication of Professor Hume having nearly exhausted all that could be said upon that department of Scottish Jurisprudence, little more remained than to make such annotations as appeared to be called for by subsequent entries in the criminal record. For that purpose, the Editor has carefully searched the Books of Adjournal; and he is not aware that any entry of importance, since the date of Mr Hume's valuable work, has been overlooked.

In the Appendix are inserted several late Statutes, of general application, and of frequent occurrence, together with such of the Standing Orders of the House of Lords as seemed most likely to facilitate the practice of business before that most Honourable House.

J. GILLON.

EDINBURGH, }
Jan. 31. 1805. }

ADVERTISEMENT TO THE FIFTH EDITION.

THIS Fifth Edition has passed through the press under the superintendence of the Editor of the DICTIONARY OF DECISIONS, 4to.

While the former mode of reference to the cases is retained, they are likewise referred to according to their distribution in that Dictionary.

The Notes of the fourth edition are reprinted, with such alterations merely as obvious mistakes rendered necessary, and such additions as happened to occur to the recollection of the Editor while reading the proof sheets; for, as the former edition was exhausted, and it was necessary that this one should be prepared in the course of a few months, it was not his object, nor was there time, to attempt premeditated improvements.

W. M. M.

November 12. 1811.

CONTENTS.

VOLUME I.—BOOK I.

TIT.	Page.
1. <i>Of Laws in general,</i>	1
2. <i>Of jurisdiction and judges in general,</i>	25
3. <i>Of the supreme judges and courts of Scotland,</i>	50
4. <i>Of the inferior judges and courts of Scotland,</i>	75
5. <i>Of ecclesiastical persons,</i>	98
6. <i>Of marriage, and of the relation between parents and children :</i>	
1. <i>Of marriage,</i>	117
2. <i>Of the relation between parents and children,</i>	153
7. <i>Of minors, their tutors and curators ; and of the relation between master and servant :</i>	
1. <i>Of minors, their tutors and curators,</i>	163
2. <i>Of the relation between master and servant,</i>	207

BOOK II.

1. <i>Of the division of rights, and the several ways by which a right may be acquired,</i>	217
2. <i>Of heritable and moveable rights,</i>	240
3. <i>Of the constitution of heritable rights by charter and seisin,</i>	255
4. <i>Of the several kinds of holding,</i>	293
5. <i>Of the rights of superiority, and its casualties,</i>	299
6. <i>Of the right which the vassal acquires by getting the feu,</i>	344
7. <i>Of the transmission of rights by confirmation or resignation,</i>	393
8. <i>Of redeemable rights,</i>	407
9. <i>Of servitudes,</i>	427
10. <i>Of teinds or tithes,</i>	471
11. <i>Of inhibitions,</i>	524
12. <i>Of apprisings, adjudications, and the judicial sales of bankrupt estates,</i>	536

VOLUME II.—BOOK III.

1. <i>Of obligations and contracts in general, and of contracts to be perfected re,</i>	585
2. <i>Of obligations by word and by writing,</i>	606
3. <i>Of obligations arising from consent, and of accessory obligations,</i>	639
4. <i>Of the dissolution of obligations,</i>	702
5. <i>Of assignations,</i>	718
6. <i>Of arrestments and poindings,</i>	727
7. <i>Of prescription,</i>	751
8. <i>Of succession in heritable rights,</i>	789
9. <i>Of succession in moveables,</i>	871
10. <i>Of last heirs and bastards,</i>	916

CONTENTS.

BOOK IV.

Tit.	Page.
1. <i>Of actions,</i>	925
2. <i>Of probation,</i>	963
3. <i>Of sentences and their executions, and of decrees-arbitral,</i>	992
4. <i>Of Crimes,</i>	1020

APPENDIX.

No.	Page.
1. <i>Charter of lands held soccage,</i>	1
2. <i>Charter by James IV. to Lady Margaret Stewart, by which as well as by the charter mentioned in Mr Hay's Vindication of Elizabeth More, it appears that legitimation per subsequens matrimonium was rejected by the ancient law of Scotland,</i>	ib.
3. <i>Declaration by a bailie, in a separate writing, that he had given possession to the vassal,</i>	3
4. <i>Notorial instrument of seisin before the return of James I. from England, the period when these instruments are supposed to have been introduced into this country,</i>	4
5. <i>Rollment of court,</i>	5
6. <i>Service of the heirs-portioners of Duffgall, in 1271, by which it appears that general services were then in use, though from the preceding article it would seem that they were not known about the middle of the 16th century,</i>	6
7. <i>Abstract of the act 10. Geo. III. c. 51, for encouraging the improvement of lands in Scotland held under settlements of strict entail,</i>	7
8. <i>Abridgment of "An Act" (39. and 40. Geo. III. c. 46, passed May 30. 1800), "for the more easy and expeditious recovery of "small debts, and determining small causes, in that part of Great Britain called Scotland,"</i>	10
9. <i>Abridgment of "An Act" (43. Geo. III. c. 54, passed 11th June 1803), "for making better provision for the Parochial School-masters, and for making further regulations for the better Government of the Parish Schools in Scotland,"</i>	13
10. <i>Abridgment of "An Act" (39. and 40. Geo. III. c. 98, passed 28th July 1800), "to restrain all Trusts and Directions in Deeds "or Wills, whereby the profits or produce of real or personal estates "shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited,</i>	18

NOTE of ABBREVIATIONS, and of the manner of referring
to Authorities.

<i>Act of Sed.</i>	-	Acts of Sederunt of the Session, <i>edition</i> 1790.
<i>Reg. Maj.</i>	-	Books of <i>Regiam Majestatem</i> .
<i>Q. Attach.</i>	-	<i>Quoniam Attachamenta</i> .
<i>Leg. Burg.</i>	-	<i>Leges Burgorum</i> .
<i>St. 1. Rob. I.</i>	-	<i>Statuta prima Roberti primi</i> ; and so of the other statutes in Skene's collection.
<i>Cr.</i>	-	Sir Thomas Craig <i>De feudis</i> , quoted according to the edition 1732, <i>fol.</i>
<i>Hop. Min. Pr.</i>	-	Sir Thomas Hope's Minor Practics, sometimes by page and section, sometimes only by section, of edition 1726, <i>8vo.</i>
<i>St.</i>	-	Visc. Stair's Institutions, by book, title, and section, of edition 1759.
<i>Bankt.</i>	-	Lord Bankton's Institute, by the book, title, and section.

Printed collections of decisions observed

<i>Dir.</i>	-	by Lord Dirleton, from Dec. 1665 to June 1677,	} Referred to by the number of the decision.
<i>Gilm.</i>	-	by President Gilmour, from July 1661 to July 1666,	
<i>Pr. Falc.</i>	-	by President Falconer, from November 1681 to January 1686,	
<i>Harc.</i>	-	by Lord Harcarse, from 1681 to 1691,	
<i>Dalr.</i>	-	by President Dalrymple, from June 1698 to June 1720,	
<i>Br.</i>	-	by Mr Alexander Bruce, from Nov. 1714 to July 1715,	
<i>Kames,</i>	-	by Lord Kames, from Nov. 1716 to Feb. 1728,	
<i>Kames, Rem. Dec.</i>	-	by Lord Kames, from Feb. 1730 to June 1752,	
<i>Kames, Sel. Dec.</i>	-	by Lord Kames, from Feb. 1752 to Nov. 1768,	
<i>Kilk.</i>	-	by Lord Kilkerran, from 1738 to 1752,	
<i>Clerk Home,</i>	-	by Mr Alexander Home, from Nov. 1735 to July 1744,	
<i>Falc. i. or ii.</i>	-	by Mr David Falconer, in 2 vols. from Nov. 1744 to Dec. 1751,	
<i>Fac. Coll. i. ii. iii, &c.</i>	-	denotes the Decisions collected by appointment of the Faculty, which commence in 1752,	

<i>Spottis.</i>	-	-	by Sir Robert Spottiswoode,	} Referred to by the date of the deci- sion and the pursuer's name.
<i>Fount.</i>	-	-	by Lord Fountainhall, in 2 vols. from June 1628 to July 1712,	
<i>Durie,</i>	-	-	by Lord Durie, from July 1621 to July 1642,	
<i>Stair,</i>	-	-	by Lord Stair, in 2 vols. from June 1661 to July 1681,	
<i>Forbes,</i>	-	-	by Professor Forbes, from Feb. 1705 to Nov. 1713,	
<i>Edg.</i>	-	-	by Mr Edgar, from Jan. 1724 to July 1725,	
<i>Balf.</i>	-	-	by Sir James Balfour, referred to by the page and section.	

Manuscript collections of decisions observed

<i>Had.</i>	-	-	by the Earl of Hadinton.
<i>Hop. Maj. Pr.</i>	-	-	by Sir Thomas Hope.
<i>Gosf.</i>	-	-	by Lord Gosford.
<i>Forbes, MS.</i>	-	-	by Mr William Forbes.
<i>Br. MS.</i>	-	-	by Mr Alexander Bruce, from June 1716 to Jan. 1717, (afterwards printed).
<i>Tinw.</i>	-	-	by Lord Tinwald.

N. B. The cases referred to as in these MSS. which are in the Library of the Faculty of Advocates, (except Lord Tinwald's, which has not been preserved,) will now be found printed in the Dictionary of Decisions, 4to.

<i>Steu. Ans.</i>	-	-	Sir James Steuart's Answers to Lord Dirleton's Doubts.
<i>Skene,</i>	-	-	Sir John Skene, <i>De verborum significatione.</i>
<i>Mack.</i>	-	-	Sir George Mackenzie's Institutions, referred to by the book, title, and section.
<i>Mack. Obs.</i>	-	-	Sir George Mackenzie's Observations on the acts of parliament.
<i>Mack. Crim.</i>	-	-	Sir George Mackenzie's Treatise on the Criminal law, referred to by the part, title, and section.

The decisions from 1621 to 1713, referred to by the date of the decision and the pursuer's name, without any distinguishing mark, are to be found in the printed collections by Lord Durie, Viscount Stair, or Mr Forbes.

The decisions after 1719, which are neither to be found in any printed collection, nor in the Dictionary of Decisions, were observed by the author.

The acts of parliament before the reign of James VII., are quoted by the year of God, and the number of the act.

The quotations from the Code of the Roman law are marked in the usual way by the letter *C*. Those from the Pandects have no distinguishing letter.

The references from one part of this work to another, are marked by the book, title, and section; but if the reference is from one part of the same book to another, then it is marked only by the title and section.

AN
INSTITUTE
OF THE
LAW OF SCOTLAND.

B O O K I.

TITLE I.

Of Laws in general.

THE word *law* is frequently made use of, both by divines and philosophers, in a large acceptation, to express the settled method of God's providence, by which he preserves the order of the material world in such a manner, that nothing in it may deviate from that uniform course which he has appointed for it; and as brute matter is merely passive, without the least degree of choice upon its part, these laws are inviolably observed in the material creation, every part of which continues to act, immutably, according to the rules that were from the beginning prescribed to it by infinite wisdom. Thus, philosophers have given the appellation of *law* to that motion which incessantly pervades and agitates the universe, and is ever changing the form and substance of things, dissolving some, and raising others, as from their ashes, to fill up the void; yet so that, amidst all the fluctuations by which particular things are affected, the universe is still preserved without diminution; *Gravina, De jure nat.* Thus also they speak of the *laws* of fluids, of gravitation, &c.; and the word is used in this sense in several passages of the sacred writings; in the book of Job, and in Prov. viii. 29., where God is said to have given his law to the seas, that they should not pass his commandment. But *law*, in the strict meaning of the word, is peculiar to intelligent beings, endued with consciousness and liberty of will¹; who, consequently,

VOL. I.

A

Book I.
Law, its extensive, as well as more limited signification.

¹ Indeed, in any other sense, it may perhaps rather be regarded as a mere metaphorical sort of expression, for which, in strictness, some different and possibly more appropriate term may be substituted. Professor Christian has made a similar remark on an analogous passage in Blackstone's Commentaries.—“When we apply,” says he, “the word *Law* to motion, matter, or the works of nature or of art, we shall find, “in every case, that, with equal or greater propriety and perspicuity, we might have “used the words *quality, property, or peculiarity.* We say, that it is a law of motion, “that a body put in motion *in vacuo* must for ever go forward in a straight line with

BOOK I.

sequently, have an inward power of acting and forbearing, and by disregarding the prescriptions of the law, contract guilt, and render themselves obnoxious to punishment. In this restricted meaning, God directs his laws, either to pure spirits, or to the human race. But as the law of pure spirits has no immediate relation to the conduct of man, nor indeed falls within the reach of human capacity, the subject of this treatise is to be confined to laws which are prescribed to mankind.

Its definition in the sense of jurisprudence.

2. *Law*, even when it is thus limited, is an equivocal word, sometimes denoting the science which teacheth what things are or are not just, styled by the Romans *jurisprudentia*; and sometimes what is contained in that science; or, in other words, the particular rules to which the science is applied. In this last acceptation, *law* may be defined, the command of a sovereign, containing a common rule of life for his subjects, and obliging them to obedience. By a sovereign is understood the supreme power, whether it be lodged in the hands of one or of many.

General characteristics of law.

3. Laws must be directed to those alone whom the lawgiver has a right to command; for the obligation to obey, on the part of the person commanded, can have no other foundation than his dependence on the lawgiver, and the lawgiver's just power of directing his actions. That cannot be a rule of life which is impossible or unintelligible, or of which one cannot be assured whether it be truly commanded. The thing prescribed as a law, therefore, must be in itself possible to be performed; it must be so distinctly exhibited, as to convey a precise knowledge of its meaning to those who are to be bound by it; and it must be notified to them in such a way, as they may know it to be the will of their sovereign. As the end of law is an equal distribution of justice, on which the happiness of every society depends, all laws ought to be in themselves just. This character is inseparable from the laws of God, who is Justice itself; and human laws, when they prescribe any thing repugnant to natural justice, have no coercive force².

4. Justice

"the same velocity;—that it is a law of nature, that particles of matter shall attract each other, with a force that varies inversely as the square of the distance from each other;—and mathematicians say, that a series of numbers observes a certain law, when each subsequent term bears a certain relation or proportion to the preceding term;—but in all these instances, we might as well have used the word *property* or *quality*, it being as much the property of all matter to move in a straight line, or to gravitate, as it is to be solid or extended; and when we say that it is the law of a series that each term is the square, or square root of the preceding term, we mean nothing more than that such is its property or peculiarity. And the word *Law* is used in this sense in those cases only which are sanctioned by usage; as it would be thought a harsh expression to say, that it is a law that snow should be white, or that fire should burn."—1. *Blackst.* 39. Note 1.

The truth is, as the same authority goes on to observe, "when law is applied to any other object than man, it ceases to contain two of its essential ingredient ideas, viz. *disobedience* and *punishment*." Or, as our own author himself expresses it, (*infra*, § 11. *h. t.*) "Creatures which are merely sensitive have no faculties which can be influenced by motives above sense: They act from *necessity*, and so are incapable of proper *obedience*, nor consequently of the *obligations* of *LAW*."

² It is in the same spirit laid down by Blackstone, in general terms, that "the law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity if contrary to this; and such of them as are valid, derive all their force and all their authority, mediately or immediately, from this original." (1. *Blackst.* 41.) And as is noticed by Professor Christian, in a note on the above passage:—"Lord Chief-Justice Hobart has also advanced, that even an Act of Parliament made against natural justice, as to make a man a judge in his own cause, is void in itself, for *jura nature sunt immutabilia*, and they are *leges legum*." (Hob. 87.)

4. Justice, when it is ascribed, not to laws, but to persons, consists in the conformity of one's actions to law. Ulpian, indeed, copying after the stoic philosophy, has defined it to be, a constant and uniform disposition of mind to give every man his due, *L. 10. pr. De just. et jur.* But though this definition may pass without censure from the pen of a divine or a moralist, who considers persons according to the judgment of God, not merely by their actions, but by the inward springs which move to action, yet human tribunals cannot judge by the affections of the mind. If a man act conformably to law, he must be accounted just, whatever his motives to action may have been. On the contrary, if one fail to make good his engagements in any matter of civil right, *ex. gr.* to discharge his debts; though this may have been owing to unavoidable misfortune, yet he is in the judgment of law unjust, and therefore subjected to imprisonment, or such other penalty as the law has inflicted on that constructive transgression.

5. When laws have a tendency to promote the real happiness of the subjects, that alone creates an obligation to obedience, called by Heineccius, and other writers, *the internal obligation of law.* This, however, would be insufficient of itself for enforcing obedience, if these laws were not also guarded by a commination of some punishment or evil which is not the natural consequence of the transgression. That part of the law which inflicts the punishment upon disobedience is called its *sanction*, from *sancire*, "to confirm," because it is that which gives the enactment full force and authority, and chiefly preserves it from being violated by perverse men, who would disregard the true grounds of obedience. Hence it follows, that a sanction, though it should not be expressed in the law, is implied; so that the magistrate or judge to whom the execution of the law is committed may inflict a punishment on the transgressor, greater or less, according to the demerit of the offence.

"With deference to these high authorities," however, the Professor continues, "I should conceive, that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature. His province is to interpret and obey the mandates of the supreme power of the state. And if an act of Parliament, if we could suppose such a case, should, like the edict of Herod, command all the children under a certain age to be slain, the judge ought to resign his office rather than be auxiliary to its execution; but it could only be declared void by the same legislative power by which it was ordained. If the judicial power were competent to decide, that an act of Parliament was void because it was contrary to natural justice, upon an appeal to the House of Lords this inconsistency would be the consequence, that as judges they must declare void, what as legislators they had enacted should be valid." (1. Blackst. 41. Note 3.)

This commentary is founded perhaps on rather too literal an interpretation of the text. For that neither Blackstone nor our Author differed essentially in their real meaning, and with reference to its practical application, from the sentiments of the learned Annotator, appears distinctly from what both of them afterwards lay down in the context. Thus, Blackstone says, "If the Parliament will positively enact a thing which is unreasonable, I know of no power in the ordinary forms of the Constitution that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government."—"There is no court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature or no." (1. Blackst. 91.) So also Erskine, (*infra*, *h. t.* § 50.) "Where the words of a statute are incapable of a double meaning, they must be explained in that only sense which they can bear, whatever hardship this may draw after it. By the precise words in which the statute is conceived, every interpretation is excluded, except that which necessarily arises from the words themselves; and a judge who should, under the pretence of equity, explain a law in a sense inconsistent with the words, would assume the character of a lawgiver, rather than that of a judge."

Book I.

Justice, its proper definition. The conformity of our actions to law.

Internal obligation of laws and their sanction, express or tacit.

BOOK I.

offence. This doctrine seems to be admitted by all writers, even by Hobbes, *Lib.* 14. *De cive*, § 8. ; and is taken for granted in several of our statutes, enjoining certain things to be done for the police of the country, in which, though no special penalty is annexed to the enactment, it is recommended to the Judge to see the law carried into execution, 1661, c. 41. &c. ; and how this can be done effectually, without punishing the breach of the law, is hard to imagine.

This sanction threatens punishment, but cannot bestow reward.

6. Under the sanction of the law may be also included that part of it which proposes rewards as encouragements to obedience. Cumberland, *C.* 5, *De leg. nat.* § 40, maintains, that this is the chief and most proper sanction of a law. But his reasoning appears too subtle, and it is certain that this species of sanction is but little in the power of earthly lawgivers. No state can possibly furnish out a stock sufficient for rewarding all who may live in a due observance of the laws : it is God alone, who can not only inflict the severest pains upon transgressors, but also, from the inexhaustible treasures of his power and goodness, animate his creatures to obedience by the highest rewards.

General division of law.—
Law of nature.

7. Law is divided into the law of *nature*, the law of *nations*, and *civil* or *municipal* law. The law of nature may be defined, after Grotius, the dictate of reason, by which we discover whether an action be morally good or evil, by its agreement or disagreement with the rational and social nature of man. That there is such a law, cannot be denied, without denying the essential attributes of the Deity. Man is endued by his Creator with intellectual faculties, capable of distinguishing between truth and error, between real and apparent happiness ; and with a power, either of acting immediately, if his judgment shall so direct him, or of suspending the execution of his purposes, in cases which require deliberation, till he shall, by a thorough examination, be satisfied of their rectitude. The infinitely wise and good God hath not thus enlightened the soul of man, merely to enable him, by an abuse of his understanding, to range more expertly, and with greater success, in the paths of violence and oppression, without being accountable for his wickedness. God necessarily wills what is just and good ; and that divine will which we are capable of discerning by natural light, truly constitutes a law to us. The law of nature, therefore, has the God of nature for its author ; and it is not made known to us by any formal or external notification of his will, but is impressed on our minds by the internal suggestion of reason ; and is therefore elegantly said by St Paul to be written by God upon the heart of every one of us.

Objects of the law of nature. God, our neighbour, and ourselves.

8. The law of nature hath for its objects, God, our neighbour, and ourselves, according to Tully, *Tusc. Quæst.* L. 1. C. 26. Its duties are known by attending to the relations in which man stands to his Creator, to his fellow-creatures of mankind, and to the other beings that surround him, and by considering the nature and frame of the human constitution. Thus, the essential reason of things teaches us to reverence and obey God, who, as our Creator and Preserver, hath the highest title to our worship and obedience ; to honour and obey our parents, to whom, under God, we owe our being ; to adhere strictly to our obligations and engagements ; to perform all the friendly offices we can to those with whom nature hath intended that we should live together in a state of society, as mutual helps to one another ; to do to them whatever we might reasonably

reasonably expect they should do to us in the like circumstances ; to take a proper care of our own preservation ; to restrain our natural passions and appetites within due bounds ; and to cultivate and improve our faculties to the utmost of our power, &c.

9. As a necessary consequence of this, the law of nature lays an indispensable obligation to obedience on the whole human race, who have the exercise of their reason, without exception ; for all men are alike subject to the command of their Maker, and the frame of the human constitution is the same in every individual. As that constitution, therefore, and the relations of men to other beings, must always continue what God at first made them, the duties of natural law must also be of unchangeable obligation. " It is not therefore one law in Rome, and another in Athens ; one " to-day, and another to-morrow ; but it is ever the same, exerting " its obligatory force over all nations, and throughout all ages ; " as Cicero expresses himself in a beautiful fragment preserved by Lactantius, *Lib. 6. C. 8.*

The law of nature, its immutable obligation on the whole human race.

10. The observance of the law of nature is strongly enforced by that faculty of the mind called *conscience*, by which we are not only informed of what we ought to do, but enabled to turn our eyes inward upon ourselves, and after recollecting and examining our past actions by the test of reason, to pass judgment, either approving or condemning them. The terrors which take fast hold of wicked men upon a sense of their guilt, though they should be placed beyond the reach of human censure, or concealed from the view of their fellow-creatures, clearly prove their knowledge, not only of the law itself, but of its being fenced with the heaviest penalties. On the other hand, that inward serenity of mind, on the reflection of having led a virtuous life, or of having performed any act of disinterested justice, humanity, or self-denial, is the reward which God hath been pleased to bestow, even in this life, upon those who give a willing obedience to his law.

Its observance is strongly enforced by conscience.

11. The Romans have, with great impropriety, ascribed this law to the brute part of the creation, *L. 1. § 3. De just. et jur.* Creatures which are merely sensitive, have no faculties which can be influenced by motives above sense : They act from necessity, and so are not capable of proper obedience, nor consequently of the obligations of law. On this account also, infants before they have attained the use of reason, and idiots, who either never had reason, or have lost the use of it, are not to be accounted moral agents, or subjected to punishment as transgressors ; for where there is no law, there can be no transgression.

It therefore presupposes the faculty of reasoning.

12. Writers divide the law of nature into the primary and the secondary. The primary is that which regards men, simply considered, or in their state of nature, previous to any human act or establishment. To this branch of the division, the instances already given of natural law may be applied. The secondary respects men as they are formed into several distinct and independent states ; and it arises from the nature of society, and from the necessities of mankind as members of it. Because this sort can have no room till men be placed in particular circumstances, Puffendorf, and some writers after him, have chosen to call it *the hypothetical law of nature.*

Law of nature divided into primary and secondary.

13. From this secondary law of nature the right of property hath arisen. By the first or original law, all things were common : The few who inhabited the earth were, for some time after the crea-

BOOK I.

Secondary, is the origin of property, or, in general, that law which is applicable to man in a state of society.

Law of nations properly means that system of duties which all states owe to each other ;

But is frequently used to signify certain particular and arbitrary regulations between states.

tion, served abundantly with such of its fruits as sprang up without culture or industry, so that no person needed to take possession of more than served his present necessities. But as men multiplied, experience soon taught, that society could not long subsist if this common use of things continued : A right of property was therefore established, whereby every man had a certain portion of ground appropriated to him, which he might hold for ever, if he did not himself abandon it, or transfer it to another. From hence hath proceeded that mutual intercourse among men, which branches out into the contracts of barter, sale, hire, loan, and most of the others mentioned in law-books. It is evident that this secondary law is derived by necessary consequence from the primary ; and that it is nothing more in effect than the first and most obvious principles of natural law applied to the state of civil society : For civil government is so far from destroying the essential relations of men and things, that it enables us to discharge the duties of that primary law to one another, with greater advantage to the community.

14. The law of nations, in its proper sense, is that which comprises in it all the duties which one independent state or body-politic owes to another. Both the law of nature and of nations derive their coercive power from reason alone, and so both may be justly said to be prescribed by God himself : For as independent nations may be considered with respect to each other as so many political persons in a state of equality among themselves, the same duties which nature has laid on individuals, must be also binding upon states in their mutual intercourse : That, therefore, which is the law of nature when applied to men considered in their first condition, is truly the law of nations when applied to two or more independent kingdoms. Hence Mr Hobbes, not improperly, divides the law of nature into the natural law of men, and the natural law of states ; which last is, in other words, the law of nations. Under this law may be classed the rights of war, the security of ambassadors, the obligations arising from treaties, &c.

15. But the law of nations is frequently understood in a very different sense. It is made to signify those rules that are generally received by sovereign powers for fixing the order of their mutual correspondence, whether in times of war or of peace ; *ex. gr.* the form of declaring war previous to any acts of hostility ; the regulations relating to reprisals, to contraband goods found aboard neutral ships, to the exchange of prisoners, and to suspensions of arms or negotiations of peace ; the ceremonial of receiving and entertaining ambassadors ; the privileges indulged to their servants and domestics, &c. But these rules make no part of the law of nations in its proper acceptation ; for they are arbitrary, and may, without violating the law of nature, be changed for others equally agreeable to right reason. If therefore they are to be accounted laws, they ought to be thrown into the class of positive, which derive their sole authority, either from express treaties, or from the tacit agreement of nations, and whereof the obligation can last no longer than the agreement on which it is grounded. And, in fact, several of those rules, where they have been established merely by usage, without express stipulation, are frequently altered by a kingdom or state, without consulting with, or giving previous notice to, the neighbouring powers.

16. There are certain laws of nature of the greatest importance to society, the observance of which is not enforced by the positive law

Law of any country ; either because they consist in the affections of the mind, which are beyond the reach of earthly judges ; or because the wisest and best-constituted policy cannot settle their measures and degrees by special rules. Of this sort are benevolence to our neighbours, charity to the poor, protection of innocence, gratitude for benefits received, temperance, &c. All these are left entirely to the conscience, without any aid from human penalties ; and are therefore said to have God alone for their avenger.

17. The law of nature, of which God is the author, must needs be perfect in its kind. The depravity of men's minds, however, often leads them to pervert that law in its application to particular cases. Hence it hath become necessary for the supreme power in all civilized states, to superadd certain rules to it for explaining its true extent, where that appears doubtful, and adapting it with some degree of precision to the several exigencies of the state ; that so all the members of the community, instead of being left to their own partial reasonings, may be tied down by a set of laws that speak the same uniform language to every individual. To illustrate this by an instance or two ; by one of the laws of nature, fathers are bound to leave at their death some part at least of their substance to their children ; and by another, every man has a right to dispose of his property to whom he will : That neither of those laws may be stretched beyond its just limits, it is highly expedient that special rules be prescribed, for fixing the particular proportions of the father's estate which he is disabled from leaving to strangers to the prejudice of his own issue ; that so every member of the state may be taught to give to both of these laws their due weight. Again, it is without doubt a breach of the law of nature, to take the smallest advantage of the seller's necessity in a contract of sale : But as the greatest human sagacity cannot discover whether the buyer hath done so, unless in so far as outward circumstances may make it presumable, it was highly expedient for the supreme power to fix a standard, as has been done by most states, by which judges might presume whether the bargain was fair or not.

18. That law which is thus superadded to the law of nature by the legislative power of any sovereign state, is called *civil*, and sometimes *positive*, or *municipal*. It hath the name of *civil*, because it is enacted by a *civitas*, or state. It is styled *positive*, in contradistinction to that law which is impressed on us by nature itself, without positive enactment. The appellation of *municipal* was, in the original acceptation of the word among the Romans, proper to such laws as obliged *municipia*, or dependent states, which, though they could of themselves claim no right of legislation, being subject to the Roman power, yet had certain magistrates invested with a limited power of enacting laws that were binding upon their own community, *L. 21. § 7. L. 25. Ad munic. ; L. 6. De decr, ab ord. fac.* But that word hath by degrees been drawn to signify also laws enacted by sovereign states.

19. The right of legislation is vested in the sovereign alone, or the supreme power of the state ; for none other but the supreme power has a right to exact our obedience. No independent state can subsist without a supreme power, or a right of commanding in the last resort ; and supreme power cannot restrain itself. No enactment, therefore, of the legislative power in one age, can fetter that power in any succeeding age ; for the legislature of every age, as it has the unlimited power of *making* laws, must have the same

TITLE L

Certain laws of nature have no positive human sanction ;

But in general they are enforced and explained by the laws of civilized nations.

These super-added laws are called Civil, Positive, or Municipal.

Legislation resides in the supreme power. Consequences of this maxim.

same right of *abrogating* or *altering* former laws, otherwise it would cease to be supreme; and from hence the rule arises, *Posteriora derogant prioribus*, L. 4. *De const. princip.* Where the supreme power resides in one person, as in an absolute monarchy, the sovereign is the only lawgiver: If it be vested jointly in the king and the states of the kingdom, as in Britain, the people cannot be bound by an enactment in which the king and the states do not concur. A nation subject to the dominion of a foreign prince, can have no supreme power within itself; and consequently no right of legislation, except in so far as the state on which it depends has granted a permission, L. 9. *De leg. Rhod.* Such was the case of the Roman *municipia*, and other tributary kingdoms. But this doctrine cannot be justly applied to feudatory kings or princes; who, though they are bound to do homage for their crowns to the sovereigns of whom they are holden, have nevertheless an unlimited right of prescribing laws to their own subjects, so long as they take care not to forfeit that right by any feudal delinquency.

The supreme power may add to, or circumscribe the law of nature.

20. The supreme power may not only superadd, but even circumscribe or set bounds to the law of nature, without violating its authority. On this head, doctors generally distinguish between the preceptive and the concessive law of nature. By the preceptive is meant, that which the law of nature either expressly commands or forbids. Concessive is that which gives a man a right, without obliging him to exercise it. What the law of nature has commanded, cannot be forbidden, or even dispensed with, by positive law; and in like manner, what it prohibits, cannot be commanded, or even permitted, by human authority. The law of nature being indeed the command of God, to whom all his creatures owe absolute obedience, no earthly lawgiver, who is himself subject to that law, hath a right of abrogating or controlling it. Obedience, therefore, to any enactment which is plainly adverse to the preceptive law of nature, is rebellion against God. But where the law of nature is barely concessive, bestowing upon a person a right of acting, without obliging him to make use of it, he may not only give it up by compact, but, by entering into civil society, he is understood to vest the legislature with a power of taking it from him, either in whole or in part, if the common interest shall so require. Hence it may be concluded, that things which natural law has left mankind at liberty either to do or to forbear, and these only, are the matter of positive law; which is therefore defined by Aristotle, that which treats of things which were indifferent before the enactment, but become necessary afterwards. This points out the true reason why positive law is not, like the law of nature, immutable, but may, and indeed in many cases ought, to be altered or abrogated, according to the changes wrought by time on the riches, commerce, or manners of the people.

Promulgation of positive law, and its effects.

21. Though the laws of nature require no formal or external notification, *supr.* § 7. positive law, which, however agreeable it may be to reason, is not discoverable by it, cannot possibly be known, nor consequently serve for a rule of life, till it be promulgated⁴ to those whose conduct it is to regulate, L. 9. C. *De legib.* After the law is promulgated, no pretence of ignorance can justify the breach of it; according to the rule, *Ignorantia juris neminem excusat*, L. 9. *pr. et* § 3. *De jur. et fact. ign.* And though this may bear hard upon such individuals as, from their way of life, have no access to be apprised

⁴ As to the promulgation of British Statutes, *vid. infra*, h. t. § 37.

TITLE I.

apprised of it, even after its promulgation ; yet if any such excuse were to be admitted, it would be pleaded by every transgressor.

22. Laws are given as a common rule of life for the whole people of a kingdom or state, and hence they are called *communia præcepta* and *communes reipublicæ sponsiones*. Nor are they obligatory only upon the natural subjects of the state by birth, but likewise upon those who are merely temporary subjects, by residence ; for the civil rights, even of foreigners, must be determined by the laws of that country where they reside for the time. From this property of law it follows, that rules made only for one person, or for a particular corporation, or body of men, are not proper laws ; *L. 8. De legib.* Of this kind are gifts, pardons, exemptions, monopolies. They are commonly called *privileges* ; *privæ leges* ; and judges are not obliged to take notice of them, if they are not pleaded upon in judgment by the party interested.

23. If laws are given for a rule of life, they must consequently look forward, and can regulate future cases only ; for past actions are not in our power, and so admit no rule. Sir George Mackenzie, § 11. *h. t.*, excepts from this conclusion laws which, without any new enactment, declare what was formerly law. But that exception is improper ; for the only purpose of a declaratory law is, to explain the meaning of a prior statute in a doubtful point ; so that it has no retrospect. It is the first law which obliges : The last does no more than give to that first a just interpretation ; and it is included in the notion of interpretation, that it must draw back to the date of the law interpreted.

24. It has been doubted, whether statutes which, without either commanding or forbidding, simply allow persons to do certain things, are proper laws ; because all laws lay by their nature an obligation upon those to whom they are directed ; whereas, in actions which the law declares indifferent, no necessity is laid upon any one to act. Nevertheless, even permissive laws imply a positive right in certain persons to have or enjoy the use of certain things, which necessarily draws after it a prohibition that no other shall hinder or obstruct the exercise of it ; so that a law of this sort, though it lays no obligation on him to whom the permission is granted, is still a prohibitory law as to others.

25. Civil law is either barely such, mere civil,—or mixed. That is barely civil, which derives its whole force from the arbitrary will of the lawgiver, without any obvious foundation in nature ; as the Roman laws of adoption, and most of those which have been calculated for the forming and perfecting of the feudal system. Mixed civil law is that which is plainly founded in the law of nature, but which, by adding to, or varying from, that law, gives a particular modification to things which nature had left undetermined. Of this sort are the laws of marriage, tutory, testaments, contracts, &c. which are, by the peculiar civil law of each state, clothed with proper forms, that their use may become fixed and certain to the whole community.

26. Positive or civil law may be also divided into divine and human. God himself delivered to the Jews a law, distinct from the law of nature, not only in relation to their ritual observances, but with respect to their public polity, and private right, the last of which is called the *judicial law of Moses*. Some have affirmed, that this law, being enacted by an infallible Lawgiver, ought to be copied, in so far as it goes, by every other state ; and it must be admitted,

Laws bind all subjects, whether so by birth or residence.

Laws regulate only future cases.

Permissive laws, their force.

Civil law, either merely civil as distinct from natural, or mixed.

Positive or civil law is either divine or human.

Book I.

mitted, that no part of it is contrary to the law of nature ; for God, who is the author of both, cannot contradict himself. But no positive law, let it be ever so agreeable to the law of nature, can oblige those to whom it is not directed. The ordinances of the Jewish law, in as far as they are the necessary result of reason, and so make part of the preceptive law of nature, must without doubt be binding universally ; not because God prescribed them as a rule to the Jews, but because natural law had enjoined their observance antecedently to all enactment. But whatever in that law is adapted specially to the Jewish constitution, or framed with a particular view to the genius of that people, may be disregarded by the legislature of other states, without any want of reverence to its great Author. And indeed most of the Jewish laws will be found, on strict examination, to be either wholly or in part of this last kind.

27. Among all the systems of human law which now exist, the Roman so well deserves the first place, on account of the equity of its precepts, and the justness of its reasonings, that wherever the civil law is mentioned, without the addition of any particular state, the Roman law is always understood by way of excellency, though that epithet is alike applicable to the laws of every state. Great weight therefore is given to it, not only in Scotland, (of which afterwards), but in most of the nations in Europe. In England, it is of considerable authority in the courts of chancery, admiralty, and arches ; and several axioms of their common law are borrowed from the old Roman juriconsults. This law was from an immense bulk brought down to a moderate size, and reduced into method, by the Emperor Justinian, who, in the year 528, caused compile an institute of it, under the name of the *Pandects* or *Digests* ; and immediately after an abridgment or breviary, which he called *Institutions*. In 529, he published the *Code*, or a collection of the constitutions of the Emperors his predecessors, from Adrian down to his own time ; and these, joined to such as were afterwards enacted occasionally by himself, and a few of his successors, called the *Novels*, make up the body of the Roman law. Upon the repeated inroads made into Italy soon after Justinian's death by the Goths, Lombards, and other barbarous nations, the Roman law declined fast in its authority, and the books of it either suffered by the fate of war, or lay concealed in private libraries, till towards the middle of the twelfth century, when a copy of the Pandects having been found at Amalphi, that law was again publicly taught by authority in the schools of Italy, and from thence quickly spread over all the nations of Europe.

28. Soon after the recovery of the Pandects at Amalphi, a body of law began to be composed, under the direction of the Bishop of Rome, styled the *Canon law*, from *Canon*, a rule, the name given to the ordinances of churchmen assembled in councils or synods, to distinguish them from the constitutions of temporal sovereigns. It was formed to conciliate authority to that extensive jurisdiction which the pope had usurped over the civil rights as well as the consciences of men ; and it contains rules, not only for informing the conscience, but for the fixing of private property, civil as well as ecclesiastical. It is compounded, on the one hand, of beautiful principles of equity, chiefly borrowed from the Roman law ; and, on the other, of a collection of absurd canons and rescripts, extolling church-authority above the highest secular powers. The body of the canon law consists, *first*, of the *Decretum*, a collection made by Gratian,

Roman law, its authority and history.

Canon law, consisting of the *Decretum* and *Decretalia*.

a Benedictine monk, after the middle of the twelfth century, drawn from the opinions of the fathers, popes, and church-councils, in imitation of the Roman Pandects, which were gathered from the opinions of their jurisconsults; *2dly*, The *Decretalia*, which were collected by Pope Gregory IX. near a century after, from the decretal rescripts or epistles of the popes, as Justinian's Code was from the imperial constitutions; to which decretals new collections were added by several succeeding popes. It may be observed, that when mention is made of the *Common law* in our statutes, the Roman is understood, either by itself, 1540, C. 69.; 1585, C. 18.; 1587, C. 31.; or in conjunction with the Canon law, 1540, C. 80.; 1551, C. 22. When the expression is fuller, *the Common laws of the realm*, our ancient usages are meant, whether derived from the Roman law, the feudal customs, or whatever other source, 1503, C. 79.; 1584, C. 131, &c. The epithet of *Common law* is used by English lawyers nearly in this last sense, to denote their most ancient customary law anterior to statute.

29. Positive law may be divided into public and private. The public law is that which hath more immediately in view the public weal, and the preservation and good order of society; as laws concerning the constitution of the state, the administration of the government, the police of the country, public revenues, trade and manufactures, the punishment of crimes, &c. Private law is that which is chiefly intended for ascertaining the civil rights of individuals. The private law of Scotland is to be the proper subject of this treatise; to which a general sketch of that part of the public law that relates to crimes shall be subjoined in the last title.

30. The municipal law of Scotland may be divided, after the example of the Romans, into written and unwritten. Written or statutory law is enacted by the express authority of the supreme power, and is always reduced into writing. Unwritten or customary law derives force wholly from the legislature's tacit or presumed consent; and is generally transmitted from one age to another, by oral tradition and universal usage. Where the customary law of a state is, by the sovereign's order, collected into one body to preserve its remembrance the more incorrupt, and confirmed by him, it becomes thereby the explicit enactment of the supreme power, and consequently makes part of the written law of that state. Instances of this occur in the customary laws of Normandy, Brittany, and some other provinces of France, which, after several alterations and amendments, made by commissioners appointed for that purpose by the French King, have been confirmed by the royal authority, and now make up the body of the written law of these provinces.

31. How far back statutes have been enacted in Scotland, cannot now be certainly known on account of the loss of our public records, the most valuable of which were carried off into England, first by Edward I., and afterwards by an order of Oliver Cromwell, about the middle of the 17th century. Those laws, which are said by Hector Boece, and other Scottish historians, to have been passed before the reign of Malcolm III. surnamed *Canmore*, are of suspected credit. What appears to be the only genuine remains of the statutory law of this country, hath been preserved by Sir John Skene, and published by him in the beginning of the 17th century, by licence of Parliament; *Index to unprinted acts of 1607*, NO. 31⁴.

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⁴ See this statute now printed in "The Acts of the Parliaments of Scotland," at present in course of publication, under the authority of the Commissioners on Public Records,—vol. iv. p. 378.

TITLE I.

What understood by Common law.

Positive law divided into public and private.

The Municipal law of Scotland is either statutory or consuetudinary.

Ancient statutory law of Scotland.

The statutes of Malcolm II. surnamed *Mackenneth*, which stand first in that collection, betray themselves, as the learned Sir H. Spelman observes, to be the product of a later age, by the several vocables, and titles of magistrates and public officers therein mentioned, which were not known in Scotland till after the reign of that king. Thus, our antiquary Dempster admits, that we were strangers to the title of *Baro* till the reign of Malcolm Canmore. Thus also *Seneschallus*, *Balivus*, *Coronator*, *Constabularius*, are all words of Norman original, which were not used in England before the Norman conquest, and which cannot, with any probability, be supposed to have been sooner imported into Scotland. Spelman therefore conjectures, that the name of Malcolm II. may have been erroneously transcribed by copiers for Malcolm III.

Reg. Majestatem. Doubts with regard to its original. More probable opinion that it is a Scottish performance.

32. The treatise of *Regiam Majestatem*, to which Skene's whole collection owes its title, has given rise to two questions; Whether that composition be of Scottish or of English original? and, Whether it had, at any period of time, or now hath, the authority of law? Sir Thomas Craig, in his treatise of Feus, *Lib. 1. Dieg. 8. § 11.* pronounces positively, though he speaks elsewhere with greater diffidence, that it is but a transcript of Glanville's book of the laws of England, written in the reign of Henry II., which was dressed up by a Scottish lawyer in a new form, and with such alterations as might make it pass for an institute of Scottish law. But it is the more probable opinion, that it was originally a Scottish performance, compiled at the desire of David I., as its preface bears. That a system of the laws of Scotland was compiled by the order of David, is clearly proved by an ordinance of Edward I. of England, preserved by Prynne in his collections of that king's reign, p. 1055, directing his lieutenant of Scotland to assemble the principal persons of that kingdom, to read over to them the laws of David, and to amend such of them as appeared contrary to reason. That the *Regiam Majestatem*, which, together with the *Leges Burgorum*, contained the laws of David, was the very treatise referred to in that royal ordinance, appears extremely probable, *first*, from several old manuscripts of it yet extant, one of which, Sir James Dalrymple, *Hist. Coll. p. 147.* concludes, from the handwriting and other characters, to have been written in the reign of Robert I., which could not be many years posterior to the aforesaid ordinance of Edward; *2dly*, from several references made to the laws of David, in the statutes of William, who began his reign about twelve years after the death of David, and in those of Alexander II. the son of William; which references are found in the books of the Majesty; compare *St. Gul. C. 1.* with *Reg. Maj. L. 1. C. 16.* and *Stat. Alex. II. C. 12.* with *Reg. Maj. L. 1. C. 20.* *Lastly*, It may be observed, that the acknowledged statute-book of Scotland, from its earliest period, mentions the books of the Majesty as of Scottish composition, and sometimes dignifies them with the appellation of *The King's laws*, 1425, C. 54.; 1471, C. 48.; 1487, C. 115. Lord Bankton observes on this last argument, that mention is made in 1429, C. 114. of six heads which are, by the laws of Scotland, essential to the execution of brieves, and that these are distinctly recited in *Reg. Maj. L. 1. C. 6. § 8. et seqq.*; and are to be found no where else.

Objections to this opinion considered.
1st Objection.

33. It has been objected to this opinion, That it draws after it a consequence hardly admissible, that the English law is borrowed from that of Scotland; *Spelm. Gloss. v. Lex.* But the only just consequence

sequence deducible from it is, that Glanville, the author of the English institute, happened not to write his book till after the publishing of the books of the Majesty; and that that writer extracted much from the last-mentioned treatise, which he transfused into his own. This may be true, without derogating from the antiquity of the laws of England; and considering the strong resemblance between the laws of the two kingdoms at that period, it was natural for Glanville to pick out what he thought proper for his purpose, from a treatise lately published on a similar subject: more especially if a fact be attended to, which is recorded by Hoveden and several other English historians, that Henry II., in whose reign Glanville composed his abridgment, was educated with David of Scotland, his great-uncle, till his age of sixteen, and instructed by him in matters of government.

34. It has been also objected, That the books of the Majesty, which have been in part formed upon the model of Justinian's Institutions, could not be written so early as the reign of David, who died *anno* 1154, within sixteen years after the recovery of the Pandects at Amalphi. But, *first*, we learn from Giannoni's History of Naples, *Lib.* 11. *C.* 2., that notwithstanding the destruction of the most valuable books, during the invasions into Italy by the barbarous nations after the sixth century, not only copies of the Pandects escaped from the general devastation, as appears by the frequent references made to them by Ivo of Chartres, in his epistles 46. 69, &c., but that Justinian's Institutions were also preserved in Italy by Abbot Desiderius in his library of Cassino. *2dly*, Theobald, Archbishop of Canterbury, who was consecrated, according to the most ancient English historians, *anno* 1138, near sixteen years before the death of David, brought into England the books of the Roman law soon after his consecration, *Jo. Sarisb. Polycrat. L.* 8. *C.* 22.; and the study of that law was so general in the English schools in 1149, that it was taught in them that year publicly by Rogerius Vacarius, a Lombard lawyer, to a numerous audience both of rich and poor, *Chron. Norm. inter Duchesn. Hist. Norm. script. antiq. p.* 983.

2d Objection.

35. A third objection, that the *Regiam Majestatem* hath a strain of English law and phrase running through it, though it were true, would prove no more, than that that treatise had been interpolated by transcribers. But the objection is not grounded on fact. The only two passages in the book brought to support it, are, *L.* 2. *C.* 27., which makes holding by soccage one of the Scottish feudal tenures; and *L.* 2. *C.* 51., which affirms, That by the law of Scotland, children cannot be legitimated by the subsequent marriage of the parents. As to the first, it appears by *St.* 2. *Rob.* 1. *C.* 8., that soccage was a holding then known in Scotland; and there is a charter now in the author's possession⁵, which, though it bears no date, hath the appearance of having been written above four centuries ago, of lands holden *in libero sochagio* in favour of Duncan de Strivelyn. As for the second, it is evident that the doctrine of legitimation *per subsequens matrimonium* was anciently rejected in Scotland as well as in England, not only from the *Reg. Maj. L.* 2. *C.* 51. § 1. 2., but from the old law book *De iudicibus, C.* 24., and a charter of James II. to the Earl of Caithness⁶, preserved in Hay's Vindication of Elis. More, p. 6. This last objection against the Scottish original of the *Regiam Majestatem* is ingeniously retorted against the objectors, in an argument drawn from the law of deathbed by Lord Bankton, vol. i. p. 30.

3d Objection.

Book I.

What is the authority of the *Regiam Majestatem*, *Quoniam attachiamenta*, &c.

36. The second question still remains, What authority the books of the Majesty, and the other tracts in Skene's collection, have had, or now ought to have, in the courts of Scotland? The *Regiam Majestatem* is said, by its preface, to have been written at the command of King David, and with the consent of the people and clergy; and though no confirmation by the legislature now appears, our later statutes have expressly acknowledged it for the ancient law of Scotland, *supr.* § 32. The authenticity of the Borough-laws, and of the *Assisa Regis Davidis*, which are universally agreed to have been enacted by the same David, and of the statutes of William, Alexander II. David III. and the three Roberts, have never been called in question; so that these must have had, when they were first enacted, the authority of law. The remaining tracts in that collection were either written by private hands, as *Quoniam attachiamenta*, *Iter camerarii*, &c. or by magistrates of boroughs, as *Statuta gilda*; and therefore have had at no time any proper authority. But the whole of Skene's collection, even that part of it which was originally authoritative, gradually lost its force, because not having been preserved from interpolation by any public record, the copies, in passing through different hands, had been in many places corrupted⁷. The legislature, with a view to give authenticity to such of those remains as should be found to deserve it, directed three several committees to be appointed for revising and correcting them, who were to make their report to Parliament, 1425, C. 54.; 1487, C. 115.; 1633, C. 20. But as no such revision or report appears to have been made by any of the three, and far less any ratification by parliament, it may be concluded, that none of those remains ought to be received as of proper authority in the courts of Scotland. Nevertheless they may be produced, not only for illustrating, but even in proof of our ancient customs. They are also of excellent use towards understanding the history and gradual progress of our law; and consequently may furnish a lawyer with proper arguments, where statute-law is silent, and the more modern practice doubtful.

Statute-law of Scotland consists of the Scots Acts and British statutes.

How our laws are promulgated.

37. Under statute-law, therefore, in its proper and strict sense, those acts only are included which passed in the reign of James I. of Scotland, and from thence down to the union of the two kingdoms in 1707; and such of the British statutes, enacted since the Union, as concern this part of the united kingdom. The Scottish acts were, by our most ancient usage, to be proclaimed in all the county-towns and boroughs of the kingdom, and properly notified to barons, and their tenants, at baron-courts, 1425, C. 67.; 1457, C. 89.; but after they were printed in consequence of 1540, C. 127., that custom, which was no longer necessary, fell into disuse by degrees; and at last it was enacted by 1581, C. 128., that the publication of laws at the market-cross of Edinburgh should be deemed sufficient notification, and that they should be obligatory over the whole kingdom forty days after. British statutes require no formal promulgation to make them known; either because the printing of them is truly a publication, or because every subject is, by a maxim of the English law, a party to them, as being present in parliament either by himself or his representative. But still before a British statute becomes obligatory, a reasonable time must be allowed for carrying notice of it from the parliament to their several constituents;

⁷ Wight, in his treatise on the Election Law of Scotland, says, (p. 21. note*) "Skene's edition of the old laws is not always to be trusted." He therefore quotes "from the manuscript copy presented to the Advocates' Library by the Earl of Cromarty, which is the oldest now extant, and may therefore be esteemed the freest from errors."

tuents; otherwise such statute, contrary to the common property of laws, would have a retrospect*. In the beginning of the reign of Queen Mary, the acts of the five Jameses, and her own, were, by her authority, printed from a copy subscribed by the clerk-register; and in like manner those were printed which passed in the remaining part of her reign, and in that of James VI. down to about the year 1586 or 1587, all in the black or Saxon character, from which that impression has got the name of the *Black acts*. Several statutes contained in that first edition were left out in all the later ones; most of them because they were private acts, and a few from reasons of state.

38. Sir George Mackenzie hath asserted, both in his *Institutions*, and at greater length in his *Jus Regium*, that this written law of Scotland was truly enacted by the King alone; that the parliament did no more than consent; and that therefore the Kings of Scotland had the sole right of legislation. But, 1st, His admission that the consent of parliament was required towards the passing of laws, imports an acknowledgment, that the king could not by our constitution enact laws by himself. 2^{dly}, Though no records have been preserved in Scotland, old enough to furnish materials for an account of parliaments upwards to their first institution, it may reasonably be concluded, that ever since the establishment of the Gothic polity in Europe, we have had parliaments or national assemblies, constituted with the same powers that were formerly vested in the estates of France, Poland, Spain, Sweden and Denmark, and of England under the Saxons. 3^{dly}, As far back as records have been preserved, the style of our statutes, and the forms of their enactment, prove them to have been the joint deeds of the King and the three estates. The statutes ascribed to Malcolm Mackenneth, which are admitted to be the oldest remains of the law of Scotland, appear to have been so many grants by the Barons to the King, and accepted by him, *C. 1. § 3. ; C. 2. § 1. &c.* The first words of the 1st statute of William are, *Placuit Regi et concilio suo*; and of the 9th, *Rex statuit per commune concilium*: And whoever takes the pains to turn over the other old statutes published with the books of the Majesty, and even our later acts, will find numbers of them in the same or a stronger style, *St. Alex. II. C. 1, 2. 4. ; St. Dav. II. C. 28, 29. ; 1424, C. 7. 14. 46. ; 1437, C. 2, &c.* When the lesser barons are enjoined to send commissioners to parliament from each county, 1427, *C. 102.*, power is given to those commissioners, not barely to consent, but to hear, treat, and finally to determine in all matters to be propounded there; and accordingly bills and overtures were, by the usual forms, debated, amended, and at last resolved in parliament, before the King interposed either by his assent or his negative.

39. Private

* The acts of the Scottish Parliament generally bear a date, and are understood to take effect from that period. As to British statutes, it was formerly a fixed point, that if no particular time should be fixed for their commencement, they should be held to operate from the first day of that session of Parliament in which they were made, *Fac. Coll. July 7. 1758, Robertson, Dict. p. 11280. Nov. 21. 1772, Anderson; Dict. p. 14774.* A decision on the general point was given by the House of Lords, 25th May 1772, upon the unanimous opinion of the Judges, in an appeal from the Court of Exchequer in England, *Panter and Turner versus Attorney-General*. This rule must have arisen from the mode of giving to all acts passed in one session of parliament the same date, viz. "At the Parliament begun and holden at the day of

"The rule is altered by stat. 33. Geo. III. c. 13., which appoints, that from and after 8th April 1793, the Clerk of Parliament shall indorse, in English, on every act, the time when it receives the royal assent, which is declared to be the date of its commencement, unless another is specified in the act itself.

TITLE I.

Black Acts.

Scots Statutes were the joint enactment of King and Parliament.

BOOK I.

Private acts not proper laws.

39. Private acts were nothing but grants by the parliament, or parliamentary ratifications of grants made by the crown, in favour of particular persons or corporate bodies. But none of those were proper laws. For, 1st, They required no publication. 2dly, Ratifications, by their nature, carry no new right: They barely confirm that which was formerly granted, without adding any new strength to it by their interposition. 3dly, As by the forms of parliament, no person was called as a party to the passing of an act, however deeply he might have been interested in it, private acts were carried through *periculo petentium*, and could not hurt third parties, who were not heard on their interests, according to the rule, *Res inter alios acta aliis non nocet*. They were therefore open to reduction by the court of session, 1567, C. 18. NO. 1. ; and in almost all the Scottish parliaments holden since 1606, the last act of the sessions, intituled, *Act salvo jure cujuslibet*, appears to have been enacted for the single purpose of securing third parties against the effect of private acts and ratifications.

Acts of sederunt likewise a part of the written law. Their authority.

40. The written law of Scotland consists, 2dly, Of the acts of sederunt, which are ordinances made by the court of session, for regulating the forms of proceeding to be observed in all actions or matters which may be brought before them. These are not indeed laws in the strict sense of the word, because they are not enacted by the supreme power; but their obligatory force is as strong as if they had the express sanction of parliament; for the court of session have a delegated power from the parliament, to make such statutes as they think proper for the ordering of process and the expediting of justice, 1540, C. 93. The powers committed by this statute to our supreme court are precisely limited to the forms of proceeding, which may be the reason why the parliament hath in several instances ratified acts of sederunt, where it might seem that the court had exceeded their powers, 1579, C. 75. ; 1584, C. 138, 139. ; 1621, C. 18., &c. But it must be acknowledged, that many acts of sederunt have been made on matters of right, which, without any aid from the authority of parliament, the nation hath acquiesced in universally. Such acts import no more than a public notification of what the judges apprehend to be the law of Scotland, which therefore they are to observe for the future as a rule of judgment. When an act of sederunt is confirmed by an inveterate custom and acquiescence of the community, such custom constitutes law of itself in the most proper acceptation of the words; *vid. infr.* § 43. Under the same class with the acts of sederunt, may be ranked the regulations made in the year 1695 and 1696, concerning the forms of procedure in the court of session, which are subjoined to the first volume of the printed acts of sederunt*. These were the ordinances of a commission specially authorised by 1693, C. 34. to make regulations, to be obligatory, after they should be approved by the King, as these were.

41. Sir George Mackenzie, § 7. *h. t.*, considers the Roman law as the

* An accurate and complete collection of the Acts of Sederunt of the Lords of Council and Session, from 15th January 1553 to 11th July 1790, was published under authority of the Court in 1790, by William Tait, Esq. advocate^s; and by an act on 8th March 1799, the Collectors of Decisions, appointed by the Faculty of Advocates, were allowed and authorised to publish the Acts of Sederunt subsequent to the publication in 1790, and in future.

^s The regulations 1695 and 1696, referred to in the text, will be found p. 209. *et seq.* of this collection.

TITLE I.

Roman law ;
opinion with
regard to its
authority.

the written law of Scotland⁹ ; Lord Stair, on the other hand, rejects its authority, *B. 1. Tit. 1. § 12. and 16.* ; also Craig, *De Feudis, Lib. 1. Diæg. 2. NO. 14.* Without offering any precise opinion upon this point, an observation or two drawn from our statutes may not be improper. *First*, The powers exercised, both by our sovereigns and judges, have been justified by parliament, on this single ground, That they were conformable to the Roman law. Thus, the revocations, by our kings, of deeds granted during their nonage, are expressly founded on the right competent to minors by the Roman law, 1493, *C. 51.* ; 1540, *C. 70.* ; 1587, *C. 31. vers. 9.* Thus also the trying of treason after the death of the traitor was approved by parliament on account of its conformity to the *Common law, though there was no special law, act, nor provision of the realm made thereupon*, 1540, *C. 69.* *2dly*, A special statute was judged necessary, soon after the Reformation, for abrogating such of the laws, either Civil or Canon, as were repugnant to the protestant doctrines, 1567, *C. 31.* ; and the abrogation of a law is generally understood to import, that the law abrogated had formerly been in force. These observations prove at least, that great weight is to be laid on the Roman law in all cases not fixed by statute or custom, and in which the genius of our law will suffer us to apply it ; and as we have few statutes in the matter of contracts, transactions, restitutions, servitudes, tutories and obligations, the knowledge of it must be singularly useful in determining controversies arising from those heads of the law. Yet where any rule of the Roman law appears to have been founded on a subtilty peculiar to their system, it were absurd to pay the smallest regard to it*.

42. The Canon law must have been at least of as great authority in Scotland as the Roman before the Reformation. That law had originally no proper authority, in instances regarding civil property, unless where the Pope was temporal sovereign. Therefore all other nations, even those who acknowledged the see of Rome, were at liberty either to reject it entirely, or to receive it with such limitations as they judged expedient. In the course of time, however, it became the law of Scotland in most articles of private right, civil as well as ecclesiastical. This proceeded from the extensive jurisdiction of the clergy ; who, to make their court the more effectually to the Roman Pontiff, used that law as the rule of their judgment. The statute last cited, 1567, abundantly proves the regard that had been paid to it in times of popery ; but since the Reformation it has declined fast in its authority, so that it is now little respected, except in questions of tithes, patronages, and a few articles more of ecclesiastical right, where the canons are consistent with Protestant principles.

Authority of
the Canon law
very limited.

43. Unwritten law is that which, without any express enactment by the supreme power, derives force from its tacit consent ; which consent is presumed from the inveterate or immemorial usage of

Unwritten or
consuetudinary
law, its autho-
rity.

E

* See some very excellent observations on the authority of the Roman law in Scotland, in Professor Hume's work on the Description and Punishment of Crimes. *Introd. p. 57. et. seq.* (2d edit. vol. 1. p. 15. *et. seq.*)

⁹ Sir George Mackenzie, *in loc. cit.* only says, that the Roman law "has great influence in Scotland, except where our own express laws or customs have receded from it,"—a position which does not seem substantially to differ from what is also laid down, both by Stair and Craig, and our Author himself. Instead of ranking it, again, as part of our "written law," this last seems to be expressly confined by him, (§ 9. *h. t.*) 1st, to "our statutory law;" 2d, "the Acts of Sederunt;" and 3d, the books of "*Regiam Majestatem*," &c.

Book I.

the community. If the community be in the form of a republic, it can make no difference, whether the will of the people be declared by formal enactment, or by acts of approbation, *L. 32. § 1. De legib.*; and even in absolute monarchies, the sovereign is presumed to acquiesce in what has been long practised in his dominions, if he do not, by some positive declaration, testify his dislike, or put a stop to it. The authority therefore of customary law is not grounded on any presumption, that what has been long observed must be just, as some lawyers choose to speak; for that presumption is alike applicable to written and unwritten law: but both one and the other derive their coercive force from this, that they are the ordinances, either express or implied, of the supreme power.

Consuetudinary law sometimes requires evidence to prove the custom.

44. The most essential articles of our customary law are so interwoven with our constitution, that they are notorious, and so require no evidence to prove them; as, the laws of primogeniture and death-bed, the order of legal succession, the legitim of children, the husband's courtesy, and the widow's terce: But where any later usage, which has been gradually gathering strength, is pleaded upon as law, the antiquity and universality of that usage must be proved to the judge, as any other matter of fact; for all customary law is founded on long usage, which is fact. No precise time or number of facts is requisite for constituting custom; because some things require in their nature longer time, and a greater frequency of acts to establish them, than others. Neither is it necessary for this purpose, as some writers have affirmed, that the custom be declared by the previous sentence of a judge: For no court of justice can constitute law; and therefore any sentence, declaring the customary law, is of itself a clear proof that the law was constituted before.

Custom may interpret and even repeal statutes; but non-usage does not constitute custom.

45. Custom, as it is equally founded in the will of the lawgiver with written law, hath the same effects. Hence, as one statute may be explained by another, it may be also explained by the uniform practice of the community; for which reason custom is said, *L. 37. De legib.* to be the surest interpreter of law. Hence also, as a posterior statute may repeal or derogate from a prior, so a posterior custom may repeal or derogate from a prior statute, even though that prior statute should contain a clause forbidding all usages that might tend to weaken it: For the contrary immemorial custom sufficiently presumes the will of the community to alter the law in all its clauses, and particularly in that which was intended to secure it against alteration; and this presumed will of the people operates as strongly as their express declaration. No statute can however be repealed by mere non-usage or neglect of the law, though for the greatest length of time; for non-usage is but a negative, which cannot constitute custom: There must be some positive act that may discover the intention of the community to repeal it. Where the usage contrary to a statute hath not yet acquired strength enough to abrogate it, the King and council may by proclamation prohibit the farther observance of such usage, and thereby restore the statute to its first vigour. This power in custom to derogate from prior statutes, has been confined by most writers to those concerning private right; and it hath been adjudged once and again, that laws which regard the public policy cannot fall into disuse by the longest contrary usage¹⁰, *Jan. 27. 1681, Jack, (Dict. p. 1838), Feb. 1729, Smollet, (not reported.*

¹⁰ The statute 1592, c. 156, which enacts, that "in time coming there shall be no exercise of craftes in the sub-urbes adjacent to burrowes," found to be in desuetude. *Paterson, 6th December 1810, Fac. Coll.*

ed.) But the last of these decisions, by which the election of a provost had been set aside, because he did not reside in the borough, according to the direction of our old statutes, was reversed upon appeal, *Feb.* 19. 1730*: And it now appears to be the opinion of our supreme court, that public laws concerning the elections of magistrates and counsellors of boroughs, may fall into disuse; and that the sets of the several boroughs, established and confirmed by the general convention of boroughs, ought to be the rule in determining such questions, unless where the sets are altered by a contrary immemorial custom. See *Fac. Coll.* ii. 7. (*Dunbar* against *Macleod*, *DICT.* p. 1855¹².)

46. Our customary law is either universal, which obtains over the whole kingdom, or local, which prevails only in particular counties or boroughs. There is hardly an instance of a local custom in any county, but in the udal right proper to the stewardry of Orkney and Zetland, of which afterwards, *B. 2. Tit. 3. § 18.* Certain usages are practised in particular boroughs, relating to the entry of heirs, resignations, warnings, &c. which make part of the customary law of those boroughs, but have no authority elsewhere¹³.

Consuetudinary law, universal or local.

47. An

* The particulars taken from the appeal cases, will be found in the Dictionary of Decisions, App. II. *voce* DESUETUDE¹¹.

¹¹ It is believed Mr Morison, when preparing the last edition of this work, intended to publish some such Appendix to his Dictionary as is here referred to. That intention has never been carried into effect: but a short notice of the case of Smollet, as founded on in the several reports of the subsequent case of Wick, is given, *DICT.* p. 1895. From a mistake as to the date of the judgment in the House of Lords, (which is there stated to have been in 1735, instead of 1730,) Mr Morison had “not been able to find this case, either in the Journals of the House of Lords, or in the appealed cases sent to the Advocates’ Library.” It is, however, under the proper date, to be found in both.

The point decided in Smollet’s case is now perfectly fixed, *Anderson and other burgesses of Wick v. the Magistrates*, 17th February 1749, (*DICT.* p. 1842); *Trades of Burntisland v. the Magistrates*, 5th December 1752, (*ELCHIES*, NO. 37. Burgh Royal);—*Bell’s Election Law*, p. 483.

¹² There can be no doubt, both that the “public laws” concerning burgh elections may fall into disuse, and that the “sets of the several boroughs” may be altered by a contrary immemorial custom. But there would seem to be a very material distinction between the two cases. The *set* of a burgh may be controlled and altered by a sufficient continuance of contrary usage within that burgh alone. But the *public laws*, enacted with reference to the whole burghs of Scotland, can go into desuetude, only by a contrary usage co-extensive with the authority originally inherent in the public laws themselves. A public statute cannot be in desuetude in one burgh, and in active operation in another, at one and the same time. It must exist and be in full force all over the kingdom, or it cannot exist as a statute at all. The case of Smollet affords an illustration of this; for the decision there, as to the non-residence of the provost, appears, from the appeal cases, to have proceeded, not on the *peculiar* practice of the individual burgh of Dumbarton, but on the broader ground of a *general* disuse,—that the “statutes are fallen into desuetude, and a contrary custom has prevailed in this *and most other burghs in Scotland*,” (*Appeal Case for Appellant*.) Accordingly, in the case of Wick, and in all the other subsequent cases, it has been held as *general* law for all the burghs, that the provost need not reside; and this without any inquiry into the particular practice of these burghs.

It is presumed, that so far as public laws are not cut down by a desuetude of this general and comprehensive character, they cannot be affected by the practice, whatever it may be, of only one or two individual burghs. For example, could it be held, that the practice in one individual burgh to elect non-resident persons for its *Bailies*, would be sufficient, in the face of the statutes, and of an universal usage to the contrary, founded upon these statutes, in all the other burghs, to sanction such irregularity even in the burgh where the illegal practice had been introduced?

¹³ Among other decisions, more or less connected with the subject of consuetudinary law, discussed in the text, the following may be noticed.

A court possessed of jurisdiction over two neighbouring, but independent territories, may, in respect of immemorial consuetude, while sitting in the one territory, exercise jurisdiction over an inhabitant of the other, notwithstanding a declinature; *Dowie*, 30th May 1817, *Fac. Coll.*

Book I.

Decisions, what is their force and authority.

47. An uniform series of decisions of the court of session, *i. e.* of their judgments on particular points, either of right or of form, brought before them by litigants, and anciently called *Practicks*, is by *Mackenzie*, § 10. *h. t.*, accounted part of our customary law. Thus far may be admitted, *1st*, That their more ancient decisions, from which it appears that any particular usage had then acquired the force of law, may be properly brought in proof of that custom, if it have not afterwards lost its authority, by an immemorial and universal usage to the contrary; and, *2dly*, That great weight is to be laid on their later decisions, where they continue for a reasonable time uniform, upon points that appear doubtful, *L. 38. De legib.* But they have no proper authority in similar cases; because the tacit consent, on which unwritten law is founded, cannot be inferred from the judicial proceedings of any court of law, however distinguished by dignity or character; and judgments ought not to be pronounced by examples or precedents, *L. 13. C. De sent. et int.* Decisions, therefore, though they bind the parties litigating, create no obligation on the judges to follow in the same tract, if it shall appear to them contrary to law. It is however certain, that they are frequently the occasion of establishing usages, which, after they have gathered force by a sufficient length of time, must, from the tacit consent of the state, make part of our unwritten law. What has been said of decisions of the Court of Session, is also applicable to the judgments pronounced upon appeal by the House of Lords: For in these that august court acts in the character of judges, not of lawgivers; and consequently their judgments, though they are final as to the parties in the appeal, cannot introduce any general rule which shall be binding either on themselves or inferior courts. Nevertheless, where a similar judgment is repeated in this court of the last resort, it ought to have the strongest influence on the determinations of inferior courts.

48. To conclude this account of the municipal law of Scotland, it must be observed, that notwithstanding the treaty of union in 1707, by which the kingdoms of England and Scotland were made one nation,

All the laws regarding private right are reserved entire by the Union.

The clerk of a borough of regality cannot acquire a right by custom to act as notary, in taking the infeftments of the vassals of the borough; *Magistrates of Edinburgh*, 2d Feb. 1814, *Fac. Coll.*

Magistrates and council are not entitled to elect their chamberlain *ad vitam aut culpam*, contrary to former practice; *Turnbull*, 24th January 1812, *Fac. Coll.*

The Court will not review or alter an immemorially established mode of assessment of a town-tax, on an allegation, that, as a general rule of taxation, it is unequal and unjust in its operations, while the party complaining admits, that the rule of assessment has been applied to him in the same manner as to the other inhabitants; *Gibsons*, *Thomson and Craig*, 13th Nov. 1810, *Fac. Coll.*

Magistrates are entitled to levy customs according to long usage, though higher than were allowed by a statute, in 1593, introducing the right to levy; but additional duties laid on by the magistrates *de recenti* were set aside; *Wauchope*, 28th Jan. 1800, *Fac. Coll.*

Customs cannot be increased or extended by magistrates without an act of Parliament; *Raitt, &c. v. Magistrates of Aberdeen*, 21st November 1804; *Reid v. Magistrates of Edinburgh*, 6th Dec. 1810, *Fac. Coll.*

In a meeting of heritors and elders, the preses is not entitled both to a deliberative and casting vote; *Campbell*, 4th March 1813, *Fac. Coll.* Our law, on this point, appears to agree with the law of England, where it is held, that "a casting vote neither exists in corporations nor elsewhere, unless it is expressly given by statute or charter, or, what is equivalent, exists by immemorial usage;" 1. *Blackst. Commentaries*, 181. *in n.*;—6. *T. R.* 792.;—*Tomlin's Law Dictionary*, Parliament vii.

In general, where the management of a mortified fund is in the heritors, minister, and kirk-session of a parish, each member of the kirk-session is entitled to vote *Earl of Galloway*, 22d February 1810, *Fac. Coll.* But otherwise, where there has been a long unvaried usage to the contrary; *Alexander Leslie, &c.* 9th June 1814, *Fac. Coll.*

nation, under one king and one parliament, all the laws of Scotland concerning private right, whether statutory or customary, are reserved entire, not to suffer any alteration, but for the evident utility of the subject.

49. A statute may be divided into the rubric, the preamble, and the statutory part. The rubric, *i. e.* the title, is so called, because it was written anciently in red letters. Where the title of a statute is either framed by the legislature itself, or hath received its tacit approbation in any succeeding enactment, it ought to be accounted part of the statute; and of course an argument may be properly drawn, in that case, *a rubro ad nigrum*, from the title to the act itself: But as the rubrics of most of the Scottish acts were framed *ex ingenio* of the clerk-register, great caution is to be used in applying this rule to practice, *Mack. Obs. on 1424, C. 23*. The narrative or preamble is that part of an act which recites the inconveniences that had attended the former law, and the reasons of a new enactment. Though the consideration of these may enable a judge to discover the general intention of the statute, yet if he make use of the preamble for fixing its true latitude and extent, he will probably be misled; for most preambles either fall short of the mark or go beyond it. Sometimes a preamble selects two or three of the most specious cases for justifying the enactment, though it be meant to comprise under the act others that are not specially mentioned. On the contrary, it may happen, that a law ought to receive a strict interpretation, though the lawgiver hath not thought fit to assign any reason in the preamble for limiting it, *Bacon, De augm. scien. Lib. 8. C. 3. aphor. 70*. What therefore is to be chiefly regarded in the interpretation of a statute is the statutory part, or the enacting words.

50. On this head it may be premised, *first*, That statutes can in no case be explained into a sense which infers injustice or absurdity¹⁴, or which, if admitted, would render them of no effect; for laws enacted by the wisdom of a nation must be presumed to be agreeable to the immutable laws of nature, consistent in themselves, and made for some salutary purpose, *L. 19. De legib.* *2dly*, That properly there is place for interpretation with regard to those statutes only, the words of which are either obscure, or admit of two different senses, *arg. L. 25. § 1. De legat.* *3dly*, Where the words of a statute are incapable of a double meaning, they must be explained in that only sense which they can bear, whatever hardship this may draw after it, *L. 12. § 1. Qui et a quib.* By the precise words in which the statute is conceived, every interpretation is excluded, except that which necessarily arises from the words themselves; and a judge who should, under the pretence of equity, explain a law in a sense inconsistent with the words, would assume the character of a lawgiver rather than that of a judge.

51. The interpretation of laws ought not to depend on critical learning, or the subtile distinctions of schoolmen: For they are directed to the whole body of the people; and therefore ought to be construed in that sense which the words most obviously suggest to the understanding, *L. 67. De reg. jur.*; otherwise the lower part of

TITLE I.

Statute consists of the rubric, preamble, and statutory part.

Statutes, how to be interpreted;

Not with critical subtilty, but according to their most obvious meaning.

¹⁴ As to the extent in which this holds, *vide supra* (p. 2. Note 2.) Indeed, that the rule here laid down can have no application to the case, where a statute, (no matter how unjust or absurd its enactments,) is clearly and unequivocally expressed, appears evident, both from the other rules of interpretation immediately subjoined, and from the civil law text (*L. 19. De legib.*) on which the authority of this *first* rule itself is rested:—" *In ambigua voce legis, ea potius est accipienda significatio, quæ vitio caret: præsertim cum etiam voluntas legis ex hoc colligi possit.*"

Book I.

mankind would be obliged by laws, which, for want of acquired parts, they are not able to comprehend. As a consequence of this, no statute ought to be explained figuratively, where the proper meaning of the words is as commodious, and equally suited to its subject. This rule holds more especially, where the statute treats of matters concerning which persons do not usually advise with lawyers, but trust to their own judgment; for there the lawgiver is presumed to speak *ad eaptum vulgi*, in a popular style, *Bacon, ibid. aphor. 68.* But where any term of law which hath a known legal signification occurs in a statute, it is to be interpreted, not according to the popular use of the word, but in its legal sense: for lawgivers, when they make use of technical words, are presumed to enact in the style of law.

They may be explained from the purview, context or collateral circumstances.

52. Where the words of a statute are dark, the obscurity may be removed, and the true meaning of the law discovered, by comparing them with other parts of the same statute, where the lawgiver hath expressed his mind more clearly. It is therefore recommended to judges, *L. 24. De legib.*, to have the whole tenor of the law under view, and not to cull out detached words or sentences from it, which may pervert its true meaning. Former statutes also are of considerable use in interpretation; for posterior laws ought, in doubtful articles, to be explained most agreeably to former enactments on the same subject, *L. 28. De legib.* If there be none, the usage of our own country, and the laws even of neighbouring kingdoms, may throw light on the difficulty. *Lastly*, Doubtful laws ought to receive that interpretation which suits best with the intention of the lawgiver, *L. 17, 18. ibid.* Indeed to this, every rule of interpretation delivered in systems may be reduced; for they are all drawn, either more immediately or more remotely from his presumed will. Where, therefore, the strict letter seems contrary to the spirit of law, or to equity, judges ought not to regard the proper or received signification of the words, so much as that meaning which appears most consonant to the design of the law.

When their interpretation should be ample, and when strict.

53. It may happen, that though the words of a law are plain, yet they are at the same time so general, as to comprehend certain particulars, which it was not meant should fall under it. At other times, the expression may appear confined to particular persons or things, when yet it was designed that it should reach to others not specially mentioned. Human knowledge being confined within so narrow limits, it is impossible to fix with precision all possible cases to which laws ought or ought not to be applied. The most perfect system of laws, therefore, must be subject to an equitable interpretation; sometimes ample, so as to give the words of a statute the whole extent of which they are capable, where extension is not plainly excluded; and sometimes restrained, beyond what the true propriety of them admits. A strict interpretation is to be applied to correctory statutes, which repeal former laws or customs; for laws, after they have once taken root in a state, become in some degree part of the constitution, *Bacon, aphor. 14.*; and therefore, the wisest lawgivers are extremely backward to abrogate laws which have been in long observance, *L. 2. De const. princ.* Under this head may be reckoned laws which tend to deviate from the general frame and structure of our constitution, or from the general rules of law, though they should not import the repeal of any statute, *L. 14. De legib.*; yet where a statute, correctory of a former, is itself corrected by a new law, the last ought to be liberally interpreted; because, though it alters a prior law, it does not derogate from our most ancient laws, but

but, on the contrary, restores them to use. A statute may be repealed, not only by an express repealing clause, but by any new enactment that is plainly irreconcilable with the former; for two contradictory laws cannot subsist in force at the same time.

54. A statute which is made on occasion of particular exigencies in a kingdom, ought not to be extended to omitted cases, however similar they may be to those specified in it, after the cause is removed which gave rise to the law. It is enough if such a law can afterwards support itself in the cases that it expressly provides for, *Bacon, aphor. 13.* Laws which establish the necessity of certain solemnities to deeds, must be strictly interpreted; so that such solemnities may not be supplied by equivalents. Solemnities lose their nature when they are not performed specifically: There is not, therefore, the least latitude to be allowed in substituting other forms in their place, *Bacon, aphor. 19.* Where a statute specially enumerates a certain number of cases to which it is to be applied, we must be careful not to extend it to others: For as an exception made to a law, adds strength to the law in the cases not excepted; so the enumeration of particular cases in which the law is to obtain, takes off its force as to the cases not enumerated: But where the law is more concise, without descending to particulars, there is the less hazard in extending it to similar cases, *Bacon, aphor. 17.* A law, though expressed in the most general terms, ought not to be extended to any case to which the reason inductive of the law is in no degree applicable, though it should be included in the enacting words; an instance of which occurs in *L. 1. § 1.* compared with *§ 6. De ædilit. ed.* But this rule fails, where the law is so expressed, that the lawgiver appears to have intended that it should reach to every case that falls under the natural signification of the words.

55. Laws which carry a dispensation or privilege to particular persons or societies, receive a strict interpretation; because, though they are profitable to the grantee, they derogate from the general law, and most commonly imply a burden upon the rest of the community; for which reason they reach no farther than to the person or society privileged, *L. 1. § 2. De const. princ.* But privileges which draw no consequential prejudice after them to others, must be largely interpreted for the grantees, agreeably to that munificence which is natural to the supreme power, *L. 3. De const. princ.* At no rate can a privilege be wrested to the hurt of those in whose behalf it was granted, *arg. L. 25. De legib.* Strict interpretation is also to be applied to laws which enact heavy penalties; for it is inhuman to wrest or torture laws to the distressing of society, *Bacon, aphor. 13.*—and to those which restrain the natural liberty of mankind; for every restraint upon liberty implies a burden, and so is unfavourable. Lastly, Customary law is strictly interpreted; for as its only foundation is usage, which consists in fact, it can go no farther than the particular usage has gone.

56. All statutes which carry in them no characters that seem to require a limited interpretation, may be extended to similar and omitted cases; for as the reason of the law is truly the will of the lawgiver, therefore in every case where the reason is the same, the law ought also to be the same, *L. 12. De legib.; L. 32. pr. Ad leg. Aquil.* This holds more especially in statutes which are enacted concerning matters specially favoured by the law, *ex. gr.* in acts for the encouragement of trade, or of any undertaking profitable to the country, for making effectual the wills of dying persons, for restraining fraud, and for the security of creditors. Marriage also, and the liberty

Temporary statutes, or such as enact solemnities, or regard only particular cases, are strictly interpreted.

Privileges, penal statutes and customary laws, are strictly interpreted.

What statutes admit a more liberal interpretation.

Book I.

When statutes may be extended to similar cases.

Other rules for the interpretation of statutes.

Nature and effect of prohibitory statutes. What is prohibited is not necessarily annulled.

berty of the subject, are favourites of the law. All enactments made for these and the like purposes, if they are defective in the expression, ought to be extended by a liberal interpretation, *L. 13. De legib.*; and they are generally called by doctors *favourable laws*.

57. In the extension of favourable statutes to similar cases, care must be taken not to give scope to the imagination in discovering remote resemblances. The extension must be limited to the cases immediately similar to those expressed in the law; for if the liberty be taken of building one consequence on another, cases may be at last included quite dissimilar to those which are specified, *Bacon, aphor. 16*. No statute, let it be ever so favourable, ought to be extended to a case which seems from circumstances to have been industriously omitted by the legislature, however similar that case may be to those mentioned; agreeably to a rule of the doctors, which, though couched in improper words, has a just meaning, *Casus omissus pro omisso habendus est*. On the other hand, all statutes, however unfavourable, must receive that interpretation which is necessary to give them effect. Hence, where a statute prohibits an act, it implies a prohibition of whatever necessarily produces that act; for every one truly transgresses the law, who does what is plainly intended should not be done, though it be not expressly forbidden, *L. 29, 30. De legib.* But there is no such necessity of extending a statute of strict interpretation to *similar* cases; for though it should be explained so as to exclude these, it may have its full effect as to the cases expressly provided for. Yet sometimes an unfavourable law may be extended to such *similar* cases as did not exist at the time of passing it; because it was not in the lawgiver's power, though he had designed it, to provide for cases which had not then emerged, and were so many *non entia* at the time of the enactment, *Bacon, aphor. 20*.

58. Where a statute, without any intention of repealing a former, contains a clause derogating from it, so that in certain articles both laws cannot be observed or complied with in their full extent, the law which is most essential to the commonwealth ought to be preferred to the other; the law which forbids or commands, to that which is barely permissive; the law guarded with a heavier penalty, to that which inflicts a slighter or none; the law which descends to particulars, to one delivered in general terms, *L. 80. De reg. jur.*; the law which requires immediate obedience, to that which may be complied with afterwards. These, with many other rules laid down for interpreting laws by Tully, *De invent. L. 2. § 49.*, have been commented on at large by Grotius, Puffendorf, and others. They are frequently, without doubt, misapplied from inattention or prejudice; but he bids the fairest for a just interpretation, who keeps constantly in view the mischiefs or defects in the laws formerly enacted on the same subject, the remedies which the statute has provided to cure them, how far these remedies are proper, and what sense appears most congruous to its subject-matter, and most agreeable to equity.

59. This title may be concluded with an observation or two concerning the nature and effects of prohibitory statutes. The Roman law is express, that all bargains and covenants entered into in contradiction to a statute prohibiting them, are null, *L. 5. C. De legib.* But this doctrine, if it be not properly limited, appears not to be founded in the nature or reason of things. To forbid an act, and to destroy its effect when done, are in themselves quite different. A simple prohibition is intended merely to lay a moral obligation upon

upon persons, not to do what is forbidden ; but does not point out the operation of the law in respect of the action prohibited. Thus, though natural law forbids the giving of a subject to one which hath been before promised to another ; yet where it is so given, in breach of the anterior promise, the act is valid ; because the law does not, with the prohibition, take away the power of giving ; and this holds also in human or positive prohibitory laws, according to Grotius, *Lib. 2. C. 5. § 16.* Some lawyers, though they reject the Roman doctrine in laws which have a penalty annexed to them, admit it in such as have none ; because if acts done in breach of these be not void, such laws must be without a sanction. But it has been observed, *supr. § 5.*, that the breach of every law is an offence which subjects the offender to punishment. What words in a law are necessary for annulling acts that are done in breach of it, can hardly be comprehended under precise rules. In general, a statute, where it prohibits, not only the act, but the obligations resulting from, or the effects consequent on it, must be construed to annul : Or where the law enacts, that it shall not be in one's power to do a thing, the act, if done, must necessarily be void ; because the very right which the person had to do it, is taken from him.

60. Where a prohibitory law disables a person from acting, the disability, if it be imposed merely in behalf of a third party, may be taken off by the consent of that party, since every one has the power of renouncing a benefit introduced in his own favour, *L. 29. C. De pact.* Thus, though a father is disabled by the law from disposing of his personal estate to strangers with a fraudulent intention to disappoint his children of their legitim ; yet the renunciation by the children of that claim after their perfect age, is sufficient to support the father's act, which would otherwise have been of no force. In matters, however, which regard the public utility of the state, the consent or renunciation of the person immediately interested is void, as contrary to the common interest. In such cases, the authority of the law is stronger than the agreement of the private parties ; and therefore, public statutes must have their effect, independent of the will or pactions of private men, *L. 38. De pact. ; L. 45. § 1. De reg. jur.*

Whether the benefit of prohibitory laws may be renounced.

TIT. II.

Of Jurisdiction and Judges in general.

THE objects of law, or the matters of which it treats, are three : *First*, Persons ; *2dly*, Things, or rights which persons are capable of enjoying ; *3dly*, Actions, by which the persons entitled to those rights make them effectual. It is not the purpose of this treatise to explain such divisions of persons as relate chiefly to the *public* law. The rights competent to private persons cannot be distinctly understood, without a previous explication of the powers of judges, by whom all questions of private right must be decided, and of the just extent and limits of their authority. In order to this, it is necessary to premise some account of the general nature of jurisdiction, with which every judge is invested, either in a higher or in a lower degree.

The objects of law are Persons, Things, and Actions.

2. Jurisdiction is a power conferred on a judge or magistrate, to
VOL. I. G take

BOOK I.

Essence and nature of jurisdiction.

take cognisance of, and determine, debateable questions, according to law, and to carry his sentences into execution. This power in judges of executing their sentences in civil matters, was, by the Roman lawyers, called *imperium mixtum*, L. 3. *De jurisd.*, in opposition to the right of executing criminal sentences, which was styled *imperium merum*, or *jus gladii*. And because no jurisdiction could subsist without *imperium mixtum*, it is said by them *inhæerere jurisdictioni*. The Romans had certain judges whom they styled *judices pedanei*, who were authorised by the Prætor to hear and decide in a variety of causes; but without the right of execution, which was reserved to the Prætor himself. Arbiters had a similar power of pronouncing sentences in civil matters referred to them, but not of carrying them into execution. The law of Scotland is the same with that of Rome, in regard to arbiters; but there is perhaps no instance in our law of persons named by statute, merely to exercise certain judicial acts, without a power of execution, except bishops, whose powers are now devolved on presbyteries. These were directed by 1572, C. 48. to design or mark out proper manses and glebes for ministers. Their powers go no farther than designation: If the possessor of the ground marked out refuse to give up the possession to the minister, the execution is committed to the supreme civil court, by whose authority letters issue from the signet for that purpose.

It flows from the sovereign power. Territory of a judge.

3. Doubtless the supreme power is, in the general case, the fountain of jurisdiction; for he who has the right of enacting laws, ought also to have the right of erecting courts, and appointing magistrates for applying those laws to particular cases, L. unic. *Ad leg. Jul. de amb. pr.* But by the Gothic or feudal plan, which prevailed almost universally in Europe upon the decline of the Roman empire, kings, though they had not the sole right of legislation, became the supreme feudal lords of all the lands within their dominions, and had also the executive power of the state committed to them. Under these two characters, our sovereigns were vested with the sole right of jurisdiction; in consequence of which they communicated judicial powers to others, sometimes along with a grant of lands, and sometimes without it, in such degree and to such extent as they thought expedient. The tract of ground, or district, within which a judge, thus constituted, has a right of jurisdiction over the persons and estates of the inhabitants, is called his *territory*. As his whole powers are confined to the precise limits of that district, every act of jurisdiction exercised by him beyond his territory is null; not only his judicial proceedings before, or at giving judgment, but those acts by which his sentence is to be made effectual, L. 20. *De jurisd.* Thus, an arrestment executed without the territory of the judge who granted the warrant, was declared null, though he in whose hands the arrestment was used had his residence within the territory, Dec. 5. 1671, *Millar*, (Dict. p. 7293.)

Jurisdiction either voluntary or contentious.

4. Jurisdiction hath suffered various divisions, which have some relation to the usage of Scotland. The Romans divided it into voluntary and contentious. Voluntary was that which was exercised in matters that admitted of no opposition. Contentious had place in all questions truly debateable, which were in their nature capable of receiving a judicial discussion. A decree, therefore, upon a point which might have been the subject of dispute, though in fact pronounced in absence of, or without opposition from the defender, was *jurisdictionis contentiosæ*. The essential differences between the

TITLE II.


two were, that voluntary jurisdiction might be exercised by any judge, and upon any day, and in any place; whereas acts of contentious jurisdiction must have been performed *pro tribunali*, or in court, and upon a lawful day, and by that judge alone who was competent to the cause. The judicial ratifications of women clothed with husbands may be accounted *voluntariæ jurisdictionis* by the law of Scotland; for they may be proceeded in by any judge, even *extra territorium*, *Fount. Feb. 3. 1688, Cochran*, (Dict. p. 7294.) Brieves of tutory, and general services of heirs, have this character of voluntary jurisdiction, that they may be directed to any judge, even to one within whose territory neither the minor nor the deceased had ever resided. The registration of deeds is, by some writers, considered as an act of jurisdiction; because, though in that step there is neither any real interposition of the judge, nor appearance of the party, every extract in its recital contains both. If it is to be accounted an act of jurisdiction, it seems to partake of the nature of both kinds. It may be accounted voluntary, in so far as the judicial sentence prefixed to the extract is a mere *factio juris*, and the registration admits of no dispute, but passes of course. On the other hand, the prohibition of 1685, *C. 38.*, that no clerk of an inferior court shall register any writing, either for conservation, or execution against a party dwelling without the judge's jurisdiction, gives registration a nearer resemblance to the nature of contentious jurisdiction.

5. Jurisdiction is either civil or criminal. By the first, questions of private right are heard and determined: by the other, crimes are tried and punished. It is also divided into superior, inferior, and mixed. That jurisdiction is supreme from which there lies no appeal to an higher court. Though the British house of Lords is, since the union of the two kingdoms, our only supreme court, in the strictest acceptation of that word, in all civil and revenue causes, yet the courts of session and exchequer may be still called supreme, with respect to those causes in a larger sense; as their jurisdiction is universal over the whole kingdom; as the sentences of all the inferior courts of Scotland are subject to the review of one or other of them, unless where special statute interposes; and as their sentences cannot be brought under review by any court proper to Scotland; nor indeed by any *original* court; for the house of Lords have no original jurisdiction in questions of civil right. Whether our supreme criminal court of justiciary be entitled to that epithet in its highest sense, shall be afterwards considered, *Tit. 3. § 24.*

6. Inferior judges are those whose sentences are subject to the review of one or other of our supreme courts, and whose jurisdiction is confined to a particular county, borough, or other territory, *ex. gr.* sheriffs, justices of the peace, magistrates of boroughs, inferior admirals and commissaries, and barons. Mixed jurisdiction participates of the nature both of the supreme and inferior. Thus the judge of the high court of admiralty, and the commissaries of Edinburgh, have an universal jurisdiction over Scotland, and may review the decrees of inferior admirals and commissaries: But because their own decrees are subject to the review of the court of session or justiciary, they are in that respect inferior courts. Thus also justices of the peace, when sitting in their quarter-sessions, have a power of reviewing the decrees pronounced in civil causes by themselves in their particular or common sessions; but their decrees,
even

Division of jurisdiction into civil and criminal, and into superior, inferior, and mixed. What courts are supreme.

Inferior courts, and those that partake of mixed jurisdiction.

Book I.

even in their quarter-sessions, are, in the general case at least, subject to the review of the court of session. It would seem that, by the Roman law, none but the *magistratus majores*, or supreme courts, had a power of reviewing their own definitive judgments, *L. 16. § fin. De minor.*; *L. 17. eod. tit.* And though by our customs several inferior judges, as sheriff-deputes, commissaries of Edinburgh, and bailies of boroughs, may review interlocutory judgments pronounced by themselves, till decree be extracted in the cause; yet no inferior court has an implied right of reviewing any definitive sentence of its own, so as, without special statutory powers, to suspend or set it aside, after it hath, by the clerk's giving forth an extract, become a decree. From that period, the judge's right of cognisance ceaseth, *L. 55. De re jud.*; *Gosf. Jan. 26. 1677, Cowan, (Dict. p. 7486.)*; whereas our supreme civil court can review, not only the decrees of inferior judges, but their own.

New created jurisdiction, when privative, and when only cumulative.

7. Where a new civil jurisdiction is created by statute, with a power to the new erected court of judging in special matters, it is not understood to be exclusive of the judge formerly competent to that species of causes, unless the statute constituting the court expressly declare, that the causes therein specified shall be discussed by that court, and no other. In like manner, in questions where the cognisance naturally belongs to the ordinary courts, a jurisdiction granted to another court to judge in certain of these causes, will not easily be presumed privative, but be considered barely as an option given to the party aggrieved to apply for redress to either of the two courts at his pleasure. An instance of this occurs in the late statute conferring a new jurisdiction on the circuit-court, of which below, *Tit. 3. § 28.* No encroachment on the jurisdiction of the established judges is, *in dubio*, to be presumed: It is therefore a never-failing rule in all new jurisdictions, That the limitation under which the jurisdiction is granted, is to be most amply interpreted, so as to import a denial of every branch of jurisdiction beyond those limits. Hence also such new jurisdiction ought to be accounted subordinate; and consequently its sentences are to be subjected to the review of that court which the law itself hath declared to be supreme in all civil causes. The same general rule holds in criminal jurisdiction: But where a fact, not criminal of its own nature, is declared a crime by statute, and made cognisable either by a new-erected court, or by one already known in our law, it may be doubted, whether the court established by statute for such trials has not the sole cognisance of them, exclusive of the court of justiciary, as the crime is merely statutory. See *Hist. Law Tr. Tit. Courts.* Yet thus far there can be no doubt, that if in questions of public police, of which the ordinary courts never had the cognisance, judicial powers shall be conferred upon a newly-erected court, no other can interfere with or control them; because the jurisdiction itself being wholly a creature of the law conferring it, can be exercised only by those to whom the law hath made over the grant. It arises from the same legal presumption against the extension of jurisdictions, that British statutes simply declaring any matter *finally* determinable by a special court, are not understood to mean, that the judgment of such court shall be subject to the review of no other, but merely that it shall have the power of pronouncing a definitive sentence on the question brought before it, *Fac. Coll. i. 108, (Buchanan against Tozart, Dict. p. 7347.)* The law is understood to confer a supreme and sole jurisdiction, only when

when the expression is so explicit as to exclude all doubt, *ex. gr.* that the court shall have power to determine *without appeal*, or that the judgment shall not be subject to the review of any other court¹⁵.

8. In all grants of jurisdiction, whether civil or criminal, supreme or inferior, every power is understood to be conferred, without which the jurisdiction cannot be explicated, *L. 2. De jurisd.* By this rule, a judge may determine incidentally questions which fall not under his original cognisance, where, without that power, he could not pronounce a definitive judgment in the action which is properly insisted in before him. Thus, if in an action brought before the Sheriff, to which he is confessedly competent, forgery be alleged, either by way of defence or reply, the sheriff is under no necessity of staying process for want of jurisdiction, but may judge in the forgery *incidenter*, *Durie, Nov. 30. 1630, La. Williamson*, (DICT. p. 7483.) Yet the effect of his sentence in that incidental question is merely to support his judgment in the original cause carried on before him. Thus also, if the reduction of a service as heir shall be brought before the session upon the head of bastardy, or other ground of illegitimacy, the court itself may try that incidental question, without remitting to the commissaries, though it be properly consistorial. But where the exception of bastardy was offered to an inquest in bar of a service as heir, the service was by our more ancient practice put off, and the question remitted to the commissary, *Durie, July 23. 1630, Lord Pitligo*, (DICT. p. 7402.) Were such a case to occur now, it may be doubted whether the court of session would not, at the suit of any of the parties, advocate the

Every power is conveyed with jurisdiction, which is necessary for carrying it into effect.

VOL. I.

H

brief

¹⁵ So strict is the rule of interpretation in this particular, that although the stat. 39. Geo. III. c. 66., (which extends to Scotland as well as England,) empowers Justices of Peace, at their quarter-sessions, in certain cases, "*finally to hear and determine*," and declares, that "no such judgment or conviction shall be removable, by *certiorari*, into any court whatsoever;" it has been held, in the face of a strong argument to the contrary founded on the presumed intention of the legislature, that the exclusion of the power of review is limited to England, where alone procedure by *certiorari* is known; while, on the other hand, as to Scotland, "the privilege of appeal to the supreme court, not being expressly prohibited, an exclusion of its jurisdiction is not to be presumed;" *Guthrie, 10th December 1807*; see also *Anderson, 28th February 1811, Fac. Coll.*

Even when a final and conclusive jurisdiction is conferred in the broadest terms, still, if the inferior court exceed its powers, or refuse to act, or otherwise proceed in a way inconsistent with, and not recognised by the statute, the Court of Session may competently review the proceedings, and give redress; *Dawson, 18th February 1809; Heritors of Corstorphine, 10th March 1812; Young, 28th June 1814, Fac. Coll.*

Upon the same principle, where a particular jurisdiction is appointed under a canal, or road, or other local act, to determine all questions that may arise in carrying such act into execution; if the statutory trustees do not follow the terms of the act, or exceed the powers thereby given, the party aggrieved is not limited to the statutory or local jurisdiction, but may at once apply for his redress in the Court of Session; *Fac. Coll. 28th May 1793, Countess of Loudon*, DICT. p. 7398;—also the following cases decided in the House of Lords on appeal; *Goldie, 1st June 1814, 2. Dow, 534; Shand, 28th July 1814, 2. Dow, 519; and Knowles, 5th July 1815, 3. Dow, 280.*

In a certain class of questions, however, *viz.*, those arising out of the proceedings of courts of lieutenantancy under the militia statutes, the Court, before holding it competent to interfere, have been comparatively scrupulous in demanding very strong *prima facie* evidence as to the alleged excess of powers. Accordingly, it has been held in one case, that "it is not competent to receive any such bills" (of advocacy or suspension,) although "there be *some reason* for thinking that the commissioners have exceeded the powers vested in them by the act;" *Chivas, 11th July 1804, Fac. Coll.*;—while, in another case, it has been stated "to be now settled, that the excess of power must be *flagrant* before this Court can be warranted to interfere, and stop or impede measures of administration, conducted at least under colour of parliamentary authority, on which the general safety may depend;" *Imray, 2d March 1811.* In both cases, there was considerable difference of opinion on the bench.

brief to themselves. By the same rule, every judge, however limited his jurisdiction may be, is vested with all the powers necessary, either for supporting his jurisdiction, and maintaining the authority of the court, or for the execution of his decrees. Hence the court of session, though its jurisdiction be merely civil, has an inherent power of punishing those who shall insult any of the judges while the court is sitting, or who shall obstruct the execution of its sentences, with degradation, banishment, a fine, or corporal punishment, according to the demerit of the offence. Hence also, even those courts which are the most limited, are competent to trials for the deforcement of their own officers*. And on the death of a defender, they can transfer any action against his representative, if he reside within their territory. In like manner, all judges, even of the very lowest rank, have a power of enforcing the execution of their own decrees, by certain known methods of legal diligence.

9. The division of jurisdiction into cumulative and privative, is much attended to in our practice. Cumulative, or concurrent, is that which may be exercised by any one of two or more courts in the same cause. To prevent the collision that might happen in the case of two cumulative jurisdictions, by each of the courts claiming the exercise of their right in the same cause, a rule is established by custom, That the judge who first exercises jurisdiction in the cause, acquires a right, *jure preventionis*, to judge in it, exclusive of the other. The judge by whose authority the offender is either first apprehended or first cited, prevents, and so excludes the other from his right of cognisance; because these are the two first acts of jurisdiction that can be exercised by any court. This right of prevention plainly appears to be peculiar to criminal jurisdiction. In civil, it is the private pursuer who has the only right of choosing before which of the courts he shall sue. No citation, therefore, in a cause merely civil, to appear before a judge, which is not given at the suit of the pursuer, can fix the cause in that judge's court, preferably to any other that is competent; whereas in criminal questions or breaches of the peace, it is not the party injured only, but the procurator-fiscal, or public prosecutor of any competent court, who may bring the delinquent to his trial. If the judge who has thus acquired the exclusive jurisdiction, shall not bring the delinquent to trial, the precluded judge may bring the cause before his own court; for public policy requires, that crimes should not remain unpunished: But no citation by the public prosecutor of one court, can hinder the party injured to bring his action against the delinquent, for reparation and damages, before any other competent court, though no negligence should be alleged in the party preventing. An action of damages is grounded on a civil right, in which the private party alone has interest: He cannot therefore be deprived of it, by a citation given by a public officer of the law, which is intended for a quite different purpose, *in publicam vindictam*;

* *Vide Nov. 14. 1679, Magistrates of Kirkaldy, Dict. p. 1984; and Fac. Coll. i. l. Bell against Dundas, Dict. p. 7609¹⁶.*

¹⁶ In both of these cases, the power of punishing a party, who had insulted and threatened the members of the Court, was recognised as inherent in every tribunal. In the first case, indeed, "the Lords found the decret null;" but this appears to have arisen from the punishment's having been awarded not by the *Magistrates*, who alone constituted the Court, and were entitled to act as judges, but by the *Town-Council*, who of course had no jurisdiction. Even here, however, the decree was "sustained as a libel," and the offender fined in the Court of Session.

tam; Nov. 9. 1672, *Scot.* (Dict. p. 7315); *Gosf.* July 1. 1673, *Fork.* (Dict. p. 7316.)

TITLE II.

What courts have a privative jurisdiction.

10. Privative jurisdiction, otherwise called peculiar, is that which belongs only to one court, to the exclusion of all others, whether the cause of such exclusion arises from the nature of the action to be brought before the court, (to which some writers have confined it,) or from its weight or importance. Thus, the jurisdiction of the court of session is privative in all actions for declaring property, in provings of the tenor, &c. ; as that of the court of exchequer is in all revenue causes, except in so far as special statute has given the cognisance of them to justices of the peace. Commissaries are the only judges in the first instance, in all questions properly consistorial; and the high court of admiralty, in all maritime causes, whether civil or criminal.

Jurisdiction either personal, or patrimonial and heritable.

11. Jurisdiction is either personal or patrimonial. Personal jurisdiction is that which is either revocable by the granter, or which, though no power of revocation be reserved in the grant, falls by the death of the grantee. Patrimonial, or heritable, is that which is truly part of a man's property, and descends as such to his heirs. Jurisdictions were granted originally on account of the fitness of the grantee himself, and consequently were personal: But on the introduction of the feudal plan, the king, when he made any grant of lands for military service, conferred on the grantee a certain degree of jurisdiction within the lands granted, along with the lands themselves, *ex. gr.* of sheriffship, regality, or barony; and as the lands were made over, not only to the grantee, but to his heirs, the jurisdiction annexed to them became also heritable. Because this kind of jurisdiction was incident to, and followed the lands or territory to which it was annexed, not only through the grantee's heirs, but his singular successors, it got the name of *territorial*. Several jurisdictions, however, after they ceased to be territorial, continued heritable: For though our sovereigns soon found it necessary to resume sheriffships from the proprietors of the territory to which that jurisdiction was originally annexed, *vid. infr. Tit. 4. § 1.*, and to grant them to others who had no property in the lands; yet the new grant was frequently bestowed not barely to the grantee personally, but to his heirs.

Heritable jurisdictions abolished.

12. The power which attended these heritable jurisdictions became at last formidable to the state, and enabled some of our first families to bid open defiance to the law. It was for this reason, that immediately upon the forfeiture of the Earl of Douglas, *June 10. 1455.* (see *Black acts*, fol. 34.) it was statuted by 1455, *C. 43.*, that no regality should be granted for the future without the authority of parliament; and *C. 44.* said year, that no office should be given afterwards in fee or heritage. Our sovereigns nevertheless continued to make grants of heritable jurisdictions; most of which were confirmed by parliamentary ratifications; and others were, without such confirmation, strengthened by the immemorial exercise of the jurisdictions, till it became at last the general opinion, that those statutes had lost their authority, *Mackenzie's Obs.* on 1455, *C. 43.* All heritable offices and jurisdictions, without distinguishing whether they were granted before or after the said two acts in 1455, were, by the treaty of Union, *art. 20.* reserved to the owners as rights of property; but it does not certainly appear, whether these acts were then understood to be in force or not, as the offices and jurisdictions were reserved in the same manner only as they were then enjoyed

enjoyed *by the laws of Scotland*. Several heritable sheriffships and stewardries having accrued to the crown by the rebellion in 1715, the parliament, from the same reason of state, declared, by the inquiry act 1° *George I. C. 50.* that these forfeited jurisdictions should not be alienable by the crown, either heritably or during life; and now by act 20° *George II. C. 43.* to be afterwards more fully explained, all heritable jurisdictions, except those of Admiralty, and a small pittance reserved to barons, are either abolished, or resumed and annexed to the crown. By our present law, therefore, almost all jurisdictions, both supreme and inferior, are again personal, more agreeably to the original nature and condition of jurisdiction.

Jurisdiction either proper or delegated.

13. Jurisdiction is either proper or delegated. Proper jurisdiction belongs to a judge or magistrate himself in virtue of his office. Delegated is that which is communicated by the judge to another, who acts in his name, called a *depute* or *deputy*. One named by a deputy who has himself the power of deputation, is called a *substitute*. No judge has the right of appointing deputies, unless it be contained in his grant; for an office which requires personal qualities, cannot be delegated by the grantee to another without a special power. Such power has been always expressed in the personal grants of sheriffship, stewardry, and admiralty; but justices of the peace, and magistrates of boroughs, have no power of deputation. In heritable jurisdictions, though the first grantee should have possessed every qualification proper for a judge, the heir succeeding to him might have been quite incapable of discharging the office in person; for which reason powers were given by 1424, *C. 6.* to those who enjoyed patrimonial jurisdictions, to appoint deputies for whom they should be answerable. The deputies thus authorised, had, by the nature of their commission, the whole jurisdiction communicated to them which was before in their constituents; for there is no limitation in the statute relative to the power of the deputies. The opinion, therefore, that in deputations by barons, the *potestas gladii* was not delegated to the baron-bailie, appears ill founded, and was certainly contrary to practice. A passage quoted from *Balfour* in support of it, p. 548. is plainly misunderstood; and other delegates, *ex. gr.* sheriff-deputes, have always judged in crimes, in virtue of the power of appointing deputies, expressed in the sheriff's commission. The sheriffs appointed in pursuance of the late jurisdiction-act are improperly styled deputies in that statute: For they have a proper, not a delegated jurisdiction; they are named, not by the high sheriff of the county, but by the king; and they are authorised to appoint deputies under them, who are called in the act *substitutes*, to exercise jurisdiction, either over the whole country, or in a particular district.

Delegated jurisdiction understood to be the act of the judge who delegates; consequently no appeal lies to the principal judge from the sentence of his depute.

14. Delegated jurisdiction is not, in the judgment of law, the jurisdiction of the deputy who acts; for he has no proper jurisdiction; but of the judge who appoints him, and from whom alone he derives authority. Hence a deputy or substitute acts at the peril of the principal judge, 1424, *C. 6.*; 1469, *C. 26.* near the end; for the principal judge, who is the only person considered in law, must be accountable for the actions of the deputy, as for his own. This makes a material difference between proper and delegated jurisdiction. In causes which are first brought before a proper jurisdiction, subordinate to another, *ex. gr.* before an inferior commissary, the cause must, or at least may, where any of the parties thinks himself aggrieved by the decree, be carried to the commissaries of Edinburgh,

burgh, in respect of whom the jurisdiction of the inferior commissary is subordinate, before it comes to the supreme court; whereas in delegated jurisdiction it must be carried from the deputy,—not to the principal judge, *vid. supr.* § 6., for no inferior judge can, without express powers, review a decree pronounced by himself,—but directly to the court of session. By this rule, the decrees of admiral-deputes ought to be carried from them, in the case of review not to the high court of admiralty, but to the court of session, because the judges deputed by the admiral are deputies in the most proper sense of the word; but the judge of the high court is, by special statute, 1681, C. 16. authorised to review the sentences of all the admiral-deputes.

15. Sometimes persons are delegated by a special commission to judge in a particular cause, after which their power ceaseth. This was the case of messengers, who were appointed judges in appraisings, as sheriffs in that part, in virtue of the warrant contained in the letters of appraising; and it is still the case of macers of the session, when, upon a remit from that court, they judge in the service of heirs¹⁷; and of commissioners appointed by a judge to take the oaths of parties or of witnesses, in any action brought before him¹⁸. Those judges who, by the nature of their office, have a fixed and determined jurisdiction in all actions of the same general nature, are called *judges-ordinary*, whether they be supreme or inferior, 1487, C. 105.; and they are in that statute opposed to the privy or secret council, who had no stated terms or places of sitting, and whose jurisdiction was confined to certain special and uncommon actions or complaints.

Jurisdiction delegated for a particular cause.

16. Since no judge can pronounce sentence on persons or subjects without his territory, civil jurisdiction cannot be founded unless the defender either, *first*, reside within the judge's territory, or, *2dly*, be possessed of some estate or subject within it. In the first case, the judge's jurisdiction is said to be founded *ratione domicilii*. A domicil is the dwelling-place which a man chooses for a fixed abode to himself and his family: a pleasure-house, therefore, to which he goes only by starts, is not a domicil; and far less a friend's house, or an inn¹⁹. To prevent disputes upon this point, a rule is received by custom, That where one has resided with his family for forty days immediately preceding his citation, is to be deemed his domicil as to the question of jurisdiction²⁰. Where a person has two

Civil jurisdiction *ratione domicilii*.

VOL. I.

I

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¹⁷ By Act of Parliament 1. and 2. Geo. IV. c. 38. § 11., the remit to macers to judge in services is prohibited; and it is enacted, that the commission for proceeding in services shall be granted to the Sheriff-depute of Edinburgh, or his substitute. *Vide infr.* B. 3. t. 8. § 64. note.

¹⁸ A person employed to perform any functions by commission from the Court in a depending process, is entitled to claim payment from any one of the persons concerned in procuring his appointment, *in solidum*; *Wilson and Others, petitioners*, 10th July 1813, *Fac. Coll.*

¹⁹ Such temporary residence may not constitute a man's *principal* domicil; this implying, as the text observes, "a fixed abode to himself and his family." But with reference to that *legal* domicil, which is sufficient to found jurisdiction, it has been decided, that "a domicile, by forty days' staying at any place, though in an inn or "hired chamber, might be sufficient to sustain a citation made there," though "not to constitute a domicile whereupon denunciation and escheat might follow, or whereupon the confirmation of a defunct's testament might fall to the commissar of that place; but as to these the *principal* domicile behoved to be considered;" *Stair*, 20th November 1672, *Paterson v. Fermour*, *DICT.* p. 3724.

²⁰ It does not seem necessary that the person have resided "with his family." The place where, indeed, he has thus established himself, and where, when occasionally absent, he leaves his family, is, of course, to be considered his domicil in a still stricter and more proper sense. But there seems no reason to doubt, that, as to the question

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Book I.

Civil jurisdiction
ratione rei sitæ.

different houses, in different jurisdictions, which appear equally entitled to this appellation, he is liable to both jurisdictions, *Fount. July 15. 1701, Spottiswood*, (Dict. p. 4790)²¹. And if, on the other hand, one be engaged in such a way of life as to have no fixed residence, *ex. gr.* a soldier, or a travelling merchant, a personal citation against him is sufficient to establish a jurisdiction over him in the judge of that territory where he was cited, *Fount. Nov. 12. 1709, Lees*, (Dict. p. 4791.) It imports nothing, where the pursuer hath his domicile²², for he must follow that of the defender; since no defender is obliged to appear before a court to which the law hath not subjected him, *L. 2. C. De jurisd.*

17. Civil jurisdiction is founded, *2dly, ratione rei sitæ*, if the subject claimed by the pursuer lies within the territory, whether the defender resides within it or not, *Durie, Nov. 28. 1635, Williamson*, (Dict. p. 4815.) And indeed if the subject in question be immovable, the judge of the territory where it is situated is the sole judge competent, in so far as he hath the cognisance of heritable rights; for things that are immovable are incapable of shifting places, and must therefore be restored in that place where they lie, and by the warrant of that judge whose jurisdiction reacheth over them. As this reason fails in personal actions founded barely on obligations relative to land, which may be fulfilled any where, a judge's jurisdiction reacheth over a person residing within his territory who is sued for fulfilling an obligation for granting a conveyance or a lease of lands, though the lands contained in the obligation should be situated without the territory. No suit can proceed against a defender till he be lawfully summoned to appear in judgment; neither can a judge issue a warrant to cite one who resides in another territory: Where therefore one whose domicile is not within the territory is to be sued before an inferior court *ratione rei sitæ*, the pursuer

of jurisdiction, his own personal residence for forty days, though *without his family*, is sufficient to constitute a legal domicile against him.

By Act of Sederunt, 14th December 1805, § 1., it is enacted and declared, "that where any person against whom legal diligence is meant to be executed, or who is to be cited as a party in any judicial proceeding, has left the ordinary place of his residence, which may render it doubtful whether he is within the kingdom of Scotland or not, and, consequently, whether the charge or citation against him ought to be executed at his dwelling-house, or at the market-cross of Edinburgh, and pier and shore of Leith, when he is not personally found, it shall in time coming be held and presumed, that the said person, after forty days' absence from his usual place of residence, but not sooner, is forth of the kingdom of Scotland; and therefore, that within the said forty days the citation or charge may be at his late dwelling-house, but after that period must be at the market-cross of Edinburgh, and pier and shore of Leith, unless he be personally found, or, prior to the execution, shall have taken up some other known and fixed residence within Scotland."

This Act of Sederunt having been passed relative to the Act of Parliament 33. Geo. III. c. 74., it may be doubted whether it did not expire with the statute. 2. *Bell's Commentaries*, p. 175 and 179. *in not.* But it has been suggested by Mr More, with regard to the particular clause quoted above, that it "may be considered as a declaration of the common law upon the subject to which it refers;" *Erskine's Principles*, (11th edit.) § 9. *h. t. in not.*

²¹ See also *Stair*, 11th February 1674, *Macculloch*, Dict. p. 3701; *Fount. 13th March 1707, Irvine v. Deuchar*, Dict. p. 3703; *Edgar*, 30th July 1725, *Home*, Dict. p. 3704; and *Douglas and Heron*, 23d November 1779, Dict. p. 3700.

The rule is different as to the domicile where confirmation of one's moveable succession must take place; the *principal* domicile being there exclusive. See *infr. B. 3. t. 9. § 29.*

²² Unless his wife be the defender; for then, wherever she may actually reside, her legal domicile is inseparable from her husband's; *French*, 13th June 1800, *Fac. Coll. Dict. v. Forum competens, Appendix, NO. 1.*, where it was laid down, in the case of the wife's residence being abroad, that she should be "cited both at market-cross, and pier and shore, and at the house of her husband." Perhaps, however, the above rule ceases

pursuer must apply to the court of session, whose jurisdiction extends over the whole kingdom, for letters of supplement, which are granted of course, containing a warrant to cite the defender to appear before the judge of the territory where the controverted subject lies, *Nov. 28. 1635, Williamson (sup. cit.)* *. This method is also followed, where one resides without the territory, who is to be cited, not as a principal defender, but merely for his interest ²³.

18. Where the party to be sued resides in another kingdom, and hath an estate in this, the session is the only competent court in questions concerning such estate; since that court is the *commune forum* to all who reside abroad ²⁴. But as no court of Scotland can grant warrant for a personal citation against such as reside without this kingdom, foreigners, if they have a land-estate in Scotland, are considered, in respect of all claims on that estate, to be lawfully summoned as defenders, by what is styled *an edictal citation, i. e.* a citation published at the market-cross of Edinburgh, and pier and shore of Leith: For since the *locus rei sitæ* is the only place where questions of immoveable rights can be tried, the necessity of law supports that only manner of citation which is practicable. Nor can this afford any just ground of complaint to the defender: For whoever enjoys a real estate in a country, has a *forum* there, or a court where all questions concerning that estate may be discussed and decided; and consequently he ought to employ one in his absence to look after it, and appear for him in all actions which may be brought against him concerning it. But this sort of action cannot be said to be directed against the *person* of the defender, over which the judge hath no jurisdiction, but only against that part of his estate which lies within the territory, *Durie, Nov. 15. 1626, Gabbraith, (Dict. p. 4430, and 4813.)*; *Ibid. Dec. 8. 1626, Lo. Blantyre, (Dict. p. 4813.)*.

19. When a foreigner, who is actually abroad, hath no other than moveable effects within this kingdom, he is accounted so little subject to the jurisdiction of its courts, that no action can be brought against him, till those effects be attached by arrestment, called *arrestum jurisdictionis fundandæ causæ*, *Harc. 487, (Young against Arnold, Dict. p. 4833* ²⁵.) This arrestment may be laid on at the suit of

Where a person has an estate in this kingdom, but resides in another.

Arrestment jurisdictionis fundandæ causæ. Caution judicis sisti et judicatum solvi.

* See as to the origin and nature of Letters of Supplement, Kames's Law Tracts, Tract 7. History of Courts.

ceases to hold, where there is a formal and unrevoked deed of separation between the parties. See what was thrown out on this subject, both by the Lord Chancellor and Lord Redesdale, in *Lindsay v. Tovey, 24th May 1813, 1. Dow, 117.*

²³ Letters of Supplement have also been granted, to compel the appearance of a witness before an inferior jurisdiction, where that witness, (who then resided within the inferior jurisdiction,) had been regularly cited under a first diligence, but had removed beyond the territory before second diligence could be executed; *A. v. B. 27th February 1819, Fac. Coll.*

²⁴ *Durie, 11th March 1624, Lamb, Dict. p. 4812; Edgar, 29th December 1724, Haldane, Dict. p. 4818.*

²⁵ As to the competency of a jurisdiction founded in this way, a most important distinction is to be observed, between such questions as originate in a mere ordinary patrimonial claim for the payment of debt or the performance of a mercantile contract and the like, and that other class of cases, where the personal *status* and character of the individual is sought to be affected; as, for example, all questions of legitimacy, marriage, divorce, &c. In a case of this latter kind, "it was observed on the bench," that the "*forum ratione rei sitæ*, in respect of an arrestment used *ad fundandam jurisdictionem*," was not applicable, "where the conclusion is not founded on a document of debt, but to declare, in a contract the most personal of any, that a man in Ireland is a married man."—"The source of that species of jurisdiction in this and other commercial countries was utility, and the facilitating the recovery of debts. It is properly

of the creditor, either by the court of session, or by the admiralty-court, or by the judge-ordinary where the goods to be arrested lie. Border-warrants, explained below, § 21, which are frequently granted by the sheriff, are truly of the same nature. All of them have the effect to fix the debtor's goods within the judge's territory, and thereby to subject him to the jurisdiction of the courts of Scotland*. And even when they are used on the sheriff's warrant, they found a jurisdiction in our supreme court of session to judge in a personal action against the foreigner, proceeding upon an edictal citation, for constituting the debt due by him to the arrester, in order to pronounce a decree of forthcoming against those in whose hands arrestment was used, *Fac. Coll.* ii. 155, (*Hardie against Liddle*, Dict. p. 4830.). The *nexus* laid on the goods is loosed so soon as the foreigner gives security *judicio sisti*, that is, to appear in court upon the day to which he shall be cited: For though the border-warrants granted for arrestment generally bear that the goods shall remain under arrestment till the debtor shall also give security *judicatum solvi*, that he shall make payment to the arrester of whatever sum shall be found due, the Lords have adjudged, that security *judicatum solvi* ought not to be exacted, except in maritime causes, *Fac. Coll.* i. 153, (*Herries against Lidderdales*, Dict. p. 2044²⁷). This decision was indeed pronounced in the case of setting a foreign debtor free from prison, but seems by a fair analogy to hold equally in the loosing of arrestments. If the debtor be a native of Scotland, it would seem that he is to be deemed a Scotsman, though he should have gone abroad *animo remanendi*; and that therefore action may be pursued directly against him *ratione originis*, even upon moveable subjects, without the aid of a previous arrestment. See the last cited decisions, *Nov. 15. 1626*, (*Galbraith*, Dict. p. 4430, & 4813.); and *Dec. 8. 1626*, (*Blantyre*, Dict. p. 4813.)†²⁸. The reason of

* In a case where the debtor's effects were already fixed *in medio* before the Court of Session by a process of multiplepoinding, a previous arrestment was found to be unnecessary to establish jurisdiction; *Fac. Coll. June 17. 1795*, *Mansfield, Ramsay and Co.* Dict. p. 2594²⁶.

† See also *July 3. 1627*, *Hepburn against Monteith*, Auchinleck MS. Dict. p. 4814; and *Durie, March 7. 1629*, *Wilkie against Muirhead*, Dict. p. 4814. See contrary, *Durie, March 23. 1639*, *Heir of Col. Brog*, Dict. p. 4816.; *Kilk. NO. 3. voce FORUM COMBRETENS*, *Anderson against Hodson*, Dict. p. 4779.; *Fac. Coll. Feb. 9. 1789*, *Brunsdone*, Dict. p. 4784.

“ a mercantile jurisdiction, not an universal one; and being an exception from the general rule, is not to be extended to a case not founded in the intention of introducing that sort of jurisdiction, and where the pursuer had a legal remedy, viz., by resorting to the defender's proper *forum* in Ireland;” *Scruton, 1st December 1772*, *Fac. Coll.* Dict. p. 4822.

²⁶ Neither is arrestment *jurisdictionis fundandæ causa* necessary, where a foreign creditor, and his attorney, having recovered his debt by poinding, is summoned under the bankrupt act, in order to contribute his statutory proportion of the proceeds of the poinded goods; *Black and Knox, 7th June 1805*, *Fac. Coll.*

²⁷ See also 1. *Bell's Commentaries*, 292.

²⁸ Lord Kames, in one of his Law Tracts, where he has occasion to consider the subject of the text, says, “ The law of nations indulges individuals to change their country, and to fix their residence where they can find better bread than at home. Such migrations are frequent in all trading countries; and it would be unreasonable to subject a man to the laws of his native country, after he has deserted it, and is perhaps naturalized in the country where he is settled for life. It is, indeed, not an absurd rule, that even in this case the duty he owes to his native country ought to restrain him from carrying arms against it; and I observe this has been reckoned the law of nations. But supposing him so far bound, it is a much wider step to subject him to the Courts of his native country, where he has *no residence*, where he has *no effects*, and to which he has *no intention ever to return*.” His Lordship afterwards

of which decisions seems to be, that those who are born within the kingdom, though they should be afterwards settled abroad, without

VOL. I.

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“terwards adds, that Voet (*De Judiciis*, § 91.) cites many authorities to prove, that “birth singly doth not produce a *forum competens*, excepto solo majestatis crimine:” *Tract VII. COURTS.*

With reference more particularly to the Law of Scotland, it seems extremely questionable, how far the circumstance of a man’s nativity, *per se*, and unsupported by any additional circumstance, can unqualifiedly be laid down as founding a jurisdiction in our Courts. Mr Hume, in his chapter on “Criminal Jurisdiction,” incidentally observes, “that the circumstance of nativity is of *doubtful* virtue even in “civil process.” The whole tenor also of the opinions delivered by the Lord Chancellor and Lord Redesdale, in the case of *Tovey and Lindsay*, 24th May 1813, 1. *Dom*, 117., has a tendency to show the very serious doubts, to say no more, with which these high authorities too regarded the subject. And then, finally, there is a decided case, where the Court of Session, though they no doubt sustained their jurisdiction, did so upon the special *ratio*, “that in this case, the ground of action had its rise in “Scotland; for the Lords were pretty much agreed, that had the ground of action been “a fact committed, or contract entered into *out of Scotland*, it would not have been “enough to subject the defender to the jurisdiction of this Court, that he had been *born in Scotland;*” *Kilk. July 1747, Anderson v. Hodgson*, *DICT.* p. 4779.

Accordingly, on an attentive examination of the different cases that have occurred, there does not appear to be one instance, in which the pure and unaided circumstance of *nativity* has ever been sustained, as by itself affording jurisdiction over a defender permanently settled abroad. The authorities chiefly relied on, in support of the *forum originis*, are the cases of Galbraith, Blantyre, Hepburn, and Wilkie, which are referred to in the text, and in the immediately preceding note; another reported by *Durie*, 1st February 1642, *Douglas*, *DICT.* p. 4816; and, finally, the case also alluded to in the text, (as occurring *infra*, tit. 4. § 34,) of *Hog v. Tennent*, 27th June 1760, *Fac. Coll. DICT.* p. 4780.

Now, in all of these cases except the last, so far as can be judged from the extreme brevity with which they are stated, the Court seem to have taken into consideration, not merely the fact as to the *forum originis*, but also the farther circumstance, real or supposed, that the defender was to a certain extent possessed of property within their jurisdiction. “So much appears from them,” says Kames, “that the Court of Session did not pretend to assume a jurisdiction over the subjects of a foreign prince, “upon account, singly, of their being natives of Scotland; and that, in order to found “such jurisdiction, it was thought necessary to have reference to effects situated here, “either really, or by supposition.” *Law Tracts, ut supra.* Indeed, the case of Hepburn is expressly in these terms: “A Scotsman, residenter in another country, and “remaining there *animo remanendi*, if he have goods or gear, or lands in Scotland, he “may be convened at a creditor’s instance in Scotland:” while all the rest sustain process “to produce execution *only* against the defender’s *goods and lands which he had within Scotland.*” And our author himself goes no farther than to say, that action may be pursued *ratione originis* “even upon moveable subjects, without the aid of “a previous arrestment.”

The Court seem farther, in the above cases, to have been more or less actuated by the consideration,—either that the defender, tho’ resident abroad, could not yet be viewed as altogether disconnected with his mother country;—or that the ground of action itself, in some measure, kept up or renewed this connection. Thus, in the case of *Douglas*, though the bond pursued on was in the English form, “the Lords repelled the allegation, seeing the bond was made betwixt Scottish men, and to have execution for “Scottish goods lyand in Scotland.” In the case of Galbraith, the creditor in the bond seems also to have been a domiciled Scotsman. In the case of Blantyre, the ground of action had actually originated in Scotland; the principal debtor, whom the defender represented, having, as the summons bore, “intromitted with his (the pur- “suer’s) money, and *fled therewith out of Scotland;*” a circumstance which seems to bring this case a good deal under that of *Anderson and Hodgson*, *supra cit.* And, finally, in the case of *Wilkie*, besides that the judgment proceeds on the defender’s “being “summoned *personally* in Scotland,” a circumstance of itself sufficient to constitute jurisdiction, it also founds on the relation, which, through his business, seemed still to subsist between him and his country, “he being a Scottishman and *factor to Scottish- “men.*”

As to the case of *Hog and Tennent*, it occurred between two members of the *Scots Factory* at Campvere, who, considering the peculiar character of that establishment, could not be said ever to have lost their proper *forum originis*. They were undoubtedly subject to the jurisdiction of the Conservator’s Court, a court, as our author informs us afterwards, (tit. 4. § 34.) “constituted by the authority of a *Scottish Parlia- “ment,*” and “tied down to judge by the rules of the law of *Scotland:*”—and, in addition to this, the jurisdiction of the native courts of the foreign country was expressly

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an intention of returning home, cannot shake themselves loose from the obligations naturally due by them, either to the laws or to the courts of their mother-country. Hence, in criminal matters, sentences of outlawry or forfeiture pass against natives, though they should reside in foreign parts *animo remanendi*; and an instance occurs *infr. Tit. 4. § 34.* of a civil case, in which a *forum* was found to be established *ratione originis*.

Jurisdiction *ratione contractus*.

20. Civil jurisdiction is also founded *ratione contractus*, if the defender had his domicil within the judge's territory at the time of entering into the contract sued upon, though he should not have his

and peremptorily excluded. The only objection in this way to the jurisdiction of the Supreme Court at home, was that the jurisdiction of the Conservator Court was "*private*." But that being repelled, "the erection of the Conservator Court at Campvere was not thought to give any exemption from the Supreme Court of this country: but rather, on the contrary, that the establishment of a Scots Factory there strengthened the original jurisdiction of this Court over the Scotsmen composing that factory."

Such being the principal cases, in which the jurisdiction of the native courts has been sustained against Scotsmen resident abroad, it is impossible to rely upon them, as deciding, that the circumstance of a man's *nativity* is *per se* sufficient to found a *forum* against him. Looking at them, indeed, in connexion with other cases where that question seems to have arisen in a purer form, it is conceived the law must rather be held as leaning towards the opposite direction.

Thus, in the case of *Brog's heirs*, (*supra*), "the Lords found, seeing the defunct (*Col. Brog*) lived and died in Holland, and that the goods were alleged to have been in Holland when the defunct died, and where they were intromitted with by the defender as was libelled, and that the defender was an actual resident in Holland," &c. being there married, and an actual dweller "there *animo remanendi*, albeit he was a Scotsman, that no process ought to be granted against him in this country for the said intromission; but that he ought to be pursued therefor in Holland, *quia actor debet sequi forum rei*; neither was it respected, that the pursuer declared that he insisted in this pursuit against the defender being a Scotsman, that he may have execution against such of the defender's goods and estate as he had within Scotland."

Again, in the case of *Brunsdone* (*supra*), though the defender was not only a native Scotsman, but "inherited a Scotch title of honour, and was a substitute in the entail of a considerable landed estate in Scotland," an action of divorce against him was dismissed,—the marriage of the parties having taken place in England, and the defender having been ever since resident abroad.

The same decision was unanimously pronounced, under nearly similar circumstances, in the case of *Morcombe*, 27th June 1801, *Fac. Coll. Dict. v. Forum Competens*, *App. No. 3.*; although it was strongly argued, that the defender having been constantly in the navy-service ever since he left Scotland, had acquired no other *forum*, and that, consequently, the country in which he was born and educated was still his proper domicil.

It must be admitted, however, that in the two last cases, and especially in that of *Brunsdone*, it is doubtful how far the judgment of the Court was not also influenced by an argument, founded on their incompetency, in the peculiar circumstances, to dissolve the English marriage; though, looking at the decisions of the Court in other cases of English marriage where jurisdiction was sustained, it is not easy to see on what principle jurisdiction could be sustained in the above cases, without the same consequence of divorce following.

It only remains to remark, that, though the general conclusion from the authorities seems rather to be, that the circumstance of a man's *nativity*, when standing by itself, will not subject him to the Scots Courts, yet it must, when combined with other circumstances, have a powerful effect in settling the question of jurisdiction. For example, 1. If Scotland has also been the *locus contractus*, the place where the ground of action originated, there seems no doubt that parties will be presumed to have had the law and the Courts of Scotland in view, and that jurisdiction will of course be sustained; *Anderson*, July 1747, *supra*; *Pirie*, 8th March 1796, *Fac. Coll. Dict. p. 4594*; *French*, 13th June 1800, *Fac. Coll. Dict. v. Forum Comp. App. No. 1.*; *Mackenzie*, 8th March 1810, *Fac. Coll.*; *Bell*, 22d February 1812, *ibid.*—2. Jurisdiction will also be sustained, whether Scotland be the *locus contractus* or not if it is the place where the contract was to be carried into execution; *Edmonstone*, 1st June 1806, *Fac. Coll.*—3. Likewise, if the Scotsman has never been properly domiciled elsewhere, but has been always moving about, or perhaps has only been carried abroad by his public duties,—as, for instance, a soldier with his regiment.

—4. Finally

his domicil there when the action is brought against him*. But it is necessary, in order to establish jurisdiction in this manner, that the defender be actually within the judge's territory, and be cited by a warrant issuing from his court, or at least that he have effects lying there, *L. 19. pr. § 1, 2. De judic.*; for jurisdiction cannot have the least operation, when both the person and the estate of the defender are withdrawn from the judge's power. This manner of founding jurisdiction was however sustained by our supreme court, in an action of declarator of marriage brought by a wife against her husband, a native of England, who, after he had married the pursuer in this country, and had children by her, abandoned his family and retired into England, though neither his person nor effects were subject to the judge's cognisance. But in this singular case the defender, who was called by an edictal citation merely for the sake of form, was not truly considered as a party; both the pursuer and her child had an obvious interest to get their legal state ascertained in that country to which they belonged originally, and where they were constantly to reside; and though she had known the place of her husband's residence, she could not be compelled to sue him in a kingdom, where perhaps the solemnities essential to marriage differed from those which were received in Scotland; *Kilk. and Falc. June 11. 1745, Dodds, (Dict. p. 4793.)** 30.

21. A

* *Haddington, Nov. 23. 1610, Vernor, Dict. p. 4788. See Elvies, Dict. p. 4893²⁹.*

† This judgment has not been followed as a precedent, *Fac. Coll. Dec. 1. 1772, Scruton, Dict. p. 4822; Feb. 20. 1789, Forrest, Dict. p. 4823.*

—4. Finally, there can be no doubt, that the moment a Scotsman returns to his country, the jurisdiction of the native courts at once revives, though he even be here transiently only; *Wilkie, 7th March 1629, supra; Calder, 19th January 1798, Fac. Coll. Dict. v. EXECUTION, App. No. 1.; Dickie, 20th December 1811, Fac. Coll.* But in this case the defender must either be cited personally, or have acquired a legal domicil by residence for 40 days in one place. If, however, he has once acquired such a domicil, he may "be lawfully summoned by a citation left for him at the "lodging-house where he had chiefly staid, although he had quitted it, and was "on his road to England, two or three days before the citation was given;" *Calder, supra.*

²⁹ See also the cases connected with this subject, in the preceding note.

³⁰ A most important class of cases, nearly connected with the subject of the text, and involving an issue of the highest possible interest, not to Scotsmen alone, but to the whole subjects of the British Empire, has lately received much solemn and deliberate discussion, in the numerous questions which have occurred as to the jurisdiction of the Scots Courts in the dissolution of marriages,—either actually contracted in England,—or at least between parties who, though married in Scotland during a transient visit made for that single purpose, were at the time truly and substantially domiciled in England.

In this country the following points have been decided:—

1. That a marriage contracted in England, between Scots parties, whose domicil was properly Scots at the time of marriage, and who afterwards returned, and did actually reside in Scotland, may be dissolved by sentence of divorce in the Scots Courts; *Edmonstone, 1st June 1816, Fac. Coll.*

2. That the same holds good, where the husband only is a native of Scotland, and even though the parties should latterly have had their chief residence in England, so long as the Scots domicil is not lost; *Lindsay, 26th January 1807, Fac. Coll. Dict. v. FORUM COMP. App. No. 6.* This case was carried to the House of Lords by appeal, and remitted back for reconsideration; both the Lord Chancellor and Lord Redesdale expressing very grave doubts on the subject of the decision, 1. *Dow. 117*:—And if it really was the case, as seemed to be the opinion of these high personages, either, 1. that the husband who pursued the divorce had lost his Scots domicil, whereby his wife's domicil, which of course followed his, was no longer Scots; or, 2. that the wife's Scots domicil was at all events excluded by the effect of a valid English deed of separation, there seems little doubt that the case would ultimately have been held to be ill decided. The death of the pursuer, however, prevented any farther consideration of that case. But the principle of the decision, as stated above, on the supposition that the Scots domicil was not lost, has, in other cases since, been repeatedly recognised in our Courts, after the most solemn and deliberate consideration not only of the doubts thrown out in the House of Lords, in the case of *Lindsay*, but of the

21. A judge may, in special cases, secure the persons of such as have neither residence nor estate within his territory. Thus, on the border between Scotland and England, warrants are granted of course by the judge-ordinary of either side against debtors who have their domicile on the opposite side, for arresting not only their goods, but their persons, till they give security *judicio sisti*. This obtains also in every case where the creditor has ground to suspect that the debtor is *in meditatione fugæ*, that he intends to withdraw suddenly from the kingdom, and so disappoint his creditors, *St. B. 4. T. 47. § 23.**; which suspicion the creditor who applies for the warrant must declare upon oath¹: And it makes no difference whether

* See *Fac. Coll. Feb. 6. 1782, Wright, Dict. p. 8559.*

the whole bearings of the discussion generally. See cases of *Edmonstone, Forbes and Levett, 1st June 1816, Fac. Coll.*; and *Levett and Kibblewhite, 21st Dec. 1816, Fac. Coll.*, more fully reported, *Ferguson's Reports, App. p. 436.*

3. That, on the other hand, where the marriage has been contracted in England between parties who, though natives of Scotland, were at the time substantially settled and domiciled in England, and had since uniformly resided abroad without returning to Scotland, the Scots Courts will not entertain the action of divorce; *Brunsdon, 9th February 1789, Fac. Coll. Dict. p. 4784*; *Morcombe, 27th June 1801, Fac. Coll. Dict. v. FORUM COMP. App. No. 3.*

4. That even where both parties to the English marriage are themselves natives of England, and have no view whatever to change either their domicile or the law under which they married, yet still the Scots Courts are competent to dissolve such a marriage, and they will accordingly sustain process of divorce to that effect, provided merely that such a domicile has been acquired in Scotland by the defender as would be sufficient to found ordinary civil jurisdiction, viz. by simple residence for 40 days. See Lord Meadowbank's Notes in the case of *Utterton v. Tewsh, 12th October 1811, Fac. Coll. in a note to Bernard, 11th June 1811*; another note by his Lordship in the case of *Gordon v. Pye, 14th July 1814, Ferguson's Reports, App. p. 357.*; *Sugden v. Lolly, 20th March 1812, in Commissary Court, ibid. p. 269*; cases of *Edmonstone, Forbes and Levett, 1st June 1816, Fac. Coll.*; and of *Levett and Kibblewhite, 21st December 1816, ibid.* The like seems to have been found, where the defender, without ever acquiring a domicile, had merely prorogated the jurisdiction of the commissaries; *Murray, 8th March 1805, Fac. Coll. Dict. v. FORUM COMP. App. No. 5.*

5. The case of English parties coming to Scotland for the sole purpose of being married, and immediately thereafter returning to England, has been regarded as really and truly the same with a proper English marriage; the only point of difference, viz. the marriage's actually taking place in Scotland, being, indeed, an additional circumstance in favour of the Scots jurisdiction; *Wyche, 27th June 1801, Fac. Coll. Dict. v. FORUM COMP. App. No. 2.*; *Forbes, 1st June 1816, Fac. Coll.*

While the law may thus be held to be definitively settled in Scotland, it is of much importance to observe, that the validity of the divorce obtained from our Courts is far from being recognised in the sister country. In *Sugden v. Lolly*, indeed, one of the cases where, as just noticed, the English marriage had been dissolved, the divorced husband having returned to England, and contracted a new marriage, was regularly prosecuted in the criminal court, and convicted of *bigamy*; and the sentence afterwards received the solemn sanction of the unanimous opinion of the twelve Judges. In the discussion also, which subsequently took place in the House of Lords, in the appeal in the case of *Lindsay*, the doctrine of the absolute *indissolubility* of an English marriage except by act of Parliament, was not only strongly argued, but favourably listened to. It is subsequent to all this, that the most solemn decisions, maintaining the powers of the Scots Courts, have been pronounced in this country. Is it not then highly expedient, that a conflict between the laws of the two countries, on a point involving interests so extremely momentous, should be put to rest in the only possible way in which it can satisfactorily be put to rest,—by a solemn act of the Legislature?

¹ In a recent question of damages arising out of the illegal execution of a *meditatio fugæ* warrant, Lord Robertson took occasion to remark on the frequent occurrence of such cases of late; adding, "that the decisions of the court, and the opinions of the bench, ought to impress on the mind of the inferior judges, that such warrants are not matters of course; and that, on the contrary, the granting of them was a very delicate thing;" *Borthwick v. M'Gibbon and Hamilton, Fac. Coll. 14th May 1813.*

It may, therefore, not be amiss to notice a few of the more important points connected with this subject, a little more in detail; and as it is impossible to follow a better authority, this shall be done chiefly in the words of Mr Bell, who, in his excellent Commentaries,

ther the debtor be a foreigner or a native; or whether he had contracted the debt within this kingdom, or in another country*." But,

VOL. I.

L

28.

* Found, by a narrow majority, that this remedy is not competent to one foreigner against another occasionally residing in Scotland, Dec. 6. 1776, *Scot*, DICT. p. 2057. See also on this point, *Fac. Coll. June 3. 1797, Scudamore*, DICT. p. 8559.

mentaries, treats of this part of our law, with his usual soundness and attention to principle.

1. It is not necessary that the warrant should be issued by "the court which is to try the cause, as in England: it is an act of magisterial duty, which should be performed by the judge-ordinary of the jurisdiction within which the debtor is found;"

2. *Bell's Commentaries*, p. 541, *Barrowfield v. Weatherspoon*, June 1727, DICT. p. 8549.

2. "It is not necessary that the debt should be established by document or decree;" (*Wright v. Gammell*, *Fac. Coll. 6th February 1782*, DICT. p. 8559.)—"But although full evidence of the debt is not necessary, an oath is required by the creditor to the truth of his demand, on which, if false, he may afterwards be tried for perjury." *Bell, ut supra*.

3. "To justify even the simple arrest of the debtor to be brought up for examination, the creditor is bound not only to swear to his present belief of the debtor's intention to leave the country in order to defeat his claim, but he must specify the grounds of that belief;" *ibid*. "The magistrate is not bound nor entitled to proceed upon a general oath of credulity;" *ibid*. p. 542, *Laing v. Watson and Mollison*, *Fac. Coll. 20th Dec. 1789*, DICT. p. 8555. It has been found sufficient, and, in reference to the statements contained in the petition, necessarily to imply an oath of belief, that the creditor swear, "that he has been 'informed' that his debtor is about to leave the country;" *Anderson v. Smith, &c. Fac. Coll. 26th Nov. 1814*.

"The oath must apply to the circumstances in which the debtor is placed at the time when the creditor asks the warrant. A warrant will not be granted on an oath to a *meditatio fugæ* long before. Neither will it be granted on an oath taken in another country, without being ratified in Scotland, either by the debtor himself; or by his mandatory swearing conformably;" 2. *Bell*, 542, *Place v. Donnison*, 2d July 1814, *Fac. Coll.*

It is almost unnecessary to notice, that "it is not enough that the debtor means to leave one part of the country for another." (*Laing v. Watson and Mollison, supra*.) Neither is it sufficient, "that he is going to retire to the sanctuary." (*Place v. Donnison, supra*.) 2. *Bell*, 544. His purpose must be to leave Scotland:

4. In the question, whether the warrant for imprisonment is to be granted, "much discretionary power must be committed to the judge."—"He will be entitled to take into his view collateral evidence, capable of instantaneous proof. And he undoubtedly must listen to any evidence which the debtor may offer instantaneously to bring forward in refutation of the suspicions charged against him." (*Scudamore v. Lechmere*, *Fac. Coll. 3d June 1797*, DICT. p. 8559, *Tasker v. Mercer*, *Fac. Coll. 4th March 1801*, DICT. v. *Med. Fug. App. No. 1.*) "He is bound to examine the debtor himself with a view to the explanation of any thing which may appear mysterious." (*Service v. Hamilton*, *Fac. Coll. 25th May 1811*, 2. *Bell*, 543. See also *Robertsons v. Chisholm*, *Fac. Coll. 20th June 1812*. It has even been decided, that "the magistrate himself must take the examination of the defender, or remit to another magistrate. It is not competent to remit to a clerk not a magistrate," *Borthwick v. M^cGibbon and Hamilton*, 14th May 1813. It is true, that in a later case, where both "the oath of the creditor and the examination of the debtor had been taken by the town-clerk, the assessor of a royal burgh," on a special commission from the magistrates, a contrary decision was pronounced; *Carrick*, 14th November 1818, *Fac. Coll.* But perhaps it may be doubted, how far this case can be held as settling the law; it having been pronounced by the narrowest majority in one of the Divisions, and this, too, in the face of the solemn opinions of a majority of the whole Court. The decision is not noticed by Mr Bell in his last edition, (1821,) where it is still laid down, that "the magistrate, in examining the debtor, must himself act, and not delegate his office to a clerk," (2. *Bell*, 546.); otherwise "he is guilty of an irregularity, which, although not in the least tainted with *mala fides*, will subject him to damages, if, by such irregularity, the debtor suffers;" (*Ibid*. p. 548.)

5. "To detain a person upon an unsigned warrant is illegal," no matter how pressing the necessity of securing the debtor; *Anderson v. Smith, supra*.

* Alluding to the doctrine in the text, Mr Bell observes, in his *Commentaries*, (vol. ii. p. 545, 6,) that "there are some late decisions, which confirm this doctrine in many points. Thus, 1. A person who has fled from another country to escape from debt, is liable to this warrant in Scotland, whether the creditor is a foreigner or native." (*Ray v. Bellamy*, *Fac. Coll. 21st June 1763*, DICT. p. 2051; *Tasker v. Mercer*, 4th March 1801, *Fac. Coll. DICT. v. MED. FUG. App. No. 1.*) 2. A stranger who has acquired a domicile in Scotland has always been recognised as a fit object of this warrant, (*Scudamore v. Lechmere*, *Fac. Coll. 3d June 1797*, DICT. p. 8559.) 3. If a foreigner contract debt in Scotland, he is undoubtedly liable to this process: this re-

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as the summary apprehending of strangers may discourage commerce, the creditor at whose suit the debtor is imprisoned is liable in damages, if the circumstances offered to be proved by him in support of his suspicion appear insufficient to justify the imprisonment, 1738, *Dr Tennent*, (not reported) *³³. Such debtors must be set free from prison, if they give security *judicio sisti*, though they should not offer also security *judicatum solvi*³⁴, *supr.* § 19. and *infr.* B. 3. T. 3. § 73. †.

22. Boroughs-royal

* See on this head, *Falc. Dec.* 7. 1744, *Scot.* DICT. p. 1929; *Dec.* 16. 1773, *Heron*, DICT. p. 8550; *Dec.* 20. 1789, *Laing*, DICT. p. 8555.

† This remedy may, in certain cases, be adopted even against debtors who have retired to the *sanctuary*. See *Fac. Coll. Feb.* 10. 1787, *Park, &c.* DICT. p. 8555; *March* 9. 1793, *Wight*, DICT. p. 8558³⁵.

As it is founded on an allegation of fraud, it may be executed on a *Sunday*, *Jan.* 16. 1786, *Kempt*, DICT. p. 8554.

“quires no authority to prove it. But, 4. Where a foreigner is for a time and without fraud in this country, for a particular and temporary purpose, as a journey of health or of business, his proper domicile being in his own country, where he is ready to answer, there does not seem any good ground for authorising this sort of warrant to be issued against him, either at the instance of a foreigner, or that of a native of Scotland, in order to make him responsible to the courts of this country. In a case which is not reported,” (*Jouet, &c. v. Maidmont, 8th July 1797*, noticed by Mr Bell in a note,) “the Court is said to have decided the abstract point unfavourably for foreigners in this situation; but there appears in that case to have been at least strong suspicion, if not evidence, that the person, against whom the warrant was applied for, had left his residence abroad to avoid his creditors, as in the cases of Bellamy and of Mercer, already noticed; and there is one case of an older date, in which a different decision was pronounced,” (*Scott v. Carmichael, Fac. Coll. 6th December 1775*, DICT. p. 2057.) In this case of Scott, however, Mr Bell adds, (and a similar observation was made from the Bench in the case of Lechnere,) “it should be stated, that there was much division on the Bench. Some very able judges were against the decision; and it passed only by the casting voice of the Lord President Dundas.”

See also the case of *Dickie v. Dick, &c. 20th December 1811, Fac. Coll.* where it was found; that an English bankrupt, (being, however, a native Scotsman), against whom a commission had been issued, but who had not obtained his certificate, might, at the instance of his Scots creditors, be imprisoned in this country, as *in fuga*, upon his preparing to return to England.

³³ Or, if he swear falsely to a debt, or to the circumstances on which his suspicions were said to rest; 2. *Bell's Commentaries*, p. 548.

The judge too may be liable in damages, 1. To the *debtor*, where he issues a warrant irregular or illegal; as, for example, in the cases of *Laing v. Watson and Molison*, and *Borthwick v. McGibbon and Hamilton, supra cit.* And, 2. To the *creditor*, should he illegally refuse a warrant, he will, if the debtor shall have left the country, be liable as for an escape; ; *Bell, ut supra.*

As to the responsibility of the Magistrates in whose jail the debtor is incarcerated, “there is an essential difference between the imprisonment upon these warrants, and imprisonment for debt. The object of the latter is to force the debtor, by confinement, to pay the debt, or to disclose those funds which the law presumes him to have concealed; the object of the former is merely to secure the person of the debtor, that he may not escape from the reach of common diligence. The Magistrates may, therefore, indulge, with what degree of liberty they please, a person confined upon a warrant of *meditatio fugæ*. All that the creditor can require of them is, that his debtor's person shall be produced in judgment when called for. The Magistrates do indeed run the risk of the debt by any indulgence; they become cautioners for the debtor should he escape; but if he is ready to be produced, it is enough.” (*Gordon v. Mellis, Fac. Coll. 24th January 1786*, DICT. p. 11756; *Brown v. Magistrates of Lanark, Fac. Coll. 16th November 1792*, DICT. p. 11769.) *Bell, ut supra*, p. 547. See also, *Dean v. Magistrates of Ayr, Fac. Coll. 27th January 1803*, DICT. p. 11765, and *Whitecross v. Magistrates of Edinburgh, 25th February 1819, Fac. Coll.* in both of which cases, the magistrates were found liable for the debt.

³⁴ *Ray v. Bellamy, Fac. Coll. 21st June 1763*, DICT. p. 2051; 1. *Bell's Commentaries*, p. 292.

“It was held in this last case, that the application “fell to be made in the first instance to the Baillie of the Abbey.” See also 2. *Bell's Commentaries*, p. 547.

It has likewise been laid down, that “*personal protection* will not shield a man from a *meditatio fugæ* warrant, if it can be shewn, that under that protection he is
“taking

22. Boroughs-royal have a special privilege conferred on them by 1672, C. 8., which probably took its rise from *Leg. Burg. C. 34. et seq.*, that where a person residing without the borough is furnished with meat or merchandise by an inhabitant of the borough, who has no security for the debt other than his own book, the creditor may arrest the person of the debtor, if he shall be found afterwards within the borough, till he give security to appear before the court of the borough. This, and the cases mentioned under the preceding section, strike against the rules already explained, and can be justified only from necessity. It appears by the recital of the last-quoted act, that the former custom had authorised this summary arresting of debtors apprehended within borough, not only for the price of necessary furnishings, but for all debts, though contracted upon bond for borrowed money, by which persons of the best credit might have been affronted; but this practice, as it was not founded in necessity, was prohibited by the statute*.

23. Criminal jurisdiction is founded, *first*, *Ratione domicilii*, if the defender has his residence or domicile within the sheriffdom or other territory of the judge; for every criminal judge must have an inherent power of punishing all offenders who reside within his territory, and so are subject to his jurisdiction³⁶. Vagabonds, who have no fixed domicile, may be tried wherever they are seized. *2dly*, Criminal jurisdiction is founded *ratione delicti*, if the crime was committed within the judge's territory; and this appears to be the

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* See as to the application of this statute, *Kilk. and Falc. Dec. 7. 1744, Scot, Dict. p. 1929.*

“ taking measures for his escape from the country. But no person can be liable to a *meditatio fugæ* warrant, who is, by *privilege*, exempted from imprisonment; for the warrant is merely an auxiliary to the right of imprisoning the debtor;” *Bell's Commentaries, ibid.*

“ In the question, whether *officers* or *soldiers* are liable to arrest on *meditatio fugæ* warrants, the opinions of the Court have altered more than once. In one case, the judges thought it ‘no *fuga*,’ that an officer was setting off for his regiment.” (*Scott v. Sandilands and Manderston; Falc. 7th December 1744, Dict. p. 1929.*) In “a later case, the same question having incidentally occurred, a different opinion was delivered, (*Campbell v. Montgomery, 1790, Bell's cases.*) But, finally, the Court has determined, that *meditatio fugæ* warrants cannot be issued against officers on the ground of their being on their way abroad, accompanying, or intending to join their regiments.” (*Service v. Hamilton, 25th May 1811, Hamilton v. Bryson, 6th June 1811;*) 2. *Bell's Commentaries, p. 545.* These two cases of *Service* and *Hamilton* are not reported on the particular point observed by Mr Bell. But the last of them having given rise to an action of damages, which was libelled on the express ground, that “an officer obeying the commands of his superior officers in going to join the regiment, was not in *fuga*,” the matter was again brought before the Court, and damages found due; *Bryson, Fac. Coll. 10th March 1812.* The point may now, therefore, be considered as completely set at rest.

Even “in the case of a person not in the public service, it appears, that while he is held liable to this warrant, he will be indulged with a reasonable time to make his appearance, on showing just cause of absence;” 2. *Bell's Commentaries, p. 544.* That is to say, the Court will so modify the obligation for his appearance in the bond of caution, as to afford him a reasonable time subsequent to any requisition to be made by the creditor. Thus, in the case of *Wright v. Gammell, Fac. Coll. 6th February 1782, Dict. p. 8553,* the Court, “to accommodate the defender as much as possible, allowed him to find caution for his appearance six months after requisition by the pursuer.” Mr Bell adds in a note to the above quotation, “A similar case, I understand, was decided, 18th February 1803, *M'Callum v. M'Callum.* But it is not reported, and I have not the session papers.”

Another point of no small importance, viz. that a debtor's being owner of a Scots land estate, does not protect him from the operation of a *meditatio fugæ* warrant, was decided in the case of *Heron v. Dickson, Fac. Coll. 16th December 1773, Dict. p. 8550.* 2. *Bell's Commentaries, 541.*

³⁶ It would rather seem, that the *forum domicilii* would not now be sustained; *Clephan, 7th February 1810, Books of Adjournal; Mure, 10th July 1811, Fac. Coll.; Buchanan, 28th May 1818, ibid.; 2. Hume, p. 51.-56.*

TITLE II.

Summary arrestment of debtors within borough.

Criminal jurisdiction is founded, 1. *Ratione domicilii*;

2. *Ratione delicti.*

most natural and rational course of criminal trials; because those under whose eye the offence was committed, will be most effectually deterred from a wicked course of life, by seeing the criminal also punished, *St. Gul. C. 18.*; and the just resentment of the person injured, and his friends, will be most amply satisfied, *L. 28. 15. De pœn.; L. 3. pr. De re mil.*; for which reason, sentence pronounced against atrocious offenders is frequently directed to be carried into execution on the very spot where the crime was perpetrated. By the Roman law, the judges of the several provinces were directed to send back the persons of criminals who should be laid hold on within their jurisdiction, to that province where they had offended, that they might be also tried and punished there, *L. 7. De custod. et exh. reor.; Nov. 134. C. 5.* And in like manner criminals who were apprehended in another shire, were, by several of our old statutes, sent back by the magistrates of that shire to the *locus delicti*, that they might be punished in the place where they had transgressed the law, 1426, *C. 90.*; 1436, *C. 148, &c.*; but by the present practice, they are more frequently tried at the circuit-court of the district in which they were apprehended, or brought to Edinburgh, to be tried by the court of justiciary. Where a foreigner, after having committed a crime in this kingdom, retires to his native country, our judges cannot, on pretence that the *locus delicti* is a competent *forum* in the trial of crimes, proceed against the criminal; for the moment he leaves the kingdom, our courts lose that power which they had over him while he was here; and if a citation be necessary to found civil jurisdiction *ratione contractus*, *supr. § 20.*, much more must it be essential in trials against criminals, who ought not to be condemned unheard, *L. 1. pr. De req. vel abs.*; yet if such foreigner shall afterwards return to the kingdom, and be laid hold of, or cited by a proper warrant, he may be tried by our supreme criminal court*.

A judge may be excepted against, 1st, *Ratione causæ*: 2dly, *Ratione privilegii*.

24. A judge may be declined, or, in other words, his jurisdiction may be excepted to judicially, on the following grounds: *First, Ratione causæ*, on account of his incompetency to the special action brought before him. Thus the court of session may be declined in criminal causes, the justiciary court in civil, inferior judges in declarators of property in heritage, &c. *2dly, Ratione privilegii*, when the party is by special privilege exempted from the jurisdiction of the judge. Thus, all members of the college of justice may decline the jurisdiction of inferior courts³⁷, 1555, *C. 39. in fine*. Between those two grounds of declinature, there is this difference: In that which proceeds from the judge's incompetency, his proceedings must be null, though the party entitled to the privilege should not appear and move his exception, because the judge had no original jurisdiction in such causes, *vid. infr. § 27.*; whereas all privileges exempting persons from a jurisdiction in itself competent, must by their nature be pleaded upon by the party privileged, before they can operate. Inferior judges, therefore, not only may, but they ought to proceed in every cause to which they are competent, though a member of the college of justice be the defender, if he does not insist in the plea arising from his privilege; so that a decree

* See this subject ably discussed in Mr Hume's work on Trial for Crimes, vol. i. p. 77. *et seq.* (2d edit. vol. ii. p. 49. *et seq.*)

³⁷ There is one exception to this privilege in the case of the small debt court, 39. and 40. *Geo. III. c. 46. § 19.*

decree in absence is effectual against him. This rule, however, suffers an exception in the privilege exempting members of parliament from civil jurisdiction, during the sitting of parliament; which is so strongly founded, that action cannot proceed against them unless they wave their privilege expressly³⁸.

25. Declinature is founded, *3dly*, *ratione suspecti judicis*, where either the judge himself, or his near kinsman, hath an interest in the suit. It is a rule founded in nature itself, That no man ought to judge in his own cause; and it holds, though the judge have only a partial interest in the cause, *ex. gr.* in a question relating to a copartnership, where he is but one of several partners. Yet where a company is constituted, either by patent or act of parliament, by which a public benefit is intended, rather than the advantage of the private adventurers, a judge cannot be declined in the cause of that company, barely because he is a proprietor, *Voet. Com. tit. De judic. § 45.* Hence the proprietors of any bank-company, established either by statute or royal grant, may judge in the cause of that company^{* 39}.

3dly, Ratione suspecti judicis.

26. Neither can one judge in the cause of a kinsman; where the propinquity of blood makes a sort of identity between the parties related. Hence by the Roman law, no person could judge in the cause of his father, or son, or wife, or any of his family, *L. 10. De jurisd.* It would appear that no restraint was laid on our supreme judges, by the ancient practice, from sitting and voting in the causes of their nearest kinsmen, since it required a statute, 1594, *C. 216.*, to disable the Lords of Session from judging in any action where their father, or brother, or son, was a party. But by our present law, one rule is established for all judges supreme and inferior, That no judge shall sit and vote in the cause of his father, brother, or son, whether by consanguinity or affinity; nor in the cause of his uncle or nephew by consanguinity, 1681, *C. 13.* By this rule, a judge may vote in the cause of one who is married to his niece; but if the niece be the proper party, and the husband only cited *for his interest*, such case falls under the prohibition of the statute, *Fount. Jan. 31. 1712, Calder, (Dict. p. 197.) † 40.* It is a common opinion, that a judge

Propinquity or consanguinity, a cause of declinature, and where a judge is party in a similar cause.

VOL. I.

M

who

* In a case in which Douglas, Heron and Company were concerned, several of the Lords of Session moved declinatures against themselves, on account of their relation to different partners of the Company; but it being observed, that, if these declinatures were sustained, a quorum would not remain sufficient to determine this cause, or any other in which that Company was concerned, the declinature was repelled; *Acts of Sederunt, July 22. 1774.* On the same ground, the Court repelled a declinature, that several of the judges were heritors in a burgh, in a question where that burgh was a party; *January 22. 1789.* These two acts are inserted in p. 644. edit. 1790.

† By Act of Sederunt, June 28. 1787, the Court expressly find, that affinity in the case of uncle and nephew is no ground of declinature. A doubt on this point had been started in a case decided of the above date; *Sir William Erskine contra Drummonds; Fac. Coll. (Dict. p. 2418.).*

³⁸ This privilege is now done away by *stat. 10. Geo. III. c. 50.* See *infra, tit. 3. § 8. in not.*

³⁹ The Court resolved, that the circumstance of a judge being a proprietor, or holding any share of the capital stock of any of the chartered banks in Scotland, is not a ground of disqualification against his Lordship judging in a question connected with such bank, wherein it may have any interest; *A. S. 1st Feb. 1820.*

It has also been found, in the case of *Blair, 26th January 1814*, where indeed there was less room for doubt, that "the being members of the Board of Trustees does not disqualify judges from sitting and judging in cases where the officers of the board are parties;" *Fac. Coll. App. to vol. 1814-15.* In this case, the Judges had "no private or individual interest. Their connexion with the case arose in the strictest sense *ratione officii.*"

⁴⁰ It is not a ground of declinature that the defender's wife is the sister of the judge's wife; the relation here being merely *affinitas affinitatis*; *Harc. Dec. 1687, Binny, Dict. p. 3420; Goldie, 16th February 1816, Fac. Coll.; A. S. 16th Feb. 1816.*

who stands in an equal degree of propinquity to both parties, let it be ever so near, cannot be declined; because there the bias or partial affection must be also presumed equal. But, *first*, Admitting this to be a good reason why the law *ought* to stand so, the rule contained in the act 1681 makes no such exception. And, *2dly*, There is the same reason for declining a judge who stands in an equal relation to both parties, as for rejecting the testimony of a witness in the like situation; for which see below, *B. 4. T. 2. § 24*. It would seem, that though the marriage which first created the affinity between the judge and the party should be dissolved, the judge continues disqualified from voting in that party's cause, not only from the words of the act, but from the reason of the thing: For though the affection which works the bias in the judge had its first rise from the marriage, it is seldom or never taken off by the dissolution of it. In the House of Lords of Great Britain, every member of that sovereign court may judge, not only in any kinsman's cause, but even in his own. That privilege however is seldom if ever used. A judge may likewise be suspected on account of his dependence on a superior. Thus a cause may be carried to the court of session from a deputy, because the principal judge is a party to it, 1555, *C. 39. in fine*. And though Lord Stair limits that act to the case of removing tenants, which is the special subject of it, *B. 4. T. 37. § 20.*; yet it seems to have required an express statute, to authorise deputies to judge in the causes of the principal, 1579, *C. 84*⁴¹. Where a judge is himself party to a cause so similar to the one brought before him, that both fall to be decided by the same rules, he is said in the Canon law, *fovere consimilem causam*, and by that law may be declined, *Decretal. L. 2. T. 1. C. 18*.

Jurisdictio in consentientes, or prorogated jurisdiction.

27. Prorogated jurisdiction is that which is, by the consent of parties, conferred on a judge, who, without such consent, would be incompetent. The Romans, who were strangers to the word *prorogate*, gave it the name of *jurisdictio in consentientes*. It is authorised by *L. 1. De. judic.*; where two things are required as essential to it; the consent of parties, and jurisdiction in the judge. *First*, The parties must consent; for where a judge is incompetent, he can have no authority, till his jurisdiction be rendered competent by the consent of him who is not subject to it. It is not therefore sufficient, that no appearance be made in behalf of the defender; for one is under no necessity to appear before a judge who has no right to call him to judgment, *L. 20. De jurisd.*, unless he acquiesce in his authority, either by an express declaration in word or writing, or tacitly, by some act which implies consent. Tacit prorogation is inferred against a pursuer, by bringing his cause before the judge; and against a defender, by his appearing, and offering defences in the cause, either dilatory or peremptory; which the law considers as an acknowledgment of the competency of the court, according to the rule, *Primus actus judicii est judicis approbatorius*. The offering of a declinature is so far from importing an acquiescence in the judge's jurisdiction, that it is an express disowning of it. Where a declinature has been offered by the party and repelled by the judge, the party is not understood to pass from it, though he should afterwards offer defences *in causa*, *Fount. July 29. 1696, Schaw*, (Dict.

⁴¹ This statute extends only to a few special cases. The general rule seems to be stated with more accuracy in Mr Erskine's *Principles, h. t. § 13*. "A deputy may be declined, as suspected, where the principal judge is a party, 1555, *c. 39. § ult., except* in causes in which he is authorised to judge by special statute, 1579, *c. 84*."

(DICT. p. 7314.); but this is commonly done, under protestation, that his proponing of defences shall not hurt his declinature. As the crown's interest cannot be affected by the undue consent of its officers in the management of processes, 1600, C. 14., the King's causes may be carried from that very court before which the crown-officers themselves had brought the action, Jan. 19. 1711, *Eyres*, (DICT. p. 7596.).

28. A clause of registration, though it bear a consent to register the deed in the books of a particular court, does not import prorogation, so as to found that court in a jurisdiction, in questions that may arise afterwards upon its validity or legal effects. The consent is confined to the registration, which is *quodammodo jurisdictionis voluntariæ*; though therefore it has the effect to support the diligence which is founded on the registration, it is not to be so stretched by implication, as to confer judicial powers on the judge in acts of contentious jurisdiction. Thus, though a bond for a sum exceeding L.40 Scots should bear an express consent for registration in the books of any commissariat, the commissary is not thereby authorised to judge of the import of that bond in any subsequent question, without a proper prorogation.

29. The *second* requisite of prorogation is, That the judge have such jurisdiction as may be a proper or habile subject of prorogation, L. 3. C. *De jurisd.* For this reason, there is no place for prorogation, where the jurisdiction is vacated, or its term expired, which doctors call *prorogatio de tempore in tempus*: For no private consent can create jurisdiction; and a magistrate or judge, after the term of his office is elapsed, or his commission revoked, is no longer a magistrate or judge. Neither can jurisdiction be prorogated *de loco in locum*; i. e. parties cannot subject themselves to the jurisdiction of a judge while he is without his territory; for a judge *extra territorium* is no better than a private person. But *prorogatio de loco in locum* has been admitted in our practice, when understood in a different sense: If, for instance, one who resides in the shire of Haddington, shall appear before the sheriff of Edinburgh, and exhibit defences *in causa*, without pleading the *præscriptio fori*, he thereby brings himself within the territory of that sheriff, and so is understood to acquiesce in his jurisdiction, Feb. 23. 1627, *Service*, (DICT. p. 7305.). Yet it still remains a doubt, whether *prorogatio de loco in locum* ought to be extended to the case where the defender's domicil is not within the judge's territory, more than it can be to the case where the judge sits in judgment in a place without it ⁴².

30. Jurisdiction is said to be prorogated *de causa in causam*; when parties consent, that a judge, who hath jurisdiction in causes of a particular kind, or to a particular extent, shall have the cognisance of a cause of a different kind, or to an higher extent. By the Roman law, prorogation from civil causes to criminal was rejected, L. 1. C. *Ubi causæ fisco*: because the power of the sword was not included in civil jurisdiction: But a judge appointed to a determinate kind of civil causes might, by the consent of parties, take cognisance of civil causes of a different kind, L. 1. C. *De jurisd. omn. jud.* By our law, the limiting of jurisdiction to a certain sort of

TITLE II.

Clause of registration in the books of a court does not import prorogation.

When there is no room for prorogation. *Prorogatio de loco in locum.*

Prorogatio de causa in causam.

⁴² Yet such a prorogation of the Commissaries' jurisdiction was lately sustained in a question of divorce between English parties, and in reference to a marriage contracted in Ireland, where the defender, having only been a few days in Scotland, had of course acquired no sort of domicil; *Murray*, 8th March 1805, *Fac. Coll.* DICT. v. *FORUM COMP. App.* NO. 5.

of civil causes, imports a denial of it, in causes of an higher or different nature, *Pr. Falc.* 13. (*Bethune*, DICT. p. 7307.); in which therefore there can be no prorogation, though both parties should acknowledge the judge's jurisdiction in the most express terms. Thus no consent of parties can give force to the sentence of a sheriff in an action for declaring the property of heritage, or in a sale or ranking of a bankrupt estate. Thus also the jurisdiction of the justices of the peace ought not to be prorogated to actions upon common debts. The powers conferred upon them were intended solely for preserving the public peace, and maintaining a well-regulated police over the kingdom. They seem therefore to have no radical jurisdiction in civil causes, which may be the proper subject of prorogation, *Fac. Coll.* ii. 170. (*Barclay*, DICT. p. 7611.)*⁴³. But in questions of the same nature with that to which the judge is confessedly competent, though the law may have confined his jurisdiction to causes within a stated sum, parties may prorogate it to causes beyond that sum; as the transition is easier from a smaller sum to a greater, than from a cause of one kind to one of a quite different kind, *June 25. 1668, Black*, (DICT. p. 7309.).

No prorogation in baron courts, nor where the judge may be declined from propinquity,

31. Prorogation of jurisdiction is, in special cases, excluded by statute. Thus, *first*, No prorogation can, by the late jurisdiction-act, 20^o *Geo. II.*, be received in baron-courts; so that baron-bailies are shut out from the cognisance of causes which exceed the sum to which that statute has limited the baron's judicial powers⁴⁴. *2dly*, The ground of declinature arising from the judge's propinquity to one of the parties, is so strongly founded, that no consent of parties can enable or qualify the judge to take cognisance of such causes; for all right of judging in them is expressly denied to him by the following words of the act 1681, *C. 13.* that *the judge shall not sit, nor*

* There is some reason to doubt if the case here quoted supports the doctrine of the text. In a later question, a person being sued for grass-mail before the justices, pleaded his defences, which were overruled. He suspended; but the court found the letters orderly proceeded, *Jan. 24. 1769, Boyd contra Millar, &c.* (DICT. p. 7617.).

⁴³ The principal report here referred to seems irreconcilable with the use that is made of it in the text. According to that report, it appears, that the justices having, in the first instance, sustained their jurisdiction, "the defenders appealed to the quarter-sessions, who found, that the Justices of Peaces were *not competent* judges in this process, and *dismissed* the same;"—but that afterwards the pursuers complaining to the Supreme Court by advocacy against this decision, "the Lords *advocated the cause*; and remitted to the Lord Ordinary to proceed accordingly."

It is presumed, however, that some inaccuracy must have crept into the report; for the case is thus abridged in the General Index by the Reporter himself: "Jurisdiction of the Justices of the Peace *cannot be prorogated*;" while in the Folio Dictionary, it is said, "The Lords *advocated the cause*, upon the ground that Justices have no *jurisdiction in civil matters*." Accordingly, the law, as stated by Mr Erskine, was afterwards held to be quite settled; and in *Robertson, 15th June 1790, Fac. Coll.* DICT. p. 7625, "The Court considered the total incompetency of Justices of the Peace to judge in any ordinary questions of debt, however small the subject of litigation might be, as a point so clear, that it did not admit of the smallest doubt." Since this decision, the Justices have been empowered, by special statute, to try and determine "all causes and complaints brought before them concerning the recovery of debts, or the making effectual any demand; provided always, that the debt or demand shall *not exceed the value of L.5 Sterling*, exclusive of costs;" 39. and 40. *Geo. III. c. 46. § 2.* But this very proviso seems to exclude the prorogation of their jurisdiction in causes of a higher value, agreeably to the doctrine laid down, § 31. of the text. See *infra*, tit. 4. § 13.

⁴⁴ In the same way, under the provisions of the act 1681, *c. 16.*, which vests a privative jurisdiction in the Court of Admiralty, the jurisdiction of the Court of Session cannot be prorogated in purely maritime causes; *Clark, 8th August 1783, Fac. Coll.* DICT. p. 7532; *Lawrie and Pinkerton, 31st January 1812, Fac. Coll.*

nor vote. Besides, the statute disables the judge from voting, not only where the party related to him is pursuer, but where he is defender; though it must be evident, that a pursuer who brings before a judge a son or brother of that judge as a defender, does an act, which, in its own nature, infers prorogation, and virtually passes from all grounds of declinature which might have been competent to him against the judge on account of his proximity of blood to the defender.

Essential requisites in a judge. He holds his office *ad vitam aut culpam*.

32. All judges must be just men, that so all who are subject to their jurisdiction may have equal justice done to them, 1449, C. 13. They must have attained to the age of twenty-one years at least; for no person, to whom the law denies the unlimited management of his own property, ought to be entrusted with that of others. They must, by 1567, C. 9., maintain the purity of religion; by which is meant the Reformed Religion, in opposition to Popery: And by *Conv. Est.* 1689, C. 13., it is declared contrary to law to employ Papists in places of the greatest trust. *Lastly*, Judges must have a competent estate of their own, out of which they may be punished, if they minister not the law evenly, or be negligent in their offices, 1424, C. 6. & 45.; 1457, C. 76. This last qualification has been borrowed from the Roman law, which provided, that if a judge *litem suam fecerit*, erred either through ignorance or corruption, he was liable in damages to the party hurt, *L. 5. § 4. De obl. et act.* But because few persons would adventure on the office of a judge, if an undesigned error, perhaps *in apicibus juris*, were to subject them to damages, this penalty is, by the usage of Scotland, pointed only against those judges who from wilfulness or a bad heart delay or pervert judgment, *July 19. 1706, Black**; *Fac. Col.* i. 111., (*Blaw, Dict.* p. 7610. †). Yet where the sentence is glaringly illegal, *lata culpa equiparatur dolo*; law, from the grossness of the error, presumes a perverse will, *Br. 79, (Pitcairn, Dict.* p. 13948 ‡). All our supreme judges hold their offices *ad vitam aut culpam*, which is the likeliest way to preserve them from undue influence. There is indeed no statute limiting the crown's right in this respect; but it was declared contrary to law, by *Conv. Est.* 1689, C. 13., to change a grant of jurisdiction, once made during life, to a commission during pleasure.

Oaths to be taken by judges.

33. The oaths imposed by law on our present judges are, *first*, The oath of allegiance, with the assurance, the tenor of which is inserted in 1693, C. 6. *2dly*, The oath of abjuration, which was first imposed by 6° *Ann.* C. 14., on all who, by the former laws, were required to swear the allegiance, and subscribe the assurance; and has been since continued by several British statutes. *3dly*, The oath of supremacy, which was by 1° *Geo. I.* C. 13. imposed upon all officers, civil and military, in Britain. This oath contains in substance, that no foreign prince or prelate hath any ecclesiastical authority in this realm; but it hath never been imposed in our practice. *4thly*, The oath *de fidei administratione*, that they shall faithfully discharge the duties of their several offices.

VOL. I.

N

TIT.

* *Forbes*, p. 127. *Dict.* App. II. *voce* REPARATION.

† Lord Stair, upon this subject, expresses himself thus: "The punishment provided against judges can go no further than manifest and palpable injustice against law, which doth always infer fraud by wilful injustice, but reacheth not to dubious cases, where just and rational men may be of different judgments, unless there be corruption by bribe or bias; otherwise no man but a beggar or a fool would be a judge." *B. 4. tit. 1. § 5.*

‡ *Fac. Coll. Dec.* 20. 1789, *Laing, Dict.* p. 8555.

TIT. III.

Of the Supreme Judges and Courts of Scotland.

Whether the Sovereign, the fountain of jurisdiction, has a reserved power of exercising it when once bestowed.

THE Sovereign, from whom all jurisdiction is derived, must have had that right in himself in the highest degree, which he alone could confer upon others. Hence, in all grants of jurisdiction, he was understood to reserve a power, either of investing others with the same jurisdiction, or of taking cognisance by himself of those very causes to which he had made the grantees competent, 1469, C. 26. A strong instance of the last is given by *Craig, Lib. 3. Diog. 7. § 12.*, in the case of James VI., who having, as heir to Archibald Earl of Angus, laid claim to the Earl's estate, was declared by our supreme court to have a right of pronouncing sentence on the import of his own claim. Charles II. extended this branch of the prerogative so far, as to appoint sheriffs-depute, and even to erect regalities within the bounds of heritable sheriffships; which extension was expressly justified by act 1681, C. 18., declaring that the king, notwithstanding any offices or grants of jurisdiction conferred by him on his subjects, retains a jurisdiction cumulative with the grantees. From this James VII. assumed a power of naming magistrates in several royal boroughs, which by former grants had a right to name their own magistrates. But these steps having been justly looked upon as encroachments on property and patrimonial jurisdiction, were, upon the Revolution, declared contrary to law, *Cow. Est. 1689, C. 13.*; and soon after the act itself of Charles II. was formally repealed, by 1690, C. 28. It seems now to be agreed, that the several courts on which the crown hath conferred a stated extent and degree of jurisdiction, have, by the immemorial exercise of it, acquired a power of judging according to that usage, exclusive of the Sovereign himself, which cannot be altered without a statute, *Hist. Law Tracts, v. 2. p. 7.*

Parliament of Scotland.

2. It admits of no doubt, that the parliament of Scotland, as a court of appeal, was in use to determine all causes in the last resort, unless where the judgments of any court were by special statute declared final. But it may be doubted, whether it had any original civil jurisdiction; for the decisions in parliament mentioned in act 1587, C. 39. are probably to be understood only of decisions upon appeal. Our parliaments consisted at first only of the king's barons or freeholders, *St. Malc. II.*, under which appellation it would seem that the dignified clergy were included on account of their freeholds. These last are expressly mentioned in the introduction to the statutes of William; and they are there, and in the title prefixed to the acts of James V., ranked before the temporal barons. It appears, that parliaments were, in the reign of Robert II., made up of three estates, *St. Rob. II. C. 3.*, of which that of the boroughs was one, *ibid. C. 17. § 4.* From that period, to the Revolution in 1688, the three estates of parliament were, the clergy, barons, and burgesses.

Greater barons.

3. The name of *baron* was commonly used in France, for some time before the Norman conquest, to denote persons of the first dignity, *Du Fresne; Glossar. v. Baro.* After that vocable was transplanted into Britain, its signification became more extended, and frequently included all who held their lands immediately of the King.

King. Barons may, according to the usage of Scotland, be distinguished into the greater and the lesser. Though all barons, however small their freeholds might be, had from the beginning a right to sit in parliament; yet the *majores*, or greater barons, were sufficiently distinguished from the *minores*, by their grants or patents of peerage, in virtue of which they were dignified with the titles of *Duke, Earl, Lord, &c.* and so raised above the rank of common barons. When by the increase of the number of the lesser barons it became impracticable to assemble them all in one house, their attendance was dispensed with, upon choosing two or more of their own number in each county to represent them, 1427, C. 101.; from which dispensation, however, the *barones majores* were expressly excepted. This leave of absence was renewed, first by 1457, C. 75. as to all freeholders under the yearly rent of L.20 Scots; and afterwards, by 1503, C. 78., to all below 100 merks of new extent, unless they should be called by special writ; and by 1587, C. 114. to all without exception. But still the right of sitting continued with those smaller barons, though they could no longer be fined for absence. As in those days few barons claimed their seat, to avoid the expense and trouble which necessarily attended the service of parliament, it came at last to be understood that they had no right to sit unless they were elected by the freeholders, agreeably to the directions of 1427, C. 101.; but no statute appears to have been ever enacted, expressly disabling them.

4. Though the lesser barons had from that period no hereditary seat in parliament, they still continue capable of electing or being elected members of parliament, provided they be infeft in and possessed of lands in property or superiority holding of the crown, and extending either to 40s. Scots of old extent, or to L.400 Scots valued rent, 1661, C. 21. Proper wadsetters are by that statute accounted proprietors; and under the appellation of *lands*, is included every heritable estate capable of seisin. Hence fishings, even where they are not connected with lands, if they are valued at L.400, entitle the proprietor to a vote.

Lesser barons.

5. A committee, called *the committee of articles*, was elected in the beginning of every parliament, and consisted of a certain number of the three estates. Its constitution appears to be at least as old as the oldest of our proper statutes, *Black acts, fol. 1.* This committee was at first chosen by the three estates, *ibid. fol. 50.* Their business was, to receive all proposals relative to parliamentary matters, and transmit them to parliament; and frequent references are made in our more ancient statutes to the special articles laid before that committee, 1503, C. 64.; 1540, C. 82. 119, 120, &c. Immediately after the election of this committee, the parliament was adjourned, *dabatur cateris licentia recedendi*, as it is expressed, in *Black acts, fol. 1.*, and in the mean time this committee prepared overtures, which were afterwards voted in full parliament, generally on the last day of their sitting. Under colour of preventing frivolous debates, it was enacted by 1594, C. 218., that no matter should be brought before the parliament which was not first laid before this committee, and presented by the clerk-register in their name to the three estates. The manner in which they were chosen about a century ago is particularly set forth, 1663, C. 1. It having been, after the Revolution, accounted inconsistent with the freedom of parliament, that nothing could be there proposed but what had been previously concerted by an inconsiderable number of its members,

that

Lords of the articles.

Book I.

Convention of estates.

that committee was declared a grievance by *Conv. Est.* 1689, C. 18., and actually suppressed by 1690, C. 3.

6. When the estates were called by the sovereign, for the particular purpose of imposing a taxation, or upon any special emergency which required immediate deliberation or advice, it got the name of a *convention of estates*. Those meetings consisted of any number of the estates that might be suddenly drawn together by the king, without the necessity of a formal citation against them upon a precise number of days; and their powers were limited to that particular business for which they had been called, *Mack. h. t.* § 5. But the convention holden in 1689, under the authority of the Prince of Orange, exercised higher powers than that author seems willing to allow to the parliament itself.

Parliament of Scotland united to that of England.

7. By the treaty of Union in 1707, the parliaments of Scotland and England are united into one. The Scottish share of representation in the house of Peers, is, by *art. 22.*, fixed to sixteen Peers elective. But though none of the Peers of Scotland, except these sixteen, have a seat in Parliament, they are, by *art. 23.*, declared to have, in all other respects, the privileges of British Peers. In the house of Commons, Scotland is represented by forty-five members; of whom thirty are elected by the freeholders of counties, and fifteen by the royal boroughs, said *art. 22.* The method of electing the Scottish Peers is set forth in act 1707, C. 8.: And the most material British statutes for regulating the election of our Commoners, and declaring the qualifications of the electors and elected, are 6° *Ann. C. 6.*; 12° *Ann. st. 1. C. 6.*; 2° *Geo. II. C. 24.*; 7° *Geo. II. C. 16.*; 16° *Geo. II. C. 11.**

Constitution of the British Parliament.
Privileges of Parliament.

8. The parliament of Britain have no such restraint on their deliberations as was imposed on that of Scotland by the committee of articles. Officers of state, as such, have no right to a seat in the British parliament. The two houses of Peers and Commons sit separately; and each of them must concur in all bills brought into parliament before they can pass into a law. The house of Lords is, in its judicative capacity, the sovereign court, which determines finally in all appeals from the supreme courts of both parts of the united kingdom; and it never judges in civil questions but upon appeal. In criminal matters, it hath an original jurisdiction, which is exercised either over Peers or Commoners, upon impeachment by the house of Commons, for treason or for high crimes and misdemeanors. In the trial of Peers by indictment, the house of Peers sit, not as a court of parliament, but as a court constituted by special commission from the king, who names the person who is to preside in it as High Steward. Every member of a British Parliament, whether Peer or commoner, enjoys certain privileges to which he is entitled by the usage of parliament. One is, That none of them can be sued upon any action, nor any diligence used either against their person or estate, during the sitting of Parliament, nor for forty days after its rising, or before the day to which it is adjourned or prorogued; and this privilege is not confined to the members themselves, but reaches also to their menial and certain other of their servants. But it hath suffered a restriction by 11° *Geo. II. C. 24.*, which declares, that all suits may be commenced and prosecuted against any person entitled to the privilege of

* Also *stat. c. 1707, c. 8.* already quoted: 6° *Ann. c. 23.*; 1° *Geo. I. c. 13. § 4.*; 14° *Geo. III. c. 81.*; 22° *Geo. III. c. 41.*; 37° *Geo. III. c. 138.*; 22° *Geo. III. c. 45.*; 30° *Geo. III. c. 17. § 4.*; 35° *Geo. III. c. 65.*

of parliament, immediately after the dissolution or prorogation of a parliament, till a new one shall meet, or the same be re-assembled; and immediately after the adjournment of both houses for above fourteen days till both houses shall re-assemble. It has been always admitted, that it affords no protection against prosecutions upon treason, felony, or breach of the peace; and it was resolved by both houses in the noted case of Mr Wilkes, *Nov. 1763*, that no privilege of parliament extends to the writing and publishing of seditious libels; than which no breach of the peace can be productive of greater mischiefs to a state*.

9. Though our Kings, who seldom exercised their power of judging causes by themselves, did very early commit the regular administration of justice to stated judges, *viz.* to the justiciar or justice-general, who had an universal supreme jurisdiction over the whole kingdom, and to inferior judges, whose judicial powers were limited, in respect both of territory, and of the special kinds of causes to which they were competent; yet they continued to exercise jurisdiction in a great variety of causes, by the advice and with the concurrence of their council. And even after it had been enacted, that all complaints should be decided by the judges-ordinary, 1424, *C. 45.*, it appears by act 65. of the next year, 1425, that the King and his council judged in such causes as the pursuer chose to bring before them in preference to the judge-ordinary, *St. B. 4. Tit. 1. § 7.* The judicial powers vested in the council were, by the said act, 1425, *C. 65.*, transferred to the court of session; and soon after, from the session to the judges-ordinary, in the manner to be explained next section; during which last period, the ordinary jurisdiction of the King and council was confined to causes which called upon the special attention of the public, namely, actions pertaining to the King, and to strangers; complaints made by churchmen, orphans, and pupils; and those that were directed against officers of the law, 1487, *C. 105.*; besides which, they seemed to be vested with the extraordinary powers, not barely of punishing judges-ordinary for their negligence, 1469, *C. 27.*, but of reviewing their sentences in case of iniquity, 1475, *C. 63.* This council consisted

Jurisdiction of the general council, and privy council.

* By *stat. 4. Geo. III. C. 33. § 1.* it was enacted, That any creditor to a certain value, of a merchant, or other person falling under the description of the laws relating to bankrupts, having privilege of Parliament, may, if the debt be not secured, paid, or compounded, within two months after a summons or bill is issued against him, have the debtor adjudged a bankrupt, and sue out a commission against him as against other bankrupts. And by § 3., That if any merchant, or other person falling under the statutes relating to bankrupts, should, after the last day of that session of parliament, commit an act of bankruptcy, a commission might be sued out against him, and proceeded in notwithstanding his privilege⁴².

By *stat. 10. Geo. III. C. 50. § 1. and 2.* it was enacted, That after the 24th day of June 1770, it should be lawful to sue any action or suit against any Peer or member of the House of Commons, or other person entitled to privilege; and that the suit or action should not be stayed under pretence of privilege; provided that nothing in the act should extend to subject the person of any member of the House of Commons to be arrested or imprisoned upon any such suit or proceedings.

⁴² By *stat. 52. Geo. III. C. 144. § 1. and 2.* it is enacted, That whenever a commission of bankruptcy shall issue against a member of the House of Commons, and he shall thereupon be declared a bankrupt, he shall during the next twelve calendar months be incapable of sitting or voting, unless within that period the commission shall be superseded, or the debts either be paid to the creditors in full, or, in case of dispute, their payment (so far as may afterwards be recovered in law or equity,) secured by the bond of the bankrupt with two sureties. If the commission be not superseded, or the debts satisfied within the above period, the Speaker shall issue his warrant, according to certain directions contained in the act, for electing a new member.

As to privilege of Parliament, generally, see *Tomlin's Law Dictionary*, v. PARLIAMENT.

Book I.

sisted of a number of persons named by the King, to assist him with their advice, chiefly in matters of government; and was afterwards called the *secret*, 1489, C. 12., or *privy council*, 1609, C. 14., in contradistinction to the parliament, which got the name of the general council, 1427, C. 102., or the King's great council, 1537, C. 40. The privy council came at last, beside their powers in matters of state and public police, to have a fixed supreme jurisdiction in all questions of wrong, for which no redress could be had in the common courts of law, and in all causes where the public peace was concerned. Thus, they inquired into and punished violent encroachments upon possession, all acts importing oppression, concussion or contempt of the laws, or of public authority; they decreed alimony to pupils, and to wives barbarously used by their husbands; and judged in many other questions of that sort, where summary proceeding was necessary. These powers continued in the Scottish privy council, till an act passed soon after the Union, 6° Ann. C. 6., whereby that court was abolished, and sunk into the privy council of Britain, which for the future was declared to have no other powers than the English privy council had at the time of the Union. What the powers of a British privy council are, it does not much import a Scottish lawyer to know: It is certain, that they have no judicial powers that can affect Scotsmen; for though they may commit them to custody for crimes against the state, and examine them, they have no right of trial.

Origin of the
court of session;

10. A new court was erected by said act 1425, C. 65., consisting of the chancellor, and other persons of the three estates of parliament to be named by the King, who were to sit thrice in the year where he should command them, and judge in all causes that were formerly decided by the King and council. This court was called the *session*, because, in place of being, like the council, itinerant, and without any fixed terms of sitting, it was ordained to have a determinate number of sessions annually, at such stated places as the King should appoint. Certain doubts which had arisen upon the jurisdiction of this new-erected court in relation to spuilzies, were removed by 1457, C. 61., and a superadded jurisdiction seems to have been conferred on them in spoliations committed against tacksmen, and other possessors of land, and in all obligations, contracts, debts, and other civil actions which concern neither fee nor heritage; which last words sufficiently prove, that declarators of property of heritage, or, as they were then called, brieves of right, did not fall within the cognisance of that court. The session appears, by this last act, to have had only a cumulative jurisdiction with the judge-ordinary: But if the pursuer should have once made his election of the session, neither party had the remedy of appealing from their sentence to parliament, 1457, C. 62.; which has probably proceeded from this, that the court of session, being truly a committee of parliament, were accounted to have parliamentary powers.

Changes in its
constitution.

11. This constitution of a court was soon found to be inconvenient. The judges who were named out of the estates, served by rotation, and were changed from time to time for others, after having sat forty days, 1457, C. 63. Their term of officiating was so short, that they could not in that time acquire any tolerable knowledge of the practice of the court; and they were particularly negligent in the causes of the poor. For these reasons, the jurisdiction of this fluctuating committee of parliament was abolished by several

several acts, 1469, C. 27.; 1475, C. 63., not indeed in express words, but by necessary consequence; for it was enacted by these statutes, That all causes should come first to the judges-ordinary, *i. e.* to the justices, sheriffs, stewards, bailies, and barons, provost and bailies of boroughs; and that if they neglected to do justice, or administered it partially, the party aggrieved should apply to the King and his council, without once mentioning the session, or supposing them invested with any jurisdiction, either in the first or second instance. That the jurisdiction vested in the court of session was in this manner taken away from them, is affirmed by Stair, B. 4. *Tit.* 1. § 11., and still in stronger terms, B. 4. *Tit.* 1. § 15.; notwithstanding which, it must be acknowledged, that the act 1503, C. 58., which altered the former establishment, carries an insinuation, that the court of session had not then fallen into total disuse; for these words, *because there has been great confusion of summonses at ilk session*, cannot possibly be applied to any other court then known in Scotland. However that may be, it is certain, that by the said act, 1503, C. 58., all the powers that had been formerly in the session were transferred to a council to be named by the King, called the *daily council*; who were to hold their courts continually at Edinburgh, or where the King should appoint, and to decide in civil causes and complaints daily as they should occur. But neither was this court of long continuance: The civil jurisdiction vested in it was extremely limited, and it was perhaps considered as too heavy a burden for the justiciar of Scotland to be charged with the supreme jurisdiction, not only in criminal, but in all civil matters concerning heritable rights; wherefore it was judged proper to erect a new court, which might have an universal and supreme jurisdiction in all civil questions whatever.

12. James V. therefore gave to this court of the daily council a new form, after the model, as Sir George Mackenzie informs us, of the parliament of Paris, 1537, C. 36. He dignified it with the appellation of *The College of Justice*, and the judges with that of *Senators*, 1540, C. 93., who are numbered among the judges-ordinary, 1584, C. 3. &c. and pass sometimes in our statutes by the name of *Lords of Council*; and sometimes by that of *Lords of Session*. In all their extracted acts and decrees, they are styled *Lords of Council and Session*. It may be worth remarking in this place, that though the parliament which instituted this court, is in all the later editions of our statutes said to have been assembled *anno* 1537, it was truly holden in 1532⁴³. For proof of this, the first or black edition of our statutes may be appealed to, which places that parliament in the year 1532; and surely that first edition printed by the special commission of Queen Mary, and copied immediately from the records, is to be accounted of more certain authority than the later ones. *2dly*, It appears from 1537, C. 68. as it stands in our later editions, that the King's ratification of the privileges of the new-modelled court was subscribed in the 19th year of his reign. Now James V. began his reign *anno* 1513, from which if nineteen years be reckoned downwards, the year must be 1532, not 1537. *3dly*, It is manifest

College of Justice modelled after the Parliament of Paris.

⁴³ Accordingly, the first Acts of Sederunt of the Court, (which have been inserted in the same editions of the statutes, as so many acts of Parliament,) bear date 27th May 1532; *Acts of Sederunt from May 1532 to Jan. 1553*, p. 1. *et seq.* See also the Preface to that publication, p. v.; *Acts of Sederunt, 1753 to 1790*, Pref. p. 1.; *stat.* 1532, C. 2. as contained in "The Acts of the Parliaments of Scotland, now publishing under the authority of the Commissioners on Public Records," vol. ii. p. 335.; and Mr Thomson's Preface to the same vol. p. 14.

Book I.

manifest from the King's revocation made at Rouen, and fully recited 1540, C. 70., that he had attained his perfect age of twenty-five in April 3. 1537, a month or two before the date ascribed in our statute-book to the institution of the College of Justice; nevertheless it is expressly affirmed, 1540, C. 93., that he was still under the age of twenty-five when that court was established, or at least reformed. *Lastly*, Mention is made in 1535, C. 32. of the Lords of Session, which is a denomination not applicable to any Scottish court, from the erecting of the daily council, till it was new-modelled by James V. This contrariety cannot be otherwise reconciled, than by placing under the year 1532 the statutes which appear in the common editions of our acts of parliament as passed *anno* 1537. The transcribers of our statutes have undoubtedly been led into this mistake from the near resemblance between the figures 2 and 7; in the ancient way of writing.

One half of the judges were formerly churchmen: Now all must be laymen.

13. The judges of this court, by the institution, consisted of seven churchmen and seven laymen, with a president, 1537, C. 36. The Abbot of Cambuskenneth was named the first president, C. 42., and in his absence, another churchman vice-president, *ibid.* But there is no statute of that year which excludes laymen from the office of president; though it be affirmed, 1579, C. 93., that it behoved the president, by the first institution of the court, to be a clergyman, which is for the future dispensed with by that statute. Frequent instances occur in the books of sederunt, of parsons, rectors, and other churchmen, who were admitted judges after the reformation; but parochial ministers were, by 1584, C. 133., declared incapable of exercising any office in the College of Justice, under the pain of deprivation, that they might not be diverted from their proper functions. By a posterior act during the Usurpation, 1640, C. 26., which extended this incapacity against all churchmen indiscriminately, the distinction between temporal and spiritual judges was suppressed, and the whole number ordained to consist of laymen: And though this statute was voided by the act rescisory of Charles II., 1661, C. 15., no clergyman has been since that period admitted to the bench.

How they are elected.

14. The first judges of this court appear to have been chosen by the parliament; but as far back as the books of sederunt now extant⁴⁴ carry us, viz. January 1554, they have been named by the crown. James VI. transferred to the judges the right of electing their own president, by 1579, C. 93.; and in a sederunt of the court of session recorded June 26. 1593, where the King himself was present, he condescended to name three presentees to the Lords, upon every vacancy in the bench, out of which they were to choose one; and in this form, Preston of Fenton was admitted a judge, March 8. 1596, and Macgill of Cranston, May 23. 1597. The exercise of both rights, however, was soon after resumed by the Majesty, and continued in the crown till the Usurpation, when a committee of parliament, named in 1641 to negotiate with Charles I., insisted that the officers of state, and the judges of the court

⁴⁴ Upon a more thorough inquiry, it has been discovered, that the record of the Court, during the first twenty-one years, from May 1532 to 1553, is extant; and accordingly the Acts of Sederunt during that period have been published "by authority" of the Court of Session, and of the late Commissioners for inquiring into the Administration of Justice in Scotland, under the direction of the presiding member of "the commission in Scotland," Sir Ilay Campbell. This publication confirms the statement in the text, as to the nomination of the Judges by the Crown, from the first institution of the Court.

court of session, should be named by the parliament. This article having been referred by the King to the parliament itself, it was enacted, *C. 15.* of that year, That the King should name them by the advice of the three estates. Upon the restoration of Charles II. the right of nomination was again declared to be solely in the crown, by 1661, *C. 2.* ; with whom it has ever since remained, without challenge.

15. Though other judges may be named at the age of twenty-one, the judges of the session must be at least twenty-five, on account of the firmness of judgment and resolution which that important office requires, 1592, *C. 132.* By the treaty of Union, *art. 19.*, no person is to be named a judge of the court of session, who hath not served as an advocate or principal clerk of session for five years, or as a writer to the signet for ten ; and in the case of a writer to the signet, he must undergo the ordinary trials on the Roman law, and be found qualified, two years before he can be named. Upon a vacancy in the bench, the King names a presentee to supply it in a letter directed to the judges, requiring them to try and admit him. The judges, at the desire of Charles II., fixed the method of trial by act of sederunt, July 31. 1674 ; and the form therein prescribed hath been ever since observed. The judges in 1723 actually exercised the power of rejecting the presentee, which is implied in trial, and which was expressly given them by 1579, *C. 93* ⁴⁵. But by an act passed 10^o *Geo. I. C. 19.* that power is taken from the court ; and the only remedy left them is to remonstrate to the crown, if a person they think improper be presented ; who however must be received if the King insist upon it.

16. Beside the fifteen ordinary Lords, the Sovereign was at liberty, by the first institution, to name three or four Lords of his great council or parliament, who might, as extraordinary members, sit and vote with the other judges, 1537, *C. 40.* This number was soon exceeded. Six, seven, and sometimes eight, extraordinary Lords, appear upon the rolls in the same sederunt, about the beginning of the 17th century. But upon a complaint of that excess, James VI, in a letter recorded in the books of sederunt, March 28. 1617, promised to restrict himself to the statutory number. By the aforesaid act, 10^o *Geo. I.*, it was provided, that no vacancy which might afterwards happen by the death of any extraordinary Lord, should be filled by the crown. This clause of the statute was enacted from a suggestion, that the extraordinary Lords, who were not tied down to close attendance, might, by attending on particular occasions, stop the free course of justice. In other respects that branch of the institution was of use. It had a great tendency to qualify those Lords for the public service, and particularly for judging in appeals brought from the court of session to the house of Lords. The quorum, or number of judges whom it behoved to be present before they could proceed as a court, was at first ten, or rather eleven, ten with the president, 1537, *C. 57.* ; but it appears by 1587, *C. 44.*, that the practice prior to that act had restricted the quorum to nine ordinary Lords ⁴⁶.

VOL. I.

P

17. The

⁴⁵ See the case of *Haldane v. Dean and Faculty of Advocates*, 4th Feb. 1722-3, *Robertson's Appeal Cases*, p. 422.

⁴⁶ The constitution of the Court of Session has of late years undergone considerable alterations.

By *stat. 48. Geo. III. C. 151.* the Court was divided into two chambers, the Lord President with seven of the Ordinary Lords forming the First Division, and the Lord Justice-Clerk

Requisite qualifications and trial.

Extraordinary Lords. Quorum of the judges.

Book I.

Privileges of
the College
of Justice.

17. The appellation of *The College of Justice* is not confined to the judges, but includes advocates, clerks of session, writers to the signet, and other members of court, as they are enumerated in an act of sederunt, *Feb. 23. 1687*⁴⁷. Where therefore the College of Justice is entitled to any privilege, it extends to all the members of the College. Beside the privilege explained under the former title, § 24., they are, by 1537, *C. 68.*, exempted in general terms from all taxes and contributions: And it was, no doubt, in consequence of this exemption, that the lands belonging to the members of that college were declared free from the burden of the taxation imposed by the convention of estates 1665. But though, by a still later act, this general immunity from taxes was confirmed in the strongest terms to the ordinary Lords of Session, 1670, *C. 8.*; yet neither they, nor the other members of the College of Justice, have ever claimed an exemption from the land-tax since the Revolution, and it is believed not even since the Restoration. It appears by 1592,
C.

Justice-Clerk with six of the Ordinary Lords, the Second Division; four Judges in each Division being declared a quorum.

By *stat. 50. Geo. III. c. 112.* the three junior Ordinary Judges of the First Division and the two junior Ordinary Judges of the Second Division were relieved from attendance in the Inner-House, and appointed to sit as Permanent Lords Ordinary in the Outer-House, the quorum in either Division being then diminished to three. It was declared, however, that this new regulation should not affect the existing junior Judges, except with their own consent; but should commence to operate only when, in consequence of such consent, or by new appointments of Judges, the requisite number of Permanent Lords Ordinary should be obtained.

By *stat. 53. Geo. III. C. 64.* a further change was enacted,—that the Junior, or last appointed Judge of the First Division, should, in time of session, officiate as Lord Ordinary on the Bills; and that to the same Judge should be made all remits from the Teind Court, and all remits from the Court of Session in matters relating to sequestrations or bankruptcy, “and in such other matters as to either Division shall seem proper;”—to which have since been added, by *stat. 1. and 2. Geo. IV. c. 38. § 5.* all remits in processes of reduction after great avisandum, “to hear parties thereon, and to discuss the reasons of reduction, and other conclusions of the libel, without prejudice to the power of the Court, on the ground of contingency, or any other sufficient cause, to make such remit to any of the Permanent Lords Ordinary.”

It is further provided by the above statutes, that in cases of importance and difficulty, it shall be competent to the Judges of either Division to state in writing questions of law arising in such cases, and to require the opinions of the Judges of the other Division thereon; 48. *Geo. III. c. 151. § 10.*; and that, in all cases where questions of law shall be so stated, the five Permanent Lords Ordinary shall likewise communicate their opinions thereupon; 53. *Geo. III. c. 64. § 15.*

In case the Judges of either Division shall, by death, resignation, sickness, declination, or absence, be reduced to less than a quorum, one or more of the Permanent Lords Ordinary of such Division shall be called in, in rotation; 53. *Geo. III. c. 64. § 14.*

“In all cases in which, upon report of the Lord Ordinary on the Bills to the Lords of either Division, there shall be a difference of opinion and an equality of voices, such Lord Ordinary on the Bills shall vote in the case:—and in all other cases, when, in consequence of such difference of opinion and equality of voices, the cause or matter shall be appointed to remain for future discussion, if the question shall have previously depended before any Lord Ordinary of the same Division, being at the time of such discussion one of the Permanent Ordinaries, such Lord Ordinary shall, without regard to any rotation, be called in to be present at the discussion, and to vote;” 1. and 2. *Geo. IV. c. 38. § 3.* In other cases, where an equality of voices in either Division has to be provided against, the Permanent Lords Ordinary of that Division shall be called in, in rotation; 53. *Geo. III. c. 64. § 13.*

In framing Acts of Sederunt, and in the exercise of all their other powers, duties, and functions, not affected by the statutes, the Court of Session remains exactly what it was, and the old quorum of nine is still necessary to sanction their various acts and proceedings; 48. *Geo. III. c. 151, § 11.*

⁴⁷ It includes also the Barons and other members of the Court of Exchequer, 6. *Anne, c. 26. § 11.*:—the Lords Commissioners and all the officers of the Jury Court, 59. *Geo. III. c. 35. § 36.*;—the Auditor of the Court of Session, 1. and 2. *Geo. IV. c. 38. § 32.*;—Collector of the fee fund, *ibid. § 29., &c.*

C. 153., that they were, by a custom anterior to that statute, free from watching, warding, and other services within borough. By the act of sederunt 1687, last cited, which proceeded on an action for ascertaining the privileges of the College of Justice against the city of Edinburgh, they are discharged from the payment of ministers' stipends, and of all customs, causeway-mails, shore-dues, and other impositions laid on goods carried to or from the city*. When a subsidy is imposed, to which the members of the College are to be subjected in common with the other inhabitants of the city, the faculty of advocates, and the society of writers to the signet, are, in consequence of that act of sederunt, in use to name some of their number to meet with the stent-masters appointed by the magistrates, to take care that the members of the College be not burdened beyond their just proportions.

18. Though all writs relating to actions brought before the session, not only of process but of execution, issue in the name of the Sovereign, and not of the court, it is nevertheless certain, that that court hath a proper jurisdiction, and right of execution in itself; for the signet-office, from whence all these writs issue, is under the sole direction of the court of session⁴⁸. The jurisdiction of the Lords of Session in civil matters is, *first*, universal as to extent, and, *2dly*, supreme in degree. As to the *first*, it is expressly declared to extend to all civil causes, 1537, C. 36. And though private right or property is, without doubt, the chief and most proper subject of their jurisdiction, they are also competent to several questions which carry no pecuniary or patrimonial interest, *ex. gr.* to elections of magistrates of boroughs, of commissioners of supply, &c. Though the house of Commons alone can judge in the merit of elections and returns of members of parliament, with respect to those who claim a seat in that house, yet the court of session, not as the supreme civil court, but in virtue of special statutes, have the only cognisance of all complaints against sheriffs, or clerks to elections, for making false or undue returns, and of condemning them in the legal penalties; which powers, without such delegation, would not have been competent to them, 7° *Geo. II. C. 16.*; 16° *Geo. II. C. 11.* Though all charters, and gifts granted by the crown, must pass under the authority of the Barons of Exchequer, as the King's commissioners; yet the court of session is the only competent court in questions concerning their legal effects and preference, and in all causes relating to infestments of the King's property, 1640, C. 22.; 1661, C. 59., even though they should be confirmed in parliament, 1567, C. 18. N° 1⁴⁹. By a letter from the King directed to that court,

This court has an universal jurisdiction in civil causes.

* See *Fac. Coll.* 16th June 1779, *Christian*, (DICT. p. 2416.); 29th January 1788, *Magistrates of Edinburgh*, affirmed on appeal, 25th March 1790, (DICT. p. 2418.)

⁴⁸ In a late case accordingly, the Court suspended an individual "from his office of "writer to the Signet;" *A. S.* 17th, 24th, and 26th January 1815. The society of writers to the Signet are not entitled to enforce observance of their regulations by stopping letters of diligence, &c. at the Signet-office; *Depute-Keeper and Society of W. S.* 21st June 1814, *Fac. Coll.*

⁴⁹ It has been found competent to the Court of Session to interdict parties from passing a signature in Exchequer; *Dickson*, 6th March 1815, *Fac. Coll.* But an action of declarator of immunity from taxes, imposed by British statutes, is incompetent before that Court; *Duke of Queensberry and Lord Hopeton*, 15th December 1807, *Fac. Coll.* And it is also incompetent on any pretence to suspend a charge for crown feuduties, given by the Barons of Exchequer; *Warrender*, 19th June 1810, *Fac. Coll.* See two other cases in which the question, as to the respective jurisdictions of the Courts of Session and Exchequer, was discussed under very special circumstances; *Craigie*, 22d December 1809, *Postmaster-General*, 8th July 1818, *Fac. Coll.*

Book I.

court, and recited in Lord Stair's decisions, *June 14. 1665*, (DICT. p. 7408.), they were declared the sole judges in declarators of the casualties of superiority, at the suit of the King's donataries, till it should be considered by the King whether the jurisdiction in these questions belonged to them or the Lords of Exchequer; and it does not appear that any inquiry was afterwards made by the King. These branches of jurisdiction are reserved to them in the British statute, 6^o Ann. C. 26., erecting the court of exchequer in Scotland¹⁰.

In most causes this jurisdiction is primary; but in some it is only by way of review.

19. Actions of uncommon importance or intricacy are peculiar to the court of session, and consequently excluded from the cognisance of inferior judges, *ex. gr.* declarators of property in heritage, and other competitions of heritable rights, restitutions of minors, provings of the tenor, *cessiones bonorum*, reductions of decrees and of deeds, and all other rescissory actions, judicial sales of the estates of minors and of bankrupts, &c. In a second class of causes, the jurisdiction of the court of session cannot be exercised but by way of review, after the action is brought from the inferior court; as in causes proceeding on brieves, because brieves must be directed to inferior judges: in maritime or consistorial causes, which must be carried on in the first instance before the admiral or commissary; and in actions for sums not exceeding 200 marks Scots¹¹, which, by 1672, C. 16., § 16. *concerning the Session*, must be first brought before an inferior court. But this last act contains two exceptions; *first*, Of causes pursued by members of the College of Justice¹²; *2dly*, Of actions of debt due to merchants, vintners, and others in borough, for goods sold by them to such as dwell not within the county where the goods are furnished; because if debts of that kind were to be sued for separately, the expense would frequently exhaust the value of the subject in dispute. In all civil matters which fall under neither of the two above-mentioned classes, the judicial powers of the court of session are concurrent, even in the first instance, with that of the judge-ordinary.

This jurisdiction is supreme as to degree.

20. The jurisdiction of the court of session is also supreme as to degree. For, *first*, That court can set aside or suspend the sentences of all inferior courts in civil causes, unless where that power is denied to them by special statute¹³. *2dly*, They can review their own sentences, under the limitation contained in 1672, C. 16., and the others explained below, B. 4. T. 3. § 8.; not only interlocutory sentences upon reclaiming bill by the party aggrieved, but definitive, (after sentence pronounced, and even extracted), by way of suspension or reduction. *3dly*, Their sentences are subject to the review of no court but the house of Lords, that high court of appeal, which is common to both parts of the united kingdom. It was warmly disputed, whether the decrees of the session were, before the union of the two kingdoms, subject to the review of the parliament of Scotland. On the one hand, instances occur in the books of sederunt, soon after the institution of the College of Justice, of parties protesting for remedy of law; *i. e.* of their appealing from the sentences of the session to the king and parliament, *Jan. 29. 1555*, and *March 7. 1561-2*. On the other, the court of session

¹⁰ The Court of Session will not interfere with the orders of the Lords of the Admiralty given to the commanders of ships of war, in regard to the detention of foreign seamen; *Boyesen, &c. 16th January 1813, Fac. Coll.*

¹¹ Now extended to L.25 Sterling by 50. Geo. III. C. 112. § 28.

¹² Or, in which members of the College are defenders; *Jameson, 21st February 1815.*

¹³ *Vid. supra, tit. 2. § 7.*

session disallowed this right of appealing, because their sentences are declared to have the like force as those of the old court of session, 1537, C. 39. ; and that old court had a power of judging finally, without appeal to parliament, 1457, C. 62. When therefore an appeal was offered to parliament, in 1674, against a decree of the session, the judges ordained the appellant's counsel to confess or deny, whether they had advised their client to that measure? and, upon their declining to answer, the court, after debarring those advocates from the exercise of their offices, applied to the privy council, who banished not them only, but all the other advocates who would not declare their abhorrence of such appeals, twelve miles from Edinburgh: And under this sentence many of the most eminent lawyers continued for several months, till the court, at the King's desire, restored them upon their disclaiming the right of parties to appeal. The convention of estates in 1689, C. 18. declared that the banishment of those advocates without a trial was a grievance; and by C. 13. they asserted it to be the right of every subject to appeal to parliament against the decrees of the session. See this argument, which is now rather of curiosity than use, discussed at large by *Stair, B. 4. Tit. 1. § 1. et seq.*; and *Dirlet. v. Session*.

21. Though the jurisdiction vested in the court of session be merely civil, yet several criminal causes fall under their cognisance upon one or other of the following grounds: *First*, From the force of statute. From thence proceeds their jurisdiction in contraventions of lawborrows, 1581, C. 117. ; in deforcement, and breach of arrestment, *ibid.* C. 118. ; in fraudulent bankruptcy, 1696, C. 5. ; and in wrongous imprisonment, 1701, C. 6. The statute 1555, C. 47., though it seems to declare their jurisdiction in perjury and the subornation of witnesses in general terms, is in practice limited to the case where these crimes are committed during a depending action: And even then the court cannot inflict the pains of law upon the offender, but must restrict their sentence to a slighter corporal punishment. *2dly*, From the necessary connection which the crime hath with a civil question depending in court. Thus, as the court of session has the sole cognisance in the reduction of deeds, they cannot explicate this point of jurisdiction, without a power of judging in the crimes of falsehood or usury⁵⁴, where either of these happen to be the ground of reduction. As to the crime of falsehood or forgery, there is no doubt that the court of session's jurisdiction is exclusive even of the court of justiciary, in the special case where the summary proceedings of the justiciary, whose diets are peremptory, are inconsistent with the evidence which is to be brought in the trial of that crime⁵⁵. But *Mackenzie, Crim. Tr. Tit. Falsehood, § 4.* goes farther, and affirms, that the sole cognisance of falsehood is in the session in every case; for which he appeals to the books of adjournal, in which he could not find one trial of that crime in the first instance before the criminal court. It is however certain, that by the later usage such prosecutions have been brought directly to the criminal court, where the proof can be finished in so short a time as is consistent with the diets of that court, *ex. gr.* where the crime of forgery is to be proved in the direct manner, by the testimonies of the writer of the deed and the instrumentary witnesses.

Criminal jurisdiction of this court, how understood and limited.

⁵⁴ They have a proper jurisdiction in questions of usury; *vid. post. B. iv. l. 4. § 78.*

⁵⁵ Mr Hume says, "this question seems still to be open to a judgment. But it would be singular and anomalous, that the competent jurisdiction should be distinguished according to the nature of the evidence, and not according to the matter and conclusions of the process;" 4. *Hume* 159.

Book I.

witnesses. 3dly, All actions, even upon crimes or delicts, when pursued *ad civilem effectum*, are within the proper jurisdiction of the session⁵⁶. Hence, as the statutory punishment to be inflicted on those who assault their adversary during the dependence of a suit, is the loss of the cause, 1594, C. 219., the court of session is authorised to judge in that crime of battery, in consequence of the general expression in the act, declaring it triable by the justice, or *other judge competent*. Hence, also, all actions upon scandal or verbal injuries, for the recovery of a sum, in name of assythment or damage to the private party, being truly of a civil kind, may by the present practice be brought before the court of session; *vid. infr. t. 5. § 30*. And on the same footing, though no riot or delict, let it be ever so slight, can be judged by the court of session in the first instance; yet after sentence pronounced by the inferior judge, condemning the delinquent in a pecuniary fine, the matter becomes properly civil, and consequently our supreme civil court may reduce or suspend the sentence of that inferior judge, *Fount. March 4. 1707, Alves. (Dict. p. 7403.), vid. supr. t. 2. § 8⁵⁷*.

It is a court of equity as well as of law. *Nobile officium*.

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.

Ministerial powers of the court of session:

23. The court of session, beside their judicative, have also ministerial powers. They have more than once fixed the price of victuals within the city of Edinburgh; and when the greatest part of the brewers there, had, in 1725, entered into a concert to give up their trade, under pretence that they could not continue it with any profit, on account of the impositions chargeable upon malt and ale, the court, at the suit of the King's advocate, committed them to prison; where they lay, till they became bound to carry on their trade as formerly. They are also in use to appoint persons by special commission to act as officers of the law in completing of feudal rights, where property may be in danger, by the death or supervening incapacity of the stated officers. Thus, when the city of Edinburgh was, after Michaelmas 1745, without a magistracy, and

so

⁵⁶ *Leslie, 9th December 1785, Fac. Coll. Dict. p. 7422.*

⁵⁷ The jurisdiction of the Court of Session has been in several instances confined within rather stricter limits. It seems now quite settled, that in all proper criminal cases excepting, perhaps, the lesser branches of police, the power of review lies exclusively in the Court of Justiciary. Nor does it make any difference, [as laid down in the text, though the sentence of the inferior court should have issued merely in a pecuniary fine. "The Court were unanimously of opinion, that wherever the fine was solely *ad vindictam publicam*, they had no jurisdiction;" *Johnstone, 15th May 1810; Meek, 5th June 1812, Fac. Coll.* See also *Berry, 17th January 1809; Porteous, 9th July 1818, Fac. Coll.*; and 2. *Hume, p. 69-71.*

so had no bailies to receive resignation, or give seisin, in burgage tenements, they appointed certain persons bailies for that special purpose, till a new magistracy should be established in the due course of law. And on the death of any sheriff-depute, they appoint an interim deputy, who acts under their authority, not only as an officer of the law, but as a judge. These and the like extraordinary powers were proper to the privy council of Scotland, while that court 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 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.

24. The justiciar of Scotland, or, as he was afterwards called, the *justice-general*, or simply *the justice*, had in ancient times a supreme jurisdiction, not only in criminal, but in civil matters, even in questions of heritage, *Rtg. Maj. L. 1. C. 5. § 3, 4, 5. ; L. 2. C. 6. § 37.* That he retained his civil jurisdiction till 1487, appears by act 105. of that year, in which he is placed at the head of the judges-ordinary: And by a decision observed by *Haddington, v. Sheriff*, as far down as *Dec. 18. 1523, Dalziel**, actions respecting heritage were adjudged to be cognisable by the justice-general, to the exclusion of the Sheriff. After the institution of the College of Justice, the justiciar never judged in *civil* matters. He still continued however to be the supreme *criminal* judge; and in that capacity, not only determined the punishment to be inflicted on the criminal, but condemned him in the damage claimed by the party injured; in which last he had a cumulative jurisdiction with the court of session. The question, Whether the jurisdiction of the court of justiciary is supreme in the highest sense, so as to exclude a review, even by the House of Peers, is of considerable importance; and the solution of it not without difficulty^s. Those who maintain the affirmative, appeal to our more ancient laws, *St. Alex. II. C. 2. § 6. ; Balf. 573. C. 37. ; Skene. treat. of judges in crim. causes, T. 14. § 7.* They also allege, that the same doctrine is agreeable to the claim of right *anno 1689*, which, though it authorises the applying to parliament against the iniquitous sentences of the court of session, carries not the least insinuation that the same remedy is competent against those of the justiciary; and they add, that as by *art. 19.* of the treaty of Union, the court of Justiciary is to continue as it was then constituted, there can be no appeal to the British parliament from the sentences of our supreme criminal court, since there was none to the Scottish parliament. If this question were confined to the verdict of juries upon criminal trials, it could hardly admit of a doubt. These verdicts are not the proper subjects of appeal, as their truth, or conformity to the evidence, cannot be properly judged of by those who were not present when the evidence was taken. But if the question includes also the proceedings of the judges, or court, upon any point of relevancy,

Origin of the court of Justiciary. In what sense a supreme court.

* There is no case in Haddington's Collection of an earlier date than 1592: The case alluded to is in Balfour's Practics, v. Sheriff, p. 19.

^s This question is now completely set at rest; it having been fixed by a series of solemn decisions, that the judgments of the Court of Justiciary, whether as to mere interlocutory orders, or final conviction and sentence, "are not subject to reversal in any form of process, either before themselves, or any other tribunal, not even excepting the House of Lords," 2. Hume, 486; and the cases of *Ogilvie, August 1765; Campbell, 7th February 1770; Murdison and Miller, 10th March 1773; Bywater, spring 1781; Robertson and Berry, 8th May 1793.*

levancy, inhability of witnesses, degree of punishment to be inflicted on the pannel, &c. that may be liable to exception, the opinion that the sentences of the justiciary are reviewable by the British House of Lords is the most probable; for that House, as the sovereign court of appeals, seems to have an inherent right of reviewing the sentences of all other judges, except in so far as they may have been limited by an order of their own, which has never been done: And in fact an appeal was entered and tried in that august house against a justiciary sentence, *anno* 1713, (see *Historical Law-Tracts, Tit. Courts*), upon which the sentence of the justiciary was reversed.

Ancient constitution of that court.

25. The courts of the justiciar or justice-general were either universal over the whole kingdom; or particular, for special districts. He was at first ordained to hold yearly two justice-courts, or, as they were anciently called, (*aires*, from *iter*, because they were itinerant), at Edinburgh or Peebles, where all the freeholders of the kingdom were bound to attend, *Q. Attach. C. 79*. But this universal court, from being itinerant, came to be fixed at Edinburgh, 1587, *C. 81.*; and in trials of importance, assessors were frequently named by the privy council, as assistants to the justice, of whom mention is made in several statutes, 1535, *C. 35*, &c. Besides this universal court, special justice-aires, or circuit-courts, were, for the benefit of that part of the country which lay at a distance from Edinburgh, holden both on the north and south sides of Forth, either by the King in person, or by judges named by him, twice in the year, on the grass and on the corn, *i. e.* in spring and in autumn, *St. Rob. III. C. 30.*; 1440, *C. 5.*; 1491, *C. 29*. These courts, after they had been long discontinued, were again revived by 1587, *C. 81.*, which enacted, That the King should, either by himself or the justice-general, name eight deputies, two for every quarter of the kingdom, who should make their circuits in April and October.

Its present constitution. Judges and circuits.

26. This supreme criminal court was, by 1672, *C. 16.*, modell'd after a new form, which subsists to this day. The office of justice-deputes is thereby suppressed; and in place of these, and of the assessors formerly appointed to the justice-general, five judges of the court of session, specially commissioned by the King, are joined to the justice-general and justice-clerk, who constitute the court of justiciary; the justice-general being constant president, and in his absence the justice-clerk. Four of these commissioners make a court during the sitting of the session, and three in vacation time¹⁹. This act divided the kingdom into three districts; and appointed circuit-courts to be holden each spring, by two of the commissioners, at Dumfries and Jedburgh: by two at Stirling, Glasgow, and Ayr; and by two at Perth, Aberdeen, and Inverness, with power to the justice-general to attend at and preside in any of them. These circuit-courts were, soon after the Union, by 6° *Ann. C. 6.*, directed to be kept twice in the year. By 10° *Ann. C. 33.*, they were brought back to the regulation of the year 1672; and now again, by the late jurisdiction-act, 20° *Geo. II. C. 43.*, they are ordained to be holden both in spring and autumn*. By the last-mentioned statute, the county of Argyle was added to the western

* By *stat. 30. Geo. III. c. 17.* the spring circuit must be held between 12th March and 12th May.

¹⁹ By *stat. 23. Geo. III. c. 45.* the quorum is declared to be three, both in session and vacation.

tern circuit, and the circuit-courts for it and the shire of Bute appointed to be held at Inverary. Ayr, which formerly belonged to the western, was afterwards transferred to the southern circuit. By the same statute the judges must continue at least six days at each place where the circuit is to be held*; it is made lawful for one judge to proceed on business in his colleague's absence; and power is given to the King, to make a new division of the circuits, and to alter the times and places of their meeting. It is beyond doubt, that the justice-clerk was originally clerk of the criminal court, and that the epithets of *justice-clerk* and *clerk of justiciary* were used promiscuously in our old statutes to denote the same person; for, the taking up of the dittay, and the charge of the porteous-roll, which in some statutes are made part of the office of the justice-clerk, 1436, C. 139.; 1449, C. 27., are in others ascribed to the clerk of justiciary, 1493, C. 43. 45.; and in the last-quoted act, the same person who is in the rubric designed *justice-clerk*, gets the name of *clerk of justiciary*, in the body of it. This officer soon grew up to considerable power and dignity. He is mentioned as an officer of the crown, jointly with the Treasurer, Justice, Advocate, and Register, in 1587, C. 31. *vers. Therefore*; and was about that time vested with certain judicial powers, 1587, C. 87. The King's justices for the several districts of the kingdom were in the same year directed to be named by the crown, with the advice of the Chancellor, Treasurer, and Justice-Clerk, 1587, C. 81. And at last, in 1663, the Justice-Clerk was declared a member, and one of the judges, of the court of justiciary, by an act of privy council, *Mack. Cr. Treat. part 2. tit. 15. § 4.*

27. The jurisdiction of the justiciary has been always confined to crimes; and it extends to all crimes. It was anciently deemed privative in the crimes of robbery, rape, murder, and wilful fire-raising, which were called *the four pleas of the crown*; and doubtless got that name, because they were reserved to the King's own court, *St. Alex. II. C. 14. § 2.* But the only crime in which the jurisdiction of the justiciary became at last exclusive of all inferior jurisdictions, was, in Mackenzie's opinion, that of high treason, *Cr. Treat. part 2. Tit. 11. § 5.*: of which more hereafter, *B. 4. Tit. 4.* The powers of this court, when sitting at Edinburgh, where all the commissioners are constituent members, reach over the whole kingdom; for they are competent to the trial of every criminal brought thither from the remotest corner of Scotland, without regard either to the *locus delicti*, or to the offender's domicil; and they advocate criminal causes from all inferior judges, and suspend their sentences. By the older practice, the court of session exercised this power of advocating from inferior criminal judges, on the head of incompetency, because the competency of a court is a point of civil jurisdiction; but since the reforming of the court of justiciary by the act 1672, the commissioners, who apprehended themselves to be vested with as high a jurisdiction in criminal matters, as the court of session are in civil, have been in use to advocate criminal causes from inferior courts to their own, upon whatever ground, without the interposition of the court of session⁶⁰.

Its jurisdiction extends to all crimes committed within Scotland.

VOL. I.

R

28. But

* By act 23. Geo. III. c. 45. the Judges of the court of justiciary are empowered to fix, previously to the commencement of the circuit, how long the judges are to remain at each place: Provided always, that that time be not less than three days, and that no trial begun within the time be left unfinished.

⁶⁰ *Vid. supra, note 57.; 2. Hume 491, 494.*

Book I.

Its civil jurisdiction by way of appeal.

28. By the foresaid act, 20° *Geo. II.*, the circuit-courts of justiciary have acquired a new supreme jurisdiction, by way of appeal, from any inferior court which lies within the district of that circuit, not only in such criminal causes as infer neither death nor demeritation, but in lesser *civil* causes, where the subject does not exceed L.12 Sterling⁶¹. These appeals are to be lodged with the clerk of the inferior court within ten days after pronouncing the decree appealed from; and the adverse party, or his doer, is to be served with a copy, fifteen days before holding the circuit⁶²: But no appeal is to lie before a final decree shall be pronounced by the inferior court. The circuit judges must proceed in these causes in a summary way, and their sentences are declared final: But in cases of difficulty, they are to report their proceedings, with their reasons of doubting, to the court of session, or justiciary *respective*, as the cause happens to be civil or criminal; which court is in that case to judge and decide. That part of the statute which relates to civil actions was only temporary, but is now made perpetual, by 31° *Geo. II. C. ult**.

Ancient heritable grants of criminal jurisdiction.

29. Grants of criminal jurisdiction were anciently made by the crown, in favour of a few considerable families, over particular counties or districts which lay the most inaccessible to the fixed courts of justice; which imported as high a jurisdiction over the territories mentioned in the grants, as was vested in the court of justiciary over the rest of the kingdom. But notwithstanding these separate jurisdictions, the stated court of justiciary might have judged within the territory of the special jurisdiction, if the person entitled to that special right had not exercised it by reclaiming the offender to his own court. By the already cited statute, 20° *Geo. II.*, all heritable jurisdictions of justiciary are dissolved, and grants of them by the crown prohibited in time to come.

30. The

* See an account of our several courts of criminal jurisdiction given by Mr Hume, *Trial for Crimes*, vol. i. p. 1. *et seq.* (vol. ii. c. i. 2d edit.)

⁶¹ Now extended to L.25, by *stat. 54. Geo. III. c. 67, § 5.* An appeal in a question of nuisance was found incompetent as being beyond the statutory value; *Davidson*, 21st November 1812, *Fac. Coll.* But *quære*, Whether, in such a case, where the libel concludes merely for interdict, and there is no conclusion of a *pecuniary* nature, the incompetency of appeal be not radical?

⁶² The words of the statute are, "Such appeal it shall be lawful for the party conceiving himself aggrieved to take and enter in open Court at the time of pronouncing such decree, judgment or sentence, or at any time thereafter within ten days, by lodging the same in the hands of the clerk of Court, and serving the adverse party with a duplicate thereof personally, or at his dwelling-house, or his procurator or agent in the cause, and serving in like manner the inferior judge himself, in case the appeal shall contain any conclusion against him, by way of censure, or reparation of damages, for alleged wilful injustice, oppression, or other malversation; and such service shall be sufficient summons to oblige the respondents to attend and answer, at the next Circuit Court which shall happen to be held fifteen days at least after such service;" 20. *Geo. II. c. 43. § 35.*

Under this enactment, two things are required to concur, in serving the copy of the appeal:—1. That such service take place "within ten days" after pronouncing the decree appealed from:—And 2. That it take place so as to afford an interval of "fifteen days at least" between and the Circuit Court which is to decide on the appeal. The text, therefore, seems not to go far enough, when it merely says, "the adverse party, or his doer, is to be served with a copy fifteen days before holding the circuit;" for he may have been so served, and yet the appeal be incompetent, in respect of the service having been delayed beyond the ten days after pronouncing the decree appealed from. An appeal was accordingly rejected on this objection, at the Perth Spring Circuit, 1818, *Murison v. Finlay and Low.*

Where an appeal is thus dismissed on the ground of informality, the judgment, though final as far as it goes, does not affect the merits of the principal dispute, but the party has still his remedy as if no appeal had been presented. Thus, in the above case, the appellant afterwards presented a bill of suspension in the Court of Session which having been passed, the principal question was ultimately decided in his favour.

TITLE III.

Court of Exchequer.

30. The Exchequer was the King's revenue-court. It consisted of the Treasurer, the Treasurer-depute, and as many of the Lords of Exchequer as the King was pleased to appoint. The ministerial part of the treasurer's office was to receive the casualties arising to the King, either as sovereign, or as feudal superior. Another officer, who had the name of *comptroller*, levied the rents of the crown-lands, borough-rents, and customs, and he examined the treasurer's accounts; but these two offices were united about a century before the Union of the kingdoms. The Scottish court of exchequer was, by the treaty of Union, *art. 19.*, to continue till a new revenue-court should be established in Scotland by parliament, which was done 6° *Ann. C. 26.* The judges of the new-erected court are, by that act, declared to be the High Treasurer of Great Britain, with a Chief-Baron, and other four Barons, who must be made either of serjeants at law, or English barristers, or Scottish advocates of five years standing. All may plead before this court who can practise in the courts of Westminster, or in the court of session: and all the privileges belonging to the College of Justice are communicated to the Barons, and to the other members of court*.

31. The judges of this Court have, by the aforesaid act, a peculiar jurisdiction as to all duties of custom and excise, and other revenues pertaining either to the King or Prince of Scotland, and as to all honours and estates, real and personal, forfeitures and penalties of what nature soever, arising to the crown within Scotland; and as to all questions relating to the said matters, which they are authorised to determine either in law or in equity, by the same forms that have been used in the English exchequer⁶³. But under the two following limitations, to preserve the private law of Scotland from innovation; *First*, That no debt due to the crown shall affect the debtor's real estate, in any other manner than such estate might be affected by the law of Scotland; by which is meant, not barely, that lands belonging to the crown's debtor shall not be affected by any personal obligation granted by him to the king, which is the law of England; and that they shall not be attached by a writ of extent according to the English form; but that no higher preference shall be given with respect to heritage in favour of the crown's diligence, even supposing it to have been carried on according to the forms of Scotland, than any other creditor using the same diligence would have been entitled to, *Fac. Coll. i. 112.* (*Burnet's Creditors*, *DICT. p. 7873.*) †. *2dly*, That the validity of the crown's titles

Its jurisdiction how limited.

* "Excepting only that they may be pursued in justice before the Lords of Session, for causes not competent to the Court of Exchequer."

† The reverse is the case with regard to the personal estate of one who is debtor to the Crown. In consequence of the *statute 33. Henry VIII. c. 39.*, as extended to Scotland by said act, 6. *Ann. C. 26.*, the prerogative process of the Crown has been found preferable even to the landlord's right of hypothec over the tenant's effects. The contrary had indeed been found as to the hypothec over the crop and stocking, *Fac. Coll. 29th June 1791, Ogilvie*; but this decision was reversed in the House of Lords, *June 15. 1792, DICT. p. 7884.* The Court of Session has since preferred the officers of the revenue suing for debts due to the crown, to the landlord claiming his hypothec over the *invecta et illata*; *Fac. Coll. 3d December 1793, Factor on Leslie's estate, DICT. p. 7889*⁶⁴.

☞ See the subject, "Extent of the Crown," fully and distinctly illustrated in *Bell's COMMENTARIES ON THE LAWS OF SCOTLAND, in relation to Bankruptcy, &c. edition 1810, p. 464. et seq., where the later cases are mentioned, (4th edit. vol. ii. p. 48. et seq.)*

⁶³ See the cases referred to *supra*, note 49.

⁶⁴ More recently, the Court have found the prerogative process of the crown preferable

Book I.

Particular subjects of its jurisdiction, and powers of the court.

Court of admiralty, its jurisdiction privative and cumulative.

titles to any honours, lands, or casualties, shall be tried as formerly by the court of session, *supr.* § 18⁶⁵.

32. All persons employed in collecting the revenue, or accounting for it, are, by the statute, declared to be under the jurisdiction of this court in all revenue-matters: And all sheriffs, and officers appointed by them, are to be obedient to, and attendant on the court, under such penalties for neglect of duty, or contempt, as shall be imposed by them. The barons have power, by the said act, to pass the accounts of sheriffs, or other officers, who have the execution of any process issuing from or returnable to the court of exchequer; and to receive resignation of lands, and pass signatures, tutories, and other gifts, as the Scottish exchequer formerly did⁶⁶. But this power in the exchequer has been always limited. When the signature contains no more than was contained in the vassal's former charter, the Barons may pass it: But when it imports a conveyance of any new subject not formerly granted by the crown, it must be first superscribed by the King himself: For if it pass of course in exchequer, it is not effectual to the grantee, in so far as relates to such new right. Gifts of escheat, and some others of less importance, may be also passed in exchequer, without a special warrant from the crown; but remissions of crimes, and gifts of forfeiture on high treason, must have the King's sign-manual for their warrant: which was also the case of gifts of recognition, while the casualties incident to a ward-holding subsisted.

33. The jurisdiction of the High Admiral of Scotland has the character of sovereign given to it as early as the act 1609, C. 15. By a later statute, 1681, C. 16., which hath considerably enlarged the Admiral's powers, he may exercise his jurisdiction by a deputy, who is called *the Judge of the High Court of Admiralty**; and he may also name inferior deputies, whose jurisdiction is confined within particular districts, and whose sentences are subject to the review of the high court. The Admiral's jurisdiction, as enlarged by this act, is both civil and criminal. The first extends to all maritime causes⁶⁷; and so comprehends questions of charter parties, freights, salvages, wrecks, bottomries, policies of insurance⁶⁸, and, in general, all contracts concerning the lading or unlading of ships, or any other matter to be performed within the verge of the Admiral's jurisdiction; and all actions for the delivery of goods sent on shipboard, or for recovering their value, or where the subject of the suit consists of goods transported by sea from one port to another. In all these the Admiral's jurisdiction was of old cumulative

* By *stat.* 26. *Geo.* III. c. 47. § 5., no person can be appointed to the office unless he has, during the three years immediately preceding his appointment, attended the Court of Session regularly and *bona fide* as a practitioner in the time of session. The statute requires the same qualification in the Commissaries of Edinburgh.

ferable to the landlord's hypothec, as long as the tenant's effects remain unsold, though after sequestration and a warrant to sell; *Robertson*, 6th July 1802, *Fac. Coll. Dicr.* p. 7891. Nay, it has even been held in Exchequer, that where the goods were actually sold, but a warrant for payment to the landlord was not yet granted, the crown was still preferable; *King v. Johnston*, 29th June 1809, as reported, 2. *Bell's Commentaries*, p. 64.

⁶⁵ See 1. *Bell's Commentaries*, 643.

⁶⁶ *Vid. supra*, § 18., and the case of *Dickson*, 6th March 1815, *Fac. Coll.* referred to, note 49.

⁶⁷ See a special case, where the jurisdiction of an Admiralty Court was sustained, in a question, (arising out of alleged maltreatment at sea), between the master and mariners of a foreign vessel, none of whom had a domicile in this country; *Bernard*, 11th June 1811, *Fac. Coll.*

⁶⁸ *Vid. infra*, notes*, 71. and 72.

tive with that of the court of session, *Sinclair, March 9. 1543, Lord Bothwell*, (DICT. p. 7322.). But by the act 1681, all causes which fall under the Admiral's jurisdiction must be brought before him in the first instance; and the court of session itself, though it may review his decrees by suspension or reduction, cannot carry a maritime question from him by advocacy⁶⁹. This is however to be understood only of advocations upon the head of iniquity; for the jurisdiction of the court of session, as the highest civil court, is privative in all questions of competency. Neither is the court of session barred by this prohibition from advocating causes from *inferior* admiralties, for the privilege of supreme is given only to the high court, not to its deputies: But as the court of session cannot judge in maritime causes, except by appeal, they must remit the cause which is thus advocated by them from the deputy to the judge of the high court, who is declared by the statute sole judge in the first instance, *Fount. June 22. 1700, — contra Bruce*, (DICT. p. 7414.). All bills of suspension of the Admiral's sentences must be passed in time of session in the inner-house by the whole Lords, or *in præsentia*; but they may be passed in vacation-time if three Lords be present⁷⁰.

34. Though the Admiral's judicial powers reach only, by 1681, C. 16. to maritime causes, he is commonly said to have acquired by long possession a right of cognisance in bills of exchange, and other mercantile questions, though they should not be in the smallest degree maritime, *Fount. July 19. 1706, Anderson*, (DICT. p. 1460.)*. Whether a judge who is by his commission limited to

Nature of its jurisdiction in mercantile causes.

VOL. I.

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* The ruling circumstance to be noticed, in distinguishing whether a cause is peculiar to the admiralty court, is the nature and character of the transaction which gives rise to the question, and by no means the *locus contractus*, as being within or without the territory prescribed by law to the office of judge-admiral. Thus, it has been found, that the judge-admiral is not exclusively the judge in case of an unlawful seizure made at sea, *Fac. Coll. Feb. 8. 1765, Campbell*, DICT. p. 7859.; nor in an action to account for intromission with the effects of a person who died there, *ibid. Feb. 11. 1778, Bartholomew, &c.* DICT. p. 7521.; nor in an action to compel performance of an indenture betwixt a mariner and his apprentice, *ibid. Feb. 5. 1783, Kinnear*, DICT. p. 7392.; nor in an action of damages for detention of a mariner's apprentice to serve at sea, by an impress officer, *ibid. July 28. 1778, Chalmers*, DICT. p. 594. and 7522.

As to actions upon policies of insurance, decisions have fluctuated. In a case, *March 10. 1779, Moir*, DICT. p. 7527., advocacy was found incompetent. A decision was afterwards given, finding advocacy competent, *Fac. Coll. July 5. 1780, Ritchie, &c.* DICT. p. 7527. This was determined after a hearing in presence, and full deliberation. In a subsequent case, *ibid. Aug. 8. 1783, Clark*, DICT. p. 7532., upon a verbat report at the foot of the table, it is said that a contrary opinion was given. The same question again occurred, *Feb. 6. 1802, Judge-Admiral contra Beid and Company*, (not reported), when the Court remitted to the Lord Ordinary to hear parties farther on the point of competency⁷¹. If the action, as set forth in the libel, be properly maritime, it will be privative to the admiral, whatever be the nature of the defence, *ibid. Feb. 14. 1798, Balderston, &c.* DICT. p. 7535. The proceedings cannot be removed from the admiral-court till a final decree is pronounced, even though the application should be, in form, a suspension or reduction; *ibid. June 15. 1798, Kincaid*, DICT. p. 7536⁷².

⁶⁹ So positively exclusive is the admiral's jurisdiction in causes purely maritime, that the jurisdiction of the Court of Session cannot even be prorogated; *Clerk, 8th August 1789, Fac. Coll.* DICT. p. 7532; *Lawrie and Pinkerton, 31st January 1812, Fac. Coll.*

⁷⁰ See farther, *infr. B. 4 t. 3. § 18. and 19.*

⁷¹ By *stat. 1. and 2. Geo. IV. c. 39. § 1.*, it is enacted, "That hereafter it shall not be competent to insist in any civil process before the High Court of Admiralty, where the subject-matter in dispute, exclusive of expenses, is of less value than L. 25 Sterling, excepting only maritime cases, wherein the said Court has a privative jurisdiction; and actions for recovery of premiums of insurance on ships and cargoes, and actions for mercantile claims against shipmasters and owners of vessels, if preceded by arrestment of the vessel."

⁷² More lately, it has been found, that action by the insurance-broker against the insured for the premium is not of a maritime nature, and is competent before the Court of Session in the first instance; *Forbes, 8th December 1812, Fac. Coll.*

⁷³ That is, in proper maritime causes. As to the procedure, in the review of mercantile causes, *vide note 74.*

a certain sort of causes, may, in contradiction to the tenor of his grant, acquire by prescription a jurisdiction in a different kind of causes, is at best doubtful; for the same reason, that no vassal whose property is specially bounded by his charter, can prescribe a right to lands without the bounds expressed in it; *vid. sup. Tit. 2. § 30.* But this appears indubitable, that that kind of jurisdiction which derives no degree of force from the will of the Sovereign, who is the alone fountain of jurisdiction, ought to be confined within the narrowest limits. On this ground the acute author of Historical Law-tracts is of opinion, that the admiral's right of judging in mercantile causes is not accompanied with any coercive power over persons who are unwilling to submit to it; and that consequently a defender in a mercantile cause which is brought before the court of admiralty, may, if he pleases, except to the authority of the judge, and carry the suit to the court of session, by advocacion on the head of incompetency, *vol. 1. p. 372.** And even where the parties in such cause have acquiesced in the jurisdiction, he affirms, that either of them may carry it to the court of session by advocacion on the head of iniquity, as he might do from the sheriff or any other inferior judge, notwithstanding the statutory privilege granted to the Admiral, that no cause can be advocated from his court to the court of session, *ibid. p. 328.*, as that privilege cannot by any just interpretation be extended beyond the causes to which the statute has declared the admiral-court competent⁷⁴. This appears to be also Lord Fountainhall's opinion in observing a contrary decision, *Jan. 24. 1699, Cairns, (Dict. p. 7506.)*. It does not appear, that *admiral-deputes* have ever laid claim to this prescriptive jurisdiction in causes merely mercantile†. The

* The admiral's jurisdiction in such cases is now fully ascertained by a solemn decision, *June 23. 1784, Gordon, Dict. p. 7592.*

† It has been found, that admiral-deputes have no jurisdiction in causes merely mercantile. *Haig, Daes and Company, merchants in Alloa, brought a process against John Campbell, writer in Stirling, before the admiral-substitute of Alloa, for payment of the price of some foreign wood. The admiral sustained his jurisdiction; but the cause having been advocated, the Lords found he had no jurisdiction, and dismissed the process with costs, Fac. Coll. July 16. 1768, Haig, Daes and Company, Dict. p. 7517. See ibid. March 5. 1772, Craig, Dict. p. 7518⁷⁵.*

⁷⁴ The case of *Walker, 15th June 1803, Fac. Coll. Dict. p. 7537.*, affords a good illustration of the doctrine in the text, as to the peculiar circumstances in which advocacion may or may not be competent. Goods were shipped at London for Dunbar, on board a vessel bound to Leith. At Leith they were lodged in a wharf, till a second vessel could be procured to forward them. Being afterwards forwarded by this vessel, they were found on delivery to be damaged; and different actions for reparation were raised in the Admiralty Court against the master and owners of the first vessel, the wharf agent, and the owners of the second vessel. "The Court found, that the process against Walker (the wharf agent) was not maritime, and might therefore be advocated, but that the other processes were strictly maritime," and so advocacion incompetent.

It has lately been enacted by *50. Geo. III. c. 112. § 35.*, that "bills of advocacion and suspension from the Admiralty Court, in mercantile causes," shall be regulated in the same manner with "advocations and suspensions from the judgments pronounced by Sheriffs and other inferior judges." *Vid. infr. B. 4. t. 2. § 39. et seq. and ibid. t. 3. § 18. et seq.*

⁷⁵ In this case of *Craig*, the jurisdiction of the Admiral-depute of *Leith* was sustained, on a proof of special consuetude. This, however, does not affect the general doctrine of the text, nor at all derogate from the authority of the decision in *Haig, Daes and Co.*; these having reference to "admiral-deputes," holding their deputations under the *stat. 1681, c. 16.* from the High Admiral, while the Admiral or Admiral-depute of *Leith* holds his commission independently of the statute, from the Lord Provost, Magistrates, and Town-Council of the City of Edinburgh. Accordingly, in a still more recent case, the general incompetency of proper Admirals-depute was confirmed by an unanimous decision of the court; *Beugo and Bryce, 14th June 1776, Fac. Coll. Dict. v. JURISDICTION, p. 7521, and Appendix, No. 2.*

The civil jurisdiction of the High Admiral has this mark of supreme given it by the act 1681, that he may review, not only the decrees of inferior admirals, but his own, *supr. Tit. 2. § 6.*

35. As to criminal jurisdiction, the High Admiral is, by the said act 1681, declared, in virtue of his being the King's Lieutenant and Justice-General on the seas and in all harbours and creeks, and upon fresh water within the flood-mark, to have the sole jurisdiction in all maritime and seafaring causes within this realm. Though, therefore, in consequence of this act, he hath the exclusive cognisance of the crimes of piracy, mutiny on shipboard, and others which may with propriety be called *maritime causes*; yet in those of murder, adultery, and, in general, such as offend not against the laws of navigation, his jurisdiction is not exclusive, though they should be committed on shipboard, because the statute hath not declared his judicative powers to reach beyond the crimes which affect the rules of navigation. In support of this opinion, the author of *Historical Law-tracts, Tit. Courts*, mentions a decision, though without a date, or the names of parties, in which the court of justiciary sustained its own jurisdiction, in the trial of a crime which had not the proper character of maritime, though it was committed within the sea-mark*. The Admiral hath, ever since the foresaid act, claimed a jurisdiction properly supreme, in all causes truly falling under his cognisance, so as not to be subject to the review of the justiciary itself; both because the statute constitutes him Justice-General on the seas, and because it declares that no suspension of his decrees shall pass but by the court of session, without giving the like power in criminal matters to the justiciary. This claim was never brought under challenge till the year 1734, when the justiciary actually exercised the power of reviewing sentences pronounced in criminal trials by the court of admiralty, in a noted case, the King's Advocate against Long and Macadam†. It is not a clear point whether the High Admiral of Scotland hath a supreme jurisdiction, exclusive of the court of session and justiciary in the first instance, *since the Union*⁷⁶; for the court of admiralty is not, by *art. 19.* of that treaty, continued with all.

TITLE III.

Nature of its criminal jurisdiction in maritime causes.

* The doctrine laid down in the text is well expressed, and supported by numerous authorities, in Mr Hume's work on Crimes, vol. iii. p. 51. (*2d edit. vol. ii. p. 35.*)

† The same was done 1st and 15th July 1784, in the trial of Maciver and Maccallum, for attempting to defraud the underwriters, by sinking an insured ship. See *Hume, vol. iv. p. 411. (2d edit. vol. ii. p. 490.)*; *Arnol's Criminal Cases, p. 279.*

⁷⁶ There seems to be no doubt, that in maritime causes, the jurisdiction of the Court of Admiralty is exclusive, in the first instance, both of the Courts of Session and Justiciary; and that the Act of Union has made no alteration whatever in this respect. As to the Court of Session, it is sufficient to refer to the cases of *Clark, 8th August 1783, Fac. Coll. Dicr. p. 7532*; *Lawrie and Pinkerton, 31st January 1812, Fac. Coll.*; and to the *stat. 1. and 2. Geo. IV. c. 39. § 1.*, which, in speaking of civil process "in maritime cases," expressly says, "wherein the said court has a privative jurisdiction." As to the Court of Justiciary, again, the circumstance of the Admiral's possessing an exclusive jurisdiction in civil causes is of itself decisive; for the Act of Union draws no distinction, as to this matter, between the civil and criminal jurisdictions, and, of course, must be operative in regard to both equally, or neither. Mr Hume, accordingly, states the exclusive criminal jurisdiction of the Admiral as undoubted; *2. Hume 35. and 490.* And the Act of Union itself seems really to afford no ground whatever for the difficulty, it being added immediately after the declaration noticed in the text, "that the Court of Admiralty now established in Scotland be continued; and that all reviews, reductions or suspensions of the sentences in maritime cases, competent to the jurisdiction of that court, remain in the same manner after the Union as now in Scotland, until the Parliament of Great Britain shall make such regulations and alterations as shall be judged expedient for the whole United Kingdom."

all its former powers, as the other supreme courts of Scotland are ; and that article expressly declares, that all admiralty jurisdictions shall be under the Lord High Admiral, or Commissioners for the admiralty, of Great Britain. This question was moved in a criminal trial before the justiciary *anno* 1723, in which, upon the pannel's objecting to the jurisdiction of that court upon the act 1681, the court, in a point so delicate, put off the decision for some time ; and the prosecutor withdrew his suit *. The heritable jurisdictions of admiralty are not abolished by the late jurisdiction-act. The jurisdiction of the Commissaries of Edinburgh, which is as truly supreme as that of the High Admiral, is explained below, *Tit. 5.* 77

36. There

* See what is said about this case, *Fac. Coll. July 5. 1780, Ritchie, &c. Dict. p. 7527.*

77 A new Court, introducing trial by Jury in civil causes, was instituted by *stat. 55. Geo. III. c. 42.*, and afterwards declared, by *stat. 59. Geo. III. c. 35.*, to form a permanent part of the judicial establishment of Scotland. It is composed of one Chief Judge and two other Judges, called "The Lords Commissioners of the Jury Court in Civil Causes;" but trials may proceed equally "in presence of one, or more than one, of the said three Commissioners;" *55. Geo. III. c. 42. §. 13.*

Under its present constitution no action can originate before this Court; it derives its jurisdiction by virtue of remits from the Court of Session, and the Court of Admiralty.

The remits from the Court of Session are regulated by the following enactments: *First*, "In all processes raised in the Outer-House of the Court of Session, by ordinary action or otherwise, on account of injuries to the person, whether real or verbal, as assault or battery, libel or defamation; or on account of any injury to moveables, or to lands where the title is not in question; or on account of breach of promise of marriage, seduction or adultery; or any action founded on delinquency, or *quasi delinquency* of any kind, where the conclusion shall be for damages or expenses only; the Lord Ordinary of the Outer-House, before whom such processes shall be enrolled," is "required, after defences are lodged, to remit the whole process and productions forthwith to the Jury Court;" *59. Geo. III. c. 35. §. 1.* But "if it shall appear to the parties, or either of them, that there is a question of law or relevancy which ought to be decided previous to the remit of the cause to the Jury Court, it shall be competent for them to state the same orally to the Lord Ordinary," who may either give judgment *de plano*, or order pleadings, or "reserve the alleged question of law for the consideration of the Court of Session, after the matters of fact shall have been found by a Jury." Where pleadings are ordered, "the case is to be proceeded in according to the course of the Court of Session. But "as soon as the question of law or relevancy shall be disposed of, if matters of fact remain to be proved, the whole process and productions in the case shall be forthwith remitted to the Jury Court;" *ibid. §. 2. and 3.* *Second*, "In all cases other than the actions for damages herein before enumerated, when matters of fact are to be proved," the Lord Ordinary, where the cause depends in the Outer-House, and either Division of the Court, where the cause depends in the Inner-House, may, if it shall appear to them expedient for the due administration of justice, remit the same to the Jury Court, either generally, or by special interlocutor "pointing out the matters of fact which they require to be determined by a Jury;" in which cases the necessary issues will be settled in the Jury Court,—or upon issues duly prepared and settled in the Court of Session by the Lord Ordinary or Division before making the remit; *ibid. §. 4–8.* *Third*, "In all cases brought from an inferior court to the Court of Session, wherein proof by witnesses has been taken by order of the inferior court, the Court of Session, in either of its Divisions, or the Lords Ordinary, if they deem further proof to be expedient to be taken, shall direct the same to be taken, and the investigation of the facts to be completed according to the forms of the said Court, unless the parties consent to cancel the deposition of such witnesses as are alive and within Scotland; in which case it shall be competent for the Court of Session, or Lords Ordinary respectively, to direct the case to be sent to the Jury Court;"—"provided always, that nothing herein contained shall restrain the Court of Session in either of its Divisions, or the Lords Ordinary, from directing issues in the cases brought before them from an inferior court, as aforesaid, on any point or points not connected with the proof already taken before such Court;" *ibid. §. 14.* *Fourth*, "It shall be lawful for the House of Lords, in remitting to the Court of Session any cause which is now, or shall hereafter come before the said House by appeal from the said Court of Session, to instruct the Division of the said Court of Session to which the said cause is remitted, to order and direct such issue or issues, as the said House of Lords shall think fit, to be transmitted to the said Commissioners (of the Jury Court,) for the purpose of being tried by a Jury;" *55. Geo. III. c. 42. §. 19.*

As to the remits from the Court of Admiralty, it is enacted, "That it shall and
" may

36. There was no jurisdiction conferred in Scotland before the Union, upon officers of the army, or others, for punishing military offences, except what was constituted during the Usurpation, for inflicting the pains of death on runaways and deserters; of which mention is made, 1644, C. 2. In England, though by the constitution of that kingdom, no person could be subject to any punishment by martial law; yet when it was necessary to keep up a body of regular troops for the public security and defence, an act was made, 1^o *Gul. & Mar. C. 5.*, intituled, *For punishing mutiny and desertion*, to last only for a year, authorising the King to grant commissions to certain officers to hold courts-martial, for the trial of crimes committed by officers or soldiers in the King's service; which act has been renewed from time to time, almost every year, with little variation, and has since the Union been extended to Scotland. Courts-martial are either regimental or general. No particular regulations are laid down in the act with regard to the first. As to the last, it requires that they should consist of at least thirteen judges, all commission-officers; and that the president be a field-officer. Their jurisdiction is precisely limited to points of military discipline, as mutiny, desertion, neglect of duty, beating an officer or fellow-soldier, &c. In all other matters, both officers and soldiers are amenable to the common courts of law. No capital punishment can be inflicted by a court-martial, unless nine officers present shall concur. Where they do not exceed their proper powers, no appeal lies against their sentences to any other court: The only remedy is in the Sovereign, to whom their sentences are reported. But if they shall pronounce judgment in any matter that falls not within their cognisance, the party injured may complain to the civil judge*. An act of the same nature passed in the parliament of England, 13^o *Car. II. C. 9.*, authorising the Lord High Admiral to grant commissions to inferior vice-admirals, &c. to call courts-martial for the trial of offences committed at sea by officers, mariners, or others in

VOL. I.

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* See this subject very fully treated of, in "An Essay on Military Law, and the Practice of Courts-Martial; by Alexander Fraser Tytler, Esq. Judge-Advocate depute of North Britain," (Lord Woodhouselee.) Edin. 1800. As to the jurisdiction of Lieutenantcy courts held under the militia acts, and of Justices of the Peace acting under comprehending acts, see Hutcheson's Treatise on the Office of Justices of the Peace, &c. vol. iii. p. 96.

"may be lawful and competent for the Judge of the High Court of Admiralty, in all processes relating to the running down of, or other injury to ships, and relating to policies of insurance and charter parties, and in all maritime and mercantile cases competent to his jurisdiction as a civil judge, wherein matters of fact are to be proved, to order, by special interlocutor, the whole process and productions, without reporting to the Court of Session, to be remitted to the Jury Court." And "it shall be competent to either of the parties in any such action in the Court of Admiralty,—if the Judge-Admiral shall refuse to order a remit to be made to the Jury Court,—to apply for a review of the deliverance to that effect, to the Court of Session, in either of its Divisions, by petition, to be intimated three days before the same is boxed; which Court, if it shall see cause, is hereby authorised to pronounce an interlocutor, instructing the Judge-Admiral to make such remit;" 59. *Geo. III. c. 35.* § 10, 11.

"It shall not be competent, by representation, reclaiming petition, bill of advocation, appeal to the House of Lords, or otherwise, to bring under review any interlocutor by the said Divisions, Lords Ordinary, or Judge of the Admiralty, ordering a trial by Jury;" *ibid.* § 15.

For further particulars, as to the powers, jurisdictions, procedure, &c. of the Jury Court, see the Statutes.

Book I.

High-Constable
and inferior
Constables.

the King's actual service. This statute was in many points altered by posterior enactments, till at last all the laws, relating to courts-martial for the sea-service, were reduced into one act, which equally affects the whole united kingdom, 22° *Geo. II. C. 33* 7^s.

37. The High Constable of Scotland had no fixed territorial powers of judging, but was invested with a supreme itinerant jurisdiction, jointly with the Marischal, in all crimes committed within *twelve* (or, according to a different reading, *two*) leagues of the court, *Leg. Malc. II. C. 6. § 3*. Upon a commission granted by Charles I. for inquiring into the nature and extent of that jurisdiction, which became in the course of time little known, the commissioners reported, that it extended to all slaughters and riots committed within four miles of the King's person, or of the parliament, or of the privy council. Inferior constables, who all depended on the High Constable, were keepers of the King's castles, and sometimes had not only forts, but boroughs subject to their jurisdiction, as Dundee, Montrose, Forfar. They had the right of proclaiming in those boroughs such fairs as had been established there, of levying the customs belonging to them, of exercising criminal jurisdiction while the fairs lasted, and of applying the fines of delinquents to their own use, *Stair, July 18. 1676, E. Kinghorn*, (Dict. p. 13100.). All heritable constabularies are by 20° *Geo. II. C. 43*. dissolved, except the office of High Constable*: But all the lands, and feu and farm duties, annexed to those dissolved offices, are reserved to the possessors.

Chamberlain of
Scotland.

38. The Chamberlain of Scotland, whose office hath been long sunk, was anciently an officer of the highest dignity, and of supreme jurisdiction. He had the inspection of all the royal boroughs, a power of inquiring into the conduct of the magistrates, and of applying the borough-revenues to proper uses. In his chamberlain aires or circuits, he received complaints between burgess and burgess, and against craftsmen for not performing their work, or for charging exorbitant prices for it. He judged also in matters relating to the public police within borough, which is a power now exercised by the dean of guild. The powers of this officer, and the duties incumbent on him, are fully explained in the *Liter camerarii*, and in the statutes of the first four Jameses.

Seals of the dif-
ferent courts.
King's signet.
Exchequer sig-
net.

39. All our supreme courts have seals or signets proper to their several jurisdictions, which are used for sealing the writs or warrants issuing from them. Thus the High Admiral and the Commissaries of Edinburgh have each their proper signet. But when the signet is mentioned indefinitely, that of the session is commonly understood; which is also called *the King's signet*, because all the writs issuing from thence are made out in the King's name. In this office are sealed all summonses for citation, all letters of execution or diligence, or for the staying or prohibiting of diligence; and, generally, whatever passes by the warrant, either of the whole Lords, or of the Lord Ordinary, which requires to be executed by the officers of court. It is the signet, when stamped on these, which gives them authority; and all of them must, before sealing, be subscribed by the writers, or, as they are called in
ancient

* The office of High Constable is hereditary in the family of Hay, Earl of Errol. *Vide* Lord Woodhouselee's work, Appendix, No. 2.

7^s Explained and amended by *stat. 19. Geo. III. c. 17*.

ancient statutes, *clerks of the signet*, 1537, C. 59: *et seqq.*, except letters of diligence for exhibition of writings or other evidence, which, though they pass by the signet, must be signed by a clerk of session⁷⁹. The clerks of the signet also prepare and subscribe all signatures of charters or other royal grants which pass in exchequer. It appears by the style of the brief of dittay preserved by *Skene, De v. s. voce Iter*, that the justiciar of Scotland had anciently a seal peculiar to his own court. It is however certain, that criminal indictments, and executorial letters issuing from the justiciary, after they were signed by the clerk of court, passed for a long time by the signet of the session. But that court, soon after it had received its present form by the act 1672, got a new seal proper to itself. The Barons of Exchequer have also, by the act 6^o *Ann.* constituting that court, a proper seal for all grants, precepts, and other process issued from thence, or which ought to pass under the seal of the court. An account of the different seals under which the crown-grants ought to pass, is to be explained *infr. B. 2. Tit. 5. § 82. et seqq.*—Hitherto of supreme judges.

TIT. IV.

Of the Inferior Judges and Courts of Scotland.

SIR Thomas Craig, *Lib. 1, Dieg. 12. § 14.*, is of opinion, that the sheriff came in place of the ancient *Comes*, who appears, by many charters, in the reigns of Robert and David Bruces, of the earldoms of Moray, Fife, Strathern, &c. to have been a person who had a large tract of land granted to him heritably by the Sovereign, with jurisdiction annexed to it; whereas the word *Comes*, or *Earl*, as it is now understood, is a mere title of dignity. He conjectures, that these *Comites* abused the powers conferred upon them to such a degree, that the Sovereign was glad to reassume the jurisdiction to himself, and in their place to appoint sheriffs for the ordinary administration of justice: And the Latin *vicecomes* and *vicecomitatus* which signify *sheriff* and *shire*, make this opinion probable. He derives the word *sheriff* from the Saxon *Grave* or *Comes*. But Spelman, with greater probability, *Gl. v. Reve* and *Shira*, fetches it from *reeve*, magistrate or ruler, and *sheer*, to cut or divide; from whence the different districts into which the kingdom is divided are called *shires*: And according to this etymology, *sheriff*, or, as it is sometimes pronounced at this day, *shireeve*, denotes the magistrate or judge-ordinary constituted by the crown over a particular shire or county. Yet sometimes the crown erected small tracts of land, that made only parts of a shire, into a jurisdiction of sheriffship, the grantees of which had a jurisdiction cumulative with the sheriff of the county, in all matters, civil or criminal, within the erected territory.

Sheriff, origin of his office.

2. The sheriff's jurisdiction, both civil and criminal, was in ancient times nearly as ample within his own district, as that of the session or justiciary was over the whole kingdom; for he received in his court the four pleas of the crown, when authorised by the justiciar, *St. Gul. C. 2. § 5.*; and he was judge competent, not only to

His ancient jurisdiction.

⁷⁹ By *stat. 1. and 2. Geo. IV. c. 98. § 17.* all extracts whatsoever, and of course letters of diligence among the rest, are appointed to be signed by the Extractors.

to all personal actions, but to declarators of property in heritage, and other questions of the greatest importance, *Reg. Maj. L. 1. C. 3.* — *C. 5. § 1.* Even after his jurisdiction became more limited, it retained for some time this character of supreme, that causes might be carried by appeal from baron-courts to the sheriff, 1503, *C. 95.* And indeed, since the courts held by sheriffs were truly the King's baron courts, at whose head courts, therefore, all the King's immediate vassals were bound to give suit and presence, *St. Gul. C. 2. § 3.*, it was but reasonable that these should have an higher jurisdiction than the baron-courts of subject-superiors. But upon laying aside the old form of appeals, after which advocations and suspensions were received by the court of session from all inferior courts indiscriminately, the jurisdiction of a baron was no longer considered as subordinate to that of a sheriff.

His civil jurisdiction at present.

3. After the institution of the College of Justice, sundry civil causes, which formerly fell under the sheriff's cognisance, were gradually appropriated to the court of session, on account either of their importance or their intricacy. But he judges to this day, in all personal actions upon contract, bond or obligation, to the greatest extent, whether the suit be brought against the debtor himself, or his representatives; in actions of rent and of forthcoming; in poindings of the ground; and even in the adjudication of lands, when it proceeds on the renunciation of the apparent heir*; in all possessory actions, as removings, ejections, spuilzies, &c.; in all brieves issuing from the Chancery, as of inquest, terce, division†, tutory, &c.; and, generally, in all civil matters which are not by special law or custom appropriated to other courts. Sheriffs, and other judges-ordinary, are authorised by 1669, *C. 17.*, where a landholder proposes to inclose any part of his grounds, to appoint, at his suit, a visitation of the marches between him and the adjacent proprietors; and where they are crooked, or otherwise improper for a fence, to adjudge such part of the grounds as occasion the inconvenience, from one proprietor to the other, for grounds of equal value, so that the fence to be made, according to that adjudication, shall be reputed the common march for the future. This power is not limited by the intendment of the statute to small parcels of ground, but reaches to that quantity which produces the inconvenience, though it should amount to several acres, *Fac. Coll. i. 121. NO. 2, (Pew against Miller, Dict. p. 10484.) †.*

4: The

* See *infra, B. 2. Tit. 12. § 59.*

† Brief of division among heirs-portioners cannot be advocated from the Sheriff to the *Macers*⁸⁰; *Feb. 22. 1772, Cathcart, Dict. p. 7663.* This was called a pleadable brief. See the distinction between brieves retourable and brieves pleadable, stated *B. 4. Tit. 1. § 3.*

‡ *Ibid. NO. 213, Chalmers against Pew, Dict. p. 10485* ⁸¹.

⁸⁰ By *stat. 1. and 2. Geo. IV. c. 38. § 11.*, the direction of brieves to the *macers*, either in the first instance, or by advocacy, is in every case prohibited; and a different course of proceeding substituted instead; *vid. infr. B. 3. T. 8. § 64.* But the above case of *Cathcart* was beyond the limits both of the old and new course; the ground of decision being, that the brief of division, as being essentially distinct from the brief for serving heirs, was exclusively competent to the "Sheriff of the county where the lands are situated."

⁸¹ This decision seems chiefly to have proceeded on a different statute. It is thus abridged in the index to the Faculty report: "The statute 1695, *anent run-rig*, was extended to the division of parcels consisting of three acres and two acres, lying interjected." To this effect, accordingly, it is afterwards cited in the text, *B. 3. t. 3. § 59.*

See farther, on the subject of the text, *infr. B. 2. t. 6. § 4.*

TITLE IV.

His criminal jurisdiction.

4. The sheriff's criminal jurisdiction long extended to certain capital crimes. Thus, he was competent to the crime of witchcraft, 1563, C. 73., till all prosecution upon that crime was prohibited by a British act, 9^o Geo. II. C. 5. He has to this day the cognisance of theft, upon an action pursued against the thief by the private party; in which crime he may also judge by way of indictment, though there should be no private prosecutor, if the criminal was taken with the fang, *i. e.* apprehended while he was carrying off the stolen goods, *Mack. Crim. Tr. Part 2. Tit. 12. § 5.*⁸²; and he is also competent to murder, though it be one of the pleas of the crown. Mackenzie, *h. t.* § 2. affirms, that this part of the sheriffs' jurisdiction is confined to the case where the murderer is seized red hand, or in the fact; but it is evident from 1426, C. 90., of which a posterior act, 1491, C. 28. appears to be a transcript, that sheriffs might try murderers, (for slaughter committed of forethought felony, which are the words of these statutes, is truly murder), though they should have been laid hold of *ex intervallo*, within another territory; with this only variation between the two cases, that if the murderer was taken *flagranti crimine*, sentence must have been executed against him within that sun, as it is in the before-cited acts, or within nine days, according to a posterior act, 1695, C. 4.⁸³; whereas if he was apprehended *ex intervallo*, the sheriff might do justice upon him at any time within forty days after his being seized⁸⁴. The sheriff hath also the cognisance of all crimes which offend against the common police of the country; as, shooting of deer, 1551, C. 9.; forestalling, 1535, C. 21.; destroying of planting, and breaking orchards or dovecots, 1579, C. 84, &c. He is vested, notwithstanding the powers conferred on justices of the peace by special acts, with a jurisdiction cumulative with theirs, in all riots and breaches of the peace, and particularly in bloodwits; *i. e.* riots where blood is spilt, from *wyte*, a Saxon vocable, which, according to Spelman, signifies a fine, and which is used in our ancient statutes to denote blame or *culpa*, 1426, C. 75. *vers. Gif the bailies*. Mackenzie affirms, that the sheriff cannot fine for blood in a higher sum than L. 50 Scots, *Crim. Tr. Part 2. Tit. 12. § 3.* But every judge who is made competent to a crime, has an implied power of inflicting that degree of punishment which is adequate to the circumstances attending the offence, where the punishment is not fixed by statute. The sheriff was long the judge-ordinary to whom the preservation of the public peace was committed; and as such was, and is still, authorised to apprehend fugitives, rebels, and notorious offenders against the peace; and, if necessary, to call the

VOL. I.

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⁸² It is now settled, that the Sheriff has jurisdiction, though the thief be "neither taken with the fang, nor accused at instance of the party injured, but of the procurator-fiscal alone;" 2. *Hume* 64.

⁸³ By *stat. 11. Geo. I. c. 26. § 10.*, no sentence importing a capital, or any corporal punishment, if pronounced south of the Forth, shall be put to execution within less than 30 days, nor, if north of the Forth, within less than 40 days. This enactment was afterwards so far modified by *stat. 3. Geo. II. c. 32. § 2.*, which declares it lawful to put in execution any sentence, importing any corporal punishment less than death or dismembering, if pronounced south of the Forth, after the elapsing of 8 days; and if north of the Forth, after 12 days. But by § 3., any Judge of Justiciary is authorised, upon cause shewn, to stay execution of such sentence for 30 days.

⁸⁴ Mr Hume disputes the Sheriff's competency altogether in this last case; 2. *Hume*, 61. *et seq.*

Book I.

His head courts at the head boroughs of shires or districts.

the *posse comitatus* to his assistance, 1426, C. 98.; 1592, C. 124.; 1685, C. 25*.

5. Though by our most ancient law no freeholder was tied to attendance on the ordinary sheriff-court, unless he was lawfully cited, *Q. Attach. C. 33. § 3.*; yet all freeholders were bound to attend the three *head-courts* which were held by the sheriff yearly, *ibid. § 5.* Freeholders, who owed suit and presence, were to be personally present: Those who owed suit only, might appear by their suitors or proxies, if they were men qualified for passing upon an assize, 1540, C. 71. These three head-courts were at last reduced to one, called *the Michaelmas head-court*, where the sheriff had generally little other business till the act 1681, than to call over the roll of the freeholders, and pocket up the fines of the absents. But by the act 20° *Geo. II. C. 50.*, intituled, *For taking away the tenure of ward-holding*, proprietors of land, whether holding of the King or Prince, are no longer subjected to a fine for absence from any sheriff-court, unless they be summoned thither to serve as a juryman, or for some other lawful purpose. All shires have a head borough, where the jurisdiction is to be exercised, and where all letters of inhibition, interdiction, horning, &c. are to be published and registered. Some of the larger shires are, for the conveniency of the inhabitants, subdivided into lesser districts, each of which hath a proper head borough. Thus, in the shire of Clydesdale, Lanark is the head borough of the everward, both for holding courts, and registering diligences; Hamilton is the head borough of the netherward, for holding courts; and Rutherglen, for publishing and registering diligences; and immemorial custom hath given a sanction to these divisions without the authority of statute.

Ministerial powers of the Sheriff.

6. Sheriffs have not only judicial powers, but ministerial; in virtue of which, they were employed in publishing our laws, and sending copies of them to prelates, barons, and boroughs, before the art of printing was known in Scotland. At this day, they return juries for the trial of causes before the justiciary or exchequer which require juries[†]. It is their duty to execute all writs issuing from the court of exchequer; to levy, for the King's use, the escheats of those who are denounced rebels, and the blanch and feu-rents, casualties of superiority, and other duties payable to the crown, for which they must account in exchequer, 1663, C. 15.; and, in general, to look after every matter which regards the crown's interest within their county. It is another branch of their ministerial duty, to strike the sheriff-fiars yearly in February by a jury; *i. e.* they fix the prices of grain of the growth of the respective counties for the preceding crop; which are to be accounted the legal prices in a few cases where they either cannot be, or, *de facto*, are not ascertained by covenant, or where no positive or precise proof can be had of the true values, *Jan. 1734, Henderson, (Dict. p. 4415.)*. The forms of proceeding in this matter are prescribed

* See an account of the Sheriff's criminal jurisdiction in Hume, *Trial for Crimes*, vol. i. p. 95. *et seq.* (2d edit. vol. ii. p. 58. *et seq.*)

† They now also return Juries for the Jury Court, 55. *Geo. III. c. 42.*; 59. *Geo. III. c. 35.*

scribed by *Act. Sed. Dec. 21. 1723** ** . Since the Union, the writs for electing members of parliament have been directed to the several sheriffs; which, after they are executed, are returned by the sheriff to the crown-office from whence they issued, with the names of the persons elected annexed to them, 6° *Ann. C. 6. § 5.*

7. Regalities were feudal rights of lands granted by the King *in liberam regalitatem*; so that regality-jurisdictions, while they subsisted, were properly territorial, and attendant on the lands. The grantees, though commoners, were called *Lords of Regality*, on account of the high and regal jurisdiction implied in these grants. Regalities proceeded upon signatures presented in exchequer, which passed by the great seal. No lands could fall under this jurisdiction, but such as belonged either in property or superiority to the grantee. And on this medium, royal palaces, though locally situated in boroughs of regality, were adjudged to be no part of the regality, but of the royalty, because they belonged not to the lord of regality, but to the King; and consequently the curators of those who resided in these palaces could not be legally cited at the head borough of the regality, but of the shire, *Jan. 11. 1662, Lo. Carnegy*, (DICT. p. 7909.). Lands subject to the sheriff's jurisdiction are said to be *of the royalty*, because sheriff-courts are in the most proper sense the King's courts, established by him for the regular and ordinary administration of justice in every county; in opposition to lands subject to the special and extraordinary jurisdiction of regality; see 1540, *C. 97.* It was singular in this high jurisdiction, that the lord of regality might appoint deputies, called *stewards* or *bailies*, not only during pleasure or for life, but heritable, who had, by that deputation, all the profits incident to the jurisdiction made over *in perpetuum* to themselves and their heirs. Mackenzie in *Crim. Tr. Part 2. Tit. 11. § 8.*, affirms that Lords of regality could not have judged in their own person; and it is certain, that for above a century before that author's time, they always administered justice by a bailie: But that they might have judged by themselves, is taken for granted, in a decision observed by *Had. Feb. 7. 1610, E. Bothwell*, (DICT. p. 7658.), adjudging that where one had been constituted heritable bailie, the lord of regality could not name another bailie, but that still he might judge in his own person. A lord of regality had a chancery proper to his jurisdiction, from whence he might issue brieves to his bailie, for the service of heirs: And the service proceeding on such brief, when recorded in the books of the regality, was as effectual as a retour on a brief issuing from the King's chancery.

8. The civil jurisdiction of a lord of regality was in all respects equal to that of a sheriff; but his criminal was truly royal: For he might have judged in the four pleas of the crown; whereas the sheriff was competent to none of them but murder. It was even

as

* See also acts of sederunt, *Feb. 29. 1728.* Even though it should appear that the fiars have been irregularly struck, persons liable in payment by that rule cannot get relief by suspension, *Fac. Coll. August 5. 1760, Town of Aberdeen*, DICT. p. 4415.

** See also *A. S. 14th November 1816*, as to the time and mode of striking the fiars in the stewartry of Orkney and Zetland.

Application by summary complaint against a sheriff, for the purpose of obtaining rectification of the fiars, is incompetent; *Fount. and Forbes, Brewers of Edinburgh, 17th and 19th June 1712*, DICT. p. 7463; *Home, 7th February 1806, Fac. Coll. DICT. v. SUMMARY APPLICATION, App. No. 2.* See also *10th December 1771, Knox and Co., Fac. Coll. DICT. p. 4420*, where an action of reduction to the same effect was dismissed.

Lords of Regality.

Their ancient civil and criminal jurisdiction.

BOOK I.

as ample as that of the justiciary as to every crime, except treason, *Mack. Crim. Tr. Part 2. Tit. 11. § 5.*, and in this one respect it prevailed over it, that where a criminal was amenable to a regality, the lord might have repledged or reclaimed him to his own court, not only from the sheriff, but from the justices themselves. He who had this right or his procurator, appeared before the court from whom he was to repledge, and demanded judicially, that the person accused, because he resided within his special jurisdiction, might be sent to his court to be tried there; and it behoved him to give security to the court repledged from, that he would administer justice to him within a year, which security was called *culrach*, from the Gaelic *cul*, which signifies back, and *rach*, cautioner. If the repledger neglected to try the defender in that time, he forfeited his right of holding courts for a year; the first judge might again proceed in the cause; and if the defender did not appear, the cautioner was to answer for him. See *Q. Attach. C. 8.* and *Skene's notes*. Notwithstanding this right of repledging, the jurisdiction of the justiciary or sheriff over those who resided within a regality-jurisdiction, was not thereby abolished: The repledger might indeed, in virtue of his privilege, carry the trial from their courts to his own; but if he did not exercise the privilege, it was not only lawful to those other judges, but it behoved them to proceed in the trial.

Church regalities.

9. All regalities, whether belonging to the church or to laymen, had originally the same right of repledging from the justices; but it was, soon after the Reformation, taken from church-regalities. The jurisdiction itself of church-regalities fell regularly to have been annexed to the crown, in consequence of the annexation of church-lands, by 1587, *C. 29*. But most of the churchmen in whom that right was vested, having for a sum of money made over the exercise of their jurisdiction to laics and their heirs, who were by such grants constituted heritable bailies of the regalities, the Legislature considered those baileries as rights of property; and therefore, instead of suppressing them, it only declared, that the bailies should not for the future have the right of repledging from the justice-aire: and to take from them all occasion of complaint, they were allowed to sit with the justices, and to continue to levy for their own use all the emoluments arising from those trials. Sir James Stewart makes it a doubt, *Ans. v. Advocation*, whether even a laic regality could repledge from the justiciary after that court was modelled of new by the act 1672.

Stewartries.
Office of the
Steward of Scot-
land.

10. It has been observed, *supr. § 7.*, that regality-deputes were sometimes called *stewards*; but steward, in a strict sense, signified a magistrate appointed by the King over special lands belonging to himself, having the same proper jurisdiction with that of a regality. The account given by Mackenzie, *h. t. § 7.*, that the lands which had been formerly erected into earldoms and lordships became stewartries, after accruing to the King by forfeiture, does not want its difficulties, unless he means those earldoms that were granted to the ancient *Comites*; for the erection of lands into an earldom or lordship imports no higher jurisdiction than barony, *July 9. 1713, D. Montrose*, (*Dict. p. 10919.*); and it cannot be affirmed, that a jurisdiction is, by escheating to the King, made more ample than it was before. It appears, therefore, more probable, that it was the *regalities* belonging to subjects, which, on their falling to the crown, became stewartries; yet where lands were expressly erected by the King into a stewartry, the jurisdiction annexed to them must, with-
out

out doubt, have been equal to a regality, whatever the former jurisdiction had been. Most stewardries consisted of small parcels of land, which were only parts of a county, as Strathern, Monteith, &c. ; but the stewartry of Kirkcudbright, and that of Orkney and Zetland, make counties by themselves, and therefore send each of them a representative to parliament. Where lands fell to the King, which had not been formerly erected into a regality, or which he did not intend should have regality powers, he appointed a bailie over them; whose jurisdiction, both civil and criminal, was in all respects equal to that of a sheriff.—We may here take occasion, from the identity of the name, to add a few words concerning the office of Steward of Scotland. This officer was in ancient times of the highest dignity and trust; for he had not only the administration of the crown-revenues, but the chief superintendence of all the affairs of the household, and the privilege of the first place in the army, next to the King, in the day of battle. Some antiquaries affirm, that he had the hereditary guardianship of the kingdom in the Sovereign's absence; for which reason he was called *Steward* or *stedeward*, from *ward*, guardianship, and *stede*, vice, or place. From this the royal house of Stuart took its surname; but the office was sunk on their advancement to the crown, and has never since been revived.

11. This is the proper place for explaining the alterations which our law hath suffered in jurisdictions by the act frequently before cited, 20. *Geo. II. C. 43*. All heritable jurisdictions of justiciary, all regalities and heritable baileries, and inferior constabularies, and all stewardries and sheriffships of smaller districts, which were only parts of counties, are by that act dissolved; and the powers formerly vested in them are to be exercised by such of the king's courts as these powers would have belonged to if the jurisdictions had never been granted. All sheriffships and stewardries not dissolved by the statute, *i. e.* those which comprehend whole counties, where they had been granted either heritably or for life, are resumed, and annexed to the crown. For the future, no sheriffship or stewartry (*i. e.* no high sheriffship or high stewartry) is to be granted, either heritably or for life, or for any term exceeding one year; no high sheriff or steward can judge personally in any action civil or criminal; and one sheriff-depute or steward-depute is to be appointed by the King in every shire or stewartry not dissolved; who is to be an advocate of three years standing, and who is declared incapable to act as an advocate in any cause that shall be brought from his county. These deputies are authorised to name each a substitute or substitutes, either over the whole shire or within such a particular district of it as shall be mentioned in the substitution: And they may not only hold stated courts at their head boroughs, but itinerant ones, when and where they please, or shall be directed by the King, on previous notice to be published at the several churches within the district where the court is to be held. Every deputy must reside personally, for at least four months in the year, within his shire or stewartry; and, upon misbehaviour in his office, may be deprived by the court of session, at the suit either of the King's advocate, or of any four freeholders who can vote in electing members of parliament for the county*. All sheriff-de-

VOL. I.

X

putes

* In the distribution of territory for the sheriffs in Scotland, there were instances in which one sheriff was appointed for two shires. Respecting these a subsequent statute, 21. *Geo. II. c. 19. § 12.*, provided, "That the sheriff-deputes appointed for the said shires

Heritable jurisdictions abolished by act 20. *Geo. II.*

putes that then were, or should be appointed, are by that statute to hold their offices *ad vitam aut culpam* after March 1756; till that time a power was given to the crown to appoint them during pleasure, and by later acts that power hath been continued, till a farther term not yet elapsed*. Because by *art. 20.* of the treaty of Union, all heritable offices and jurisdictions were reserved to the grantees as rights of property, the statute provided that compensation should be made, in respect of every dissolved jurisdiction, to the persons possessed of them, on their entering claims before the court of session, who were to report their opinion of the value of them to the king and council. Claims were accordingly entered; and the court sustained all claims upon grants, though posterior to the acts 1455, C. 43. and 44., prohibiting them, if they were either ratified in parliament, or supported by possession, *Jan. 12. 1748, D. Douglas, (Dict. p. 7695.)*. On report of the court of session, the parliament voted about L. 150,000 Sterling to be given to the claimants, as a compensation for the loss of their jurisdictions; see act of sederunt, *March 18. 1748.* Though the register-books of hornings, inhibitions, &c. that had been kept in the abolished jurisdictions, were, by the said act abolishing them, directed to be transmitted to the general register at Edinburgh; and though there could be no record kept there for the future; yet letters of diligence were afterwards frequently executed at the head boroughs of those jurisdictions; but all such executions were prohibited by act of sederunt, *Feb. 29. 1752.*

Principality or appanage of the Prince of Scotland.

12. Sundry lands, mostly in the shires of Ayr, Renfrew, and Ross, were granted by the crown, at least as early as the reign of Robert III., for an appanage or patrimony to the King's eldest son, then called the *Prince of Scotland*, and erected into a regality, called the *Principality*. It is evident from the several acts of revocation by our Kings, that those lands were as little capable of alienation as the annexed property of the crown. The prince's vassals are entitled to elect, or be elected members of parliament equally with those who hold directly of the crown. And indeed, when there is not a Prince to interpose between the Sovereign and them, they hold immediately of the crown, and were therefore bound to attend the Parliament and the justice-aies, as the King's freeholders, 1489, C. 16. For the same reason the principality rents are, during those intervals, levied by the crown's officers, and applied to the King's use. There is some doubt, whether the regality powers of the Prince are extinguished by the late jurisdiction-act; for the jurisdiction annexed to the principality is not heritable, but personal to the King's eldest son; upon whose accession to the crown it remains no longer with him, than till the existence of his eldest son; and the statute, both by its rubric and general strain, is pointed

“ shires shall not be obliged to reside four months in each of the said shires, but that their residence within the two shires, considered as one district, shall be deemed sufficient to all intents and purposes.”

By the same act, § 10., no sheriff-depute, or steward-depute, or substitute, shall be steward, chamberlain or commissioner to any subject whatsoever, or collector of the cess, or shall exercise or act in the service, employment, or office of any such; and this under the sanction of an *ipso facto* forfeiture of office as sheriff²⁷.

* By stat. 29. *Geo. II. c. 7.* it was continued for fifteen years²⁸.

²⁷ By the same act, § 11. no sheriff-depute or steward-depute shall be capable of being elected a member of the House of Commons.

²⁸ Of course, it is long since at an end.

ed only against *heritable* regalities: Yet the statutory words, *all regalities*, are unlimited, and so may be construed to include every regality jurisdiction, heritable and personal. Though the prince was, for the better supporting of his dignity, and collecting his revenue, entitled to name a number of great officers for his service, as advocate, secretary, treasurer, &c.; yet the jurisdiction annexed to the principality is of the inferior kind. The sentences of the Prince's court in civil matters are subject to the review of the court of session, in the same manner as those of a sheriff; and if he had a supreme criminal jurisdiction, it must have been in virtue of a special grant of justiciary.

13. The Romans had an officer called *Irenarcha*, who is defined, A magistrate constituted for preserving the public peace within the territory to which he is named, *L. unic. C. De iren.* In England, justices of the peace were appointed by the crown as early as the second year of Edward III. We had no such officers in Scotland till 1609, by the 7th act of which year the King was authorised to name commissioners for each county, for binding over disorderly persons to their appearance before the justiciary or privy council; but their powers have been since much enlarged. They are, by 1617, C. 8., and 1661, C. 38., directed to judge in riots, and breaches of the peace; to give order for repairing highways, and punish those who straiten them; and to execute the laws against beggars, vagrants, swearers, drunkards, and other disorderly persons. They have also authority to punish the destroyers of green wood, slayers of fish in forbidden times, and other offenders against sundry penal laws; but they cannot try offences of this last kind without a special commission from the crown. They may compel servants and day-labourers to serve for a reasonable hire, under the pain of imprisonment⁸⁹, and condemn their masters or employers to pay their wages; upon which debts, not only the debtors, but their representatives, may be sued before them. This is the only point of jurisdiction properly civil that is conferred on them by statute⁹⁰. And even that seems to be granted to them, not so much as a branch of civil jurisdiction, as because it is a power necessary for supporting their character, as guardians of the public peace; for which reason it would seem that their judicial powers in civil causes ought not to be stretched beyond the letter of the statute, *Dec. 15. 1710, Forsyth*, (Dict. p. 7596.); *Fac. Coll. ii. 170, (Barlay, Dict. p. 7611)*⁹¹. The justices can also fix the rates of harvest-fees and craftsmen's work⁹², and appoint overseers in each parish

Justices of the Peace, what was anciently their jurisdiction.

* See also *Fac. Coll. Feb. 10. 1756, Fergus*, Dict. p. 7610; *June 15. 1790, Robertson*, Dict. p. 7625. By *stat. 35. Geo. III. c. 123. June 26. 1795*, a civil jurisdiction is conferred upon the justices, in causes where the debt or demand does not exceed L. 40 Scots, exclusive of costs. This statute was declared to continue till the end of the session of parliament ensuing the term of five years from *June 1. 1795*. It was rendered perpetual by *39. and 40. Geo. III. c. 46., May 30. 1800*. By this statute several

⁸⁹ By *stat. 53. Geo. III. c. 40.* the Justices' powers in this respect are taken away; so much of the acts 1617, c. 8., and 1661, c. 38., "or of any other act of Parliament in force in Scotland, as authorises and empowers any Justices of the Peace, or Magistrates of cities and boroughs, to rate wages, or fix prices of work for artificers, labourers, and craftsmen," being thereby repealed. The jurisdiction of the Justices, however, in questions of wages between master and servant, arising out of voluntary contract, still remains; 1. *Hutcheson*, p. 116.-118; *Tait*, p. 178.

⁹⁰ Inveterate usage has conferred on the Justices another point of civil jurisdiction;—for they also judge in questions of aliment to natural children; 1. *Hutcheson*, p. 115; *Tait*, *ut supra*.

⁹¹ *Vid. antea, tit. 2. § 30.*

parish within the county for applying properly the sums destined to the poor. By the last of the before-mentioned acts, 1661, they may appoint collectors for levying the fines imposed by the court, at whose suit letters of horning are authorised to pass on the decrees imposing them⁹³. These fines, after deducting the charges of the court, were, by the aforesaid act 1661, to be applied, partly to the informers and prosecutors, and partly to pious uses. But by the present oath *de fidei* to be taken by them, which, since the Union, runs in the same style as the English, all the fines, except those which are to be applied for the use of the court, are to be brought into exchequer.

Their present jurisdiction.

14. By 1669, C. 16.; 1670, C. 9.; 1686, C. 8., justices of the peace are vested with more ample powers in regulating highways, bridges, and ferries, and in determining questions concerning them. They are authorised to call out the tenants, with their cottars and servants⁹⁴, to perform six days' work yearly, with their horses, carts, or sleds, and proper tools, for upholding the highways; which must be twenty feet broad at least, without including the ditch on either side; and they may, in conjunction with the landholders, assess the shire in the sums necessary for that purpose, or for building

new regulations were introduced. In particular, the amount of the debt thus cognisable by the justices is raised to L. 5 Sterling⁹².

⁹² In these small debt courts, the Justices are entitled to try and determine "all causes and complaints brought before them concerning the recovery of debts, or the making effectual any demand; provided always, that the debt or demand shall not exceed the value of L. 5 Sterling, exclusive of costs;" 39. and 40. Geo. III. c. 46. § 2.; under the following exceptions, viz. 1. "Any debt for rent, upon a tack, or lease or real contract, where the title of any lands, tenements, or hereditaments, can or may come to be brought in question:" 2. Any debt that "may arise upon or concerning the validity of any will, testament, or contract of marriage:" 3. Any debt for any money or thing won at, or by means of any horse-race, cock-match, or any kind of gaming or play:" 4. "Any debt or demand for, or an account of any spirituous liquors;" *ibid.* § 20.

It has accordingly been found competent to award damages, not exceeding L. 5, against a messenger for professional misconduct; *Turnbull*, 14. Feb. 1801, *Fac. Coll. Dict. v. Jurisdic. App. No. 9.*; also to judge in an action, where the liability of the defender seemed to rest on the fact of his having incurred representation, and subjected himself to the debts of a deceased party; *Johnston*, 19th Jan. 1803, *Fac. Coll. Dict. p. 7634.*

The decree of the Justices is subject neither to "advocation, nor to any suspension, appeal, or other stay of execution;" but it may be reduced "on the ground of alleged iniquity or oppression;" the pursuer bringing his action within one year from its date, and finding caution "for payment of such expenses as may be awarded against him;" 39. and 40. Geo. III. c. 46. § 13. The "iniquity," here declared to be a sufficient ground for reduction, has not been taken in its ordinary technical sense, as afterwards explained, (*B. 4. tit. 2. § 41.*) in reference to the process of review in the case of other courts; but has been regarded rather as synonymous with "oppression." Accordingly, in the case of *Johnston (supra)*, the court held, "that unless the most apparent iniquity has been done, in the execution of the small debt act, by the Justices appointed to carry it into execution, no appeal from their sentence should be received;" and again, in a later case, that decree under the small debt act is "not liable to reduction, unless *malus animus* in the Justices be alleged;" *Sempill*, 19th Jan. 1810, *Fac. Coll.*

See an abstract of the last small debt act, APPENDIX, NO. VIII.

⁹³ As to the execution competent upon decrees of the Justices generally, see *infra*, *B. 4. t. 9. § 16.*

⁹⁴ The acts have been found to comprehend all classes of inhabitants within burgh, —householders, merchants, tradesmen, &c. *Trustees of Perth and Queensferry Turnpike v. Magistrates of Perth*, 1st Feb. 1757, affirmed on appeal 10th April 1757, *Fac. Coll. Dict. p. 13166*; *Trustees of Glasgow Turnpike v. Inhabitants of Paisley*, 11th Jan. 1758, *Fac. Coll. Dict. p. 13170*:—nay, even "apprentices to artificers in a town," *Mackay, &c.* 27th Nov. 1807, *Fac. Coll. Dict. v. APPRENTICE, App. NO. 2.*: —and fishers, or those who were boatmen, or sailors in the passage boats," but *secus* "as to those sailors who went upon foreign voyages, or voyages coastways;" *Falc. Hamilton v. Inhabitants of Kirkcaldy*, 24th July 1750, *Dict. p. 13159.*

ing or repairing bridges, or the passages at public ferries, not exceeding 10s. upon every L. 100 Scots of valued rent; and where the course of an highway is to be altered, they have power to apply part of the sum so levied, to compensate the loss of the proprietor through whose grounds the new road is to be carried. But the commissioners of supply were joined with the justices in that branch of their jurisdiction, by 1686, C. 8.; and it is now enacted, by 5° Geo. I. C. 30., that their joint meeting shall be held yearly on the third Tuesday of May*, for the purposes of the statute, with a power of adjournment; and that the tenants, cottars, &c. within the county, shall be obliged to work upon the roads three days every year before the end of June, seed-time excepted, and three days after harvest. Justices are also authorised, by 1707, C. 13., to judge in the laws for preserving the game; which powers are continued with them by a British act, 24° Geo. II. C. 34, &c.

Their sessions
or times of
meeting.

15. To prevent justices of the peace from encroaching on the jurisdiction of other courts, whose powers are all reserved entire by the act 1661, no person can be cited before them till fifteen days are elapsed after committing the offence for which he is to be tried; within which time any judge competent may have an opportunity to exercise his jurisdiction. They are specially directed by that statute to meet four times in the year at the county-town^o, on the first Tuesdays of May, August, and March, and the last Tuesday of October, with power to continue or adjourn these quarterly meetings to any other day or place they shall judge proper. But they have always held courts upon particular causes at any time and in any place within the county, though not by way of adjournment of the quarter-sessions. In those quarterly meetings they have power, in the general case, of reviewing the sentences pronounced at their intermediate meetings which are called *special* or *common sessions*. As the judicial powers of justices relate chiefly to offences against the peace, which in their nature require dispatch, their forms of proceeding are more simple and summary than those observed in courts which are vested with a proper civil jurisdiction^o. Where a county is of great extent, the justices sometimes divide it into smaller districts, for the conveniency of the inhabitants; but as that voluntary division cannot cut off any part of the legal jurisdiction vested in the justices, those of one district may judge the inhabitants of another, and hold their courts in any part of the shire, Br. 8. (*Fullerton*, Dict. p. 7501.).

16. Constables are the proper officers for executing the orders of the justices of the peace. They are appointed by them in their

Constables are
their officers.

VOL. I.

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* By 11. Geo. III. c. 53. it is enacted, That instead of the meeting appointed by the act 5. Geo. I. c. 30., there shall be two general meetings yearly of the justices of the peace and commissioners of supply, for the business of the high-ways; the first upon the same day that the commissioners of supply shall be directed by the land-tax act to assemble for the purpose of assessing the land-tax, and the second upon the same day that the freeholders shall assemble at their Michaelmas head-court. See Hutcheson's Treatise on the Offices of Justice of the Peace, &c.

^o The statute says nothing as to these meetings being held "at the county town." There is, however, a *decided case*, where the Court "found, that the head burgh of "the shire is the place where the Justices of the Peace ought to hold their Quarterly "Courts or Sessions;" *Kilk. Earl of Home, &c.* 30th June 1741, Dict. p. 7602.

^o On the assumption that the proceedings themselves have been regular, it is not essential that the record be full, provided it be intelligible; *Broadford*, 14th Nov. 1807, *Fac. Coll. Dict. v. JURISDICTION, App. NO. 16.* With regard, indeed, to proceedings before the small debt courts, the statute contains an express proviso, that no "pleadings, or minutes, or evidence, be taken down in writing, or be entered upon any "record;" 39. and 40. Geo. III. c. 46. § 6.

Book I.

quarter-sessions, two at least for every parish; and in royal boroughs the magistrates are to name them every six months, 1661, *C. 38.*, under the head *Constable*. It is their duty to apprehend offenders against the peace, vagrants, frequenters of disorderly houses, and such as can give no account of themselves, and carry them to the next justice; to suppress riots, with the assistance of the neighbourhood, and apprehend the rioters; but after the riot is over, no constable is authorised to lay hold of any person concerned in it, unless one has been dangerously wounded in the fray.

Their extrajudicial powers. Magistrates bound to execute their warrants.

17. The powers of the justices are sometimes executed out of court. Thus, by a warrant directed to a constable, a single justice of the peace can order suspected houses to be searched, and suspected persons to be brought before him, in order to their examination, or to bind them to the peace. He can also, out of court, imprison offenders by warrants of commitment, directed to a jailor, for receiving and detaining them in prison, till they be set free by the course of law. And though, for securing personal liberty, there can be no imprisonment in order to trial, without a written warrant proceeding on a signed information, 1701, *C. 6.*, inferior magistrates are allowed to imprison for slighter offences without that solemnity; the prisoner having, in all cases, relief by offering bail, or demanding a trial. It is customary, in breaches of the peace, for the justices, sheriffs, or other magistrates, who are intrusted with the preservation of it, to imprison the offenders *ex incontinenti*, or summarily, not merely for quelling the riot, but for punishment, if any one engaged in it hath been mortally wounded. Yet such summary warrants ought not to be granted *ex intervallo*, where there happened nothing but dry blows, and nobody hurt; for summary warrants are extraordinary remedies; and a civil action for damages appears in this last case to be sufficient for every good purpose. One ought not to be fined by a justice for refusing to give security for his good behaviour, for that is not always in a person's power, *Nov. 9. 1710, Just. of the shire of Wigtoun*, (*DICT. p. 7595.*): but he may be *imprisoned*, for that may be necessary for preserving the peace. All magistrates of boroughs are enjoined to receive into their prisons those who shall be sent to them by a warrant of the justices; but the justices must relieve the magistrates from the expence of maintaining the prisoner; and they are empowered, by the foresaid act 1661, to assess, at their quarter-sessions, every parish within the shire in the sums necessary for that purpose. Where sheriffs or other magistrates failed in their duty, the justices were, by the same act, required to inform against them to the privy council: And they are, since the Union, directed to make presentments in their quarter-sessions against delinquents, in order to their trial before the circuit-court, *8° Ann. C. 16.*

Powers of the justices of Scotland the same with those of England.

18. Justices of the peace, over and above the powers committed to them by the laws of Scotland, may, by a British act, *6° Ann. C. 6.*, exercise all powers pertaining to the office of a justice by the laws of England, in relation to the peace. From that time, the commissions of the peace by the crown for both parts of the united kingdom have run in the same style. By these, power is given to the justices to determine in all capital crimes, felonies, and several others specially expressed, with this limitation subjoined, *of which the justices of peace may lawfully inquire*. Sir M. Hale, *Plac. Cor. Part 2. C. 7.*, makes two exceptions from the general rule, that justices of peace are competent to felonies: *first*, That those felonies which are by

by statute appropriated to other courts, as murder in the King's palace, forgery, embezzling records, &c. fall in no case under their cognisance; 2dly, That engrossing, perjury, and several other crimes, are by special statute to be judged by the justices, only in their quarter-sessions. All commissions of the peace have a proviso, That in cases of difficulty the justices shall respite judgment, till one of the King's judges be present; which, when applied to the law of Scotland, must be understood of a Lord of Justiciary: But there have been few instances where Scottish justices have adventured to exercise such extensive jurisdiction. By a clause in the act 6^o Ann. trials before the Scottish justices are still to be proceeded in, according to the forms which had been before observed in Scotland. Upon this head, three justices were found necessary to make a quorum, agreeably to the act 1661, though two are sufficient by the English law, because the number constituting a quorum appeared to be a point of form, *Br. 8. (Fullerton, Dict. p. 7501.)* But it was afterwards adjudged, that we were to be governed in that point by the English law, or rather by the present style of our commissions, by which two or more may sit as a court, *Dec. 1730, Reid, (Dict. p. 7636.)*⁹⁷.

19. Scottish justices had formerly no cognisance in revenue matters; but by the treaty of Union, *art. 18.*, it was declared, that the laws of excise should from thenceforth be the same in Scotland as in England. Hence, because by several acts passed in England before the Union, justices were made final judges in many frauds and concealments relating to the excise, the court of session have refused to review such sentences on alleged nullities, *Jan. 25. 1710, Paterson, (Dict. p. 7594.)*⁹⁸. In some British acts relative to the excise, the judgment of any two justices is final, without appeal to any other court, *6. Geo. I. C. 21. § 20, 21.*; but generally an appeal lies from them to the quarter-sessions, whose judgment is declared final, *9. Ann. C. 11. § 36.*; *12. Ann. sess. 1. C. 2. § 37, &c.* The more effectually to prevent the frequent frauds committed against the revenue, the justices are authorised, in special cases, to inflict penalties upon the evidence of one or more credible witnesses, *11. & 12. Gul. III. C. 15. § 6.*, and even in absence of the party, provided he have been summoned, said *9. Ann. C. 11. § 36.* No commissioner of excise, or brewer, can act as a justice in matters of

Justices have cognisance in some revenue matters.

⁹⁷ In an advocation, on the ground that decree had been pronounced by a single justice, the court remitted with this instruction, that the cause should be judged by two or more justices; *Mackay, 10th July 1760, Fac. Coll. Dict. p. 7637.* But in *Kilk. Dinwoody, 22d Nov. 1748, Dict. p. 7636*, it was doubted by some of the judges, whether in cases between master and servant decree might not be pronounced, as in England, by a single justice. In applications against debtors as *in meditatione fugæ, Barrowfield, June 1727, Dict. p. 8549*,—in lawborrows, and generally in all process connected with the preservation of the peace, *Tait, p. 179, 181, &c.*,—one justice is competent to act. He can also precognosce witnesses in criminal cases, and commit the accused to jail for farther examination, or until liberated in course of law. By special statute,—as for instance under the vagrant, pawnbrokers, and militia acts,—various powers, both judicial and ministerial, are conferred upon single justices. Other instances of powers competent to a single justice “out of court” are noticed in the text, *supr. § 17.* Even in those matters, which can be decided only *in* court, though two or more justices are by law required for constituting such court, and for pronouncing sentence and judgment, it has been said, that “incidental orders or warrants are usually signed only by one;” *Tait, p. 278.* But it is, with some, a subject of serious doubt, how far, in strict law, a single justice can act in this last class of cases, even incidentally.

⁹⁸ *Vid. supr. tit. 2. § 7.*

of excise, 15. *Car. II. C. 11. § 8**. Justices are also authorised since the Union to judge in offences against the rules prescribed to the raisers of hemp and flax, and to the manufacturers and bleachers of linen cloth, 13. *Geo. I. C. 26. &c.*; see also 24. *Geo. II. C. 44.*

Boroughs.

20. A borough may be defined a corporate body, erected by the Sovereign, and made up of the inhabitants¹⁰¹ of a determinate tract of ground, with jurisdiction annexed to it. Boroughs were erected by the Sovereign, either to be holden of himself, or in favour of subjects who enjoyed the property or superiority of the lands contained in the charter, to be holden of those subjects. From this difference arises the common division of boroughs into boroughs-royal, which in the general case hold immediately of the crown, and have a right to be represented in parliament; and boroughs of regality or barony, holding of the lord of regality or baron; of which last *vid. infr.* § 30. All royal boroughs have power, by their charters of erection, to choose annually such office-bearers or magistrates as are specified in the grant; most frequently a provost, bailies, dean of guild, and treasurer, together with a common council. The manner of this election was regulated by a general law, 1469, *C. 30.*; but for a long time past, every borough has had a set or constitution proper to itself, according to which the magistrates and common council are elected.

Boroughs royal.

Jurisdiction of the magistrates of royal boroughs.

21. Magistrates of boroughs, though not royal, have the cognisance of debts, and questions of possession between the inhabitants; and it is the general opinion, that royal boroughs have as extensive a civil jurisdiction within the borough, as the sheriff hath in his territory. By special statute, 1644, *C. 35.*, revived by 1663, *C. 6.*, the provost and bailies of royal boroughs have power to value and sell ruinous houses to the highest offerer, where the proprietors refuse to rebuild or repair them. In criminal matters they had anciently the same privilege as regalities, of repledging from the justiciary or sheriff, for which see *Leg. Burg. C. 61.*; 1488, *C. 1.*; and they had by special statute, 1426, *C. 75.*, the cognisance of reckless or undesigned fire raising: But their criminal jurisdiction hath been much abridged by our latter usage. They are still competent to petty riots; but they never had jurisdiction in bloodwits, unless their grants carried an express right of sheriffship, regality or barony, *Leg.*

* The Lords found, That justices of the peace had no jurisdiction in a complaint against a customhouse officer for an improper seizure; *Kilk. July 17. 1747, Ramsay, Dict. p. 7590*⁹⁹; and that they had no power to grant warrant for arrestment on excise decrees; *ibid. July 30. 1747, Caldwell, Dict. p. 7603*¹⁰⁰.

⁹⁹ "It is true, where the act of seizure is attended with a riot, the Justices of the Peace, as judges in riots, may cognosce upon the riot, and it will be no defence that the person complained on was an officer making a seizure;" *Kilk. ibid.*

¹⁰⁰ Neither, in excise matters, can they issue warrant for pointing; the statutes, under which this part of their jurisdiction arises, directing recovery to be made only by "distress;" *Lord Advocate v. Forgers, 20th February 1811, in Justiciary, Fac. Coll. App. No. I.*

¹⁰¹ Every mere inhabitant of a burgh is not a member of the corporate body: he must likewise be duly admitted burgess; and, indeed, such admission constitutes one a member of the burgh corporation, whether he actually dwell within the burgh or not. "There are three sorts of burgesses," according to Kilkerran; "burgesses, *in sua arte*, who are members of one or other of the corporations; burgesses, who are "guild-brothers; and a third sort, who are simply burgesses, and neither guild-brothers, nor members of any corporation;" *Kilk. Hog, 26th January 1743, Dict. p. 1928.*

Leg. Burg. C. 19. and *Shene's notes*; which special right hath been granted to Edinburgh, Stirling, Perth, and some other royal boroughs. And indeed, when a royal borough is entitled to any of these, it continues to enjoy a jurisdiction, not only civil, but criminal, as ample as sheriffs now have, or as barons or lords of regality formerly had; for by the act 20. *Geo. II.* all jurisdictions and privileges vested in any royal borough are reserved in their full extent. But this jurisdiction is only cumulative with, not exclusive of, that of the sheriff: For sheriffs have also the cognisance of all questions arising within the bounds of the erected lands, except such as are more closely connected with the public order or police of the borough; in which, if the sheriff, who may possibly be a stranger to its condition, were allowed to judge, the administration of the magistrates might be embarrassed, and their plans for the public interest defeated¹⁰². The magistrates of some boroughs are by their charter constituted justices of peace within the bounds of their erection, in which case they have also a cumulative jurisdiction with the county-justices¹⁰³. Since the Union, the eldest magistrate of every royal borough is named of course in all the commissions of the peace.

22. Though the jurisdiction of royal boroughs may be exercised by the provost as chief magistrate, it is generally a bailie who sits as judge: But in matters of police, or of common concernment to the community, the magistrates and town-council must concur, as the full representatives of the community. In this capacity they make by-laws, not repugnant to the laws of the realm, or set of the borough; choose persons into offices which are in their gift, &c.; and they can not only proportion among the inhabitants the burden of taxations imposed by parliament, but they may impose taxations for the utility of the borough by their own authority, (for so the court of session has explained the act 1592, *C. 155.*), provided not only the consent of the magistrates and council, but of the special corporations burdened, be adhibited to their act, *Jan. 11. 1678, T. of Aberdeen*, (*DICT. p. 1866*¹⁰⁴).

Their powers in matters regarding the community.

VOL. I.

Z

23. The

¹⁰² *Vid. infra*, § 24.

¹⁰³ With reference to such magistrates when sitting *qua* Justices, it has been found, in the case of Edinburgh, that they may hold Quarter-Sessions, and exercise all the jurisdiction which Justices holding regular Quarter-Sessions enjoy; *Mackay, Skirring and Co.*, 19th November 1813, *Fac. Coll.*

¹⁰⁴ It is not the consent of the "special corporations," which seems to be necessary, but that of "the whole incorporation" of the burgh, or, in other words, of the majority of the burghesses duly convened at a regular meeting, after previous proclamation of the reason of the stent; *Stair, Forbes v. Town of Inverness*, 14th February 1672, *DICT. p. 1895*; *Town of Aberdeen, supra*; and a doubt might, perhaps, be raised, how far, even in this way, any tax could, at the present day, be imposed without the sanction of Parliament. It is, at all events, quite a settled point, that the Magistrates and Town-Council have, of their own authority, no power, either of imposing "new burdens, taxes, duties, or customs;" *Tod v. Magistrates of St Andrews*, 15th June 1781, *Fac. Coll. DICT. p. 1997*; *Boog and Thomson v. Magistrates of Burntisland*, 22d February 1775, *DICT. p. 1991*; or of increasing and extending the old ones, *Wauchope, &c. v. Magistrates of Canongate*, 28th January 1800, *Fac. Coll. DICT. v. COMMUNITY, App. No. 1.*; *Fleshers v. Magistrates of Glasgow*, 15th June 1802, *Fac. Coll. DICT. v. BURG ROYAL, App. No. 11.*; *Raitt, &c. v. Magistrates of Aberdeen*, 21st November 1804, *Fac. Coll. DICT. v. JURISDICTION, App. No. 13.*; *Reid v. Magistrates of Edinburgh*, 6th December 1810, *Fac. Coll.* Where, however, for an useful and necessary purpose of police, it has been deemed advisable to appoint certain new officers, the ordering a fee to be paid to such officers, not exceeding a reasonable remuneration for their trouble, has been regarded in a different light from the imposition of a tax. It was accordingly found, that the Magistrates and Town-Council of a royal burgh are entitled to appoint coal measurers for the burgh, and to impose a small duty upon each cart of coals sold in the burgh for their payment; *Gass*, 15th June 1815, *Fac. Coll.* See a parallel decision, in the case of a burgh of barony, *infra*, § 30. *in not.*

BOOK I.

Convention of
boroughs, its
powers.

23. The convention of boroughs, which is composed of commissioners, one from each borough, was, as early as 1487, C. 111., authorised to sit yearly, with power to make laws and settle rules for promoting trade, and advancing the common weal of the boroughs. Its powers were confirmed and enlarged by many posterior acts; and in pursuance thereof, that body has been in use to regulate the manner of election in particular boroughs, where the former sets appeared irrational or inconvenient; to prohibit undue exactions made by boroughs; to examine how their yearly revenues have been applied by the magistrates; to punish the magistrates for mal-administration; and to proportion among the several boroughs, according to their abilities, that part of the parliamentary subsidies which is payable by the state of the boroughs. From the time that these high powers were vested by law in the convention of boroughs, the chamberlain's jurisdiction, of which so much is said in our old law-books and statutes, fast declined, and has now for upwards of two centuries been quite laid aside. The powers, however, of this convention, were never understood to be final, or uncontrollable; for royal boroughs have ever been the creatures of the crown. Accordingly, the magistrates of boroughs were ordained, by 1535, C. 26., long after the first establishment of yearly conventions, to bring annually into exchequer the account of the revenues of their boroughs, that the lords-auditors might judge whether they had been profitably expended. And even since the Revolution, the care of the revenues of boroughs is, by 1693, C. 28., declared to belong to the crown. Hence the mal-administration of borough-revenues is to be considered rather as a matter of public government than the subject of a popular action in a court of law; and therefore no private burgess, or number of burgesses, seem entitled to such action against their magistrates¹⁰⁵. Yet where the burgesses have a patrimonial interest, *ex. gr.* of pasturage in any commony granted to the borough, they have a right to sue the magistrates, for declaring that interest which belongs to them as private burgesses; see *Fac. Coll.* 1. 17. (*Anderson, Dict.* p. 2539.)*

24. The head of the merchant-company, or guild-brethren, is called *the dean of guild*, from *guild*, a Saxon word for fraternity. He was vested by 1593, C. 184. with a jurisdiction in all causes between merchant and merchant, as it was exercised in the towns of France and Flanders, where Burses are constituted †; *Bourse* signifies the exchange or place where merchants assemble in trading towns, for the negotiating and transacting of business. By that act deans of guild had also the cognisance of causes between merchant and mariner; and under that pretext they took occasion to judge in maritime causes within the borough. But since the act of Charles II. establishing the court of admiralty, they have laid no claim to that branch of jurisdiction: Neither have they of a long time exercised the powers conferred on them by this statute, in causes

* See *Lang, &c.* against *The Magistrates of Selkirk*, Nov. 28. 1748, *Dict.* p. 2515.

† And especially in Paris, Roan, Bourdeaux, Rochelle.

¹⁰⁵ This doctrine was in the strongest manner confirmed in the late case of *Mollison, &c. v. Magistrates of Inverury*, 14th Dec. 1820, not yet reported; where the Court decided, 1. That individual burgesses have no title either to pursue a *general* action of accounting against their Magistrates, or even to complain against *special* acts of mismanagement and peculation; and 2. That supposing the action to be competent in this respect, the Court of Session have no jurisdiction in such matters. See also *Gilchrist, &c. v. Magistrates of Kinghorn*, 5th March 1771, *Fac. Coll. Dict.* p. 7366.

The Dean of
Guild,—his
office and juris-
diction.

causes between merchant and merchant, which point of jurisdiction seems naturally to have fallen to those courts to which the cognisance of such causes would have been competent if it had never been granted to the dean of guild. It belongs to the dean of guild to take care that buildings within borough be agreeable to law, neither encroaching on private property, nor on the public streets or passages; and that houses in danger of falling be thrown down*. Though he be a magistrate of a royal borough, his jurisdiction depends not in any measure on the court of the borough, or, as it is commonly called, *The bailie court*, July 21. 1631, *Adamson*, (DICT. p. 7483.).

25. Though all who hold lands immediately of the crown, to a certain yearly extent, are barons in respect of the title to elect or be elected into parliament, *B. 1. Tit. 3. § 4.*; yet to constitute a baron, in the strict law-sense of the word, one must have his lands either erected, or at least confirmed by the King, *in liberam baroniam*. A baron, in this sense, enjoyed a fixed jurisdiction, both civil and criminal, which, in the general case, he might exercise, either by himself, or by his deputy, called a *bailie*. In civil matters, he might have judged in questions of debt within the barony, and in most of the possessory actions; and though, by a known rule, no person ought to judge in his own cause, a baron may judge in all such actions, between himself or his vassals and tenants, as are necessary for making his rents and feu-duties effectual, to prevent the expence which must be incurred, if trifling causes, which happen daily, and seldom admit of difficulty, were to be carried to distant courts. Thus he may ascertain the price of corns due by a tenant, and pronounce sentence against him for arrears of rent: He may, in consequence of his own decree, compel his tenants to perform to him all the services, either contained in their rights or fixed by usage, and to carry their corns to the mill of the barony: He may punish them for abstracting their grain to another mill; and he could anciently have brought actions of removing against them before his own court; but in all the cases where he himself was a party, he could not judge in person. He had also a power of police, by which he might fix reasonable prices upon work wrought within the barony, &c.¹⁰⁷; of which afterwards.

Barons, their civil jurisdiction.

26. According to the laws ascribed to Malcolm Mackenneth, *C. 13.*, the criminal jurisdiction of a baron reached to all crimes except treason, and the four pleas of the crown †; and even by our later law, he might have judged, not only in reckless fire-raising, 1426, *C. 75. in fin.*, in processes for breaking of orchards and dove-cots, destroying of green wood and of planting, &c., provided the offenders were taken in the fact, 1579, *C. 84.*; *Feb. 3. 1674, L. Strowan*,

Their criminal jurisdiction.

* This jurisdiction of the dean of guild is strictly confined to possessory questions, *Kilk. Feb. 22. 1750, Nielsons, &c. DICT. p. 7584.*; but in these he judges to the exclusion of the Sheriff, *Kames's Select Decisions, Nov. and Fac. oll. Dec. 14. 1752, Magistrates of Stirling, DICT. p. 7584*¹⁰⁶.

† Robbery, murder, rape, and fire-raising.

¹⁰⁶ The Sheriff has jurisdiction, where the Magistrates are parties; *Earl of Kintore, 27th February 1802, Fac. Coll. DICT. p. 7673.*

See farther as to the jurisdiction of the Dean of Guild, *infr. B. 2. t. 9. § 9.*

¹⁰⁷ This power, it has already been observed, is by express statute taken from Justices of the Peace, and Magistrates of cities and burghs, *supra, § 13. in not. 89.* It is presumed, that though the statute does not extend to the particular case of Barons, yet any attempt by them to exercise the powers mentioned in the text would now be discountenanced.

Strowan, (DICT. p. 7541.), and in riots and bloodwits, the fines of which he might have appropriated to himself, but, according to the general opinion of our lawyers, in the capital crime of theft, though he should not have had the clause *cum fossa et furca* in his charter, *Cr. Lib. 1. Dieg. 12. §. 16.*; *Skene, v. Baro*; *Hope, Min. Pr. p. 93.*; yet he could judge in no other capital crime, if he had not been specially infest with that privilege. Some charters of barony had a clause of outfang and infang thief; others were restricted to infang thief; as to the meaning of which terms, the curious may consult *Q. Attach. C. 100.*; *St. B. 2. Tit. 3. § 62.*; *Skene, v. Infang thief*. A baron can exercise no part of the jurisdiction which properly belongs to him as baron, till he be infest in the barony; for it is a feudal right conferred by the King upon the baron as his vassal, and he is not the King's vassal till seisin.

A degree of this jurisdiction communicable to their vassals.

27. A baron, where he sold part of his barony-lands to be holden of himself, was understood to communicate to the purchaser a certain degree of jurisdiction over that part of the barony which he had sold to him. If the purchaser was infest simply *cum curiis*, he had the cognisance of common riots, and of actions of debt between tenant and tenant; and if the charter had a clause *cum curiis et bloodwitis*, his infestment was, by the later practice, considered as an heritable bailliery from the baron, and so entitled him to fine for blood, *Fount. Dec. 23. 1692, Chessors*, (DICT. p. 7547.). But the jurisdiction thus granted to the vassal was only cumulative with that of the baron; for the baron was bound, by accepting the jurisdiction from the crown, to do justice to all within the territory. While therefore a baron continues baron, it behoves him to retain the jurisdiction annexed to the barony, as well over the lands disposed to the vassal, as over the part unsold, *March 3. 1630, Lord Lorn*, (DICT. p. 4789.); *Cr. Lib. 2. Dieg. 8. § 30.*; *St. B. 2. T. 3. § 62.* Any freeholder or King's vassal, though his lands were not erected into a barony, might have held courts for rent, and fined for blood, *Jan. 30. 1622, Stewart of the Merse*, (DICT. p. 7299.).

Alteration on the powers of barons by act 20. *Geo. II.*

28. Thus stood the baron's judicial powers till the aforecited act 20. *Geo. II. C. 43.*, by which his civil jurisdiction is in effect reduced to the right of recovering from his vassals and tenants the feuduties and rents of his lands, and compelling them to perform the services to which they are bound, either to himself or his mill; for he can judge in no other civil action where the debt or damages exceed 40 s. Sterling, and no prorogation can extend his jurisdiction beyond that sum. He hath no longer the cognisance, as a criminal judge, of any trial upon penal statutes; for his criminal jurisdiction is expressly limited to assaults, batteries, and smaller offences, which may be punished, either by a fine not exceeding 20 s. Sterling, or by setting the delinquent in the stocks, in the day-time, not exceeding three hours. The fine is to be levied by pointing the delinquent's goods; and in default of these, by imprisonment for one month at farthest. The baron must enter into a book to be kept by the sheriff-clerk, the place which he has appropriated for a prison, and must not imprison any where else, under the penalty of L. 20 Sterling, with costs. The sheriff must inspect these prisons, and disallow them if they are not healthy, or have no grates so as to be open to inspection from without. Nor can the baron imprison any person without signing a written order to his officer, expressing the cause, extracts of which are to be sent every six months to the sheriff. These restrictions lie so heavy on the baron, that

that they amount nearly to a prohibition of this branch of his jurisdiction.

29. The former jurisdiction is however reserved to every proprietor of lands within which collieries or salt-works shall be carried on, over the workmen; and to proprietors entitled to fairs, for correcting disorders which may be committed during their continuance; with this restriction, That they shall exercise no jurisdiction inferring death or demembration. No charter to be granted, for the future, for erecting lands into a barony, is to convey any higher jurisdiction than for recovering the rents of lands, multures, and mill-services; which, in proper speech, makes no jurisdiction, but is a right which was always understood by our former law to be inherent in every landholder, though neither baron, nor infest *cum curiis*; and which he indeed enjoys at this day*. The obligation which was long imposed by the law of Scotland on barony-vassals to attend the baron's head courts, is now prohibited by 20. *Geo. II. C. 50. § 18.*

30. A borough of barony is a corporation, consisting of the inhabitants of a determinate tract of ground within the barony, erected by the King, and subjected to the government of magistrates. Sometimes the right of electing the magistrates is by the charter vested in the inhabitants themselves, and sometimes in the baron, their superior: But whatever jurisdiction belongs to the magistrates of the borough, the superior's jurisdiction is cumulative with it; for the territory granted to the body-corporate continues as truly a parcel of the barony, as if it were the property of a single vassal; differing only in this, that the jurisdiction is in the first case exercised by a community, and in the other by one person, *Dec. 7. 1734, E. Wigtoun, (Dict. p. 7299.)*. The same doctrine holds in boroughs of regality both as to the manner of incorporating them, and as to the superior's cumulative jurisdiction, *Jan. 14. 1668, Regal. of Kirmuir, (Dict. p. 7298.)*. By the jurisdiction act, all jurisdiction formerly competent to any borough of regality or barony, or to the magistrates of it, which is independent of the lord of regality or baron, is reserved entire; only their power of repledging from the sheriff or steward's court is taken away †¹⁰⁸.

31. The commissioners of supply are the persons appointed by parliament, in their yearly acts of supply, to levy the land-tax within the county to which they are named, according to the proportion settled by law¹⁰⁹. They ought to be possessed of L.100 Scots
VOL. I. 2 A yearly

* By stat. 35. *Geo. III. c. 122. June 26. 1795*, the Sovereign is authorised to erect free and independent burghs of barony on those parts of the sea-coast in which the fisheries are carried on, in the manner usually practised before the stat. 20. *Geo. II.* The magistrates in such burghs are to exercise the powers of justices, cumulatively with the justices of the county.

† And their jurisdiction thus reserved is declared to be cumulative only.

¹⁰⁸ The jurisdiction of burghs of regality or barony, dependent upon royal burghs, is, under § 26. of the jurisdiction act, held to be reserved in the same state as prior to the passing of that act; *Dowie, 30th May 1817, Fac. Coll.*

The bailie of a burgh of barony, which has right to hold markets, possesses all necessary jurisdiction for regulating the police of the market. Thus, it has been found, in the case of Dalkeith, that the bailie has power to appoint sworn searchers for ascertaining the purity of the tallow of cattle slaughtered within the burgh; *Armstrong, &c. 9th July 1800, Fac. Coll. Dict. v. Jurisdiction, App. NO. 8.* And farther, that the regulation thus established extends to tallow, even though sold to one who resides, and who is to receive delivery, without the bounds of the jurisdiction; *Plumber, &c. 6th March 1804, Fac. Coll. Dict. ibid. App. NO. 10.*

¹⁰⁹ The jurisdiction bestowed upon Commissioners of Supply for levying the land tax does not exclude the other ordinary jurisdictions; *Bruce, 28th Nov. 1810, Fac. Coll.*

TITLE IV.

Exception as to the proprietors of collieries and salt-works.

Boroughs of barony and regality.

Commissioners of supply, their powers.

Book I.

yearly valued rent, in property, superiority, or liferent; and every person acting without that qualification, though he should be named a commissioner, is subjected to the penalty of L. 20 Sterling, and his vote not to be reckoned. Where a proprietor sells part of his lands to another, the commissioners determine how that sum, with which the whole lands had been formerly charged in the cess-books of the county, is to be proportioned between the purchaser and the seller: But though they have their powers from the parliament by a special commission, their judgments in that matter fall under the review of the court of session, as the supreme civil court for the ascertaining of property, *Feb. 12. 1751, Sir J. Gordon, (Dict. p. 7345.)**

Lyon King of Arms.

Messengers at Arms.

32. In this list of inferior judges may be also placed the Lyon King of Arms. The name of *Lyon* hath been assumed by this officer, from the armorial bearing of the Scottish Kings, a lion rampant, which he carries upon his robes. The officers serving under him are heralds, pursuivants and messengers, who are all admitted by himself into their respective offices. The first mention made in our statutes of messengers or officers at arms, is in 1587, *C. 46.*, which appoints a fixed number to be named by the Lyon for each county †, who are to behave according to the injunctions said to have been inserted at the end of that statute; and though these injunctions have by inadvertency been left out, the duty of messengers is well known by posterior acts, and inveterate usage. They are subservient to the supreme courts of session and justiciary, and are employed in executing all summonses and letters of diligence, both in civil and criminal matters. At their admission they receive a silver blazon, on which the King's arms are engraved, as a badge of their office, and a wand or rod usually called the *wand of peace*; and it appears that, as early as 1426, *C. 99.*, the mairs or serjeants who attended on the sheriffs and other judges-ordinary, were not allowed to travel through the country without a horn and a wand.

Lyon's jurisdiction and ministerial powers.

33. The extent of the Lyon's jurisdiction is set forth in several statutes, 1587, *C. 46.*; 1592, *C. 127.*; 1672, *C. 21.*; by the two last of which he is authorised to visit the arms and ensigns-armorial of all the noblemen and gentlemen within the kingdom; to distinguish the arms of younger brothers with congruent differences; to give proper arms to virtuous and well-deserving persons; to matriculate them all in his register; and to fine those who use arms, which are not matriculated, in L. 100 Scots, besides escheating to the King the moveable goods or furniture on which the arms shall

* The qualifications and jurisdiction of commissioners of supply are very fully explained by Mr Wight, in his *Inquiry into the Rise and Progress of Parliament, &c.* 4to edit. 1784, p. 181. *et seq.* Supplement to ditto, 1796, p. 28. *et seq.*

† In the number of messengers fixed by statute for the county of Edinburgh, the Lyon, heralds, and pursuivants are not counted upon, *Rem. Decis. No. 55., Lindsay, Dict. p. 8889.* In Shetland, where there is but one messenger appointed by the Lyon, the court of session, upon an application, allowed diligence to be executed, for the greater dispatch, by the sheriff-officers; *Fac. Coll. June 19. 1764, Mitchel, Dict. p. 7355*¹¹⁰.

¹¹⁰ The authority thus granted to the sheriff-officers was not a general authority to be afterwards acted upon in other cases, but was confined to the particular case of Mitchel, in which it was obtained only upon a special application, and in consequence of very peculiar circumstances. See the Report.

The limitation of a certain fixed number of messengers for each county, is not now observed; *Bankt. B. 4. l. 6. § 15.*

shall be painted or engraved. He may by the said act 1592 deprive or suspend messengers, heralds or pursuivants, by the advice of the court of session; but that supreme court is also in use to deprive them by its own authority; *act of sederunt*, Nov. 4. 1738. In the case of misdemeanor, the Lyon can fine messengers to the extent of the sum for which they gave security upon their admission; and in virtue of the powers granted to him in letters patent under the great seal, and ratified in parliament, he claimed also the right of judging in the damage arising through the messenger's fault to the third party; which claim was sustained, *Dirl.* 30, (*Lyon*, *DICT.* p. 7648.); but soon after rejected, *June* 27. 1673, *Heriots*, (*DICT.* p. 7649.). Executions by a deprived messenger, though the deprivation should be published in the terms of 1587, *C.* 46., are sustained, if he is still held and reputed a messenger, *Nov.* 10. 1676, *Stewart*, (*DICT.* p. 3092.); *Fount.* July 11. 1699, *Learmont*, (*DICT.* p. 3096); but after his deprivation is intimated in the public newspapers, they are null, *Feb.* 18. 1732, *Hunter*, (*DICT.* p. 3097.). A great part of the Lyon's office is ministerial. He was anciently employed in carrying public messages to foreign states; and to this day it is his province to denounce war and proclaim peace, to publish proclamations made by the King and council, and to assist at all public ceremonies in his robes, with his heralds and pursuivants. Mention is made of macers who attend the court of session, as if they had been officers under the Lyon, 1587, *C.* 46. But it is certain that the nomination of the macers hath, for two centuries past, been either in the crown or in private families, in virtue of special grants by the crown. Macers are, by some lawyers, considered as persons having jurisdiction, because they frequently judge in the service of heirs; but this proceeds, not from any jurisdiction inherent in them as macers, but because, in the commissions to them issuing from the chancery upon a warrant from the court of session, they are specially appointed thereto, as judges in that part¹¹¹.

Macers.

34. The conservator's court at Campvere in Zealand may be also reckoned among the inferior jurisdictions. It appears by 1503, *C.* 81, 82.; 1579, *C.* 96, 97., that Scotland enjoyed several commercial privileges in the Netherlands, while that country was yet under the dominion of Spain. By our later temporary treaties with the town of Campvere, which have been continued from time to time ever since, sundry staple goods of the produce of Scotland are allowed to be brought into that port free from duty. In questions between merchant and merchant residing abroad, the only judge beyond seas, before whom action can be brought, is the Conservator of the Scottish privileges in the Netherlands, 1503, *C.* 81.; who is by that statute ordained to choose at least four merchants for his assessors. His court is constituted by the authority of a Scottish parliament; he is tied down to judge by the rules of the law of Scotland, 1597, *C.* 259.; and as there is no expression, either in the staple contracts, or in any of our statutes, excluding the jurisdiction of the court of session from any cognisance in matters belonging to that court, it has been adjudged, *Fac. Coll.* ii. 225. (*Hog*, *DICT.* p. 4780.), that a jurisdiction is founded in the session, as our supreme court, cumulative with the Conservator's court, in causes between such Scotsmen as are members of the factory at Campvere, *ratione originis*. It had been formerly decided, *Jan.* 1749,

Conservator at Campvere, his jurisdiction.

¹¹¹ These commissions to the macers are now prohibited; *vid. infr.* *B.* 3. *t.* 8. § 64.

Book I.

1749, *Couts*, (DICT. p. 7341,) that the sentences pronounced by the Conservator were not subject to the review of the court of session, though a complaint might possibly lie against them to the King and council, as was the case with regard to judicial proceedings in the American colonies; and this decision seems to receive some support from 1503, C. 82. But it would appear, that if our supreme court has truly a cumulative jurisdiction in the first instance, as to the causes cognisable by the Conservator, (which the supreme civil court of England has not, in respect of any actions pursued in the British colonies), it has also a power of reviewing the decrees pronounced in these causes by the Conservator.

Ancient times of sitting of the several courts.

35. It was long observed as a rule, that no court of justice could sit in time of parliament, because every subject was bound to answer any summons or call from the parliament: but ever since the Revolution, *anno* 1688, the court of session hath had its ordinary terms of sitting, whether the parliament sat or not; and hence, when the parliament intended that that court should not meet at the same time with themselves, they adjourned it by special acts, several of which passed in the reigns of K. William and Q. Anne. Inferior courts sat at no period of time during the vacation of the session, that so some interval might remain free from the hurry of all courts of justice, for seed-time and harvest. The benefit of this institution having been little felt, from the frequent dispensations granted by the session to inferior courts to sit in vacation time, it was resolved by act of sederunt, *July* 21. 1696, that no such dispensations should be granted for the future, beyond the 20th of August for the harvest-vacation, and the 20th of March for the spring vacation. But this act is to be understood only of *general* dispensations; for they continue to be granted for sitting after these periods, in special causes, where there may be inconveniency or danger in the delay, or where the action bears a resemblance to voluntary jurisdiction, as the service of tutors, &c.

Times of sitting at present.

36. Certain inferior courts may sit during the vacation of the court of session, without dispensation. *1st*, Sheriffs might always have sat after Easter and Michaelmas; because the head courts held upon these festivals were considered as the beginning of the sheriff's session, and the reason drawn from the necessity of country-affairs generally ceaseth after these terms, *July* 2. 1629, *L. Bamf*, (DICT. p. 7496.); *June* 30. 1675, *Wardlaw*, (DICT. p. 7497.). *2dly*, It was necessary for the police of the country, that riots and other breaches of the peace might be tried at any time: And hence justices of the peace, whose powers chiefly consist in preserving good order, may sit at all times in matters which concern the public peace; as sheriffs also do in criminal causes: But their sentences pronounced in civil questions in vacation-time are null, *Dalr.* 115, (*Fullerton*, DICT. p. 7500.). *3dly*, Barons may hold courts without dispensation for the payment of rent, on account of the danger attending the delay, *July* 8. 1624, *Richardson*, (DICT. p. 7496.); but not in questions between tenant and tenant. *4thly*, Borough-courts sit during the whole year without dispensation, not only in breaches of the peace, but in actions merely civil: This at least is the usage in several of our most considerable boroughs. *Lastly*, Commissaries may judge at all times in matters properly consistorial, because these require dispatch; but not in causes where the commissary has barely a cumulative jurisdiction with other courts, *Feb.* 6. 1624, *Gordon*, (DICT. p. 7573.). By the jurisdiction-act, 20° Geo. II., all sheriff and steward courts
over

over Scotland may sit in vacation-time, without dispensation, in all causes whatever; but as that statute does not extend to other inferior courts, the law in relation to these continues as formerly. On the late alteration of the kalendar, the court of session resolved, by act of sederunt, *Feb.* 16. 1753, to grant no dispensations for the sitting of inferior courts after the 2d of April and the 2d of September.

37. None of our judges, supreme or inferior, had for a long time any other appointments than what arose from the sentences they pronounced. The criminal judges applied to their own use the fines or issues of their several courts, *i. e.* all the sums levied from delinquents as penalties of transgression: And regalities had a right to the single escheat of all persons denounced rebels, who resided within their territory. In the same manner, the judges of the old court of session were, jointly with the clerk-register, entitled to 40s. Scots upon every decree, by 1457, *C.* 63., which, as appears by that act, was the only consideration then allowed to them. This sentence-money was, by 1587, *C.* 43., raised to the twentieth part of the sums awarded against the defender, where the decrees were for liquid sums, and to L. 5 Scots where they consisted *in fact*. Soon after the institution of the College of Justice, the small sum of L. 1412 Scots was allocated to the judges as an annual contribution or tax, payable by prelates out of their benefices, which is mentioned in 1543, *C.* 2., and has been now of a long time assigned by them to their private clerks. We learn from the books of sederunt, *April* 13. 1564, that they had a grant from *Q. Mary* of L. 1600 Scots yearly, out of the quots of testaments; but having, at the desire of James VI., given up this right in favour of the bishops, they obtained a grant of L. 10,000 Scots yearly, out of the customs, by 1609, *C.* 11.; and by a posterior act, 1633, *C.* 22., a taxation of 10 s. Scots for four years was imposed on every pound-land of old extent, and a proportional tax on the boroughs, the produce of which was to be properly secured for the judges of the session. After this last provision was made effectual, the parliament 1641, *C.* 55., prohibited the exacting of sentence-money by that court; and though the act 1641, which was enacted during the Usurpation, was not revived after the Restoration, it appears from 1661, *C.* 50., by which a new addition was made to the salaries of the judges, that their exacting of sentence-money had been before that time laid aside.

Appointments
of the judges
of the supreme
courts.

38. Sheriffs were also entitled to the twentieth part of the sums contained in every decree, in name of sheriff-fee; and as it was the sheriff's office to carry into execution all sentences which were to be executed within the shire, whether pronounced by himself or by the court of session, 1537, *C.* 58., he was entitled to his sheriff-fee for them all, 1491, *C.* 30. When this became a task too burdensome for the sheriff himself, a custom was introduced, of directing letters of diligence, which issued from the signet-office against a debtor's person or estate, not to the sheriff, but to a messenger, 1537, *C.* 58., who, because he was substituted in the sheriff's stead, and with his powers as to that particular matter, was styled in the letters *sheriff in that part*, and was under that character entitled to the sheriff-fee, 1503, *C.* 66*. By the jurisdiction-

Sheriff's fees.

* The statute directs the sheriff's fee "to be taken of the person or persons, that the summes or debts be recovered on." By judgment of the court, in the case of

act, no fines to be afterwards recovered are to belong to the sheriff or his deputy, but to the King; and all exaction of sentence-money by them is declared unlawful; in place of which, they have stated salaries from the crown: whereby the bias is removed, that the former practice of poundage or sentence-money might have given them, of rising too high in their fines against offenders, or in other sums contained in their decrees. Messengers, when employed in poidings, are to this day entitled to the sheriff-fee; which they usually assign to the creditor, upon getting a reasonable allowance for their pains or trouble.

TIT. V.

Of Ecclesiastical Persons.

General distinction of clergy and laity.

IN all states where provision is made for the worship of the Deity, the members may be divided into laymen and clergymen; the last of whom are persons consecrated to the service of God and religion. Some account has been already given of the power and authority of the civil magistrate, and of jurisdiction, as it is exercised in Scotland by laics, in causes merely secular. We are in this title to take a view of the offices peculiar to the clergy, in so far as they have any relation to our law, and of the several jurisdictions exercised in this kingdom, either by churchmen themselves in matters purely spiritual, or by laymen in ecclesiastical causes.

Ancient general districts of the church.

2. The Christian church was early divided into five general districts; Jerusalem, Alexandria, Antioch, Rome, and Constantinople; each of which had a church-governor, called a *patriarch*, who had Primates, Archbishops, and Bishops under him, in their several orders of subordination; though the general appellation of *Bishop* was frequently used to express the higher dignitaries of the church, even patriarchs themselves. All these patriarchs were at first of equal authority; and continued so till the beginning of the seventh century, when, by the concurrence of several favourable incidents, the patriarch of Rome was acknowledged, by almost all the western parts of Christendom, as the first and universal bishop of the church, by the name of *Papa*, or father; an appellation that had been formerly common to all bishops.

Secular clergy.

3. The clergy was divided into the secular and the regular. The secular were those who had the inhabitants of a particular tract of ground given them in charge, over whom they exercised the pastoral office, either in an higher degree, as Primates, Archbishops, and

Monro contra Ross, Nov. 4. 1738, Dict. p. 8889., recorded in the act of sederunt already quoted (*supra*, § 33. *h. t.*) it is declared, "that all messengers ought to be paid of their fees and expences, for executing letters of horning or caption, by the creditor employer, and not by any exactions from the debtor; and that any messenger's claiming, exacting, or taking from any person or persons, under diligence by horning or caption, any sum or sums of money, or security for the same, under colour of fees or expence for executing, or for delaying of execution of any such diligence, or expence of going or coming to or from any place or places, towards, or in order to the execution of such diligence, is unwarrantable, illegal, and oppressive, and opens a door to high and grievous exactions, from ignorant, distressed, and indigent persons." See, as to the application of this act, *Fac. Coll. Nov. 24. 1772, Monro, Dict. p. 8891*; also a case *A. v. B. Dec. 19. 1776, Dict. p. 8892*.

and Bishops, who had spiritual jurisdiction over the inferior clergy within their dioceses; or in a lower, as Presbyters, Deacons, &c. whose charge was confined to a particular parish or congregation. The church where the bishop had his seat or see was styled a *cathedral*. Gentlemen of estates frequently founded colleges or collegiate churches, the head of which was called *præpositus*, provost, under whom were certain canons or prebendaries, so called, because they had a stated portion, or *præbenda*, allotted to them, each of them according to his degree or stall in the church, where the music was performed, *St. B. 2. T. 8. § 15*. Others of lesser fortunes endowed chapels; which were built generally at some distance from the parochial church, for the benefit of the founder, and of those who lived in the remotest parts of the parish; and which were served by a chaplain, or *capellanus*. Altarages were small donatives, destined for the maintenance of a priest, who was to perform divine service for the soul of the founder, or some of his deceased kinsmen, at a particular altar, several of which were placed in every church, *Dir. Doubts, v. Altarages*. The clergymen who officiated in those colleges, chapels, and altarages, were of the secular kind; though none of them, except the chaplain, had any cure of souls.

4. The regular clergy had no *cura animarum*, nor the charge of any congregation, but were tied down to close residence in their monasteries, unless when they were sent out on missions. And they got the name of *regular*, because they were circumscribed by vow to certain rules of devotion and penance, according to the institution of their several orders: and the individuals of them were styled *monks*. Their governor had the name of *abbot*; and under him was a prior, who governed in the abbot's absence, or while the office was vacant. But many instances occur of priors independent of any abbot, who were the heads of separate religious houses called *priories*. Some few monasteries were founded in Scotland for the redemption of captives from the infidels, under the name of *hospitals* or *ministries*. *Prelate* is used chiefly in the Canon law as a word synonymous with *Bishop*, *Decretal. L. 3. Tit. 10. &c.*; but in our ancient statutes it denotes any dignified clergyman, whether secular as bishop, or regular as abbot, who had a seat in parliament in virtue of his office; see *title prefixed to acts of James V.*; 1540, *C. 125, &c.* Upon the vacancy of any benefice, secular or regular, stewards were frequently appointed to levy the fruits during the vacancy, who, because they were mere trustees, were called *commendators*. Bishops were in use to grant the inferior benefices within their dioceses, *in commendam* for six months. The Pope alone could name commendators for the higher; and he at last, from the fulness of his power, appointed them for life, and without any obligation to account; which was chiefly intended as a cloak for the plurality of benefices, and to evade the canon of the second council of Nice, by which one benefice only was allowed to be given to one and the same churchman. But all commendams were by our law prohibited, even during Popery, by 1466, *C. 3.*, except those that should be granted by bishops for a term not exceeding six months.

5. The Papal jurisdiction was first abolished in Scotland by an act in 1560; which, because it was enacted in a parliament not regularly authorised by the Sovereign, was ratified by 1567, *C. 2*. Though from that time the regular clergy was totally suppressed, yet several

Regular clergy.

Changes in the ecclesiastical constitution of Scotland.

abbacies

Book I.

abbacies and priories were, on the death or resignation of the Popish beneficiaries, given by the King *in perpetuum commendam* to laics; in virtue of which grants, the commendators not only enjoyed the benefices for life, but were entitled to a seat in parliament, as coming in the place of the former abbots and priors. As for the secular clergy, we had, by the first plan of church-government after the Reformation, only parochial presbyters, and over them certain church-officers, styled *superintendents*, who watched over the affairs of the church, each within his proper district. In 1572, the names of Archbishop and Bishop, which had been almost lost since the Reformation, were restored to those clergymen who were then, or should be, ordained ministers of the cathedral churches, with the right of sitting in parliament, and with the same spiritual jurisdiction over the inferior clergy which had been enjoyed by the superintendents. By 1592, C. 116. Presbyterian church-government was established, by kirk-sessions, presbyteries, provincial synods, and general assemblies. The vacant bishoprics were, by 1597, C. 231., ordained to be filled up by the King, with actual preachers or ministers, who were to have a vote in parliament; reserving the spiritual policy of the church to be settled as the King and general assembly should agree. Bishops were, by 1606, C. 2., restored to all the rights, spiritual and temporal, formerly belonging to them, which were consistent with the Reformation. Presbytery again took place, *anno* 1638; then Episcopacy for the second time, by 1662, C. 1.; and, lastly, Presbytery, by 1689, C. 3., and 1690, C. 5.¹¹¹.

The King supreme over the Church.

6. As the Pope had, during the Papacy, exercised a most absolute jurisdiction over churchmen, and in ecclesiastical causes, quite independent of the civil magistrate, which some of the Protestant clergy seemed willing to draw to themselves after the Reformation, the King was, by 1584, C. 129., declared to have royal authority over all estates; and to be, by himself and his council, judge competent to all persons spiritual and temporal, in all matters on which they might be charged. His supremacy over the church was, by 1669, C. 1., raised up to the right of directing its external government: But that act was repealed by 1690, C. 1. as inconsistent with Presbytery, which was then upon the point of being established. By 1584, C. 131. all assemblies, even in ecclesiastical matters, which had not the King's previous licence, were prohibited; and though the powers of the church seem to have been enlarged in that respect, by 1592, C. 116., the clergy have not attempted, even since the Revolution, to meet in a national assembly without the royal warrant: And when the King's commissioner thought it incumbent on him, in the discharge of his office, to dissolve the assembly before their business was over, they prudently submitted to the dissolution*.

Bishops, by whom elected in the early ages.

7. While our church-government was Episcopal, we had two archbishops, *viz.* of St Andrew's and Glasgow. The first had the precedence,

* In the year 1746 and 1760, when, by accident, the King's commission had not arrived at the time fixed for the meeting of the assembly, the assembly met, chose their moderator, and settled the order of taking up business, but did not actually proceed to business till the commission arrived.

¹¹¹ In a late case, the Court deemed it proper, by a special interlocutor, to "appoint the designation assumed by the pursuer, as 'one of the bishops, or senior clergy-man, of the superior order of the Episcopal Communion in Scotland,' to be erased from the summons, as not recognised by the Court;" *Drummond, 6th July 1809, Fac. Coll.*



cedency, with the title of *Primate of all Scotland*; the other was called the *Primate of Scotland*. It cannot be affirmed with certainty in whom the right of electing archbishops and bishops was vested for some ages after Constantine the Great. Several Papal rescripts, from the year 450 to 850, make the clergy and the people joint electors, *Dist. 61. C. 13.*; *Dist. 63. C. 11, 13, &c.*; and this is conformable to the 4th council of Toledo, held *anno 638, Dist. 51. C. 5. § 1.*, and to an imperial constitution made about the year 800, *Capit. Kar. et Lud. L. 1. C. 84.* Others place the election in the clergy, upon the proposition or demand of the people, *Dist. 62. C. 1., &c.* The emperor Justinian, *anno 528*, directed that three clergymen should be proposed by the inhabitants of the episcopal city; of whom one might be named bishop, (probably by the clergy of the diocese), *L. 42. pr. C. De episc. et cler.* At last, it was decreed by that Lateran council which was held in 1215, that the right of election should be in the chapter of the vacant cathedral church, *Decretal. Lib. 1. Tit. 6. C. 42.*

8. James V. willing to have the episcopal sees filled with churchmen in whom he could confide, did, after the example of Francis I. of France, his father-in-law, who had obtained that right by a concordat with Pope Leo X., assume to himself the sole nomination of bishops; see 1540, *C. 125.* He indeed continued to send to the chapter a *congé d'élire*, or a power to elect, under the colour of preserving their former right; but, at the same time, he recommended to them a particular churchman, whom it behoved them to choose. He who was thus recommended got the name of *Bishop-elect*, after he was chosen; and the King's patent under the great seal, confirming the election of the chapter, established in him a right to the spirituality of the benefice. The King afterwards granted a mandate for his consecration, at which the presence of at least three bishops is required, both by the first council of Nice, *Can. 3.*, and by *Dist. 66. C. 2.*; to which church-canon our statute 1617, *C. 1.* seems to refer. Upon this consecration, the King was, by the last-quoted act, to make a second grant of the temporality of the benefice; but as the first was understood to comprehend the whole of the benefice, the second fell soon into disuse. The bishop afterwards did homage, and swore obedience to the King, and till then he could not intermeddle with the fruits: But after his right was completed, he was entitled to the fruits downward from the date of his election. Every bishop had his council; which was called *chapter*, or *capitulum*, because it was deemed the inferior head of the diocese. It consisted of an archdeacon, dean, and several canons or prebendaries, who were generally ministers within the diocese; and, by their advice, the bishop not only exercised his spiritual jurisdiction, but managed the temporal affairs in which he had a concern within the diocese.

9. A clergyman who has the charge of a parish-church committed to him, is styled in the canon law a *presbyter* or *rector*; and frequently, in ours, a *parson*, from *personatus*, a general term made use of by the canonists for an ecclesiastical office, 6° *Decretal. L. 3, Tit. 4. C. 6, &c.* After he was admitted to the church canonically, or according to the prescribed rule, he had a right to the benefice *proprio jure*. It hath been much contested, whether in the earlier ages of Christianity, the people had the election of their own pastors or presbyters, as they seem originally to have had of their deacons, *Acts vi. 1. et seqq.* Gratian affirms, from the authority of a council



Scottish Bishops chosen by the Sovereign.

Origin of the right of patronage.

held at Orleans, *anno* 511, that then, and by former church-canon, all inferior churches within the bishop's diocese were under the bishop's power, *Caus.* 16. Q. 7. C. 10. But soon after, that right was, for the encouragement of pious donations, transferred to the founder, who is by Justinian called the *patron*, or *advocatus ecclesie*, *Nov.* 123. C. 18.; and it has been acknowledged in this kingdom by our most ancient customs, *Reg. Maj.* L. 3. C. 33.

10. All are deemed founders, who have either built a church, or endowed it with yearly revenues, *Dict. Nov.*; *Caus.* 16. Q. 7. C. 31. Garsias and some other canonists affirm, that the proprietor of the ground on which the church is built has also the right of a founder, as soon as the church is actually built on it. As these foundations were entirely voluntary, patrons used for some time great liberties, both with those whom they placed in the church, and with its revenues. They frequently compounded with the incumbent for the half, or some other proportion, of the oblations of the Christians who attended divine service there; a practice heavily complained of, and forbidden by the third council of Brancara, *anno* 570. And in truth patrons considered themselves in those days to have as strong an interest in church-benefices, as superiors had in temporal. Hence upon the emerging of a vacancy, they not only named the person who was to supply it, but they *collated* him, by giving him investiture or possession of the church, in these or the like words, *Trado tibi ecclesiam; Accipe ecclesiam.* And though collation was soon declared to belong solely to churchmen as a spiritual right, which laics were forbidden to exercise under the pain of excommunication, *Decretal.* L. 3. T. 38. C. 4. et 10, yet patrons were universally acknowledged to have the right of presenting to the bishop a proper person for supplying the vacant church, whom it behoved the bishop to collate. The powers assumed by patrons in the appropriation of benefices, are to be explained *infr.* B. 2. Tit. 10. § 11. The Pope, while his authority continued, was the presumed patron of all churches, the right of which was not claimed by another; and since the Reformation, the King is the universal patron, where no right of patronage appears in a subject, *St. B.* 2. Tit. 8. § 35. All patronages appendant upon lordships and baronies which belonged to the church before the Reformation, were by 1587, C. 29. annexed to the crown¹¹³. Those which belonged to archbishops, bishops, or their chapters, were restored to them by 1606, C. 2.; 1617, C. 2. But since the suppression of Episcopacy, the King, as coming in their place, is now the patron of all churches which belonged formerly, either to the bishops, or their chapters.

Patronage abolished, and afterwards restored.

11. Patrons continued to have this right of presenting, from the Reformation down to 1649, by the 39th act of which year it was abolished; and after they were restored to it by the act rescissory of

¹¹³ The act makes no mention of patronages among the subjects annexed. But, lordships and baronies being *nomina universitatis*, any "appendant" patronages,—any patronages, that is to say, incorporated therein,—would, though not expressed, be carried by an annexation of the lordships and baronies themselves, under the general description; *St. B.* 2. t. 8. § 35. *vers. Ecclesiastical benefices.* Other patronages, not so incorporated, have been found not to fall within the act; *Kames, Sel. Dec. Donaldson, 8th Jan. 1755, Dict. p. 9926; Murdoch, 22d Feb. 1783, Fac. Coll. Dict. p. 9942.*

of Charles II., 1661, C. 9., it was again taken away by 1690, C. 23., and the election of parochial ministers vested in the heritors and elders of the parish. The heritors were by that act ordained to give to the patron, as a compensation for his loss, 600 merks Scots : in consideration of which, the patron was obliged to renounce and convey the right of presentation in favour of them and the kirk-session, and of the magistrates of the borough, where the church was within a royal borough. Patrons were again restored to this right by 10^o Ann. C. 12., with the exception of the few presentations which had been sold in consequence of the act 1690. Many instances occur where two or more are joint patrons to the same church ; *ex. gr.* where different persons have contributed to the foundation, or where the right of patronage descends to co-heiresses, or where two churches, which had formerly belonged to different patrons, are united into one. In the last case, the two patrons are, by special statute, directed to present to the united benefice *alternis vicibus*, or by turns, 1617, C. 3. § 3. ; and it is probable that the same rule would, from analogy, be observed in the other two *. No patron can present to the expectancy of a benefice ; for that right arises only upon the death, translation, deprivation, or resignation, of the former incumbent, *Decretal. L. 3. T. 8. C. 16. †* ¹¹⁴.

12. Though the collegiate churches, chaplainries, and altarages before described, were suppressed on the Reformation ; the parliament, who had no intention to encroach on the right of laic patrons, instead of annexing their benefices to the crown, applied the revenues to the education of bursars at the universities, who were to be bred to the church, and the presenting of whom was continued with the former patrons or their heirs, 1567, C. 12. As the provost or other churchmen, provided to those benefices before the Reformation, had been the proper beneficiaries or titulars, and consequently the superiors of the lands which were holden of them ; so the bursars, who were by that act vested in their right, became the superiors, by whom alone, according to the feudal rules, their vassals could be entered : But as it was not so easy to discover the residence of bursars, who were perhaps dispersed over all the universities of the kingdom, as it had been formerly to find out the church-beneficiaries, whose residence was fixed, the entry of the vassals to their lands is, by 1661, C. 54., declared to belong to the laic patrons, whose right from the crown is better known, and may, in most cases, be found out by the records. Mackenzie, *Obs. on last-quoted act*, doubts, whether the patrons are thereby made the proper superiors of the lands holden of those benefices, because it is only said, that they shall come in the place of the titulars, as superiors ; that is, that

Patrons of collegiate churches, altarages, and chaplainries.

* When that patron, whose turn it is to present on a particular vacancy, does not choose to exercise his right, the other patron is entitled to present, *Fac. Coll. Feb. 7. 1788, Grant, Dict. p. 9945.*

† Patrons can effectually present by commissioners, *Fac. Coll. Jan. 22. 1778, Tait ; affirmed on appeal, Dict. p. 9938.*

¹¹⁴ Where the present incumbent, through bad health, advanced age, or incapacity arising from any other cause, has become unable to discharge his clerical duties, it is quite a common and recognised practice for the patron, with his consent, to present an assistant and successor. This practice seems indirectly to have received the sanction of the legislature, in a late act of parliament ; which, while it restrains the crown, generally, from granting the *reversion* of offices, provides, "that nothing in this act shall be construed to extend" "to prohibit the appointment of *assistants* and *successors* to the parochial clergy of Scotland ;" 48. *Geo. III. c. 50. § 4.* See also, 2. *Connell, (Tithes), p. 190 : ditto (Parishes), p. 514. et seq.*

Patron's right
to undisposed
tithes, vacant
stipends, &c.

that they shall supply their room in entering the vassals : But it is absurd to suppose, that a law was to grant to any person a perpetual right of infefting vassals, without conferring on him all the other rights attending upon superiority ; see *Falc. Feb. 26. 1745, Sir Patrick Dunbar*, (DICT. p. 8844.).

13. Beside the right of presenting, patrons are entitled to all the tithes in the parish not heritably disposed, *vid. infr. B. 2. T. 10. § 49.*, and to a seat and burial-place in the church¹¹⁵ ; and they have also the power of receiving and disposing of the fruits of the benefice during a vacancy. This last right appears, by our statutes passed soon after the Reformation, to be not a bare right of administration, but of property ; so that the patron could have held and disposed of them as his own, 1584, C. 137. ; 1592, C. 115. ; 1593, C. 172. ; 1612, C. 1. But by 1644, C. 20., the patron was obliged to apply them, with the advice of the presbytery, to pious uses within the bounds of the parish, or at least of that presbytery. And though patrons were by the act rescissory 1661, C. 15., restored to their former rights, it appears by 1661, C. 52. ; 1672, C. 20, &c. to have been the sense of the legislature in the reign of Charles II., that the right of patrons to the vacant stipends was merely a trust ; so that they still continued under the restraint imposed on them by the act 1644, of applying them to pious uses within the presbytery. Patrons were farther limited in the exercise of this right by 1685, C. 18., which precisely obliged them to apply their vacant stipend, not any where within the presbytery, but within the parish, yearly as it fell due, under the penalty of losing their right of presenting an incumbent for the next turn. But as there was no longer room for this penalty, after the right of presentation was taken from patrons by the act 1690, C. 23., it is declared by that act, that the patron who neglects to apply the vacant stipend according to law, shall forfeit the right of disposing of it for that and the next vacancy. Lord Bankton's opinion, *B. 2. T. 8. § 77.*, appears to be well founded, That now, since the right of presenting is restored to patrons by the act 10. *Ann.*, the first penalty of losing the next presentation, which was imposed by the act 1685, is to be applied against patrons who neglect to dispose of the vacant stipend for pious uses ; both because the right of presentation, which was restored to patrons by that British statute, must be understood to be burdened with all the qualities which formerly affected it, and because the said statute, which restores also, in express words, the administration of the vacant stipend to patrons, virtually repeals the act 1690, in so far as it transferred that right from the patrons to the presbytery. The patron, though he must, by the act 1685, apply the vacant stipend at the sight of the heritors, is not bound to follow their advice in the appropriation ; for the only interest of the heritors is, to take care that the stipend be applied to some pious use within the parish. The act 1663, C. 21. has declared the reparation of the manse during a vacancy to be a pious use preferable

¹¹⁵ Where the patron was also titular of the teinds, and an heritor in the parish, the Court found him entitled to " the first choice of a seat ;" *Lord Torphichen, 13th February 1765, Fac. Coll. DICT. p. 9936.*—A late writer adds, " it is probable the claim of the patron would be sustained, where he is not an heritor ;" *Connell, (Parishes,)* p. 546. As to a burial-place, it would seem a patron is not now entitled to have one in the church, but only in the church-yard, unless where his claim to the former is sanctioned by long usage. See *Act of General Assembly, 9th August 1643,* against burial in churches.

preferable to all others ; but the patron's right of application is not by statute limited to any other particular use. Though, therefore, the building of a manse be undoubtedly a pious use, he is under no necessity of relieving the heritors of that expence, by appropriating the vacant stipend to defray the charges of the building, but may apply it to any other pious use he thinks fit ¹¹⁶.

14. The sovereign is expressly exempted by the said act, 1685, from that precise application of the vacant stipends of the churches of his patronage to which the patrons of other churches are limited ; so that the King's right in the disposal of these continues, notwithstanding that act, to be what it had been formerly ; that is, he may appropriate them to any pious use within the kingdom : For though none of our Kings since the Reformation have considered their right to the vacant stipends of the crown's churches otherwise than as a trust, yet they were not confined in the disposal of them to pious uses within any particular parish or presbytery ¹¹⁷. And this usage is not obscurely hinted at in the foresaid act 10. *Ann.*, by which the patronages of the churches formerly belonging to prelates are declared in general terms to belong to the king, who may dispose of the vacant stipend to pious uses, as in the case of other patronages belonging to the crown. It has been doubted, whether the King is entitled to the same privilege, as to the patronages to which he has acquired right since the act 1685, by purchase or forfeiture ; 1st, From the words of the statute, *whereof the King is patron*, which, by the rules of grammar, exclude those of which he *shall be* patron ; 2^{dly}, From the rule of law, that the Sovereign, when he acquires any right from a subject, can be in no better case than his author, and so is liable to the same burdens to which the original patrons were subjected ; yet it was adjudged, *Fac. Coll.* i. 106. (*Dict.* p. 9958.), that the exemption, being a personal privilege competent to the King, ought to be extended to patronages acquired since the act 1685, as well as to those which were vested in the crown at that time. It is not a fixed point, whether patrons are entitled to apply the fruits of the glebe during a vacancy to pious uses. It would seem that they are not ; for the glebe is not a proper part of the stipend, but an allowance given by special statute to the minister over and above his stipend ; as was adjudged, *July 6. 1665, Colwill*, (*Dict.* p. 464.) ; and therefore the heritors, on whom the burden of the glebe falls, appear to have an equitable right, in the character of donors, to dispose of the produce of it to any pious use within the parish ¹¹⁸.

15. It is affirmed by some canonists, and by Hope, *Min. Pr.* p. 14., that the founder of a church does not become patron of it, unless he had in the deed of foundation reserved the right to himself ; for that patronage, being a servitude upon churches, is not to be presumed without an express constitution. But it is a more probable opinion, that such founder is patron, unless he shall have formally renounced the patronage in favour of the church ; *first*,
VOL. I. 2 D Because

King's privileges as patron.

Foundation of a church gives a right of patronage. Whether patronage is a feudal right.

¹¹⁶ By *stat. 54. Geo. III. c. 169.*, (*Local and Personal Acts*) "vacant stipend, in so far as it has heretofore been applicable by the patron to pious purposes," is now appropriated in aid of the fund established for the widows of clergymen.

¹¹⁷ The *stat. 54. Geo. III.*, appropriates the vacant stipends of churches under the patronage of the Crown, in the same way with every other vacant stipend. See the preceding note.

¹¹⁸ This opinion has been adopted by *Sir John Connell*, (*Parishes*), p. 436.

Book I.

Because both the imperial constitutions and church-canons already quoted expressly ascribe this right to the founder, without making his reservation a condition of it; *2dly*, Founders would have been entitled to the patronage, where they had expressly reserved it to themselves, without the aid of any canon or constitution; *3dly*, If all churches were exempted from patronage, where that right had not been reserved in the foundation, every church where no deed of foundation is extant to prove the reservation must be free from patronage, contrary to the known rule, that the King is presumed to be the patron of all such churches. In the special case, of a parish which is judged too extensive for the cure of one minister, if a fund shall be raised by voluntary contribution, or from the revenues of a borough, for the maintenance of a second, not the contributors, but the patron of the mother-church within which the other is erected, is deemed also the patron of that other church: unless either, *first*, Where the contributors reserve, in the deed of foundation, the patronage to themselves; or, *2dly*, Where they have been in the exercise of any of the rights of patronage without challenge from the patron of the first church, *Pr. Falc. 42*, (*Town of Dundee, Dict. p. 9904*). The right of patronage cannot, in Craig's opinion, be transferred without also transferring some part at least of the lands to which it was united, in the original right, *Lib. 2. Dreg. 8. § 87.*; but it is very possible, that a patronage may be granted or conveyed, without any lands or baronies to which it must be annexed. For it is originally not a feudal right, but a personal privilege, which may subsist of itself, as a *jus incorporate*, and consequently may be carried by a disposition without seisin, *St. B. 2. T. 8. § 35*; but though this may hold in patronages which have never been conjoined to lands, yet where they are once united to, and transmitted along with lands by investment, the acquirer of the right cannot divest himself of it, otherwise than by investing the disponent, *Fac. Coll. i. 84.* (*Urquhart, Dict. p. 9919.*)¹¹⁹.

What if the presbytery shall refuse to admit the presentee?

16. Rules have been established, both by the Canon law and our statutes, for the more speedy filling of vacant churches, where either the patron, or those appointed by law to admit the presentee, appear backward. If the bishop refused to collate a presentee who laboured under no legal incapacity, he was obliged, by the Canon law, to provide him in some other competent benefice, *Decretal. L. 3. T. 38. C. 29*. By the acts passed in Scotland immediately after the Reformation, if the superintendant refused to admit the presentee, the patron might appeal to the provincial synod, and from thence to the general assembly, whose sentence was to be final, 1567, *C. 7*. After the establishment of Episcopacy, the patron was directed, in case of the bishop's refusal, to complain to the archbishop; and if he also refused, the privy council might grant warrant for letters of horning against the ordinary, *i. e.* the bishop of the diocese, charging him to perform his duty; and if he still continued obstinate, the patron was allowed to retain the vacant stipend, 1612, *C. 1*. Presentations must now be tendered to the presbytery, as coming in place of the bishop: And though no letters of horning have been directed against presbyteries since the statute of Queen Anne, restoring to patrons their right of presenting; either because that part of the former law was not expressly

¹¹⁹ *Vid. infr. B. 2. t. 6. § 19.*

pressly revived by the statute, or because such a form of diligence against a spiritual court might be thought inconsistent with Presbyterian church-government; yet the right of presentation is by that act restored to patrons, and of course all the consequential rights, and among others that of retaining the vacant stipend. Hence the admission of one into a church by the presbytery, in opposition to the presentee, though it may confer on the person admitted a pastoral or spiritual relation to that church, cannot hurt the civil right of the patron, who therefore may retain the stipend as if the church had continued vacant, *Falc.* ii. 213., (*Cochran*, *DICT.* p. 9951.); and this doctrine was confirmed by a judgment of the House of Lords, *April* 1753, on an appeal in the case of Dr Dick, then minister of Lanark, (*DICT.* p. 9954)*. The patron's right of retention, however, must not be understood in the sense of the old acts, as if he had the absolute property: He can only retain as a trustee, on the footing of the present law¹²⁰.

17. A laic patron, who neglected to present a fit person to the bishop within four months after the vacancy might have come to his knowledge, forfeited, by the Canon law, his right of presenting for that turn, *Decretal. L. 3. T. 38. C. 27.*; which was transferred *jure devolutionis* to the bishop in the first place, then to the archbishop, and so upward till it came to the Pope; and this limitation of four months obtained also by our ancient law, *Reg. Maj. L. 1. C. 2. § 3.* A church-patron might have presented by the Canon law within six months. By the later law of Scotland, six months have been indulged to lay patrons for presenting; which term is computed, as in the Canon law, not from the vacancy, but from the patron's probable knowledge of it, if it happened through the incumbent's death, 1567, *C. 7.*; and if through his deprivation, from the time of shewing the extracted sentence of deprivation to the patron, 1592, *C. 117.* In default of the patron's presenting within that time, the nomination devolved on the church, 1567, *C. 7.*; that is, on the Presbytery, under Presbyterian church-government, 1592, *C. 117.*, and on the bishop during Episcopacy, 1612, *C. 1.* Though the act 10. *Ann. C. 12. § 3.* restoring the right of presentation, mentions the six months, as if they were to be computed from the vacancy itself, it were hard to construe that general expression into a repeal of the rules formerly established for computing that time; as the legislature's declared intention was, not to alter, but to restore to us our ancient law^{†121}. The presentation by a patron of one who has not taken the oaths to the government, or who is minister to another church, or who shall not accept the presentation, is not accounted an interruption of the six months, 5 *Geo. I. C. 29. § 8.*; but if the presentee be qualified in the terms of that statute, the currency of the six months is suspended by the presentation,

Jus devolutum
upon the pa-
tron's neglect
to present.

* See *Fac. Coll. Feb. 18. 1762, Lady Dowager Forbes*, *DICT.* p. 9931.

† See *Bankt. B. 2. T. 8. § 59.* This point well illustrated, *Fac. Coll. May 15. 1795, Lord Dundas*, *DICT.* p. 9972.

¹²⁰ *Vid. supr. Notes 116. and 117.*

¹²¹ There seems now to be little doubt, that the six months must be computed "from the vacancy itself;" *Connell (Parishes)* p. 496 *et seq.*; *Presbytery of Strathbogie*, 2d *Aug. 1776*, *DICT.* p. 9972, and *v. PATRONAGE*, *App. NO. 2.*; *Lord Dundas, supr. not. †.* But, in this last case, the patron, having "executed the presentation a full month before the time limited," was held not to have lost his right, though, from "unforeseen accidents, in no way imputable to him," it did not reach the presbytery till after the period was expired.

Book I.

Ceremony of receiving the minister to his church.

Collation by the bishop formerly a necessary ceremony.

presentation, during the whole time that the church courts are employed in deliberating whether to receive him or not; and if they should at last reject him for heterodoxy, or whatever other cause, the patron has as much time left him to present after their sentence, as was to run of the six months when the presentation was offered to the Presbytery * 122.

18. In the ceremony of receiving a parochial minister to his church, during episcopacy, three different acts must have been performed: *First*, Presentation, by which the patron, in a writing directed and delivered by him to the bishop of the diocese, named a person capable of being admitted into the vacant church, and required the bishop to collate him to it. *2dly*, Collation, called also *institution* by the canonists, which was a writing signed by the bishop, whereby he approved of the person presented as properly qualified, and conferred on him the vacant benefice, requiring a certain number of the inferior clergy to induce him to the church. *3dly*, Induction, which was an act of the parochial ministers or presbyters thus deputed by the bishop, carrying the presentee to the church, and giving him possession, by placing him in the pulpit, and delivering to him the bible, and the keys of the church. Upon this the minister took instruments in the hands of a public notary; and it gave him the same real right to his benefice, that seisin does to lands.

19. Collation by the bishop was necessary in all benefices which had a *cura animarum* annexed to them, and in those only. It behoved therefore all parochial ministers to be collated; not only proper beneficiaries, who were entitled to the tithes themselves, or had allocations of certain parts of them, but those who were merely stipendiary, *i. e.* who, because their benefices had been appropriated to cathedrals or monasteries, had only a stipend modified to them, either out of the tithes or some other fund: For both the one and the other had the souls of their congregations in charge. But prebends, and other benefices which had no such charge, might be fully vested in the presentee, by the bare nomination of the patron, without any interposition of the bishop, unless perhaps to confer orders on the person named, if he had been a layman. In churches within the bishop's diocese, where he himself was patron, there was no room for presenting; for presentations were to be offered by the patron to the bishop, and the bishop could not with propriety present to himself. In these, therefore, he collated *pleno jure*, that is, without presentation, whether they were mensal churches, *vid. infr. B. 2. T. 10. § 11.*, and as such parcel of the bishop's benefice, or separate churches, of which he was barely patron, *July 4. 1627, Mackenzie, (Dict. p. 14785.)*. If he was patron of a church that lay in another diocese, it behoved him to present in common form to the bishop of that diocese. Common churches or those which were appropriated to chapters, passed also, before the reformation, by
simple

* Same found as to a presentee who had at first accepted, and afterwards, but before his being settled, renounced the presentation; *Fac. Coll. March 2. 1762, Procurator for the Church, Dict. p. 9961.*

¹²² *Vid. Connell (Parishes,)* p. 502. *et seq.* But *quere*, whether, in the particular case of a qualified person accepting and afterwards renouncing, the decision noticed in *note* * does not extend the effect of the interruption beyond what is laid down in the text; the Court, by that decision, having determined against the *jus devolutum*, notwithstanding the full period of six months, even after deducting the time consumed before the Presbytery under the first presentation, had more than expired?

collation, without a formal presentation, *St. B. 2. T. 8. § 35.*: But as the King, or his donatary, became patrons of these upon the suppression of chapters, they were ordained to be conferred, like other parsonages or vicarages, on the patron's presentation, 1594, *C. 196.* It is the less necessary to enlarge on this head, that all parochial churches are now patronate, *i. e.* subject to the right of presenting, which was originally inherent in patronage; without excepting even those, the presentations of which were sold in pursuance of the act 1690: For the heritors and kirk-sessions, in whose favour they were renounced, became truly the patrons of those churches, as to the right of presenting to the presbytery.

20. Since the Revolution, the form of admission into vacant churches is more simple; for instead of collation and induction, the presbytery, by an act, proceeding either upon the presentation addressed to them by the patron, or on their own *jus devolutum*, or on a call or invitation given by the heritors and elders of the parish, admit the person presented, or called, as minister of the parish; or, as it is expressed in our statutes, 1592, *C. 116, &c.* they collate him to the benefice, after having ordained him a presbyter, if he was not before in orders. And this judicial act of admission gives to the person admitted a legal title to the benefice*.

21. As the several expedients attempted, after the Reformation, to provide the Reformed clergy in reasonable stipends, to be explained below, *B. 2. T. 10.*, fell short of the end proposed by them, a commission of parliament was appointed in the reign of James VI. by 1617, *C. 3.*, to plant churches, and modify stipends to ministers out of the tithes of every parish within the kingdom; and to unite small churches, where the tithes were not sufficient for the maintenance of two ministers. To this commission a power was soon superadded, by 1621, *C. 5.*, of dividing large parishes, and erecting new churches. By 1633, *C. 19.*, a second commission was granted, with authority not only to modify stipends, but to value and sell tithes; which was therefore styled, *The commission for the plantation of kirks and valuation of teinds.* Several new commissions were afterwards appointed, with more ample powers of uniting and disjoining parishes, of transporting churches already built to more convenient places, and of annexing and dismembering churches, as the commission should think proper, 1661, *C. 61, &c.* The last of this kind was authorised by 1693, *C. 23.*: But the power of that and all the former commissions were, by 1707, *C. 9.*, transferred to the court of session, with this proviso, that it should not be lawful for them to transport churches, disjoin parishes, or build or erect new churches, without the consent of three-fourths of the heritors, reckoning the votes, not by the number of heritors, but by their valued rent within the parish. Though the commission-court is thus restrained from erecting new churches without the consent of three-fourths of the heritors, it hath been adjudged, that that clause is to be understood only of building a new church in the old parish, or transporting a church from one part of the parish to another; but that they have authority to annex or unite two parishes into one

Form of admission at present.

Commission of teinds, its powers.

VOL. I.

2 E

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* A variety of intermediate forms have been introduced between the presenting of the minister by the patron and his collation: *First*, It is customary, that there shall be a concurrence, signed by the principal heritors, approving of the patron's choice, and recommending the presentee to the presbytery; *2dly*, There is a moderation of a call, or an instrument, signed by some of the heritors and elders, requesting the presbytery to proceed to the ordination of the presentee; and then a day is appointed for the ordination.

without such consent; in which case, they may judge what spot of the united parish is the most commodious to build the church upon, *July 18. 1750, Parish of Kirknewton*¹²³. The reason why the consent of the heritors is necessary to the disjunction of a parish is, because they are, by the disjunction, to be loaded with a certain expence in building the church, and perhaps in providing a stipend and glebe for an additional minister; whereas they can have little or no interest to oppose the union of two parishes into one, by which union one incumbent is to supply the place of the two former.

Its office rather ministerial than judicial.

22. By the aforesaid act 1707, the court of session, in the character of commissioners of tithes, in order to make up for the loss of the records of the commission-court, which had been burnt by an accidental fire in the Parliament-close, *anno 1700*, are empowered to receive such extracts as had been taken from the record before that period, which, after being booked in the new register, are to have the same authority as the principal writings; and where no extract of the deed or decree had been taken out, the court is authorised to make up the tenor of the lost writing upon proper evidence. As all the above-mentioned powers are conferred on the session by special statute, they are considered, when sitting in the commission-court, not as judges of the session, but as a commission of parliament; and therefore they have, in that character, distinct clerks, macers, and other officers of court*. All summonses of citation before this court and all diligences issuing from it, pass under the signet of the session; nevertheless, it is the Lord Register, or his deputies, and not the clerks of the signet, who must subscribe them, 1707, C. 9. Though it be this court alone who can grant augmentations of stipend (at least out of the tithes), or pronounce decrees of modification or locality, or of the sale or valuation of tithes, it is the court of session, *qua* such, who must judge in all questions that may afterwards be moved, on the legal effect and import of such decrees¹²⁴.

The commission regulates such stipends only as arise from teinds.

23. The only fund for modifying or augmenting stipends, which is put under the power of this court by the several statutes establishing it, is the tithes of the parish where the minister, who insists for the modification, serves the cure, unless there shall be a previous agreement to provide for the minister, out of a separate fund, by the parties who have interest in that fund. And hence, though the ministers of a borough should bring an action of augmentation before the commissioners, and in support of it offer to prove that there are separate funds, arising either from royal grants, or private donations, under the management of the magistrates, out of which an augmentation ought to be decreed to them, the court hath no jurisdiction in such action, *Dec. 12. 1764, Ministers of Edinburgh*¹²⁵: The reason has been formerly assigned, *supr. B. 1. T. 2.*

* Their proceedings in that capacity are subject to the review of the house of Lords, as in other cases. See judgment of that House, *Kirkden; July 8. 1784, Fac. Coll. Dict. p. 7479, p. 14816, and App. v. STIPEND, Notes to NO. 6.*

¹²³ The particulars of this case are very fully given; *Connell, (Parishes,)* p. 161. *et seq.*

¹²⁴ The powers of the Commission of Teinds, in augmenting and modifying stipends, have lately been regulated by *stat. 48. Geo. III. c. 136.*

¹²⁵ The final result of this case, as it is here stated, does not appear to be reported. Its earlier stages, which have not been equally neglected, are thus more apt to mislead than otherwise. See *Fac. Coll. 19th Jan. 1763, Dict. p. 7476; ibid. 20th July 1763, Dict. p. 3969.*

T. 2. § 7. If therefore the presbytery have erected a new church, either where there are no tithes, as in boroughs, or where the tithes have been already exhausted, the commission-court cannot decree a stipend, however expedient or even necessary the erection may have been. In such case, a stipend cannot be established otherwise than by a voluntary deed of the borough, or by royal or parliamentary grant, or by private contributions or donations. Nay, though a second church should be erected in an old parish, without the authority of the commission-court, by the voluntary donations or subscriptions of the inhabitants, even where the tithes of the parish are not exhausted, the court cannot grant to such minister an augmentation out of the tithes of the parish, which remained free after what was appropriated for the maintenance of the first minister. The terms of the voluntary agreement among the donors must be the only rule for the rate of such stipend; which is not to be augmented at the expence of heritors, who perhaps never consented to the original erection, and cannot therefore be bound by the deed of third parties. The minister of a new-erected church is entitled to a judicial augmentation, only where the erection hath been made, or at least ratified, by the commission-court, all the heritors having been made parties.

24. The jurisdiction vested in churchmen is either spiritual or civil. By the present establishment, our general assemblies, or convocations of the clergy, may define or explain articles of faith, condemn heretical opinions, and make canons for the better establishment of the government and discipline of the church, provided their resolutions be consistent with the laws of the realm, from which our national church derives its whole authority. It is the business of presbyteries to inflict church-censures on offenders, plant ministers in vacant churches, and ordain them, translate them from one church to another, suspend them from the exercise of their office, and deprive them of the office itself. But an appeal lies from all sentences of presbyteries, first, to the provincial synod, and from them to the general assembly. Churchmen, during the height of the Papal authority, extorted from the German Emperors an absolute exemption from the jurisdiction of temporal courts, so as not to be amenable to them, even in civil or criminal causes, *Const. Frid. II. § 4. subjoined to the books of the Feus*; which appears also to have been the law of Scotland, 1466, C. 8. And though now, since the Reformation, they are equally subject with laymen to the jurisdiction of the civil magistrate; yet no act of a spiritual nature can to this day be exercised, nor any spiritual censure inflicted, either on the clergy or the laity, but in church-courts. A clergyman, for instance, may, without doubt, be tried by the justiciary for treasonable discourses, though uttered from the pulpit; but no person can be either received into orders, or deprived of them, or be thrown out of the church by excommunication, but by the sentence of a church judicatory. It may however be observed, that certain sentences or proceedings of church-courts, in spiritual matters, draw civil effects after them. Thus, the admission by a presbytery of one to the pastoral charge of a church, who has a legal capacity or qualification for it, gives the person admitted a title to the benefice, 1690, C. 5., and their sentence of deprivation cuts off that right, 1592, C. 117. Our law formerly annexed civil penalties to the sentence of excommunication; all which are now taken away by 1690, C. 28. And, by our present law, the

Jurisdiction of proper church-courts, presbyteries, synods and assemblies.

the civil magistrate is prohibited from compelling any person to give obedience to the sentence of excommunication, or to appear in any process brought for the purpose of inflicting that censure, 10° *Ann. C. 6.* To have a just notion of the church's *civil* jurisdiction, as it presently stands, a distinction must be made between *ecclesiastical courts and proper church-courts.* By the last, we understand those that are composed partly of clergymen, and partly of a number of laymen, who bear office in the church under the name of elders, *ex. gr.* presbyteries, synods, &c. Ecclesiastical courts consist of laymen only, as commissariots, the commission-court, &c. The civil jurisdiction of proper church-courts consists of the following particulars: 1st, Presbyteries have, in some respect, the charge of parochial schools. By 1696, *C. 26.* the heritors in parishes where no parochial school has been before established, are ordained to provide a school-house¹²⁶, and modify a salary to the schoolmaster, not under 100 merks Scots, and not above 200, and to proportion it among themselves, according to their valued rent. If the heritors fail, then the presbytery is directed to apply to the commissioners of supply of the shire, who, or any five of them, have power to establish a school, and settle a salary in terms of the statute. 2^{dly}, All schoolmasters and teachers of youth are made liable to the trial and judgment of their respective presbyteries, not only for their sufficiency and qualifications, in order to their being elected, but for their conduct and deportment after their admission, while they continue in their offices, 1693, *C. 22* *¹²⁷. Their powers in the designation of manse and glebes are explained, *supr. B. 1. T. 2. § 2. et infr. B. 2. T. 10. § 56, 58, 59.*

Origin of ecclesiastical courts consisting of laymen only.

25. Before explaining the extent of the civil jurisdiction vested in *ecclesiastical courts*, the judges of which have, since the Reformation, been laymen, it may be premised, that in the first ages of Christianity, when the church, in place of being protected, was persecuted by the state, dying persons, from the great confidence they reposed in the clergy, frequently committed to them the care of their estates, and of their orphan children: But these were merely rights of trust, not of jurisdiction. During that period, Christians, to shun appearing before the courts of idolaters, usually referred their differences, in point of private right, to one of their own number, of approved integrity, for the most part to the bishop. Soon after the Roman Emperors had become Christian, all questions which properly concerned religion fell under the bishop's cognisance: Yet, at first, no proper jurisdiction was conferred on bishops, even in religious matters, but simply a power of judging where the parties consented to it; as appears by a constitution of Arcadius and Honorius, *anno 398, L. 7. C. De episc. audi.* The year after, 399,

* New regulations have been made by 43. Geo. III, c. 54.

¹²⁶ The majority of heritors, with consent of the schoolmaster, may, against the will of the minority, remove a school-house to a different situation; *Anderson, 26th Nov. 1808, Fac. Coll.* But the Justices, to whom, at their Quarter-Sessions, a certain jurisdiction is given under *stat. 43. Geo. III. c. 54.* in regard to the provision of new school-houses, &c. have no right to remove or otherwise interfere with school-houses formerly established, under *stat. 1696, &c. Dawson, 18th Feb. 1809.* See an abstract of the *stat. 43. Geo. III.*, which now regulates the government of parish schools, *Appendix, NO. 9.*

¹²⁷ By *stat. 43. Geo. III. c. 54.*, the judgment of the presbytery in such matters is declared "final, without appeal or review by any court, civil or ecclesiastical." But if they refuse to act, or exceed their powers, the Court of Session will give redress; *Heritors of Corstorphine, 10th March 1812, Fac. Coll.; vid. supr. tit. 2. § 7.*

399, the same Emperors appear to have granted to bishops a proper jurisdiction in causes concerning religion, but to have excluded them from any power of judging in points of civil right, even where the parties were willing to have submitted to their cognisance, *Cod. Theod. L. 16. T. 11. C. 1.* At last, they were authorised by the same Emperors to judge in all questions where the parties voluntarily brought their differences before them, without distinguishing between civil and religious; and it was declared, that their judgments, where the jurisdiction was thus prorogated, should not be subject to the review of any civil court, *L. 8. C. De episc. audi.* In proportion to the growth of Papal authority, the clergy had the address to establish in themselves a proper jurisdiction, not only in questions of tithes, patronage, scandal, breach of vow, and in other matters which might, with some propriety, be styled *ecclesiastical*, but in every cause which they could find the smallest colour to give that name to. Thus, because they had been early intrusted with the administration of certain legacies bequeathed to pious uses, *Decretal. L. 3. T. 26. C. 3. 17. 19.*, they gradually assumed the exclusive right, not only of proving or confirming all testaments, but of naming administrators for managing the moveable estates of all who died intestate, *vid. infr. B. 3. T. 9. § 18. 28.* Thus also, bishops took on themselves to judge, not only in questions of divorce, bastardy, and adultery, because marriage was accounted a sacrament, but in the restitution of tochers, *Decretal. L. 4. T. 20. C. 2.*, because tochers were given in the view of marriage. In like manner, our ancient law gave them the cognisance of all controversies in which an oath intervened, because an oath was an act of religious worship addressed to the Deity, *Reg. Maj. L. 1. C. 2.; L. 2. C. 38. 59. &c.*; and of the trial and deprivation of notaries, 1503, *C. 64.*, because all notaries were, by our ancient usage, authorised by churchmen in their several dioceses. As the clergy were, by means of this extensive jurisdiction, too much called off from their proper functions, they committed the exercise of it to their vicars, who are in our statutes called *Officials*, 1466, *C. 8.* or *Commissaries*. Hence, the commissary-court is called the *bishops' court*, or *curia Christianitatis*, and sometimes the *consistorial court*, a word first made use of to denote the court in which the Roman Emperors sat with their council, the *comites consistoriani*, either for determining private causes, or for deliberating on public affairs, *Tit. C. De Com. Consist.; Gothofr. Com. in Cod. Theodos. Lib. 11. T. 39. L. 5.*, and afterwards transferred to courts of judicature held by churchmen. Thus the conclave of cardinals is called the *secured consistory*.

26. As the act, which was passed 1560, and ratified 1567, *C. 2.*, by which all episcopal jurisdiction under the authority of the Roman Pontiff was abolished, did, from its first enactment, put a stop to judicial proceedings in consistorial causes, Queen Mary made a new nomination of Commissaries, one in every diocese, who were to act under the royal authority: And immediately after, by a grant, Feb. 8. 1563-4, preserved by Balfour, p. 670., she erected a new Commissary-court at Edinburgh, consisting of four Commissaries; the powers of which were ratified by several acts, particularly by an unprinted one in 1592, preserved also by Balfour, p. 676. This court is vested with a double jurisdiction; one diocesan, which is exercised within the territory specified in the grant,

Commissaries
come in place
of the bishops'
court.

Book I.

Commissaries,
by whom cho-
sen.

viz. the counties of Edinburgh, Haddington, Linlithgow, and Peebles, and a part of Stirlingshire; and another universal, by which they may set aside the sentences of all inferior commissaries, and confirm the testaments, not only of all who die in foreign parts, or who had no fixed residence in this country at the time of their decease, but even of those who had, at that time, their residence in another commissariat, during a vacancy in that commissariat.

27. Q. Mary, by a letter recorded in the books of sederunt, *Jan. 7. 1567*, gave up the nomination of commissaries to the court of session, who had about that time obtained a grant of the quots of testaments: authorising them to present to her, persons proper for the office, after making trial of their qualifications; and declaring all grants of commissariat, made without such previous presentation, null. But upon the establishment of Episcopacy in her son's reign, bishops were, by 1609, *C. 6.*, restored to the nomination of their commissaries: And the right of naming the four commissaries of Edinburgh was, by that statute, divided between the archbishops of St Andrew's and of Glasgow, each of whom was to name two. After the erection of Edinburgh into a bishop's see, in 1633, the nomination of the two commissaries of Edinburgh, which had been in the gift of the archbishop of St Andrew's, was transferred to the bishop of Edinburgh, provided that that archbishop should consent to the nomination; in consequence of which, the bishop of Edinburgh presented Wishart and Aikenhead to the commissariat of Edinburgh, with the consent of the archbishop of St Andrew's. But, since the Revolution, the right of naming all the commissaries of this kingdom has again devolved on the crown, as coming in the place of the bishops. There was but one commissary-court in every diocese, till the erection of the commissariat of Edinburgh in 1564: Afterwards, in pursuance of a royal commission in 1581, preserved by Balfour, p. 673., authorising the session to erect new ones, for the conveniency of those who lived at a distance from the court of the diocese, commissariats were established at Stirling, Peebles, Lauder, and a few other places which had never been episcopal sees.

Court of session
has no consisto-
rial jurisdiction
prima instantia.

28. As the jurisdiction assumed by the clergy during Popery was entirely independent of the civil power, and of all secular courts, the sentences pronounced by them were subject to the review of the Pope only, or his delegates; so that the jurisdiction of the bishops' courts was in that period supreme, with respect to the courts of Scotland. But on the Reformation they were stripped of this character, by an act passed 1560, and ratified by 1581, *C. 115.*, by which, the appeals from the bishops' courts, then depending at Rome, were ordained to be decided, not by the commissaries of Edinburgh, as the supreme consistorial court, but by the session; and by a posterior act, 1609, *C. 6.*, the court of session is declared the King's great consistory; and, as such, is vested with the power of reviewing all decrees pronounced by the commissaries. Nevertheless, as the session had no inherent jurisdiction in consistorial causes prior to that act, and as the act authorises them to judge only in the way of advocacy, they have not at this day any proper consistorial jurisdiction in the first instance, even though the commissaries should not reclaim the cause to themselves, *St. B. 4. T. 1. § 36.* Neither do they give sentence in any consistorial cause brought from the commissaries, but remit

it

it to them with instructions how to proceed¹²⁸. By the usage immediately subsequent to the act 1609, the session did not admit advocations to themselves from the inferior commissaries; the action must have been first carried to the commissaries of Edinburgh: But as that practice had been disused for upwards of a century, a defence founded on it was repelled, *Edg. Jan. 28. 1725, White*, (DICT. p. 7551.)¹²⁹. After sentence pronounced by the commissaries of Edinburgh, and extracted, they have no power of reviewing it, except on a remit from the session.

29. The extent of the commissaries' jurisdiction, and their forms of proceeding since the Reformation, both in common actions and in the confirmation of testaments, have been set forth in special instructions given to them from time to time. Q. Mary, soon after she had named commissaries, signed particular instructions to be observed by them, *March 12. 1563-4*; to which the session, after the Queen had resigned to them her right of nomination, added a few more, *March 26. 1567*. In pursuance of the act 1609, C. 6. directing the commissaries to observe the injunctions which should be prescribed to them, the bishops signed a full set of instructions, both to the commissaries and their clerks, *March 2. 1610*; all which are preserved by Balfour, p. 655. *et seq.* After the Restoration, it was thought proper to reinstate the commissary-courts in their ancient rights and forms, which had suffered considerable innovations under the Usurper, by new injunctions drawn up by the bishops, and authorised by the King, *Jan. 21. 1666*; which are inserted, both in Lord Stair's decisions, and in the printed acts of sederunt. To this day, the commissaries retain a privative jurisdiction in all matters properly consistorial, *ex. gr.* in declarators of marriage, actions of adherence or divorce, in adultery, bastardy, the execution of testaments, &c. Their jurisdiction in questions of bastardy is limited to the life of the person alleged to be a bastard. An action for having it declared, that one deceased was a bastard, and that his estate is fallen to the King, must, like all other declarators of escheat, be pursued before the session.

30. In actions which bear only a remote resemblance to consistorial causes, the jurisdiction of the commissaries is cumulative with other judges-ordinary, as in actions for tithes, or the payment of stipend, in those brought by wives for a separate alimony against their husbands¹³⁰, in applications for inspecting or sealing up the writings of persons deceased, or in actions brought by their creditors or legatees against the executors. But where a privileged creditor of the deceased sues on his debt only to constitute it, without a conclusion of payment, such action is deemed properly consistorial, and so must be brought before the commissaries in the first instance, *Fount. Feb. 10. 1693, Graham*, (DICT. p. 7555). Questions of slander and defamation have been in every period of time, even since the Reformation, proper to the cognisance of the commissaries.

Proper jurisdiction of the commissaries.

In what causes they have a privative jurisdiction, in what only cumulative.

¹²⁸ It is, in some sort, a consequence of this, that where an action of divorce has by advocacy been brought before the court of session, and the judgment there pronounced been afterwards appealed from to the House of Peers, any subsequent application by the wife for money to carry on the cause must be made to the commissary court, where the radical suit lies; *Cunningham Fairlie, 4th Feb. 1813, Fac. Coll.* Such applications are competent in the court of session, only during the actual dependence of the case before themselves.

¹²⁹ It has since been decided, that the commissaries of Edinburgh have no power to advocate causes from inferior commissaries; *Kames, Sel. Dec. Commissary of Aberdeen, 18th Feb. 1763, DICT. p. 7552.*

¹³⁰ *Vid. post. tit. 6. § 19. in not.*

Book I.

missaries. In all the instructions given from time to time by the crown, or by bishops, to these judges, actions of slander are mentioned as falling under their jurisdiction, immediately before the confirmation of testaments, in which it is incontestable that their judicial powers are privative. But verbal injuries strictly taken, *i. e.* hasty words uttered suddenly *in rixa*, of which below, *B. 4. T. 4. § 80.*, have been for some time past judged of by the court of session, and even by the justices of the peace, *Fac. Coll. i. 147, (Auchenleck, Dict. p. 7348.)*¹³¹. By the above-mentioned instructions, commissaries had a cumulative jurisdiction in the actions, though not properly consistorial, of widows, orphans, and other *personæ miserabiles*, not exceeding L. 20 Scots; and in causes referred to oath, not exceeding L. 40 Scots; and indeed in all causes where the parties prorogated their jurisdiction: But where their jurisdiction was not prorogated, they were found not to have the cognisance of physicians' fees, where the sum exceeded L. 40, *Nov. 26. 1622, Liddel, (Dict. p. 7553.)*; nor of tutory accounts, *Dec. 8. 1675, Wright, (Dict. p. 7578.)**; though they claimed a jurisdiction in both, as the causes of dying persons and orphans. This part of their jurisdiction, which relates to causes that have not the proper consistorial character, is now precisely defined by act of sederunt, *July 29. 1752*, proceeding on a complaint exhibited by the sheriff-clerks against the commissaries, for illegally extending their jurisdiction. That act declares, that the commissaries have no power to pronounce decrees in absence, for any sum above L. 40 Scots, in actions of debt or other civil causes, referred to oath; or, in other words, that they have not the cognisance of such causes unless their jurisdiction be prorogated by the consent of parties: But they are declared competent to the authenticating of tutorial and curatorial inventories; and to the registration, not only of bonds, contracts, or other deeds which bear a clause of registration in the books of any judge competent, but of protests upon bills; without any limitation as to the extent of the sums contained in those inventories, bonds, contracts, or bills¹³². But this must be attended to, which has been already suggested, *B. 1. T. 2. § 28.*, that the common clause, bearing the granter's consent to register in the commissary-books, does not give *jurisdictio contentiosa* to the commissaries, in questions concerning the legal effects of the deed registered. The consent is merely to register, and so can go no farther, unless the parties shall submit to the jurisdiction of the court.

31. Inferior

* Compare the case of Wright with that of Horsburgh, *Dict. p. 7576.*

¹³¹ Action of damages for scandal and defamation has been found competent before the Bailie-Courts in royal burghs; *Kilk. Hamilton, 19th June 1750, Dict. p. 7682*; before the Sheriff, *Forrest, 12th Dec. 1807, Fac. Coll. Dict. v. JURISDICT. App. No. 18.*, where it was argued, that "if there are any questions of slander, wherein the jurisdiction of the consistorial court is exclusive, it is restricted to those in which a palinode or ecclesiastical censure is required." Nay, the court of session sustained their competency, even where, in addition to damages, palinode and censure were concluded for, though of course, as to these last, no judgment could issue; *Kames, Sel. Dec. Wilkie, 15th Feb. 1765, Dict. p. 7360.* Since the institution of the Jury Court, such actions have become so very familiar, that the idea of an exclusive jurisdiction in the commissaries is altogether exploded; *Murray's Reports, passim.* The late statute declaring that court permanent, specifies actions for "libel or defamation," as a positive class, among many others which must be *de plano* remitted to it from the Court of Session; *59. Geo. III. c. 35. § 1.*

¹³² By *stat. 49. Geo. III. c. 42. § 2.* the registration of probative writs, &c. and of protests on bills, is taken from them.

TITLE VI.

Jurisdiction of
inferior commissaries.

31. Inferior commissaries have no jurisdiction in such consistorial causes as are, from their importance or intricacy, proper to the commissariat of Edinburgh. Of this kind are actions of divorce, 1609, C. 6., and declarators of the nullity of marriage, under which are included questions of bastardy and adherence, when they have a connection with the lawfulness of marriage, or with adultery, *Instr.* 1666, C. 2. The right in the commissaries of Edinburgh to set aside the judgments of inferior commissaries is limited in point of time by said instructions, § 16., which requires, that the reduction shall be carried on before the commissaries of Edinburgh within a year from the decree of the inferior commissary.

TIT. VI.

Of Marriage, and the Relation between Parents and Children.

I. OF MARRIAGE.

AFTER having treated of the several ranks of persons as they are distinguished by their public characters, they may be considered in their more private capacities, as husband and wife, father and child, tutor and pupil, master and servant. The relation between husband and wife is constituted by marriage; which may be defined, after the Roman lawyers, the conjunction of man and woman in the strictest society of life till death shall separate them. The words *man* and *woman* may perhaps have been put in the singular number, to exclude bigamy, by which is understood a man's marrying a second wife, or a woman's marrying a second husband, while either of them stands married to a first.

Definition of
marriage.

2. Marriage is truly a contract, and so requires the consent of parties, of which *infr.* B. 3. T. 1. § 16. And it is constituted by consent alone, by the *conjunctio animorum*; so that though the parties, after consent given, should, by death, disagreement, or other cause whatever, happen not to consummate the marriage *conjunctio corporum*, they are nevertheless entitled to all the legal rights consequent on marriage^{*133}. Neither idiots, nor pupils¹³⁴ can marry because both are incapable of consent †. The Canon law indeed affirms, that a pupil may enter into marriage, where there is an ability to procreate or conceive, *Decretal. L. 4. T. 2. C. 3.*; or, as it is expressed by some doctors, *si malitia suppleat aetatem*. But,

It is constituted
solely by con-
sent.

VOL. I.

2 G

first,

* But it is not enough that the form of consent be interposed, unless it is the free and voluntary act of the parties. See, in illustration of this, *Kames's Select Decis. Cameron, DICT. p. 12680.*

† A marriage was found null, where the male party was an idiot, though there had been a child procreated subsequently to the union; *Kilk. NO. 1. voce IDIOT, Blair, DICT. p. 6293.*

¹³³ See farther on the subject of consent, *infr.* § 5. *h. t.* and *Not.* 139.

¹³⁴ It was unanimously so found in the case of a male pupil, though at the time of the marriage wanting only *two months* of 14, and though proved to have been in bed with the woman within even a *fortnight* of completing that age; *Johnston, 17th Nov. 1770, Fac. Coll. DICT. p. 8931.* The court likewise held in this case, that "the maxim of the canon law, *nisi malitia, &c.* was not received in the law of Scotland."

Antenuptial contracts and promises of marriage may be resiled from,

first, This doctrine supposes an indecent *inspectio corporis*, which is not to be admitted without the most urgent necessity, *L. 3. C. Quand. tut. vel cur.* *2dly*, It is adverse to first principles: For if the law declares a pupil incapable of entering into the most trifling contract, from a defect of judgment, it surely ought not to suffer him to engage in an indissoluble society, the nature of which he cannot form the smallest notion of; yet if the married pair shall continue to cohabit after puberty, such acquiescence makes the marriage valid, *L. 4. De rit. nup.*

3. Marriage is seldom contracted without previous espousals, or a promise of marriage, called by the Romans *sponsalia*, or *stipulatio sponsalitia*; but these are quite distinct from the marriage itself, which requires present consent. The written antenuptial contracts, therefore, in use with us, do not constitute marriage: For though their style seems to import a consent *de præsenti*, in the following words, *We take one another for our lawful spouses*; yet the obligation which is immediately subjoined, to solemnize the marriage in the face of the church, shews that the parties do not hold the contract for perfected, till that ceremony be performed. Hence instances have occurred of persons being charged upon letters of horning to solemnize the marriage in the terms of that written obligation; whereas, if the marriage had been deemed perfected by subscribing the contract, the proper action would have been a declarator of it before the commissaries. The *stipulatio sponsalitia* had this only effect by the *jus antiquum* of the Romans, that an action of damages lay against the party promising and refusing to perform, *Gell. Noct. Att. L. 4. C. 4.* And when afterwards earnest, *arrha sponsalitie*, came to be given by the bridegroom, he lost his earnest if he resiled; and if the bride resiled, she was obliged to restore it with as much more, *L. 5. C. De sponsal.* The Canon law allows the party a liberty to resile, though he should have promised upon oath, *Decretali L. 4. T. 1. C. 2. 17.* In Holland, he who has entered into espousals, according to the law of that country, may, at the suit of the other party, be compelled to fulfil his engagements *remediis pœtoris*, by imprisonment, seizing his goods, &c.; and if he still continue obstinate, the judge may, by his sentence, declare the marriage perfected; the consent given in the espousals being in such case brought down, *fictione juris*, to the date of the sentence, *Brower de jure connub. p. 255.* By the custom of Scotland, all promises of marriage, whether private or more solemn, contained in written contracts, may, in the general case, be resiled from; which proceeds from our close adherence to the rule, *Matrimonia debent esse libera*, and from the consideration of the fatal consequences which often attend forced marriages*. But if we suppose matters not entire, that is, any thing done in consequence of the promise, whereby

* A contrary rule seems anciently to have been observed, *Balfour's Practics*, p. 97, 98; *Spottiswood*, tit. MARRIAGE; but our later custom has been agreeable to what is laid down by the learned author; and accordingly, it has been found, that no action lies for recovery of the penalty contained in a contract of marriage, *Jan. 21. 1715, Young, Dict. p. 8473.* See *June 17. 1742, Provan, Dict. p. 9511*¹⁰⁵. See *Johnston, Dec. 21. 1770, Dict. p. 13916.*

¹⁰⁵ There are two very discordant reports of this case; one by *Kames, Rem. Dec. vol. ii. NO. 30.*, the other by *Clerk Home, NO. 195.* The latter alone has reference to the subject of breach of promise of marriage; and so far as it goes, it seems adverse to the general doctrine in the above note. It is needless, however, to examine this, or any other of the older cases, more minutely, our law now being settled as stated *infra*. *Nat. 137.*

whereby damage arises to any of the parties from the non-performance, the party refusing to fulfil, though he cannot be compelled to celebrate the marriage, may be condemned to pay the damage sustained by the other party *¹³⁶.

4. In the case of a promise of marriage followed by a *copula*; if the promise hath been declared by a written marriage-contract in the usual style, the subsequent *copula* must doubtless be considered as the perfection or consummation of the prior contract, after which there can be no room for resiling: And indeed, though the promise *de futuro* should be barely verbal, the canonists, *Decretal. L. 4. T. 1. C. 30.*, and, upon their authority, both our judges and writers, are agreed, that a *copula* subsequent to such promise constitutes marriage, from a presumption or fiction, that the consent *de presenti*, which is essential to marriage, was at that moment mutually given by the parties, in consequence of the anterior promise, *St. B. 1. T. 4. § 6.*, and *B. 3. T. 3. § 42.*; *Fac. Coll. i. 46.*, (*Pennycuick, Dict. p. 12677.*)†. This presumption, though but slightly founded in nature, is abundantly recommended by its equity, and the just check which it gives to perfidy ‡.

unless a *copula* has followed.

5. The consent essential to marriage is either express or tacit. Express consent in regular marriages is signified by a solemn verbal vow of the parties, accepting each other for their lawful spouses, uttered

Marriage may be constituted by consent, either express or tacit.

* *Fount. Jan. 2. 1685, Graham, Dict. p. 8472*¹³⁷. But this is to be understood only where no reasonable cause can be assigned for resiling. See *Fac. Coll. June 27. 1767, Thomson, Dict. p. 13915.*

† The method formerly resorted to for making effectual a promise *subsequente copula*, appears to have been an action before the commissaries, concluding for decree against the refractory party to solemnise the marriage, and that upon failure the marriage shall be declared complete. Craig mentions an instance: "Commissarii, viri acuti, successionem bonorum mobilium concesserunt liberis Edwardi Younger, licet matrimonium nunquam fuit contractum, neque banna proclamata: ea ratione, quod cum Edwardus, sub fide futuri matrimonii, eos liberos suscipisset, materque commissarios causam obtinisset ut Edwardus matrimonium promissum implere cogeretur, eo recusante, perinde habuerunt ac si eam in uxorem duxisset, liberisque bonorum mobilium executio sive hæreditas adjudicata est." See also the case of *Barclay*; (as noticed by *Stair, B. 1. t. 4. § 6., vers. "The public solemnity," apud fin.;*) that of *Craig* against *Sinclair, Dec. 16. 1628, Dict. p. 10034.*; *Kames's Elucidations, Art. 5.* But any farther discussion of the subject is superseded by the case of *Pennycuik*, which was taken up by the court entirely upon the general point. It was held for law, "that a promise of marriage, followed by a *copula*, made, from that moment, an actual marriage."

‡ A promise (to the effect of constituting marriage) can be proved only by writ or oath of party¹³⁸. But a train of circumstances, such as a regular courtship before the *copula*, may be proved by witnesses; *Fac. Coll. Nov. 21. 1755, Smith, Dict. p. 12391.*

¹³⁶ Damages are now also given *in solatium* of the wounded feelings of the party, although no specific patrimonial damage be condescended on. In the case of *Hogg, 27th May 1812, Fac. Coll.*, the Court of Session awarded a *solatium* of L. 700. And again, in a similar case, *Rose, 19th July 1816, Murray's Reports*, damages were assessed by a Jury at L. 900. The principle of decision thus acted upon by our Courts, appears since to have been assumed as settled law in the recent *stat. 59. Geo. III. c. 35.*; which enacts, § 1. that all processes brought before the Court of Session "on account of breach of promise of marriage," shall be forthwith remitted for trial in the Jury Court.

¹³⁷ In this case the special damage proved amounted only to L. 80; but "the Lords, at the advising, for that expense, and for her loss of the market, modified L. 100 against him, in regard especially that he could give no rational ground why he gave over the bargain." The decision is, thus, in some sort, an anticipation of the present state of the law; and *Fountainhall*, who reports it, observes, that it "seems equitable, though it be new."

¹³⁸ See also *Cockburn, 19th July 1670, Dict. p. 12386*; *Harvie, 19th Feb. 1732, Dict. p. 12388.*

uttered before a clergyman, who thereupon declares them married persons. But it is not essential to marriage, that it be celebrated by a clergyman: The consent of parties may be expressed before a civil magistrate, or even before witnesses; for it is the consent of parties which constitutes marriage *¹⁵⁹. And hence the same statute which

* The private declarations of parties, even in writing, are not, *per se*, equivalent to actual celebration of marriage; for notwithstanding of such private declarations, there may be circumstances to induce the conclusion, that there was not an intention to enter into the contract *de presenti*. In two cases, *Fac. Coll. Dec.* 20. 1781, *Macinnes*, *DICT.* p. 12683.; and *Feb.* 16. 1786, *Taylor*, *DICT.* p. 12687.; the court of session had sustained such declarations: But both these judgments were reversed in the House of Lords; and the court of session, in a subsequent case, seem to have held it necessary, either that the marriage be actually celebrated before a clergyman, or that the consent be adhibited in some other mode equally unequivocal, *Fac. Coll. Dec.* 6. 1796, *Maclauchlan*, *DICT.* p. 12693.

¹⁵⁹ The cases referred to in Note *, if rightly taken, do not at all impeach the doctrine laid down in the text. For, observe the very special circumstances with which they are attended. The reversal in the case of *Macinnes* is, by the anxious and detailed judgment of the Court of Appeal, put on this express ground, that the written acknowledgment founded on "was not given by the defender, or accepted by the pursuer, or understood by either, as a declaration of the truth, but merely as a colour to serve another and a different purpose, which had been mutually concerted between them." In the same way, the reversal in the case of *Taylor* is put on the special ground, "that the two letters insisted upon in this process, signed by the parties respectively, and mutually exchanged, were not intended by either, or understood by the other, as a final agreement; nor was it so intended or understood, that they had thereby contracted the state of matrimony, or the relation of husband and wife from the date thereof; on the contrary, it was expressly agreed that the same should be delivered up, if the purpose they were calculated to serve proving unattainable, such delivery should be demanded; which last-mentioned agreement is farther proved by the whole and uniform subsequent conduct of both parties." And finally, in the case of *Maclauchlan*, (which after an opposite judgment was ultimately decided against the marriage only "by a narrow majority,") the Court appears to have been influenced chiefly by this consideration, that "the letters previous to the meeting in 1791 establish only an intention to marry at a future period, which would not have been binding on the defender; and it seems difficult to give a higher effect to what passed afterwards, where the nominal consent *de presenti* to enter into marriage was attended with an avowed resolution not to live in the relation of husband and wife." In noticing this decision, accordingly, Mr Hutcheson, writing under the correction of a very eminent judge who sat on the bench at the time of its being pronounced, states, that "under the very particular circumstances of that case, the Court did not think there was sufficient evidence of a real *de presenti matrimonial consent*;" 2. *Hutcheson*, p. 215, in note. The same view of the decision was, after the maturest and most solemn consideration, adopted in the English consistory court, in deciding the important case of *Dalrymple*, 16th July 1811, *Dodson's report*, p. 53; and again in the House of Peers, in affirming the judgment of our courts in the equally important case of *Walker v. Macadam*, 21st May 1813, 1. *Dow*, p. 182, 188.

In reviewing the above decisions, therefore, it is obvious that they proceed on grounds which leave the doctrine in the text altogether untouched. Lord Redesdale's observation upon the case of *Maclauchlan* is equally applicable to them all;—that judgment was given against the marriage, "not because a declaration *de presenti* was *per se* insufficient to constitute a marriage; but because, from all the circumstances taken together, it was evident that the parties had no intention of forming a present marriage;" 1. *Dow*, p. 188. Had the declarations founded on been truly intended by the parties themselves to constitute marriage, they would have been found by the courts to constitute marriage. They only failed to have this effect, because the parties themselves did not mean they should have it; or, to use the words of our author, because "the consent essential to marriage" had never *de facto* intervened. For want of this "essential consent," judgment has been given against the marriage, even where the ceremony was regularly performed by a clergyman; *Kames, Sel. Dec. Cameron*, 29th June 1756, *DICT.* p. 12680; *Allan*, 1773, reported 2. *Hutcheson*, p. 216.

That our law requires no more to the constitution of marriage than the serious and deliberate consent of parties, and that "the private declaration of parties," whether verbal or written, if "so conceived as necessarily to import their present consent," are "per se quite equivalent to actual celebration of marriage," is now established past all doubt, by the recent decisions. Judgment was pronounced to this effect, in the case of a Gretna Green marriage, on an improbativ certificate which was subscribed both by the

which declares that no person can be a minister without episcopal ordination, takes it for granted, that marriage celebrated by a person who is not ordained by a bishop, is valid, 1672, C. 9. Marriage may be also, without doubt, perfected by the consent of parties declared by writing, provided the writing be so conceived as necessarily to import their present consent¹³⁹. The proof of marriage is not confined to the testimonies of the clergyman and witnesses present at the ceremony. The subsequent acknowledgment of it by the parties is sufficient to support the marriage, if it appear to have been made, not in a jocular manner, but seriously and with deliberation. Thus a marriage was sustained against the husband, *Feb.* 1739, *Arrot*, (not reported), chiefly on his owning it to the midwife whom he had called to assist his wife in the birth, and to the minister whom he had desired to baptize the child, without any actual proof, either of the marriage, or of the parties cohabiting together as married persons*.

VOL. I.

2 H

6. Marriage

* A variety of cases have been decided on similar grounds; and judgment has varied according to the degree of evidence which appeared of the solemn and deliberate consent of the parties. See, on the one side, *Feb.* 23. 1714, *Anderson*, DICT. p. 12676.; *Fac. Coll.* March 3. 1786, *Inglis*, affirmed on appeal, *Feb.* 14. 1787, in which marriage was found proved, DICT. p. 12689. On the other hand, see *Fac. Coll.* Nov. 18. 1766, *Johnston*, DICT. p. 12681.; *Nov.* 18. 1785, *White*, DICT. p. 12686.; *Nov.* 13. 1795, *Anderson*, &c. DICT. p. 12690.

the celebrator and parties, the genuineness of which was supported by reference to the oath of the husband; *Wyche*, 27th June 1801, *Fac. Coll.* DICT. v. FORUM COMP. App. NO. II.;—again, in another case, where the parties had mutually “acknowledged themselves to “be married persons” before a Justice of the Peace; *Crawford’s Trustees*, 20th Jan. 1802, *Fac. Coll.* DICT. p. 12698;—again, in the case of a written declaration, *Edmestone*, 15th May 1804, *Fac. Coll.*, App. DICT. v. PROOF, App. NO. II.;—and, finally, under very peculiar and rather unfavourable circumstances, in the case of a mere verbal declaration; *Walker*, 4th March 1807, *Fac. Coll.* DICT. v. PROOF, App. NO. IV.; affirmed on appeal, 21st May 1813, 1. *Dow*, p. 148. In this last case, indeed, the Lord Chancellor took occasion to observe, in express allusion to the whole train of decisions, and, among the rest, to those commented on in the earlier part of this Note, that “it was a position again and again clearly recognised in them, that the contract “*de præsenti* formed very marriage, *ipsum matrimonium*; and the judgments of the “House of Lords had not trenched on the general doctrine.” The decision of the English consistory court, in the case of *Dalrymple* already referred to, affords another very strong illustration to the same effect. And perhaps a more valuable exposition of our whole law, in reference to the important question of the constitution of marriage, is nowhere to be found than in the clear and able judgment delivered by Sir William Scott in that case, accompanied as it is, in Dr Dodson’s report, by the detailed opinions of so many of the most eminent among our own lawyers.

It is true, that in one recent case, *Macgregor*, 28th Nov. 1801, *Fac. Coll.* DICT. p. 12697, there was found to be no marriage, notwithstanding an apparent acknowledgment of the parties. But the decision here just falls under the same class with those pronounced in the cases of *Macinnes*, *Taylor*, &c.;—the Court were satisfied, from the whole circumstances, that there had been *no intention*, on either side, to *contract marriage*, and that any show of acknowledgment that had taken place was intended merely “as some sort of excuse to the world.” In fact, the woman had “demanded “wages and livery meal as a *servant* to the period of Campbell’s (her alleged husband’s) decease; and when called before the kirk-session of Comrie, she did not “claim the character of *widow* and *lawful mother* of the child.”

It remains only to be added, that, notwithstanding the contrary has sometimes been pleaded, it seems now settled, 1. That a verbal acknowledgment, or declaration of marriage *per verba de præsenti*, may competently be proved by parole testimony; *Walker*, *supr.* 1. *Dow*, p. 182, 189. 2. That although consummation may perhaps add, in a doubtful case, to the strength of evidence as to the true intent of parties, it is by no means an essential:—a marriage constituted *de præsenti*, by mutual declarations, “does not require consummation in order to become very matrimony;” it does “*ipso facto et ipso jure* constitute the relation of man and wife;” *Dalrymple*, *supr.*, *Dodson*, p. 58., *et passim*; *Walker*, *supr.* 1. *Dow*, p. 181. *et seq.* 3. That a first marriage, although private and irregular, can in no degree be affected by a second, how regular and public soever. There can, in fact, properly speaking, be no second marriage: there may be a ceremony, but it is a mere nullity; *Dalrymple*, *supr.* *Dodson*, p. 87. *et seq.*; *Pennycook*, 15th Dec. 1752, *Fac. Coll.* DICT. p. 12677.

Book I.

What circumstances presume consent.

6. Marriage may be also entered into, where the consent is not express, but is discovered *rebus ipsis et factis*. In this way it is presumed or inferred from cohabitation, or the parties living together at bed and board, joined to their being habite, or held and reputed, man and wife. Cohabitation therefore does not by itself establish this presumption; for a man and woman may thus cohabit to gratify their unlawful desires, without any intention of being bound by marriage¹⁴⁰. This legal presumption is grounded not only on the nature of things, but on statute, 1503, C. 77., which provides, that a woman who has been reputed the wife of a man till his death, shall be entitled to and enjoy the terce as his widow, till it be proved that she was not his lawful wife. Hence it may be observed, that the presumption of habite and repute is not so strong an evidence of marriage as to exclude a contrary proof; it only throws the burden of it on him who denies the marriage^{* 141}.

—Hitherto of the consent of the parties themselves. By the Roman law, the father's consent was so necessary to the marriage of his son, while he continued in his family, that it was doubted whether his subsequent approbation could ratify that marriage to which he had not given an antecedent consent. But this duty, of consulting parents on so important an article, is one of those which our legislature hath not thought fit to enforce, either by annulling the undutiful act, or by inflicting any penalty on the actor, though the marriage should be entered into even against the express remonstrances of the father. The consent of curators is not necessary to the minor's marriage, either by the Roman law, or the usage of Scotland.

Marriage is null where there is an incapacity of procreation.

7. Marriage is in itself null, where either of the parties is, at the time of contracting it, naturally incapable of procreation; for such marriage is inconsistent with the propagation of mankind, which is at least one great design of its institution; yet where the disability proceeds, not from nature, but from some temporary infirmity of body, or even from old age, the law allows such persons to assume to themselves perpetual companions in the way of marriage, *in solatium vitæ*. 2dly, Marriage is null, where either of the parties stands already married to a third person; for as one cannot be married to two persons at once, the marriage to the first being valid, the other must be void: But of this, *infra*. B. 4. T. 4. § 54. It is also null, 3dly, when it is contracted within the degrees of propinquity or affinity forbidden by law †.

Computation of the degrees of propinquity and affinity.

8. Propinquity is distinguished by its different lines, and measured by degrees. A line in propinquity is a series of persons descended

* The cohabitation must have lasted for a considerable time; *Stair*, B. 4. Tit. 45. § 19., and have happened within Scotland, *Fac. Coll. Feb. 10. 1759, Macculloch*, Dict. p. 459. In this case the cohabitation and habite and repute took place in the Isle of Man; and the marriage was found proved by the court of session; but their decision was reversed in the House of Lords.

† See another impediment to marriage, *infra*, § 43. h. t.

¹⁴⁰ In a late case, where the decision of the courts here sustaining the marriage was reversed in the House of Lords, it seems to have been held, that “in cases of cohabitation the presumption was in favour of its legality,—*secus*, if the connexion is known to have been in its origin illicit;” *Cuninghams*, 20th July 1814, 2. *Dow*, p. 483, 502. In the same case, it was also thrown out, *ib. p.* 483, 511, “that repute, to raise presumption of marriage, must be founded on general, not singular opinion; and that a divided repute is, on such a subject, no evidence at all.”

¹⁴¹ Marriage having once been constituted by habite and repute, no regard will be paid to a subsequent writing, acknowledging that the parties did not live together as man and wife; *Stair*, B. iv. t. 45. § 19.; *Mackenzie*, 8th March 1810, *Fac. Coll.* See also *infra*. § 37. h. t.

descended from the same stock or root. That line where the propinquity is constituted between the persons generating and generated, is called *the direct*. A father is, with respect to his child, in the direct line of ascendants; a child, in regard of his parents, in the direct line of descendents. Where the persons related are not descended the one from the other, but have the same common parent, by whom the propinquity is formed, that line is called *the oblique, transverse, or collateral*. In computing the degrees of consanguinity, according to the Roman law, every person who was generated made a degree, without reckoning the common stock. By this rule, father and son were in the first degree of consanguinity, because the son is the only person generated; brothers in the second, uncle and nephew in the third, and first cousins or cousins-german in the fourth. The computation of the degrees of propinquity in the Canon law agrees precisely with that in the Roman, in the direct or right line of ascendants and descendents; but in the collateral, the canonists compute, not by the number of persons descended on both sides from the common stock, but by the number of generations upon one side only. According to this reckoning, cousins-german are in the second degree, because each of them is but two generations distant from the grandfather, who is the common stock; whereas they are by the Roman rule in the fourth. In the unequal collateral line, where one of the two is farther removed than the other from the common stock, the Canon law reckons the distance by the number of generations of the person farthest removed, *Decretal. L. 4. T. 14. C. 9*. Thus, a niece is related in the second degree to her uncle, because she is related in the second degree to her grandfather, the common stock; and, by the same rule, she is no farther removed from her uncle's son; which abundantly discovers the absurdity of that method of reckoning. Affinity is that tie which arises in consequence of marriage betwixt one of the married pair and the blood-relations of the other; and the rule of computing its degrees is, that the relations of the husband stand in the same degree of affinity to the wife, in which they are related to the husband by consanguinity; which rule holds also, *e converso*, in the case of the wife's relations. Thus, where one is brother by blood to the wife, he is brother-in-law, or by affinity, to the husband. But there is no affinity between the husband's brother and the wife's sister, which is called by doctors *affinitas affinitatis*; because there the connection is formed, not between one of the spouses and the kinsmen of the other, but between the kinsmen of both.

9. As to the degrees in which marriage is prohibited, the law of Scotland has adopted the Jewish law, by act 1567, *C. 15.*, declaring that marriage shall be as free as God hath permitted it; and that seconds in the degrees of consanguinity and affinity, and all degrees farther removed, contained in the word of God, may lawfully marry; by which manner of reference it would seem, that our legislature hath considered the law of Moses in that matter to be obligatory upon all nations. By *Levitic. C. 18.* the following rules are established, either expressly, or by consequence. *First*, Intermarriage between ascendants and descendents in the direct line is forbidden *in infinitum*, let the degrees of propinquity between the parties be ever so distant; for such marriages are universally agreed to be repugnant to the law of nature, and destructive to the ties

In what degree marriage is prohibited.

Book I.

ties of birth, *Grot. De jur. bell. L. 2. T. 5. § 12. vers. 2. 2dly*, Marriage, even in the collateral line, is forbidden *in infinitum*, where one of the parties is *loco parentis* to the other, *i. e.* where he is brother or sister to the direct ascendent of the other party. Thus, one cannot intermarry with his grand-niece, though he be as far removed from her in degree as first-cousins are, both by the computation of the Civil and of the Canon law. *3dly*, In every instance which falls not under either of these two rules, marriage is lawful in the second degree according to the Canon law, or in the fourth according to the Roman; and consequently cousins-german may intermarry, and all that are farther removed than they. It may be observed, that the act 1567, which was enacted not long after the Reformation, has followed the rule of the Canon law, as it was the common way of computing degrees in Scotland at that time, and continues to this day among the vulgar. *4thly*, The degrees prohibited by the law of Moses in consanguinity, are, in every case, virtually prohibited in affinity; and, by the aforesaid act 1567, the prohibition is equally broad in the degrees of affinity as in those of consanguinity. Thus one cannot marry his wife's sister, more than he can marry his own¹⁴². In all this matter, the rules are the same by the law of Scotland, whether the parties be related by full or by half blood*.

Proclamation of bans is requisite to a regular marriage.

10. Marriage is either regular or clandestine. That is regular marriage, where bans have been regularly published, according to the rules of the church. Proclamation of bans is the ceremony of publishing with an audible voice in the church, immediately before divine service, the names and designations or additions of those who intend to intermarry, and inviting all who know of any sufficient objection against the marriage to offer it before it be too late. This ceremony has probably been intended, not only as a guard against bigamy and incestuous marriages, but that the parties themselves might have time to think seriously, before they entered into engagements that were to last for life. Publication of bans was first introduced by the Lateran council which was holden in 1216, in general terms, without specifying in what churches or how often the publication was to be made, *Decretal. L. 4. T. 3. C. 3. pr.* Afterwards the council of Trent, *Sess. 24. De reform. matr. C. 1.*, ordained bans to be proclaimed on three successive holidays, in the parish-church or churches of the persons contracting; and this canon was adopted by our first Reformers, and hath been ever since observed by our church †. A certificate signed by the clerk of the kirk-session,

* Mr Hume, in treating of the crime of incest, has some very important observations on the subject of the text.—*Description and Punishment of Crimes*, chap. 18. (vol. i. p. 441. et seq. 2d edit.)

† By statute 10. *Ann. c. 7.* it is enacted, that no Episcopal minister residing in Scotland shall marry any persons, “but those whose bans have been duly published three several Lord's days in the Episcopal congregations which the two parties frequent, and in the churches to which they belong as parishioners, by virtue of their residence.”

¹⁴² Doubts have been entertained how far the statute 1567 includes this case, 1. *Hume*, 444, 5. On the other hand, it has been observed, “that the Confession of Faith, ratified by Parliament “in the haill heads, articles and clauses thereof,” (1690, c. 5. and 1700, c. 2.) expressly declares, (c. 24. *Of Marriage and Divorce*.) that “the man may not marry any of his wife's kindred nearer in blood than he may of his own; nor the woman, of her husband's kindred nearer in blood than of her own;” *Ersk. Princ. Mr More's edition*, § 4. h. t. note 47.

kirk-session, that the bans were duly published, is received as legal evidence that they were proclaimed on three different Sundays; not to be traversed by positive proof, that all the three proclamations were made on the same day. Not bishops only, but presbyteries, were indulged, by act of assembly 1638, *Sess. 23. C. 21.*, with a power of dispensing with this form on extraordinary occasions: But the presbyterian clergy have not exercised it since the Revolution.

11. Clandestine marriages, which are contracted without the previous solemnity of publishing bans, are as valid as regular marriages are; but certain penalties have been annexed to them from time to time by statute, affecting not only the parties, but the celebrator and witnesses. By 1661, *C. 34.*, whoever shall marry, or procure themselves to be married, without proclamation of bans, or by persons not authorised by the established church, are subjected to imprisonment for three months, and to the payment of the sums specified in the act, in name of fine, higher or lower according to their station and quality; and the celebrator is to be condemned to perpetual banishment¹⁴³. After the re-establishment of Presbytery, the prohibition to solemnize marriages was pointed against ministers who were not ordained by presbyteries, 1695, *C. 12.* This restraint, in so far as it affected the Episcopal clergy, was taken off by 10. *Ann. C. 7.*, which gave such of them liberty, both to baptize, and to celebrate marriages, as should take the oaths of allegiance and abjuration, and pray in express words for the Sovereign and all the royal family, at some time during divine service. The parties who are clandestinely married, must, by 1698, *C. 6.*, declare the names of the celebrator and witnesses, under high pecuniary penalties, and the witnesses are also to be fined in L. 100 Scots each. Those whose marriages were celebrated by persons not authorised by the church, had been also subjected by a prior act, 1672, *C. 9.*, to the loss of some of the rights consequent on marriage; the husband lost his *jus mariti*, and the wife her *jus relictae*; which statute, with several others enforcing conformity, that had passed in the reigns of Charles II. and James VII., were, after the Revolution, rescinded, by 1690, *C. 27.*, in the gross, without mentioning any of their contents: And it was adjudged, *Fount. Dec. 11. 1705, Carruthers*, (*DICT. p. 2252.*), that the first act 1672 was rescinded in all its parts by the last; and that consequently neither of these rights are now forfeited by a clandestine marriage¹⁴⁴. This judgment may receive some support from the favour of marriage, and the strict interpretation which ought to be applied to penal statutes; and likewise from this negative argument,

Clandestine marriage.

VOL. I.

2 I

that

¹⁴³ There have been several recent convictions in cases of this kind; *Rutherford and Hoggan*, 15th April 1812; *Rev Joseph Robertson*, 18th March 1818; *Macdiarmid*, April 1818,—cited 2. *Hume*, p. 461-3. Interlocutor of relevancy was also pronounced on an indictment against a Catholic Priest, for celebrating a marriage between a Protestant man and Catholic woman; he, as a Catholic priest, not being qualified to celebrate marriage. The case was actually carried to trial, but happily issued in a verdict of *not proven*; *Lamont*, Sept. 1815, 2. *Hume*, p. 461. It is impossible not to join in the censure which this last case forces from Mr Hume. "Doubts," says he, "may reasonably be entertained respecting both the justice and policy of such a prosecution, which places the members of the two communions in a very strange and distressing condition." The question, however, being brought before the Court, it does not appear, that, upon the statutes, any other than an interlocutor of relevancy could have been pronounced.

¹⁴⁴ The widow's claim to her *jus relictae* was again sustained in the case of a clandestine marriage; *Crawford's Trustees*, 20th Jan. 1802, *Fac. Coll.*, *DICT. p. 12698.*

Book I.

that in a poterior act 1698, C. 6. for making more effectual the former acts against clandestine marriages, the only two expressly confirmed by that statute are 1661, C. 34., and 1695, C. 12., without any mention of the act 1672. Yet in strict law it seems to carry some doubt with it; *first*, Because the rescissory act 1690 plainly appears, both by its rubric and general strain, intended merely to strike against the penalties inflicted upon non-conformity by the acts repealed; *2dly*, Because it is declared, by 1695, C. 12., that the acts formerly made against clandestine marriages (*acts* in the plural number) shall continue in force: Nevertheless, if the act 1672 be not included in the reckoning, there is but one statute to be found then enacted on that subject*.

Rights consequent on marriage, legal and conventional.

Communion of goods.

12. The rights consequent on marriage are either legal, which are conferred by the law itself, where there are no special stipulations between the parties contracting; or conventional, where the contractors settle their several interests by signed articles of agreement. It is the first sort only which is to be considered under this title. A man and woman, by entering into marriage, are joined in the strictest society or copartnery, which necessarily draws after it a communication of their mutual civil interests, (as far as is necessary for preserving the society), styled in our law, *the communion of goods*. This communion does not however extend to all subjects belonging to the married pair at their marriage. As the society entered into is to last no longer than the joint lives of the partners, rights that have a perpetual duration, and may be transmitted from one generation to another without perishing in the use, (which our law styles *heritable*), are not brought under the partnership; *ex. gr.* a land-estate, a tenement of houses, a right of tithes: Nay, a bond of borrowed money, if it carries interest, and so produces annual fruits, while the debt subsists, is, as to this question, accounted heritable †¹⁴⁵. Nothing therefore becomes common to husband and wife, but subjects which are of a temporary nature, and produce no yearly profits while they last; and which are therefore said by lawyers to be *simpliciter* moveable, or moveable in all respects.

Jus mariti.

13. By the common rules of society, the administration of the goods falling under communion ought to be vested equally in the husband and wife, who are the two *socii*. But as the wife is by nature itself placed under the direction of the husband, the husband hath by the law of Scotland the sole right of administering the society-goods. This right gets the name of *jus mariti*; and may be defined, that right or interest accruing from the marriage to the husband in the moveable estate, which either belonged to the wife at the marriage, or shall be acquired by her, standing the marriage. It is so absolute, that it bears but little resemblance to a right of managing a common subject: For the husband can by himself receive all the sums due to the wife which fall under the communion, and grant acquittances to the debtors; he can sell, and even gift at his pleasure, her whole moveable subjects, by any deed that is to

* The kirk-session have no title, under any of the statutes, to pursue for fines of clandestine marriage; Nov. 14. 1761, *Kirk-session of Dundee*, Dict. p. 2255.

† The bygones of an annuity which fell due during a wife's viduity, and before her second marriage, were found to fall under the *jus mariti* of the second husband, though the former contract of marriage bore, that this annuity was to bear interest from the respective terms of payment thereof; *Kilkerran*, HUSBAND AND WIFE, NO. iii., *Dunlop*, 23d Feb. 1739, Dict. p. 5770.

¹⁴⁵ *Vid. infr.* B. ii. t. 2: § 10.

to take effect during the marriage * ; and his creditors may attach them as his, for their payment : So that marriage carries all the characters of a legal assignation by the wife, in favour of her husband, of her whole moveable estate. Hence any moveable subject which, after the wife's death, shall be discovered to have belonged to her, falls to the surviving husband ¹⁴⁶ ; which it could not do, if the *jus mariti* imported barely a temporary right of administration during the marriage. As the fruits produced from heritable subjects, *ex. gr.* the rents of land, or the interests of money, are truly moveable, the husband must not only have the right of doing whatever is necessary for making the profits of his wife's heritage effectual, but he is as truly proprietor of them as he is of any other of her moveable subjects †. This absolute power in the husband over the moveable estate belonging to the wife, may be thought inconsistent with the notion of a communion of goods ; but it can be no matter of wonder, to find strong deviations in the society of marriage, from the nature of an ordinary copartnership ; since the husband's confessed superiority over the wife must necessarily give to this particular communion, properties very different from those which obtain in the ordinary contract of society.

14. It has been always an agreed point, that the conveyance of an estate by a stranger in favour of the wife, whether real or personal, under condition that it shall not fall under the husband's administration, effectually excludes the *jus mariti* ; for every proprietor may dispose of his own under such limitations as he shall think proper. And though the conveyance to a wife of a sum or yearly subject should contain no direct exclusion of the *jus mariti*, all are likewise agreed, that the husband can have no interest in it, if it be given for her maintenance or alimony ; because such provisions are so personal to the wife, for whose subsistence they are specially destined, that they cannot be transferred to the husband, nor of course be subjected to the diligence of his creditors, *St. B. 1. T. 4. § 9.* But the *jus mariti*, as to all subjects which truly fall under it, was considered, both by our supreme court, and by all our writers of the last century, except *Direlton, v. Jus mariti*, as a right so inseparable from the character of a husband, that all reservation of it by the wife, or renunciation of it by the husband, even in an antenuptial

This right may be renounced by the husband, or excluded by third parties.

* See on this head, *Fac. Coll. June 26. 1760, Campbell, Dict. p. 5944.*

† In case of the husband's bankruptcy, the wife has been found not even entitled to an aliment out of her own estate, falling under her husband's *jus mariti*, *Fac. Coll. March 8. 1794, Robb, Dict. p. 5900.*

¹⁴⁶ It was found, that a moveable succession opening to a wife during her husband's lifetime, though not vested in her by confirmation till after his death, did yet fall under the *jus mariti*, and so belonged to the husband's representatives ; *Pulteney, 18th Dec. 1807, Fac. Coll. Dict. v. HUSBAND AND WIFE, App. NO. VI.* But it has since been observed, that "the case of Pulteney cannot be regarded as a precedent, since it appears to have been decided upon special circumstances, and not to have been intended by the Court as a judgment on the abstract point of law ;" *per Lord Justice-Clerk, (Boyle), and Meadowbank, in Egerton, 27th Nov. 1812, Fac. Coll.* In this last case accordingly, the Court seemed generally to concur in thinking, that unless the property had actually vested in the wife during the husband's life, the *jus mariti* could not have effect ; and although, therefore, as in the prior case of Pulteney, the Court still found the *jus mariti* to extend to a moveable property which had fallen to the wife, but had not been confirmed during the husband's life, this was only on the special ground that that property was situate in England, by the law of which country it vested, *ipso jure*, from the instant of the ancestor's death, and without the necessity of any legal steps being taken for that purpose. Had the property not been held thus to vest *ipso jure*, the decision would have been different. See also *2. Bell, p. 88.*

tial contract, was ineffectual, and by the necessity of law returned to the husband; because that very reservation or renunciation fell under the *jus mariti*, as a moveable right conceived in favour of the wife, *St. ibid.* *; July 13. 1678, *Nicolson*, (DICT. p. 5834.). This doctrine, which springs from a mere subtlety, is irreconcilable to that *bona fides* which ought to prevail in marriage-contracts, and indeed to common sense; for all rights not unalienable may be renounced by those entitled to them, and the husband's right of administering his wife's moveable estate, is not accounted by the law of any other country so essential to him, but that he may divest himself of it. It is therefore now received as a settled point, both by our judges and writers, that a husband may, in his marriage-contract, renounce his *jus mariti* in all or any part of the wife's moveable estate, *June 23. 1730, Walker*, (DICT. p. 5841.); *Falc. and Kilkerran, Feb. 5. 1745, Trustees of Mrs Murray*, (DICT. p. 5842.) †¹⁴⁷. The *jus mariti* arises from the marriage *ex lege*, from an act of the law itself, and therefore needs no intimation, or other form, to its constitution, *Dec. 18. 1667, Auchinleck*, (DICT. p. 6033.). His being husband gives him a complete title to his wife's moveable estate.

What things are exempted from the *jus mariti*.
Paraphernalia.

15. From the *jus mariti* paraphernal goods are exempted. Over these the husband has no power: They are neither alienable by him, nor can they be attached for his debts. By the Roman law, the whole estate belonging to the wife continued her property, and was enjoyed by her as such after marriage, except the *dos* or tocher, of which, though it was to be returned to her on the death of the husband, he enjoyed the fruits while the marriage subsisted. Every subject belonging to the wife, *præter dotem*, or besides the tocher, was in that law styled *paraphernal*; and we also make use of the word to denote that kind of moveables which continues the wife's property notwithstanding the marriage. By a solemn decision, *Fount. Dec. 4. 1696, & Jan. 15. 1697, Dicks*, (DICT. p. 5821.) *paraphernalia*, as understood in the law of Scotland, are declared to include the whole *vestitus* and *mundus muliebris*; *i. e.* not only the lady's body-clothes and wearing apparel, but all the ornaments of dress proper to a woman's person, as necklace, ear-rings, breast or arm jewels, given by her husband to her at any time of her life, either before or standing the marriage. Things of promiscuous use to man and wife, *ex. gr.* watch, jewels, medals, plate, and even the repositories for holding *paraphernalia* ‡, are not paraphernal, unless they be made such by the bridegroom's giving them to the bride before or on the marriage-day; for if he should make a present to her of a subject not properly paraphernal the next morning after the marriage, the donation is revocable; of which see *infra*, § 29. *et seqq.* Things of this last kind are paraphernal only with respect to that husband who made them such; and therefore are esteemed

* Lord Stair's words are: "The very right of the reservation becomes the husband's *jure mariti*, and makes it elusory and ineffectual, as always running back upon the husband himself; as water thrown upon an higher ground doth ever return."

† It was found in the same case of Murray's trustees, that the husband can renounce his right of administration. See to the same effect¹⁴⁷, *Fac. Coll. March 4. 1774, Anand and Colquhoun*, affirmed on appeal, *March 23. 1775, DICT. p. 5844.*

‡ A lady's dressing plate was found not paraphernal; *Wigton, 7th June 1748, DICT. p. 5771.*

¹⁴⁷ The same was found under a deed of separation, both as to the *jus mariti* and right of administration; *Keggie, 25th May 1815, Fac. Coll.* The case of *Anand and Colquhoun*, referred to in note †, is not a case of renunciation by the husband, but of exclusion by the wife's father, in a settlement of his estate.

esteemed common moveables, if the wife, who had right to them, be married to a second husband, unless he shall in like manner appropriate them to her. The present frequently given to a wife by a purchaser of lands, for her renunciation of the life-right she had in the lands purchased, which is commonly styled *the Lady's gown*, hath by our customs the like nature and effects with goods properly paraphernal, *July 26. 1709, Lu. Pitfirran*, (Dict. page 579.) *

16. As the husband acquires by his marriage a right to the moveable estate belonging to his wife, he is liable in payment of the moveable debts contracted by her before the marriage, according to the rule, *L. 149, De reg. jur. Ex qua persona quis lucrum capit, ejus factum præstare debet*. And as this right is universal, extending to the universal *jus* of his wife's moveable estate, his obligation also reaches to her whole moveable debts, which, as some lawyers choose to speak, *transeunt cum universitate*, though they should far exceed her moveable estate †. But this burden suffers a restriction in point of time: As the obligation was created by contracting the marriage, it falls by its dissolution. And in truth the husband is not the debtor in his wife's debts even while the marriage subsists: In all actions for payment, the wife who continues debtor, notwithstanding the marriage, is the proper defender; the husband is made a party to the suit, merely for his interest; that is, as curator to the debtor; and he is made liable as having, under the name of administrator, the absolute disposal of the goods common to the debtor and himself. As soon, therefore, as the marriage is dissolved, and the society-goods suffer a division; the husband is no longer concerned in the share belonging to his deceased wife; and consequently he is no longer liable in payment of her debts, which the creditors must recover, either by a demand from her representatives, if she have any, or by legal diligence against her separate estate ¹⁴⁹.

Husband's obligation for the wife's debts, how limited.

17. This obligation upon the husband is perpetuated against him in the following cases: *First*, if complete diligence have been used upon his wife's debts, against his estate, real or personal, while

In what cases this obligation is perpetual against the husband.

VOL. I.

2 K

while

* The same found, *Kilk. HUSBAND AND WIFE*, NO. xvii., *Mungel*, Dict. p. 5771. Presents made to a lady on occasion of leases being let, or other bargains made by the husband, are not *inter paraphernalia*, but are considered as donations *quæ morte confirmantur*; *Ibid.* NO. xviii. *Douglas*, Dict. p. 6019.

† A husband is even liable for his wife's expense, incurred in a successful action of declarator of marriage, brought against himself; *Fac. Coll. Nov. 18. 1762, Macalister's agent*, Dict. p. 4036 ¹⁴⁰.

¹⁴⁸ Special costs had been decreed for in favour of the wife. But her agent having expended a large sum beyond what was covered by these, brought an action for the money thus laid out, not on the footing of costs, but "of money necessarily expended for a wife, and for which, as such, the husband is liable." The court accordingly subjected the husband.—It seems to be on something of the same principle, that the court awards interim allowances in name of aliment and expenses, to wives pursuing actions of separation and divorce; *vid. infr. not.* ¹⁵¹. And if the small interim sum, which was allowed in the case of *Anderson*, 3d March 1819, *Fac. Coll.* was given in consequence of the conclusion for exhibition, in a summons held incompetent as to every thing else, it may perhaps be inferred generally, that the same principle extends to every necessary action which a wife is forced to bring against her husband.

¹⁴⁰ Where the husband, *jure mariti*, uplifts and appropriates the rents of property belonging to his wife, over which property an annuity stands heritably secured, he takes the rents *cum suo onere*, and becomes debtor in the annuity during the period of his intromissions, so that, on the subsequent dissolution of the marriage by his death, his representatives are liable for any arrears then due; *Nison*, 18th Feb. 1806, *Fac. Coll. Dict. v. Liferenter, App.* NO. II.

while she was alive; for there the husband, as proprietor of the subject affected, must, by the common rules of law, either abandon his property, or relieve it from the burden with which it stands charged. Though, therefore, diligence have been commenced, during the marriage, against his land-estate, by summons of adjudication, or against his moveables by arrestment, the diligence will fall, unless it hath been also perfected before her death, by decree of adjudication, or of forthcoming, *Jan. 23. 1678, Wilkie*, (Dict. p. 5876.); *St. B. 1. T. 4. § 17. ** Nay, though decree hath been recovered against the husband for the debt during the marriage, yet if it has no relation to land, the obligation upon him will fall by the wife's decease, even supposing the utmost diligence to have been used upon it against his person, by imprisonment, *Dirl. 10. (Burnet, Dict. p. 5863.), § 2. ; Had. Feb. 26. 1623, Douglas*, (Dict. p. 5861.); because such decree, and all the personal diligence consequent on it, is directed not against the husband's estate, but against his person barely for his interest; and so ceaseth with his interest. *2dly*, If the wife's creditors have not been able to obtain payment, after her death, out of her share of the society-goods, or her other separate estate, the surviving husband continues liable to those creditors, though they should not have used the least step of diligence against him; not indeed *in solidum*, for the whole of their several debts, but *in quantum lucratus est*, in so far as he hath enriched himself, or been a gainer, by the marriage; for equity will not suffer him *locupletari cum damno alterius*, to retain any profit out of the wife's estate, by which her creditors are cut off from the natural and only fund of their payment. A husband is not accounted *lucratus*, who has got no more than an ordinary tocher by his wife; for a tocher is given for an onerous cause, *ad sustinenda onera matrimonii*: It is therefore the excess only which is *lucrum*; and that must be judged of by the rank and fortune of the two parties, *Dec. 23. 1665, Burnet*, (Dict. p. 5863.). The husband, because he was at no period the proper debtor in the sums due by the wife, is only liable in payment of them *subsidiarie*, if her own separate estate be not sufficient to clear them off; and therefore no action can lie against him as *lucratus*, at the suit of the creditors of his deceased wife, till the primary debtors, that is, the wife's representatives, be discussed, *Jan. 23. 1678, Wilkie*, (Dict. p. 5868.); *Pr. Falc. 54. (Earl of Leven, Dict. p. 3217.)*.

18. Where the wife was, prior to her marriage, debtor in such debts as would have excluded the *jus mariti* if they had been due to her, *ex. gr.* in bonds heritable by a clause of infestment, or even in moveable bonds bearing interest, the husband is not liable for the principal sums contained in those bonds, but merely for the interest remaining due at the marriage, or which may grow upon them during the marriage; because in bonds of that kind due to the wife, the husband would have been entitled to no more than that interest, and a husband's obligation for his wife's debts ought to be commensurated to the right he hath in her estate, *Fount. Jan. 10. 1696, Osborn*, (Dict. p. 5785.); *July 13. 1708, Gordon* (Dict. p. 5789.). But in the following instances, he is liable even for the principal sums contained in such bonds: *First*, Where he has been, by the marriage-contract, assigned to the *universum jus* of the wife, heritable as well as moveable; for if the husband be liable to pay his wife's moveable debts, in consequence of the legal right which

Husband not liable in such debts as, if due to the wife, would have excluded his *jus mariti*.

* *Vid. Fount. Nov. 16. 1698, Bryson, Dict. p. 5869.*

which he acquires by marriage to her moveable estate, he ought, by the same reason, to be subjected to her whole debts, where he accepts of a present conventional right to her whole estate, *Jan. 24. 1738, Dick*, (DICT. p. 5857.). *2dly*, The husband, where he is *lucratus*, is bound for his wife's debts of whatever kind, in so far as the *lucrum* goes, if she has no separate estate for the payment of her creditors; for the principle on which that obligation is grounded is equally strong and forcible, whether it be applied to debts which carry interest, or to those that are simply moveable, *Fount. Jan. 23. 1708, Lesly*, (DICT. p. 5853.).

19. The husband acquires by the marriage, a power over both the person and estate of the wife. Her person is in some sort sunk by the marriage; so that she cannot act by or for herself: And as for her estate, she has nothing that can be truly called her own, where matters are left to the disposition of the law; for not only her personal, but the rents of her heritable estate, and the interest of her bonds, become the property of the husband. In consequence of this power, *first*, The husband can recover the person of his wife from all who shall withhold or withdraw it from him: Nay, her person, while she is *vestita viro*, is free from all execution upon debts contracted by herself; which, by her coverture, she becomes disabled to pay, *Fount. Jan. 11. 1704, Gordon*, (DICT. p. 5787.). At the same time the husband, who is not the proper debtor, is liable to personal diligence at the suit of her creditors, so long as the marriage subsists. But notwithstanding this power in the husband, execution may be used against a wife's person, to compel her to the performance of facts which are in her own power, and cannot be validly performed but by herself; *ex. gr.* to enter the heirs of her vassals, to receive adjudgers in lands holden of herself, or to exhibit writings in her own custody, upon letters of diligence, *St. B. 1. T. 4. § 14. 2dly*, As the wife is incapable of acting for herself, the husband is laid under an obligation to provide for her; not only to supply her with the necessaries of life, but with its conveniencies and comforts, suitable to his rank and estate. Upon this principle, where the use of the waters at Bath, or in any foreign country, is judged necessary for the wife's health, the husband, if his fortune can afford it, is made liable in repayment of the sums borrowed by her from her relations or acquaintance for defraying the expense of the journey, *Fount. July 19. 1711, La. Kinfauns*, (DICT. p. 5882.). As it is the wife's duty to live in family with her husband, he cannot be compelled to maintain her in a separate house; yet, if he should either abandon his family, or turn his wife out of doors, or by barbarous treatment endanger her life, or even offer such indignities to her person as must render her condition quite uncomfortable, the judge will, on proper proof, authorise a separation *a mensa et toro*, and award a separate alimony to her, suitable to her husband's fortune, to take place from the time of the separation, and to continue till there shall be either a reconciliation between the parties, or a sentence of divorce *¹⁵¹.

Husband's
power over the
person of his
wife.

20. It

* See *Colquhoun, March 7. 1804, DICT. App. NO. V. voce HUSBAND AND WIFE* ¹⁵⁰.

¹⁵⁰ In this case, the husband having required his wife to leave his house, without assigning any reason, the Court refused to interpose by an interdict to keep her in possession; holding the only remedy to be "a claim for aliment, and the right of suing for adherence."

¹⁵¹ The Court, during the dependence of an action of separation, "decerned an interdict to keep her in possession, and to continue till there shall be either a reconciliation between the parties, or a sentence of divorce" ¹⁵¹ rim

BOOK I.

He is the wife's curator.

20. It arises from this *potestas maritalis* that the husband becomes, by the usage of Scotland, curator to his wife. He was, by the Roman law, incapable even of being named his wife's curator by a magistrate, *L. 2. C. Qui dar. tut.*, lest the wife, either through affection or fear, should be backward to call him to account. But this reason, in so far as concerns the goods in communion, can have no place in our law, which authorises the husband to manage them without account. It is said by Lord Stair, *B. 1. T. 4. § 13.*, and after him by Sir George Mackenzie, § 11. *h. t.*, that the husband is both tutor and curator to his wife: But women are set free from the power of tutors at the age of twelve; and till they arrive at that age they are incapable of marriage. Sir James Steuart, *v. Curator*, affirms, that on the marriage of a female minor, who had before been under curatory, the former curatory, though it expires in as far as relates to her person and personal estate, which fall under the husband's power, yet still subsists as to her heritable estate: But it is the more common opinion, that the moment that the husband's right of curatory commences, the office of the former curators expires *in toto*.

She therefore can neither sue nor be sued, unless the husband is a party in the action.

21. In consequence of the husband's office of curatory, *first*, no suit can proceed against the wife, till he be cited as defender, for his interest*; and if the husband hath not his domicile within the territory of the inferior judge before whom the cause is brought, application must be made by the pursuer to the Court of Session, who of course grant letters of supplement, as a warrant for the husband's citation. If the suit be brought before an inferior judge, against an unmarried woman, who marries during the dependence, and whose husband is subject to his jurisdiction *ratione domicilii*, he may be made a party to it, by letters of diligence proceeding on the warrant of that judge, *Spottis. Baillie, p. 154 †*. But if he be not subject to that jurisdiction, letters of supplement are

* See *Kilk. HUSBAND AND WIFE, NO. ii. Dict. p. 6080*. It has even been found, that a wife pursued for a delict, could not waive the defence, That the husband was not called, *Ibid. NO. xv. Dict. p. 6080*.

† The words of Spottiswood are; "A woman being summoned in the principal summons, if thereafter she marry, (because a wife cannot answer unless her husband be summoned), the pursuer, commonly by a bill meaning himself to the Lords, gets the summons continued against her husband, as if he had been summoned in the beginning. This was found between Margaret Baillie and Janet Robertson."

"rim aliment to the wife for carrying on her process;" *Cramond, 25th Jan. 1756, Dict. p. 5886*. But more recently, such interim allowance was refused, as premature, "to a wife who had only commenced an action of separation," *Maxwell, 5th March 1808, Fac. Coll. Dict. v. HUSBAND AND WIFE, App. NO. VII*. Here, however, the husband offered to receive her back into his family, and perhaps the Court considered it a preliminary requisite, that, at least, something like a *prima facie* case should be made out against him.

In a process of divorce, whether at the wife's instance against the husband, or *vice versa*, it is quite undoubted, that the wife is entitled to interim aliment; *Lady Lenox, 23d March 1719, Dict. p. 5877*; *Cunningham Fairlie, 4th Feb. 1813, Fac. Coll.* Nay, where decree of divorce has actually been pronounced against the wife, she has been found entitled, upon bringing a reduction of this decree, "to an aliment, and to the expense of the process of reduction, till the date of the final interlocutor repelling the reasons of reduction;" *De la Motte, 9th Feb. 1789, Fac. Coll. Dict. p. 447*.

In a late very peculiar case of declarator of marriage, it was found, that a woman having, by the acts and deeds of the husband himself, and particularly by a regular power of attorney executed in her favour, been placed in the *status* of his wife, is entitled to aliment during the dependence of the cause; *Sassen, 20th Jan. 1819, Fac. Coll.*— See also *ante, Not. 148*.



are necessary, which must be granted by the court of session; and get that name, because they are designed to supply the want of jurisdiction in the inferior judge, by the interposition of our supreme and universal civil court. Neither, *2dly*, can the wife sue in any action without the concurrence of the husband ¹⁵². If the husband without reason refuse to concur, *Falc. i. 235*, and *Kilk. HUSBAND AND WIFE, NO. xiv. (Dict. p. 6051.)*, or shall be incapable of concurring, on account of any disability, either legal, as forfeiture; natural, as fatuity; or accidental, as residing for the time in a foreign country; or if the suit is to be brought against her own husband, for securing to her the stipulations in her favour, contained in the marriage-contract, *Fount. Feb. 17. 1703, Scot. (Dict. p. 6050)*, the judge will of course authorise any person she is pleased to recommend, to concur with her, and carry on the action in her name, *Jan. 9. 1623, Marshall, (Dict. p. 6036.)*. Yet a wife is not to be authorised to sue her husband, except in necessary or urgent cases, *ex. gr.* if he be *vergens ad inopiam*, *Fount. Nov. 16. 1704, Ross, (Dict. p. 6050.) **, or if he has wilfully diverted from or thrown off his wife, *Dec. 21. 1626, La. Foulis, (Dict. p. 6158.)*. Process is sustained at the suit of the wife, though no curator be authorised, where she sues her husband after separation, for payment of a yearly sum which he had agreed to give her in name of alimony, *Fount. Nov. 7. 1695, E. Argyll; (Dict. p. 6054.)*; for if her person be in that case so far recovered from her husband's power, that she is capable of enjoying the property of an alimentary provision, she must also be capable of holding plea for the recovery of that provision ¹⁵³. To save the trouble of applying to judges for the authorising of such actions, care is generally taken, in marriage-contracts, to name some of the wife's nearest kinsmen, at whose suit execution may pass against the husband, for performing his part of the articles.

22. It also proceeds from the curatorial power of the husband, that all deeds done or granted by a wife without his consent are in themselves null, though they should relate to her own property, and make no encroachment on any right competent to the husband; see *infr. § 27* ¹⁵⁴. The rule, That wives are under the curatory of their husbands, is applicable even to brides; for though a bride be truly *sui juris* while she continues unmarried, yet, on her actual marriage, the husband's curatorial powers draw back to the time of

All deeds done by the wife are null without his consent.

VOL. I.

2 L

proclaiming

* *Fac. Coll. Jan. 18. 1773, Macpherson, Dict. p. 6052.*

¹⁵² On the other hand, the husband cannot sue in the name and right of his wife without her concurrence; of which, accordingly, the defender may oblige him to produce evidence; *Aitkins, 11th Feb. 1802, Fac. Coll. Dict. p. 16140.*

¹⁵³ A wife may use caption against her husband for the arrears of a separate aliment due to her; *Maclachlan, 25th May 1809, Fac. Coll.* It would appear, however, from a case abridged in the Folio Dictionary, that, "once, the Lords gave their opinion, that no action nor no diligence can proceed betwixt man and wife while the marriage subsists;" 1. *Fol. Dict. p. 406, Hamilton, 11th Jan. 1625.* But, *quære*, on comparing the abridged case with the principal report, *Durie, p. 155, Dict. p. 6048*, how far the former is not stated too broadly. A contrary decision was, at any rate, soon afterwards pronounced; *Lady Glenbervie, 13th July 1638, Durie, Dict. p. 6053.*

It was recently found, that a husband, on shewing cause, may get a caption on letters of lawburrows against his wife; *Thomson, 7th March 1815, Fac. Coll.*

¹⁵⁴ But this curatorial power, or right of administration on the part of the husband, may, as well as the *jus mariti*, be renounced by himself, or, (in regard to any property specially conveyed in favour of the wife), be excluded by third parties; in which case, the deeds of the wife alone are effectual. *Vid. ant. § 14., notes † and* ¹⁴⁷.

proclaiming the bans ; after which, the bride is disabled from contracting debts, or granting deeds not only to the prejudice of her future husband, but her own. She cannot, therefore, after the proclaiming of bans is begun, contract any debt which will be effectual either against herself or the bridegroom ; nor can she dispose of any part of her estate in donation, or even as a provision to her children of a former marriage, without his consent, *Dirl.* 13., (*Lady Bute*, *DICT.* p. 6030.) ; though he cannot properly be said to suffer prejudice by such provision or donation, since he is brought under no obligation to pay, and only loses the hope of what might have otherwise been his upon the marriage. Yet it is not sufficient for this purpose, that the bans have been published at the bridegroom's parish-church ; for no notification, by publishing bans, can interpell a person from contracting with any woman, unless it be made within the parish-church where she herself dwells. Besides, bans ought to be published in the specific terms of law ; the law refers to the order of the church, 1661, *C.* 34., and the church hath required their publication in the parish-churches, both of the bridegroom and of the bride, *supr.* § 10. ; *July 8. 1623, Macdougall*, (*DICT.* p. 6027.). But if the person contracting with the bride knew, before executing the deed, that her bans were proclaimed in a church, though not that of her own parish, such private knowledge is, in the judgment of law, accounted an interpellation with respect to him.

In what respect this curatory differs from that of a minor.

23. In the following particular, the legal curatory of an husband differs from common curatory. Curators are given to minors, solely for the minor's benefit, not their own ; and therefore they cannot, by any interposition of their authority, give strength or validity to any deeds of the minor in which they themselves have a direct interest ; but a husband can give a legal effect to deeds of that sort granted by the wife ; for the husband's consent is required, not because the wife is incapable of judging for herself, (for no incapacity can be alleged against such at least as are of perfect age), but because she is under the power of the husband ; and as his curatorial powers arise in part from his superiority over the wife, and so are to be considered as a mutual benefit to both, it would be unjust to wrest that authority which is vested in him partly for his own benefit, to his prejudice, by rendering him incapable of receiving any present or donative from his wife. It has therefore obtained in practice, that in all cases where the consent of the husband would be necessary, if the deed were to be granted by the wife in favour of a third party, his simple acceptance or intervention equally authorises it if it be granted in favour of himself. Thus, in postnuptial contracts, or in renunciations by the wife of her liferent, or in pure donations to the husband, there is no necessity of a formal interposition of his authority ; his barely intervening as a party in the postnuptial contract, or his acceptance of the renunciation or donation, implies his authority, and consequently is sufficient to give force to the deed. This doctrine is universally held to be just where the wife is major ; but if she be minor, it admits of a doubt, whether she can execute any deed in her husband's favour, since no minor has a power of granting deeds without the consent of his curator, and no curator to a minor can be *auctor in rem suam*. There is this other difference between the curatory of a husband, and that to a minor, that the wife's contracts *after majority*, authorised by her

her husband, are not only valid, but not subject to challenge upon lesion¹⁵⁵.

24. There are some obligations granted by the wife during marriage, which require the husband's consent; others are valid without it; and a third sort are null, though his consent be interposed. Obligations arise either from delict or contract. Obligations formed by the wife's delict, stand good against herself, because marriage affords no indemnity to delinquents; but they have no operation against the husband, unless he be convicted of accession to the crime or delict which produced the obligation; for delicts, being personal, ought to draw no punishment on the innocent; *Culpa teneat suos auctores*. The effect of such obligations is in several respects limited even as to the wife: For though her person be under the power of the law, so as she may be banished, imprisoned, or even punished capitally upon a criminal trial; yet where the punishment resolves into a pecuniary fine, neither can her person be attached for the payment of it during the marriage, because she is by her coverture utterly disabled from paying*; nor the goods in communion, because these are the property of the husband, who is not liable †: Diligence must therefore be suspended till the dissolution of the marriage, except as to such heritable estate of the wife as is not subject to the *jus mariti*, *Edg. July 2. 1724, Murray*, (Dict. p. 6079.); *Home, 105. Kilk. HUSBAND AND WIFE, NO. I.* (Dict. p. 6079.).

25. As for obligations arising from contract, our law hath been so solicitous to protect wives from imposition while they are *sub cura mariti*, as to declare all personal obligations granted by the wife, though with the husband's consent, to be *ipso jure* void; *ex. gr.* bonds, bills, promissory-notes, obligatory receipts, contracts, &c. for whatever cause they may have been granted, whether for borrowed money, the price of goods, or as cautioner for others; because her person being *quodammodo* sunk in that of her husband, is not a proper subject of obligation ‡. For this reason, personal obligations granted by a wife do not acquire force even by her judicial ratification of them, *Feb. 18. 1663, Birch*, (Dict. p. 5961.); for deeds in themselves null cannot be rendered effectual by any ratification, (though they may, by acts of homologation performed by the granter after becoming *sui juris*, *infr. B. 3. T. 3. § 47.*): and indeed this doctrine is necessary for the security of women clothed

TITLE VI.

Obligations arising from the wife's delict.

Personal obligations even with the husband's consent are null.

* *Fac. Coll. Feb. 19. 1790, Chalmers*, Dict. p. 6083.

† It was found in the above case of Chalmers, that neither the effects nor person of the husband can be affected for sums awarded against his wife in name of damages and fine. The husband was, however, found liable personally for the expenses of process and extract; but this last part of the judgment was reversed on appeal; *April 6. 1791, Dict. p. 6086*¹⁵⁶.

‡ Such obligations cannot even be the foundation of diligence against the wife's separate estate; *Fac. Coll. Dec. 8. 1761, Menzies*, Dict. p. 5974.; *Dec. 10. 1772, Watson*, Dict. p. 5976.

¹⁵⁵ It is the reverse as to contracts, &c. executed by a married woman before majority, she having the same right of challenge, in this case, as other minors; *Gibson, 6th June 1809, Fac. Coll.*

¹⁵⁶ It was reversed, however, under the modification, that the husband, as *dominus litis*, was "responsible for the conduct of the cause, in so far as the same is malicious, vexatious, and calumnious." And accordingly the judgment of the House of Lords "remitted back to the Court of Session, to inquire how much of the expenses of process and extract has been occasioned by the conduct of the defender in the said cause;" Dict. p. 6086.

clothed with husbands. But this rule admits of several exceptions. *First*, Where the wife gets a separate *peculium* or stock, either from her father or a stranger, for the maintenance of herself and children, which is by the grant exempted from the *jus mariti*, she can lawfully charge or burden that stock, and bind herself for sums of money, in so far as it extends, *Dirl.* 164. (*Neilson*, *Dict.* p. 5984.)¹⁵⁷. By stronger reason, *2dly*, Where there is a legal, or even voluntary separation of the husband and wife, and the husband hath settled a yearly sum for the wife's separate maintenance, her personal obligations during their separation are effectual against her; yet not so as diligence may proceed on such obligations against her person; since no wife can be subjected to personal diligence upon a civil cause, even after either legal or voluntary separation, till the marriage itself be dissolved by divorce*. These obligations contracted by the wife after separation, cannot in the least degree affect the husband; for by his securing a yearly annuity for her maintenance, he fulfils the natural obligation the marriage laid him under to provide for her; and therefore the creditors, who continue to deal with her, contract upon her faith solely.

Where the wife is *præposita negotiis*.

26. Where the wife is *præposita negotiis* by the husband,—intrusted with the management, either of a particular branch of business, or of his whole affairs,—all the contracts she enters into in the exercise of her *præpositura*, and even the debts due by her for the price of goods, though they should not be constituted by writing, but arise merely *ex re*, from furnishings made to her, are effectual; but such obligations have no force against herself, for she acts not in her own name, but against her husband, who gave her powers to act, and who must on that account be bound by her deeds. A *præpositura* may be constituted, either expressly by a written commission or factory, or tacitly, when the wife has been in use, for a tract of time together, without a formal mandate, to act for her husband, while he either approves of her management by fulfilling her deeds, or at least, being in the knowledge thereof, connives at or acquiesces in it, *Dirl.* 319, (*Wilson*, *Dict.* p. 6021.). With regard to disbursements necessary for a family, the rule is, that the wife, who is formed by nature for the management within doors, is presumed, while she remains in family with her husband, to be *præposita negotiis domesticis*. In this character she hath power to purchase whatever is proper for the family; and the husband is liable for the price, even though what was purchased may have been applied to other uses, or though he may have given the wife a sum of money *aliunde*, sufficient for the family-expense, *Dirl.* 310, (*Dalling*, *Dict.* p. 6005.); *Harc.* 871, (*Alston*, *Dict.* p. 6007.) †. This *præpositura* ceaseth, *first*, By the wife's delict; for if she should abandon her husband's family, and take up her residence elsewhere, she can be no longer

* Where a husband had left Scotland in bankrupt circumstances, his wife, who had entered into trade, was found liable to personal diligence for debts contracted after his departure; *Fac. Coll.* July 11. 1789, *Churnside*, *Dict.* p. 6082.

† But the wife herself does not become bound by such family transactions; *Fac. Coll.* Dec. 12. 1780, *Mitchelson*, *Dict.* p. 5886.

¹⁵⁷ In his smaller work, our author says, "she may grant obligations *in relation to such stock*;" *Principles*, h. t. § 15.

Such stock cannot be affected by the wife's *cautionary* obligation—even for her own son; "the only way in which a wife's personal obligation can be made good, is by shewing that the money has been *in rem versum* of the wife;" *Harvey, &c.*, 21st Feb. 1791, *Dict.* p. 5980.

longer looked upon, either as manager of the family, or as being under the husband's protection; and so hath no longer power to oblige him to the payment of any of her debts, except those that she may have contracted for her necessary subsistence, *July 6. 1677, Allan*, (DICT. p. 6005.). *2dly*, It ceaseth by the husband depriving the wife of the management of his family. This is effected by inhibition; which is a remedy competent to every husband whose wife discovers an inclination to live beyond his fortune. It is obtained upon a bill or petition preferred to the court of session, and prohibits all persons to contract with the wife, or give her credit. As the wife's *praepositura* falls by the perfecting of this diligence, according to the forms observed in common inhibitions, *infra, B. 2. T. 11. § 4. et seq.*, the husband is not liable for any debt contracted by his wife after inhibition, except for such furnishings suitable to her quality, as he cannot prove that he provided her in *aliunde*, *Gosf. June 23. 1675, Auchinleck*, (DICT. p. 5879.); *July 25. 1676, Campbell*, (DICT. p. 5879.). As the wife's right of managing her husband's family is founded entirely on the presumption that he placed her in the direction, and as every one may remove his managers at pleasure, without assigning any reason for it, inhibition may pass against the wife, *etiam causâ non cognitâ*, though the husband should not offer to justify that measure by any actual proof of her bad economy, or profuseness of temper, *Falc. i. 209. Kilkerran*, HUSBAND AND WIFE, N° xii. and xiii. (DICT. p. 6024, and 6025.)—Hitherto of personal obligations.

27. All obligations granted by the wife, either charging, or even alienating, any estate or subject, of which she retains the property exclusive of the *jus mariti*, whether proper heritage, or bonds bearing interest, are effectual, provided the husband as curator consent to them: For though a wife cannot oblige her person, which is in some sort sunk by the marriage, she continues capable of holding a real estate, and her *paraphernalia*; and in grants or obligations relative to subjects which are her own property, her estate is solely considered, and not her person. Such obligations are valid, even where they are accessory to a personal obligation, though it be certain that personal obligations granted by a wife have no degree of force, *Harc. 878, 882, (Marshall, DICT. p. 5990, and Sommervell, DICT. p. 5991.)*. Nay, though the obligation be in its form merely personal, yet if, by a backbond or defeasance of the same date, it shall be restricted to her heritage, it will be effectual, *Jan. 23. 1678, Bruce*, (DICT. p. 5965.); for by such backbond the nature of the obligation, of which the backbond makes a part, is in effect changed, and continues no longer personal¹⁵⁸. If the wife can, with the husband's consent, grant securities upon or even make over her heritage to a stranger, she may with the same consent grant leases of it: But it may be doubted, whether she can do this, or indeed any act of administration relative to her heritage, without his consent, notwithstanding a decision, *Fount. Feb. 21. 1679, Cockburn*, observed in *Dict. i. 401.*, (DICT. p. 5795 and 5998.); for though the *jus mariti* extends not to the heritable subjects themselves, yet the husband's consent to the granting of leases, removing of tenants, and other acts of administration exercised by the wife, appears indispensable, on account of his office of curator, under which character he

What obligations she may grant with the husband's consent.

¹⁵⁸ This decision, however, it is observed by Fountainhall, "deserves to be again considered;" DICT. p. 5966.

must interpose in all her deeds, whether respecting heritage or moveables¹⁵⁹. This is so true, that if the wife should, without his consent, make a grant of lands, though with the reservation of the husband's *jus mariti*, and the courtesy, the grant would be void; for he is her guardian, for security of her and her heirs, as well as for himself. Upon this ground, though paraphernal goods are not subject to the *jus mariti*, being truly the wife's property; yet the husband's right of curatory extends over them, in the same manner that it does over her proper heritage; so that she can do no deed by which they may be affected, without his consent. Hence, if the wife should impignorate any paraphernal subject, in security of a debt contracted by herself without the husband's consent, the subject continues the free and unburdened property of the wife, notwithstanding the impignoration, which being null for want of his consent, can create no real security to the creditor, *July 11. 1735, Gemmil*, (Dict. p. 5997.)*. But a wife may effectually impignorate her *paraphernalia*, in security of a debt contracted by the husband, even without his consent; because that is accounted a donation by the wife to the husband, which requires not any formal interposition of his consent, *supra*, § 23. Where the husband is, from furiosity, or other disability, rendered incapable of interposing his consent as curator, the necessity of the case may support a deed granted by the wife alone, affecting her heritage, if it be rational.

Her power of making deeds *mortis causa*.

28. The wife's powers in making grants which are not to take effect till after her death, are more ample; because the husband's interest ceaseth before such grants or deeds can have the least operation. Perhaps she cannot, in the form of a writing *inter vivos*, dispose of or burden such moveable subjects as may accrue to her on the death of her husband, though his interest be then at an end; because no subject can be conveyed effectually by a present deed of alienation, to which the granter has not a proper right at the date of the grant; and the wife has no more than the hope or prospect of a right to the goods in communion while the marriage subsists: see *Dec. 19. 1626, Matthew*, (Dict. p. 5959.). But she can bequeath her share of these goods by testament, even without the husband's consent, in the same manner that a minor can test without the consent of his curators. And she may, upon the same ground, become bound for a sum of money, in the form of a deed *inter vivos*, if it be not to take effect till after her death, *Feb. 1720, Colquhoun*, (Dict. p. 5973.). Though minors are, from the weakness of their judgment, and instability of their inclinations, incapable of settling the succession of their heritable estates, yet wives, those at least who are of perfect age, against whom unripeness of judgment cannot be objected, may, it is thought, lawfully execute such settlements, even without their husbands' consent; for no reason occurs, why his consent should be necessary to deeds, which can neither affect his interest, nor have the least operation till his *potestas maritalis* be at an end.

Donations *inter virum et uxorem* are valid, but revocable.

29. All deeds, whether granted by the wife to the husband, or by

* Compare *Pringles, July 1711*, Dict. p. 5970¹⁶⁰.

¹⁵⁹ Unless where his right of administration has been renounced or excluded; as to which, *Vid. ant. not.*¹⁴⁷.

¹⁶⁰ Which, however, besides being a prior case, and therefore derogated from by the subsequent decision referred to in the text, is noticed by Fountainhall as carried "by a scrip plurality;" Dict. p. 5973.

by him to the wife, importing a donation. are indeed valid ; but may, both by the Roman law and ours, be revoked or voided by the donor, at any time of his or her life ; lest either of the two spouses should, by ill-judged testimonies of their affection, undo themselves or their families, *Reg. Maj. L. 2. C. 15. § 10, 11. ; L. 1. De don. int. vir.* Deeds, though gratuitous, executed by the husband or wife to a third party, are not revocable, not even a ratification by the husband of a disposition granted by the wife in favour of her children of a former marriage, *Jan. 15. 1669, Hamilton, (Dict. p. 6107.)* ; see also *July 12. 1671, Murray, (Dict. p. 5689.)* ; because these are not donations between the two spouses. But a deed, the only genuine intention of which is to convey a gratuitous right from one of the spouses to the other, though it be granted nominally, or in trust, to a third party, is, notwithstanding that mask, subject to revocation, *Feb. 1. 1728, Sanders, (Dict. p. 6108.)* : *Plus enim valet quod agitur, quam quod simulate concipitur.* And, on the other hand, an obligation, though it should be granted by one of the spouses directly to the other, and even truly intended for the benefit of the grantee, is nevertheless secure against revocation, if it contain a right, even gratuitous, in favour of a third party, *Spottis. L. Hislide, p. 155, (Dict. p. 6087.)*. And hence it would seem that a wife's impignoration of any paraphernal subject, in security of a debt contracted by her husband, which truly constitutes a donation by her to her husband, cannot be revoked ; because the husband's creditor, who is a third party, acquires a direct interest by the impignoration, which ought therefore to subsist irrevocably as to him ; see *Dalr. 170, (Clerk, Dict. p. 5996.)*. Donations, where they are antenuptial, fall not under this description ; for the parties are not husband and wife till marriage ; consequently, not only are paraphernal donations irrevocable, but even gratuitous bonds granted by the bridegroom to the bride at any time before marriage, *Harc. 888, (Gordon, Dict. p. 6097.)*. All donations are thus revocable, in whatever form they may be constituted. Craig indeed affirms, *Lib. 1. Dieg. 12. § 38.*, that though a gratuitous disposition by a husband to his wife, of lands to be holden of himself, be subject to revocation ; yet his resignation or surrender of lands to the superior in her favour cannot be revoked : And he repeats the same doctrine, *Lib. 3. Dieg. 1. § 34.*, in the case of a wife's surrender in favour of her husband. But the distinction made in this question between the effects of a base right, and a resignation or surrender, is not supported by either reason or authority : It defeats the plain intention of the law, by opening a way to make all donations between the husband and wife, of heritage, irrevocable ; and it seems to have been disapproved of by our lawyers, who do not so much as use it as an argument for securing such surrenders against revocation, *Harc. 883, (Stewart, Dict. p. 6096.)*.

30. Donations are grants which arise from the mere liberality of the giver, without any antecedent cause or obligation. Hence, *first*, mutual remuneratory grants between the spouses, made in consideration of each other, are not revocable, *Jan. 26. 1669, Chisholm, (Dict. p. 6137.)*, where there is any reasonable proportion between the value of the two ; for as trifling inequalities ought to be overlooked in the transactions of those who are so closely united, the excess on the one side ought to be considerable, in order to found the party who

Remuneratory grants fall not under this description, nor settlements in contracts of separation.

who is hurt in a right of revocation, *L. 28. § 2. De don. int. vir.** 161. But where an onerous cause or remuneration is simulated, and a donation appears truly intended, the grant is revocable as a pure donation. Hence, *2dly*, grants, given in consequence of a natural obligation, are not subject to revocation. Thus, as it is the husband's duty, where there has been no previous written contract, to make a rational provision for his wife, in the event of her survivance, such provision is not revocable; and if it should be immoderate, it might be revoked only *quoad excessum*, *June 27. 1677, Short*, (*Dict. p. 6124.*) †. And though it be no proper part of a wife's duty to provide for her husband, yet a postnuptial settlement of her estate, in favour of him and the issue of the marriage, if it shall appear rational, will probably stand secure against revocation; see *July 25. 1710, Chalmers*, (*Dict. p. 6056.*) But where the interest of the husband and wife have been settled by antenuptial contract, postnuptial deeds are revocable, in so far as they either add to or diminish the provisions of the first contract, without a valuable consideration on the other part: For every such provision, adding to the wife's prior settlement, is a donation by the husband to her; and every deed by which the wife renounces the least share of her former provision, is a donation by her to the husband. *Diri. 368 †; Jan. 1724, Exec. of Bairnsfather*, (not reported). Every bond or disposition granted by the husband to the wife is not presumed to be gratuitous, nor consequently to be used as a cover to a donation: For many instances occur, in which a husband may truly become his wife's debtor, *ex. gr.* by intermeddling with such of her effects as fall not within his *jus mariti*, &c. And if it is to be held for law, that the husband cannot, by any deed or declaration, establish a charge against himself in such cases, the consequence must be, that the wife lies under the necessity of accepting one for her curator, who cannot by any deed effectually bind himself to account for his intromissions. In a question therefore concerning the validity of such bond or obligation, the mention, in the recital, of any probable occasion by which he became his wife's debtor, is sufficient to support it as onerous, and not revocable by the granter, if the fact be not disapproved by legal evidence. In such case, however, it may be prudent for the wife to preserve some written voucher, in proof of the truth of that affirmation in the recital; lest the granter should afterwards, upon a revocation, allege, and offer to prove, that the inserting of it was intended merely as a cover to the donation. All voluntary contracts of separation between husband and wife, by which the husband settles on her a fixed annuity for her maintenance,

* The contrary found where the remuneration was not the inductive cause of the *donatio*, but arose afterwards from the act of the law; *June 17. 1774, Watson, Dict. p. 6103.*

† It was found, that a husband who had nothing to provide his wife in, and who, upon that narrative, had, in a postnuptial deed, renounced his *jus mariti* in favour of her and the children of the marriage, could not revoke the renunciation as a *donatio inter virum et uxorem*; *Kilk. HUSBAND AND WIFE, NO. xvi. Macpherson*. A postnuptial contract of marriage, between labouring persons, providing that the longest liver shall bruike all, found to be revocable as *donatio inter virum et uxorem*, where the whole property of any consequence, both at the date of the contract, and at the dissolution of the marriage, consisted of a house belonging to the husband; *Steven against Dunlop, Feb. 1. 1809, Fac. Coll.*

† *Leslie against Fletcher, July 5. 1676.*

¹⁶¹ A strong decision upon this principle was pronounced by the House of Lords, reversing a judgment of the Court of Session, which had found the contract to be "in substance a gratuitous settlement;" *Hepburn, 6th June 1814, 2. Dow, p. 342.*

maintenance, were, by our more ancient practice, null from the beginning, as contrary to one of the essential duties of marriage, *viz.* the adherence of the married pair to one another, *Feb.* 11. 1634, *Drummond*, (DICT. p. 6152.). But by our later decisions, they are effectual during the whole period of the separation, as being granted by the husband, in consequence of his natural obligation to maintain the wife ¹⁶². But they are revocable, and accounted actually revoked, so soon as he shall offer to receive her again into his family, *Feb.* 6. 1666, *Livingston*, (DICT. p. 6153.), unless the separation shall have proceeded from harsh usage, or other reasons sufficient to found a legal or judicial separation * ¹⁶³.

31. Donations between husband and wife may be revoked, either expressly or tacitly. Expressly, by an explicit declaration of the donor's will to revoke. Where the donation is constituted by writing, it ought to be revoked also by writing; both in respect of the rule, *L. 35. De reg. jur.*, and because by the genius of our law the effect of written deeds is not, in the common case, to be taken off by the testimony of witnesses. This revocation may be signed *etiam in articulo mortis*: And at what time soever it may have been signed, whether upon deathbed, or in a state of health, there is no necessity for the donor to make it known to the other spouse. A donation may be tacitly revoked by any deed of the donor inconsistent with the gift, *ex. gr.* if the donor shall make over absolutely to another the subject gifted, *L. 12. C. De don. int. vir.*; for by that conveyance he is understood to resume the property from the donee to himself, and in the character of proprietor to transfer the right to another. But a right of annualrent, or other security, with which the donor has charged the subject to a creditor, or any third person, imports not a total revocation of the gift; for the law, which presumes always *in dubio* for the donation, *L. 32. § 4. De don. int. vir.*, considers the donor to have in that case resumed the property

Donations may be revoked either expressly or tacitly.

VOL. I.

2. N

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* In such a case, the voluntary contract of separation is no bar to the wife bringing an action for judicial separation *a mensa et toro*; *Fac. Coll. Nov.* 28. 1797, *Lawson*, DICT. p. 6157.

¹⁶² Upon this principle, as already laid down in the text, (*supr.* § 21.) process is sustained at the wife's instance, "where she sues her husband, after separation, for payment of an yearly sum which he had agreed to give her in name of alimony;" *Fount. Nov.* 7. 1695, *E. Argull*, DICT. p. 6054. But where no separate alimony has been thus agreed on by the parties, the court will not supply the deficiency. In a recent case, accordingly, where a wife pursued her husband for an aliment, during their voluntary separation, to be modified by the court, action was refused as incompetent, *Bell*, 22. *Feb.* 1812, *Fac. Coll.*

¹⁶³ In a late case it was laid down, "That this legal rule," as to the power of revocation in either party, "rested on the reason, that separation was contrary to the duties of the married state, of which the object was, that the parties should live together: That, for the attainment of this object, law allowed either party to revoke expressly, and even held the contract of separation voided *ipso facto*, if they actually came together again: But that it did not appear this rule of law could apply, where the reason of it was inapplicable, where the parties would not, or could not live together: That supposing, for instance, one party revoked, but yet refused adherence, such a revocation seemed to receive no support from our law: and there appeared to be just as little reason for giving effect to a revocation made after one of the parties was dead, when all adherence was out of the question, when the effect of the contract in separating the parties had had its full completion, and was exhausted." Upon these principles, it was decided, that a voluntary contract of separation was not revocable by the wife after the death of her husband; and that as little so was an exclusion therein contained of the wife's legal provisions in the event of the dissolution of the marriage, though these were more valuable than the provisions of the contract, the difference, however, not being so great, as to render the contract *grossly unequal*; *Palmer*, 25th *Jan.* 1810, *Fac. Coll.* At the same time it seems to have been the opinion of the court, that, in other circumstances, such a contract, so far as its objects extended beyond the mere separation of the parties, "might in itself, as a *postnuptial contract*, be revocable; it might be held *donatio inter virum et uxorem*, if it was, in its own nature, *grossly unequal*."

to himself, only in so far as was necessary for charging the subject with the right granted to the third party, *Dirl.* 204, (*Kinloch*, *DICT.* p. 11345.). Revocation is not presumed, from a disposition *omnium bonorum* being granted by the donor in favour of a stranger, *Fount. Feb.* 7. 1699, *Handiside*, (*DICT.* p. 11349.), for the general clause in such disposition cannot be construed to include any special subject of which the granter had formerly divested himself, *L.* 80, &c. *De reg. jur.*; see *infr.* *B.* 3. *Tit.* 4. § 9. The bare contracting of debt by the donor creates not the slightest presumption of an intention in him to revoke. Indeed the posterior creditors, where the debtor has no separate funds sufficient for their payment, may plead upon the faculty of revocation competent to him, which the law will transfer to those creditors from the debtor, if he cannot be prevailed on to revoke voluntarily¹⁶⁴, but the representatives of the donor cannot plead upon posterior contractions as a tacit revocation of the gift. It may even be doubted, whether, though the donor should suffer a decree of adjudication to pass against the subject of the donation, the effect of a presumed revocation would be allowed while the legal reversion is current, to extend farther than to the sums adjudged for; because adjudication, during that period, is but a right in security. It is affirmed by Bankton, *B.* 1. *T.* 5. § 100., that a revocation is presumed from the commission of adultery by the wife, not forgiven by the husband; and that this operates *ipso jure*, in odium of the crime: But the decision from Hope, *Donatio inter v. et ux. Douglas**, cited in support of this doctrine, requires a decree of divorce as essential to the revocation or avoidance of the gift †¹⁶⁵.

The right of the donee is pendent till the death of the donor.

32. Though a donation between man and wife is not null, yet the donee holds it under the tacit condition, that it shall fall in the case of revocation; so that the donee's right continues pendent upon the donor's will during his life. The donee cannot therefore alienate the subject, nor charge it with any burden to the prejudice of the donor; and consequently the donor returns, upon his revocation, to the full property of the subject, free from the consequences of all the intermediate deeds granted by the donee, even to his creditors or singular successors: *Resoluto enim jure dantis, resolvitur jus accipientis*. This right of revocation is personal to the donor; and therefore, if he himself do not revoke, his heirs or representatives cannot: The thing gifted becomes after the donor's death the absolute property of the donee: *Morte donantis donatio confirmatur*.

Judicial ratification of deeds granted by the wife.

33. All deeds granted, or contracts entered into, by any person through force or fear, are in themselves void, being destitute of the essential character of a free consent. As husbands have in their power various methods of prevailing on their wives to grant irrational deeds, not only by persuasion, but by violence or menaces, third parties, in whose favour deeds had been granted by wives, were frequently vexed with actions of reduction brought by the

* *Douglas* against *Aiton*. † See *Murray*, *June* 16. 1575, *DICT.* p. 328¹⁶⁵.

¹⁶⁴ The husband's right of revoking a contract of *voluntary separation* from his wife, cannot be attached by his creditors. The wife's provision under such contract having been heritably secured by the husband while solvent, is effectual in a competition with the creditors, there being no suspicion of fraud; *Macgregor's Trustee*, 22d *Jan.* 1820, *Fac. Coll.*

¹⁶⁵ A husband divorced for adultery cannot revoke a gift made to his wife, *stante matrimonio*; *Colvil*, *Murray*, 16th *June* 1575, *DICT.* p. 328. Nay, it has been found, that, to give effect to the revocation, he must prove it was executed *before committing the crime*, as well as before sentence of divorce. *Same party*; 9th *July* 1576, *DICT.* *ibid.*

the wife, upon an allegation, that she had been compelled to grant them *vi aut metu*, through the force or fear of the husband. In like manner, if the husband had, with the wife's consent, made over to a stranger any part of the lands settled on her in life, action was competent to her for setting aside the alienation, upon this ground, that the consent given by her to the deed had been extorted from her by her husband. To secure the grantees against the consequences of such actions when they were pursued vexatiously, ratifications have been introduced into our practice, by which the wife, appearing before a judge, declares upon oath, that the husband neither induced her by force nor fear to grant the deed, or give her consent, but that she did it freely, and for her own utility; and that she shall never afterwards call it in question. A deed may be ratified by a wife before any judge, even before one within whose territory neither she nor her husband, nor the grantee resides; nor is it necessary that she make oath in court, or *pro tribunali*, July 8. 1642, *Grant*, (Dict. p. 16483.), because such ratifications are acts of voluntary jurisdiction. If the husband be present at the ceremony, the deed is presumed to have been ratified under his influence; nay, if the ratification do not specially mention that he was not present, it is null. Though judicial ratifications were, both by our statute law, 1481, C. 84., and by long inveterate usage, made upon oath, we are now insensibly coming into the custom of being contented with the wife's solemn declaration. It may be doubted, however, whether this would be esteemed sufficient, were it brought to a trial.

34. After this ratification, upon which an instrument is always taken in the hands of a notary, and a judicial act extracted, the wife is for ever cut off from her right of impeaching the deed ratified, though she should offer to bring the clearest evidence that she was compelled to grant it. This doctrine was established by a judgment, in a private cause, pronounced by the Lords of Council, March 6. 1481, which, because it is engrossed in the body of our statutes, 1481, C. 84., is become part of our written law. By a posterior decision of the session, July 8. 1642, *Grant*, (Dict. p. 16483.), the wife's right of reduction was excluded by her ratification, though she offered to prove compulsion by the husband, in the ratification, as well as in the deed ratified. This judgment appears contrary to the rules of reason; and is repugnant both to the canon law, *Decretal. L. 2. T. 24. C. 28.*, which gives that effect only to such ratifications of the wife upon oath, as are made *sine vi aut dolo*, and to the principle on which our practice is grounded; for if the law accounts all ratifications made by the wife in her husband's presence null, from a presumption that she is thereby laid under undue influence, it must, *a fortiori*, reject such ratification as shall appear, upon positive evidence, to have been actually extorted from her *ex vi aut metu* of the husband.

35. Every deed by which any right accrues to a third party, may be thus secured by the wife's ratification, though a consequential benefit should arise to the husband; for the aforesaid act 1481, which establishes the law of ratifications, and fixes their extent, applies them expressly to the case of a wife, whose husband was pressed by debt to sell his estate, and who had renounced her interest in her jointure-lands, that the purchase might be disincumbered; and had judicially ratified her renunciation. Sir George Mackenzie, *h. t.* § 14., makes ratifications of more general use, and affirms, that deeds granted by wives, not only to strangers, but to their

This excludes all reduction by the wife. What if she has been compelled to the ratification?

Donations from the wife to the husband are not rendered irrevocable by ratification.

their husbands themselves, though they should be pure donations, become irrevocable by the wife's ratification; and this opinion seems to be favoured by a decision observed by *Fount. Dec. 4. 1685, Richardson*, (Dict. p. 6147.); but cannot be reconciled to the confessed notions of ratifications, which, all our writers admit, were intended merely to secure grants against the exceptions of force or of fear. Donations, therefore, by the wife, which proceed from the love, not from the fear of the husband, cannot be the proper subject of ratification; for though the wife should swear *optima fide*, that she had not been induced to make the grant through the force or fear of the husband, it may nevertheless be true, that she made it from an excess of fondness for him, which the law hath expressly said to be a sufficient ground for subjecting the gift to revocation. And if a donation by a wife to her husband might be rendered irrevocable by her ratification, which an husband can seldom fail to obtain by the same methods of persuasion or force which procured the gift, the law of donations between husband and wife would turn out a most hurtful one to the wife, whose donations to the husband might be made irrevocable by her ratification, while the donations by the husband to her would stand exposed to revocation all his life long, *Feb. 15. 1678, Gordon*, (Dict. p. 6144.). See a singular opinion of Sir James Steuart on this point, *v. Donatio int. vir. et ux.* This reasoning may be justly applied to all deeds granted by the wife to third parties, in trust, for the use of the husband; for these are truly *donationes velatae*, gifts under a cover, *supr. § 29.**. If a deed granted by a wife in favour of a stranger hath been extorted from her *vi aut metu*, not of the husband, but of the grantee, her ratification ought not to exclude her right of reduction: For ratifications were not introduced that third parties might profit by the force or threatenings used by themselves against the wife, but merely that they might be secured against her plea of the force or fear of the husband; and therefore her oath expresses no more than that she was not compelled by her husband. Ratifications by the wife, therefore, though they bar reductions founded on the force or fear of the husband, have no tendency to exclude her right of revoking donations which she has made from the affection she bears to him, or of setting aside deeds which she may have granted to third parties, on the head of violence or menaces used against her by the grantees.

Ratification not necessary to validate deeds, but only to secure them from challenge.

36. It appears, that, by the old practice, the wife's ratification was absolutely necessary for securing the grantee, insomuch that every deed granted by her to a stranger, or consent adhibited by her to a deed of her husband, was accounted null, unless her subsequent ratification had been also obtained, *Cr. Lib. 1. Dieg. 15. § 20*. But even since Craig's time, a wife's deeds are held valid, though not confirmed by her judicial ratification, if they have been executed according to the legal solemnities. It is indeed competent to the wife to bring an action for reducing any deed that she has not ratified, upon the head of force or fear: And if this be sufficiently proved, the deed must be set aside; (for which reason, it may be prudent in the grantee to demand her ratification, in order to exclude that right of reduction); but if she fail in the proof, the deed, though not ratified, remains effectual to the grantee, *Jan. 27. 1681, Steuart*, (Dict. p. 7762.); *June 28. 1706, Hay*, (Dict. p. 16506.).—Hitherto of the legal effects of marriage while it subsists.

37. Though

* See *Borthwick, July 21. 1724, Dict. p. 6149.*

TITLE VI.

Marriage cannot be dissolved by consent.

37. Though marriage be a contract which is perfected by the consent of parties, it cannot be dissolved by a contrary consent¹⁶⁶; for the character of perpetuity seems to have been impressed on it by God himself in its first institution, when he declared the two common parents of all mankind to be one flesh, *Gen. ii. 22. et seqq.*; which was afterwards confirmed by our Saviour's injunction, that no man should put asunder whom God hath joined, *Matth. xix. 6.* Hence a marriage entered into by minors *puberes*, who are capable of consent, cannot be declared null for want of the consent of their curators; and however the articles ascertaining the several interests of the two spouses may be subject to reduction on the head of minority and lesion, the marriage itself is secure against all reduction. The Romans indeed, who paid no regard to this rule, and looked on marriage as a common contract of society, admitted divorces, not only on the special grounds of old age, want of health, or of children, &c. *L. 60. § 1. L. 61. De don. int. vir. et ux.*; or upon the joint agreement of both parties, *L. 62. pr. eod. t.*; but even when either of the two intimated to the other, by a proper writing, his or her intention to be free, *L. 3. 7. De divort.* And this unlimited power of divorcing, after it had been restrained in part under the Christian Emperors, *L. 8. § 2. 3, C. De repud.*, was again authorised by *Nov. 140. pr. et C. 1.* But it is adversary to the rules not only of our holy religion, but of right reason and of sound policy: For married persons, if they shall be left at full liberty to break off from their first engagements, may be too apt, on the slightest disgust, to look out for more agreeable companions; and thus the natural ties, between parents and their first issue, must be quickly slackened, if not totally dissolved, and the education of children miserably neglected. For these reasons, marriage cannot, by the usage of Scotland, be dissolved till death, except by divorce, proceeding either upon the head of adultery, *Matth. xix. 8, 9., Mark x. 11.*, or of wilful desertion, *1 Cor. vii. 15.*

38. The dissolution of marriage by death may happen, either within year and day from its being contracted, or after that space of time. If it be dissolved within year and day, all grants made in consideration of the marriage become void, and things return to the same condition in which they stood before the marriage. The tacher, if it was originally the wife's property, returns to her; or if she die before the husband, to her executors: If it was given by a father or other relation, it must be restored to the giver; and every

Effect of marriage dissolving by death within the year.

VOL. I.

20

interest

¹⁶⁶ This rule has been scrupulously kept in view, in judging of the effect, even, of those sometimes equivocal circumstances, by which irregular marriages are too frequently contracted. *Lord Stair* mentions a case, where "a contract of marriage was found valid, and the man thereby obliged to solemnise the marriage, seeing he had procreate children with the woman, and by his missives acknowledged he had married her, though, by a contract posterior to the contract of marriage, she had renounced the same;" *B. 1. t. 4. § 6. vers. "The public solemnity."* And again, referring to the effect of "cohabitation, and behaving as man and wife for a considerable time," his Lordship says, "these are presumptions so strong, that the confession or oath of either, or both parties, will not elide the same, though they should acknowledge that they neither promised marriage *de futuro*, nor contracted the same *de presenti*; yea, though they should acknowledge that they so cohabited to cover their fornication, that they might be free to marry others when they pleased; for all these and such things would be presumed as collusive to dissolve the marriage upon dissonance of humours, or other designs, seeing marriage is indissoluble but by adultery, or wilful desertion;" *B. iv. t. 45. § 19. vers. "Thirdly."* See a recent case decided on these principles, *supr. not.*¹⁴¹.

interest accruing to the wife from the marriage in the husband's estate, heritable or personal, whether by the disposition of law or by covenant, returns to the husband, or his heirs. This rule extends to all settlements in marriage-contracts¹⁶⁷ in favour of any of the two spouses which are expressly made *intuitu matrimonii*, July 16. 1678, *Lo. Burleigh*, (DICT. p. 6172.); and to every provision where the wife or issue of the marriage are secured in any part of the subject provided, though it should not be expressly mentioned to be made in contemplation of the marriage; because such provision cannot possibly be granted in any other view: But stipulations in a marriage-contract, which are formed merely between the contractors on the one side, without securing any benefit to the other, are not, without an express clause, accounted to be made *intuitu matrimonii*; and therefore stand good, notwithstanding the dissolution within the year. This is the case of a provision of land or money made by the husband's father, not to the wife, or to the issue of the marriage, but without restriction to his own son; which, because it does not form a contract between the married parties, but barely between one of the parties and his father, without any stipulation in favour of the wife, or the issue of the marriage, continues in full force, let the marriage be of ever so short a duration, *Home*, 132. *Kilk. HUSBAND AND WIFE, N° v.* (*Hood, DICT. p. 6175.*)^{* 168}.

The right of the survivor in all goods which fell under the communion ceases;

39. In consequence of this rule, the right which the husband acquires by marriage in the wife's moveable estate, though it arises *ipso jure*, determines by the dissolution within year and day; which is considered as a resolute condition, on the existence whereof that right evanishes *retro*, as if it had never been acquired. And since

* See to the same effect, *Fac. Coll. July 24. 1766, Hunters*, DICT. p. 6164.; *Feb. 7. 1781, Cuming*, DICT. p. 6165.

By a solemn decision, *Fac. Coll. Dec. 15. 1786, Lowther*, DICT. p. 435., it was found, that where marriage had been dissolved by the death of the husband within year and day, without issue, the wife was entitled to an aliment out of his estate.

¹⁶⁷ And to postnuptial, as well as antenuptial contracts; *Kames, Rem. Dec. Kilk. Somerville*, 22d *Feb. 1751*, DICT. p. 6161.

¹⁶⁸ Opposite judgments had been pronounced in this case, and the final decision is called in question by Lord Kilkerran, who closes his report with the remark,—that “the authority of this decision will be the less, when it is remembered that it “proceeded upon the narrowest majority, and when four of the Lords were absent.” It is difficult, indeed, altogether to reconcile the principle of the decision, with that which must have ruled the Court in the previous case of *Lord Burleigh*, likewise noticed in the text; though there, too, the judgment seems to have created differences of opinion, Lord Fountainhall observing that it “was wondered at by many.” In this state of the authorities, it can scarcely, perhaps, be considered as yet settled, that it requires “an express clause,” to prevent the falling of stipulations, even “between the contractors on one side;”—if, on the whole, it be quite clear, that these stipulations were made only *intuitu matrimonii*, and were substantially intended as of a conditional character.

As to the two cases referred to in the first part of note *, they seem to have little or no relation to the point; both of them, indeed, arising out of provisions made directly by the husband in favour of his wife, and of course involving no dispute as to the validity of stipulations “between the contractors on one side.” Thus, in the case of *Hunters*, a disposition to “a betrothed wife,” was found *good*, it appearing to be truly a testamentary donation. In that of *Cuming*, again, where the husband had purchased a house, and taken the title to himself and his wife in conjunct fee and liferent, for her liferent use allenary, and to the children of the marriage in fee, the provision of liferent was found *void*, on this ground—that, in the particular circumstances of the case, it “was not a pure donation, and consequently must have been granted in contemplation of the marriage.”

since the wife hath in that event no interest in the goods falling under the communion, it is necessary for preserving a just equality in the society of marriage, that the husband's interest in them should also fall and resolve. He is even obliged to account for the wife's tocher, without deducting the sums by which it has been diminished for her maintenance during the marriage; though tochers are given for that very consideration, of defraying the expense of a married state; but he is allowed to retain out of it her funeral charges, because these are expended after the marriage is dissolved; and the sums he had applied towards the payment of the debts contracted by herself before the marriage, *Feb. 23. 1681, Gordon*, (Dict. p. 6180.). The husband is accounted a *bonâ fide* possessor, with respect to what he has consumed of his wife's moveables, on the faith of his right, while the marriage subsisted; for which therefore he is not accountable, *Dirl. et Stewart, v. Jus mar. 169.* Where things cannot be restored on both sides to their former state, it would be inconsistent with equity, and with the spirit of the law, to restore one party and not the other. Hence, an infestment granted by the husband for the wife's jointure was found to subsist, though the marriage dissolved within the year, as a security for the repayment of her tocher, *July 20. 1664, Petrie*, (Dict. voce MUTUAL CONTRACT, N^o 2. p. 9136.).

40. Presents made on occasion of the marriage to the new-married pair, by the friends on either side, are understood to be absolute gifts, not fettered with any tacit condition of return; and therefore, though the marriage should be dissolved within the year, such presents are not restored to the donors, but are divided equally between the surviving spouse and the representatives of the deceased, *Jan. 14. 1679, Wauch*, (Dict. p. 6179.). But if, from the nature of the present, it shall appear that it could be intended for one of them only, it goes entirely to that party for whose use it is presumed to have been given, *Nov. 14. 1710, Dewar*, (Dict. p. 6180.). In like manner, the presents made by the husband himself to the wife at the marriage, whether of subjects properly paraphernal, or of common goods, ought not to be restored, at whatever time the dissolution may happen; but must either remain with her, in case she be the survivor; or, if the marriage shall dissolve by her death, go to her executor. If a living child has been procreated of the marriage, who was heard to cry, the marriage, though it had been dissolved within the year, is as effectual to all purposes as if it had subsisted

unless a living child has been born of the marriage.

¹⁶⁹ It has been remarked on this passage, in reference to what is laid down in the immediately preceding sentence, that "it is not easy to conceive a practical example of this, if it be true that there is no deduction given for sums by which the tocher has been diminished for the wife's maintenance during the marriage;" 1. *Bell's Comm.* p. 548. But if we advert that Dirleton, *in loc. cit.* draws a distinction between the tocher,—which he regards in the light of a provision, "in respect of a marriage durable and standing,"—and the moveables, incidentally, as it were, coming into the husband's possession after marriage, and by force of the *jus mariti*; (for instance the rents of his wife's separate estate, interest of bonds, &c.)—the difficulty seems to be removed. To the former, there is in some sort a condition attached, which prevents it from finally or completely vesting in the husband,—until that condition be purified, and the marriage have actually acquired a "durable and standing" character. Whereas the right to the latter is more immediate, being "founded upon the relation of *maritus*; *et ipso momento* that he was married, he was husband." The distinction may or may not be well founded; but if it be, the application of the doctrine of *bona fide* consumption seems equally practical and correct.

BOOK I.

subsisted beyond it.¹⁷⁰ The crying of the child is, in Lord Stair's opinion, the only legal evidence receivable by the judge of its being born alive, *B. 1. T. 4. § 19.*; *B. 2. T. 6. § 19.*, that the matter may not be left to the uncertain conjectures of those who are present at the birth. And though the doctrine of the Roman law seems fully as consonant to equity, and to the analogy of ours in other cases, (as to which *vid. infr. B. 3. T. 8. § 96.*), which admits of other circumstances, provided they be equally pregnant, in proof of that fact, *L. 3. C. De posth. hæred.*; yet in this particular, the court of session has departed both from the reason and the authority of that law, and by a recent decision, *Fac. Coll. July 17. 1765, Dobie*, (*Dict. p. 6183.*) has considered a child, which by both parties was admitted not to have come to proper maturity, and was not heard to cry, as a foetus, or untimely fruit of miscarriage, rather than a child¹⁷¹.

Effect of marriage dissolving after the year.

41. If the marriage hath been dissolved by death after year and day, the surviving husband becomes the irrevocable proprietor of the tocher; and the wife, in case she survive, is entitled to all the provisions secured to her in that event, whether legal or conventional. Where the interests of the married pair have not been fixed by marriage articles, special rights arise, by the disposition of the law itself, to the surviving spouse, whether husband or wife, and to the issue of the marriage. The interest of the surviving husband in the heritable estate of the wife is called *the courtesy*; and that of the surviving wife in the husband's heritage, her *terce*. A particular share of the goods in communion falls to the surviving wife, in virtue of her *jus relictæ*; and another to the children, either in the right of *legitim*, or as next of kin; all which shall be explained in their proper places*. As the widow has, upon the husband's death,

* Where the widow's legal provisions of *terce* and *jus relictæ* are insufficient, the court will modify to her an additional aliment out of her husband's estate, *Fac. Coll. March 6. 1778, Thomson, Dict. p. 434., Jan. 27. 1790, Young, Dict. p. 400*¹⁷².

¹⁷⁰ In a recent case, where the parties had cohabited for many years, had procreated children, and ultimately acknowledged themselves married persons, so as to legitimate these children, it was made a question, whether the widow was entitled to her legal provisions, the marriage having been dissolved within ten months of its having been declared, and without any child having been born subsequently. The court decided in favour of the widow, "upon the principle, that she was the mother of lawful children at the time of her husband's death;" *Crawford's Trustees, 20th Jan. 1802, Fac. Coll. Dict. p. 12698.*

¹⁷¹ In this case, it even "appeared, that the child breathed, raised one eyelid, and "expired with the usual convulsive agonies, about half an hour after its birth." But the rule of law was held peremptory,—that the child must be heard to cry.

¹⁷² It was in one case found, that a widow in the lower ranks of life is not entitled to this extraordinary aliment; *McCowan, 20th May 1809, Fac. Coll.* But the soundness of the decision has since been questioned, and a contrary judgment unanimously pronounced; *Smith, 11th March 1812, Fac. Coll.* In this last case, it should perhaps be observed, that some of the judges rested their opinion on what they considered a material difference of circumstances; the property left by the husband being in the former case rented so low as L. 12, while, in this, the rents were alleged to exceed L. 50. In the former case, too, "the woman before marriage had been in the rank of a servant, "earned her bread by her hands, and never was out of that line of life;" whence it was thought, that "after her husband's death, she must earn her bread in the same way "she had done before marriage."

Where the widow's provisions have been settled in an antenuptial contract, the court will not interfere, to modify an additional or extraordinary aliment, notwithstanding any change in the rank or circumstances of the husband; *Lady Findlater, 8th Feb. 1814, Fac. Coll.*

death, no present fund for the subsistence of herself and her family, she has a claim against her husband's representatives for alimony, from the day of his death, to the first term of payment of her provision, whether legal or conventional; the measure of which is to be ascertained, not by the extent of that provision, but by the husband's quality and fortune, and the number of servants left by him in his family when he died, *July 15. 1713, Cred. of Scot.* (Dict. p. 5916.): *Home, 76. (Boswell, Dict. p. 5916.)*¹⁷³. She has also a legal claim to mournings for her husband, suitable to his quality, where his estate or rank requires mourning in point of decency, *July 7. 1675, Wilkie*, (Dict. p. 5923.)*. And in case of a posthumous child, she may recover from the husband's representatives the expense incurred by her on occasion of the birth or baptism of the child, *Nov. 10. 1671, Hastie*, (Dict. p. 5922.). But none of those articles, not even the last, can be claimed, if her husband, let his station be ever so high, hath not left a sufficient fund for the payment of all his onerous creditors †¹⁷⁴. Where the wife survives, the paraphernal goods continue her property, and cannot be attached by the husband's creditors. If the wife die first, they go to her children or her other next of kin.

42. If a marriage shall subsist for a year, and part only of the day next ensuing the year, all deeds granted in contemplation of the marriage subsist, *Feb. 25. 1680, Waddel*, (Dict. p. 3465.): Which arises not so much from the favour of marriage, the only reason assigned in that decision, as from the legal meaning of the expression *year and day*: For where any right is to be completed, or act to be performed, within a year, of which many instances are to be met with in our law, a day is generally adjoined to the year, 1661, C. 62.; 1695, C. 24., &c. *in majorem evidentiam*, that it may appear with the greater certainty that the year itself is completed; and therefore the running of any part of the day next after the year hath the same effect as if the whole day were elapsed.

Effects of the dissolution of marriage within the year, are commonly barred by a clause in the contract.

VOL. I.

2 P

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* Found, that the widow had a claim to mournings, even where the marriage had not subsisted for a year; *Kilk. HUSBAND AND WIFE, NO. vi. Gordon, Dict. p. 6161.*

† *Nov. 21. 1776, Neilson, Dict. p. 6165*¹⁷⁴.

¹⁷³ This claim was held good, though the establishment of the husband had been broken up immediately after his death, and the wife herself had gone to live with her father; these circumstances merely affecting the *quantum*; *Palmer, 27th June 1811, Fac. Coll.* Where the parties had been living apart, under a regular deed of separation, the aliment was restricted to the sum provided by that deed; though the conventional provisions, which were to take effect afterwards, under the contract of marriage, were considerably greater; *Turner, 19th May 1803, Fac. Coll. Dict. v. Aliment, App. NO. 7.* In this case, indeed, the very special terms in which the deed of separation was conceived, would seem to have precluded all operation of the general rules of law.

The legal claim of the widow for aliment, as well as the analogous one for mournings, is held not to be cut off by a mere general clause in any deed securing conventional provisions, and declaring these to be "in full of all terce, courtesy, half, or third of moveables, and of every other legal claim competent by and through the dissolution of the marriage, any manner of way." It must in itself be expressly renounced; being of such a nature that the Court cannot assume it to be discharged by implication; *Palmer, sup. cit.*; *Rennie, 16th May 1800, Fac. Coll. Dict. v. Presumption, App. NO. 4.*

¹⁷⁴ The contrary has been decided, with regard to the widow's mournings, which, (notwithstanding the case of *Neilson* referred to in note †), are now held to constitute a privileged debt, even in a competition with creditors; *Sheddan, 15th May 1802, Fac. Coll., Dict. p. 11855; 1. Bell's Comm. p. 548.*

Book I.

The disputes which might spring from the dissolution of a marriage within the year, are now, for the most part, prevented by a clause in the marriage-contract, stipulating, that the interests of the two spouses shall continue in full force, though the marriage should be dissolved before the year, without a living child.—Hitherto of the dissolution of marriage by death.

Marriage may be dissolved by divorce, 1st, On account of adultery.

43. A marriage which is null from the beginning, and may be declared so by a sentence of a proper court, (instances of which have been mentioned, § 2. 7.), cannot be said to be dissolved, because it was never truly contracted; and as marriages, in themselves void, can have no legal effects, every thing must, on a declarator of their nullity, return *hinc inde* to its former condition*. Marriage, when it is lawfully constituted, may be dissolved, not only by death, but by divorce; which may be sued for, either on the head of adultery or wilful desertion. Divorce is such a separation of married persons, while they are both alive, as loosens them from the nuptial tie, and leaves them at freedom to intermarry with others. Marriage being by the canonists numbered among the sacraments, is accounted a bond so sacred, that no crime committed, or provocation given, by either of the parties, can dissolve it. Hence, though in the case of adultery, the Canon law admits of a *separatio tori*, a separation as to bed and board, the nuptial tie remains still undissolved, the parties continue married, *Lancel. Inst. jur. Can. L. 2. T. 16. § 9.*, and their intermarrying with third parties infers bigamy. And even by the usage of Scotland, neither adultery nor wilful desertion are grounds which necessarily dissolve marriage; they are merely occasions or handles, which may be laid hold of towards obtaining a divorce: But if the injured party choose to live on in a married state, the marriage continues in full force. The position laid down in general terms by Mackenzie, *h. t. § ult.*, that after divorce the party guilty cannot marry, is inconsistent with the notion of divorce, which extinguishes all the ties and obligations consequent on marriage. The adulterer, therefore, being as effectually loosed by the divorce as the party injured, may lawfully enter into a second marriage. This liberty is indeed abridged by positive statute, 1600, *C. 20.*, which, in the case of divorce on the head of adultery, disables the party divorced from marrying him or her with whom the adultery is said, by the sentence of divorce, to have been committed; a doctrine borrowed from the Roman law, *L. 18. De his quae ut ind.*: But the guilty person is at full liberty to intermarry with any other. The Canon law does not carry the restraint so far: It permits the adulterer, after the marriage is dissolved by the wife's death, to intermarry with the very woman with whom he was guilty, except in the special case where the adulterers had contrived and been accessory to the death of the wife, *Decretal. L. 4. T. 7. C. 6.*

44. Divorce may also proceed on wilful desertion, *i. e.* where either of the spouses, deliberately and without just cause, deserts or separates from the other, and thereby defeats the chief purposes for which marriage was instituted. This ground of divorce is not only approved of by St Paul, *1 Cor. vii. 15.*, but established by statute, 1573, *C. 55.*, which enacts, That where any of the spouses shall divert from the other without sufficient grounds, and shall remain

* Haddington, July 14. 1610, *Earl of Eglinton*, Dict. p. 6185.

remain in his or her malicious obstinacy for four years, the party injured may sue the offender for adherence before the judge-ordinary; and if the defender disregard the sentence, the pursuer may apply to the court of session for letters of horning to enforce it. After this, the church is directed to admonish the defender to adhere; and if he shall still continue obstinate, the church-court is to proceed to excommunication; which previous steps are by the statute declared to be a sufficient foundation for a divorce. Though the offending party must, by the words of this act, have deserted four years before he can be cited in the preparatory process for adherence, the commissaries, *de praxi*, admit that action, and even pronounce sentence in it, upon one year's desertion: judging it to be a sufficient compliance with the injunction of the act, if four years intervene between the first desertion and the decree of divorce. Though the act makes no distinction as to the judge competent, between the previous process of adherence and subsequent action of divorce; yet by the instructions given to the commissaries, 1666, § 2., and the practice immediately following, the jurisdiction of the inferior commissaries is limited to the previous process of adherence; the divorce itself must be prosecuted before the commissaries of Edinburgh. It would seem, that the only persons who can be sued on the process for adherence are such as continue within the kingdom; for these alone are capable of receiving admonition from the church, and of incurring, through their wilful obstinacy, the censure of excommunication. Action might perhaps be sustained at the suit of the innocent party against the deserter, though not residing in this kingdom, upon evidence adduced that the desertion was wilful, and that the defender left the kingdom, and still remains abroad, from a deliberate purpose of abandoning the conjugal society, lest such wrong should be left without a remedy. But, on the other hand, it may be safely maintained, that without such evidence no action for adherence would receive support, either from equity or the analogy of law, against persons continuing abroad, even beyond the four years, since divorce is not founded either in the divine law or our own upon the head of desertion, if it does not appear to be wilful. If a woman shall contract with a second husband, upon false intelligence that her first had died abroad, that first hath it in his power, upon his return, either to take his wife home to his family, or to sue for a divorce against her on the head of adultery; for bigamy ought, as to this question, to be accounted adultery; but the woman, if she had probable grounds to believe her husband dead, is not subjected to any criminal trial, upon an accusation either of bigamy, or of adultery.

45. It is a reasonable practice, that in all actions of divorce, whether on adultery or wilful desertion, the pursuer must swear, that the action is not carried on by collusion; otherwise parties, contrary to the first law of marriage, might at pleasure disengage themselves from that sacred tie by their own consent. Upon this ground, cohabitation by the injured party, after being in the knowledge of acts of adultery committed by the other spouse, if it has not been constrained by force or menaces, imports a passing from or forgiveness of the prior injury, and is therefore sufficient to elide any action of divorce that may afterwards be pursued upon those injurious

Divorce cannot proceed by collusion.

injurious acts, *July 15. 1681, Watson*, (DICT. p. 330.)^{175*}. A proof of collusion, where it has not been brought till after the decree of divorce, can hardly have the effect to set aside the prior decree as to the divorce itself; but it ought to save the interest of creditors from being affected by such collusive devices, *i. e.* the wife will not be put in present possession of her terce or jointure, in consequence of the decree, so as to exclude the husband's creditors from the fund of their payment; or, if she hath already obtained possession, she may be obliged to give it up.

Effects of divorce on account of desertion.

46. The legal effects of divorce upon desertion, are defined by the aforesaid act, 1573, C. 55., in these words, "The party offending shall lose the tocher, and the *donationes propter nuptias*." The Roman law, from which this act is borrowed, *Nov. 117, C. 8. § 2.*, describes *donationes propter nuptias* to be that sum or subject which is given by the husband, either in remuneration or in security of the tocher; which, when applied to our law, must signify the provisions granted by him to the wife, in consideration of the tocher given by her or her friends to the husband. The meaning of the act, therefore, is, that the offending wife not only loses her tocher, which is in that case to be retained by her husband, but forfeits her *donationes propter nuptias*, all the provisions which would otherwise have accrued to her in the event of her survivance; and *vice versa*, the husband, if he be the party offending, not only loses the tocher, or, in other words, must not only restore to the wife the sum he received in the name of tocher, but he is also bound to make good to her all the provisions in her favour, as well legal as conventional; so that she hath immediate access to them upon the decree of divorce, though neither the legal provision of terce, nor the conventional ones secured by marriage-articles, are, in the common case, due to a wife, till the actual death of her husband; see *March 21. 1637, La. Manderston*, (DICT. p. 1741.)

These effects reciprocal.

47. Some writers interpret this statute, as if the loss of the tocher related only to the offending wife, who, by her desertion, forfeits it to the husband; and that consequently the husband, where he is the

* *Lenocinium* is a good defence to the wife, in an action of divorce for adultery. As to the description of conduct in the husband, on which this defence may be founded, see *Falc. Feb. 28. 1745, Mackenzie*, DICT. p. 333.

Lord Bankton, *B. 1. T. 5. § 128.*, holds a plea of recrimination to be "a good defence against divorce for adultery." But lawyers have doubted the soundness of this opinion; holding it as inconsistent, that the infidelity of one of the parties should be a sufficient ground of divorce, while the infidelity of both should secure the continuance of the matrimonial connexion. In a late case, the Court allowed the wife to repeat a counter action of recrimination in the action of divorce; but under a qualification, that, by adopting that form of procedure, she should not be prevented from pleading the recrimination, when proved, as a total bar to a decree of divorce, nor the pursuer from pleading his answers thereto, *March 9. 1787, Jardine*, DICT. p. 338¹⁷⁶.

¹⁷⁵ Also, *Lockhart, 7th Dec. 1799, Fac. Coll. DICT. v. Adultery, App. NO. 1.* In a recent case, a husband pursuing a divorce, attempted to explain away the cohabitation. "Suspicions," he said, "were certainly raised in his mind; but they were removed by the tears and protestations of the defender: and he cohabited, not because he forgave her, but because he believed her innocent." He admitted, however, that, prior to cohabitation, he had been informed of all the circumstances alleged to have taken place. In this situation, and as he did not raise his action till twelve or thirteen years afterwards, the Court assoilzied the defender; *Duncan, 9th March 1809, Fac. Coll.*

¹⁷⁶ In the still later case of *Lockhart*, referred to in the preceding note †, "the Court were clearly of opinion, that recrimination is no bar to divorce, though mutual guilt may affect patrimonial consequences; that on this account it can be stated only in a counter action," but cannot be pleaded in defence.

the guilty party, is not obliged to restore it to his injured wife, *Wallace, Inst. B. 4. T. 15. § 287.* But the statute thus explained would be most unequal: For it appears irreconcilable to justice, that the offending wife should be punished with the loss of her tocher, which is generally her all, without receiving the least consideration in its place, while the offending husband, though he suffers the immediate loss of the provision secured by him to the wife, is allowed to retain to himself the tocher, which is the valuable consideration he received at the marriage in place of that provision.

48. By the opinion both of Lord Stair, *B. 1. T. 4. § 20.*, and Bankton, *B. 1. T. 5. § 134.*, which is strongly founded on analogy, the same penalty lies against the offending party in a divorce for adultery, that the act 1573 has imposed on those who are divorced on the head of wilful desertion, agreeably to the Roman law, *d. Nov. 117.*; and the court of session, in the late case of Mr Justice, *Aug. 5. 1761*, pronounced judgment conformably to that opinion by their first interlocutor; but on a reclaiming bill, it was decided, that the offending husband, in a divorce for adultery, was not bound to restore the tocher, in regard that it had been so fixed by an uniform tract of old decisions, partly observed by Sir J. Balfour, and partly recovered from the records * 177.

Effects of divorce on account of adultery.

II. OF THE RELATION BETWEEN PARENTS AND CHILDREN.

49. AFTER having explained the rights and duties of husbands and wives consequent on marriage, the relation of parents and children falls naturally to be handled. The most usual division of children is into lawful and unlawful. Lawful children are those who are either procreated in marriage, or who are afterwards legitimated

Presumption of legitimacy of offspring.

VOL. I.

2 Q

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* This case is reported by Kames, *Sel. Decis. NO. 172. DICT. p. 334.* See another, *Anderson, Feb. 8. 1734, DICT. p. 333.*, which is referred to in the case of Justice. The crime itself, unless followed by divorce, is not held to be a forfeiture of the wife's legal provisions, *Sel. Decis. March 4. 1762, Clement, DICT. p. 337.*

¹⁷⁷ In place of its having "been so fixed by an uniform tract of old decisions," it appears from Lord Kames' report of this case, (under date 13th Jan. 1761, *Sel. Dec.*, *DICT. p. 334.*), that the old authorities were all the other way, and that the husband's argument was entirely rested on a "change of system," which he alleged to have been introduced. The single decision cited as being in his favour, was one pronounced in the case of *Anderson, 8th Feb. 1734, (Fol. DICT. v. iii. p. 19.) DICT. p. 333.*; and excepting it, it was noticed as "remarkable, that from the altered practice, there is not to be found one authority *pro* or *con.*" Even this decision, however, seems to have been misquoted; for if we can trust to the only report of it which remains, the divorce was there obtained against the wife, who being thus the offending party, was necessarily found to have no right to the return of her tocher. The authority of *Balfour* was also unfavourable; for he expressly lays it down, that "quhen ony man and his wife are *simpliciter* partit and divorcit be the authoritie of the Judge Ordinar, for adulterie or ony uther trespas committit be the man, *the haill tocher gude, &c.* aucht to be restorit to the woman, with the proffettis thair of, after the geving of the sentence of divorce betwix thame; 18th Dec. 1540, *Janet Auchinleck contra James Stewart,*" *Balfour*, p. 99. *DICT. p. 339.* It seems, indeed, absurd in the very reason of the thing, that a husband divorced for adultery should be placed in a better situation than if divorced for simple non-adherence. And it is not unworthy of remark, that the whole argument, which was successful in the case of *Justice*, applies with equal strength to the non-return of the tocher in the one case, as in the other. Be the law, however, on the above point, as it may, all the authorities concur in this, that the wife who obtains a divorce against her husband, whether for adultery or desertion, is entitled to her whole legal and conventional provisions, precisely as in the case of her husband's death.

Under an entail excluding terce, but allowing a certain provision to wives and husbands, a wife who had divorced her husband was found not entitled to more than the provision allowed by the entail, even during the life of her husband; *La. Cunningham Fairlie, 15th June 1819, Fac. Coll.*

mated or made lawful. All children born in wedlock, *i. e.* born of a mother who at the time of the conception was lawfully married, are presumed to have been begotten by him to whom the mother was married, according to the rule, *Pater est quem nuptiæ demonstrant*; and consequently to be lawfully begotten children. This legal presumption may doubtless be overruled by a contrary proof; but the favour of marriage is so strong, and the securing of the point of legitimacy so important to society, that it cannot be defeated, but by direct evidence that the mother's husband could not be the father of the child. Though therefore it should be proved, that the wife was engaged in a criminal correspondence with a stranger for some tract of time together, and that her husband and she lived in separate houses during that whole period, the presumption for the legitimacy of the children stands good, because those facts do not infer an absolute impossibility that the mother's husband could be their father¹⁷⁸. The canonists however maintain, that the concurring testimonies of the husband and wife, denying upon oath the child to have been procreated by the husband, sufficiently elide the legal presumption, *Decretal. L. 4. T. 17. C. 3.*; which doctrine is adopted by Craig, *Lib. 2. Dieg. 18. § 20.*, and by Stair, *B. 3. T. 3. § 42.* But it is an agreed point by all writers, that if either of the two have, before making such oath, acknowledged the child as lawful, there is a right acquired to him by that acknowledgment, which is not to be taken away by any posterior testimony to the contrary, *Decretal. L. 2. T. 19. C. 10.*; *Cr. ibid.*

How this presumption is defeated.

50. The two principal grounds upon which this presumption may be defeated, are the husband's absence from the wife, and his frigidity or impotency, because either of these exclude all possibility of the child being procreated by the husband. Impotency is of most difficult proof; and few or no instances have occurred in this kingdom of questions either of divorce or of bastardy upon that medium. As to bastardy on the head of absence, the great difficulty is, to fix the precise period of time backward from the birth of the child, at which, if the husband be absent from the wife, the child is to be deemed unlawful. The solution of this doubt depends on two questions, more proper for the discussion of physicians than of lawyers, *viz.* What time is necessary for the production of a living child? and, How long a woman may continue pregnant before her delivery? As to the *first*, Hippocrates, in his treatise *De septimestri partu*, and the Roman law upon his authority, have pronounced six months as the *minimum*, *L. 12. De stat. hom.*; that is six solar months, as it is explained, *L. 3. § 12. De su. et leg. her.* But our supreme court have, from the favour of legitimacy, adjudged, that to fix bastardy on a child, the husband's absence must continue till within six lunar months of the birth. As to the *second*, a child born after the tenth month is accounted a bastard, *D. L. 3. § 11 * 179*. The proof of absence must be special and pregnant

* The doctrine here laid down affords a solution of another question, relative to the filiation of natural children. It has been decided, that a *copula* at the distance of more than

¹⁷⁸ *Routledge, 19th May 1812, Fac. Coll. ; Buchanan's Rep. p. 121.*; affirmed on appeal as to this point; *29th June 1816, 4. Dow, p. 392.* Proof of likeness to the supposed parent will not be allowed, even in corroboration of other circumstances tending to cut down the presumption of legitimacy; *Routledge, 20th Jan. 1810, Fac. Coll.*

¹⁷⁹ Yet there seems no doubt that the period of gestation has been occasionally prolonged beyond even the tenth month; *2. Fodéré, Médecine Légale, p. 103, et seq.*

pregnant. It is not indeed required by our usage, as it is said to be by that of our neighbours of England, that one of the spouses must have been out of Britain; but the distance between them ought to be so great, as to carry full evidence with it, that they could not have cohabited during the whole time libelled, *St. B. 3. T. 3. § 42*¹⁸¹.

Bastards.

51. All children born of a woman who was not married at the time of her conception, are unlawful, otherwise called *natural children* or *bastards*; and consequently are entitled to none of the civil rights conferred by law on those who are procreated in marriage; of which rights *vid. infr. B. 3. T. 10*. As all marriages reprobated by law, whether on account of bigamy or propinquity of blood, are utterly null, the issue of them must be illegitimate, in the same manner as if they had been born out of wedlock, § 12. *Inst. de nupt.*; but if either of the parties were, at the time of the marriage, ignorant of the near relation they stood in to one another, or of the prior marriage, the *bona fides* of that party, though it could not make the marriage lawful, had by the Canon law the effect of legitimating the issue, provided the marriage labouring under the nullity had been solemnized in the face of the church, *Decretal. L. 4. T. 17. C. 14*. Craig is of opinion, *Lib. 2. Dieg. 18. § 18.*, that such of the children as are procreated after both parties have come to the knowledge of the fact which made the marriage unlawful, are to be reputed bastards: but that the ignorance of any one of them ought to support the legitimacy of the children begotten prior to the decree by which it is declared void, because till then none of the spouses ought to decline the conjugal duties, *Lib. 2. Dieg. 18. § 19. †*¹⁸². When it is said, that those children are bastards who are born of a mother whose marriage with the father was unlawful, Lord Stair, *B. 3. T. 3. § 42.*, understands that expression in the limited acceptation, of marriage forbidden by the divine law, *ex gr.* marriage within the forbidden degrees, or that which is contracted while either of the parties stands already married; and from thence concludes, that marriage between the adulterer and adulteress, after the dissolution of the former marriage by divorce, does not fix bastardy on the issue, notwithstanding the statutory prohibition, and penalty annexed to such marriage, by 1600, *C. 20*¹⁸³. As to the consequences of this doctrine with respect to the legal rights of succession competent to such issue, *vid. infr. B. 3. T. 10. § 6*.

52. Legitimated

than ten months preceding the birth does not filiate, *Fac. Coll. Aug. 17. 1774, Stewart, Dict. p. 11664*¹⁸⁰.

† See on this head, *Falc. July 28. 1747, Campbell, Dict. p. 10456*.

¹⁸⁰ But such a *copula*, and indeed one at a considerably greater distance of time, will constitute a *semiplena probatio*, and thus leave room for establishing the filiation by the mother's oath in supplement. *Vid. infr. B. 4. t. 2. § 14. in not.*

¹⁸¹ See this matter very fully discussed in *Routledge, 19th May 1812, supr. cit.*

¹⁸² This very interesting question, as to the effect due to the *bona fides* of either parent, in determining the children's legitimacy, occurred in a late case, *Brymer v. Riddell*. The point was very ably discussed, both in written pleadings, and in a hearing in presence. The Judges, 19th Feb. 1811, were equally divided; *Lords Justice-Clerk (Hope), Glenlee and Meadowbank*, being in favour of the legitimacy, and *Lords Polkennet, Robertson and Newton*, against. The case stood over for the opinion of Lord (now Justice-Clerk) Boyle, and memorials were ordered on the whole cause. But the child having died in the meanwhile, the question dropped.

See another report of the case of *Campbell*, referred to *supr. not. †*, in *Elchies, v. Proof, NO. 7*.

¹⁸³ See the effect of this statute explained *infr. B. 3. t. 10. § 9*.

Book I.

Legitimation of bastards.

52. Legitimated children are those who were born bastards, but have afterwards been made lawful. By the Roman law, children were thus legitimated, either by letters of legitimation from the Sovereign, at the desire of their natural father, who had no issue lawful; *Nov. 89, C. 9.*, of which afterwards, *B. 3. T. 10.*, or by the subsequent intermarriage of the mother of the child with him by whom it was procreated. This last kind, though it was not received by our most ancient customs, *Reg. Maj. L. 2. C. 51. § 2. 3.*; *Cr. Lib. 2. Dieg. 18. § 8.*, has been adopted into our law, for some centuries past, and entitles the children so legitimated to all the rights of lawful children: And consequently, if they be sons, they exclude, by their right of primogeniture, the sons procreated after the marriage, from the succession of the father's heritage, though these sons were lawful children from the birth. The subsequent marriage, by which this sort of legitimation is effected, is by a fiction of the law considered to have been contracted when the child legitimated was begotten; and consequently no children can be thus legitimated, but those who are procreated of a mother whom the father at the time of the procreation might have lawfully married: If, therefore, either the father or the mother of the child were at that period married to another, such child is incapable of legitimation¹⁶⁴. It is a hard doctrine which is maintained by Voet, *Comment. tit. De concub. § 11.*, that legitimation by a subsequent marriage has full effect, even to the prejudice of the children of a marriage intervening betwixt the procreation of the bastard, and the subsequent marriage, by which that bastard was legitimated. Put the case, that a person, after the death of his wife, who left behind her a lawful son of the marriage, intermarries with a woman by whom he had a bastard son prior to his first marriage: The bastard being thus legitimated, excludes, according to this opinion, by his right of primogeniture, not only his brothers by the full blood, procreated after the marriage of their parents, but the son of the father's first wife; who, though he was indubitably at his birth his father's only lawful son, is nevertheless, by this last marriage, without the least fault imputable to him, deprived of the right arising from his primogeniture, by an act of his father to which he never consented. But the contrary opinion is more agreeable to the analogy at least of the Roman law, *d. Nov. 89, C. 9.*; and it would seem, that that kind of legitimation is sufficiently favoured, when it puts the bastard in the same condition, in a question with his brothers by the full blood, as if the father had been actually married to their common mother at the time of his procreation, though it should not have effects with regard to third parties, which tend so much to weaken, and must sometimes render quite elusory, the stipulations by which brides secure their own and their children's rights in marriage-contracts.

Natural obligations of parents to children.

53. Parents lie under the strongest obligations, from nature itself, to take care of their issue during their imperfect age, *infr. § 56.*; in consequence of which, they are vested with all the powers over them which are necessary for the proper discharge of their duty. This parental power or authority is chiefly discovered in the father, whom nature has constituted the head of the family, and who in that

¹⁶⁴ Parties domiciled, and having bastard children, in a country where legitimation *per subsequens matrimonium* is not recognised, cannot legitimate their children by marrying in that country, even to the effect of succeeding to a landed estate in this; *Sheddan, 1st July 1809, Fac. Coll. Dict. v. Foreign, App. NO. 6, affirmed on appeal, 2d March 1808.*

that character has the sole and absolute right of directing whatever concerns the persons of his children under age, of exercising that degree of discipline and moderate chastisement upon them which their perverseness of temper or inattention calls for, and of ordering every thing relating to their education, or the improvement of their minds. He is entitled to all the profits accruing from their labour and industry, while they continue in his family, or are maintained by him at bed and board, *St. B. 1. T. 5. § 6. 8.* But even then the children are capable of receiving donations, either from the father himself, or from others, which thereby become their own property. Children who get a separate stock from the father during their minority, for carrying on any trade or manufacture, or setting up a separate employment by themselves even though they should continue in his family, may be said to be emancipated or forisfamiliated, in so far as relates to that stock; for the whole profits arising from it are their own: But if the profits arising from such employment shall be sufficient for their subsistence, the father is not obliged to maintain them in his family at his own expence, but may article with them for the payment of board. Forisfamiliation, when understood in this sense, is also inferred by the child's marriage, or by his living in a separate house, with his father's consent or permission, *St. B. 1. T. 5. § 13.*

54. A father is, in consequence of these powers, the natural guardian, or, as we express it, administrator-in-law for managing the estate belonging to his children during their minority; not only their tutor while they are pupils, but their curator after they become *puberes*, till their perfect age. That the father was tutor-in-law to his issue, was never doubted; for he must necessarily have that authority himself over his pupil children, which he can devolve on others after his death: But because fathers could not, by our former law, name curators for their children past pupillarity, (nor indeed can at this day, except in *liege poustie*, 1696, C. 8.), some have held, that a father was not curator to his child: But the contrary was adjudged, *Dir. 55. (Mackenzie, Dict. p. 8961.)* This right of legal administration is not limited to the subjects gifted to the children by the father, but extends to every estate which they may get from others, either by donation or succession; for the relation of a father lays him under a natural tie to look after whatever belongs to his issue, till they are capable of managing it themselves. Hence, though minors who have attained the age of puberty, may, with the father's consent, name curators for the management of an estate properly their own; yet the nomination, if the father shall oppose it, cannot proceed, *July 14. 1681, Bartholomew, (Dict. App. II. voce MINOR.)* Minor children may, however, have other curators than the father, without his consent, in the following cases: *First*, Where the child has a claim against the father, the judge will of course authorise a curator *ad lites* to maintain the suit against him. *2dly*, Where a child has an estate left to him by a stranger, exclusive of the father's administration, and no curator for the management of it is named in the grant, the judge must, from the necessity of the case, name, not the father, but another curator to look after it; because every proprietor may bequeath or devise his own property under such restrictions as he shall judge proper. *3dly*, The father's right of legal administration to his daughter is, upon her marriage, transferred from him to the husband, who is by our law entitled to the legal curatory of the wife.

A father is tutor and administrator to his children.

Book I.

Nature of that
power of admi-
nistration.

55. The father's administration is restricted, with us, to such of his children as continue in family with himself; and a child is, as to this question, held to continue in his father's family, though he should reside elsewhere, if he earns not his livelihood by his own industry and labour, independent of any aid from the father; see *Dirlet*. 31. Dec. 7. 1666, (*Mackenzie*, Dict. p. 8959.). It is the father alone who is administrator-in-law to his children; the father's father has no title to the office, upon the predecease of the immediate father, *Harc.* 713, *Lamington*, (Dict. p. 16306.). This right requires no cognition or service to complete it, but arises *ipso jure* from the relation in which the father stands to his child. And because fathers are, from the affection stamped by nature itself upon that relation, presumed to act to the best of their power for their children's interest, the obligations arising from their right of administration are not near so strong, as those which we shall soon learn are imposed, in the common case, on proper tutors and curators. They are under no necessity to take the oath *de fidelis administratione*, nor to give security that they shall account for their management; unless where, from the lowness of their circumstances, the child's property may be in danger, *Durie*, Feb. 12. 1688, *Govan*, (Dict. p. 16263.)*. They are not obliged to make inventory of the child's estate, nor are they liable for omissions. This office of legal administration being a right properly civil, can be exercised on such children alone as are procreated in lawful marriage. A father therefore cannot be administrator-in-law to his bastard son, because a bastard hath, in the judgment of law, no father. The decision brought by some writers in support of the contrary opinion, *March* 17. 1624, *L. Touch*, (Dict. p. 16243.), proves no more, than that every person, whether father or stranger, who makes a donation to a minor, is presumed to reserve the administration to himself during the minor's lesser age. The power inherent in a father, of naming to his issue tutors and curators, whose office does not commence till after his own death, falls to be explained under the next title. Lord Stair seems to affirm, that the father may, even after the children's majority, compel them to live in his family, and contribute their labour towards his service, *B. 1. T. 5. § 13.*; but it is the more general opinion, and better founded in nature, that the compelling power of a father over his issue lasts only till they arrive at perfect age; and that they are from that period their own masters in every respect, and continue no otherwise obliged to him, but by the bonds of duty, affection and gratitude, which no length of time nor station of life ought to dissolve, or even slacken. Yet where a child is fatuous or furious, the same grounds of natural law which entitle the father to be his child's legal administrator while he is minor, entitle him also to the office of curatory after his majority, during the continuance of his distemper, *infr. T. 7. § 49.*

Particular du-
ties of parents to
children, their
extent and du-
ration.

56. As to the duties of a father towards his children, from which duties all his powers over them are truly derived, he is obliged to preserve and protect them during their nonage; to provide them in bed, board, and clothing, and all the necessaries of life; and to give them an education suitable to their rank, in their younger years. Nor is this obligation merely natural; for if they refuse to discharge it, they may be compelled to performance by the civil magistrate,

* In a case where the father was in embarrassed circumstances, and not resident in Scotland, security was required, *Fac. Coll. Feb. 22. 1794, Graham*, Dict. p. 16383.

gistrate, according to their station of life, and the measure of their fortune; *L. 5. § 10. 12. De agn. lib.* It is not limited to the father alone; though he, as the head of the family, and as the sole manager of the goods in communion, is bound most directly and in the first place: But in default of the father, who is the ascendent in the first degree, either through death or incapacity, the burden of maintaining the children falls upon his father, or the children's paternal grandfather, and so upwards upon the other ascendants by the father; and failing these, upon the mother, and the ascendants by her, *Stair, Feb. 23. 1666, Children of the E. of Buchan, (Dict. p. 411.)*¹⁸⁴. And though a grandfather is not, in the common case, obliged to maintain any of the issue of his daughter; because daughters are by marriage transferred from their father's family to that of the husband, *L. 8. cod. 1.*; yet the law makes him liable *subsidiariè* in every case where those who are more directly obliged become indigent, *Ibid.* Parents are not, however, bound to give their children a separate alimony, that is, to maintain them in a house by themselves: It is enough that the father, or other parent, offer to entertain them in his own family; unless he shall by his harsh treatment of them forfeit his right to that alternative, *July 30. 1734, Hepburn, (Dict. p. 410.)*; see *K. 27**; in which case, the judge will ordain the child to be taken from the father's custody, and decree a reasonable sum for his maintenance. As soon as the children can subsist by their own labour or industry, the obligation ceaseth, *d. L. 5. § 7.*; for he who can earn his own bread, has no right or claim of maintenance from another: And upon this ground a parent may exact board from a child who enjoys a separate estate of his own. But the obligation which lies on parents to maintain their indigent children is perpetual¹⁸⁵; insomuch that though the parent himself should be reduced to necessitous circumstances, yet as long as he keeps house, he is obliged to give the same entertainment that he takes to himself, to such of his children as have not sufficient funds for their own subsistence, *Stair, Jan. 13. 1666, Dick, (Dict. p. 409.)* †. Parents are thus

* *Rem. Dec. vol. i. Fowles, Dict. p. 3223.*

† In the case of *Adam contra Lauder, Fac. Coll. March 1. 1762, Dict. p. 398.*; and *June 14. 1765, Dict. p. 15419*, and *Sel. Decis. NO. 220, Dict. p. 400.*, this obligation upon the father was extended to the son's wife, the son being alive and abroad, leaving his family indigent¹⁸⁶.

¹⁸⁴ A grandfather found liable in aliment to his grandchild, even during his father's life, where the father was unable to support it; *Tait, 28th Feb. 1802, Fac. Coll. Dict. v. ALIMENT, App. NO. 3.* So also where the father had left the country, although it would appear from the report he was able to maintain his family; *Christie, 6th July 1802, Fac. Coll. Dict. v. ALIMENT, App. NO. 5.*

¹⁸⁵ A mother in wealthy circumstances is bound, *jure naturæ*, to support her son, though major, until he can maintain himself; *Maidment, 25th May 1815, Fac. Coll.* This decision was reversed on appeal, *27th May 1818, 6. Dow, p. 257.* But the reversal does not seem to touch the general principle, having proceeded on the special effect due to an English marriage-settlement; under which, the Lord Chancellor held, 1st, That the interests of parties had been solemnly and definitively fixed; and 2d, That, at all events, "as the son had a vested interest in the property" secured by the settlement, "with which he might deal in the market, he had sufficient aliment without aid from his mother."

¹⁸⁶ The same was found, *Duncan, 17th Feb. 1810, Fac. Coll.* It is different where the son is himself able to maintain his wife; *ibid. Christie, 6th July 1802, Dict. v. ALIMENT, NO. 5.* The father is not liable in aliment to the son's widow; *Adam, 11th July 1764, Dict. p. 400, 14th June 1765, Dict. p. 15419; Duncan, 22th Feb. 1809, Fac. Coll.; Yussil, 21st Dec. 1815, Fac. Coll.:* though one exception seems to have been found to this

Obligation of maintenance is reciprocal between parents and their children.

thus bound to maintain their issue, though the relation should be merely natural; not only the mother, who is always certain, *d. L. 5. § 4.*, but likewise the father, if he hath either acknowledged the child for his, or may be presumed from other circumstances to have begotten him*. It does not seem fixed in general how long parents are bound to maintain their natural children: In the case of a gentleman, the obligation was found to continue till the child was fourteen years of age, *Fac. Coll. ii. 97. (Paterson, Dict. p. 11080.)* †¹⁸⁹.

57. In consequence of this obligation, an action lies against the father for the price of goods given upon credit to his child, if they were suitable to his fortune, though he should not be living in family

* The *quantum* of aliment due to a natural child, must necessarily depend upon the circumstances of its parents. Where the father was a day-labourer, and the mother of the same rank, the Court awarded against the father L.3 annually, *Fac. Coll. March 7. 1778, Oliver, Dict. p. 444.*; in many later cases, L.4 or L.5 according to circumstances. But among persons of higher rank, the sum of L.100 Scots has been often given, *Fac. Coll. Nov. 19. 1782, Glendinning*¹⁸⁷; *Dict. p. 445.*; *ibid. Nov. 29. 1782, Paterson, Dict. p. 445.*; and *Jan. 27. 1779, Kincaid*, referred to in the report of Paterson's case. Sometimes even higher sums have been given. But all this is discretionary, and depending very much upon circumstances.

† The same found, *Kilk. ALIMENT, NO. iv. Graham, Dict. p. 441.*; *Fac. Coll. Feb. 21. 1765, Short, Dict. p. 442.* In the case of *Oliver, Dict. p. 444.*, the aliment was found due *absolutely* till the child's age of seven years, and thereafter "until either that the father shall take the child into his own keeping, or that the child shall attain the age of ten years."

Questions have frequently arisen between the parents respecting the custody of their natural child. During the period of infancy, the mother has always been preferred, *Fac. Coll. March 4. 1758, Burgess, Dict. p. 1357.*; but decisions have not ascertained, with perfect precision, the age at which this exclusive right in the mother ceases, or in what circumstances the father may be entitled to such custody. In general, custody implies guardianship, which legally does not belong to the father of a natural child. But as the court of session has in all such cases a supereminent power, so it must belong to the court, judging upon the circumstances of each particular case, to regulate matters both as to the aliment and custody of natural children, without being tied down to any precise rule, as in the case of *Farquharson, &c. contra Anderson*, in 1805, (not reported). In the above case of *Short*, the mother was preferred to the custody of her child, a female, for the full space of fourteen years from the birth; but in *Oliver's* case, the period was limited to seven years. In two later cases, already quoted, the mother was found entitled to demand aliment for a female child till ten years of age, and for a male child till seven, *Fac. Coll. Nov. 19. 1782, Glendinning, Dict. p. 445.*; *ibid. Nov. 29. 1782, Paterson, Dict. p. 445.*¹⁸⁸.

this rule, *De Courcy, 3d July 1806, Dict. v. ALIMENT, Fac. Coll. App. NO. 8.*, where it was decided, that the proprietor of an entailed estate is bound to maintain the widow of his son, she being also the mother of the heir of entail: This, however, has always been regarded as a special case, and by some even questioned as of dubious authority.

¹⁸⁷ According to the report, L.10 Sterling was given in this case.

¹⁸⁸ On a fair view of the authorities, it does not appear ever to have been positively found, that the father is entitled *de jure* to the custody of his natural child; though the same result has perhaps been arrived at indirectly, by making the father's custody the condition of extending his obligation of aliment beyond a certain period.

In a recent case, the leaning of the Court seems to have been in favour of the mother's *permanent* right of custody; at least wherever personal disqualification did not exist; *Goadby, 7th July 1815, Fac. Coll.* The circumstances, indeed, admitted no decision of this point, as in a competition with the father; but it was expressly so found, in regard to a male child of twelve years old, as between the mother and the relations of the deceased father: and the decision is of more importance, because pronounced notwithstanding an avowed purpose on the part of the mother, who was an Englishwoman, to remove the child (who also had been born in England, but had, at this time, with her concurrence, been resident for two years in Scotland with the father's relations) beyond the jurisdiction of the Court. This last circumstance gave rise to a very delicate question, which much divided the Court, as to the propriety of sanctioning such removal out of their jurisdiction. But the decision ordered the child to be restored to its mother.

¹⁸⁹ Where the child is an idiot, or otherwise labours under incapacity, the obligation continues "aye and while it shall be unable to support itself;" *Finlayson, 7th July 1809, Fac. Coll.*

mily with his father, *Fac. Coll.* ii. 119. *Barclay*, (DICT. p. 9624.), unless he bring proof that he gave the child a separate allowance to provide for himself, or that the child was provided *aliunde*. Nor is it necessary, in such case, for the shopkeeper or tradesman to consult the father beforehand, or to demand from him a warrant to furnish the child upon credit for what he calls for, *Stair*, Jan. 20. 1672, *Wallace*, (DICT. p. 13425.); *Fount.* Jan. 14. 1698, *Hopkirk*, (DICT. p. 12482.). This obligation for maintenance is reciprocal between parents and children; and hath as strong effects against the last as the first; for the tie of piety and gratitude, by which nature hath bound children, when they have a fund sufficient for it, to maintain their indigent parents, is supported by the civil sanction, *d. L. 5. § 1. 2. 15.*; *L. ult. § 5. C. De bon. quæ liber.*; *July 20. 1710, Brown*, (DICT. p. 448.)¹⁹⁰.

58. A father is not barely bound to maintain his children during his own life; he ought so to provide for all of them, that they may be able to live comfortably after his death: It is therefore his duty either to make over by a deed *inter vivos*, or to bequeath to each of them by testament, such a patrimony or provision, in land, money or other subjects, as is suitable to his circumstances. This duty is however one of those which is left entirely upon the conscience, without being enforced by any civil sanction; and therefore, if the father neglect to grant provisions to his younger children, that obligation is not, upon his death, transferred against his heir. But the obligation to maintain the younger children is, by the usage of Scotland, justly continued after the father's death, if he was proprietor of a land estate, and is transferred against the eldest son or heir; who, as representing the father, must maintain these his younger brothers and sisters: For the right of primogeniture, which entitles the eldest son to the father's whole heritage exclusive of the other children, would be most iniquitous, if it were not charged with the alimony of the younger brothers and sisters, where the father has left them unprovided^{*191}.—Here an

Father's obligation to provide his children after his death, and obligation on the heir to maintain his brothers and sisters.

VOL. I.

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observation

* The representative of a grandfather has been found liable in like manner, *Sel. Decis.* NO. 214, *Seaton*, DICT. p. 431. But the contrary was found, *Fac. Coll.* iii. NO. 44, *Patersons*, DICT. p. 429.—See *ibid.* Feb. 28. 1802, *Tait*, DICT. App. 1. voce ALIMENT, NO. 3; *Ibid.* July 6. 1802, *Christie*, DICT. App. 1. voce ALIMENT, NO. 5. The Court have also found aliment due to one sister-uterine by another, who had been left her mother's sole executrix, *Fac. Coll.* ii. 183, *Scott*, DICT. p. 440.; *Sel. Decis.* 153. *Scott*, DICT. App. 1. voce PARENT AND CHILD.

¹⁹⁰ *Anderson*, 25th Jan. 1754, *Fac. Coll.* DICT. p. 427; *Paterson*, 25th June 1761, *Fac. Coll.* DICT. p. 429; *Seaton*, 11th Feb. 1764, *Sel. Dec.* DICT. p. 431; *Campbell*, 25th Feb. 1809, *Fac. Coll.*

¹⁹¹ It would seem, that in every case, the representatives of a person deceased, whether the degree of relationship be nearer or more remote, and whether the succession, by which they are *lucrati*, consist of heritage or moveables, are, out of this succession, liable in aliment to those whom the deceased himself was under a natural obligation to maintain. Thus, in the cases referred to, *supr.* p. 146, *not.* * and p. 148, *not.* *, a wife was found entitled to aliment from the representative of her husband, (although, as in the case of *Lowther*, "a distant collateral relation,") her legal provisions being defective. In the same way, a mother and grandmother were found entitled to aliment out of the son and grandson's estate, though "very distant collateral relations had succeeded;" *Buchanan*, 21st January 1813, *Fac. Coll.* So also in the case of the sister-uterine referred to above, *not.* *, *h. p.* And so also, perhaps, especially since the decisions in *Tait* and *Christie*, *supr. not.* ¹⁹¹, as to the obligation of the representative of a grandfather to aliment the grandchildren, notwithstanding the conflict between the two cases of *Seaton* and *Patersons*, *supr. not.* *, *h. p.* :—See *Dalziel*, 14th Dec. 1788, *Fac. Coll.* DICT. p. 450.

A father having settled certain provisions on his younger children, payable at their respective

observation may be made by the way, (though it does not directly concerns the relation between parents and children), that in questions about the continuance of the burden, as thus transferred after the father's death against his heir, a reasonable distinction is made in our practice between the alimony due to brothers and to sisters. The heir is bound to maintain his younger brothers, only until their majority, because they are presumed capable, after their perfect age, of earning a livelihood to themselves by business or employment. But sisters must be maintained till their marriage; because the daughters of gentlemen can do as little for themselves after as before majority, till they get a husband to provide for them, Clerk *Home*, 114. (*Douglas*, DICT. p. 425.). The endurance of the aliment to sisters seems to depend on the degree of opulence as well as the rank of parties. Where the family-estate of a gentleman was small and somewhat encumbered, the aliment to sisters was therefore found due only till they should come of age*. In persons of lower rank, the obligation to maintain the sisters lasts no longer than till they are fit to be put to an employment, or to enter into service. By the law of nature considered abstractly, the eldest brother is not obliged to maintain a younger while the mother is alive, who is more directly debtor in that obligation. Yet in the case of an eldest son succeeding to the whole heritage of his father, the right of primogeniture is justly charged with the maintenance of all the younger children of him to whom that eldest succeeds as sole heir; and the mother's jointure is considered as no more than a suitable provision for herself, Clerk *Home*, 114. (*Douglas*, DICT. p. 425.) †. This obligation upon an eldest son to maintain his brothers and sisters, hath place only where he takes an estate as heir to his father: If he does not succeed to, or otherwise represent him, he is not subject to any such claim of alimony ‡.

59. It

* *Kilk.* NO. 6. *voce* ALIMENT, *Bisset*, DICT. p. 413. In this case the aliment was appointed to continue "till the majority or marriage of the daughters, whichever should first happen." More lately, the Court gave aliment to a female (the niece of the defender) "during her life, or till her marriage," *Fac. Coll. Dec. 14. 1788, Dalziel*, DICT. p. 450. 192.

† The heir is indeed primarily liable as representing his father; yet if his estate do not afford a sufficient aliment for himself, as well as for the other children, the deficiency must be made up by the mother, who is liable *secundo loco* to maintain her children, *Rem. Decis.* NO. 99., *Kilk.* NO. 6. *voce* ALIMENT, *Falc.* II. 20, *Bisset*, DICT. p. 413.

‡ *Fac. Coll. Jan. 25. 1754, Anderson and Gibson*, DICT. p. 427.; *ibid. Jan. 16. 1756, Malcolms*, DICT. p. 439.

respective majorities, died, while they were yet under age; it was found that they must be alimented in the meantime, but the Court "did not think it necessary, *in hoc statu*, to "determine, whether this was ultimately to come out of the fee of their own provisions, or "out of the subject belonging to the heir;" *Riddels*, 6th March 1802, *Fac. Coll. DICT. v. ALIMENT, App.* NO. 4. The principle laid down by the Lord Chancellor, in the case of *Maidment*, *ant. not.* 185, would seem to settle the question here reserved, in favour of the first alternative; unless an argument could perhaps have been raised on the presumed intention of the father, which seems not altogether impossible from the terms of the report.

193 It is indeed observed by Kilkerran, in the previous case of *Bisset*, "Suppose an "heir to enjoy an opulent estate, and to represent a family, with the dignity of which "it could not well consist that the daughters should go to service, marriage would still "seem to be the proper period for the endurance of the aliment." See also *Scot*, 8th March 1759, *Fac. Coll. Sel. Decis.* DICT. p. 440. and *App.* NO. 1. PARENT AND CHILD.

59. It were to deviate from the proper subject of this treatise, to enter into a particular detail of those natural obligations between parents and children, which seldom receive support in any country by positive law; *ex. gr.* the honour and obedience due by children to their parents. But we shall afterwards learn, that some grosser breaches, even of that duty, may, by our law, be brought under the cognisance of the civil magistrate.

TITLE VI.
Duties of honour and obedience on the part of children.

TIT. VII.

Of Minors, their Tutors and Curators; and of the Relation between Master and Servant.

L. OF MINORS, THEIR TUTORS AND CURATORS.

PERSONS who, from the want either of years, or of the exercise of reason, cannot conduct themselves, or manage their estates with discretion, and who have lost their father, who was their natural guardian, *supr. T. 6. § 54.* are made the special object of the protection of the law in every country, and are furnished with proper guardians; till their perfect age, or their return to a sound judgment.—And first, of those who stand in need of guardians on account of their lesser age. The Roman law takes notice of several ages, as infancy, the age next to infancy, the age next to puberty, puberty itself, and majority: And though the law of Scotland makes some difference in each of these, the stages of life principally distinguished with us are only three, pupilarity or pupillage, puberty or minority, and majority. A child is in pupillage from the birth till the age of fourteen, if a male, and till twelve, if a female. Minority begins where pupilarity ends, and continues till majority; which is, by our law, the age of twenty-one years, both in males and females. But minority, when made use of in a larger sense, includes all under age, whether pupils or *puberes*. The guardians who are intrusted with the care of minors, get the name either of *tutors* or *curators*. Tutory, from *tueri*, is a power and faculty to govern the person, and to manage the estate of a pupil; that is, of one who hath not yet attained the age of puberty. Curatory, from *cura*, is the power of managing the estate, either of a minor *pubes*, or of a major who is incapable of acting for himself through a defect of judgment.

Guardianship of minors by tutors and curators.

2. In the doctrine of tutors, the law of Scotland nearly resembles the Roman; most of the variations between the two arising from the different general contexture of the two systems. With us tutors are either testamentary, otherwise called *nominate*, or of law, or dative; which division is analogous to the *tutores testamentarii*, *legitimi*, and *dativi*, of the Romans. A tutor-testamentary is he whom the father names tutor to the child, either by testament, or other writing which sufficiently indicates his will. The right of nomination was, by the Roman law, founded solely on the *patria potestas*; and by ours also it is an effect of the natural guardianship inherent in the father, of his child's person and estate; for the effects of that right are not wholly extinguished by the father's death. It includes a power of naming persons who may look after what concerns his child during his pupillage, after death shall have put

Division of tutors. Tutors testamentary or nominate.

an end to the father's own administration. The right of naming testamentary tutors is neither competent by the Roman law, nor by ours, to any but fathers: A grandfather, therefore, as he is not administrator-in-law to his grandchild, so neither can he name tutors for him, even though the immediate father be dead, *supr.* T. 6. § 55. As every proprietor can dispose of his property under such limitations as he shall judge proper, a mother, or any stranger who devises an estate to a pupil, may name one to manage it during the child's pupillage: But though such nominee gets the name of a tutor, L. 4. *De test. tut.*, the appellation is improper; for he has no power over the pupil's person, and even his right of administering the estate is limited to the special subject devised by the deceased*. Such pupil may, therefore, notwithstanding that nomination, be put under the power of a proper tutor, who hath a right to defend his person, and manage his other property. The nomination of tutors by a father being entirely pendent on his will, may, like a testament, be altered at his pleasure, in the very last moments of life, L. 8. § 3. *De test. tut.* †. Nay, it retains its ambulatory nature, though it should be engrossed in a deed *inter vivos* which is in itself irrevocable, *ex. gr.* in an absolute disposition. A father is not limited in his nomination to any number of tutors; he may appoint one, or two, or more, as he judges best.

Tutors-testamentary, their office and obligations.

3. Testamentary tutors are justly preferred to all others; because the father's express will, declared by his nomination, ought to prevail over his presumed will, upon which the office of tutor of law is entirely grounded. Hence the rule of the Roman law, That as long as a tutor-testamentary can be hoped for, there is no room for any other sort of tutor. Though therefore testamentary tutors should not have for many years moved the least step, importing the acceptance of the office; yet so soon as they accept, they exclude the tutor of law, though he should have actually served himself tutor, and entered upon the management, Dec. 17. 1631, *Auchterlony*, (DICT. p. 16258.). Upon this ground also, the father's nomination is so favourably interpreted, that though one or more of the tutors-testamentary should lie under a legal incapacity, yet if there are others in the nomination who can lawfully exercise the office, the persons incapable are held *pro non adjectis*, as if they had not been named, and law supports the nomination as to the rest, July 3. 1711, *Baird*, (DICT. p. 7431.) ‡. Hence, lastly, a testamentary tutor is authorised by the nomination itself, to enter into the immediate exercise of his office, without any form of law, and is exempted from making oath *de fidei administratione*. And from the same favour of law, he neither was by the Roman law, nor is by ours,

* A person who had been appointed by the father of a natural child "guardian to the person and estate of his said reputed son," was found entitled to custody of the boy, preferably to one to whom he had been previously committed by the father, *Fac. Coll. Nov.* 23. 1785, *Johnson*, DICT. p. 16374¹⁰⁰.

† A father's powers of naming a factor for the tutors of his children may be exercised in similar circumstances, *Kames's Rem. Decis.* 38. *Tutor of Straiton*, DICT. p. 16348.

‡ Where two are appointed, without expressing them to be joint tutors, though one of them should die or decline the office, it will subsist in the person of the other, *Kilk. voce TUTOR AND CURATOR*, NO. iv. *Young*, DICT. p. 16346; *Fac. Coll. Aug.* 2. 1758, *Children of Fisher*, DICT. p. 16361.

¹⁰¹ If, in competition with the mother of a natural child, the father hath himself no proper right of custody, *supr. not.*¹⁰⁰, so neither can he exclude her by any appointment of tutors. As to the appointment of curators to natural children, *vid. infr. not.*¹⁰⁰.

ours, under a necessity of giving security *rem pupilli salvam fore*, that he shall justly account for his management; because the confidence which the father places in him by the nomination creates a presumption, that he was well assured of his probity and diligence, *L. 7. § 5. C. De curat. fur.* Yet the court of session sometimes ordain, *ex officio*, testamentary tutors to give security, where there is ground to suspect either their honesty or their circumstances, *Fount. Feb. 23. 1693, Count. of Callender*, (DICT. p. 14701.).

4. If the father hath made no nomination of tutors, or if the tutors named by him have not accepted, or if their nomination has fallen by their death, or by a supervening disability, there is place for a tutor of law, or tutor-legitim; so called, because his right proceeds from the mere disposition of law. As tutors of law may, after they have served tutors, in the manner soon to be explained, and entered upon their office, be obliged to quit it, upon the testamentary tutors offering to accept, *supr. § 3.*, they frequently make the testamentary tutors parties to the service, that they may then declare their option either to accept or to renounce; and if they renounce, they cannot be afterwards admitted to the office, *July 6. 1627, Campbell*, (DICT. p. 16246.). By the ancient Roman law, the office of tutor-legitim devolved on the next agnate, to the exclusion of cognates; because the next agnate was entitled to the legal succession, and it was to be presumed that he who had the prospect of succeeding to the pupil's estate would be the most careful to preserve it, *L. 1. pr. De leg. tut.* Agnates, in the sense of the Roman law, were persons related to each other through males only: The relation of cognates was connected by the interposition of one or more females. Thus a brother's son is his uncle's agnate in the language of the Romans, because the propinquity is connected wholly by males; a sister's son is his cognate, because a female is interposed in that relation, § 1. *Inst. De leg. agn. tut.* But in our law-language, all kinsmen by the father are agnates, though females should intervene; and those by the mother, cognates. Justinian abolished so entirely the distinction of the old Roman law between agnates and cognates, that he admitted, both to the legal succession, and to the office of tutor of law, not only kinsmen by the father, though a female had been interposed in that relation, but even those by the mother, *Nov. 118. C. 4, 5.* We in Scotland have steered a middle course: For we exclude from those rights all who, in our law-style, are called *cognates*, that is, all relations by the mother; but we admit all kinsmen by the father, though they should not be agnates in the sense of the Roman law. The tutor of law must be a male agnate: For though a father or a magistrate may appoint female tutors; yet, in the case of tutors-legitim, who are marked out purely for the sake of blood, without regard to personal qualifications, the law has thought fit to pass by those whom nature seems to have formed for offices of a more domestic kind. Hence a woman, though she be next in succession to the pupil in default of his own issue, cannot be served tutor of law to him ¹⁹⁵.

5. Where there were two or more agnates equally near in blood to the pupil, and of course equally entitled to the legal succession, the Roman law gave the office to all of them, *L. 9. De leg. tut.*; but as the succession of heritage in males descends only to one by

VOL. I.

2 T

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Tutors of law.
Distinction of
agnates and
cognates.

Where several
agnates are
equally near to
the pupil, who
entitled to be
tutor of law.

¹⁹⁵ It is no objection to a person being tutor at law, that he does not reside in Scotland; *Bell, 10th March 1784, Fac. Coll. DICT. p. 16374; Rob, 22d Dec. 1814, Fac. Coll.*

the law of Scotland, though there should be others equally near in degree, the office of tutor-legitim goes to that one who would be heir at law to the pupil. By this rule, if we shall suppose, that, of three brothers, the second dies, leaving a child without naming a tutor to him, the youngest of the surviving brothers must be sole tutor of law to his nephew, because he alone is his heir at law. This is doubted, both by *Mack. Observ. on 1585, C. 18.*, and by *Dirl. v. Tutor*, in the special case where the estate of the deceased, to whom the pupil had succeeded, was conquest, *i. e.* acquired by himself, upon this ground, That the legal succession of conquest ascends to the elder brother. But this ground of doubt is improperly applied to the present question; for though the estate was conquest in the person of the deceased, it becomes proper heritage upon the succession opening to the pupil, and so descends after his death to his younger uncle, *infr. B. 3. T. 8. § 14.*, since it is the succession to the pupil, not to the deceased, that is to be regarded in this case. The question appears more doubtful, Whether, where the whole estate of the pupil consists in moveable subjects, the tutory of law ought to devolve on all the male agnates of the same degree, as being equally entitled to the succession of moveables, or upon him alone who could serve heir-general to the pupil on his death? But it would seem, that even in that case the heir-general ought to exclude the others in the same degree: *First*, Because none of those others have a right to serve heir at law, and our customs admit of only one tutor of law: *2dly*, Because it must create too much uncertainty, and too frequent altercations, if the rule of preference were to vary according to the different nature of the pupil's estate. Though minority ends by our law at twenty-one years of age, the age of twenty-five is expressly required in tutors of law by 1474, *C. 51.*, on account of the firmness and maturity of judgment necessary for the proper discharge of that office. But there is no such limitation in the appointing of tutors testamentary or dative, who may be received at twenty-one: probably from a reason similar to that which has been assigned in the case of female tutors, *supr. § 4. in fin.* The last-cited statute, which requires the age of twenty-five in a tutor of law, expressly enacts, That where the pupil has a younger brother, the tutory of law shall not devolve upon him, but on the agnate next after him, who hath attained the age of twenty-five, though farther removed in blood from the pupil than his brother. When the next agnate was thus under the age required by law, the Romans admitted of an interim curator to be named by the magistrate, till the agnate should become capable of the office, *L. 10. § 7. De exc. tut.*; which has given occasion to some to affirm, that by our law likewise, the office conferred on the remoter agnate of twenty-five years of age by the act 1474, is but temporary, to continue only till the pupil's next agnate attain that age, who may then serve tutor of law, and exclude the other. But this doctrine does not appear agreeable to the statute, which gives the office to the remoter agnate past twenty-five *purè*, under no limitation in point of time; whereas the curatory-dative appointed in this case by the Roman law, was, in the nomination itself, limited to a certain time of duration.

6. Where the next agnate is to undertake the office, he purchases or obtains a brief from the chancery, directed not to this or the other particular judge, but to any judge having jurisdiction, *March 8. 1636, Stewart*, (*Dict. p. 9585.*); because the serving of the next agnate to the office, is a point which truly admits of no

opposition

opposition, and so is *jurisdictionis voluntariae*. The judge is required to call a jury or inquest of sworn men to inquire into the following heads: *First*, Who is the next male agnate of the full age of twenty-five, and entitled to succeed to the pupil on his death? *2dly*, Whether that agnate be attentive to his own affairs? *3dly*, Whether he is able to give security for the pupil's indemnification? and, *4thly*, Who is the next cognate, with whom the person of the pupil may be intrusted? Inquiry is, *de praxi*, made by the jury only into the first head. The agnate's good economy or fitness to manage is presumed, till the contrary be proved; the point of security in the third head is the proper province of the clerk*; and the last, which relates to the next cognate, is left to the decision of our courts of law.

7. As to this last head of the brief, it may be observed, that though, by the Roman law, the tutor-legitim, as well as the testamentary and dative, had the charge both of the pupil's person and estate; yet, by the usage of Scotland, the custody of his person hath been, in the case of a tutor-legitim, committed to the mother, and in default of her, to the next cognate, agreeably to the laws of the Majesty, *L. 2. C. 47. § 4.*, from a just suspicion, that he to whom a succession is to open by the death of his pupil, will not be over careful to preserve a life which stands in the way of that succession. But still the tutor-legitim has the direction of the pupil's education, and of the whole expence which is to attend his person. The mother, if she continue a widow, is preferred to the custody of the pupil, so long as the pupil is *infantiae proximus*, that is, till he be seven years of age, and sometimes longer, according to circumstances¹⁹⁶. But so soon as she intermarries with a second husband, the pupil may be taken from her, though she should offer to entertain him *gratis*, *Feb. 5. 1675, Fullarton*, (*Dict. p. 16291.*), and delivered over to the tutor, if he be not tutor of law, and so his immediate heir; or if he be tutor of law, to the next cognate. The security given by the tutor of law upon his entry, must be recorded in the books of that judge's court before whom he served; and he ought to make oath *de fidei*. The inquest's verdict or sentence, declaring the obtainer of the brief to be the next agnate, must be retoured to the chancery, from whence the brief issued; and the nomination of the tutor, which follows on it, is of itself a sufficient title and warrant for his administration; but he ought to give security for his accounting, before he actually enter upon the exercise of his office.

Tutor of law has not the custody of the pupil's person, but the mother or the next cognate.

8. In default of tutors-legitim, there is place for tutors-dative; who were by the Roman law named by the magistrate, but with us, by the King alone, as *pater patriae*, in his court of exchequer. Because the tutor of law, who is to be preferred to the office before tutors-dative, ought to have a reasonable time to deliberate, whether he will serve or not, no tutory-dative can be given, till the expiry of a year from the time when first the tutor of law might have served. And this period varies in its commencement, according to different circumstances. A tutor of law may serve immediately

Tutors-dative.

* See on this point, *Kilk. TUTOR AND CURATOR, No. 12, Liddil, Dict. p. 13964.*

¹⁹⁶ Tutors testamentary are entitled to remove the pupils at an earlier age, and to fix their residence for the purpose of education; *Scots, 16th Feb. 1759, Fac. Coll. Dict. p. 16361.* That even the tutor at law has right to direct the pupil's residence for such purpose, may be inferred from *Reoch, 14th Nov. 1817, Fac. Coll.*; but the Court will deprive him of it, on cause shown; *ibid.* See farther as to this matter of custody, *Macilvain, 30th July 1796, Clerk Home, Dict. p. 16340; Robertson, 28th May 1814, Fac. Coll.; Higgins, 7th June 1821. Anon.*

Book I.

ly upon the father's death, if there has been no nomination of tutors, or if the nominees do not instantly accept. If they accept, the tutor of law cannot serve till the nomination falls either by their death or legal disability; and in the case of a posthumous child, he may serve immediately after the child's birth. The tutor of law is thus preferred before the tutor-dative, because he is presumed, both from his proximity and hope of succession, to have a more hearty concern in the pupil's affairs than any stranger. Hence, though the tutor of law had not, within the year in which he ought to have served, given security, which is a duty incumbent on all tutors of law, previously to their entry, he excluded the tutor-dative, *June 29. 1632, Irvine* (Dict. p. 16260.). Nay, Steuart, *Ans. v. Tutors*, is of opinion, that though the next agnate had taken no step towards his service within the year, he might oppose a tutory-dative, and ought to be preferred to the office, if no exception lay against his character and circumstances, and if matters were entire.

Form of passing
tutories-dative.

9. The form of passing tutories-dative, is, by presenting a signature to the court of exchequer; which, after it has been revised by the Barons, and a small composition paid to the crown by him who offers it, is stamped, with the King's cachet, and then passes by the quarter-seal; and not by the privy seal, as Mackenzie affirms, § 5. *h. t.* Of old, the security given by tutors-dative for their accounting was recorded in the commissary-books, but is now in those of the exchequer; and when several tutors are appointed by the gift, they are received as mutual cautioners for one another. The oath *de fidei* hath not for a long time been exacted from this kind of tutors. It would appear, that, by the former practice, tutories-dative were upon the matter granted of course to any who applied for them; but that pupils may not suffer by being cast upon the care of improper tutors, all gifts of tutory are declared null by 1672, C. 2.; which pass in exchequer without summoning the next of kin both by the father and mother, at least without their consent to the gift, or their declaration that they have no objection against the person applying for it.

Factor appointed
where there
are no tutors.

10. That pupils may not be left entirely defenceless, when they are without a tutor or guardian of any kind, which frequently happens, if their affairs are involved, a factor or steward is in such case named by the court of session, at the suit of any kinsman of the pupil*, for the management of his affairs; which factor must conduct himself by the rules set forth in the act of sederunt, *Feb. 13. 1730* 198; but that act does not extend to the case of minors *pu-beres*, who can choose curators for themselves.

11. Minors

* And on intimation made to the nearest of kin on the father's and mother's side, in order to afford them an opportunity of stating any relevant objection which may seem to lie against further procedure, *Fac. Coll. Jan. 19. 1788, Cowans*, Dict. p. 7452 197. A factor *loco tutoris* may be superseded by the service of a tutor of law, *quandocunque*, *Fac. Coll. March 20. 1784, Bell*, Dict. p. 16374.

197 This seems rather an inaccurate statement of the decision, as reported. It was observed on the Bench, that "in the present case, as the application is only made in the names of the mother of the children, and of her father, intimation ought to be given under form of instrument to the two nearest agnates, not because their consent is deemed essential, but in order that they may have an opportunity of stating any relevant objection to the proceeding. The Court having unanimously acquiesced in this opinion, the above-mentioned intimation was accordingly ordered." The practice, however, is very much what is stated in the note; and it is supported by a similar procedure in the analogous case of the appointment of curators on the application of a minor; *infr.* § 11.

198 It has been decided, though under considerable difference of opinion, that a factor *loco tutoris* has no title *de jure* to the custody or disposal of the person of his ward;

TITLE VII.

Curators named by the father, or chosen by the minor.

11. Minors, after attaining the age of puberty, were presumed to be possessed of such a degree of judgment and discretion, that guardians could not be imposed on them against their wills, either by the Roman law, § 2. *Inst. De curat.*, or by our former usage; so that they might, in every case, have assumed to themselves the sole management of their affairs, if they had opinion enough of their own capacity and prudence. But by 1696, C. 8., it is declared lawful to fathers, while they are in a state of health, or, as we usually express it, in *liege pousie*, to name curators as well as tutors to their children; which by the general opinion of lawyers they had no right to do before that statute*. Thus, by our present law, curators may be divided into necessary, who are imposed on the minor in consequence of the act 1696, and voluntary, whom the minor himself chooses for guardians without compulsion. The minor, when he intends to put himself under the direction of curators, must, by 1555, C. 35., raise and execute a summons, citing at least two of the most honest of his kin personally, and all others having interest edictally, at the head borough of the jurisdiction where the minor's lands lie, to appear on nine days' warning before his own judge-ordinary, to hear and see curators given to him. At the day and place of appearance, he offers to the judge a list of those whom he proposes for curators. Such of them as are willing to undertake the office must sign their acceptance, and give security for accounting; and upon this proceeding, an act of curatory is extracted. It was adjudged, *July 23. 1674, Wallace*, (DICT. p. 16290.), that in order to the choice of curators, it behoved two of the next of kin to be cited on the father's side, and two on the mother's: And though Lord Stair has by mistake given for the *ratio decidendi*, that the statute 1555 expressly required the citation of that number of friends to every act of curatory, whereas it requires only two in whole; yet the decision may be justified as agreeably to the spirit of the statute, especially after the passing of a later one, 1672, C. 2., which clearly requires the citation of the next of kin, both on the side of father and mother, at making up the minor's inventories. And from hence it is, that custom has now established the requisite, taken for granted, in the above decision, as necessary¹⁹⁹. It would seem, both from the narrative and the

VOL. I.

2 U

statutory

* Whether a father is entitled, on deathbed, to name a factor for his son's curators? debated, but not determined, *Kames's Rem. Decis. 38. Tutor of Straiton*, DICT. p. 16348.

ward; *Robertson, 28th May 1814, Fac. Coll.* As to his powers in the management of the estate, they seem to be much the same with those of a proper tutor; *Ibid.*

Special authority was given to a factor *loco tutoris* to serve a pupil, who had no tutors, heir to his father; *Baird, 13th Jan. 1741, Kilk. DICT. p. 16346.*

The Court will not appoint more than one person factor *loco tutoris*; *Brown, 1st Feb. 1815, Fac. Coll.*

Where the nearest agnate was abroad, the Court appointed the next agnate in the country, factor *loco tutoris*, in preference to the pupil's mother; *Arstruther, 3d March 1818, Fac. Coll.*

¹⁹⁹ In the case of a natural child, who having no next of kin acknowledged by law, is unable to comply with the ordinary forms of citation, the Court, lately, on a special application, and "in respect of the very particular circumstances of this case," appointed curators, after intimation in the minute-book; and authorised the "Judge-Ordinary to interpose his authority to the curatorial inventories, to dispense with the citation of the next of kin, and to receive the proper and usual caution for the curators," &c.; *Young, 19th Feb. 1818, Fac. Coll.* In another case, a natural child, whose father had left him considerable funds, and had appointed certain persons to act as guardians, was, notwithstanding, found entitled to apply to the Court for appointment of curators; *Wilson, 10th March 1819, Fac. Coll.*

Vid. ant. § 2. h. t. in not. as to the tutors of natural children.

Who may be tutors or curators.

statutory part of the above-cited act 1696, that the choice of curators by the minor cannot exclude from the office those who are named by the father according to the directions of that act ²⁰⁰.

12. All persons may be appointed either tutors or curators to minors, who are fit for the management of an estate, and are not debarred by law or custom ²⁰¹. Tutory, being accounted by the Romans *officium virile*, could not be exercised by women, excepting mothers in special cases, *Tit. C. Quand. mul.* Married women are utterly disqualified for the office: For if it be, as Justinian reasons in a parallel case, a shameful confounding of names and things, that the same person should be both tutor and minor, *L. 5. C. De leg. tut.*; it must be equally absurd, for one who is herself subjected to the power or curatory of an husband, to have another under her care and tuition ²⁰². But a father may name for tutors to his children, either his own widow, or any other woman who is not married, *vid. supr. § 4.*; and such nominee may lawfully exercise the office till she be *vestita viro*; and no longer, though the nomination should expressly provide the contrary; *vid. infr. § 29.* All children, under Popish tutors or curators, are, by 1661, *C. 8.*, to be taken from under their care; and by a posterior act, 1700, *C. 3.*, professed Papists, and even persons who are only suspected of Popery, are declared incapable of the offices of tutory or curatory, till they purge themselves, by signing the *formula* appointed for that purpose. Those who are either creditors or debtors to the minor were, by the *jus antiquum* of the Romans, capable of the office of tutory, *L. 9. § 5. De adm. tut.*: And though they were afterwards disabled by Justinian, *Nov. 94. C. 1.*, we have justly adhered to their ancient law: For such persons are, from their knowledge of the minor's affairs, and frequently from the proximity of blood, the most proper for the office.

Curator bonis and curator ad lites.

13. Curators are sometimes named to a minor for a special purpose, without any general power of management. Thus, *first*, As a stranger may name a tutor to a pupil to whom he has devised an estate, for managing that estate, *supr. § 2.*, so he may name a curator to a minor *pubes* for the same purpose. But such nominee is more properly *curator bonis* ²⁰³, curator to a special estate, than guardian to a person; and therefore the nomination by the deceased cannot hinder the minor from choosing proper curators for the administration of his other estate, *Dirl. 316, (Scot. Dict. p. 8970.)* ²⁰⁴. *2dly*, Where

²⁰⁰ *Vid. infr. § 13. and not. 204.*

²⁰¹ *Vid. ant. not. 125.*

²⁰² A married woman may legally be named trustee, *et sine qua non*, her husband consenting to her acceptance of the trust; *Stoddart, 30th June 1812, Fac. Coll.* But the Court distinguished the office of trustee from that of tutor or curator; and seemed to hold the doctrine in the text as settled, in reference to the appointment of a married woman, in either of these latter capacities.

²⁰³ *Vid. infr. B. 2. t. 12. § 58.*, as to the judicial appointment of a *curator bonis*.

²⁰⁴ It has been questioned, how far the nomination of curators, even by a father under the *stat. 1696, c. 8.*, excludes the minor's choice of separate curators; *Wilson, 10th March 1819, Fac. Coll.*; and, in the opinions delivered from the Bench, this view seems to have been favoured, in reference to such separate estate as is not derived from the father, or to such general assistance and advice in the minor's affairs as does not involve a joint administration along with the curators named by the father. Our author appears to have obviously contemplated the co-existence of two such separate classes of curators, *supr. § 11. ad fin.*—See, however, *Pitcairn, Feb. 1731, Dict. p. 16339*; *Drumore, 27th Jan. 1744, Kilk. Dict. p. 16349*; where it was held, "that, a father having named curators to his son, he could not, in prejudice to the father's nomination, elect curators to himself:" But, perhaps, the attempt was, in these cases, to control or exclude the curators named by the father, in regard to the administration of an estate which himself had left.

Where a minor is either pursuer or defender in any action, he must have a curator to support him in his prosecution or defence, under whose authority the suit may be managed on his part; for, *sententia contra minorem indefensum lata, nulla est* ²⁰⁵. Whether, therefore, the minor be engaged in a law-suit with his curators, or, having no curators, with a stranger, a curator *ad lites* must be given him by the judge, even though the nomination should be demanded from him, not by the minor himself, but by the adverse party; for every litigant has an interest, that the proceedings in any cause in which he hath a concern be regular. And if such curator be not demanded by either party, the judge ought to appoint one *ex officio*. This sort of curator makes oath *de fidei*; but he is under no necessity to offer security, because he has no power to intermeddle with the minor's estate. If curators *ad lites* are named to minors past pupillage, by stronger reason they must be given to minors yet under pupillage, who are parties in a suit against their tutors; but even then, they get the name, not of tutors, but of curators, because they are appointed merely for a special purpose; and when that is over, the office ceaseth*.

14. The chief difference between tutory and curatory is, that *Tutor datur personæ*, (§ 4. *Inst. Qui test. tut.*) *Curator rei*; not that tutors are more directly bound by their office to take care of the pupil's person than of his estate, but because a pupil has no person in the legal sense of the word. He is incapable of acting, or even of consenting. The tutor, therefore, seeing he supplies this defect in his pupil, and acts for him, is said with great propriety to be given *personæ*, even when he is managing the pupil's estate. But a minor past pupillage being himself personable, as he hath not only a natural person, but a legal, which can act and be obliged, a curator is said to be given *rei*, to concur with the minor, that his interest may not suffer by his rashness or levity. Hence a pupil cannot subscribe with his tutor; for subscription imports consent, of which a pupil is presumed incapable: But after he has attained the age of puberty, it is properly himself who acts; the curator does nothing more than concur with him, or consent to his deeds; and, consequently, a deed signed by the curator only, without the minor, is as truly void as one subscribed by the minor only, without his curator, *Dirl.* 216, (*Macintosh*, *Dict.* p. 11239.); *Dec.* 1725, *E. of Bute*, (*Dict.* p. 16338.). Hence also, though the natural person of a pupil is under the power either of his tutor or next cognate, yet a curator cannot claim the custody of a minor's person who hath attained the age of puberty, or prescribe to him where he must reside, *Dirl.* 316, (*Scot*, *Dict.* p. 8970.), and *Kilk. MINOR, NO. 5.* (*Marshall*, *Dict.* p. 8930.).

Tutor datur personæ, Curator rei.

15. In most other respects, the privileges, the powers, the duties, and the obligations, of the two offices of tutory and curatory coincide. Neither tutors nor curators have salaries for their trouble or loss of time, in attending the management, because they are presumed to have undertaken their offices purely from natural affection, or considerations of friendship: And this obtains, let the minor's affairs be ever so much embarrassed, *Home, 22.* (*Scot*, *Dict.* p. 13433.).

In what particulars their offices coincide.

* The Lords never authorise a curator *ad lites*, in general, to a pupil; but only for a particular suit, *Kilk. TUTOR AND CURATOR, NO. 5. Baird*, *Dict.* p. 16346.

²⁰⁵ Decree obtained against a minor, upon an edictal citation of tutors and curators, was reduced, he having had no tutors or curators, and a *curator ad litem* not having been appointed; *Bannatyne, 14th Dec. 1814, Fac. Coll.*

p. 13433.) And if salaries be expressly allowed by a father to the tutors-testamentary, or by a minor *pubes* to his curators, they are understood to be given as an allowance, in full of all incident charges that they might otherwise have had a claim to. The restrictions which lie on testamentary tutors, and on curators chosen by the minor, as to their manner of proceeding, and powers of acting, must be governed by the tenor of the writing which constitutes them. Where several are named, the number that is to make a quorum is usually fixed in the nomination itself, the concurrence of which number is requisite in every act of administration. Sometimes one is named *sine quo non*, in which case no measure can be agreed on, without the concurrence of the number fixed for the quorum, of which he who is *sine quo non* must be always one. Where the tutors or curators are called by the father or minor to the joint administration, no deed is valid without the concurrence of every one of them; but when they have powers to act jointly and severally, or indefinitely without any limitation, the nomination stands good, if any one accept; and if more than one accept, the concurrence of the majority of the accepting nominees then alive is sufficient to give force to their acts of administration. In no case can a quorum be appointed of a lesser number than the major part of the nominees, unless where one of them is declared *sine quo non*; for if deeds done by a lesser number were to be valid, matters would be inextricable; as it would be in the power of the majority, who are supposed not to have concurred, to act in contradiction to, and overrule, all the resolutions formerly taken by the minority.

Powers of both
in acts of admin-
istration.

16. The powers which are, by our law or usage, conferred on tutors and curators, are, for the greatest part, included in the notion of administration²⁰⁶. They can sue for, receive, and grant acquittances of all sums due to the minor, whether rents of land, interest of money, or even principal sums, if the minor's necessities shall call for it; and they may use all diligence competent by law, both against the person and the estate of the minor's debtors, to compel them to payment. Thus also they may remove the minor's tenants from their possessions on the expiration of their tacks, and grant leases of the lands to others. But *first*, Such leases must necessarily determine or expire with the granter's office, *Resoluto enim jure dantis, resolvitur jus accipientis*; and if a lease granted by a tutor or curator be so conceived as to last longer than his office, the minor, after the tutory or curatory is at an end, may recover the natural possession of his own lands, upon an action of removing against the tenant, without the necessity of any previous suit for setting aside the lease, *Harc. suppl.* 16. (*A* against *Marquis of Huntly*, *Dicr.* p. 16285.)²⁰⁷. *2dly*, Leases cannot in the general case be granted by tutors, or curators, under the former tack-duty. Where no offer

²⁰⁶ It would appear beyond the power of tutors to engage a pupil as partner in a Company; 2. *Bell's Comm.* p. 527; *Calder*, 11th Dec. 1811, *Fac. Coll.*; also *Pettigrew Wilson*, ; and *M^r Aulay*, 15th Feb. 1803; two unreported cases referred to by Mr Bell.

²⁰⁷ This passage, so far as relates to the case of a lease granted by a curator, humbly appears to require modification. If the curator be acting for a person incapable of consent, *e. g.* for a lunatic, there can be no doubt of the doctrine. But the law being, as afterwards laid down § 17, "that the alienation of heritage by a *minor pubes*, with "consent of his curators, is valid without the judge's interposition, unless lesion be "proved;" it is thought that a lease granted under similar circumstances, though for endurance beyond the term of the curatory, must also be valid. See, accordingly, *Bell on Leases*, p. 91.

fer rises so high, application is sometimes made to the court of session for leave to let the lands lower: And if the court decline to interpose, which they frequently do, because in such petitions there is no contradictor, *Dirl.* 277. (*Ayton's Tutor*, *Dict.* p. 7425), the lands ought to be let by public auction, upon proper advertisement⁵⁰⁸. When from the great extent of the minor's estate, or other circumstances, tutors or curators cannot conveniently undertake the whole management by themselves, they may appoint factors or stewards under them with reasonable salaries, on their giving security for the faithful discharge of their offices.

17. The power of tutors and curators to sell the minor's moveable estate was, by the *jus novum* of the Romans, limited to things which were either of small account, or which could not be preserved without sinking in their value, unless where the sentence of a judge was interposed, *L. 22. C. De adm. tut.* But frequent instances occur in our practice, of tutors, and curators disposing of the most valuable and durable moveables belonging to the minor, by their own authority; and such sales, if called in question, would probably be declared valid, though subject to reduction at the suit of the minor on the head of lesion. No immoveable subject belonging to a minor, whether land, *L. 1. et seqq. De reb. eor.*, or houses, *L. 22. C. De adm. tut.*, could, by the Roman law, be sold without a previous decree of the prætor. But though it was declared, by *L. 1. § 2. De reb. eor.*, that the prætor could only authorise such sales for payment of the minor's debt, this rule was dispensed with, in instances where the sale was beyond all doubt profitable to the minor, lest the law which was calculated for his advantage, should, contrary to its intention, be explained to his prejudice. In the same manner, our supreme court hath authorised tutors to sell such heritable subjects belonging to the minor as could not be used for his profit, even though his estate was quite clear of debt, *Fac. Coll.* ii. 21. (*Plummer*, *Dict.* p. 16358.)⁵⁰⁹. The Roman law declared

Their powers in alienating heritage and moveables.

VOL. I.

2 X

all

As to the case of tutors, and of curators for persons incapable of consent, the doctrine in the text was confirmed; *Lord Reay*, 5th Feb. 1800, *Fac. Coll.* *Dict.* p. 16385. The Court will, however, interpose its authority where, from the impossibility of obtaining a tenant for a shorter term, it becomes necessary to extend the lease beyond the duration of the grantor's office; *Hallows*, 1st March 1794, *Fac. Coll.* *Dict.* p. 14981; *Colt*, 6th March 1800, *Fac. Coll.* *Dict.* p. 16387. Where it is "merely a question of expediency," the Court will not interfere; *Ross*, 9th March 1820, *Fac. Coll.* As to the proper form of application to the Court, &c. *vid. infr. not.*⁵¹².

⁵⁰⁸ In the case of a *minor pubes* and his curators, it is thought the Court would now refuse to interpose their authority, "as unnecessary;" *vid. infr. not.*⁵¹⁰. And even in the case of tutors, it is doubted how far the letting of leases, if not for a longer term than the duration of the tutory, would be held such an extraordinary act of administration as to call for the Court's interference; *infr. not.*⁵¹¹. At all events, it would seem that application by summary petition would no longer be considered competent; *ibid.*

In a recent case, the distresses of the farming interest being notorious,—and the landed proprietors all over the country having very generally reduced their rents, as an act of judicious and even necessary management,—the Court passed a bill of suspension by the tenant of a cognosed lunatic, where an abatement had been agreed to be given by the curator, if considered within his legal powers; *Annand*, 7th March 1817, *Fac. Coll.*

⁵⁰⁹ It has since been held, "that great necessity was the only ground on which the Court could authorise the sale of a minor's estate, and that no views of expediency, however clear, were sufficient;" *Finlayson*, 26th Dec. 1810, *Fac. Coll.* In one case, a sale, even, to which the Court had previously interposed its authority, was reduced on the pupil's coming of age, as having been "at the best only an object of apparent advantage, but not of urgent necessity to the pupil's affairs;" *Vere*, 29th Feb. 1804, *Fac. Coll.* *Dict.* p. 16389. The case of *Plummer*, cited in the text, is perhaps not inconsistent with these authorities; for although there was there no necessity for the sale, arising out of the *egestas* of the pupil, the nature of the subject was such that its value would otherwise have been almost entirely lost.

all alienations of heritage null, whether they were made by tutors or by curators. This doctrine, in so far as it relates to sales made by a tutor, is agreeable to our usage. Hence in all sales of a pupil's estate, an action must be brought by him before the court of session, to which his next heirs and his creditors must be made parties; and in which an inquiry is made by the court into the yearly rent of the pursuer's lands, and the amount of his debts, that upon balancing the two, they may form a judgment, whether the sale is necessary, either in whole or in part, for clearing off the pursuer's debts; and the session must authorise the sale, by a decree pronounced upon this action*. But Stair's opinion, *B. 1. C. 6. § 44.*, that the alienation of heritage by a minor *pubes*, with consent of his curators, is valid, without the judge's interposition, unless lesion be proved, is supported by repeated decisions, *Feb. 2. 1630, Hamilton*, (Dict. p. 8981.); *Fount. Dec. 6. 1699, Clerk*, (Dict. p. 3668.). Yet even in this last sort of sales, by minors *puberes*, the purchaser, to secure himself from the danger of reduction on the head of minority and lesion, sometimes insists to have the authority of the court interposed to the sale, *Feb. 17. 1731, Campbell*²¹⁰. Heritage includes, as to this question, not only lands, but houses, fishings, tithes, and whatever is *fundo annexum*, redeemable rights; and even infestments of annualrent, though these are not, in strict speech, rights of property. Under alienation is comprehended, not only sale, but exchange, or any deed by which a real right in the subject is carried from the pupil; *ex. gr.* a servitude, or a deed charging the subject with a yearly payment †²¹¹. But this prohibition to alienate the minor's heritage cannot extend to those alienations which are made by the law itself, in which the tutor hath no part, such as adjudications of the pupil's estate, which are legal or judicial sales; nor, *2dly*, to those to which the tutor or his pupil might be compelled. Hence the renunciation of a right of wadset vested in the pupil, where it is granted by the tutor to the reverser upon payment made of the debt, is effectual *sine decreto*, though it be truly an alienation of heritage; because the pupil was compellable by the tenor of the right to renounce upon payment, *Jan. 31. 1735, Graham*, (Dict. p. 16339.). On the same ground, a tutor may, without the authority of our supreme court, grant infestment in his pupil's lands to any person in favour of whom the pupil's ancestor had granted an obligation of infestment; or to receive his pupil's vassals, by giving them charters as heirs to their ancestors. Yet if any right shall be conferred by the charter, either of property or possession,

* In the case last cited in the text, this form of proceeding was adopted, and a summary application found incompetent. In that case, the court authorised the sale, upon its being shown to be for the utility of the pupil, though not absolutely necessary for the payment of his debts. (*Vid. not.* 209).

† The granting of a wadset, for the purpose of creating a freehold qualification, has been held an alienation; *June 13. 1788, Hay*, (not reported.).

²¹⁰ This seems to be the case reported under date *17th Feb. 1738, Fol. Dict. vol. i. p. 580, Dict. p. 8930*. But its authority is now destroyed by a contrary decision; *Wallace, 8th March 1817, Fac. Coll.*; where "the Court, on the ground that the minor and his curators could sell without judicial authority, and that no decree of the Court could prevent a reduction by the minor, refused to interpose their authority, as unnecessary."

²¹¹ The Court will not authorise a factor *loco tutoris*, or curator *bonis*, to borrow money on the security of the estate; *Henderson, 19th Jan. 1803, Fac. Coll. Dict. p. 14982; Hay and Thomson, 20th June 1811, Fac. Coll.* A contrary decision was pronounced in *Home, 7th March 1793, Fac. Coll. Dict. p. 16382*. But the authority of this decision, unless in reference to its own special circumstances, seems to have been called in question in both of the later cases.

possession, which the former vassal had not, it is in the judgment of law a prohibited alienation ²¹².

18. By the Roman law, tutors were not even authorised to transact doubtful claims concerning heritable subjects belonging to the pupil, *L. 4. C. De præd. et al. reb.* Whether we would adhere strictly to this doctrine, in cases where the pupil had much at stake, and faint hopes of prevailing, may be doubted. But both tutors and curators may, by our customs, either transact or refer to arbiters, all claims of moveable subjects competent to the pupil; and the transactions made by the tutor, or the decrees-arbitral pronounced in consequence of such references, are good against the minor, where enormous prejudice is not proved, *Fount. Jan. 18. 1711, Ayton, (Dict. p. 14997.)*; *Fount. Nov. 14. 1711, Aikenhead, (Dict. p. 16331.)* *. Tutors cannot, without weighty reasons, change the nature of any subject belonging to the pupil, so as to invert or alter the course of his succession; for over that, their office was never designed to give them power. They cannot, for instance, to the prejudice of the pupil's heir, change a bond in which the creditor had originally excluded executors, into one payable to heirs and executors; nor can they, on the other hand, change a bond taken payable to executors, into one excluding executors, *Harc. 1000, (July 16. 1688, Reid, Dict. voce TUTOR, p. 16312.)*. But they may, for the better securing a debt due to the minor, take an heritable bond from the debtor, in place of a personal one, *Harc. suppl. 14. (Sharp, Dict. p. 16285.)*; or they may, where it appears profitable to the minor, lend out his rents, or the interest of his money, upon heritable security, though the effect must be, to make those sums devolve on the minor's heir, which would have otherwise descended to his executors ²¹³. Curators have as little power as tutors to invert the order of the minor's succession, by acts in which the minor himself bears no part; *ex. gr.* by giving up to the minor's debtor a bond payable to executors, and accepting in its place one excluding executors;

They may transact doubtful claims, but cannot alter the course of the minor's succession.

* Found, That a minor who had submitted, with consent of his curators, in a case which was pretty much involved in fact, *utebatur jure communi*, and could not be heard to quarrel the decree-arbitral upon the head of iniquity; *Kilk. MINOR, NO. 3. Williamson, Dict. p. 8965. Vid. not. 209.*

A factor *loco tutoris* is also entitled to enter into a submission on the pupil's account; *Fac. Coll. June 17. 1758, Brown, Dict. p. 16359.*; *Ibid. Feb. 17. 1792, Gordon-Falconer, Dict. p. 16380.*

²¹² The general leaning of the authorities, in cases respecting the interposition of the Court's authority to the acts of tutors, &c. seems to establish the following particulars:

1. The competent form of application is not by summary petition, but by regular action, calling the relations and others interested as contradictors; *Plummer, 8th March 1757, Fac. Coll. Dict. p. 16358*; *Hallows, 1st March 1794, Fac. Coll. Dict. p. 14931*; *Beatson, 24th Feb. 1810, Fac. Coll.*

2. The Court will not interfere in acts of ordinary administration, as conceiving it "not their province to superintend every common step respecting an estate;" *Home, 7th March 1793, Fac. Coll. Dict. p. 16382*; *Henderson, 19th Jan. 1803, Fac. Coll. Dict. p. 14982*; *Ross, 9th March 1820, Fac. Coll.*

3. Even in acts of extraordinary administration, they will interpose only where an urgent necessity is established *causa cognita*, and will not proceed upon grounds of mere expediency; *Vere, 29th Feb. 1804, Fac. Coll. Dict. p. 16389*; *Finlaysons, 22d Dec. 1810, Fac. Coll.*; *Ross, ut supr.*

4. And, after all, the interposition of the Court does not save from reduction at the minor's instance, in case of lesion; *Vere, ut supr.*; *Wallace, 8th March 1817, Fac. Coll.*

²¹³ This effect no longer follows. Heritable bonds taken by a tutor for money belonging to his ward, and adjudications led for personal debts, remain moveable as to succession; *Graham, 6th March 1798, Fac. Coll. Dict. p. 5599*; *Ross, 31st Jan. 1793, Fac. Coll. Dict. p. 5545*. Indeed, under these authorities, it is held to be settled law, that no act whatever, on the part of a tutor, can affect the pupil's succession; *Morton, 11th Feb. 1813, Fac. Coll.*

Book I.

They cannot be
*auctores in rem
suam.*

executors; because, by such alteration, the curator assumes a power of regulating the minor's succession, and the minor is necessarily cut off from his legal right of bequeathing that subject by testament; for a bond excluding executors cannot be carried by testament, *infr. B. 8. T. 8. § 20*. But a curator may properly concur with the minor in any deed *inter vivos*, by which the succession of a testable subject is to be altered; since the minor can, even without his consent, make a testament, and consequently dispose of any testable subject at his pleasure, *vid. infr. § 33*.

19. Neither tutors nor curators can be *auctores in rem suam*. They cannot, contrary to the nature of their trust, interpose their authority to any deed of the minor, in which themselves have an interest, or which tends to produce an obligation against him in their own favour, more than they can be judges or witnesses in their own cause*. Thus a tutor cannot lend money to the minor; because a loan lays the debtor under an obligation of repayment, *L. 5. pr. De auct. et cons. tut.*²¹⁴; nor can he purchase any subject belonging to the minor, unless it be put up to public sale; in which particular case, his raising the price of the minor's goods must, without exposing him to the least danger, bring him a certain profit. But a deed authorised by a quorum of the tutors, from which an interest arises to a co-tutor, who does not concur in that deed, stands good, unless lesion be proved, *d. L. 5. § 2*. It proceeds also from the trust implied in guardianship, that no tutor or curator can assign any subject belonging to the minor, for the payment even of a debt due by the minor himself. And for preventing frauds, the assignation by a tutor of a bond in which the minor is creditor, is discountenanced in our practice, though the conveyance should be granted in consideration of necessaries applied for the minor's own use, *Fount. July 24. 1694, Craufurd*, (*Dict. p. 16315.*); for the guardian ought, in that case, to have granted bond for these necessaries; which law would have supported against the pupil, in so far as the sum contained in it was profitable to him. But where a debt due to the minor is paid by a cautioner, the cautioner is entitled to demand an assignation of that bond from the tutor or curator, that he may thereby make good his relief against the principal debtor; and such assignation being necessary, must be effectual to the cautioner. On the same principle, tutors or curators who have acquired rights affecting the minor's estate, for a sum less than they have a just title to draw, are obliged to communicate the benefit of such transactions to the minor, though it should appear that the rights were purchased with the tutor's proper money; for in every transaction of a tutor or curator which hath a natural connection with the minor's estate, it is presumed that he acts as his trustee: which doctrine is borrowed from the Roman law, *Nov. 72. C. 5*. And if it were otherwise, a tutor, through his knowledge of the minor's affairs, and concealing them from others, might raise to himself a fortune by such purchases, at his ward's cost. Nay, though the right made over to the tutor should bear to be granted from personal favour, the presumption

* A minor having first assigned a sum to her mother and sole curatrix, reserving a power to alter, and having afterwards also settled the same upon her by testament, it was found, That the sum was effectually conveyed to the mother; *Kilt. Minor, No. 2. Craich, Dict. p. 16342.*

²¹⁴ On the other hand, he cannot take his ward's money in loan to himself, even upon heritable security; *Elphinstone, 28th May 1814, Fac. Coll.* This decision was pronounced in the case of a *factor loco tutoris*; but the principle is general.

sumption that he accepted it in behalf of the minor, will prevail over the recital of the right, *Feb. 17. 1732, Cochran*, (Dict. p. 16339 *).

20. As neither tutory nor curatory are, by the usage of Scotland, *munera publica*, to which persons may be compelled, every one is at liberty to accept or decline the office; and till he accept he cannot be subject to any of the duties attending it, *Diri. 233, (Scrimgeour, Dict. p. 6357.)* Acceptance, as it may draw severe consequences after it, is not to be inferred by implication. Whatever therefore one does in the affairs of a minor previously to his knowledge of the father having named him tutor, is to be construed merely as an act of friendship, if it can bear that construction, *July 19. 1678, Beatson*, (Dict. p. 16298.). But acceptance is fixed on tutors-testamentary, *first*, by any writing signed by them, expressing their acceptance; and consequently by receipts or acquittances granted by them, in which they assume to themselves the designation of testamentary tutors, or acknowledge their being vested with that character; *2dly*, By acts of administration done by them in consequence of the father's nomination, after they were in the knowledge of it. Acceptance is fixed on tutors of law, tutors-dative, and curators, by their soliciting for the several offices, signing their acceptance, or doing some act from which acceptance may be justly inferred; such as signing deeds for the pupil as tutor, or with the minor as curator; see *St. B. 1. T. 6. § 6*. And though neither tutors of law, tutors-dative, nor curators, are properly constituted into their offices till they give security, the omission of that ought not to put them in a better case than if they had given obedience to the law, *Nov. 18. 1671, Cass*, (Dict. p. 3504.). Tutors or curators, having once accepted, are accountable for the consequences of their failure in any part of their duty, from the time of acceptance; insomuch that though they should not have had the least intromission with the minor's estate, they must account as if they had intermeddled.

21. Tutors and curators who have undertaken the office, ought, in order to discharge the duties of their trust properly, first to make inventory of the minor's whole estate, whether consisting of heritage, bonds, or moveable effects; previously to their administration. This is prescribed, both by the Roman law, *L. 7. pr. De adm. et per. tut.*; and by ours, *1672, C. 2*. Our statute requires, that these inventories be made with consent of the minor's next of kin, both by the father and mother; that three duplicates thereof, subscribed both by the tutors or curators, and by the next of kin, be judicially produced before the minor's judge-ordinary; and that after being also signed by the clerk of court, one duplicate be delivered to the next of kin by the father, another to the next of kin by the mother, and the third to the tutors or curators. The next of kin, if they refuse to concur, are to be cited before the judge, that he may decree their concurrence; and in default of their appearance, the inventories are to be made up at the sight of the judge, or his delegate, who also must in that case sign the three duplicates; and the inventories thus made up are declared to have the same

VOL. I.

2 Y

force

Tutors and curators may accept or decline this office. Consequence of acceptance.

Tutors and curators must make an inventory.

* A tutor, when entering upon the management, found his pupils in possession of a lease of which there were two years to run. He renounced that lease, and obtained a new one in his own name for fifteen years, at an advanced rent, allowing the surplus to the pupils for the two first years. At the end of the second lease, he procured a third for thirteen years, on payment of a rent still higher. In an action at the instance of the pupils, he was found liable to account to them for the profits during the two years of the first lease, the remaining thirteen years of the second, and the whole years of the third; *Fac. Coll. June 26. 1789, Wilsons*, Dict. p. 16376.

force as if the next of kin had appeared and concurred. By our usage subsequent to this act, which still subsists, the two next of kin by the father, and the two by the mother, were always cited; and when the tutor or curator is himself one of the next of kin, he must cite the two who are next in degree to the minor after himself, *Fount. June 24. 1701, Guthrie*, (DICT. p. 16319.) * 215. The judicial extracts made out in either of these cases, in which the inventories are always engrossed, serve both as a warrant to the tutors or curators for the exercise of their offices, and as a charge against them in accounting. If, after completing the inventories, any other estate belonging to the minor shall come to the knowledge or possession of the tutor or curator, he must, by the same statute, add it to the first or original inventory within two months after having attained the possession; observing the same forms that are prescribed in relation to that first inventory.

Penalties for neglecting to make up an inventory.

22. The penalties inflicted by this statute on tutors and curators for neglecting to make inventory, are, *first*, That no expence disbursed by them in the minor's affairs shall be allowed to their credit. As this penalty, if understood in a large sense, appears too severe, for a fault which may be owing to pure indolence, it is by act of sederunt, *Feb. 25. 1693*, limited to such expence as has been laid out in law-suits and legal diligence; and so extends not to disbursements on the minor's entertainment, or on his lands and houses ²¹⁶; neither does it include the expence incurred by the tutor in completing the minor's titles, *ex. gr.* serving him heir, or confirming him executor, *July 18. 1707, Yeaman*, (DICT. p. 16323.). Tutors and curators, who neglect to make inventory, are, *2dly*, declared by the act accountable, not only for actual intromissions, but for omissions, and may be removed from their offices as suspected. What was intended by imposing these last penalties, is not so obvious: For tutors and curators were always liable for omissions, from the trust implied in their offices; and they might also have been removed by the common law upon just suspicion of fraud, or upon conviction of any gross neglect of duty, which the law considers as fraud. It was perhaps meant, that they should, upon neglect to make inventory, be liable for the slightest failure of their duty, or *ex culpa levissima*, to which tutors are not in the common case subjected; and they might be removed for omitting to make inventory, though no fraudulent intention should appear; see *Fount. Feb. 9. 1698, Turnbull*, (DICT. p. 16317.) † ²¹⁷. Where a tutor

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* It was objected to the form of making up curatorial inventories, that of three relations of the ward by the father's side, called in the action of making them up, two were not his nearest in kin; but it was repelled; *Fac. Coll. March 6. 1798, L. Christian Graham and others*, DICT. p. 5599.

† In a case where this omission had happened among tutors named by a father, with a declaration that they were to be answerable for actual intromissions only, and each for himself alone, they were found liable *singuli in solidum*; *Fac. Coll. July 10. 1788, Henderson*, (DICT. p. 16375.). A person who had been nominated both tutor and executor to his child, having neglected to make an inventory, was subjected to the penalties of the statute 1672, C. 2.; *March 10. 1790, Hawkins*, (not reported). The same decision was given, where the persons sued had been named by a grandfather, trustees and executors, as well as tutors; *Jan. 25. 1793, Kilpatrick*, (DICT. p. 16381.). The case of Hawkins is referred to in this case of Kilpatrick.

²¹⁵ The Court, on a special petition, dispensed with the citation of the next of kin, they being forth of the kingdom; *Cruickshank, 11th Feb. 1819, Fac. Coll.*

²¹⁶ It was found to extend to disbursements applied to the maintenance and outfit of the minor in the world, if they encroach upon the capital; *Thomson, 16th June 1812, Fac. Coll.*

²¹⁷ The statute enacts, that tutors and curators "shall be removable from their office"

or curator had wilfully neglected to make inventory, the minor was, by the Roman law, allowed to give his oath *in litem*, upon the extent of the estate which the tutor either had or might have intermeddled with, *L. 7. pr. De adm. et per. tut.* And without question, an oath *in litem* is particularly necessary, in instances where it is not practicable to make up a charge against the party by the ordinary methods of evidence: Yet it may be doubted, whether our law would admit it in this case; because where statute hath inflicted special penalties upon any offence, all others are understood to be excluded.

23. It is enacted by the same statute, That no tutor or curator shall have authority to exercise their several offices, till they have made inventory; which expression imports strongly, that all payments made by the minor's debtors to such tutor or curator are unwarrantable, since a debtor cannot lawfully pay to one who has no authority to receive. Yet such payment was sustained, *Dec. 1722, L. Logan*, (not reported), in respect of a posterior clause in the act, that debtors shall not be obliged to make payment to the tutor or curator, if the debts due by them be not contained in the inventory; which clause proceeds on the supposition, that debtors may warrantably pay to them, and does no more than give those an option whether to pay or not.

24. It is the duty of tutors and curators, to take proper care of the minor's person, to educate him in a manner suitable to his birth and fortune, and to disburse out of his yearly rents, the expence necessary for his subsistence and education; which if they refuse, a reasonable sum ought to be modified by the judge for that purpose, *L. 1. C. De alim. pup. præst.* No more is to be allowed to a minor under pupilage, either by the tutor or judge, for mere alimony and education, than the neat rent of his estate, or the yearly interest of his money, *Nov. 17. 1680, Sandilands*, (*DICT. p. 16300.*); but after the pupil has attained the age of puberty, when it is full time, if his stock be inconsiderable, to breed him to an employment, it is the curator's duty to employ part of the capital, and even the whole of it, if less will not serve, in order to put him at once in some way of business, *Br. 110 * 218.* And in the

Tutors, till then, have no proper authority.

Duties of tutors and curators in the care of the pupil's person and education, in paying off his debts, and doing diligence against his debtors.

* *Duncanson, June 28. 1715, DICT. p. 8928.*

"*sic* as suspect," if they fail to comply with its provisions. The Court repelled the plea, that a discretionary power was left with them under this clause, and held the enactment imperative; *Gibson and Thomson, 21st Dec. 1811, Fac. Coll.* It is no ground for removing the tutor as suspect, that tutorial inventories were not made up for some time after the tutor's agreeing to accept of the office, he not having entered upon the management of the pupil's effects; *Rob, 22d Dec. 1814, Fac. Coll.*

The minor, after attaining majority, having settled accounts with his curators, the Court will not open up this settlement, merely because the curators had not made up inventories nor found caution; *Williamson, 30th June 1815, Fac. Coll.*

The penalties of the act 1672 do not transmit against the tutor's heir in accounting for his ancestor's intrusions; *Graham, 6th March 1798, Fac. Coll. DICT. p. 5599.*

²¹⁸ In the case of *Blairs, 20th May 1802, Fac. Coll. DICT. p. 16388*, where part of the capital had been employed, a majority of the Court held, (notwithstanding a clause in the settlement, that the *interest* was intended for the maintenance of the children, and that the provisions of those who died before majority or marriage were to accrete to the others), "that whatever the tutor expended *utiliter* upon the pupil, he became a creditor, to that extent, upon the provision bequeathed to him, and would be entitled to retain it accordingly." It does not appear from the report, what the Court particularly considered to fall under the description of useful advances.

Where the tutor has neglected to make up the inventories, the Court will "refuse every claim of reimbursement where the capital of the minor has been encroached upon;" *Thomson, 16th June 1812, Fac. Coll.*

the case of a person of birth or family, who proposes to raise himself by the public service, the curator may lawfully advance a yearly sum far beyond the interest of his patrimony, that he may appear suitably to his quality, while he is unprovided of any office under the government by which he can live decently, *Fac. Coll.* i. 170, (*Gordon*, *Dict.* p. 16356.). Tutors and curators ought carefully to preserve the title-deeds of the minor's estate, and the other writings belonging to him; and if by their neglecting to complete his titles, he should suffer, either in point of right or possession, they must make up the damage, *Jan. 26. 1628, Commiss. of Dunkeld*, (*Dict.* p. 16244.); *July 18. 1635, Edmonston*, (*Dict.* p. 16264.). As to the minor's personal estate, if his guardians do not without loss of time sell such moveable subjects as cannot by any care be preserved from perishing, or sinking considerably in their value, they must make up the loss to the minor, *L. 7. § 1. De adm. et per. tut.* They ought to discharge *quamprimum* all the obligations that lie on the minor, *ex. gr.* to pay off all the debts due by him, as soon as his funds can be conveniently raised for that purpose. If a creditor of the minor wants his money, he must, in the action brought against his debtor for payment, make the tutors or curators parties to the suit. These it is sufficient to cite edictally at the cross of the head borough of the jurisdiction where the minor resides, without mentioning their names; for the pursuer is not bound to know them; and decree will go forth against both the minor debtor, and them for their interest; but as they are not truly the debtors, no execution can pass either against their persons or estates, on such decree, unless it has been pronounced upon this medium, That they were possessed of the minor's money, by which the debt might be paid either wholly or in part²¹⁹. Where the obligation of the tutor or curator consists *in facto præstando*, in performing a fact to which his office obliges him, and which it is in his power to perform, *ex. gr.* to renew investitures to the heirs of vassals, or to extend a lease in consequence of a former minute, execution may pass against his person on a decree proceeding upon such obligation. As to the debts due to the minor, the tutors or curators lie under no necessity of calling in the minor's money which is lent to debtors of good credit, unless his occasions shall require it; but they are liable to the minor in damages, if they omit using diligence against a debtor, so soon as he is suspected to decline in his circumstances. If he has a land-estate, the tutor ought to inhibit him, and adjudge his heritage; if he has moveable effects, pouding is the proper diligence; and if sums are due to him, arrestment ought to be used, and an action of forthcoming insisted in, to make good the debt arrested, *July 9. 1667, Steven*, (*Dict.* p. 500.). If the diligence used against the debtor's estate has no effect, the tutor is to have recourse to personal execution; as to which, it is generally said, that if he charge the minor's debtor upon letters of horning,

²¹⁹ Where a minor has tutors or curators, decree obtained against him is null, unless they have been cited. Accordingly an adjudication against a pupil was set aside *in toto*, in respect the action of constitution of the debt was not executed against his tutors; *M'Turk*, 7th Feb. 1815, *Fac. Coll.* Where there are no tutors it is necessary that a *tutor ad litem* should be appointed, in order to render decree effectual: an edictal citation of tutors and curators, in such case, is not sufficient; *Bannatyne*, 14th Dec. 1814, *Fac. Coll.*: And see *supr.* § 19. In all cases, it is necessary to call the minor, or other ward, as the principal party. It was, for instance, found incompetent to pursue the *factor loco tutoris* for a lunatic, even *si habet intus*, for payment of a debt due by his ward, without calling the latter as principal defender; *Govan*, 20th Dec. 1814, *Fac. Coll.*

horning, he need go no farther. But where the debts due to the minor are desperate, tutors ought not to throw away their ward's money in using fruitless diligence against a debtor who has no fund of payment, *July 2. 1628, Hamilton*, (DICT. p. 3502.) *. As for the minor's heritable estate, they ought to take care that his principal seat, if it was left habitable by the deceased, be preserved in good condition, together with the inclosures, and tenants' houses; that his farms, fishings, and other heritable subjects, be provided with proper tenants; and that the rents be demanded in due time from those that are liable in payment, lest they should perish in their hands. Curators cannot be accountable for the rents of land or interest of money received by the minor himself, without their consent, or in spite of their remonstrances; but as such payment does not release the debtor, or extinguish his obligation, *Dec. 5. 1707, Cuningham*, (DICT. p. 16325.), it is their duty to use legal diligence against him, as if no payment had been made by him to the minor.

25. Tutors and curators, after having received the yearly rents or fruits of the minor's estate, ought to employ them profitably for his behoof. In explaining how far they are bound to put the minor's money out at interest, we must distinguish between the sums belonging to the minor prior to the commencement of their office, and the rent or interest which becomes due during the office. As for the first, if the sums carried no interest at the tutor's entry to the office, they ought to be recovered from the debtors without loss of time, and put out at interest; and if any part of the minor's stock consists in merchandise, or goods proper for sale, they ought to be sold, and the price lent to sufficient debtors, within a year, *July 9. 1667, Steven*, (DICT. p. 500.). The sums which become due to the minor during the office, are, for the most part, the rents of land, or the interest of money. A year is allowed after rents fall due, if they are payable in grain, and six months, if in money, for collecting them, and finding proper debtors to lend them to, *St. B. 1. T. 6. § 19*. As for the growing interest of bonds arising during the tutorship, tutors are obliged to accumulate it into a capital bearing interest, once, either before, or at the expiration of the office, *Pr. Falc. 91. (Lockhart, DICT. p. 504.)*, which if they neglect, they are liable to the pupil in the interest of that interest from the time that their office expires, *Jan. 27. 1665, Kintore*, (DICT. p. 503.); *Fount. Jan. 16. 1696, Irvine*, (DICT. p. 501.); but curators are under no such obligation to lay out the current interest, either during their office, or when it determines; it is enough if they leave it in the hands of responsible debtors, *Harc. 996, 998. (Wilson, DICT. p. 16311. and Wilson, DICT. p. 16312.)*. It is an equitable opinion of Sir James Steuart, *v. Pecun. pupill.*, that if the particular periods at which the tutor has received the interest can be fixed by proof, that interest ought to carry interest to the pupil within a competent time after, since a provident man would have put it out at interest *in re propria* ²²⁰. If a succession should open to the minor

Must employ profitably the rents of his estate.

VOL. I.

2 z

during

* A tutor having lent his pupil's money to a person in good credit at the time, but who soon afterwards failed, was not found liable to make up the loss; *Fac. Coll. Feb. 5. 1767, Gib*, (DICT. p. 16363.)

²²⁰ It has been decided, that the tutor at law of a fatuous person is only bound to make an accumulation of interest at the commencement and expiry of his office; *Spalding, 19th May 1809, Fac. Coll.* More lately, it was found, in a long circumstantial accounting between tutor and pupil, that the tutor was bound to accumulate rents into

during the office, the tutor or curator must observe the same rules in relation to the sums accruing thereby to the minor, as if that succession had opened to him before the commencement of the office. The doctrine laid down by Stair, without any limitation, *B. 1. T. 6. § 36.* That no part of the minor's money ought to be applied to the purchase of lands, suited better with those times, than with the present: For where a minor, quite clear of debt, has a considerable yearly increase of revenue arising from the rents of his estate, it may be prudent to employ part of it at least on land; and instances of such purchases begin now to be frequent: But tutors seldom adventure upon them without the warrant of the court of session; see *Fac. Coll. ii. 83.* (*Craigie, Dict. p. 7455.*)*; (*Kilk. Minor, NO. 8. Morton, Dict. p. 8991.*)

All kinds of tutors not liable in the same degree of diligence.

26. Tutors and curators are not all liable in the same degree of diligence. *First*, It has been already observed, that fathers, in the character of administrators to their children, are not laid under so strong obligations in several respects as other guardians, *T. 6. § 55.* *2dly*, Honorary tutors, who are appointed by the father, not to manage by themselves, but barely to oversee and direct the management of others, are only liable for actual intromissions, not for omissions. *3dly*, Neither interdictors, of whom below, § 53. *et seqq.*, nor curators *ad lites* are liable in diligence: For both these are given *ad auctoritatem præstandam*; interdictors for authorising the subscription of deeds, and curators *ad lites*, for the conducting of law-suits. *4thly*, Even among tutors, in the proper acceptation of the word, it is sufficient that a testamentary tutor employ the same degree of care in his pupil's affairs that he does in his own; since he acts at the desire, and in obedience to the will of the deceased: But both tutors of law and dative ought to be liable in that exact diligence which may be expected from a provident man; for if they are not fit for management, they ought not to have sought after the office.

Tutors and curators are liable *singuli in solidum*. Exceptions from this rule.

27. Tutors and curators were, by the Roman law, *L. 3. C. De divid. tut.*, liable for the misconduct of their colleagues, only *subdiaric*, after these colleagues were themselves discussed; but, by our usage, all of them were liable in diligence, *singuli in solidum*; *i. e.* the minor may sue any one of them by himself, and make that one liable, not only for his own misconduct, but for that of his co-tutors or co-curators, *Feb. 22. 1634, Davidson, (Dict. p. 506.)*; which obtains, though the tutor who is sued should not have intermeddled, *Harc. 985. †*; that so all of them may, from the consideration of their own interest, be incited to a greater watchfulness over one another's conduct: But he who is condemned in the whole has an action of recourse against the co-tutors. From this rule of our law, two cases must be excepted. *First*, Where a father, in his nomination, divides the management into different branches, and allots to each a particular department, every tutor is liable only for his own conduct in that branch of management which was intrusted

* In this case, the application was made by a factor *loco tutoris*; the warrant was granted by the Court with very considerable hesitation; a diversity of opinion prevailed among the judges. The grounds of doubt, which seem to rest chiefly on the act of *sederunt Feb. 13. 1730*, are very distinctly stated in the report.

† *Sinclair, Jan. 1686, Dict. p. 14696.*

a capital, bearing interest at 5 per cent. every three years; *Hamilton, 25th Feb. 1813, Fac. Coll.* See some important observations by the Lord Chancellor, which seem to call in question the propriety of any distinction between the stocking out of rents and interests; *Lord and Lady Montgomerie, 8th April 1816, 4. Dow, p. 109.*

ed to him. *2dly*, Fathers are, by 1696, C. 8., permitted to name tutors and curators to their children, with the special proviso, that they shall be liable only for intromissions, not for omissions; and that each tutor or curator shall be liable only for himself, and not *in solidum* for the others. This act was intended to encourage those to accept of the office, whose probity and care the father might confide in, and who might be found unwilling to expose themselves to nice questions of diligence, or to the danger of being made accountable, not only for their own diligence, but for that of all the co-tutors. But because the great security of minors lies in the obligations imposed by law on tutors and curators, the act requires, that the father be in *liege pousie* when he dispenses with them; and, *2dly*, His power of dispensing is expressly limited by the act, to the means and estate descending from himself: So that the tutor thus named by the father cannot plead the benefit of the dispensing clause in relation to any separate estate belonging to the pupil. A decision, however, is observed by Mr Forbes, *Feb. 1. 1710, Ranken*, (DICT. p. 16327.), which is hardly to be reconciled to this last limitation*.

28. Under this obligation to diligence, the law has also laid pro-tutors and pro-curators. By these are understood persons who act as tutors or curators without having a legal title to the office, whether they sincerely believe themselves tutors, or know that they are not. By the Roman law, they were made liable in all points as tutors or curators, *L. 1. pr. De eo qui pro tut.*, not only for intromissions, but for omissions, after they had once intermeddled, *d. L. 1. § 9.*; and justly, since he who assumes to himself an office to which he hath no title, ought to be in no better case than one who acts under a proper warrant. The court of session, however, would not adventure to adopt this doctrine into our law, *June 10. 1665, Swinton*, (DICT. p. 16273.), till by an act of sederunt of that date, pro-tutors and pro-curators are declared liable as tutors and curators, not only for what they shall have intermeddled with *de facto*, but for what they might have intermeddled with †. Yet they are accountable only from the time at which they began to act: For the only ground upon which they are made liable is their actual intermeddling; which ought not to be carried *retro*, by presumption, to the period at which the minor became first *indefensus*, especially if they appear to have assumed the office from friendship to the minor, and the necessity of his affairs. Though they are thus put on the same footing with tutors and curators as to their passive title, *i. e.* the obligations they are brought under, they enjoy none of the active powers or privileges competent to tutors or curators: They can neither sue the minor's debtors for payment, nor have they authority to receive the sums due to him: Consequently, a minor's debtor who makes payment to them, does it at his peril; and therefore is not released by the payment, if the sum paid was not *in rem minoris versum*, employed profitably for the minor's use, *Br. 122. (Allan, DICT. p. 5654.)*. Hence also they may be sued by the minor in an action for accounting, even during the pro-tutory, though proper tutors or curators are not bound to account till their office

Pro-tutors and pro-curators are under the same obligation to diligence. What are their powers.

* Where a minor chooses curators for himself, he cannot effectually exempt them from being liable for omissions; *Fac. Coll. July 16. 1775, Watson*, (DICT. p. 16369.).

† The act of sederunt specifies those "who intromit with the means and estate of any minor, and act in his affairs as pro-tutors, having no right of tutory or curatory established in their persons." The character may be inferred *rebus et factis*. See *Kilk. No. 2. voce TUTOR AND CURATOR*, (*Fowler, DICT. p. 16343.*).

office determine, *infr.* § 31. Yet equity indulges them in this active title, that after they have given up the management, action lies at their instance against the minor for recovering the sums disbursed by them during their administration, in so far as it appears from the proof, that they have been profitably laid out for the minor, *L. 5. eod. tit.*

How the office of tutors and curators expires.

29. Neither tutory nor curatory expires by the renunciation of the tutors or curators: For though no person can, by our usage, be compelled to accept of either of these offices; yet having once accepted, he cannot throw it up, without a reasonable cause, admitted by the Judge, 1555, *C. 35.*, according to the rule, *Id quod prius fuit voluntatis, postea fit necessitatis*; see *July 21. 1664, Scot.* (Dict. p. 16269.). It is indeed declared, by 1696, *C. 8.*, that one who is named by the father both tutor and curator to his child, may, though he should accept of the tutory, refuse the curatory; (a clause designed to induce the tutor named to undertake the office the more readily); but that is more properly a declining to accept, than renouncing the office after acceptance; for if he shall accept also of the curatory, he must hold it till the minor's perfect age. Tutory expires, by the death either of the tutor or pupil, and by the pupil's attaining the age of puberty. If a tutor continue to act for the minor after his puberty, he is liable as curator, *St. B. 1. Tit. 6. § 24.* Curatory expires by the death, either of the curator or of the minor, by the minor's becoming of perfect age, and in case of a female minor, by her marriage. Where a minor obstinately refuses to sign the necessary deeds of administration, the curator may apply to the court of session to be discharged of his office; but the court, from a consideration of the dangers to which a defenceless minor of such a disposition may lie open, have in such applications waved removing the curator, till the minor should consent to make a new nomination*. The office both of tutory and curatory expires, *first*, by the marriage of a female tutor or curator²²¹. Thus, where a father named his wife as tutor to their common child, the nomination was adjudged to fall, upon her second marriage; both from the impropriety of a woman's having one under her power who is herself subjected to the power of another, *March 8. 1636, Stewart.* (Dict. p. 9585). *vid. supr.* §. 12.; and from the bad consequences which might be dreaded, from leaving a pupil's estate to the management of one under the influence of his stepfather. *2dly*, Both tutory and curatory fall by any supervening incapacity, whether natural or legal, which may disqualify the tutor or curator from discharging the office. *3dly*, If tutors or curators should fail in any part of their duty through negligence, or should fraudulently misapply the minor's money to wrong purposes †²²², they may be removed

* Lord Kilkerran, in reporting a case, NO. 7. *voce* TUTOR AND CURATOR, states it to have been the general opinion of the judges, "That there was no authority in the Court to compel a minor to act with his curators, more than to compel a major to act with his interdictors; that as the Court could not compel a minor to choose curators, so it could not authorise them to act without the minor," (*Drumore, Dict. p. 16349.*).

† The same consequences would result from giving in improper inventories; *Edgar, Jan. 25. 1724, Lothian.* (Dict. p. 16337.); (*Vid. supr.* § 22.) or failure of caution, *Fac. Coll. Dec. 24. 1774, Witherspoons.* (Dict. p. 16372.); *Feb. 14. 1778, Welsh.* (Dict. p. 16373.).

²²¹ *Vid. supr. not.*²⁰⁸.

²²² See, as illustrating this matter, *Elphinstone, 28th May, 1814, Fac. Coll.*

A tutor was removed as suspect, "in respect of the clandestine and unwarrantable manner" in which he had carried off the person of the pupil "out of the jurisdiction of the Court;" *Reoch, 14th Nov. 1817, Fac. Coll.*

moved as suspect, by an action, or rather complaint, called by the Romans, *accusatio suspecti tutoris*; which by their law was *popularis*, *i. e.* might be pursued by any person, even a stranger to the minor; but, with us, is competent only to the minor's next of kin, or to a co-tutor or co-curator*. By our more ancient law, 1555, C. 35., any judge-ordinary was authorised to decide upon the causes for which tutors or curators ought to be removed; but by our later usage, that branch of jurisdiction is appropriated to the court of session. Bankton, *B. 1. Tit. 7. § 34.* affirms, without limitation, that this complaint may be tried in a summary way before that court; but the act 1696, on which alone this opinion is grounded, relates to the special case of tutors named by the father in *liege poustie*²²⁴. Our supreme court is so tender of a tutor's reputation, that where his misconduct proceeds merely from indolence or inattention, he is seldom removed; but to secure the minor, a curator is either joined to him, *Dirl. 90. (Macbrae, Dict. p. 16278.)*, or, if he be a testamentary tutor, he is obliged to give security, though, in the common case, security is not taken from that kind of tutors, *Fount. Feb. 16. 1705, Balfours, (Dict. p. 16320.)*.

30. The duration of these two offices depends frequently on the tenor of the writings which constitute them. If a father names several tutors to his children, simply, without calling them to the joint administration, or if a minor appoints several curators in the same manner, the office subsists if any one of them accept; and upon the death of any one of many acceptors, it accrues to the survivors, and continues in the person of the last survivor. For though in deeds *inter vivos*, *ex. gr.* mandates, where two or more mandatories are named in general terms, they are understood to be named jointly, *vid. infr. B. 3. T. 3. § 34.*; yet the favour of last wills, and of minority, creates a presumption, that the father or minor prefers any one of the tutors or curators so named, to those who are pointed out by the law, *Feb. 14. 1672, Elleis, (Dict. p. 14695.)*. Where a number of persons are expressly named tutors or curators, and joint administrators; as the nomination hath no force till all the nominees accept, so it falls on the death of any one of them; for the epithet of *joint*, plainly shows that it was not intended to trust the management to any one or two of them separately, but to the whole taken together, *Jan. 17. 1671, Drummond, (Dict. p. 14694.)*. The non-acceptance, or death, or supervening incapacity, of a tutor or curator *sine quo non*, hath necessarily the same effect, *Harc. 995. (Montrose, Dict. p. 14697.)*; for without the *sine quo non*, no act of administration is valid †. Which rule holds,

Duration of their office often depends on the tenor of the deed which constitutes it.

VOL. I.

3 A

even

* Or to the tutor's cautioner²²³. See the case of Welsh, (*Dict. p. 16373.*)

† Vide *Kilk. Tutor and Curator*, NO. 6. (*Drumore, Dict. p. 14703.*)²²⁵.

²²³ This seems incorrect. The tutor was indeed removed in the case referred to; but it was incidentally, and only in consequence of his failure to find new caution on the former being withdrawn. It was "observed on the bench: When a minor names curators, it is *pars judicis* to require caution, whether the minor and his next of kin demand it or not. As the Court, therefore, have in this case relieved the cautioner of his obligation, it is a consequence of the judgment, that the curators must be required to find new caution by the Court; and if they do not, that they should be removed."

²²⁴ The doubt suggested in the text seems to derive support from the case of *Reoch*, 14th Nov. 1817, *Fac. Coll.*, where, "a petition and complaint" having first been brought, it was afterwards found necessary to raise "an ordinary action."

²²⁵ It had here been declared by the deed, that in case of the death or incapacity of

even in the nomination of tutors by a father, in which he has fixed a certain number for a quorum, though there should be as many tutors left alive, after the supervening incapacity of the *sine quo non*, as constitute a quorum; for still the father's nomination becomes entirely void by the incapacity of the *sine quo non*, which makes way for the tutor-in-law, notwithstanding the presumption above mentioned, that the father would have trusted any of those who were named by himself, rather than the tutor of law, *Fount. June 24. 1703, Aikenheads*, (Dict. p. 14701.); *Feb. 14. 1735, Blair*, (Dict. p. 14702.). Where a father names two persons tutors to his children, and in default of them by death, certain others to fill their place, the powers granted to the first two are not understood to cease totally upon the death of any of them; but the survivor may act by himself under that nomination, excluding those of the second class, who are no more than substitutes in case of a total failure of the first ²²⁵.

Actio directa tutelæ, vel curatellæ, when competent.

31. Upon the determination of the tutory or curatory, an action is competent to the minor, or his heir, called *actio tutelæ vel curatellæ directa*, against the tutor or curator, and his cautioners, and their heirs, for exhibiting a particular account of his intromissions and disbursements in the management, for payment of the balance to the pursuer, and for restoring to him his writings, and whatever else belongs to him, which is in the defender's possession ²²⁶. This action does not lie till the office be at an end; because, as the tutors or curators are intrusted with the complex management of the minor's whole affairs, the different parts of the administration are so interwoven, as to make it impossible to form a distinct judgment on any one part till all be wound up. In this account, the defender must charge himself, *first*, with all the rents and profits of the minor's heritable subjects, contained in the inventory and eiks, and with all the sums of money belonging to him, and with the interest upon the whole, according to the rules before mentioned; *2dly*, even with such debts due to the minor, though not taken up in inventory, as it appears by inspecting the minor's charter-chest, the defender might have come to the knowledge of, *June 24. 1680, Cleland*, (Dict. p. 12451.). But he is not bound to account for the value of such services as have been performed by the tenants to himself, unless the deceased proprietor had it in his option to demand money for them, *Jan. 11. 1668, Grant*, (Dict. p. 16280.); nor for such of the smaller flying customs, *ex. gr.* kain-hens, chickens, &c. as may reasonably have been used by him in the course of his management, *Harc. 979, (Lude, Dict. p. 16305.)*. As guardians ought to make no profit by their offices, they must account for that part of the minor's rent which is payable by the tenants in grain, at the prices truly received by them from the merchants, though they should be higher than the rates fixed by the sheriff-fiers. But they will not be allowed to state the prices lower than the

of the *sine qua non*, the tutory should not dissolve, but should continue with the other tutors so long as any of them should be in life. The *sine qua non* refused to accept. But the Court, after an opposite judgment, came to be of opinion, that the above declaration "gave sufficient evidence, that the father intended to trust any of the persons named; and that the omitting to provide for the case of the lady's not accepting, as he had done for the cases of death or incapacity, had only happened *per incuriam*, and from his having taken it for granted that she was not to decline accepting."

²²⁵ *Children of Fisher, 2d August 1758, Fac. Coll. Dict. p. 16361.*

²²⁶ *Vid. the case of Williamson, supr. not. 217.*

the fiars, unless they shew special cause why the grain was sold under the fiars, *Harc. 971*, (*Oxenford, Dict. p. 4417.*)

32. Tutors and curators may, on the other hand, sue the minor upon the *actio tutelæ vel curatellæ contraria*, to discharge them of their office and administration; to relieve them from all engagements for the minor, under which they have been brought in the course of their management, in so far as they were rational; to reimburse them of the sums superexpended by them on the minor's account, and of their personal charges *; together with the interest of the whole from the times of advancement, in so far as they were disbursed by the pursuer out of his proper money. This action must be fruitless, when the direct action for accounting has been already brought by the minor: For in the account exhibited in that suit by the tutor, he takes credit for all those particulars; and the balance, if any be due by the minor, is there decreed of course to the tutor. If the minor has not called the tutor to account, the tutor in this action for reimbursement and indemnification must exhibit a full account, both of his receipts and disbursements, in which he must charge himself with all the particulars formerly mentioned, and take credit for the sums expended by him on the minor's account, by which it may appear whether he is entitled to a discharge or to any balance: And law presumes, till accounting, that the tutor *intus habet*, or, in other words, that he hath in his own hands as much of the pupil's money unaccounted for, as will balance the claim he has against the pupil. Hence all purchases made by the tutor, of rights affecting the pupil's estate, are presumed to have been made with the pupil's money, till settling the tutory-accounts, if there is not positive evidence brought that they were not, *Jan. 24. 1662, Ramsay, (Dict. p. 9977.)*. The exception or defence competent to the minor upon this presumption is not elided, though the tutor should not have sued upon his claim, till the obligation he lay under to account to the minor was extinguished by the decennial prescription of tutorial accounts, *Dabr. 124, (Baillie, Dict. p. 10001.)*; for *quæ sunt temporalia ad agendum* are frequently *perpetua ad excipiendum*. And the defender does not in this case insist for any balance that may be due by the tutor upon his tutorial accounts; he only pleads the legal defence, That the sum demanded from him by the pursuer was presumed to be paid before the years of prescription were elapsed; which presumption must be available to him till the tutor make up his accounts. It would seem that this presumption ought to be applied only to such claims as may arise to the tutor from his disbursements in the course of his administration, and not to extend to debts due by the minor's ancestor to the tutor before the commencement of his office; *first*, Because the only rational foundation on which it is established, restricts it to the expence incurred by the tutor on the minor's account; *2dly*, Because it is repugnant to justice, that a creditor's right of demanding a just debt should be postponed, for no better reason, than that he hath undertaken a friendly and gratuitous office for his debtor; for *officium nemini debet esse damnosum*. Yet the presumption was extended to such debts, in the special case where an action for accounting was actually depending at the

TITLE VII.

Actio contraria tutelæ, vel curatellæ, when competent.

* But no salary or remuneration for their trouble can be claimed, however meritorious their management may have been, however advantageous to the minor, and whatever personal hazard it may have brought on themselves; *Fac. Coll. Nov. 13. 1780, Lord Macdonald, (Dict. p. 13457.)*

Book I.

Rights competent to, and duties incumbent on, pupils and minors.

the minor's instance against the tutor, which might soon be brought to a period, *Harc.* 990, (*Newmills*, DICT. p. 9989.) *

33. After explaining the rights and the obligations of tutors and curators, those which are competent to or lie upon their pupils or minors may be considered ²²⁷. All deeds done, or contracts entered into, whether by a pupil, or by a minor, having curators, without their consent, are null in this respect, that they have no effect against the minors; but they are obligatory on the other contractors, who may be compelled to perform their parts if the contract be judged beneficial to the minor. This rule obtains, contrary to the nature of contracts, both from the favour of minors, to whom the law has not denied the power of making their condition better, though they cannot make it worse, and *in pœnam* of those who would impose upon their weakness. But it is to be received with the two following exceptions: *First*, Minors are effectually obliged by their own acts and deeds, and even by bonds of borrowed money granted by them, though without the consent of their curators, for all sums that have been profitably applied to their use, *Dec.* 11. 1629, *Gordon*, (DICT. p. 8941.); in which case the maxim holds, *Nemo locupletandus est cum detrimento alterius*: And this exception reaches, not only to the necessaries of life furnished to the minor, *Feb.* 5. 1631, *Inglis*, (DICT. p. 8941.), but to the charges of education, *ex. gr.* to the expence of entering notary. *2dly*, A minor *pubes* may marry without the consent of his curators; for curators have no power over the minor's person: Yet their consent appears necessary in settling the provisions granted by him to his wife and children. Every deed of a minor who has no curators, is as effectual as if he had curators, and had acted with their consent †. He can even alienate his heritable

* The presumption will always be elided by contrary evidence arising from the actual state of the affairs; *Fac. Coll.* June 19. 1735, *Buchanan*, &c. (DICT. p. 11676.).

† This expressly found, where a sum of money was to be paid to a minor in such circumstances; *Fac. Coll.* Jan. 31. 1772, *Koehler*, DICT. p. 8975. See however, *Kilk.* NO. 10. *voce* MINOR, *Hay*, DICT. p. 8973; and *Fac. Coll.* Aug. 1. 1782, *Kirkman*, DICT. p. 8977 ²²⁸.

²²⁷ A minor cannot vote in electing the deacon of a corporation of a royal burgh, nor, it would seem, in any stage of a burgh election; *Rodgers*, 3d Feb. 1763, *Fac. Coll.* DICT. p. 1860; *Ogilvy*, 6th Feb. 1810, *Fac. Coll.* Neither can he be elected into the Town-Council; *Jaffray*, 21st July 1741, *Kilk.* DICT. p. 7681. Neither can he vote in electing, or be himself elected, a Member of Parliament; *St.* 1681, c. 11; 1707, c. 8; *Wight*, p. 267. Nor can he even be enrolled in the roll of freeholders, though "under a proviso, that he should not be entitled to vote in any question until he should be of perfect age;" *Wight*, *ut supr.* Neither, if a Peer, can he be called up to the House of Lords, until of age; *Wight*, p. 117.; nor can he elect, or be elected, a Representative of the Scots Peers; *ibid.*

It would seem that a minor, who has no curators, may present to a church; *Bankt. B. 2. t. 8. § 100*; *Connell (Parishes)*, p. 520. The former even holds, that where a minor has curators he may present of himself without their consent; but in this, he is contradicted by the latter.

The Court refused to confirm a minor trustee on a bankrupt estate; *Threshie*, 30th May 1815, *Fac. Coll.*

²²⁸ In the case of *Hay*, "the Lords avoided determining the point, but generally agreed in this, that no cautious debtor would venture to pay a minor without curators, otherwise than *auctore prætoris*." In that of *Kirkman*, the result seems to have been,—1st, That a distinction is to be drawn between "the payment of the principal sum, or *sors*," and that of "the interest only of money, or the rents of subjects," the uplifting of which "might be necessary for a minor's support:"—2d, That the debtor could not "be secure against future challenge, unless the money were to be afterwards profitably employed for the minor's behoof:"—3d, That "the Court ought not to interpose their authority, in order to compel him to do an act which would subject him to that hazard:"—But, 4th, That the Court would incline to order payment, on the minor's finding "sufficient security for the debtor's indemnification."

ritable subjects, without the interposition of a judge, *Cr. Lib.* 1. *Dieg.* 12. § 30.; *Dec.* 13. 1666, *Thomson*, (DICT. p. 8982.). As to deeds signed by minors which are not to take effect till their death, a minor who has attained the age of puberty may, without the consent of his curators, bequeath his personal bonds and all his moveable estate, *Nov.* 30. 1680, *Stevenson*, (DICT. p. 8949.); and dispose of such sums by testament as have been left to himself absolutely, without clauses of substitution *²²⁹. But the consent of the curators must be interposed to all the minor's deeds, *inter vivos*, even to those which truly import no more than a bequest of moveables, *Fac. Coll.* ii. 66, (*Craig*, DICT. p. 8956.). He cannot, even with his curators' consent, make a settlement of his heritable estate, *Kames*, 70, 71., (*Marquis of Clydesdale*, DICT. p. 1265, and 8964.); for in order to alter the legal succession of heritage, there must be a deliberate *animus* in the granter of the deed, which cannot be presumed in a minor; and it would be most dangerous to allow the consent of curators to supply that defect †. A minor having curators is entitled to examine the state of his own affairs, and to judge of the rationality or expediency of deeds proposed to be done by the curators with his concurrence, *Jan.* 27. 1744, *Lord Drumore*, (DICT. p. 8930.).

34. Minors, whether they have or have not curators, may be restored against all deeds granted by them in minority that are hurtful to them, by an action of reduction *ex capite minorennitatis et læsionis*²³⁰. As we have no statute-law to direct us in this point, we observe the Roman with little or no variation. The restitution of minors is, upon account of its importance, proper to the cognisance of our supreme civil court. The minor need not use the remedy of reduction for restoring him against deeds which are in themselves null by exception, *ex. gr.* those granted by a pupil, or by a minor having curators, without their consent †²³¹. But where hurtful

Restitution of minors.

VOL. I.

3 B

deeds

* *Vide Kilk. MINOR*, NO. 1. *Waddell*, DICT. p. 8965, where it is said to have been admitted, that, in the common case, a minor institute might dispose of moveables by testament, notwithstanding a substitution. *Vide also NO. 2. Ibid. Craich*, DICT. page 16342²²⁹.

† In a late case, this point was considered as perfectly fixed; *Fac. Coll. Mar.* 8. 1797, *Cunynghame*, DICT. p. 8966.

‡ As an example of this rule, see *Fac. Coll. July* 3. 1781, *Thomson*, DICT. p. 8985. There was a consent by the minor's father; but it was unavailing, as the deed was in favour of the father himself, who could not be *auctor in rem suam*.

“ cation.” Perhaps in the case of *Koehler*, the finding,—That the minor's uncle, (who had in England been appointed his guardian by the Lord Chancellor,) “ must concur with him in granting the discharge,”—may have been considered as affording, in some sort, security for the proper application of the money. Be this as it may, the later case of *Kirkman* seems now, at all events, the safer authority.

²²⁹ It would seem only to be in cases, where the substitution is so conceived, as to imply a prohibition to alter, that the minor institute is not allowed to test. For example, in the case of *Waddell, supr. not. **, a father having settled his moveable estate in favour of his son and daughter equally between them, and,—failing either, by *decease before marriage or majority*,—to the survivor, this was considered “ not as a simple substitution, but to imply a prohibition to alter before majority or marriage.” The minor's testament was accordingly set aside. A similar decision had been pronounced in the previous case of *Yorkston*, 13th Jan. 1697, *Fount. DICT.* p. 8950. On the other hand, in the case of *Craich, supr. not. **, the substitution being simple, the minor's testament was sustained.

²³⁰ It is the same, as to deeds granted by a married woman, under age, with consent of her husband; *Gibson*, 6th June 1809, *Fac. Coll.*

²³¹ A bill having been accepted by a minor, then in apprenticeship; jointly with his father, but the charger denying the minor's statement, that the transaction was for behoof of the father, it was, from the favour of commerce, found not competent to suspend the charge on the head of minority and lesion, and that reduction was the only mode of redress; *Waddell*, 18th Jan. 1812, *Fac. Coll.*

Book I.

deeds are granted by minors with the concurrence of their curators, or by those who have no curators, or by a proper tutor in name of the pupil; reduction is necessary, because such deeds subsist in law till they be set aside. Some have affirmed, that when a minor having curators executes a deed with their consent, the intervention of the curators supplies the want of years in the minor, as to all questions with third parties, and of course cuts off the right of restitution; and that the only remedy competent in such case to the minor, is an action against his curators for what he hath suffered by their undue consent. But restitution is as truly competent to the minor, when the deed is executed with the consent of his curators, as when he is without curators; both by the Roman law, *L. 2, 3. Si tut. vel cur. int.*, and by our customs, *St. B. 1. T. 6. § 44. Dirl. 88. (Blantyre, Dict. p. 8991.)*. Yet there ought to be in such case the clearest evidence of lesion in order to set aside the deed, otherwise that commerce with minors which is frequently necessary, would be too much embarrassed.

*Quadriennium
utile.*

35. The law indulges to a minor the space of four years after his perfect age, within which he can sue for the reduction of any deed he may have granted to his own prejudice while he was yet a minor, that so he may have a reasonable time, from that period in which he is first presumed to have the exercise of reason, to consider with himself what deeds granted by him in his minority are truly hurtful to him. These years, because they are thus profitable to the minor as a *tempus deliberandi*, are by us called *anni utiles*; though not in the sense of the Roman law, in which *tempus utile* signified those days in which it was lawful to hold courts, and so were useful or profitable to the party, in opposition to *tempus continuum*, which comprehended under it every day, unlawful as well as lawful. It is not enough, to preserve the minor's right of restitution, that he sign a revocation of the deed complained of within this *quadriennium* or four years, *Fount. Dec. 28. 1697, Marq. Montrose, (Dict. p. 9046.)*; for that is a private act, not directed against nor intimated to those who have an interest to support the deed: He must within that period raise and execute a summons of reduction; which will be effectual, though there should be no revocation. But the minor loses not only his right of being restored against third parties, but his recourse against his tutors or curators who have granted or consented to the deeds brought under challenge, if he does not sue them for damages before his age of twenty-five, though he should sue them within the ten years allowed to minors for calling them to account, *Kames, 98., (Cunningham, Dict. p. 16338.)*; for by his silence during the *quadriennium*, there arises a *præsumptio juris et de jure*, not to be traversed even by legal evidence to the contrary, that the minor was not hurt by the deed upon which the process of recourse against his tutors or curators is grounded.

Minority and
lesion must both
be proved.

36. In this action for restitution, two particular facts must be proved by the pursuer, before he can prevail: *First*, That he was minor when he or his tutor signed the deed, or entered into the contract in question: *2dly*, That he is truly hurt by that deed or contract. Evidence, though not strictly legal, called an *æqualis probatio*, joined with an extract of the minor's baptism from the books of the kirk-session, has been always sustained as a proof of the minor's age, *Dirl. 72, (Thomson, Dict. p. 8983, and 12701.)*. And by a decision, 1722, *L. Logan, (not reported), minority*

nority was found proved by an extract of the session-books *per se*, without any collateral evidence to support it *. The years of minority are computed *de momento in momentum*, both because one cannot in proper speech be called *major* till the twenty-one years of minority be completely run, and because that manner of computation is most profitable to the minor: And hence a deed granted by one who wanted but a single day of his perfect age of twenty-one, was adjudged to have been granted in minority, *June 26. 1624, Drummond*, (DICT. p. 3465.). As to the minor's lesion, *1st*, If it be inconsiderable, restitution is excluded; for actions of reduction are extraordinary remedies, not to be applied but on great and urgent occasions: *2dly*, As restitution is not intended to put minors in a better condition than majors, but purely to defend them against the rashness or imbecility of nonage, the minor's lesion must proceed either from the weakness of judgment or levity of disposition incident to youth, or from the imprudence or negligence of his curators. If, for instance, a minor without curators, who had purchased a house, which was afterwards burnt, should bring an action to be restored against the bargain, he would not prevail, if it appeared that the purchase was rational, and the price equal; and that his only damage arose from an accident which the greatest prudence could neither foresee nor prevent. Upon this ground minors cannot be restored against deeds done by them from the badness of their heart, *ex. gr.* against breach of trust, fraud, illegal violence, or any other unjustifiable act; for *deceptis, non decipientibus, jura subveniunt*. Hence, if a minor should fraudulently draw one to contract with him, by pretending he was major, there can be no restitution; but where the fraud is presumed barely from the minor's affirmation in a deed that he was major, that presumption may be taken off by a proof that the minor was induced to insert that clause by the persuasion of the other contractor, or that the other knew, or had strong reason to believe, that he was minor, *Feb. 23. 1665, Kennedy*, (DICT. p. 11658.). The minor cannot be restored against necessary payments, though he should suffer prejudice, unless the lesion may be justly imputed to him who made the payment. Thus, as a minor's tenant or debtor may be compelled by law to pay to the tutor or curator, who is authorised to receive the debts due to the minor, he is secure in making payment, though the sum paid has not been applied to the use of the minor; whose only remedy in such case is an action for damages against his guardians.

37. In certain cases, lesion is presumed from the nature of the deed itself, by a presumption so strong that it cannot be overruled by a contrary proof, *ex. gr.* in a deed of donation, or in a bond of cautionry, granted by the minor. In others, though the presumption of lesion requires no collateral evidence to enforce it, it may be taken off by a contrary proof; but the burden of that proof, or the *onus probandi*, is thrown upon the adverse party. Thus, in the payment of a debt made to the minor himself, and not to his curator, the law presumes against him who made the payment, that the minor has squandered away the money, except he bring evidence that it was profitable to the minor, *in rem minoris versum*. Lesion is, by the general opinion of writers, *St. B. 1. T. 6. § 44.*; *Bank. B. 1. T. 7. § 83.*, presumed in a voluntary loan of money made to the minor, even with the consent of his curators, though the minor's affairs should, at the date of the bond, have required money ever so much; and consequently the

In what cases lesion is presumed.

* See however, *Durie, March 3. 1625, Wilson, DICT. p. 17200.*

Against what
deeds is restitu-
tion competent ;

the minor will be restored against the bond, unless the creditor shall prove that the sum turned to the minor's account, in which opinion these writers are supported by a decision observed by *Dirl.* 88. (*Blantyre*, *Dict.* p.8991. ²³²).

38. Restitution is competent to the minor, against all obligations arising from contract by which he may be hurt, be they ever so solemn ; even against marriage-contracts, in so far as the provisions contained in them are prejudicial to him, *July* 4. 1632, *Davidson*, (*Dict.* p. 8988) ; *Nov.* 22. 1664, *Macgill*, (*Dict.* p. 5696.) ; *Br.* 18. & 70. (*Lyon's Creditors*, *Dict.* p. 6059.). But there lies no action for restitution against the marriage itself ; which, by the divine law, cannot be dissolved on civil considerations. It is also competent to the minor against the payment by the tutor or curator of debts due by the minor, even just ones, if the payment could not in equity be demanded of him ; *ex. gr.* against the payment of a debt due by a person deceased to whom the minor is confirmed executor, if the executry-funds are not sufficient to clear it. A minor who betakes himself to any business or profession, as trade, manufacture, law, &c. cannot be restored against deeds granted by him in relation to that employment, *Dirl.* 360. (*Galbraith*, *Dict.* p. 9027.)²³³. For as a minor is not restrained from carrying on business as a merchant, manufacturer, &c. the law ought to secure those who deal with him from vexatious processes of reduction. But this is no bar to the minor's being restored against such deeds as are not connected with the employment undertaken by him, *Dec.* 7. 1666, *Mackenzie*, (*Dict.* p. 8959.)*. Sums contained in bills of exchange accepted by a minor merchant or trader, are presumed to have been advanced to him in the course of his business ; though bills by their style do not express the cause of granting, *July* 5. 1732, *Craig*, (*Dict.* p. 9035.) †²³⁵. Restitution lies not only against extrajudicial acts, but judicial ; *ex. gr.* against the sentence of a judge, though pronounced *in foro contradictorio*, where the proper allegations of defences, either in law or in fact, have been
been

* The Court sustained action on a bill granted by a minor who had a commission in the army, though the articles for which it was given were either entirely useless to the minor, or unnecessary in his situation ; *Fac. Coll.* *Nov.* 20. 1782, *Johnston*, *Dict.* p. 9036 ²³⁴.

† Where a minor follows a trade or profession, the general maxim stated above, that lesion is presumed from his borrowing money, does not apply. He must prove lesion ; *June* 16. 1789, *Macdonald*, *Dict.* p. 9038.

²³² See, however, in the case of a bill, *Waddell*, *supr. not.* ²³¹, where the majority of the Court seem to have disregarded this presumption, and to have required proof of lesion from the minor.

²³³ A lad of seventeen, employed as sheriff-clerk substitute, was found liable to his employer, the principal clerk, for erroneous application of money ; *Heddel*, *5th June* 1810, *Fac. Coll.* The Court were divided ; Lords Meadowbank and Robertson making a distinction, that " although the minority of the defender could not be pleaded " in a question with a third party, yet, joined with *bona fides*, it formed a good defence " against his employer. Mr Heddel had employed a boy to discharge the duties of " his office, and could not reasonably expect from him the prudence of a man." The majority of the Court, however, held, that there was no getting over " the general rule " of law, by which it is established that a minor, whenever he undertakes an employment, by which he gains a part of his livelihood, becomes responsible as well to " his employer as to the public, for all his acts done in that situation."

²³⁴ According to the report, " the greater part were articles which, although not " absolutely necessary, are commonly possessed by young gentlemen of fashion and " fortune ;" and the minor was son of a nobleman.

²³⁵ See, as to a bill accepted jointly by father and son, the latter being a minor, in apprenticeship ; *Waddell*, *supr. not.* &c.

been omitted; or where others, false in fact, or hurtful to the minor, have been offered to the court by his guardians, *Dec. 11. 1705, Murray*, (DICT. p. 9001.), *Tinw. Dec. 19. 1744, Christies*. But if the proper plea or defences have been offered for the minor, and repelled by the judge, there is no place for restitution; since the lesion arises, in that case, purely from iniquity in the judge, to which majors and minors are equally exposed, *Fount. Jan. 7. 1698, Count. Kincardin*, (DICT. p. 9016.). In this class of judicial acts, may be reckoned a minor's entry by service as heir to his ancestor: for if he shall be thereby subjected to debts exceeding the value of the inheritance, he will be restored, *L. 7. § 5. De minor.; Dec. 1. 1708, Barclay*, (DICT. p. 9031.).

39. By our former law, agreeably to the constitution of Frederick Barbarossa, *Sacramenta puberum sunt servanda. Auth. L. 1. C. Si adv. vend.*, the benefit of restitution was denied to the minor against such deeds as he had sworn never to call in question. But our legislature observing, that minors might with the same facility be persuaded to ratify obligations upon oath, as they were to grant them, did, by 1681, *C. 19.*, declare the elicitors of such oaths infamous; and lest the minor might be backward to bring, in his own name, a reduction of the deed which he had sworn not to revoke, it was made lawful to any of his kinsmen to pursue an action for setting it aside. But if the minor, at any time after his age of twenty-one, even within the *quadriennium*, approve the deed done in his minority, either expressly by a formal ratification, or tacitly by any act importing approbation, *ex. gr.* by paying the interest due upon it, restitution is excluded; for such approbation gives to the original deed approved, the same validity, as if that original deed had been granted of equal date with the approbation*.

What ratification bars restitution.

40. It is generally said by doctors, that a minor cannot, *in pari casu*, be restored against a minor; because both parties have equal privilege. The rules observed in this case by the Roman law appear equitable, that where the one party is truly a sufferer, while the other grasps at profit, restitution is competent to the first against the last, in so far as the last may be a gainer. Where both are sufferers, without fraud on either side, the possessor's case is deemed the most favourable, *L. 91. § 3. in fin. De verb. ob.*; and on this ground, one minor who has borrowed a sum from another, and hath spent it unprofitably, is not bound to repay it, *L. 11. § pen. De minor.* A minor may sue for restitution, not only against the original creditor in the deed brought under challenge, but against those who have acquired the debt without a valuable consideration. Nay, though they be onerous purchasers, the minor may be restored against them, if the right they have acquired be barely personal; for it is a general rule in all personal rights, That

If restitution is competent against a minor.

VOL. I.

3 c

every

* A minor who, in his nineteenth year, had granted certain bills jointly with his father, and had within fourteen days after majority settled accounts²¹⁶, which comprehended these bills, was found entitled to restitution; *Fac. Coll. July 5. 1782, Melvil*, DICT. p. 8998.

²¹⁶ There does not appear to have been a deliberate settlement of accounts on the part of the minor. A state, as between the father and his creditor, had been drawn up, and the minor's subscription was obtained to the doquet. The *ratio decidendi* of the Court was, "that the salutary privilege of *restitutio in integrum* was not to be barred in a case like the present, in which the act alleged to infer homologation was of such a slight nature, especially as it occurred so very recently after nonage, and had proceeded from duty to a father."

every exception is good against the onerous purchaser, which is good against the original creditor. But if the right be real, committed by seisin in the person of the original creditor, the onerous purchaser, who relied on the faith of the records, is secure against reduction, unless the right has been rendered litigious by a suit prior to the purchase, *Jan. 25. 1728, Gourlay*, (DICT. p. 10288.); or unless the purchaser was *in mala fide* to acquire, knowing that the right was granted by a minor.

41. A minor's restitution ought, not only from the nature of the privilege, but from equity, to be both mutual and complete. Where matters are entire, the other party ought to be fully restored to his former state, as well as the minor, *L. 24. § 4, De. minor*. Thus, in a restitution against a sale of lands, the minor, at the same time that he recovers the subject sold, with the intermediate fruits which it has produced from the time of the sale, must repay to the purchaser the price received by him or his curators, with the interest of it; and he must also reimburse him of the expence which he may have laid out on the subject while it was enjoyed by him, in so far as it has been brought by that expence to yield higher yearly profits. Where, from after accidents, restitution cannot be complete on both sides, a distinction must be made between voluntary and necessary contracts. In voluntary, the minor ought to be restored fully, though the other party, who had it in his power not to have contracted, should be a sufferer; since it is for the benefit of minors that restitution was intended. Thus, a minor who is restored against a sale, cannot be compelled to pay the price to the purchaser, unless in so far as it has been *in rem versum*, *Dirl. 61. (Thomson, DICT. p. 8983.)* And in like manner, when he is restored against a bond of borrowed money voluntarily granted by himself and his curators, the creditor will recover that part of the sum only which has been employed profitably for the minor, *supr. § 37.* But in necessary contracts, where one is, without his own fact, brought under the necessity of contracting with a minor, there can be no restitution to the minor, whatever loss he may suffer, unless the other party be also put in his own place. Thus a pupil who has been by his tutor served heir to a bankrupt, cannot be restored against the service, till he make payment to the bankrupt's creditors of all the intermediate rents of the estate, not only such as were actually received by the tutor, but those which he might have received, *Dec. 1. 1708, Barclay*, (DICT. p. 9031.); because in that case the bankrupt's creditors were, by an act of the law, used by the tutor himself, laid under a necessity of quitting the possession to the tutor.

42. The privilege of restitution dies not, in all cases, with the person entitled to it. Where he dies either in minority, or within the *anni utiles*, the law transmits that right in particular events to his heir, though such heir be major, and consequently entitled to no privilege in his own person. The following rules are observed on this point by the Roman law. If a minor succeed to a minor, the time indulged to the minor heir, within which he may exercise his ancestor's right, is governed by his own minority, not by that of his ancestor; and consequently he has the benefit of all the years of his minority, and the whole *quadriennium* after, as a *legitimum tempus restitutionis*, *L. 5. § 1. C. De temp. in int. rest.* If the ancestor died a major, but within the *quadriennium*, the minor heir may, as in the first case, sue for restitution at any time during his own minority;

The restitution ought to be mutual between the minor and the other contracting party.

Restitution transmits to the minor's heirs.

minority; but no more of the *quadriennium* after his majority can be profitable to him, than remained not expired to his ancestor when he died, *L. 19. vers. Plane, De minor.* If a major, whether past his *quadriennium* or not, succeed to a minor, law allows him full four years, computed downwards from the minor's death, to make use of his right, because the *quadriennium* was left entire to the minor at his death; and if he succeed to a major who died within the *quadriennium*, he cannot, by the same reason, avail himself of more of it than remained entire to the ancestor when he died, *arg. d. L. 19.; L. 5. § 2. C. De temp. in int. rest.* The only decision of the Court of Session on this subject is, *March 14. 1628, Macmath*, (Dict. p. 9040.). Stair indeed affirms, *B. 1. T. 6. § 44.*, that the rules laid down in act 1621, *C. 6.*, concerning the privilege of minors and their heirs, in the redemption of apprisings, are to be observed also in restitutions. But Mackenzie's opinion, § 12. *k. t.*, is more probable, that that act ought not to be extended beyond the proper subject of it: And it is worth observing, that no argument is drawn from the act 1621 in the before-mentioned decision, though that judgment was pronounced only a few years after the act had passed.

43. Another privilege hath been early introduced into our law for the benefit of minors, of the feudal kind; *Minor non tenetur placitare super hæreditate*, *Reg. Maj. L. 3. C. 32. § 15, 16, 17.; St. Gul. C. 39.* *Placitare* signifies to be party in a suit, from *placitum*, a vocable of the middle ages for suit or process: And the meaning of the rule is, that a minor cannot be compelled to defend the right he has to the heritage of an ancestor, when it is questioned by one who claims it under a title preferable to that which was in the ancestor. Though the rule, as stated in our old law-books, is general, comprehending all heritage, from whatever quarter it should come, it has been limited for two centuries past to *hæreditas paterna*, and so has no place in heritage derived from collaterals, as brothers, uncles, &c. But Stair, *B. 1. T. 6. § 45.*, includes under it inheritances flowing from the mother, and, in general, from any ascendent in the right line, either by the father or mother, however remote.

Minor non tenetur placitare de hæreditate.

44. *Hæreditas*, or heritage, when it is opposed to executry, includes all rights which bear a tract of future time; but in this place, it is understood more strictly of those only which are in their nature perpetual. A lease, therefore, though for the longest term of years, falls not under this rule. As the privilege is feudal, all rights which are *fundo annexa* are comprehended under it, even incorporeal ones, *ex. gr.* rights of patronage, *Harc. 703. (Bishop of Dunkeld, Dict. p. 9099.)*, and all rights of property, even redeemable, as wadsets granted to the minor's ancestor, where the action brought against the minor is intended to set them aside upon any ground of nullity, *Fount. Nov. 21. 1694, Davidson.* (Dict. p. 9072.)²³⁷. But the privilege is not admitted in rights which were not vested in the ancestor by seisin, where seisin is necessary to perfect them; because such rights are barely personal, not feudal.

What is understood in this sense to be *hæreditas*.

²³⁷ This passage seems to state the law too broadly. The privilege is not admitted, where the "ground of nullity" is *intrinsic*, and appears *ex facie* of the minor's own rights; *ex. gr.* where the minor founds on a title, null, under the *stat. 1696, c. 25.*, as a blank writ; *Donaldson, cit. in not. **, p. 196. In the case of *Davidson*, referred to in the text, the alleged ground of nullity was *extrinsic* of the minor's title, and depended on the ultimate success of his opponent in a reduction libelled *ex capite inhibitionis*.

dal. If therefore a father, whose only title to lands is a charter, or disposition, die before taking infeftment in them *, the minor heir, against whom an action is brought after the father's death for evicting these lands, must answer to the suit, *Jan. 31. 1665, Kello*, (Dict. p. 9063.). Yet, *first*, If seisin has been taken on the right by the father's author, and if the father was afterwards in the natural possession of the subject, though without seisin, the minor heir is entitled to the privilege, *June 23. 1625, Pringle*, (Dict. p. 9059.) *2dly*, He may plead it, if either the father himself, or his author, had done all in his power to obtain infeftment; if, *ex. gr.* the father had charged the superior to infeft him in lands which he had adjudged from his debtor, the superior's vassal; for such charge is, in the judgment of law, equivalent in this question to actual seisin, *Pr. Falc. 66. (Fleming, Dict. p. 9070.)*. An estate in which the minor's father had done *omne quod in se erat* to obtain infeftment, is accounted the minor's heritage, though it had been conquest in the father's person; *i. e.* though it had been acquired by him upon a singular title. For though lands enjoyed by descent from an ancestor, and lands acquired by one's self are opposed to each other in a question concerning the succession of the next heir; yet, where the minor hath actually succeeded to his father in that conquest, it is justly deemed *hereditas paterna* as to him, since it is an inheritance which has descended to him from his father; *d. Pr. Falc. 66, (Fleming, Dict. p. 9070.)*.

This privilege competent to a minor, where his right is consequentially, not directly affected.

45. This privilege may be pleaded by a minor who is cited as party to a suit, though the right which is directly contested by the pursuer should belong to a major, if the eviction of the minor's heritage must necessarily be the consequence of setting aside the major's right, *June 23. 1625, Pringle*, (Dict. p. 9059); for the privilege which was designed to protect minors against the eviction of their paternal inheritance would be elusory, if the law admitted any proceeding against the minor which must necessarily issue in such eviction. It is true, that all privileges are personal, and so cannot be communicated to others; where therefore the validity of the minor's right depends on that of a major, the minor's privilege cannot defend the major from an action of reduction, unless their rights be so connected together that they are inseparable; *ex. gr.* if the major and minor be joint proprietors of the same subject. But no sentence pronounced in the action against the major can affect the minor; who, though he be called as a party, is not obliged to answer, agreeably to the rule, *Res judicata inter alios, aliis neque nocet neque prodest*; see *Nov. 25. 1624, Hamilton*, (Dict. p. 9057.).

In what cases this privilege is excluded.

46. This privilege is in several cases excluded. *First*, It cannot avail the minor in actions which relate either to the settling of marches, or to the division of lands; for the first sort is intended barely for fixing boundaries, and the other for ascertaining the just proportion of property which the minor ought to have in a subject that was before common to him with others: But neither of them tends to cut off from the minor any right competent to him

* Or if the disposition and seisin labour under nullities; *July 12. 1749, Donaldson*, Dict. p. 9080 ²³⁶.

²³⁶ *Vid. not* ²³⁷. Morison has omitted in his Dictionary the full report of this case by *Kilkerran, qu. vid. v. BLANK WRIT, NO. 1*. See also a report of the same case by *Elchies, v. BLANK WRIT, NO. 2*.

him in his ancestor's heritable property. On the same ground, it does not obtain in actions of molestation *in possessorio*, *Dirl.* 64. (*Hartshaw*, *Dict.* p. 9009.), nor in any judgment merely possessory, *Mack. Obs. on act 1587, C. 42.* 2dly, It does not defend the minor against the superior suing for his feu-duties, or for feudal casualties or delinquencies; seeing such actions, in place of questioning the minor's right, acknowledge it to be good; and they are, in the common case, designed, not to evict any heritage, but to recover that debt with which law has burdened it in favour of the *dominus directus*, or superior. We shall afterwards learn, *B. 2. T. 5. § 11.*, that this doctrine holds, even in such casualties as infer a total eviction of the lands. 3dly, It cannot be pleaded in bar of any action for evicting the minor's heritage which had been commenced against the father in his own lifetime. This exception is grounded on the rule to be explained hereafter, *Actio contra defunctum coepta, continuatur in hæredes.* By this rule, though a suit should not be transmissible of its own nature against heirs; yet, if it be begun against the party himself, it may be continued against his heirs: And it ought, with stronger reason, to be thus transmitted in the present case, where the action lies against the heir at common law, but, on account of a temporary privilege, is suspended only for a time. 4thly, If the privilege fails, where action was begun against the father, though he had retained the possession, it must also fail, where the father had lost the lawful and peaceable possession of the estate before his death. 5thly, It is not pleadable by a minor, so long as he puts off entering to his father; for till he be served heir to him, he can have no interest to put in any plea relative to subjects which belonged to him, *Pr. Falc. 66, (Fleming, Dict. p. 9070.)*. And it appears both by *Reg. Maj. L. 3. C. 32. § 3.*, and from the course of our decisions, that he ought to be also infest on his service. But the moment that he has completed his titles, he can avail himself of this privilege; and therefore the production of his special service, and seisin upon it, in any process of reduction, supersedes the necessity of all farther production of writings till his majority: For to what purpose should more be produced, since the action itself cannot proceed against the minor, after proving his title as heir to his father in the subject? Yet where the grounds of reduction depend on parole evidence to be brought by the pursuer, the court will, notwithstanding the minor's privilege, examine the witnesses, that the mean of proof may not perish, *Jan. 31. 1665, Kello, (Dict. p. 9063.)*. From these observations, it is consequent, 6thly, That no other than the heir of the investiture is entitled to the benefit of this privilege. Where therefore the deceased had, by charter and seisin, completed his right to a subject which stands devised to heirs-male, it is not competent to his heir of line, if a suit should be brought against him after the ancestor's death for evicting that subject from him, to plead the benefit of the rule; for a minor, before he is entitled to such plea, ought to be served heir in the subject, and the heir of line cannot possibly be served heir in a subject from which he is expressly excluded by the investiture. 7thly, This privilege is not competent, when the minor is sued upon his father's fraud or delict, *Dec. 27. 1711, Crawford, (Dict. p. 9102.)*. Neither, *a fortiori*, is it competent, nor indeed any privilege of a civil kind, where the action is founded on the fraud or delict of the minor himself. What privilege minors have

in defending themselves against proper criminal accusations, *vid. infr. B. 4. T. 4. § 82.* *8thly*, As a minor cannot plead this feudal privilege in an action in which his ancestor's right is acknowledged by the pursuer, neither is it competent to him where the action is grounded upon the ancestor's obligation to convey that right; for the pursuer is in that case so far from impugning the ancestor's title, that he rests his claim upon it, and barely insists, that the minor may be decreed to fulfil his ancestor's deed, *Fount. June 27. (Forbes, 25. July) 1710, Mackenzie, (Dict. p. 9101.)*. Hence also it cannot be pleaded in bar of an action for payment of the ancestor's debt, constituted by a liquid obligation, though that action should be the ground of an adjudication, by which the minor's heritage must be necessarily evicted, *Reg. Maj. L. 3. C. 32. § 16.* And for the same reason it is not competent to the minor against a reverser, who had granted a wadset of his lands to the minor's ancestor, and insists in a declarator of redemption; for the only purpose of such action is, that the lands be surrendered to the pursuer upon payment of the debt, in the precise terms of the ancestor's right*. Neither is the decision observed by Fountainhall, *Nov. 21. 1694, Davidson, (Dict. p. 9072.)*, inconsistent with this doctrine; because there the pursuer was not insisting to redeem the wadset granted to the minor's ancestor, but to set it aside upon a legal ground of reduction, *ex capite inhibitionis*; against which action, as tending directly to evict the minor's heritage in point of right, the minor might undoubtedly plead the privilege. *Lastly*, It is the common opinion, that the minor cannot defend himself on this privilege against a minor who sues for reduction on the head of minority and lesion; not merely because the pursuer has in that case equal privilege with the defender, but also because the case of the pursuer, who is *in damno vitando*, is more favourable than that of the defender, who is *in lucro captando*.

Pupils cannot be imprisoned for civil debts.

47. It may be mentioned, as another legal privilege of minority, that the persons of pupils are secured against imprisonment upon civil debts, by 1696, C. 41 †. The rights of minors in the matter of prescription, redemption of adjudications, &c. are to be explained under their proper heads.

Curatory of idiots, furious and imbecile persons.

48. It has been said, that our law provides curators, not only for minors, but for every person who, either from a total defect of judgment, or, *2dly*, from a disordered brain, or, *3dly*, from the wrong texture or disposition of the organs, is naturally incapable of managing his affairs with discretion. Of the first class are fatuous persons, called also idiots in our law, who are entirely deprived of the faculty of reason, and have an uniform stupidity and inattention in their manner, and childishness in their speech, which generally distinguish them from other men; and this distemper of mind is commonly from the birth and incurable. Furious persons, who

* The privilege was denied to the heir of an adjudger, whose right was sought to be reduced, before matters had been foreclosed by decree of declarator of expiry of the legal³³⁰; *Fac. Coll. June 29. 1797, Macfarlane, Dict. p. 9086.*

In a redemption of a wadset, where forty years had elapsed after the expiry of the term of redemption, this privilege was found to be competent, though the pursuer's minority was pleaded in bar of prescription, the right of the wadsetter being *ex facie* irredeemable; *Kilk. Minor, NO. ix. Strang, Dict. p. 9076.*

† Minors past pupilarity may be imprisoned for civil debts; *Kilk. Minor, NO. vi. Thomson, Dict. p. 8910.*

³³⁰ The question thus resolving, as was observed on the Bench, "into a count and "reckoning."

who may be ranked in the second class, cannot be said to be deprived of judgment; for they are frequently known to reason with acuteness: But an excess of spirits, and an overheated imagination, obstruct the application of their reason to the ordinary purposes of life; and their infirmity is generally brought on by sickness, disappointment, or other external accidents, and frequently interrupted by lucid intervals. Under these may be included madmen; though their madness should not discover itself by acts of fury, but by a certain wildness of behaviour flowing from a disturbed fancy. Lunatics are those who are seized with periodical fits of frenzy. Some doctors distinguish between fatuity, and a certain degree of imbecility which nearly approaches to it. They define a fatuous person, *is qui omnino desipit*, who is quite destitute of reason; but if the person appears to have the least spark of judgment, *si aliquid sapit*, they affirm, that he may by himself, without the consent of curators, execute deeds of lesser moment, which cannot in their nature prove so hurtful to him. This distinction appears to have received some support from our practice, in the case of one who was found to have understanding enough to make a testament; because that is revocable at pleasure; though he was judged incapable of signing a deed, disabling himself from making a second testament, whereby he would be stripped of all power over any of his effects, *Tinw. June 16. 1752, Halliday*. And, upon the same ground, the marriage of a person was declared null, upon the head of imbecility or fatuity, though, by his answers to certain questions judicially put to him, he appeared to be not absolutely void of reason; because the tie made by marriage is indissoluble, *July 1747, Blair of Borgue, (Dict. p. 6293.)* Stair, *B. 4. T. 3. § 9.*, seems to take it for granted, that all who are dumb and deaf from the birth are, without exception, incapable of management; as to which *vid. infr. B. 3. T. 1. § 16.* But however this question ought to be decided, thus far must be allowed to his Lordship, that where such as labour under that infirmity cannot properly exert their reason in the conduct of life, curators may be appointed for them as well as for minors*.

49. There has been, it is believed, no instance in our practice of testamentary curators given to idiots: But surely where any natural incapacity appears in a son for management, the father is as justly entitled to name a curator to manage for him, while he continues

The idiot, furious, or imbecile person, must be cognosced such, by the sentence of a judge.

* In some instances, the Court have provided the same safeguard for different kinds of imbecility, and which do not come under any of the descriptions contained in the text. They have, on application of the friends of the party, remitted to a Lord Ordinary to ascertain the state of facts, and have granted or refused the desire of the application, according to the result of such investigation. This course was followed, *March 5. 1777, Crow*, where there appeared in the party a singularity of behaviour, and a total neglect of his affairs; and *January 14. 1784, Scott*, where the interposition was craved in behalf of a gentleman, who from great age, and the consequence of severe indisposition, had been reduced to a state of nearly total imbecility. Such interpositions on the part of the Court are fully justified by the necessity of the circumstances; and perhaps they may derive authority from the Act of Sederunt, *Feb. 13. 1730*, which specifies persons "under some incapacity for the time to manage their own estates," as requiring the appointment of a judicial administration. (*These cases are not reported.*)²⁴⁰

²⁴⁰ In a late case, the appointment of curator was resisted, in the name of the party said to be imbecil; and it was argued, that he could not be deprived of his right to conduct his own affairs, unless regularly cognosced by a jury. The Court, however, having remitted to the Sheriff to receive evidence, and being satisfied, on his report, and after a hearing in presence, of the necessity of a curator, sustained their appointment; *Graham, Summer Sess. 1820.*

BOOK I.

tinues under that disability, as he is to appoint one for protecting him against the follies of youth; and this was the doctrine of the Roman law, *L. 16. pr. De cur. furios.* Yet before the testamentary curator can enter upon the exercise of his office, the son ought to be declared or cognosed an idiot by the sentence of a judge; since no person is after majority to be denied the right of conducting his own affairs, unless he be properly declared incapable of it. The regular method therefore pointed out by our law for declaring fatuity or furiosity is by brieves issuing from the chancery, and directed to a judge; who is ordained to call an inquest for inquiring, *first*, Into the person's true state; and, *2dly*, Who is the next male agnate, on whom the office of curatory may be conferred, *Cr. Lib. 1. Dieg. 12. § 29.*; 1475, *C. 66.* It has been already observed, that brieves of tutory may be directed to any judge, being *jurisdictionis voluntariæ*; but brieves of idiotry and furiosity can be directed to no other than the judge-ordinary of the territory where the person who is said to be fatuous or furious resides: And he ought to be made a party to the brief, because if he be truly of a sound mind, he has good interest to oppose it; and instances have occurred of such brieves being advocated upon the party's opposition.

Brief of idiotry, what particulars it requires to be proved.

50. As to the first head of the brief, the condition of him who is alleged to be fatuous or furious, the inquiry of the inquest was, by our old law, confined to his present state; whether he was, while the inquest were sitting, of a sound mind: and consequently, when one was to set aside, on the head of fatuity, a deed granted prior to the verdict of the inquest, it behoved him to bring evidence that the granter was fatuous at the precise time of granting the deed; because though an inquest had declared him an idiot posterior to the date of the deed, yet the evidence laid before the inquest, which was limited to his present state, could be of no use towards proving his fatuity still farther back, to the date of the deed brought under challenge. That these verdicts, therefore, might be of more general use, the inquest was ordained, by 1475, *C. 66.*, to inquire how long the person had been fatuous: and it was enacted, that no alienation made by him after the time fixed by the inquest as the commencement of his distemper should be valid. Thus the verdict is now a sufficient foundation, without farther evidence, for setting aside not only all such deeds of the fatuous person as were granted after producing the evidence to the inquest, but likewise such as were granted before that, if after the time when, according to the proof, the fatuity began *²⁴¹. As to the second head, concerning the person to be appointed curator, our law hath always committed the care of fatuous persons to the next male agnate, in the same manner as in the tutory of minors: But the care of furious persons belonged anciently to the crown, because the King alone has the power of coercing with fetters or chains, *Cr. Lib. 2. Dieg. 20. § 9.* This distinction is abolished by 1585, *C. 18.*, which statutes, that the next agnate shall be preferred to the tutory and curatory, both

* See Fountainhall's report, 9th Feb. 1704, of the case of *Moncreiff*, (*DICT. p. 6288.*)

²⁴¹ The verdict reverses the ordinary legal presumption in favour of the deeds. But where the commencement of fatuity had not been ascertained by verdict, and the evidence as to the continuance of the malady was of a conflicting character, the House of Lords, reversing a judgment of the Court of Session, held, that supposing the party "to be weak or even insane, if he was sane at the time of executing the deeds, that "was sufficient to support them;"—"and that the attesting witnesses to some of the "deeds being dead, it must be taken that they would have sworn to the sanity;" *Towart, 16th May 1817, 5. Dow, p. 231.*

both of fatuous and furious persons, according to the common law*. It would seem, that such agnate ought to have attained the age of twenty-five; not merely because the Roman law, to which the act refers, requires that age in all tutors and curators, but chiefly, because by a statute of our own, 1474, C. 51., the next agnate of twenty-five years of age is expressly declared to be, for the future, lawful tutor. And it is obvious, that the guardians given by the law to idiots are tutors in the most proper sense: They are given *personæ*, to wards who are incapable of consent; they have the name of tutors given them by the aforesaid act 1585, C. 18.; and they are appointed upon brieves, in the same form as tutors of law to minors are: And since the words of the act 1474 may with great propriety receive this interpretation, why ought they to be restricted, so as to exclude the tutory of idiots, which is an office requiring as great a degree of prudence and assiduity as that of minors? It must be admitted, that in the brieves of tutory to minors, one of the heads is, Whether the next agnate be twenty-five years? whereas in that of idiocy it is left in general, *Si sit legitima ætatis*; but the style of the two brieves continuing different in this clause since the act 1474, may have proceeded from the over-scrupulousness of the chancery-clerks, who suspected, that if they had made both writs run in the same style, they might be charged with assuming a power, by changing the style of writs without an express warrant, of altering our laws or usages, according to their fancy, by inconclusive implications. A father has a right, founded in nature itself, to the curatory of his fatuous or furious son: And a husband, as his wife's administrator-in-law, excludes agnates, in the case of her fatuity, in the same manner that he excludes them in the case of her minority †; though this is contrary to the Roman law, L. 14. *De curat. fur.*; see *supr.* T. 6. § 20. There is no difference in the style between the two brieves of idiocy and furiosity, except in the clause expressing the different conditions of the persons. In the brief of idiocy the words are, *Si sit incompos mentis, fatuus et naturaliter idiota*; in that of furiosity, *Si sit incompos mentis, prodigus, et furiosus, viz. qui nec tempus nec modum impensarum habet, sed bona dilacerando profundit*. By this description of the furious person, one might be apt to understand a prodigal, rather than a madman; but it will soon appear, that the hands of prodigals are tied up by quite different forms of law ‡.



51. When one is to be cognosced fatuous or furious, his person ought regularly to be exhibited to the inquest, that they may be the better able, after conferring with him, to form a judgment of his state from their own knowledge²⁴²: And this holds more especially

The person of the fatuous or furious must be produced to the inquest.

VOL. I.

3 E

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* The question, Who shall be accounted nearest agnate in this brieve? seems to depend on the same rules as in service of tutors of law to minors. See *Forbes*, 23d Feb. 1710, *Moncrief*, (DICT. p. 6286.).

† June 1791, *Haliburton*, DICT. *voce* TUTOR, p. 16379, taken from Fol. DICT. vol. iv. p. 338.

‡ Lord Kilkerran, in reporting a case, *Stark*, NO. 1. *voce* Idiocy, DICT. p. 6291., says, it appeared, upon search of the chancery-records, that the two brieve sare in use to be taken out, and only one to be retoured; but as the form of the claim, which remained with the clerk to the process, could not be discovered at the Chancery, the Lords appointed a claim to be given in on each brief without blending them together, that the jury might adapt their verdict to the one or the other as the proof should come out.

²⁴² Where the inquest had not thus examined the person cognosced, the Court, upon a compound view—of this circumstance as an irregular and negligent proceeding,—of the defect of evidence,—and of the result of an examination “personally in their own presence,”—reduced the verdict; *Dewar*, 25th Feb. 1809, *Fac. Coll.*

BOOK I.

Deeds done by idiots void, though they have not been cognosced.

ally in the cases of fatuity, and of a distempered brain, which are habitudes not quite so obvious to the senses as furiosity, and in some cases hardly to be discovered but by conference. The verdict, therefore, of the inquest, concerning the person's present condition, is grounded on the conviction arising in their breasts from what themselves have seen: But that part of it which looks backward to his past state, must of necessity rest solely on the testimony of witnesses. As fatuous and furious persons are, by their very state, incapable of consent, and consequently of obligation, all deeds granted by them may be declared void by an action before the court of session, at the suit even of their heirs, upon proper evidence by witnesses of their fatuity or furiosity at the time of signing²⁴³, though they should never have been cognosced idiots during their lives by an inquest, *Durie, July 26. 1638, Loch, (Dict. p. 6278); Fount. Feb. 13. 1700, Aird, (Christie against Gib, Dict. p. 6283.)*²⁴⁴. Some few instances occur, of the Sovereign's giving curators to idiots, where the next agnate has not claimed the office; but such gifts are truly a deviation from our law, since they pass, without any inquiry, into the state of the person to whom the curator is appointed; and they are admitted only from necessity, that the affairs of the idiot may not suffer. Hence the curator of law to an idiot, though he should not serve till after the year in which he might have served, is preferred to the tutor-dative as soon as he offers himself, *Jan. 21. 1663, Stewart, (Dict. p. 6279.); Fount. Feb. 28. 1710, L. Mornipae, (Moncrief, Dict. p. 6286 *).*

The office of such curators is the same as that of tutors to pupils.

52. The powers of curators to idiots and furious persons, and the obligations which their offices bring them under, are precisely the same as those of tutors to pupils, and so need not be repeated. Their office expires, either by the death of the person under curatory, or by his return to a sound mind²⁴⁵. But a curator cannot resign his office on the short lucid intervals that commonly attend furiosity:

* See also to the very same effect, *Durie, Feb. 22. 1628, Colquhoun, (Dict. p. 6276.)*

²⁴³ *Vid. supr. not.* ²⁴¹.

²⁴⁴ In a case of this kind, it was attempted to prove a constitutional tendency to insanity, by offering evidence as to the insanity of the party's relations. The Court refused to allow such proof; *Walker, 8th March 1806, Fac. Coll. Dict. v. PROOF, App. No. 3.* On appeal, the Lord Chancellor incidentally noticed this as a "very delicate question." But the case was decided on another ground; 1. *Dow, p. 177.*

An idiot is incapable of any act inferring confirmation or acceptance. Where, therefore, he had received the dead's part under his father's settlement, this did not bar his representatives from repudiating that settlement; *Morton, 11th Feb. 1813, Fac. Coll.*

See a very interesting discussion, as to the effect of *intervening* insanity, where a person, *sana mente*, had granted a general mandate, or institorial power to his son, to conduct an extensive business carried on in his name; *Pollock, 10th Dec. 1811, Fac. Coll.* The Court had no occasion to pronounce a formal decision. But they seem to have been unanimously of opinion, that such general mandate subsisted, notwithstanding the insanity, at least to the effect of protecting all obligations in favour of creditors who had contracted with the son, *bona fide*, and in ignorance of the father's situation. See also, 1. *Bell's Comm. p. 396.*

²⁴⁵ Where the person under curatory has recovered his faculties, the Court will not discharge the curator, until he has, in the first instance, accounted with his principal; *Miller, 15th May 1810, Fac. Coll.*

In England, where a commission of lunacy is issued by the Lord Chancellor, the committee, along with cautioners, grants bond in very peculiar terms for the due discharge of his office. On the committee's failure in this particular, he is generally removed from his office, and the bond ordered to be put in suit. But where both the committee and cautioners reside in Scotland, the Chancellor's jurisdiction of course does not reach them, and proceedings for enforcing the bond become necessary in our Courts. See a case of this kind, where the Court having sustained action, ordered the contents to be lodged in a bank, to await the orders of the Lord Chancellor; *Leith, 17th Jan. 1811, Fac. Coll.*

furiosity : It is necessary that the distemper be radically cured, and that ought regularly to be declared by the sentence of a judge. It is probable, that the benefit of restitution competent to minors would from analogy be indulged to idiots and furious persons. *Bank. B. 1. T. 7. § 106.*

53. Persons, let them be ever so profuse, or liable to be imposed upon, if they have the exercise of reason, can effectually oblige themselves, till they be fettered by the methods of law. This is done by interdiction ; which may be defined, a legal restraint laid upon those who, either through their profuseness, or the extreme facility of their tempers, are too easily induced to make hurtful conveyances, by which they are disabled from signing any deed to their prejudice, without the consent of their curators, who are called *interdictors*. Interdiction is either voluntary or judicial. In voluntary interdiction, the person to be interdicted agrees to the restraint. This sort is generally executed by a writing, in the form of an obligation, by which the granter, sensible of his own unfitness for business, binds himself to do no deed that may hurt his estate, without consent of the friends therein particularly mentioned. By the Roman law, there could be no interdiction, without a previous inquiry into the condition of him who was to be laid under it, *L. 6. De curat. fur.* ; for it was deemed contrary to the nature of property, that any man should be subjected, even by his own consent, in the disposal of his estate, to the humour or caprice of another without legal grounds. Agreeably to this, interdictions were, by our ancient practice, disallowed, when they were granted *citra causæ cognitionem*, — *Hope, Interdiction, Jan. 30. 1618, Robertson, (Dict. p. 7158.)*. But because few persons could bear the shame which attends judicial interdictions, even when they knew that the restraint was necessary for the preservation of their families, voluntary interdictions have gradually received the countenance of law, *Dec. 11. 1622, Seton, (Dict. p. 7128.)* ; *Fount. Dec. 23. 1703, Row, (Dict. p. 7162)*. Upon this ground a bond of interdiction will be sustained, though the causes of granting, which are recited in the bond, be but gently touched, or insufficient to found a judicial interdiction ; for men are naturally backward to acknowledge their unfitness for business by an explicit declaration under their hand ; see *Nov. 10. 1676, Stewart, (Dict. p. 7132.)* *.

54. Judicial interdiction is imposed by a sentence of the judge, disabling persons of profuse or facile dispositions from granting deeds to their prejudice, without the consent of interdictors. Interdiction being an extraordinary remedy, belongs only to judges vested with the *nobile officium*. By the Roman law, it was the prætor who interdicted ; by ours the cognisance of judicial interdictions is proper to the court of session. Their sentence proceeds either *first, post causam cognitam*, upon an action brought against the prodigal, by his heir, or his next of kin ; or, *2dly, ex nobili officio* of the judge ; who, if he perceive, during the pendency of a suit, that either of the litigants is, from the facility of his temper, subject to imposition, will interdict him *ex proprio motu*, *Feb. 17. 1681, Robertson, (Dict. p. 7144.)*. The sentence of the court imposing this restraint

Interdiction of
profuse persons.

Judicial inter-
dictions.

* A bond of interdiction was sustained, though it contained no recital whatever of the causes which led to it : “ Considering that I put entire trust and confidence in A. B. C. D. E. and F., trustees chosen by me, by whose counsel and advice I intend to direct my actions, affairs and business, therefore wit ye me to have interdicted,” &c. *Feb. 13. 1789, Brauner, (not reported)*.

straint has no retrospective quality, as the verdict upon a brief of idiocy has: For an idiot, being destitute of reason, is incapable of obligation; whereas the prodigal, since he has the exercise of reason, must necessarily be obliged by his own deeds, till he is put under some legal restraint. Besides, the first appearance of an idiot frequently betrays him; whereas one who contracts with a prodigal, can seldom discover, from his appearance or conversation, the profuseness, or even the facility of his temper, and is consequently *in bona fide* to deal with him till he be properly interpellated. Those lawyers, therefore, appear to be mistaken, *Bank. B. 1. T. 7. § 118.*, who affirm, that prodigals may be interdicted on a brief of furiosity: For though the description of the furious person in that brief may be properly enough applied in sundry particulars to a prodigal, yet that clause which contains the retrospect, *quamdiu sustinuit istam furiositatem*, cannot.

Voluntary interdiction.

55. Though voluntary interdiction be imposed by the sole act of the person interdicted, without the authority of a judge; yet, after it is imposed, it cannot be recalled at his pleasure; because the law, presuming that he would not have laid himself under that restraint if he had not been conscious of his incapacity for business, consults his interest against his inclination, and therefore continues his fetters. Nevertheless the interdiction may be taken off, *first*, upon a proper process brought before the court of session by the interdicted, though it should be opposed by the interdictors, if it shall appear in proof, either that there was from the beginning no just ground for the restraint, or that the pursuer hath, since the date of the bond, become *rei suæ providus*²⁴⁶. *2dly*, Where the interdictors concur with the granter to have the restraint removed, the interdiction may be dissolved by that mutual consent, without the authority of the court of session, even though the reason of granting the bond should still continue. After the interdictors named in the bond have given up their office, no *termini habiles* remain for continuing it, since there can be no interdiction without interdictors. On this ground, *3dly*, Where the bond of interdiction requires a determinate number for a quorum, a voluntary interdiction falls, if the interdictors are, by death or otherwise, reduced to a lesser number, *Dec. 8. 1708, Hepburn*, (*Dict. p. 7154.*). Judicial interdiction cannot be taken off, but by the authority of the same court which imposed it, finding that the party is become sober. And this authority secures all who shall contract with him, though the strongest evidence should be brought, that he still continues profuse, or liable to be imposed upon; for as it was the sentence of the court which alone gave force to the restraint, the same authority is sufficient to take it off.

Interdictions must be published and registered.

56. There is no necessity for intimating an interdiction to the party who is laid under the restraint: For if the interdiction was voluntary, he himself was the imposer of it; and if it was judicial he was made a party to the action, and so is presumed to have been present at the sentence constituting it, *Durie, Dec. 11. 1622, Seton*, (*Dict. p. 7128.*). But interdictions must be published to all the lieges, and afterwards registered, that the danger of contracting with those who are laid under that restraint may be publicly known. And because interdictions are declared to have no effect till

²⁴⁶ It is competent to the son and heir of a person interdicted, to insist on the removal of a voluntary interdictor *qua suspect*; but this only in the form of an ordinary action, and not by summary petition and complaint; *Cameron, 19th Dec. 1810, Fac. Coll.*

till registration, 1581, *C. 119. NO. 1.*, the bare publishing of an interdiction is not deemed such a notice or interpellation as puts third parties *in mala fide* to deal with the interdicted, *Colv. Nov. 1586, Cranston*, (DICT. p. 7125.). Yet so soon as an interdiction is delivered to the interdictor, it operates against all deeds granted in favour of that interdictor after the delivery: For since it was his duty as interdictor to register the interdiction without loss of time, he must be *in pessima fide* to avail himself of his own wilful or blameable omission, *Stair, July 24. 1678, Grierson*, (DICT. p. 6298.); *Dec. 1725, Tenants*, (DICT. p. 7127.). The forms required in the publishing and registering of interdictions, being the same with those that are essential to inhibitions, shall be explained *infra, B. 2. T. 11. § 4, 5.*

57. It appears that interdiction, when it was first received into our practice, secured the moveable as well as the heritable estate of the interdicted from alienation: *First*, By the style of letters of interdiction (which continues to this day) restraining the party from doing any deed, without the consent of his interdictors, by which he may be hurt either in his lands or moveables: *2dly*, By our usage, which was for a long time conformable to that style: For though particular kinds of obligations granted after interdiction have been always sustained from favour to the creditors, as bonds granted to artificers for the price of their works, or for wages, *Durie, July 29. 1624, L. Collington*, (DICT. p. 7148.); yet the general rule continued, that interdiction secured the whole estate of the interdicted without any distinction; see *Durie, July 7. 1625, Son of L. Innerwick*, with this limitation, however, that even in the period where moveables were secured by interdiction, denunciation might proceed on moveable bonds granted after that restraint; in consequence of which, the liferent escheat of the interdicted fell, *Hadd. Feb. 8. 1610, Hay*, and *Dec. 21. 1610, L. Brocks mouth*, (DICT. p. 7164.), mentioned by *Stair, B. 1. T. 6. § 41.* As this proved an obstruction to the free course of trade, it obtained at last, *Durie, Spottisw. (INTERDICTION), July 11. 1634, Bruce*, (DICT. p. 7130.). for the encouragement of commerce, that the interdicted should have, notwithstanding his restraint, full power over his moveables, so as to dispose of them at pleasure, not only for onerous causes, or by testament, but by present gratuitous deeds of alienation, *Stair, June 20. 1671, Crawford*, (DICT. p. 2741.); see *Fount. Feb. 8. 1684, Sir B. Davidson*, (DICT. p. 7142.). The question, Whether obligations, with a clause of infertment, granted for securing sums of money, but not made real by actual seisin, are in this particular to be accounted moveable, so as they may be alienated after interdiction? is to be discussed *B. 2. T. 11. § 9.*, the law being the same as to that point in inhibitions and interdictions. Though in consequence of the power that the party interdicted continues to have over his moveables, all personal bonds granted by him after interdiction are effectual in so far as concerns his person and personal estate, to the creditor, to whom all personal diligence is competent: yet not only moveable obligations, *Stair, July 24. 1678, Grierson*, (DICT. p. 6298.), but even releases or discharges of them, granted by him after that period in favour of his debtors, *Edg. Jan. 31. 1724, Arbutnots*, (DICT. p. 7144.), are reducible, in so far as they may either be the ground of diligence against his heritable estate, or may in the least degree tend to encroach upon or impair it*.

Interdiction affects only the heritable estate of the interdicted person.

* Voluntary interdiction is limited in its extent and application, by the terms of the deed

Book I.

What deeds of the interdicted person are valid.

58. Since the law does not look on a person as if he had any defect of judgment from his being laid under interdiction, all his deeds, though granted without the consent of his interdictors, are valid. They are indeed subject to reduction, where he appears to have been hurt or overreached; but where the deed is either onerous, *Gosf. Feb. 27. 1672*, (*Stewart*, DICT. p. 3094.), or even rational, *Nov. 10. 1676*, *Stewart*, (DICT. p. 7132.), it is as effectual as if he had not been interdicted. As to deeds *mortis causa*, he hath doubtless a power of bequeathing his moveable estate by testament, since he may dispose of it by present gratuitous deeds, which is a greater power; but he can make no settlement of his heritable estate, nor alter any former settlement of it, though upon the most rational grounds, either with or without his interdictor's consent, *Dec. 27. 1725*, *Tenants*, (DICT. p. 7127.); so that he is in that respect in a like condition with minors, who are utterly incapable of making deeds of settlement in relation to heritage. All deeds granted with consent of the interdictors are as valid as if the granter had been laid under no restraint, insomuch that though gross lesion should be proved, he has not the remedy of reduction competent to minors: His only recourse lies against the interdictors, whom he can sue for making up to him what he has suffered through their undue consent. This rule, That all deeds consented to by the interdictors are effectual, was extended by our older customs, even to such as were granted in favour of the interdictors themselves, which is mentioned with just indignation by *Craig, Lib. 1. Dieg. 15. § 24.*, as contradicting another most equitable rule, by which the first ought to be limited, that no tutor, and consequently no interdictor, whose office is a species of tutory, and implies as strong a trust, can be *auctor in rem suam* *.

Reduction *capite interdictionis*, to whom competent.

59. The action of reduction *ex capite interdictionis* is competent, *first*, To the interdictors, either before or after the death of the person under their care. *2dly*, It seems hard to deny this right of action to the interdicted person himself; for the benefit of interdiction, intended by the law for protecting him against hurtful deeds, would lose much of its use, if he were not entitled to pursue that action by himself, in case the interdictors should, from wilfulness or caprice, refuse to lend their names to the suit. Yet it is certain, that the interdicted was not allowed, by our ancient practice, to sue in his own name, for setting aside a deed granted by himself, *Mail. March 14. 1554*, *Ure*, (DICT. p. 7164.). *3dly*, Reduction may be pursued by the heir of the interdicted, who is accounted *eadem persona* with the interdicted himself, *Dec. 27. 1725*, *Tenants*, (DICT. p. 7127.); and therefore can pursue for setting aside any deed or conveyance by his ancestor relating to heritage, which has been granted after interdiction. But, notwithstanding this fictitious identity, the heir is subjected to no such personal diligence, upon his ancestor's moveable obligations, as was competent against the granter himself, provided he abstained from the moveable estate, *St. B. 1. T. 6. § 41*. *4thly*, This action is also competent to the assignees of the interdicted person, who come into the right of the interdicted himself, *St. B. 1. T. 6. § 42*. And, *lastly*, To the creditors-adjudgers of the special subject conveyed by the interdicted

deed by which it is imposed. See *Kilk. NO. 1. voce INTERDICTION, Dingwall, DICT. p. 7152*.

* An interdictor, like a tutor, is bound to communicate rights acquired by him relating to the estate of the interdicted; *Fac. Coll. Feb. 5. 1761, Campbell, DICT. p. 7156*.

dicted without consent of the interdictors, *Feb. 20. 1666, Lo. Salton*, (DICT. p. 10420.). The nullity of deeds on the head of interdiction is not receivable by way of exception, but must be insisted in by an action of reduction, *June 20. 1671, Crawford*, (DICT. p. 2741.); see *Stair, B. 1. T. 6. § 42*. The duty of interdictors differs much from that of proper tutors or curators: for they are neither given *personæ*, as tutors are, to sustain the person of their ward; nor *rei*, as curators, to manage his estate; but barely *ad auctoritatem præstandam*, to give their consent to such deeds affecting heritage, as it is reasonable for the interdicted to grant. Hence, interdictors are not liable for omissions; for they have no subject to manage: All that they are answerable for is, their fault, or fraud, in consenting to deeds which may be granted by the interdicted to his prejudice.

II. OF THE RELATION BETWEEN MASTER AND SERVANT.

60. By the Roman law, servants or *servi* were the property of their masters, and might be bought and sold as their goods; so that they were considered as subjects of commerce rather than as persons; and whatever they acquired, either by testament or their own industry, accrued to their masters. The Romans had also a kind of slaves, called *adscripti*, or *adscriptitii*, who were bound to perpetual service in cultivating a particular field or farm, and who were rather slaves to that farm than to the owner of it; so that he could not transfer his right in them without alienating the farm to which they were astricted, *tit. C. De agric.* Much like to these were our ancient *nativi*, or bondmen; who could not indeed be sold by their masters, but in most other respects resembled the Roman *servi*; for they had nothing which they could call their own, *Reg. Maj. L. 2. C. 12. § 4, 5.; Q. Att. C. 56.*: yet they prescribed an immunity from their servitude, by residing for a year together in any royal borough without challenge from their master, *Reg. Maj. L. 2. C. 12. § 17.* All servants have now of a long time enjoyed the same rights, by our usage, as other subjects, unless in so far as they are limited by statute, or by their own voluntary engagements.

61. Servants are, by our present law, either necessary or voluntary. Those may be called necessary, whom the law obliges to work. Of this sort are, *first*, indigent children, who, if they be declared indigent by the magistrates of the borough, or kirk-session, where they are seized, may be compelled, by 1617, *C. 10.*, to serve any of the King's subjects without wages, till their age of thirty: and whatever is gained by their work during that period is gained to their masters. *2dly*, Vagrant and sturdy beggars may, by 1663, *C. 16.*, be compelled into service by any manufacturer within the kingdom, at the sight of the magistrates of the place where they are laid hold on. And because few persons were willing to take vagrants into their service, public work-houses are, by 1672, *C. 18.*, ordained to be built in the several boroughs mentioned in the act, for entertaining and setting to work vagrants and idle persons; and the profits of their labour are, by that act, appropriated for the support of the houses. *3dly*, If labourers, workmen or servants, shall refuse to serve at the rates fixed by the justices of the peace, the justices may compel them to it, by imprisonment, or farther punishment

Rights of servants are limited only by their voluntary engagements, or by statute.

Necessary servants, indigent children, vagrants, colliers, and salters.

ment at their discretion, 1661, C. 38 ²⁴⁷. By labourers or servants in this clause of the act, may be understood all able-bodied men or women, who have neither a sufficient stock for their maintenance, nor any settled employment, though they should not have, at any time formerly, earned a livelihood by service. In this class of necessary servants may be reckoned colliers, coal-bearers, salters, and other workmen necessary for the carrying on of collieries and salt-works, as they are particularly described in 1661, C. 56. These are, by the law itself, without any paction, bound merely by their entering upon work, in a colliery or salt-manufactory, to the perpetual service thereof; and if the owner sell or alienate the ground upon which the works stand, the right of the service of these colliers, salters, &c. passes over to the purchaser, as *fundo annexum*, without any express grant; yet, to cut off all cavilling, it is usual to insert in the disposition a special clause, making over that right to the grantee. If the proprietor have a separate colliery at a moderate distance from the first, he may compel the collier to work at either of the two; and the same is the case with salters. All proprietors of colliers are prohibited to receive into their service those who fall under the description of the act 1661, without a testimonial from their former master; and where colliers and salters desert from the service they are bound to, and enter on work elsewhere, he who receives them without a testimonial must restore them to their master within twenty-four-hours after they are reclaimed, under the penalty of L. 100 Scots, provided they be reclaimed within a year from their desertion, 1606, C. 11. If the deserters should not be reclaimed within the year, he cannot indeed plead the benefit of that clause by which the possessor is obliged to restore them under a penalty; but he does not, by that short prescription, lose his property in the deserters; for the act, which was made in favour of coalmasters, ought not to be so interpreted as to cut off or weaken any right to which they had been entitled by our former law or custom, *Fac. Coll.* 1. 117. (*Dundas, Dict.* p. 2355). There is no room for this legal astriction in the following cases: *First*, If a child shall, during his pupillarity, while he is yet incapable of consent, be entered as a bearer into a colliery, by his parent, or other kinsman, he can hardly be said to be astricted in the terms of that statute, unless he shall continue to work in the colliery, after puberty. *2dly*, Children who enter as bearers to their fathers, in a work to which the father was not originally astricted even after having attained the age of puberty, are presumed to have been employed by the father to assist him, and so are left at liberty to withdraw their service from that work without the proprietor's consent; because the proprietor, who was no party to any private agreement that may have passed between the father and son, cannot, by that agreement, acquire any right or power over the son; agreeably to the rule, *Res inter alios acta, aliis nec nocet nec prodest*. But it may be doubted whether this presumption would exempt the son from becoming bound, by entering under his father to a colliery to which the father was from the beginning astricted. It may be added, *3dly*, That colliers, salters, &c. where the work to which they are astricted is either given up by the proprietor, or not sufficient for their maintenance, may lawfully engage in other works for their necessary subsistence, *Hope, Coalheughs*,

²⁴⁷ This power of the Justices to fix the rate of wages is taken away, *Stat. 53. Geo. III. C. 40. Vid. supr. Not. 89.*

Coalheughs, March 7. 1616, (Dict. p. 2349). But this manner of getting free from the astringency is but temporary; for if the work be again refitted, the proprietor may reclaim them to it, *Fount. Feb. 4. 1708, Wallace, (Dict. p. 2349.)* *.

62. Voluntary servants are those who enter into service without compulsion, by an agreement or covenant, for a determinate time; either simply for bed, board, and clothing; or also for wages †. Under voluntary servants may be included apprentices, (from the French *Apprentif*), who engage to serve under a merchant, artificer, or manufacturer, for a determinate number of years, on condition that the master shall, in that time, instruct them in the knowledge of his particular art or profession. Minority is the proper age for apprentices to enter into these engagements. Where a pupil is to be bound, the father, tutor, or some kinsman, usually engages for him; but no action lies upon the indentures against the pupil himself. Indentures entered into by a minor *pubes*, who has

Voluntary servants.

Powers of the master over his servants.

* By stat. 15. Geo. III. C. 28. it is enacted, that from and after July 1. 1775, no person who shall begin to work as a collier, coal-bearer, or salter, or in any other way in a colliery or salt-work, in Scotland, shall be bound to such work, or to its owner, in any other way or manner different from what is permitted by law with regard to servants and labourers; and that they shall be deemed free, and shall enjoy the same privileges, rights, and immunities, with the rest of his Majesty's subjects. It is also provided by this statute, that owners or lessees of such works may take apprentices: That persons under twenty-one years of age, at July 1. 1775, bound to these works, shall be free after seven years' service from that date; if above twenty-one and below thirty-five years, after ten years; and if between thirty-five and forty-five years, after seven years; but these last classes only, provided they have found an apprentice, if required, of eighteen years or upwards. Where the bondsmen are above forty-five years, they get entirely free after three years' service.

This statute, however liberally intended to the colliers, failed in having its full effect, by the great variety of conditions under which it prescribed their emancipation, as many of them remained in a state of bondage, from their not having complied with the conditions, or their having become subject to the penalties, in the act. The continuance of their servitude was also owing, in a great measure, to a general practice among owners and lessees of coal, of advancing considerable sums in loan to the colliers, as a temptation to enter into or continue engagements for a limited time. These sums the colliers never intended to repay, though the debt was kept up against them; and, at the end of the agreed term, as they were uniformly unable to discharge the debt, a farther indulgence was only to be purchased by a renewal of their engagements; so that it seldom occurred that they changed masters, unless where their new employer bought up the debt, which he again would transfer in his turn. This new bondage, of their own creating, gave rise to alarming combinations among the colliers; and the whole system having been brought before Parliament, a law was passed, which remedied those evils, and put this description of men on a footing, in point of legal rights, with other labourers. It is provided, by stat. 39. Geo. III. C. 56. June 13. 1799, "That, from and after the passing of this act, all the colliers in Scotland, who were bound colliers at the time of passing the act 15. Geo. III., shall be free from their servitude, and in the same situation in every respect, as if they had regularly obtained a decree in the manner directed by that act." 2. This statute extends to the colliers, the acts cited in the text, 1617, C. 8., and 1661, C. 38., in so far as they relate to the fixing and appointing of the ordinary hire and wages of labourers, workmen, and servants, upon application of the party aggrieved²⁴⁸, declaring two justices a quorum, but that no coal-master or lessee can act. 3. All action and diligence are denied for money advanced by coal-masters, or others on their behalf, to colliers, or for debts due by colliers, which may be acquired by coal-masters or others for their account, whether prior to or during their service, and in view of the engagements; excepting only sums advanced to any collier during his service for the support of his family in case of sickness: For these, the coal-master may retain from the collier's weekly wages, one-twelfth part of the sums advanced, till the principal sum, without interest, be paid up; and he has action for the balance, in case the term of service expire before complete payment.

† If the engagement is only for one year, it may be proved by witnesses: If for a longer period, it can only be established by writing; *Kilk. NO. 10. voce PROOF, Caddel, Dict. p. 12416.*

See further as to the obligation between master and servant, *B. 3. Tit. 3. § 16*²⁴⁹.

²⁴⁸ But *vid. supr. not. 89. and 247.*

²⁴⁹ As to the master's liability for the conduct of his servant, see *Ibid. § 33. and 46.*

has no curators, are valid; but may be set aside on the head of minority and lesion; *ex. gr.* if a young gentleman of fortune should bind himself to an employment beneath his birth or estate, or oblige himself to pay an enormous apprentice-fee. All masters have a power of moderate chastisement over their servants, whether voluntary or necessary; and the masters of public workhouses are, by 1672, C. 18., allowed to go all lengths in correction, life and torture excepted. It has been said by some writers, that one cannot bind one's self to perpetual service; such obligation being contrary to liberty, which is an unalienable right. But it is hard to conceive, how an engagement of that sort, which is to last for life, is more inconsistent with liberty, than one which is to expire after twenty or thirty years. And there appears nothing repugnant, either to reason, or to the peculiar doctrines of Christianity, in a contract by which one binds himself to perpetual service under a master, who, on his part, is obliged to maintain the other in all the necessaries of life, *Grot. De jure bell. L. 2. C. 5. § 27.* This however is certain, that excepting the case either of Turks or Moors, made slaves by way of reprisal, or of Negroes bought for the use of the European settlements in the Indies, the power claimed by masters, of selling their servants, is not allowed in any Christian country. And by the practice of Holland, negro slaves, as soon as they set their foot in the Dutch territory, may assert their freedom from servitude, in spite of their masters, *Voet. ad Tit. De stat. hom. § 3*.*

Poor, how provided for.

63. The poor make the lowest class or order of persons. They may be divided into those nuisances to society, who, though they are able, are not willing to work; and such indigent persons as from age or bodily infirmities cannot earn a sufficient livelihood by labour²⁵⁰. The punishments inflicted by law on the first sort shall be explained *B. 4. T. 4.* The poor who are aged, or disabled from work, were appointed to be maintained by a tax to be levied upon the parishes where they were severally born, 1535, C. 22. This tax was to be proportioned among the inhabitants of boroughs by the magistrates; and in landward parishes, by judges named by the King, 1579, C. 74. By a posterior act, 1663, C. 16., a power is given to the landholders in landward parishes, to assess themselves for the maintenance of such of the poor as cannot fully maintain themselves by labour, in the manner specially described in that act, and to demand relief of the half of the sum so raised from their tenants²⁵¹. Where the place of a poor man's nativity is not known, the burden of his maintenance falls on the parish where he has had his

* It has been absolutely decided, that a slave, brought from the plantations, acquires his freedom on coming to this country, and that he cannot be sent back to his former condition against his consent; *Fac. Coll. Jan. 15. 1778, Knight, Dict. p. 14545.* The late proceedings in Parliament relative to the abolition of the slave trade are well known.

²⁵⁰ Those persons, also, have been found entitled to relief under the poor laws, "who, though in ordinary seasons able to gain their livelihood, are reduced, during a dearth of provisions, to have recourse to a charitable supply. And an extraordinary assessment may for that purpose be levied;" *Pollock, 17th January 1804, Fac. Coll. Dict. p. 10591.*

²⁵¹ By the statute, the assessment is ordered, "the one half thereof to be payed by the heritors, either conform to the old extent of lands within their paroch, or conform to the valuation by which they last payed assessment, or otherways, as the major part of the heritors shall agree, liferenters and wadsetters always being liable during their rights as heritors:—And the other half thereof to be laid upon the tenants and possessors, according to their means and substance."

As to the first branch of this enactment, see the penult paragraph of *note * p. 211.*

his most common resort for the three years immediately preceding his being taken up, or his applying for the public charity, 1663, C. 16.; 1698, C. 21.; see *Fac. Coll.* ii. 19. (*Inveresk*, Dict. p. 10571.); and in a late case, August 7. 1767, *Baxter*, (Dict. p. 10573.), it was adjudged, that the maintenance of indigent or poor persons ought to fall on the parish of their last three years' residence, even preferably to the parish of their birth, though that should be known*. In parishes where a sufficient fund cannot be raised

* The law of parish-settlements in Scotland has given rise to so many questions of late, that it is necessary to be stated more at large, than has been done by the learned author of the text. The present established doctrine rests, not merely on the statutes there cited, but on many other regulations of the Scottish Parliament and Privy Council; and there is not a little contrariety in the terms of these several institutions. Thus, the statute 1579, C. 74., directs the poor to be maintained by the parish where they were born, or had their most common resort or residence for the last seven years. The next statute cited by the author relates, not to the maintenance of the indigent, but to the treatment of vagrants and vagabonds, who have no fixed residence any where. Then follows statute 1672, C. 18., which, besides containing a variety of regulations respecting vagabonds, orders the ministers of each parish, with some of the elders, and in case of vacancy of the kirks, three or more of the elders, to take up an exact list of all the poor persons within their parishes; specifying their age and condition, if they be able or unable to work, by reason of age, infirmity, or disease, and where they were born, and in what parish they have most resided during the last three years preceding the uptaking of these lists. A proclamation of Council, August 29. 1693, appoints all beggars within this kingdom immediately to repair to the several parishes where they were born; and, where the parish or place of their birth is not known, that they repair to the parishes where they have last resided for the space of seven years together. Statute 1695, C. 43., ratifies all acts of Parliament, and acts and proclamations of Council, for maintaining the poor, and repressing beggars, and ordains them to be put to rigorous execution. A similar ratification is contained in act 1698, C. 21., cited in the text.

On the ambiguity of these enactments, it has been made a question, Whether three years or seven years' residence in a particular parish is sufficient to give a right to public support, or, as it is commonly termed, to confer a *Settlement* there? The general point was first tried in a case reported by Lord Kilkerran, NO. 1. *voce* POOR, and by Lord Kames, *Rem. Dec.* NO. 65., *Poor of Dunse*, Dict. p. 10553., where, after a very able and clear analysis of the several laws upon this subject, the burden was found to lie on the parish where the persons resided during the three years immediately preceding their application for charity. To the very same effect was the judgment in the case of *Baxter*, cited in the text, and reported in *Fac. Coll.*, and by Lord Kames, *Sel. Dec.* NO. 255., Dict. p. 10573. This decision proceeded on a general inquiry into the practice throughout Scotland; and in a later case, the law was considered so completely fixed, that the Court gave costs against a party who again agitated the question; *Fac. Coll.* June 14. 1781, *Waddel*, Dict. p. 10583.

The "three years immediately preceding the application for charity," will generally coincide with the three years immediately preceding poverty; but should a pauper from modesty delay his application so as to prevent such coincidence, his aliment must be paid by that parish in which he resided for the three years immediately preceding his poverty; *Fac. Coll.* Jan. 24. 1784, *Runciman*, Dict. p. 10583.

The case of *Inveresk*, Dict. p. 10571, cited by the author, has not been followed as a precedent; and indeed, since the decision in *Baxter's* case, it has no longer been a question, Whether the last three years' residence gives a settlement in every case, or only where the place of birth is unknown? The latter proposition seems to have been exploded in the above case of *Dunse*; and, in the case of *Waddel*, the Court would make no account of the place of birth.

By a subsequent decision, it has been found, that the settlement of infant children shall be in the parish where the father resided for the last three years, without regard to

As to the *second*, it has been decided: 1. That the assessment "ought to be laid on according to *one rule*, for the whole descriptions of persons liable therein:" And, 2. That "the lawful rule of such assessment is according to their means and substance of every description within the parish;" *Parish of Cargill*, 29th Feb. 1816, *Fac. Coll.*

A minister, in his clerical character, is not liable to be assessed under either branch of the statute; he being, "*qua* minister, neither an heritor, a tenant, nor a possessor;" *ibid.*

raised for all the poor, either by taxation, or by voluntary contribution at the church-doors, the magistrates of the burgh or the kirk-session are authorised to give them badges, as a sufficient warrant

to the parish of their birth; *Fac. Coll. July 28. 1779, Parish of Coldinghame, Dict. p. 10582. See also Jan. 25. 1800, Buick, &c. Dict. App. I. voce POOR, NO. 1. 252.* If the child be a bastard, the residence of the mother has been held to be the rule; *Nov. 28. 1801, Parish of Rescobie contra Forfar, &c. Dict. p. 10589. 253.*

The place of birth may still be liable in some particular cases. One instance has occurred,—that of a soldier's child, whom the mother had exposed on following her husband abroad; the parish in which the child was found was subjected for its aliment, in a question with that parish in which the mother had previously lived for many years; *Home, NO. 65. Inveresk, Dict. p. 10552.* Another instance is that of children, who, never having resided three years in any parish, apply for aliment after their father's death. The parish where they were born was found liable; *Fac. Coll. Jan. 24. 1786, Parishes of Melrose and Stichel, Dict. p. 10584. 254.*

The execution of these regulations for the maintenance of the poor is confided to the heritors and kirk-session. The judge-ordinary is ordained to see the law put to due execution; but he cannot proceed to modify an aliment *prima instantia*; *Fac. Coll. Nov.*

²⁵² But where a boy is bound apprentice, and, quitting his father's house, resides for three years in a different parish with his master, the father's parish is freed, and the boy acquires a new settlement for himself, by virtue of this residence; *Parish of Cockburnspath, 9th June 1809, Fac. Coll.*

In the settlement of a married woman, the residence of her husband is the rule. A Scotswoman, therefore, who marries an Englishman having no settlement in Scotland, not only loses her own settlement previous to the marriage, but cannot again, during her husband's life, acquire a settlement in any parish in Scotland; *Pennycook, 3d March 1813, Fac. Coll.*

It would seem, however, that, in such a case as the above, an *interim* aliment would be awarded, "till the parish of her husband was discovered;" *Ibid.* And, generally, where the proper settlement of a pauper cannot be ascertained, the parish where he is found seems, in the first instance, liable, "reserving relief against any parish which may be instructed to be primarily liable." So it was held in the case of a lunatic, whom it had become necessary to apprehend, and place in custody, "although he had not been born in, nor, as far as appeared, chiefly haunted that parish;" *Scot, 18th Nov. 1818, Fac. Coll.* The case of *Inveresk*, noticed *infra. not. 254*, seems an authority to the same effect in regard to a foundling; though it may reasonably be doubted, how far the decision, in that particular case, did not go too far, in subjecting the parish where the child had been exposed, in a question even with the parish of the child's birth.

Where a settlement has once been acquired in a particular parish, the obligation thus constituted against that parish can only be "taken off, by an obligation constituted against another." It has, accordingly, been found, that residence in an English parish, although for three years, yet being insufficient to create a settlement by the English law, does not liberate a Scots parish, where a settlement had been previously acquired; *Brown, 4th March. 1806, Fac. Coll. Dict. v. POOR, App. NO. 4.*

²⁵³ So also in *Kirk-Session of Gladsmuir*, and *Kirk-Session of Edinburgh*, both decided *11th June 1806, Fac. Coll. Dict. v. POOR, App. NOs. 5 and 6.*

The *Kirk-Session* of a parish within which the mother of a bastard child resides, is not, from the mere circumstance of a possible and contingent liability to support the child, *in titulo* to pursue an action of aliment against the father, where, as yet, no claim for support has actually been made against the parish; *Parish of Garvold, 14th Feb. 1817, Fac. Coll.*

²⁵⁴ The authority of both these cases seems now destroyed; *Parish of Rescobie, 28th Nov. 1801, Fac. Coll. Dict. p. 10589; Kirk-Session of Gladsmuir, 11th June 1806, Fac. Coll. Dict. v. POOR, App. NO. 5.*; where, even as to bastards, (whose legal connexion with their parents is not so intimate as that of lawful children,) it was found that the residence of the mother must alone be the rule;—and that the burden could be imposed neither on the parish where the child was born and exposed, nor on that where it had resided for a period of no less than eight years. See also *2. Hutcheson's Just. of Peace, p. 65.* In regard more particularly to the case of *Inveresk*, it can in no sense be regarded as a precedent for imposing the liability, on the parish of the child's birth, as in competition with that of the parent's settlement. For, *1st*, It would seem from the report, that so far from the parish subjected being the place of birth, the parish assailed was so: And, *2d*, The mother being a married woman, her residence, for whatever length of time, could of course confer no settlement separate from that of her husband, *supr. not. 252*; and he again does not appear to have had a settlement either in the one parish or the other.

rant to them to ask alms at the dwelling-houses of the inhabitants; but they must neither beg at churches, nor where there is any public meeting, nor without the limits of their own parish, 1579, C. 74.; 1672, C. 18. The execution of these regulations, so charitably intended for the relief of the poor, is attended with so much difficulty in most of our parishes, especially those which border upon the Highlands, that it is in few places only it has been attempted.

64. Before finishing the doctrine of persons, a short account may be given of communities, or corporations. A corporation, styled by the Romans, *collegium*, or *universitas*, is composed of a number of men

Corporations and communities, their rights and privileges.

Nov. 20. 1772, *Parish of Eckford*, Dict. p. 7669. The judge ought, in the first instance, to remit to the heritors and kirk-session to modify an aliment; and this was done by the court of session in a suspension of a sheriff's decree; case of Coldinghame, in 1779, above mentioned ²⁵⁵.

It has been made a question, in whom the right of administration of the poor's funds is placed; whether in the heritors, or in the kirk-session, or in both jointly? The matter was solemnly tried in a case from the parish of Humbie in 1751, and the following judgment given: "That the heritors have a joint right and power with the kirk-session, in the administration, management, and distribution of all and every the funds belonging to the poor of the parish, as well collections as sums modified for the use of the poor, and money stocked out upon interest, and have right to be present and join with the session in their administration, distribution, and employment of such sums; without prejudice to the kirk-session to proceed in their ordinary acts of administration, and application of their collections to their ordinary and incidental charities, though the heritors be not present nor attend: But for the better preventing the misapplication or embezzlement of the funds belonging to the poor, found, That when acts of extraordinary administration, such as uplifting of money that hath been lent out, or lending or re-employing the same, shall occur, the minister ought to intimate from the pulpit a meeting for taking such matter under consideration, at least ten days before holding of the meeting, that the heritors may have opportunity to be present and assist, if they think fit." *Kilk. NO. 3. voce Poor*; *Kames's Rem. Dec. NO. 121.*; *D. Falconer, v. ii. p. 204., Dict. p. 10555.* Any one heritor may call the kirk-session to account for their management of the poor's funds, *Fac. Coll. Nov. 23. 1752, Hamilton, Dict. p. 10570.*—See *Ross, Dec. 16. 1800, Dict. App. I. voce Poor, NO. 3.* ²⁵⁶.

The statute 1663, c. 16. directs the parochial assessments to be laid on "either conform to the old extent of their lands within the paroch, or conform to the valuation by which they last payed assessment, or otherwayes, as the major part of the meeting of heritors shall agree." Under this clause, it has been found, that the heritors have a certain discretionary power, both as to the mode of assessment, *Fac. Coll. Jan. 19. 1773, Parish of West-Kirk, Dict. p. 10577,* and as to the particular description of subjects liable in payment of the poor's rates; *Fac. Coll. May 28. 1794, Parish of Inveresk, Dict. p. 10585* ²⁵⁷.

The annexation of parishes *quoad sacra tantum* does not affect or transfer the previous rights and obligations of the respective parishes, with regard to the maintenance of the poor; *Fac. Coll. Nov. 17. 1808, Thomson against Pollock, Fac. Coll.*

²⁵⁵ But where the circumstances of the case are such, as to require instant interference—*ex. gr.* in the case of a lunatic, whom it is necessary, for the public safety, to place in confinement,—it would seem competent, even *prima instantia*, for any parish, or public officer, who had advanced or become bound for the requisite expense, to bring an action against the parish ultimately liable, concluding for this expense, in name of aliment; *Scott, 13th Nov. 1818, Fac. Coll.*

²⁵⁶ This case has little analogy to the others mentioned in the note. It relates to the assessment of poor's rates *within burgh*, where the parties assessed have no right, either to a joint administration with the magistrates, or to call the magistrates to account for their management. The point decided was, that a party liable to assessment is entitled to "inspection of the books of the assessors, for the purpose of investigating whether he is rated proportionably with the other inhabitants."

²⁵⁷ In the case of *West-Kirk*, while it was observed on the Bench, that "where the valued rent can, it ought to be followed as the rule," it was found, that heritors might assess by the real rent, where that is expedient, "notwithstanding of any former practice of levying it upon the valued rent." In the case of *Inveresk*, proprietors of mills, and of coal and salt works, were held liable to assessment. See, as to another branch of these assessments, *supr. not.* ²⁵¹.

men united or erected by proper authority into a body-politic, to endure in continual succession, with certain rights and capacities of purchasing, suing, &c. as appear most suitable to the nature of that special community, and most necessary for answering the purposes intended by it. Cities, boroughs, hospitals, &c. may be thus incorporated; and we have frequent instances of lesser corporations within greater. Thus, in most of the cities and boroughs of the kingdom, we see wrights, weavers, merchants, &c. incorporated, with certain rights and franchises granted to each of them: And of the same sort may be reckoned the College of Justice, which includes several lesser corporations under it. As all corporations formed, or assemblies held, without the Sovereign's licence, are unlawful, *L. 1. pr. Quod. cuj. univ.*; *L. 3. § 1. De colleg. et corp.*; 1661, *C. 4.*; they cannot be constituted but by the King's patent, or by act of Parliament *²⁶⁰. Corporations are accounted persons, *L. 22. De fidej.*, because they have their own proper stock, rights, and privileges,

* It has, in different instances, been found, that voluntary associations of tradesmen have no *persona standi in judicio*, to enforce the regulations made by themselves; *Rem. Decis. June 11. 1730, Masons of Lanark, Dict. p. 14554; Fac. Coll. June 13. 1761, Crawford, Dict. p. 1958, Select Decis. Dec. 15. 1762; Woolcombers of Aberdeen, Dict. p. 1961* ²⁵⁸.

But by special statute 33. Geo. III. *C. 54. June 21. 1793*, it is made lawful for any number of persons in Great Britain to form themselves into, and to establish, societies of good fellowship, for raising, from time to time, by subscriptions of the members, or by voluntary contributions, a stock or fund for the mutual relief and maintenance of the members, in old age, sickness, and infirmity, or the relief of the widows and children of deceased members; and for the members, or a committee appointed by them, to make such wholesome regulations for the better government of the society, as shall be agreed on by the majority, (not being repugnant to the laws of the realm, nor to the provisions of this statute); also to impose on the members such fines and forfeitures, for the use of the society, as may be necessary for enforcing these regulations, and to alter, repeal, or renew their rules under the restrictions contained in the statute.

The act directs the regulations of such societies to be exhibited in writing, at the quarter-sessions, to the justices of the peace, who are empowered to confirm such as are conformable, annulling those which are repugnant to the act; and no society can have the privileges of the statute, unless its regulations have been so confirmed.

The effects of the societies are vested in the treasurers or trustees for the time being, who are entitled to sue and defend actions respecting the same. There are many other provisions for the government of these societies; for which recourse must be had to the statute itself ²⁵⁹.

Stat.

²⁵⁸ *Lawson, &c. 7th July 1810, Fac. Coll.*

²⁵⁹ The *stat. 33. Geo. III.* has since been extended by 49. *Geo. III. c. 125.* By both, sums due to the society, by its office-bearers, are, on their death or bankruptcy, directed to be paid "before any of the other debts are paid or satisfied." This, however, "only applies to cases where the officer of the Friendly Society has, by virtue of his office, been entrusted with the money and effects of the society;" *Ex parte Buckland, 13th March 1818, 1. Buol, p. 214.* It is farther "confined to persons duly and formally appointed officers of the society, and extends not to one receiving the society's money, as a banker; or receiving it in loan, at interest. Nay, money lent, on his note, to a treasurer duly appointed, has been found not within the act; as it was intended only to cover money getting into the hands of officers independent of special contract;" 2. *Bell's Comm. p. 165*; and see the authorities there referred to.

The jurisdiction conferred, by the above statutes, on Justices of the Peace, does not exclude that of the Judge Ordinary; 33. *Geo. III. c. 54. § 15.*; 49. *Geo. III. c. 125. § 5.*; *Bremner, 4th Dec. 1817, Fac. Coll.*

²⁶⁰ The charters of most Royal Burghs confer upon them a power of constituting subordinate corporations, by seals of cause. Similar powers have been, in many instances, conferred on the superiors of burghs of barony, &c. Even where no charter or seal of cause can be produced, the prescriptive possession and exercise of corporate rights is sufficient; *Wrights of Glasgow, 8th March 1765, Fac. Coll. Dict. p. 1961; Begbie, &c. 26th Jan. 1776, Fac. Coll. Dict. p. 7709; Skirving, 19th Jan. 1803, Fac. Coll. Dict. p. 10921.*

privileges, as persons have : And that union by which the individual members of a corporation are constituted into one body, makes each corporation to be considered as one person ; so that no particular member can claim any property in the goods belonging to the community. Communities being established for a public permanent good, are, for the most part, formed to perpetuity ; and they continue always the same ; for though the individuals of which they are composed must die out by degrees, those that come in their places, either by succession to the deceased, or by the election of the survivors, or by the nomination of the founder, according as the charter is conceived, preserve the corporation entire. Yet trading companies, whose duration is generally limited by the grant to a certain number of years, are likewise proper corporations ; because they too endure in continual succession while they subsist *. But copartnerships fall not under this description : For they are intended merely for the private interest of the parties contracting, and may therefore be constituted without the Sovereign's permission ; and they last no longer than the lives of the partners. Communities have a power of naming magistrates, directors, or other administrators and officers, who may represent the whole community, and whose resolutions may oblige them, in such particular matters as these administrators are properly authorised to transact, by their charter, or by the powers granted to them by the community. There are several things so natural to a corporation, that the grant or charter is understood to include them without an express clause to that purpose. Thus, they have a capacity of purchasing or bargaining for such moveables as are necessary for their own use, and to be sued for the price thereof ; to have a common seal for authenticating all the conveyances, acquittances, and other deeds, which it is lawful for them to make by their charter ; they may assemble or hold courts for deliberating upon their common concerns ; and they have an implied power of making bye-laws and ordinances, for the good order and right administration of the stock, and other affairs of the community, though such power should not be expressed in the incorporating charter ²⁶². But this limitation is also implied, that their acts or ordinances shall not in any degree be repugnant to the laws of

Stat. 35. Geo. III. C. 3. June 26. 1795, extends the benefit of the former act to institutions for the purpose of relieving the widows, orphans, and families of the clergy, and others in distressed circumstances.

Seceding congregations are not corporations known in law ; but they are *tolerated* ; and as they often acquire property in the name of trustees, actions concerning that property have been sustained ; *Fac. Coll. May 25. 1791, Allan, &c. Dict. p. 14583 ; May 26. 1797, Smith contra Kidd, (not reported)*. It does not, however, follow, that the sentences or proceedings of their ecclesiastical courts are entitled to be recognised ; *May 29. 1800, Bullock contra Watson, (not reported) ; May 13. 1801, Dun contra Brunton, Dict. App. I. voce SOCIETY, No. 3. ²⁶¹*.

* Probably the author has in view those public trading companies which he more particularly mentions in *B. 3. Tit. 3. § 28*.

²⁶¹ See farther, *Davidson, 27th June 1805, Fac. Coll. Dict. p. 14584*, and in House of Lords, 1. *Dow*, p. 1. ; *Bullock, 31st Jan. 1809, Fac. Coll. ; Macintyre, 24th Feb. 1809, ibid.* ; where the rights respectively competent to the majority and minority of such congregations over the common property, in cases of schism, are fully discussed.

²⁶² As to all corporate acts, where no quorum is fixed by the constitution of the corporation, it requires a majority of the whole members to constitute a legal quorum ; *Mason, &c. 29th July 1747, Falc. and Kilk. Dict. p. 1871 ; Macnab, 24th Dec. 1803, Fac. Coll. Dict. v. APPEAL, App. No. 2. ; Meiklejohn, 28th May 1805, Fac. Coll. Dict. v. BURG ROYAL, App. No. 17., affirmed on appeal, 22d March 1810*.

Book I.

of the kingdom. Communities are dissolved, either by the expiration of the term to which they are limited, if they be temporary; or, *2dly*, by act of Parliament; or, *3dly*, by forfeiture; when they abuse the powers intrusted with them: In which last case, though all the members must suffer in their political capacity, no prosecution lies against such of the individuals as had no accession to the crime. After a community is dissolved, the private members are not, in the general case, bound, even *subsidiarie*, for sums borrowed by the corporation. The estate or goods which still belong to the corporation are the only fund of the creditor's payment; for it was upon the faith of the corporation, as such, and not on that of any of the private members, that the money was lent.

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BOOK II.

TITLE I.

*Of the Division of Rights, and the several Ways by
which a Right may be acquired.*

AFTER having explained the legal powers, offices, and duties, of persons, who are the first object of law, the method proposed, *supr. B. 1. T. 2. § 1.* naturally leads to the consideration of things, which are its second object, and to the setting forth their different kinds and legal properties. Things or subjects fall no otherwise under the consideration of law, than as persons may have right to them. All rights which affect any subject are called by the Romans *jura in re*; and by us, *real rights*; and the sovereign or primary real right is that of property; which is the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction. This right necessarily excludes every other person but the proprietor; for if another had a right to dispose of the subject, or so much as to use it, without his consent, it would not be his property, but common to him with that other. Property therefore implies a prohibition, that no person shall encroach upon the right of the proprietor; and consequently every encroachment, though it should not be guarded against by statute, founds the proprietor in an action of damages. But positive statute hath secured property against several encroachments that most frequently happen, by inflicting special penalties on the trespasser; as in the acts for preserving planting and inclosures, in that which appoints winter-herding, 1686, C. 11, &c. If the proprietor has the power of disposing of his property, he must also have a power of charging or burdening it with inferior real rights in favour of others: He may, for instance, grant to his neighbour the right of a road through his lands, or he may impignorate them to his creditor in security of a debt. Though therefore it be a rule founded in common sense, that two different persons cannot have, each of

Definition and
nature of pro-
perty.

them, the full property of the same thing at the same time, *Duo non possunt esse domini ejusdem rei in solidum*; yet it is most consistent with this rule, that the right of property may be in one person, while that of servitude, impignoration, or other inferior right in the subject, is vested in another. One and the same subject may also, without any inconsistency in the nature of things, belong to two or more different persons: And such right is called *commonty*, and sometimes *common property*.

All rights of property are subject to some legal limitations.

2. The right of property is not weakened by the restraints which have been laid by law upon proprietors in the use of it: For the restraints of law are not designed to hurt property, but rather to secure and strengthen it, by inhibiting our licentiousness in the exercise of it. The law interposes so far for the public interest, that it suffers no person to use his property wantonly to his neighbour's prejudice; *interest enim reipublicæ, ne quis re sua male utatur*. But where the proprietor's act is of itself lawful, though it should be in its consequences detrimental to his neighbour, *utitur jure suo*; he is allowed to make use of what is his own, in the manner most beneficial to himself; and though his neighbour suffer damage, he has no redress unless the act of the other was *in æmulationem*¹. Hence he may lawfully drain his swampy or marshy grounds, though the water thrown off from them by that improvement should happen to hurt the inferior tenement. But he must not make a greater collection of water than is necessary for that purpose; seeing such use would be merely *in æmulationem vicini* without any profit arising to himself. It is another legal limitation or restraint on property, That it must give way to the public necessity or utility. This universal right in the public over property is called by Grotius, *dominium eminens*; in virtue of which the supreme power may compel any proprietor to part with what is his own. If, for instance, the public police shall require, that a highway be carried through the property of a private person, the supreme power may oblige the owner to give up such part of his grounds as is necessary for that purpose. But in this case there must, *first*, be a necessity, or at least an evident utility, on the part of the public, to justify the exercise of that right; *2dly*, The persons deprived of their property ought to have a full equivalent for quitting it².

3. The

¹ Where a house is built close by a garden, or where new windows are struck out, so as to destroy the garden's privacy, it is not *in æmulationem*, (there being no servitude *luminibus non officiendi*,) though the proprietor raise a wall or screen for the purpose of preventing his garden from being overlooked; nor does it alter the case though the windows of the house should in this way be darkened; *Glassford, 12th May 1808, Fac. Coll.*; and *Dunlop, 1st Dec. 1803*, reported in a note to that case; *Dict. v. PROPERTY, App. NO. 7.*

² A proprietor cannot employ his property, in any way which will render it a public or private nuisance; and it seems to be agreed, that whatever makes the enjoyment of life or property substantially uncomfortable, though it may not be actually noxious and unwholesome, will be considered a nuisance.—The law on this subject is more rigorously applied in cases within burgh; *Sel. Dec. Kinloch, 20th June 1756, Dict. p. 18163*; *Kames, Princ. of Equity, B. 1. p. 1. § 1.*

It has been held, that a place for slaughtering cattle, in the immediate vicinity of houses within burgh, or in the suburbs, is a nuisance; *Fol. Dict. Palmer, &c. May 1794, Dict. p. 15188, Kelt, &c. 8th July 1814, Fac. Coll.*; *Lauder, 16th June 1815, Ibid.* So also as to buildings for the purpose of boiling whale blubber, though proposed to be erected at the end of a town; *Dowie, &c. 11th Dec. 1813, Ibid.*—A work, within 200 or 300 yards of a populous village, and not far from the junction of certain public roads, for the preparation of blood, by boiling or roasting, as an ingredient in the manufacture of Prussian Blue; *Jamieson, &c. 24th June 1800, Ibid.*; *Dict. v. PROPERTY, App. NO. 4.*—A place, within 30 feet of the road-side, though in a country situation, for the dressing or manufacture of ox and buffalo hides into buff leather, and hanging the skins up to dry; unless there is a wall sufficiently high to shut them

3. The right of property is not lost by illegal restraints, more than by legal. Though a proprietor should be deprived of the exercise

TITLE II.
Property cannot be lost but

out from the view of the road; *Scott, &c. 5th July 1810, Fac. Coll.*—An establishment for preparing *tripe*, on the ground floor of a tenement within burgh; *Farquhar, &c. 19th Jan. 1813, Ibid.*—An iron manufactory within burgh; *Thomson, 15th Dec. 1807, Ibid.*; *DICT. v. PUBLIC POLICE, App. NO. 5.*—A smith's forge, in the second story of a house, though vaulted; *Kinloch, 20th June 1756, Sel. Decis. Fac. Coll. DICT. p. 13163*; or in a thatched house, and in the neighbourhood of other thatched houses, within burgh, *Vary, 2d July 1805, Fac. Coll. DICT. v. PUBLIC POLICE, App. NO. 4.*—A fencing-master's school, in the upper floor of a house; *Fleming, 24th Feb. 1750, Falc. DICT. p. 13159*—A printing-office in a similar situation; *Robertson, &c. 2d March 1802, Fac. Coll. DICT. v. PUBLIC POLICE, App. NO. 3.*

On the same principle, where a stream of water passes successively through different properties, the superior heritor, though he may take the natural use of it as it flows, cannot pollute it with filth, or otherwise adulterate it, so as to render it noxious and unwholesome in the rest of its course. Thus, a distiller cannot convey the refuse water of his distillery into a stream, if it be thereby rendered putrid and unfit for the use of man or beast. "The Lords were of opinion, that the primary use of water being to drink, no proprietor was entitled to employ the water passing through his ground in any purpose which could defeat that primary use to others who had before enjoyed it;" *Fol. Dict. Miller, Nov. 1791, DICT. p. 12823*; *Russell, Nov. 1791, Ibid.* The latter of these cases, indeed, was on appeal remitted for reconsideration; but the general principle of decision was not touched, the special object of the remit being "to investigate, whether the water had been pure or contaminated prior to the erection of the distillery." There seems, however, to be an important distinction in this respect between the larger public rivers and those small private streamlets, in which the above decisions were pronounced; *Magistrates of Inverness, 20th Jan. 1804, Fac. Coll. DICT. p. 13191.*

It is to be observed, that what might at first have been removeable as a nuisance, will no longer be so, if permitted to remain uncomplained of for a great length of time. Thus, in consequence of usage for more than half a century, the proprietors of lands, through which the foul burn (a stream arising from the common sewers of Edinburgh) passes, have been found entitled to stop its course, and to stagnate the accumulated filth in ponds upon their respective properties, for the purpose of collecting the deposited manure; *Duncan, &c. 9th June 1809, Fac. Coll.* A similar judgment was pronounced as to a long established nuisance in the river Ness; *Magistrates of Inverness, 20th January 1804, supr.* Where the nuisance has existed before the party complaining acquired his property, so that he came to it, and not it to him; or where the work or manufactory creating the nuisance has been constructed under his eye, the case becomes still more unfavourable, and a shorter period of acquiescence will be requisite to support it; *Colville, 27th May 1817, Fac. Coll.*; *Duncan, 9th June 1809, supr.* It is a nicer question, how far the previous existence of other nuisances in a particular situation will be held to sanction the intrusion of a new one; and perhaps it would be difficult altogether to reconcile the decisions on this head. In one case, it was observed, that "the previous existence of other and similar nuisances in the vicinity does not warrant the introduction of new, or the material extension of old nuisances;" and accordingly, though in a district of the burgh which had been "for time immemorial occupied and frequented by tan-pits, glue works, soap manufactories, carriers shades and skinneries, and the slaughter-house of the city," the defender was prohibited from making "an addition" even to his former glue work; *Charity, 5th July 1808, Fac. Coll. DICT. v. PUBLIC POLICE, App. NO. 6.* A similar view appears to have been adopted in *Thomson, 15th Dec. 1807*; *Dowie, &c. 11th Dec. 1813, both noticed supr.* On the other hand, a lamp-black work, glue work, and catgut work combined, were found not to be a nuisance in the suburbs of a great town, where other works of a like description had previously been erected; *Proprietors of Glasgow Water Works, 20th Dec. 1814, Fac. Coll.* So also it was held, that roasting the black ashes of soap, in a place which had long been used as a soap manufactory, was no additional nuisance, so as to entitle the neighbours to complain; *Balleny, &c. 3d Feb. 1813, Fac. Coll.* The same consideration seems to have had some influence in *Colville, 27th May 1817, supr.* The truth is, that every question of nuisance depends so much on its own individual circumstances, and the slightest modification in the relative situation and condition of the properties, &c. has so material an effect on the result, that in no class of cases is it more necessary to observe the utmost caution in inferring from one, what will be decided in another. How very nice are the distinctions on which the Court must sometimes have proceeded, will be still farther illustrated by a comparison of *Dewar, 20th Jan. 1767, Fac. Coll. Sel. Dec. DICT. p. 12803*,—where a limekiln was found not removable as a nuisance, though situate within 324 feet of the neighbouring proprietor's mansion-house, which, in certain states of the wind, it rendered almost uninhabitable,—with *Ralston, 29th July 1768, Fac. Coll. DICT. p. 12808*, where another limekiln was adjudged a nuisance, it being so near the neighbouring garden, that the march hedge was dead, and the trees, bushes and grass for some way from the march had suffered from the heat.

BOOK II.

by the voluntary act, delinquency, or negligence of the proprietor.

Whether a right of property can be *in pendent*.

Res communes and *res publicæ* are incapable of property.

ercise of what is his own, by violence, menaces, or other unjustifiable methods, he continues to have the right; in consequence of which he can sue all the detainers of the subject, for the recovery of his possession³. The rule is general, that whatever is a person's property, cannot, so long as it exists, cease to be such, without either the voluntary act, or the delinquency, or the negligence of the proprietor. But the different methods, either of limiting or extinguishing property, will be fully explained hereafter⁴.

4. It was a rule, almost universally received by our lawyers till towards the beginning of this century, That *dominium non potest esse in pendent*; "Property cannot float in an uncertainty," but must, at every period of time, be vested in some one person or another, *St. B. 3. T. 5. § 50, &c.*; *Mack. h. t. § 3*. Lord Dirleton is the only writer of the last century who speaks doubtfully about it, *v. Fiar*, NO. 9, 10. But it appears to have no foundation, either in nature or in law. Many things are, *ex sua natura*, fit subjects of property, which nevertheless have no proprietor; those, for example, which the proprietor abandons with a design to be no longer owner of them, or waste lands of which no person hath as yet seized the possession. In like manner, where the fee or property of any subject is granted to children yet to be procreated, and the bare liferent to the father and mother, the property of that subject must of necessity be pendent till the existence of a child, *Steu. Ans. v. Fiar*. And as, by the Roman law, all estates *in haereditate jacente* of persons deceased were without proper owners; so, by ours, the fee is, upon the death of all fiars, *in pendent*, till the next heir shall make up his titles. The necessity imposed by the law, upon an heir to enter, in order to establish the fee in his person, is a demonstration that he is not fiar till he be entered. Our judges, therefore, have by their later decisions paid but little regard to this rule, *Kames*, 51. 82. (*Douglas*, July 22. 1724, DICT. p. 1290, and *Gibson*, Feb. 4. 1726, DICT. p. 11481.), &c. The decision, *Home* 1. (*Frog's Creditors*, DICT. p. 4262.), finding, that a grant to a person in liferent, and the heirs of his body yet to be born, in fee, constitutes the fee in the father, though it be urged by many as a judgment of the session, that the fee cannot be *in pendent*, truly leaves that point undetermined. All that can be gathered from it is, that in the *species facti* there stated, it was presumed to be the granter's intention, that the father should be fiar; but that judgment cannot affect the case where the granter has, by the most express words, excluded the father from the fee, and restricted him to a bare liferent*.

5. Some things are by nature itself incapable of appropriation, so that they cannot be brought under the power of any one. These got the name of *res communes* by the Roman law; and were defined, Things, the property of which belongs to no person, but the use to all. Thus, the light, the air, running water, &c. are so adapted to the common use of mankind, that no individual can acquire

* See this subject fully discussed, *Fac. Coll. July 9. 1794, Newlands*, (DICT. page 4289.).

³ In this country, contrary to the established rules of the English Law, *rei vindicatio* lies for the recovery of stolen goods, even from a purchaser in open market; *Stair*, B. 2. t. 1. § 42.;—*Henderson*, 17th June 1806, *Fac. Coll. DICT. v. MOVEABLES*, App. NO. 1;—*1. Bell*, 219;—*Brown's Law of Sale*, p. 29, and 418.

⁴ *Vil. infr. B. 3. t. 8. § 35. in not.*

a property in them, or deprive others of their use. Other things, though they be of their own nature capable of property, are exempted from commerce, in respect of the uses to which they are destined. Of this last kind are, first, the *res publicæ* of the Romans; which were common, not to all mankind, but to the state or community; such as navigable rivers, highways, harbours, bridges, &c. the property of which belongs to the state or kingdom in which they lie, and their use to all the subjects or members of that kingdom, and to those strangers to whom it allows the liberty of trade. Not only rivers themselves, and their bed, or *alveus*, but their banks also, are public, in so far as they may be subservient to the purposes of navigation; and therefore no work or building can be raised, either in the bed, or upon the banks, of a river, which may hurt its navigation; but in every other respect the property of the banks belongs to the owner of the conterminous grounds as an accessory, § 4. *Inst. De rer. divis.* If a river, deserting its first channel, shall form to itself a new one; the new channel, because it must necessarily follow the condition of the river, becomes public; and the old one, which, for the same reason, ceaseth to be public, becomes the property of those to whom the adjacent grounds on each side belong, § 23. *Inst. eod. tit.* When a river threatens an alteration of the present channel, by which damage may arise to the proprietor of the adjacent or opposite ground, it is lawful for him to build a bulwark *ripæ muniendæ causa*, to prevent the loss of ground which is threatened by that encroachment: but this bulwark must be so executed as to prejudice neither the navigation, nor the grounds on the opposite side of the river; and as a guard against these consequences, the builder, before he began his work, was obliged by the Roman law to give security, *L. unic. De rip. mun.*

6. The Romans accounted the sea among the *res communes*; and the Dutch, who find it their interest to justify the right of an open trade to all countries, have also asserted, that the sea cannot, by its nature, be brought under the power of any proprietor, *Grot. Mare liberum.* The British have, on the other hand, maintained, *Selden, Mare clausum*, that however incapable the ocean may be of property, yet the seas, which wash the coast of any state, are subjects that may be as fitly appropriated to private uses, as rivers, bays, creeks, &c.; and that, in fact, our sovereigns are lords or *domini* of the British seas which surround this island; in consequence of which only it is, that treasures brought up from the bottom of those seas, or wreck goods found floating on their surface, belong to the crown. The sea-shore was also reckoned common by the Roman law, § 1. *Inst. De rer. div.*; but it is obvious, that by the *jus gentium* the sea-shore is not entitled to the appellation of *common*, because it is in its nature as capable of appropriation as any part of the grounds to which it is contiguous; wherefore it is with greater propriety accounted, in other texts of that law, a *res publica*, *L. 3. Sc. Ne quid in loc. publ.* And this is to be understood in the same sense that the banks of rivers are said to be public, *viz.* in so far as the shore may be used either for navigation, or the protection of trade, or the defence of the state. If our kings have that right of sovereignty in the narrow seas, which is affirmed by all our writers, and consequently in the shore as an accessory of the sea, it must differ much in its effects from private property, which may be disposed of or sold at the owner's pleasure; for the King holds both the sea and its shore

The sea and shores are by our law *inter regalia.*

Book II.

What are with
us *res universi-*
tatis.

Things destined
to religious uses.

as a trustee for the public. Both therefore are to be ranked in the same class with several other subjects, which by the Roman law were public, but are by our feudal plan deemed *regalia*, or rights belonging to the crown, *vid. infra*, T. 6. § 17.

7. The second class of things naturally capable of appropriation, which the Romans exempted from commerce on account of their destination to special uses, were *res universitatis*; that is, things proper only to a borough, or an hospital, or a trading company, or some other lawful corporation or society. The property of these belongs not to the private members of the body-corporate, but to the corporation taken jointly as such, and their use to every individual member of it; yet so as both property and use are subject to the regulations of the corporation; as town-houses, market-places, church-yards, public streets, corporation halls; the right competent to the burgesses of some corporations of pasturing cattle upon the borough's common, &c. But the revenues belonging to a state or corporate body, arising from the rents of lands, houses, customs, tolls, &c. are not to be classed with the *res publicae* or *universitatis*; for though such revenues are the property of the state or corporation, the use of them is not allowed to any particular members of it, but are *juris privati* as truly as any trust-right; for the directors or managers of those societies, after having received these revenues from the factors or others properly empowered to collect them, are bound, as other trustees, to apply them for the behoof of the corporation for whom they are trustees, 1491, C. 36.

8. Of a like general nature with *res universitatis* are those subjects which have been set apart for the service of God, and are upon that account said by the Romans to be *res nullius*; for what is *juris divini* cannot become the property of any man. And though the formal consecration of things to sacred uses hath not been practised by the church of Scotland since the Reformation, *Mack. §. 4. h. t.*; yet churches, communion-cups, bells of churches, and other things destined to sacred purposes, retain to this day so much of the character of sacred, that they are exempted from commerce, and so cannot be applied to the uses of private property while they continue in that state. Yet our law allows, in certain cases, churches to be removed from one place to another; and the bells of churches, and communion-cups, when they become unfit for service, to be melted down, or sold by the kirk-session, with consent of the heritors of the parish, and the price applied towards purchasing others. Though churches fall not under commerce, because a church is the house of God himself; the heritors, and other inhabitants of a parish, may nevertheless acquire a *quasi* property in the seats of a church, or in part of its area, limited to the special purpose of attending divine service; of which, *infra*, T. 6. § 11. By the Roman law, every place where one buried his dead became *res religiosa*, and was for ever after exempted from commerce. With us, though every man is at liberty to bury his dead within his own property, such burying-place continues to be *juris privati*; and so passes in a sale to the purchaser, as part of the lands within which it lies. As for our common burying-places, decency requires that these, when they are no longer to continue such, should be sequestered from the ordinary uses of property, till the remains of the bodies there interred shall have returned to their original dust³.

9. The

³ "It is a violation of common decency, and of the rights of all concerned," to occupy

TITLE II.

Method of obtaining and transferring property.

9. The ways of obtaining the property of such things as fall under commerce, flow either from natural or positive law. By the law of nature, property is acquired, either by occupation or accession; and it is transferred from one to another by tradition. Occupation arises from a fact of the acquirer; accession, from the dependence or necessary connection that the thing belonging to us hath with other things; and tradition, from the will of the former owner, joined with our acceptance of the thing delivered by him to us. By positive law, property may be transferred by prescription; but this last being also a way of losing property, falls to be explained under a separate title. Occupation, or occupancy, is the appropriating to one's self things which have no owner, by apprehending them, or seizing their possession. This was the original method of acquiring property; for in the first state of mankind, before societies were formed, every one, barely by taking into his possession a certain portion of ground, and cultivating it, made the fruits his own; and when he thought fit to abandon it, he, who next laid hold of it, acquired the same right. This continued, under certain restrictions, to be the doctrine of the Roman law, *Quod nullius est, fit occupantis*; not only as to things which had not as yet fallen under the power of any proprietor, but as to those which had been lost or relinquished by the former owner.

10. The doctrine of occupancy is also agreeable to the law of Scotland, in such moveable subjects—as have continued in their original state, and are presumed never to have had an owner,—whether animate or inanimate. Thus, pearls inclosed in shells, or pebbles cast on the shore, belong to the finder. Thus also, we acquire the property of all wild beasts, fowls, or fishes, as soon as we kill or apprehend them, whether upon our own grounds, or even on those of another; for they can belong to no person, wherever they may be, while they retain their natural liberty; and, consequently, must become the property of him who first seizes them. The right of hunting, fowling, and fishing, is indeed restrained in many cases under fixed penalties by the statutes to be hereafter mentioned, *T. 6. § 6.* But all game, though it should be caught in breach of these acts, or within another man's property, belongs, by the necessity of law, to him who hath seized it. The prohibition, therefore, in those statutes, can have no other effect than to inflict a fine on the trespasser, unless where the confiscation of what is caught makes a part of the statutory penalty. The rule above laid down obtains even in the fishing of salmon without a proper title, for, though the fishing of salmon be a royal right, *T. 6. § 15.*, which ought not to be exercised by any proprietor of lands without a special clause in his grant; yet the salmon themselves which are so caught are not *inter regalia*, and therefore belong to the catcher; whereas, fishes which the law accounts royal, whether they be killed in rivers or upon the shore, belong neither to the killer by occupancy, nor to the owner of the ground on which they are cast, by accession; but to the King, *jure coronæ*. By the *Leges Forestarum*, § 17., according to a copy preserved in the Advocates' library, all great whales belong to the King, and also such smaller whales as may not be drawn from the water to the nearest part of the land on a wain with six oxen. But no whales have, for at least a century past,

What subjects may be acquired by occupancy.

py a public burying ground "by pasturing it with cattle and sheep, either by itself, or along with the neighbouring fields;" *Spence, 1st Dec. 1808, Fac. Coll.; Hay, 2d Dec. 1778, Ibid. Dict. p. 5148.* The minister is, however, entitled to cut the grass growing thereon; *Ibid.*

past, been claimed, either by the King, or by the admiral his donatary, but such as were of a size considerably larger than that there described; see 17° *Edw. II. C. 11.* By an ordinance of Lewis XIV. of France, *anno 1681, Touchant la marine, Liv. 5. T. 7. Des poissons royaux*, sturgeons, dolphins, and certain other fishes, are declared royal, when they have run aground upon the shore; but if they be fished *en pleine mer*, they become the property of the fisher*. Deer inclosed in a park, fish in a pond, or birds in a volary, as they cannot be said to retain any longer their natural liberty, become the property of him who has brought them under his power; and, consequently, whoever carries them off from that owner commits theft, 1474, *C. 61.* But so soon as they get free from their confinement, he who shall have first laid hold of them, after the former proprietor has given over the pursuit, acquires their property, *L. 3. § 2. De adq. rer. dom.* This is also, by the Roman law, the case of a swarm of bees; which, by abandoning their hive, are understood to have recovered their original liberty⁶; and, if they light on the grounds of another, and have been inclosed by him in a new hive, become his property, *L. 5. § 2, 3, 4. eod. t.* But domestic animals which have never been wild, as hens, geese, turkeys, &c. though they should stray from their owner, continue his, *L. 4. eod. t. †*; and he who apprehends them, with a design to acquire their property, may be sued as a thief, *L. 5. § 6. eod. t.*

11. A rule quite different from that of occupation, *viz. Quod nullius est, fit domini regis*, obtains, by the usage of Scotland, *first*, in lands, or in rights annexed to lands; for, by our feudal plan, the sovereign is accounted the original proprietor of all the lands within the

No rights of lands can be so acquired. *Quod nullius est, fit domini regis.*

* Lord Stair, *B. 2. Tit. 1. § 33.*, says, “At the whale-fishing at *Greenland*, he that woundeth a whale, so that she cannot keep the sea for the smart of her wound, and so must needs come to land, is proprietor, and not he that lays first hand on her at land.” This opinion was adopted by the Court of Session, *Nov. 24. 1792, Rose*; but the decision was reversed upon appeal (not reported). Stair, *loc. cit.* mentions the case of a prize taken at sea, where this doctrine was brought under discussion. A frigate, belonging to an ally of this country, defeated an enemy’s privateer which had made prize of a ship belonging to the same friendly power; but the prize, while pursued by the frigate, was taken by a Scotch privateer. The Court found this capture injurious, unless it were proved that the prize would otherwise have escaped; *Feb. 15. 1677, King’s Advocate, Dict. p. 11930.*

† This has been extended to the case of house-doves, or pigeons, *Act 1567, C. 16.*; *1597, C. 270.*; *Fac. Coll. Jan. 19. 1797, Murray, &c. Dict. p. 7628* ⁷.

⁶ “While they hive, or flying away are pursued by the proprietor,” they continue property; *Stair, B. 2. t. 1. § 33. vers.* “The creatures,” &c.

⁷ As to pigeons, it seems a more correct analogy, to class them with deer in a park, rabbits in a warren, &c. On this subject, the law is laid down by Hume: “All domestic creatures, or creatures *domitæ naturæ*, such as horses, sheep, poultry, and the like, are clearly the proper subjects of theft. And the same seems to be reasonable with respect even to animals of a wild and unreclaimed nature, if so kept and confined that they cannot escape, and may easily and at any time be caught: such as deer in a pen, rabbits in a house, or young pigeons in a dovecot: They are then nearly in the same condition as their carcasses after slaughter, which may certainly be stolen. But between these extremes, there lie a great number of more ambiguous situations, such as that of deer in a park, rabbits in a warren, doves in a dovecot, fish in a stank or pond; and with respect to these, we cannot pretend to say of what opinion our judges might have been, if the legislature had not made them the subject of special provisions; which declare, that it shall be theft to take these things, or even to shoot at deer, rabbit, or pigeon, without the consent of the owner. These are the principal statutes; the act 1474, *C. 60.*; 1535, *C. 13.*; 1587, *C. 59.*; and 1579, *C. 84.*; and this last act declares, that if not responsible for the pecuniary pains, the breaker of dovecotes, cunningaires, or parks, may be punished with death for the third offence, even by an inferior court. The acts 1535, *C. 13.*; and 1555, *C. 58.*; extend the same pains to the stealing of bee-hives; and this indeed seems to be of the nature of a theft at common law.” 1. *Hume 80.*

the kingdom, and cannot be divested of that property but by a special right vested in another. Though, therefore, one should seize the natural possession of a land-estate, and continue in it for a hundred years together; yet, if he cannot prove his property by titles in writing, and if he is not infest upon these titles, his possession does not create even a presumptive title to the property, according to the feudal rule, *Nulla sasina, nulla terra*; but the estate is held as caducuary, without a proprietor, and may be claimed by the crown. As this bore hard upon those who held their lands immediately of the crown, and had lost their title-deeds by the calamity of war, or other misfortune, our ancient law allowed such freeholders to cognosce themselves heritable possessors of the lands by an inquest; and if by the verdict they were declared such, a charter was directed to pass under the great seal in their favour, *St. B. 2. Tit. 3. § 13.* But the only remedy provided in such case, by our present practice, is an action of proving the tenor of the lost deeds.

12. The above rule for the crown is also received, *2dly*, in that sort of moveable subjects which are presumed to have once had a proprietor who is now unknown. Hence, by our law, treasures hid under ground belong neither to the finder, nor to the owner of the ground, as they did by the Roman, § 39. *Inst. De rer. div.*, but to the King as escheat, *Q. Att. C. 48. § 5**. In the case of strayed or waif cattle, the owner loses not his property in them immediately upon their straying; and therefore he who has laid hold on them is held as a thief, if he neglect to acquaint the sheriff within a short time, (seven days according to Craig, *Lib. 1. Dieg. 16. § 43.*), that he may cause proclaim them at the market-cross of the county-town, and at the parish-church where they were found, *Q. Att. C. 48. § 14.* But if the true owner shall fail to appear, and claim the property of them, within a year after such notice, they are considered as *res nullius*; and consequently belong either to the King, or his donatary. The sheriff is the King's donatary to waif goods, in consequence of his grant of sheriffship, unless the goods have been found in a special jurisdiction, (*ex. gr.* of regality, while these subsisted), or within the property of such as have an express right to strays in their charter. It is usually affirmed by writers, in general terms, that the crown may, in virtue of this right of escheat, appropriate to itself strays of whatever kind, a year after the above notice given to the sheriff: But the English law has distinguished in this question between strayed animals and inanimate strays. The first sort is lost to the owners immediately after the year, because it cannot be preserved without trouble and expence; but if the thing lost be inanimate, and so may be kept from perishing, with little or no inconveniency to the possessor, the property continues, by that law, with the owner, during all the years of prescription. And this distinction might perhaps be received by our judges, not barely from its equity, see *Bank. B. 1. T. 8. § 4.*, but

This rule holds in some moveable subjects.

VOL. I.

3 L

because

* Unless the property of the treasure can be proved. Of this an instance is recorded by Lord Fountainhall. In a competition between the proprietor of a house where some coined money had been found, and the executors of the last possessor, the Court, considering that a treasure is *vetus pecuniæ depositio, cujus memoria non extat*, but that here the coin was recent, and has been the poor woman's pose who died there, preferred her executors, *Dec. 29. 1696, Cleghorn, Dict. p. 13523.* Craig takes notice of a similar case: "Quidam Cor, frater Clementis Cor, civis spectati, in publica pestis calamitate, cum pecuniam abscondisset, eam executores ejus vindicarunt." *Lib. 1. Dieg. 16. § 40.*

because the above-mentioned quotation from the *Q. Att.*, inferring the loss of the property from a year's silence of the proprietor, speaks of no lost goods but waif cattle, and therefore ought not to be extended to a quite different sort of waifs, where there is not the same reason for applying it. Besides, frequent instances occur, where the owners of lost plate, or jewels, have reclaimed them from the finder, and even from the *bona fide* possessor, long after the year, without challenge from the King or his donatary * 8.

13. It is plainly enough assumed for our law, *St. Alex. II. C. 25. § 1.*, that, in the general case, wrecks belonged to the sovereign, from the time of the shipwreck, without any right in the former owner to recover them, though they should be reclaimed immediately: For it was provided by that statute, that in the special case where any living creature in the ship, man or beast, escaped alive, the goods should not be accounted wreck, but were to be preserved by the sheriff, for the behoof of those who should within a year after prove their property in them †: and even in this most favourable view for the owners, where the wreck was not total, these goods became by the statute escheat to the crown irrecoverably, if they were not reclaimed by the owners within that short period of time. This law, however barbarous and inhuman, was generally received over Europe in the eleventh and twelfth centuries, though it has been softened in most countries by later edicts and constitutions: Particularly, this right was given up by our sovereigns, in wrecks belonging to foreigners, if they were subjects of a kingdom or state where the like indulgence was shewn when our ships were wrecked upon their coasts, 1429, *C. 124 ‡*. Mackenzie remarks, upon this last-cited act, that by the usage observed in his time in our admiralty-courts, wreck goods, even where no creature had been found alive in the ship, were not claimed as escheat, but secured for the owners, if they should insist for the recovery of them within a year, upon payment of a just salvage to the admiral, who, by his grant of admiralty, was held to be the King's donatary to wrecks, where no special right appeared in another. Nay, Bankton, *B. 1. T. 8. § 6.*, mentions a decision, *Feb. 17. 1725, Monteir*, (*DICT. p. 16796*), by which the question was given judicially, in the case of such total wreck, for the owners of the cargo, even after a year 9.

14.

* Lord Stair says, " Things lost, (of which see the rule for *Israel*, *Deut. 22. 1—3.*) " may be possess without delinquence. In these, our custom agrees with the *Roman* " law, and other nations, (except in the matter of waith and wrack goods), that such " things, not being concealed, may remain with the possessors; and, if none claim " them, they become their own; and they may dispose of them, if they cannot be " conveniently preserved without hazard;" *B. 1. Tit. 7. § 3.*

† See a case where an ox having escaped alive from the stranded vessel, the Court found there was no wreck; *Durie, Dec. 12. 1622, Hamilton, DICT. p. 16791.*

‡ This rule was acted upon, *Stair, January 20. 1674, Jacobson, DICT. p. 16792.*

For the punishment annexed to the crime of plundering stranded vessels, *vide infra, B. 4. Tit. 4. § 65.*

8 The crown has no claim to goods lodged in a public warehouse, though they have lain there twelve years unclaimed, and the owner is unknown; *Sands, 22d May 1810, Fac. Coll.*

9 " In the advancement of policy and civilization, the iniquity of the old law of " wrecks has been gradually done away."—" The custom of modern times sustains " the claim of the owners of any country, and after the lapse of year and day, and " though no living thing be found on board;" 1. *Hume, 480, 481.*

Under the act 12. *Anne, stat. 2. cap. 18.*, (which to this effect has been found to extend

TITLE I.

Mode of acquiring property by natural accession.

14. Property may be acquired, not only by occupancy, but accession; by which, in two things which have an intimate connection with or dependence upon one another, the property of the principal thing draws after it that of its accessory; for whatever proceeds or arises from what is mine, is also mine, as being part of my property. Accession is either natural or artificial. The *fœtus* of cattle, as foals, calves, &c. are an accessory of the mother, according to the rule, *Partus sequitur ventrem*; and therefore belongs to him who owns the mother, by natural accession, § 19. *Inst. de rer. div.* Trees, shrubs, and all fruits whatever, which spring from the earth, belong to the owner of the field which produced them. But after the trees are cut down, or the fruits reaped, the owner holds them no longer as accessories of the field from which they are disjoined, but as separate subjects; and therefore, if he shall, after that period, sell the field, those trees or fruits which are thus disunited from the ground, continue his own. Nay, a certain sort, even of the *fructus pendentes*, which are not yet separated from the subject which produced them, neither pass upon the death of the proprietor to his heir, nor upon a sale of lands to the purchaser, as to which, *vid. infr. T. 2. § 4. and T. 6. § 11.* In the same manner, the insensible addition which grounds lying on the banks of a river receive by what the water washes gradually from other grounds, (styled by the Romans *alluvio*), accrues by natural accession to the owner of the land which receives the addition, § 20. *ibid.* But if a part of one man's ground shall, by a sudden inundation or torrent, be carried off, and joined to lands belonging to a different proprietor, (which is called *avulsio*), the property of that separated part continues, notwithstanding its being joined to another person's field, to be the property of the former owner, § 21. *ibid.*; because what is added to a field by an imperceptible accretion, cannot be distinguished from the ground itself to which it was joined, in order to its being restored to the former proprietor; and it may perhaps have been brought from another place than the adjacent ground; whereas one can easily distinguish, in the sudden alterations occasioned by a flood of water, what ground formerly belonged to each proprietor.

15. The ways of acquiring property by industrial or artificial accession are various. Trees planted in one's ground, though not by the proprietor, are deemed an accessory of the ground in which they were planted, after they have taken root in, and drawn nourishment from it; and so belong, as an accessory of the ground, to the owner of it. By the same rule, if one shall, even with his own materials, build an house on my ground, the house is mine, because the ground is mine on which it is built, and the builder cannot so much as sue upon an action to have the materials separated from the ground, that they may be restored to himself; for public policy will not suffer buildings once finished to be pulled down,

By artificial accession.

extend to Scotland, *Commissioners of Customs, &c. 25th May 1810, Fac. Coll.*) the officers of excise and customs have, for behoof of the owners, the right of custody of "all vessels, goods and merchandise on board of vessels stranded or cast on shore without any person being on board." But they have no right to interfere with one holding the appointment of Vice-Admiral from the Crown, in regard to the custody of "wrecked goods properly so called, goods passing under the appellation of jetsam, flotsam and lagan;" *Commissioners of Customs, &c. 2d Dec. 1812, Fac. Coll.* The Vice-Admiral, (and the principle of the decision extends, of course, to the officers of excise and customs,) has no power to interfere with the management of goods saved from stranded vessels, where the masters or owners have themselves given sufficient authority for taking charge of them; and damages were accordingly awarded in a case of such interference; *Connery, 1st Feb. 1805, Fac. Coll. Dict. v. JURISDICTION, App. No. 14.*

down¹⁰. This rule of accession is so strong, that though I should build an house on my own property, with materials which I knew to belong to another, the house, and consequently all the materials of which it consists, are mine, notwithstanding my *mala fides*. What recompence may in such cases be claimed by the *bona fide* builder, or the owner of the materials, from the proprietor of the ground, shall be explained *infr. B. 3. T. 1. § 11*. The Romans excepted from this rule of accession the case of paintings drawn upon another man's board or canvas: For these belonged, by their law, not to the owner of the board on which they were drawn, but to the painter. This exception is, by § 34. *Inst. h. t.*, said to be made in consideration of the excellency of the art: But it appears rather to arise from the change which the board or canvas undergoes by the work and skill of the artist; for it becomes thereby a new species: And therefore it would have perhaps been as proper to consider the case both of paintings and writings under the head of specification, which is to be handled immediately; for a piece of canvas, paper or parchment, after it is painted or written upon, is no longer looked upon as so much canvas or paper, but as a picture, a bond, or a disposition.

By specification.

16. Under accession may be included specification, by which is understood a person's making a new species or subject, from materials belonging to another. And it is governed by this rule, That where the new species can be again reduced to the mass or matter of which it was made, the law considers the former subject as still existing: Wherefore the new species continues to belong to the proprietor of that former subject, which still exists, though under another form; as in the case of plate made of bullion. But where the new species cannot be so reduced, there is no room for that *fictio juris*; as in wine, which, because it cannot be again turned into the grapes of which it was made, becomes the property, not of the owner of the grapes, but of the maker of the wine, § 25. *Inst. ibid.* This manner of acquiring is not admitted, where the new species made by one person is united to, and so made part of an immoveable subject belonging to another. Hence, as hath been taught in the preceding section, an house built upon another man's property does not become the property of the builder, or of the owner of the materials, by specification, but belongs to the proprietor of the *house*¹¹ by proper accession; and in like manner, a picture drawn upon the ceiling or wall of an house, belongs not to the painter, but to the owner of the house*.

16.

* A particular species of property has been created, (at least confirmed, and guarded by certain forfeitures and penalties against its infraction), by stat. 8. *Ann. C. 19.*, which provides, that, from and after April 10. 1710, the authors of all books already printed, or their assignees, shall have the sole right and liberty of printing the same, for 21 years from the said 10th April, and no longer; that the author of any book, to be printed and published thereafter, and his assignee, shall have the sole liberty of printing and reprinting it, for 14 years, to commence from the day of the first publishing, and no longer; and that after the expiration of the said term of 14 years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of 14 years¹². It has been found, though the statute does not bear, that this reversionary interest is, like the other, assignable, either by the author himself; *Fac.*

¹⁰ See *McNair*, 18th May 1802, *Fac. Coll. Dict.* p. 12832; *Laird*, 10th Feb. 1807, *Ibid. Dict. v. LIFERENTER*, App. NO. 3; noticed more particularly *infr. B. 3. t. 1. § 10, 11.*

¹¹ Such is the reading of all the former editions; and it was therefore thought improper to correct it but by a note. The mistake, however, is obvious:—the house belongs to “the proprietor of the ground.”

¹² By Stat. 54. *Geo. III. c. 156.* instead of two terms of 14 years, the right is extended to 28 years absolute, and to the end of the author's life. This statute extends the privilege to authors of books published before its date.

17. Commixtion and confusion frequently fall under the description of specification, and are also ways by which property may be acquired. *Commixtio*, when taken in a large sense, includes the mixture

TITLE I.

By commixtion
and confusion.

*Fac. Coll. July 17. 1787, Cadell, &c. Dict. p. 8310, or by his representatives; Fac. Coll. July 27. 1775, Dodsley contra Macfarquhar, Dict. p. 8308; and v. LITERARY PROPERTY, App. NO. 1*¹².

The penalties enacted by this statute against printing, reprinting, or importing such books, without the written consent of the proprietor, or without such consent, selling, publishing, or exposing to sale, copies known to be surreptitious, are, 1. Forfeiture of the spurious books and sheets to the proprietors; 2. A penalty of one penny for every sheet found in the offender's custody, either printed, or printing, published, or exposed to sale, contrary to law; one-half of the penalty being payable to the Sovereign, and the other to any one who will sue for it. The statute is extended to all parts of the United Kingdoms of Great Britain and Ireland, and of the British dominions in Europe, by 41. Geo. III. C. 107. (July 2. 1810), which increases the penalty to threepence *per* sheet, and superadds a claim of damages against transgressors.

No book can have the protection of the statute, unless the title to the copy, or such book or books hereafter published, shall, before publication, be entered in the register-book of the Company of Stationers, as directed by this act, amended by stat. 15. Geo. III. C. 53.; and if the clerk of the company neglect or refuse to make, or to certify such entry when required, the proprietor may secure his property by advertisement in the Gazette.

The four Scotch universities, the two English universities, and the Colleges of Eton, Westminster, and Winchester, are enabled to hold in perpetuity their copy-right in books given or bequeathed to these universities and colleges, for the advancement of useful learning and other purposes of education, by the above stat. 15. Geo. III. C. 52.; and this right is secured by the same forfeitures and penalties, as that of authors by the act of Queen Anne. A similar privilege is granted to the Trinity College of Dublin, by the above stat. 41. Geo. III. C. 107.

The question has been much agitated, both in Scotland and England, whether the exclusive privilege of an author to print and publish his work, commonly called his *copy-right*, vests in him by common law, or is merely the creature of positive statute, and entitled to legal protection only when the requisites of the act have been observed? The Court of King's Bench, on April 20. 1769, in the case of *Miller versus Taylor*, respecting the copy-right of "Thomson's Seasons," after a most ample and deliberate discussion, gave judgment in favour of the common law right. *Vide Burrow's Report, vol. iv. p. 2303.* The trial has also been published separately. To the same effect, the Court of Chancery in England decreed, Nov. 16. 1772, in the case, *Becket, &c. versus Donaldsons*; but the House of Lords, on Feb. 22. 1774, reversed this decree, (the Judges to whom the legal question was proposed, being divided, six to five). *Vide Bur. iv. p. 2408.* The general point was afterwards tried in the Court of Session, respecting the property of "Stackhouse's History of the Bible." Upon advising most able informations, and a hearing in presence, which lasted four days, the Court decided almost unanimously against the common law right, July 28. 1773, *Hinton, contra Donaldson, &c. Dict. p. 8307, from Folio Dict. v. iii. edit. 1797, p. 388.* See

¹² Though there be no doubt that the law is as here stated, it is right to remark, that the case of *Dodsley* did not involve any question as to the author's "reversionary interest" during the second term of 14 years. The objection urged against the representatives was, "that the exclusive right given by the statute was merely personal "to authors, and to those to whom they, during their lives, might assign their copy-right;"—and therefore, that in the case of a work left by the author in manuscript, without an assignment of the copy-right, the benefit of the statute could not descend to his representatives in the mere course of legal succession. The Court decided that the statute was entitled to a more liberal construction.—Another point occurred in the above case,—whether a person had such a property in *letters* addressed to him, as entitled him to publish them, or to be protected under the statute, if he did publish. It was held, that with the consent of the writer's representatives he was entitled to publish, and that the property thus acquired must be protected. Where such consent is not obtained from the writer, or, in case of his death, from his representatives, it would seem that "sending a letter transferred the paper on which it was written, and every use of "the contents, except the liberty and property of publishing." See *Hardwicke in Pope v. Curll, 2. Atk. 342.* Accordingly, in a recent case, it was held, as to the publication of certain letters of Burns the Poet, "that the communication in letters is always made under the implied confidence that they shall not be published, without "the consent of the writer, and that the representatives of Burns had a sufficient interest, for the vindication of his literary character, to restrain this publication;" *Cadell and Davies, 1st June 1804, Fac. Coll. Dict. v. LITERARY PROPERTY, App. NO. 4.*

mixture of all substances, of whatever kind they may be; but, in a strict acceptation, it is confined to the mixture of solids. *Confusio* is never made use of but to express the mixture of liquids or fluids. When by the mixing together of two or more substances of different kinds, belonging to different proprietors, a new species is formed, which cannot be again brought back to the first condition of those substances; the mixer, whether he be one of the proprietors, or a third party, must, as the maker of the new species, become the sole proprietor of the subjects mixed, according to the rule of specification, explained last section, L. 5. § 1. *De rei vind.* Where substances of the same kind belonging to different owners, suffer

a case decided on the very same principle, *Rem. Dec. v. ii.* NO. 92.; *D. Falc. v. i.* NO. 256.; and *Kilk. voce Books, Midwinter, June 7. 1748, Dict. p. 8295.* See another report of this case, *ELCHIES, v. LITERARY PROPERTY, NO. 2. and 3¹³.*

In order to incur the penalties and forfeitures of the statute, it is by no means necessary that the spurious work contain a complete copy of the original. But what degree of plagiarism shall be held as a violation of the author's copy-right? must be a question of circumstances. See *Fac. Coll. Dec. 21. 1776, Taylor, &c.; Dict. p. 8308. v. LITERARY PROPERTY, App. NO. 2; Fac. Coll. June 25. 1785, Murray, &c. Dict. p. 8309. Ibid. May 22. 1790, King's Printer, Dict. p. 8316¹⁴.*

By statute 12. Geo. II. C. 36. § 2. it is forbidden to import and expose to sale in this country any books originally printed and published here, and afterwards reprinted abroad, under the forfeiture of the books, with a penalty of L. 5, and double the value of the books imported, to be recovered with costs. Stat. 34. Geo. III. C. 20. § 57. raises the penalty to L.10. These laws are extended to Ireland by the above act, 41. Geo. III. c. 107, § 7. All of them contain the exception of books not printed or reprinted here within twenty years next before the importation, and books reprinted abroad, and inserted among other books or tracts to be sold therewith, in any collection of which the greater part has been first composed or written abroad.

In an action brought for the penalties and forfeitures of the statute, 12. Geo. II., and for damages, the Court found, that the claim for the penalties was limited to two years by an English statute, (81. Eliz.)¹⁵, but that the defenders were bound to discover upon oath the extent of the profits of the books reprinted abroad, and imported and sold by them, *Falc. v. 1. NO. 153. Booksellers of London, Jan. 18. 1747, Dict. p. 11144.*

The property of prints and engravings is secured to the inventors by similar laws. See Stat. 8. Geo. II. c. 13.; 7. Geo. III. c. 38.; and 17. Geo. III. c. 57. And the makers of new models and casts of busts, &c. are in like manner vested with the sole right and property thereof, by 38. Geo. III. c. 71. *June 21. 1798.*

¹³ In these cases of *Hinton* and *Midwinter*, the Court held, that literary property having no existence at common law, but being altogether the creature of statute, and therefore only to be sustained where the requisites of the statute had been complied with, there was *no property* in works not regularly entered at Stationers Hall. A similar decision was again pronounced; *Cadell and Davies, &c. 18th Dec. 1804, Fac. Coll. Dict. v. LITERARY PROPERTY, NO. 5.*; but it was reversed on appeal, and the point now stands settled by the judgment of the House of Lords, thus: "That although, by the act of the 8th Anne, entitled, An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the terms therein mentioned, no person printing or reprinting any book without consent, as in the said act is mentioned, is liable to any of the penalties or forfeitures thereby enacted, unless the title to the copy of such book shall, before publication, be entered in the register-book of the company of Stationers, as by the said act is described; yet that the person to whom the sole liberty of printing books is thereby given for the term or terms therein mentioned, have, by the said statute, a right vested in them, entitling them to maintain a suit for damages, in case of violation of such right, and also entitling them to maintain a suit in order to prevent the violation thereof, by *interdict*, for term or terms, of which the statute hath given them such sole liberty, although there shall not have been such entry made before the publication as aforesaid;" *Journ. Dom. Proc. 16th July 1811.* See a similar judgment in the English case, *Peckford v. Hood, 7. T. R. 620.* Even before the law was thus settled, our courts had found an author, who had entered his book at Stationers Hall, entitled to bring an action at any time within the statutory period, declaring his exclusive right of property, and containing prohibitory conclusions, though the demand for penalties had been cut off by the short limitations of the statute; *Clark, 29th Feb. 1804, Fac. Coll. Dict. v. LITERARY PROPERTY, App. NO. 3.*

¹⁴ A fair and *bona fide* abridgment of any book is considered as a new work; and however it may injure the sale of the original, yet it is not deemed in law to be a piracy, or violation of the author's copy-right; 1 *Bro. C. R. 451*; 2 *Atk. 141.*

¹⁵ *Vid. post. B. iv. t. 4. § ult.*

suffer a mixture, the mixer can have no right by specification ; because the species continues after commixtion what it was before. Different rules must be therefore observed as to this sort, according as the mixture is either casual or made with the consent of the owners. Where similar substances are casually mixed, and consist of fluids, which cannot be again separated, *ex. gr.* two hogsheads of wine, the whole becomes the common property of the former owners ; because the different particles of the subjects mixed are by the mixture so confounded with one another, that they can no longer be distinguished ; but in the casual mixture of such solids as admit of an actual separation, by which every one of the subjects mixed may be restored to the former proprietors, *ex. gr.* in the case of two flocks of sheep, the property continues distinct after the commixtion. This last rule was, with too great subtilty, extended, by the Roman law, to the casual commixtion of all solids, even where a separation was truly impracticable, *ex. gr.* to the mixture of two parcels of wheat, on pretence that each grain or particle retained its own form, notwithstanding the commixtion, § 28. *Inst. De rer. div.* But our law would probably reject an extension which hath no solid or real foundation in reason. Where the commixtion or confusion is made with the consent of the proprietors, such consent of itself makes the whole a common property, according to the shares that each owner had formerly in the several subjects, whether the subjects mixed do or do not admit a separation, or whether a new species is, or is not formed by the commixtion, *d.* § 28. The common property arising from commixtion is an undivided right : What formerly belonged to each of the different proprietors, becomes, by the act of mixing, the joint property of them all *pro indiviso*, according to the proportions above mentioned : But none of them can claim a separate property in any one part of the subjects, because neither of them hath right to the part belonging to the other, which is mixed with their own. This common right still continues till the subjects be divided, either with the consent of the proprietors, or in consequence of a judicial sentence. And if the subjects mixed have been of different qualities, *ex. gr.* a high-priced wine and a lower, the owner of the high-priced wine has a right to demand, that a larger share be allotted to him by the judge in the division, in proportion to the value of his wine above that of the other wines mixed with it, *d.* § 28.

18. The property of such subjects as have already had an owner, is chiefly acquired, or transferred from the owner to another, by tradition ; which may be defined, the delivery of the possession of a subject by the proprietor, with an intention to transfer the property of it to the receiver. Two things are therefore required to the conveyance of property in this manner : *First*, The intention or consent of the former owner to transfer it upon some just or proper title of alienation, as sale, gift, exchange, &c. : *2dly*, The actual delivery of it, in pursuance of that intention. The first is called the *causa*, the other the *modus, transferendi dominii*. This manner of acquiring by tradition, is said in the Roman law to be founded on natural equity, § 40. *Inst. De rer. div.* ; and without doubt, the present will of the owner properly expressed, is sufficient of itself, in the reason of things, to convey the right of a subject to another, even without the actual delivery. Hence the fisk and special legatees acquire property to this day, by the usage of Scotland,

Tradition, the chief mode of transferring property.

land, merely by the proprietor's forfeiture, or a declaration of his will, without tradition of any kind; and transmissions of reversions are perfected, barely by registering the transmission in the register of reversions. But that the will of the owner to transfer may be known with the greater certainty, and that consequently property may be the better secured, the Romans, and other nations, have reasonably required, in all cases which can well admit of it, the delivery of possession for completing the conveyance: or at least some public act, by which it may appear that the former proprietor has given up his right: so that he who gets the last conveyance with the first tradition, is preferred to the property, according to the rule, *Traditionibus et usucapionibus, non nudis pactis, transferuntur rerum dominia, L. 20. C. De pact.*

Tradition either actual or symbolical.

19. Tradition is made either by the actual or real delivery of the subject itself, as in moveables, the *ipsa corpora* of which are put by tradition under the power of the acquirer; or, *2dly*, by a symbolical delivery, which must of necessity be made use of, where real delivery is impracticable. This last is the case, *first*, of immoveable subjects, *ex. gr.* lands, houses, mills, &c. which, from their fixed situation, cannot pass by delivery from hand to hand, as moveables; *2dly*, of subjects which consist *in jure*, styled by the Romans, *res incorporales, ex. gr.* rights of jurisdiction, of patronage, of fishing, &c.; for these, not being tangible, are incapable of proper delivery. In all these subjects, which exclude proper delivery, the symbols used are generally such as are fittest to express the delivery of the subject made over, which shall be particularly treated of, *T. 3. § 36.* Though moveables are capable of real delivery, it is not always necessary that the *ipsa corpora* of moveables be delivered. If, for instance, the subjects to be conveyed be under lock and key, the delivery of the key to the purchaser is accounted a legal tradition of all that is contained in the repository; at least when the question is with him who makes the tradition, *§ 45. Inst. De rer. div.* Notwithstanding the general rule, That property cannot be acquired but by tradition, yet where the possession or custody of a subject hath been before with the person to whom the property is to be transferred, *ex. gr.* if he who had been intrusted with the custody of a thing should purchase it from the owner, no tradition is necessary for perfecting the purchase, either real or symbolical, *§ 44. ibid.* It is commonly said, that in such cases there is a *ficta traditio*: The depositary is supposed to redeliver to the owner the thing deposited, and he again is supposed to give it back to the purchaser, upon the title of vendition, which is called by doctors, *fictio brevis manus*. But the plain reason why tradition is not required in that case is, because there is no room for it; for no subject can be delivered to one who hath it already in his custody*.

Possession the essence of property.

20. If property be so nearly connected with tradition, which is the delivery of possession, it cannot be improper in this place to explain the general nature and effects of possession. Property would be but a name, without possession; for it is by possession alone that we are put in a capacity to enjoy our property. The word, in its original acceptation, denoted the settlement of colonies in their particular seats, *tanquam sedium positio*; in which case, it carried with it the notion of property, as it frequently does in our language at this day. Thus, men of extensive property are said to have

* As to the effect of symbolical delivery, *vide infra*, B. iii. tit. 3. § 8.

have great possessions. But possession, when made use of in a strict sense, is defined, the detention of a subject, with an *animus* or design in the detainer of holding it as his own property. It is made up partly of fact, and partly of right. The fact consists in the detention of the subject which the possessor hath in his custody. The right consists in the view with which he holds it: He holds it in his own name, as his own property. In the first acquisition of possession, actual detention is an essential requisite; for if a bare act of the mind were sufficient, possession would be too vague and uncertain, *L. 3. § 1. De adq. vel am. poss.* Yet detention is not sufficient by itself; the possessor must also hold it as his own right. Depositaries, therefore, or stewards, who have the custody or management of a subject for the use of another, are not proper possessors, but bare custodiers or keepers of it. The detainer's view of holding it for himself is *in dubio* to be presumed from the very act of detention; but where his holding the thing as his own infers a crime, the presumption fails. Thus, one's detaining strayed cattle is not presumed to be on his own account, because the law considers such detention as theft.

21. Detention, though it be necessary in the first acquiring of possession, is not precisely required for continuing it. A possessor, for instance, of a land-estate, though he should not be always on the spot, retains the possession of that estate, as long as his *animus* continues of holding it as his own, *L. 3. § 7. 11. eod. t.*; and this *animus* is presumed to continue till the contrary appear, *i. e.* till from special circumstances it be evident that the possessor continues no longer in that intention. From that period the possession ceaseth; *ex. gr.* if the possessor shall throw away his money, or other moveable subjects, in a public place, where they must necessarily be laid hold on by others; and much more if he shall deliver them to another, upon the title of sale, or other proper title of alienation, *ibid. § 9.* It is evident, that this way of possessing *solo animo*, can continue no longer than while the real possession of the subject is void, or, in other words, while it can be reassumed by the possessor at pleasure: for the moment it is taken up by another, in such manner that the former possessor is debarred from re-entering to it, that former possessor loses his possession; since it is as impossible that two persons can have, each of them, the full possession of the same subject at the same time, as that they can have the property of it. And this holds though the possession hath been taken from the former possessor without a legal warrant, or even by unjustifiable methods, *L. 3. § 5. 9.*; *L. 15. eod. t.* Possession, where it is not given up totally, but only encroached upon by contrary acts of possession used by another, resolves into a partial or promiscuous possession; and where it is interrupted by the bare attempt of another to possess, without actual possession, it is said to be troubled or disquieted, in opposition to peaceable possession.

22. Possession is divided into natural and civil. Natural possession is the holding of the thing possessed corporally or naturally. Moveables, *ex. gr.* are possessed by holding them in one's hands, or keeping them in repositories; lands, by cultivating and sowing them, and reaping the fruits; houses by inhabiting them, &c. Civil possession is either the holding the subject by a sole act of the mind; of which, *supr. § 20, 21.*; or by the hands of another who holds it in our name, *L. 9. De adq. vel am. poss.* Thus, the owner of a thing lent or deposited possesses it by the borrower or depositary;

Detention, how far a requisite of possession.

Possession, natural, and civil.

BOOK II.

the proprietor of lands, by his tenant or steward; he for whose behoof a trust is created, by his trustee, *Fac. Coll.* i. 138. &c. *. And it is a consequent of this, that where a right of property is burdened with a servitude, or other inferior right in favour of another, the two persons interested in the subject may, in the judgment of law, possess it upon their different rights at the same time; as in the case of a pledge, where the proprietor is considered as possessing the subject, by the creditor to whom it was impignorated, in so far as is necessary for supporting his right of property, notwithstanding which the creditor possesseth in his own name the right of impignoration or security which he has in it. The same doctrine holds in liferenters, tacksmen, and generally in every case where there are inferior rights affecting any subject distinct from the property of that subject.

Possession *vi aut clam*, *aut precario*.

23. Possession may be also divided into that which is acquired lawfully, *i. e.* by fair and justifiable means; and that which is got *vi aut clam*, by violence or by stealth. Possession is got *clam*, when one, conscious that his right in the subject is disputable, and apprehending that he will not be suffered to take open possession, catches an occasion of getting into it surreptitiously, or in a clandestine manner, without the knowledge of the owner, *L. 6. pr. eod. t.* Violent possession is when one turns another masterfully, or by force, out of possession, and puts himself in his place. As to this last sort, it may be observed, that the possessor against whom the violence is used, may also use force on his part to maintain his possession, in the same manner that he might in defence of his life. But, after he has lost the possession, however unwarrantably, he cannot use force to recover it, unless he do it *ex continenti*, *L. 3. § 9. De vi et vi arm.*, but must apply to the judge, that he may be restored by the order of law: For society could not subsist, if it were permitted to private men *ius sibi dicere*, to do themselves right by the methods of force †. Where one possesseth at his own request, by the tolerance or bare licence of the proprietor, it is called "possession *precario*:" but that kind hath not the essential character of proper possession, because a precarious possessor does not hold the subject *tanquam dominus*, or in his own name.

Effect of possession, and the presumption it induces.

24. The effects of possession may be summed up under the following rules: *First*, It hath been already said, *supr.* § 10., that in things which have never yet come under the power of any person, the property itself is acquired by possession. *2dly*, Such is the natural connection between property and possession, that in moveables, even where they have had a former owner, the law presumes the property to be in the possessor; so that, till positive evidence be brought that he is not the right owner, he will be accounted such by the bare effect of his possession, *July 26. 1673, Hamilton*, (*DICT.* p. 11925.). Nay, it will not avail one who claims moveables against a possessor, though he should prove that he had once been the owner, unless he also prove *quomodo desit possidere*, the manner how he came to lose the possession; *ex. gr.* that the goods had strayed, or were stolen from him, or that he put them into the possessor's hand, merely in loan, or as a deposite, or for some temporary use, *Feb.*

* This decision, *Jaffray and others against Duke of Roxburgh*, *Feb. 18. 1755*, was reversed upon appeal, *DICT.* p. 2340 ¹⁵.

† This doctrine was made the ground of judgment; *Fac. Coll. July 6. 1757, Hunter*, *DICT.* p. 3448.

¹⁵ The principle laid down in the text is not affected by this reversal; which seems merely to decide, that in the particular circumstances of the case quoted, that principle had no just or proper application.

Feb. 3. 1672, *Scot. &c.* (DICT. p. 12727.)*. And indeed commerce could not have a free course, if it behoved the possessors of moveables, which often pass from hand to hand without either witnesses or writing, to prove the titles of their possession. Though this doctrine reaches not, by the usage of Scotland, to immoveable subjects, in questions with the Sovereign, *supr.* § 11. ; yet, in a competition between private parties, lawful possession had by one of them, even of an immoveable subject, has the effect to burden the adverse party who sues him, with the proof of a better title than that which is in the possessor, according to the rules, *Actore non probante, absolvitur reus*, L. 2. 21. *De prob.*, and, *In pari causa, potior est conditio possidentis*, L. 128. *pr. De reg. jur.* That it may therefore be known who is entitled to the privileges of a defender and of a lawful possessor, the question of possession, when that is doubtful, must be determined before discussing the point of right, L. 62. *De judic.* If the possessor hath obtained the possession warrantably, he is entitled to continue in it till the question of property be finally decided † : but if he who had been in the possession hath lost it *vi aut clam*, the judge will, upon a summary application, restore it to the former possessor, without waiting the issue of the cause itself, *Tit. Inst. De interd.* § 6.

25. In order to explain the strong effects given by law to *bona fide* possession, the difference between *bona* and *mala fide* possession must be shortly stated. A *bona fide* possessor is one, who, though he be not truly proprietor of the subject which he possesses, yet believes himself proprietor upon probable grounds, and with a good conscience, L. 109. *De verb. sign.*¹⁶, as in the case of one who purchases a subject which he had reason to think was the property of the seller, but which, in truth, belonged to a third party. A *mala fide* possessor possesses a subject not his own, and knows at the same time, or, which comes to the same account, may upon the smallest reflection know, that he is not the rightful owner ‡. No person, though he should possess *optima fide*, is entitled to retain a subject, not his own, after the true owner appears, and makes good his claim to it ; for the strongest *bona fides* must give way to truth. And seeing the possessor is in that case bound to restore to the true owner the subject itself, there is the same reason, in the nature of things, why he should restore also the whole fruits which it produced during his possession, as an accessory : Yet positive law has, from equity, conferred on the *bona fide* possessor the right to a certain part of the intermediate fruits that the subject yielded while he had reason to think his own title good. It has been disputed by doctors, whether the *bona fide* possessor was, by the Roman law, entitled to such of those fruits as he had gathered during that period, if he did not also consume them, *perceptos sed non consumptos* ; but however this point might have stood by the Roman law, it is universally agreed, that by our customs perception of the fruits is by itself sufficient for acquiring their property ;

Bona et mala fide possession. Effect of bona fides as to fructus percepti.

* *Stair*, Jan. 27. 1665, *Scots*, (DICT. p. 11616.) ; *Kilk.* NO. 4. *voce* PRESUMPTION, *Ferguson*, (DICT. p. 11618.) These rules, and the exceptions to which they are subject, are well discussed by *Stair*, B. ii. tit. 1. § 42. -

† The same rule has been applied in questions of exclusive privilege, *Fac. Coll.* Feb. 12. 1773, *Sinclair*, DICT. p. 10610 ; *Ibid.* Feb. 26. 1793, *Creditors of Jackson*, DICT. p. 10611.

‡ This definition of *mala fide* possession has been adopted by the Court ; *Fac. Coll.* Nov. 18. 1783, *Blair*, DICT. p. 1775.

¹⁶ *Duke of Roxburgh*, 17th Dec. 1815, *Fac. Coll.* On comparing the two cases, however, the distinction seems exceedingly nice, which divides this from the case of *Blair*, *not. † h. p.*

Effect as to
fructus penden-
tes, and fruits
natural and ar-
tificial.

erty ; so that if the fruits have been *percepti* by the possessor, he may retain them as his own, though they should be still extant. This doctrine has been introduced, that the minds of men who bestow their pains and money on what they believe their own, and who afterwards enjoy the profits thereof, may be secured from the continual apprehensions under which they might labour, if the event of a doubtful right should lay them under a necessity of accounting for what they had thus possessed *bona fide*. And indeed the loss ought in that case to fall on the owner who had all the while neglected to look after his property, rather than on the possessor, who, if he had not considered the subject as his own, would probably have lived more sparingly, and who, by restoring the intermediate fruits, might, without the least blame imputable to him, be at once reduced to indigence.

26. Such fruits as are *pendentes*, not yet separated from the subject which produced them, continue part of it, *L. 44. De rei vind.* ; and consequently must be restored by the *bona fide* possessor to the owner, with the subject itself ; except such as are produced by the seed belonging to, and sown by, the possessor, as wheat, barley, &c. ; for if he hath sown the ground while his *bona fides* continued, he is by our customs entitled to reap the crop, even though he should, before the time of reaping, have come to the knowledge that the subject belonged to another ; according to the rule, *Mensis sementem sequitur*. The rent of lands possessed by tenants is accounted reaped, or *perceptus*, by the possessor, at the legal terms of payment, though he should not, in fact, have received the rent till after that period *. All fruits, whether natural, *i. e.* which spring up *spon*te, or industrial, are thus acquired *perceptione*, by the *bona fide* possessor : For it is not so much the possessor's *cultura*, or industry, which entitles him to gather them for his own, as his *bona fides*, which extends equally to all kinds of fruits, *L. 48. De adq. rer. domin.* †. Even as to civil fruits, *i. e.* the rents or profits arising from subjects which produce no proper or natural fruits, it is universally allowed, that the rents of houses, which are, beyond all doubt, *fructus civiles*, are in the same case with the rents of land. But it has been said by some lawyers, that this doctrine is not to be received with regard to the interest of money ; and that, consequently, where one hath *bona fide* received the interest of a bond as his own, for a tract of years together, he must, upon the true creditor's proving his property in the bond, restore to him, not only the principal sum, but that intermediate interest. No reason however hath been assigned for this specialty, which may not be as justly applied to houses, or other subjects which produce no natural fruits ; neither does any authority occur that can be brought in support of this opinion, either from the Roman law, or our own practice. On the contrary, whatever is *in fructu*, becomes, by the Roman law, the absolute property of the *bona fide* possessor, *d. L. 48.*, and *usuræ* are justly said *vicem fructuum obtinere*, in *L. 34. De usur.* ; from whence it is consequent, that a *bona fide* possessor is as

* See on this head cases cited in *DICT.*, *voce BONA FIDE CONSUMPTION*, particularly *Falc. Feb. 13. 1745, Antonius Count Lesly, DICT. p. 1723.* ; *Fac. Coll. July 30. 1760, Bonny, DICT. p. 1728.*

† Lord Stair (*B. 1. tit. 7. § 10.*) makes the following distinction : “ Under restitution do fall not only the things of others, but their natural births and fruits extant, not *bona fide* consumed ; which are accounted as parts of the things, being accessory thereto, and belonging to the same owner. But industrial and artificial profits, in so far as such arise from the haver, and not from the thing, fall not under restitution, if once separate.”

as strongly entitled to retain interest as natural fruits*. It is a point contested by none, that a *mala fide* possessor is obliged to restore to the proprietor all the intermediate fruits arising out of the subjects, from the time of his entering to the possession, whether he has actually reaped them, or might have reaped them, by proper care; or whether they be natural, industrial, or civil: Or whether he has, or has not consumed them, *L. 28. § 2. 4. De hæred. petit.*; *L. 22. C. De rei vind.*

27. Possession, where it is vitious, that is, where it is attained by stealth, fraud, or violence, cannot be deemed *bona fide* possession; nor can it fall under that description, where the title of it is void by the obvious and universally known rules of law. Hence a right of liferent provided to a widow by her marriage-contract, if the marriage hath not subsisted year and day, cannot screen the widow who entered into the possession of the subject liferented, under the title of her contract, against restoring the whole rents received by her, *Nov. 16. 1633, Grant.* (Dict. p. 1743.) And, on the same ground, one cannot possess *bona fide* upon a right granted by a minor having curators, without their consent. But a right granted by a minor who has no curators, though it should be set aside afterwards on the head of minority and lesion, is a sufficient foundation for a *bona fide* possession; and consequently has the effect to make all the intermediate fruits, received prior to the reduction, to belong to the possessor, *Feb. 16. 1666, E. Winton,* (Dict. p. 9047.) Nay, though the title should be forged; yet, if it has the appearance of a fair and valid right, a singular successor, who had no sufficient reason to suspect the forgery, is not liable to restore the interim fruits, since as to him the title was specious, *St. B. 2. T. 1. § 24.* Many decisions are mentioned by Lord Stair, in the passage now cited, upon the article of *bona fides*, most of them in the case of adjudgers, or other creditors, who possessed *bona fide* in consequence of their diligences, though there were produced afterwards rights preferable to theirs; and they all tend to prove, that where the title has the appearance of validity, the possessor is not bound to restore¹⁷.

A title apparently good is sufficient to found a *bona fide* possession.

28. The Roman law required *bona fides*, not only in the beginning of the possession, but during the whole course of it, in order

How *mala fides* is induced.

VOL. I.

30

to

* The Court have disallowed retention of the interest of money, as *bona fide percepta*; *Fac. Coll. Nov. 3. 1790, Oliphant, Dict. p. 1721.*¹⁵

¹⁶ This judgment seems, however, to have proceeded, not on any general denial of the doctrine in the text, but on a sort of *specialty*, viz. that the particular action before the Court,—as being a *condictio indebiti*,—“admitted no claim for annualrents, “*bona fide percepta*.”

¹⁷ In like manner, where a party obtains possession by the decree of a competent Court, this will, in the general case, be a sufficient foundation for *bona fides*, although such decree may afterwards be reversed or set aside. Thus, where a minister had drawn stipend, in virtue of a decree of modification, he was held not bound to restore, though it was subsequently discovered, in the course of the locality, that the teinds had been previously exhausted; *Haldane, 11th Dec. 1804, Fac. Coll. Dict. v. BONA ET MALA FIDES, App. NO. 3.* So also, in a case of disputed election, the party declared to be legally elected professor, by sentence of the Court of Session, and who had, in consequence, entered upon the duties of his office, was held not bound to account for the salary and other emoluments levied in the meanwhile, upon the sentence being reversed on appeal; *Jackson, 5th July 1811, Fac. Coll.* So also, where one of two competing parties had, under decree of the Court of Session, and before warrant of appeal was served, obtained possession of an estate, the subsequent service of an appeal was found not to induce *mala fides*. On the contrary, though the judgment of the Court of Session did not ultimately stand, it was held “that *bona fides* must be understood to have “commenced from the date of said judgment, and to have continued till that judgment was reversed by the House of Lords; and therefore that the rents, during “that period, are to be considered to have been *bona fide percepti et consumpti*;¹⁷ *Bowman, 11th June 1805, Fac. Coll. Dict. v. BONA ET MALA FIDES, App. NO. 4.*

to make the fruits of what one possesses his own, *L. 23. § 1. De adq. rer. dom.* And this is universally held to be also the law of Scotland; so that the moment after *bona fides* ceaseth, the possessor can no longer avail himself of this privilege. *Bona fides* necessarily ceaseth, when the possessor can have no longer a probable opinion that the subject is his own; for it is in that opinion that the essence of *bona fides* consisteth*. *Mala fides* is therefore induced by the *conscientia rei alienæ*, though such consciousness should not proceed from legal interpellation, but barely from private knowledge; for private knowledge necessarily implies consciousness. This doctrine is agreeable both to the reason of the thing and to the Roman law, which expressly affirms, *L. 20. § 11. De hered. pet.*, that private knowledge, even without the least form of denunciation to the possessor, is sufficient to induce *mala fides*. And it is also established, by our practice, particularly in a case observed by Lord Stair, *Nov. 20. 1662, Childr. of Woolmet*, (*DICT. p. 1730.*), where *mala fides* was inferred from private knowledge, though it was there pleaded, that a legal intimation was necessary for that purpose. His Lordship however seems to adopt the contrary doctrine, *B. 2. T. 1. § 24.*; and, in support of his opinion, quotes a decision, *March 14. 1626, Nisbet (Westraw against Williamson, DICT. p. 859.)*, where it was adjudged, that the debtor's private knowledge of an assignation did not put him *in mala fide* to pay to the original creditor, in respect the assignation was not intimated to him. But this judgment is truly foreign to the present question; and proves no more, than that an assignation, without a legal intimation to the debtor, is an incomplete deed, which therefore need not be regarded by him.

Action brought by the true proprietor, from what period it operates.

29. The *conscientia rei alienæ* is most ordinarily presumed to commence when the proprietor insists in his action against the possessor; for by the libelled summons in that suit, the possessor hath full opportunity to consider the strength of his own right, which is brought under challenge; and if his title appear, by the nature of the action, to be lame or insufficient, the citation must induce *mala fides*, *June 30. 1705, Keith*, (*DICT. p. 13563.*). Where the question still continues doubtful, *mala fides* is not presumed till litiscontestation; which was at least the general rule of the Roman law, *L. 22. C. De rei vind.* And in instances in which the possessor's case appears uncommonly favourable, he will not be obliged to restore any of the fruits reaped or received by him prior to the sentence pronounced in the suit; see *Dec. 14. 1677, Dick*, (*DICT. p. 1757.*), *ex. gr.* where the validity of the title depends on facts which require a proof, if, from facts already known, there arise a probability that the evidence may come out for the possessor. But this matter cannot be reduced to abstract rules; every judgment must depend on the special circumstances of the several cases †¹⁸.——Many other effects of possession occur in our law, which shall be afterwards explained under their proper heads.

30. Where

* *Vide Falconer, July 15. 1746, Agnew, DICT. p. 1732.*

† The Lords found, That *mala fides* was not induced against a tacksman from the period

¹⁸ The general rule, that decree of augmentation has a retrospect to the date of the summons, held not to be so invariable as to prevent a departure from it in particular cases; and such retrospect accordingly refused under circumstances favourable to the defenders; *Simpson, 7th June 1809, Fac. Coll.*

A party possessing under a prescriptive title, apparently good, found to be *in bona fide*, until sentence declaring the prescription to have been interrupted; *Smith and Beaton, 6th Feb. 1810, Fac. Coll.*

See the cases referred to, *supr. not. 17, and infr. not. 19.*

30. Where a possessor hath several rights in his person affecting the special subject possessed, a question frequently occurs, To which of these his possession is to be ascribed? And it is a question of importance, when one of his titles is preferable to that which is in the competer and the other not; for if his possession shall be ascribed to the preferable title, *ex. gr.* an adjudication against the subject not yet expired, the debt contained in that adjudication must, in the course of time, be satisfied or cleared off by his intromission with the rents; after which, the other weaker title will not be able to defend him against the adverse party; whereas, if he be allowed to ascribe his possession to the weaker title, the preferable one, being undiminished by payment, will draw its full value, as if he had had no possession. On this head, the rule of the Roman law was, *Nemo potest sibi mutare causam possessionis*: no possessor, whose possession commenced upon one title, was suffered to invert it, by afterwards ascribing it to another, *L. 3. § 19. De adq. vel amit. pos.*, especially if that other title was not also vested in him when he began to possess. But by the usage of Scotland, one may ascribe his possession to any right whatever in his person, though acquired by him after his beginning to possess, as he shall judge most for his advantage. A purchaser, for instance, of a land-estate, who had also acquired several real securities affecting it, and who, by the voiding of his author's title, was made accountable for the rents, ought, in equity, to be allowed to impute his intromissions to the last of the infestments in his person, which would otherwise be excluded by intervening creditors, that so his preferable rights, continuing undiminished by payment, may be ranked on the subject to their full extent. We must however except from this rule the following cases. *First*, Possession, as distinct from right, cannot be ascribed to a title, other than that upon which it commenced, to the prejudice of him from whom the possessor's right flowed, and to whom it must be restored, notwithstanding any supervening title in the possessor; though that supervening title should be sufficient to recover the possession to him the moment after he has given it up, *St. B. 2. T. 1. § 27*. Thus a possessor by a lease, if, after it is expired, he be pursued by the lessor or setter to remove, cannot defend himself upon an heritable right which he acquired afterwards, though that should be evidently preferable to the title on which his possession began; but must first restore the possession to the lessor, and recover it afterwards by way of action*. *2dly*, If in a competition of rights, the possessor shall find himself under a necessity of departing from the title on which he first rested, as lame, and betake himself to a better one, he will not afterwards be allowed to ascribe his possession, in prejudice

period of the reduction of his author's right, but only from the reduction of the tack; *Fac. Coll. Feb. 9. 1765, Leslie-Grant, Dict. p. 1760*. Where a right to lands had been reduced by the Court of Session, affirmed in the House of Lords, the unsuccessful party was ordained to account from the term immediately subsequent to the decree of the Court of Session; *Ibid. June 21. 1769, Laurie, Dict. p. 1764*¹⁹. In a later case, *bonâ fide* possessors were assoilzied from bygones preceding the decree; *Fac. Coll. Feb. 25. 1795, Scott, Dict. p. 15700*.

* See on this subject, *Fac. Coll. Feb. 7. 1777, Carnegie; (Dict. App. N^o. I. voce POSSESSION)*.

¹⁹ A similar judgment was pronounced; *Henderson, 14th Dec. 1815, Fac. Coll.* Under more favourable circumstances for the losing party, it was held, in the case of a lease which had been reduced by the Court of Session, that the tenant's *bona fides* was not interrupted till the judgment of the *House of Lords* affirming the reduction; *Turner, 3d March 1820, Fac. Coll.* This decision, however, seems to have proceeded a good deal on the footing, that, "although the *House of Lords* affirmed the judgment of this Court, they proceeded on a different ground of reduction."

TITLE I.

Where a possessor hath several rights affecting the subject, he may ascribe his possession to which he pleases.

BOOK II.

dice of his competitor in that action, to any other title in his person equally incapable of defending him, with that on which he first insisted, and from which he was beaten. Neither, *3dly*, can one who is vested with a sovereign right to a subject, ascribe his intromissions to another right, which he acquired only as an accessory to the first; for *accessorium sequitur naturam rei cui accedit*. Hence one who had, in security of a purchase of lands, acquired right to the escheat of the seller, was not allowed to ascribe his possession to the gift of escheat, but was obliged to apply it to the minute of sale, because that was the principal and the sovereign right, *July 7. 1708, Lord Al. Hay, (Dict. p. 9230.)*

TIT. II.

Of Heritable and Moveable Rights.

Things corporeal and incorporeal by the Roman law.

BY the Roman law, things or subjects were divided into corporeal and incorporeal. Corporeal were those which by their nature might be handled: as a field, an house, a table, &c. Incorporeal things did not admit of being handled, but consisted *in jure*, and so were more properly rights than subjects; as rights of property, possession, servitude, succession, &c. And indeed even corporeal things are no otherwise the objects of law, than as they create a right in the proprietor, or other persons interested in them; though in common language, these two terms are made use of promiscuously.

Corporeal divided into moveable and immoveable.

2. Things corporeal were by that law divided into immoveable, as fields, houses, gardens, &c. and moveable; and these last could either move themselves, as animals, or might be moved from place to place, as corns, household stuff, pictures, &c. Things, by their own nature moveable, might become immoveable, by their being fixed or united to an immoveable subject for its perpetual use, as stone, marble, wood, used either in building any edifice, or for additional ornaments to it after it is built. This division of things into moveable and immoveable was chiefly intended by the Romans, for settling the times necessary for the acquiring of subjects by usucapion; for regulating the legal powers of guardians, and other administrators, over the subjects that fell under their management; and for determining what things ought to pass with the conveyance of an immoveable subject, as part or pertinent of it.

By our law, things are either heritable or moveable.

3. Things are by the law and usage of Scotland, either heritable or moveable. For the better understanding of this division, an observation must be hinted at concerning legal succession, which shall be more fully explained in its proper place. By the Roman law, when one died without making a will, the person next in blood to the deceased succeeded in the right of his whole estate, whatever might be the nature of the subjects of which it consisted; and when there were two or more equally near, they succeeded equally. But since the introduction of the feudal plan, we, and most of the other countries who have adopted that system, have had the preservation of family-estates so much at heart, that where two or more, who are not all females, happen to be next in blood, and consequently in the same degree of consanguinity to the deceased, such subjects as are either properly feudal, or have any resemblance to feudal, descend by law wholly to one of them, who is considered as the heir of the deceased, and the sole representative of the family; while the others, who are equally near in degree, and who are denominated the *next of kin* or *executors*, must be contented

tented with that part of the succession which is of a more perishable nature, and which in value bears generally but a small proportion to the share falling to the heir. Heritable subjects are those which, on the death of the proprietor, thus descend to the heir; and moveables, those that go to executors, who are on that account sometimes styled *heredes in mobilibus*. It may be also observed here, that those who undertake to gather in and distribute, among such as are interested in the succession, the moveable estate of a person deceased, in virtue of a nomination, either by the testator or by the judge, frequently get the name of *executors*, because it is their office to execute the last will of the deceased.

4. All subjects which were immoveable by the Roman law, as a field, or whatever is either part of the ground, or united to it, *fundo annexum*, as minerals, houses, mills, &c. are heritable by ours²⁰. This rule, if understood without limitation, would comprehend all the fruits of the earth not yet separated from the ground, (called by the Romans *pendentes*), because they continue *partes soli* until separation; but it is, by our usage, restricted to such of that kind as grow annually, for a tract of years together, without repeated culture or industry, as natural grass not yet cut, or fruits not yet plucked from the

Things properly heritable.

²⁰ In our law, the question, whether subjects are to be considered heritable or moveable, seems in some measure to be modified, according as the case may occur,—1. Between the heir and executor of the proprietor;—2. Between the proprietor and tenant, or other occupant upon a title of temporary possession;—and, 3. Between the real and personal creditors of the proprietor. In all of these cases, “if an addition has been made to land or houses, which cannot be dissevered without destruction or injury to the principal or to the accessory, things so added, though in themselves moveable, become, as fixtures, part of the land. As such they descend to the heir; or, on the expiration of a temporary contract of possession, they accompany the land; and they will also, as part of the subject of security, be available to the holder of an heritable bond;” 1. *Bell's Com.* 649. But, on the other hand, where the accessory may again be separated from the principal, without destruction or injury to either as *distinct* subjects, (which, for instance, may sometimes be done in the case of the machinery of a mill or a steam-engine), the same rule does not apply. In such cases it would seem, 1. That, as between heir and executor, the leaning would be in favour of the former; the principles of accession and destination here combining, and (so far as the matter turns on a *quæstio voluntatis*,) the intention of the proprietor, in erecting the mill, obviously being, that the building and machinery should go together, as *unum quid*. This, by some, has been carried so far as to make even the horse and other *instrumenta mobilia* of a horse-mill; *Dirl. and Stew. v. MILL*; and the buckets, chains, and all other accessory instruments of a going coal, descend to the heir; *Ibid. v. EXECUTRY*. In a recent case, however, it was found by Lord Armadale, as to a thrashing machine, that the “built part” only is to be considered as heritable, and “the machinery” as moveable, and therefore belonging to the executors; *Hyslop's Trustees*, 18th Jan. 1811, *Fac. Coll.*: But this finding was not brought under review of the Court; and its soundness, especially since the judgment in the case of *Arkwright*, *infra*, may perhaps be doubted. 2. As between landlord and tenant, the latter would seem entitled to remove whatever machinery he may have erected for his own convenience, during his temporary occupation, and for the purposes, and as an accessory to his trade; 1. *Bell*, 650-1. 3. As between the different classes of creditors, real and personal, there is perhaps more difficulty; “The question has been decided in one case, by the Court of Session, on the principle of accession of the machinery to the lands, the security of an heritable bond having been held to cover not merely the ground and house, and great moving power, or steam engine, but also the whole of the small machinery essential to the completeness of the mill;” 1. *Bell*, 652. The case here alluded to is that of *Arkwright*, 3d Dec. 1819, *Fac. Coll.*; and the pleadings, which contain a complete argument on the whole of this subject, are highly worthy of perusal. It was there found, that the “carding-machines, drawing-frames, rooving-frames, and mule-jennies” of a cotton mill, though not even nailed or screwed to the fabric of the building, but removable from place to place like furniture, or like ordinary spinning-wheels, were, notwithstanding, carried as accessories. But Mr Bell observes, that though “the authority of such a determination is very great, doubts are still entertained by the bar; and the question is by no means held to be at rest;” 1. *Bell*, 652. It adds, perhaps, to the force of this caution, that the opinions of some of the judges seem to have turned not a little on the point of intention, as being *per se* decisive in this particular case.

the tree: For those annual fruits which require yearly seed and industry, as wheat, barley, &c. are accounted moveable, even before separation, from the moment they are sown or planted; see *Durie, Feb. 2. 1627, Somervel, (Dict. p. 5074.)*; because the seed, and labour in preparing the ground, cannot be said to be employed on the lands for their perpetual use, but for the immediate profit of the possessor²¹. Trees themselves, though they may be called in some sense fruits of the earth, and though most of them require seed and culture at first rearing, are deemed *partes soli*, and so descend to the heir: For they are truly destined, not for the present use of the proprietor or possessor, as industrial fruits are, but for the use of the ground; and may, after they have taken firm root, continue united to it without farther culture, for many successive generations*.

All rights connected with heritable subjects are heritable.

5. All rights connected with or affecting any heritable subject, are also heritable, *ex. gr.* rights of superiority, tithes, patronage, servitude, and the like †. Rights of annualrent, which fall under this class, deserve a more particular consideration. For understanding the nature of these, it must be known, that the taking of interest for the use of money was accounted unlawful, and therefore prohibited by the Canon law, because money is a barren subject, which yields no natural fruits. While the authority of that law continued, those who could not apply themselves to commerce, manufactures, husbandry, or some such method of improving their stock, bethought themselves of a way of eluding this prohibition, by purchasing with their money rights of annualrent, that is, rights constituted by infestment upon lands, by which the lands contained in the right were charged with the yearly payment of a certain sum, or as it was called *annualrent*, to the purchaser, redeemable by the granter upon repayment of the purchase money: But as the granter of the right came under no obligation to repay that sum, he could not be compelled to redeem. By this expedient, that profit which the law did not allow to be taken directly was made by money indirectly; under the notion, that the purchase of a yearly annualrent on land, was not the taking of interest for the use of money, but the acquiring of a feudal right. These annuities, or rights of annualrent, are used frequently at this day in several

* A proprietor of an entailed estate sold the wood on his estate, but died before the whole was cut. The price of that part which had been cut before his death was found to belong to his executors. See *Fac. Coll. and Sel. Dec., June 24. 1761, Macleod, Dict. p. 5436*²².

† See as to a seat in a church, *Fac. Coll. July 9. 1760, Watson, Dict. p. 5431.*²³

²¹ Contrary, however, to this principle,—where grass seeds have been sown down with corn, the executor is not entitled to the crop of hay produced in the succeeding year, but merely to the first year's pasturage after cutting down the white crop; *Kilk. Kames, Rem. Dec. Clerk Home, and Falc., 7th Dec. 1744, Sinclair, Dict. p. 5421; Fac. Coll., 10th Feb. 1796, Dict. p. 5446; Fac. Coll., 19th Nov. 1816, Marquis of Tweeddale.* In this last case, could they have considered the question open, the Court seem to have been inclined to pronounce a different judgment; but they "felt it too late to shake or disturb the cases already decided."

²² It would seem that, in an unentailed estate, the whole price would belong to the executor. It is laid down, *infr. § 17.*, that a sale of the entire estate, though resting on a minute not yet carried into execution, would operate in favour of the executor: and why should there be a different result as to a partial sale? In the case of an entail, however, the heir in possession can only "cut woods, or dispose of them, if ripe for cutting, under this reservation, that the cutting must cease with his life;" *2. Bell's Com. 40.* And the next substitute, not being bound for his deeds, is entitled to oppose the implement of any contract which extends beyond his life. In this way, "what is uncut at his death is properly *pars soli*, descendible, as part of the entailed estate, to the next substitute;" *Bell, ibid.*

²³ See this case noticed *infr. Tit. 6. § 11. in not.*

several Popish countries, where interest is not allowed but in mercantile cases, and they are called in the French law, *hypothèques*. Even after the Reformation, when the prohibition of the Canon law was no longer of force in Scotland, these rights continued in use for more than a century, with this small variation in the style, that the debtor, who was still taken bound to infest the creditor in a yearly sum out of his lands corresponding to the legal interest of the capital, became personally obliged, not only to repay the current interest, but the principal sum also, in the special case, that the creditor should choose to make requisition of the debt due to him, rather than to retain the heritable security: But now these rights have been, for about a century past, changed by our style into the form of proper bonds, by which the debtor is personally obliged to repay both principal sum and interest, and, for the creditor's farther security, is bound to infest him in the special annual-rent payable forth of the lands. All rights constituted by either of these forms, are heritable; and generally in judging what rights are heritable, the matter of the right is attended to more than its form. If the matter be feudal, or connected with land, the right, though not made real by seisin, goes to the heir. Thus, naked charters, or dispositions of the property or superiority of lands, or heritable bonds, though seisin has not proceeded on them, are heritable; because they are all rights of, or securities upon land; and the proprietor or creditor may complete them by seisin when he shall think proper*. But where the creditor cannot, by the style of the clause of infestment, take present seisin, but must wait for the existence of a condition, or of a day, *ex. gr.* if he is not empowered to take seisin unless the debtor shall fail to make payment against a determinate day, the debt continues moveable, till the obligation to infest is purified by the existence of that day, and the debtor's failure; because till then it is not in the creditor's power to affect or charge the lands with the debt, *Kames*, 10. (*Fisher*, Feb. 1718, *Dicr.* p. 5516.).

6. Titles of honour, and offices, when they are granted to continue after the death of the patentee, are descendible to the heir, not to executors; *first*, because they are indivisible rights, and consequently must belong to the proper heir; *2dly*, because they were originally feudal: And to this day, titles of honour, though they be no longer connected with land, are granted as an ornament and support to the patentee and his family, and therefore must go to the representative of the family. Rights which have a *tractus futuri temporis* are also heritable. These are rights of such a nature that they cannot be at once paid or fulfilled by the debtor, but continue for a number of years, and carry a yearly profit to the creditor while they subsist, without relation to any capital sum or stock, *ex. gr.* a yearly annuity or pension for a certain term of years. Such rights are heritable, though they should have no connection with land; *first*, because by the annual profits arising from them, they have a degree of resemblance to feudal rights; *2dly*, because no right goes to executors, but what may be instantly demanded by them from the debtor, upon the creditor's death; for the office of executor goes no farther than to gather in all the funds of the deceased instantly payable, in order to their distribution among the parties having interest in the moveable succession, *Fac. Coll.* i. 39, (DICT.

Titles of honour, and rights which have a *tractus futuri temporis*.

* So found in the case of an heritable bond, "though the creditor died before the term of payment;" *Kilk.* 8th Dec. 1738, *Menzies*, *Dicr.* p. 5519.

Things properly
moveable.

(Dict. p. 5476.) ; so that admitting such rights not to be heritable *ex sua natura*, the heir is the only person who can take them. Leases of land are heritable, as to succession, both as they have a tract of future time, and as they are temporary rights affecting land, to which our statutes have given, in certain respects, the effect of real rights of land : Yet leases have been always moveable as to the fisk, and so fall under escheat, *Tit. 5. § 61.*

7. On the other hand, whatever hath no resemblance to a feudal right, and produces no annual fruits, is moveable. By this rule, cash, plate, bullion, jewels, pictures, books, corns, cattle, instruments of tillage, and household stuffs, are all moveable subjects ; and ships, even of the largest size, with their whole furniture. Arrears of whatever kind, incurred by the debtor previously to the death of the creditor, not only arrears of interest due on a moveable bond, or bond of annuity, but those that arise from a lease*, or an heritable bond, or other security on land, are moveable ; for as they are already payable, and yield no annual profits to the creditor by being unpaid, law considers them as cash destined for his present use : So that the moveable nature of the debt or subject secured, which is the arrears, prevails over the nature of the security, which is undoubtedly heritable ; for executors may recover the arrears due upon a right of annualrent, by a real action of pointing the ground. Whether the arrears due upon casualties of superiority are moveable, is not quite so clear. The opinion of *Stair, B. 2. T. 4. § 10.* followed by *Bankton*, seems attended with the fewest difficulties, *viz.* that these arrears, where a declarator is necessary for completing a right to them, continue united to the superiority, and consequently descend to the heir, as part of the superiority, till they be separated from it, either by the sentence of a judge ascertaining the amount of them, or by the superior's voluntary conveyance. This opinion too is supported by some ancient decisions, and by a later one, *July 11. 1673, Faa.* (Dict. p. 5449.). But, on the other part, it was adjudged, *Jan. 28. 1671, Keir.* (Dict. p. 5448.), that the arrears of liferent-escheat, which is, without doubt, a casualty requiring declarator, were moveable, though the donatory had not established or ascertained them by any sentence in his own lifetime ; and it is hard to assign a reason why the arrears of liferent-escheat ought to be distinguished from those of non-entry, or the other casualties which require declarator. All arrears of feu-duties were, by a long uniform practice, accounted moveable ; for feu-duties are not casualties of superiority, but a fixed sum, declared by the feu-charter itself to be due annually by the vassal : And since it was never doubted, that the arrears of rent due by a tenant before the death of the landlord, belong to the landlord's executor, the arrears of feu-duty, which is truly the rent reserved out of the lands by the superior to himself, must, on his death, go to his executors. It was for some time thought, that these arrears descended to the superior's heir, because feu-duties are inseparable from the right of superiority itself ; and upon that medium it was adjudged, *Kames, 14. (Wilson, July 29. 1718, Dict. p. 5455.)*, that the payment of them was a burden on the vassal's heir : But though it be true, that the right to current and future feu-duties due to the superior be properly united to the superiority, yet past arrears are as truly disjoined from the right of superiority itself, as the arrears due upon an heritable bond are distinct from

* See the doctrine as to division of rents between heir and executor discussed, *infra*, *Tit. 9. § 64*, and *65* :

from the right of the bond. It was therefore adjudged, *Tinw.* (not extant) June 25. 1755, *Martin**, agreeably both to the more ancient practice, and to the nature of the subject, that the arrears of feu-duty descend, as a moveable subject, to the superior's executors †.

8. It is a fixed point, that sums employed by a merchant upon trade are moveable, because they are not secured upon land, nor yield any regular yearly profit to the adventurer. On the contrary, the stock itself is frequently lost. All writers are also agreed, on the same principle, that the sums sunk by private copartners into a joint stock are moveable. And, indeed, the shares of proprietors in any public company or corporation, constituted either by statute or patent, and the shares of partners in a private society, are precisely of the same nature as to this question, and therefore ought to be governed by the same rules²³. It can admit of no doubt, that the dividends declared previously to the death of the proprietor or copartner, are moveable; for they are arrears in the most proper sense; and as to future profits, these are neither fixed as to the yearly amount, nor as to their duration; and, besides, they are accessories to a capital, viz. the company-stock, contrary to the nature of rights which have a tract of future time; *Forbes*, July 25. 1710, *Murray*, (DICT. p. 5478); July 1. 1735, *Dalbrymple*, (DICT. p. 5478 †.)²⁴.

9. Debts, called in the Roman law *nomina debitorum*, when they contain no clause of interest, *ex. gr.* debts due on promissory-note or account, are moveable; because money, the subject of them, is moveable; and because they are neither secured upon land, nor yield any annual profits to the creditor. Debts, in which interest is expressly stipulated, bear either a clause for seisin in lands, or a bare personal obligation upon the borrower, without any reference to land. The first kind has been already considered. In explaining the doctrine of personal bonds, a distinction must be made between our former and our present law; nor do all personal bonds fall under any one rule. Personal bonds bearing interest were, by a general rule of our ancient law, accounted heritable, as *quasi feuda*, because by the fixed yearly profits arising from them, they bore some degree of resemblance to rights properly feudal. But as such bonds were indubitably moveable of their own nature, and did not carry the distinguishing character of rights having a tract of future time, since they could be cleared off at once, *supr.* § 6., therefore,

VOL. I.

3 Q

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* Reported by Kames, *Sel. Decis.* NO. 88. DICT. p. 5457.

† An apprising, and the whole sums contained in it, (principal, annualrents, accumulated sum and annualrents on it, or accessories thereto), belong to the heir, though the appriser die within the legal; *Kilk.* NO. 3. *voce* ADJUDICATION AND APPRISING, *Ramsay*, DICT. p. 5538. The same rule is applied to adjudications; *Fac. Coll. Jan.* 16. 1786, *Baikie*, DICT. p. 5545; *Ibid.* July 1. 1794, *Ryder*, DICT. p. 5549. A previous judgment to the same purpose, *Dec.* 14. 1769, *Willock, &c.* DICT. p. 5539, was reversed in the House of Lords, *March* 30. 1772, DICT. p. 5544.; but this reversal appears to have proceeded on specialties. See note under the case of *Baikie*.

‡ Sums invested in the funds of Government have also been found moveable; *Fac. Coll. Dec.* 23. 1791, *Hog*, DICT. p. 5479.

²³ 2. *Bell's Comm.* 4, 5.

²⁴ The stock of a company, though consisting partially, or even entirely of heritable property, is, in questions of succession, held to be moveable; *Fac. Coll. Murrays*, 5th Feb. 1805, DICT. v. HERITABLE AND MOVEABLE, App. NO. 4.; *Fac. Coll. Corse, &c.*, 16th Dec. 1802, DICT. *ut supr.*, App. NO. 2.; *Sime*, 1st March 1804, DICT. *ut supr.* App. NO. 3.; 2. *Bell's Comm.* 4. So also, on the other hand, debts due by a company, although constituted by bonds bearing interest, or secured on land, are considered as moveable, in all questions as to the succession of a deceased partner; *Fac. Coll. Young*, 27th Jan. 1790, DICT. p. 5495.

Sums employed in trade. Stock of public and private copartners.

Personal bonds, when moveable, and when heritable. Bills, moveable.

in every case where the creditor himself considered the sum as moveable, it was judged unreasonable to adhere to a rule which was not truly founded in the nature of the right. Hence, because a creditor, who had lent money on a bond payable against a determinate day, was presumed to have an intention of turning his bond into cash at that day, the bond was deemed moveable till the term of payment; and this obtained, though the bond had carried interest from its date, if the term of payment of the interest was postponed till the term at which the bond itself was taken payable; because the clause of interest was presumed in that case to be inserted, barely that the money might not lie useless in the mean time, but not with a view to make the sum heritable, *Feb. 26. 1629, Douglas, (Dict. p. 5504.)**. But if the bond was so conceived as to make the term of payment of the interest prior to the term of payment of the bond, the sum descended to the heir, if the creditor survived the period at which the interest fell first due, though he died before the principal sum was payable; because he was, after the first term of payment of the interest, presently entitled to a yearly profit on his bond, which was accounted sufficient to make the bond heritable; *Stair, July 31. 1666, Gordon, (Dict. p. 5505.)*; *Harc. 348, (Ramsay, Dec. 20. 1682, Dict. p. 4234.)*. Where the term of payment of a bond was made at a distant or uncertain day, the bond was accounted heritable even before that term, because the distance, or the uncertainty of the term of payment, afforded evidence that the creditor intended from the beginning to employ his money for a number of years together at interest; *Durie, Jan. 15. 1628, Falconer, (Dict. p. 5465.)*; *Dirl. 39. (Gray, July 13. 1666, Dict. p. 3629.)*. It obtained universally by our ancient law, that all personal bonds were heritable after the term of payment of the capital, because the creditor, if he did not then call for his money, was presumed to have taken up a resolution to let it remain some time with his debtor, for a yearly profit²⁵. Debts which carried interest, not from the force of any clause in the obligation, but *ex lege*, as bills, claims of relief, &c. were moveable, *Durie, July 10. 1628, Cant, (Dict. p. 5564.)*; because where interest is due, not from covenant, but from the nature of the subject, or the force of statute, it is not the creditor who creates the interest, but the law itself, which considers not so much the raising of a yearly profit on the subject, as the equity of the case; and indeed bills were calculated merely to supply the place of cash in commercial matters, and not to bring any annual profit to the creditor.

Personal bonds bearing interest, are moveable as to succession, but heritable as to the fisk and rights of husband and wife.

10. For enlarging the fund for the provision of younger children, all sums contained in contracts or obligations carrying a clause of interest, were declared, by 1641, *C. 57.*, to belong to the bairns and next of kin of the deceased; and this statute, as it fell under the act rescissory of Charles II., was revived by 1661, *C. 32*. But these bonds, though they now descend to executors, and so are moveable as to succession, still continue heritable by the said statute, in respect, *first*, of the fisk, and, *2dly*, of the rights of husband and wife²⁵. By *fiscus*, the Romans understood the crown-revenue; and by

* Same found, *Kilk. NO. 5. voce HERITABLE AND MOVEABLE, Kames, Rem. Decis. and D. Falc. Nov. 22. 1748, Dict. p. 5506*; *Fac. Coll. July 9. 1765, Stewart, Dict. p. 5510.*

²⁵ A bond of corroboration bearing a clause of interest, and the granter having survived the term of payment, it was found heritable *quoad* his widow's *jus relictæ*, even where the original obligation had been found to be moveable: *Ross, &c. 14th Nov. 1816, Fac. Coll.*

by the word *fisk* in this statute, is meant the crown's right to the moveable estate of persons denounced rebels on letters of horning; which right is by the act declared not to extend to such bonds bearing interest as are due to the rebel. As to the second, the sense of the act is, that a widow, though she be entitled to a legal provision out of the husband's moveable estate, upon the dissolution of the marriage by his death, in consequence of the communion of goods, hath no claim to any part of the bonds bearing interest which were due to him. And, *è converso*, though the husband hath, in virtue of that communion, a right to a proportion of all his wife's funds which are simply moveable, he has no right to the bonds due to her which carry interest; as to which, his claim is limited to the interest which either had arisen on them before the marriage, or which hath arisen or shall arise standing the marriage; because, by that clause in the act, such bonds are declared to continue heritable as to husband and wife. Yet if a wife obtain from her husband an obligation for her annuity, in case of his predecease, containing a clause of interest, that clause is presumed to be inserted, rather as a spur to make the debtor punctual in his payments, than with a view of raising interest on the sum itself; and therefore, if she should marry again, the second husband would be entitled, *jure mariti*, to the arrears of the annuity incurred before the second marriage, notwithstanding they were constituted by an obligation containing a clause of interest, *Feb. 23. 1739, Dunlop*, stated in *Folio Dict. i. 384*, at bottom, (*Dict. p. 5770.*)

11. If the creditor in a bond takes it payable to himself, his heirs, and executors, the bond descends to executors solely, though, by the form of words, it is made payable both to heirs and executors. Nay, though it be granted to his heirs, without mentioning executors, the right devolves not on the proper heir, though heirs are mentioned, but on the executors, who are not mentioned; both because the act 1661 is express, that all bonds shall go to executors, if they be not secluded, and because the word *heir*, when taken in a large sense, is a generic term, which comprehends every person who is to succeed by law in any right after the death of the proprietor or creditor; and since bonds are by that statute declared moveable as to succession, the executor, who is *hæres in mobilibus*, is considered as the person to whom such bond is taken payable. The case is different, where a bond is taken to heirs-male, or to a series of heirs, whether male or female, one after another; for the destination of such bond secludes executors as necessarily as if they had been secluded in the most explicit words*.

12. From the rule, That obligations having a clause of interest descend to executors, the act 1661 excepts, *first*, Bonds containing a clause of infestment; because such clause plainly discovers the creditor's intention to constitute with his money a feudal right on land. Under this exception may be included even personal bonds which contain an assignation to an heritable subject for the creditor's farther security, *Falc. ii. 84.*, (*Fraser's Trustees, July 12. 1749, Dict. p. 5491.*); for such deed, being a proper conveyance of an heritable subject, is as truly heritable as the subject conveyed †.

2dly,

* A bond of provision granted by a father to his daughter, "or the heirs of her body, or her assignees *respective*," whom failing, to certain heirs named, was found moveable in the person of the daughter, and transmissible by testament; *Falc. June 5. 1745, Duff's, Dict. p. 5429.*

† The same judgment was given where the subject conveyed in security was a right of tack; *Fac. Coll. Dec. 5. 1794, Watson, Dict. p. 731.*

Bond payable to the creditor and his heirs and executors, is moveable.

Bonds containing a clause of infestment, and bonds excluding executors, are heritable.

Book II.

What if these last be conveyed to an assignee, his heirs and executors, or simply to an assignee and his heirs.

2dly, Bonds excluding executors are excepted from that act; because there also the creditor himself points out by the destination that the sum shall go to his heir²⁶. If, in a conveyance of a bond secluding executors, the creditor exclude also the assignee's executors, the bond continues, without all doubt, heritable in the person of the assignee; and, on the other hand, when such bond is conveyed to an assignee, his heirs and executors, the secluding clause in the original bond flies off, and the sum becomes moveable, *Fount. June 17. 1680, Sandilands*, marked in *Folio Dict. i. 369.*, (Dict. p. 5498.); for in both cases the assignee's design is clearly pointed out by the manner in which he directs the conveyance to be drawn. But the question is thought more doubtful where the assignation is taken to the assignee and his heirs. On the one hand, it may be affirmed, that the bond continues in that case heritable in the person of the assignee; because the excepting words of the act are unlimited, that all bonds secluding executors are heritable, without leaving room to distinguish whether the bond does or does not continue with the original creditor; and consequently, that the exception must refer to the instrument of debt, the bond itself, and not to the assignation. Yet the contrary opinion appears more probable, that the secluding clause in the bond loses its force by the assignation, and that the bond afterwards returns to the general moveable condition of bonds; for as a bond taken to the creditor's heir descends to executors, so must the assignation of a bond when taken in the same way. Besides the exception in the act 1661 proceeds not from the nature of the debt, bonds secluding executors being as truly moveable in their nature as other bonds, but from the destination of the creditor; and though every creditor is entitled by law to settle his own succession, his destination cannot be construed to regulate that of his assignee, over which he has no power²⁷. In a late case, where a bond secluding executors had been assigned by the creditor to his eldest son, and his heirs, but without an exclusion of his son's executors, the court waded deciding the general point; but, in the special case before them, they gave judgment for the son's heirs against his executors, because the bond was assigned by the creditor to his eldest son or heir, *Falc. i. 215. (Kennedy, 17th Nov. 1747, Dict. p. 5501.)*²⁸. A bond secluding executors, which is carried from the original creditor not to an assignee by a conveyance *inter vivos*, but to an heir of provision by service, continues heritable in the person of the heir; for where one makes provision for his heir, he is understood to make it, not for the first heir only, but for a succession of heirs, as long as the settlement is not altered, according to the rule, *Haeres haeredis mei est haeres meus, L. 194. De reg. jur.; Kames, 53.* (Dict.

²⁶ See the case of *Ross, 4th July 1809, Fac. Coll.*, where will be found much valuable matter as to this class of bonds.

²⁷ In the case of *Ross, not. 26 h. p.* it was held by a majority of the Court, that bonds secluding executors "were given to the heir, not merely in virtue of the special destination contained in them, but from their being held to be heritable *sua natura*;"—that they were accordingly incapable of being carried off from the heir by simple words of bequest in a Scots testament:—and that being thus, in the strictest sense, heritable by the law of Scotland, and the question what is, or is not heritable property, being necessarily to be decided by the *lex rei sitæ*, they were equally incapable of being carried by an English testament.

²⁸ The Court seems in this case to have been moved by several specialties. See *Kilkerran's report, Dict. p. 5499*; and another by *Elchies, v. HERITABLE AND MOVEABLE, NO. 13.*

(DICT. p. 3224.). From the whole of this doctrine, it may be observed, that though all subjects immoveable by the Roman law are heritable by ours, yet some things are moveable by that law which are not moveable with us, *ex. gr.* certain kinds of bonds, rights bearing a tract of future time, &c. Another instance of this will occur afterwards in the case of heirship moveables.

13. The act 1661 is limited to obligations containing clauses of interest. Obligations therefore carrying interest without the stipulation of parties, seeing there is no provision concerning these in the statute, must continue what they were by the former law. On this ground, all subjects bearing interest *ex lege*, because they were moveable by the ancient law, *supr.* § 9., are to this day moveable in all respects, *i. e.* not only as to heir and executor, but as to the fisk, husband and widow, *Edg. Dec.* 18. 1724, *Leslie*, (DICT. p. 5768.). And even as to bonds bearing interest, which are the proper subject of the act, the legislature's only intention was, to make certain kinds of them moveable in point of succession, which had been formerly heritable, in order to a more equitable distribution of the effects of deceased persons among their issue; but by no means to alter the nature of any subject which had been moveable by our ancient law, so as to make it heritable in any respect. When therefore it is declared by the act, that bonds shall continue in their former condition, not to fall under the single escheat or under the *jus mariti aut relictæ*, it can be understood only of such bonds as had been by the old law heritable, and were then made moveable as to succession, *ex. gr.* bonds after the term of payment, or even before that term, if they were taken payable at a distant day. But as bonds were, in the general case, accounted simply moveable before the act 1661 till the term of payment was past, and so fell under the single escheat, and under the *jus mariti aut relictæ*, they still continue moveable in all these respects, notwithstanding the statute, *Falc.* ii. 14. (*Kilk. and Kames, Rem. Dec. Meuse*, DICT. p. 5506.).

All obligations bearing interest *ex lege*, are moveable.

14. Rights originally moveable may become heritable, *first*, By the destination of the proprietor or creditor, who hath the right of settling any part of his estate in whatever manner he pleases, provided he shall properly discover his intention. He may therefore destine personal bonds due to himself, or his jewels, paintings, plate, books, or even cash lying in his repositories, so as they may descend to his heir²⁹. The bare appointment of the proprietor to lay out his money on land, if it be clearly expressed, makes the sum heritable, though he should happen to die without taking any step to carry his appointment into execution. Thus, a sum which was destined, by a marriage-contract, to be employed on land for the heir of the marriage, was adjudged to be heritable, though it was never so employed, *Durie, Jan.* 19. 1637, *Robertson*, (DICT. p. 5489.). One's collecting of timber, stone, slate, or other materials³⁰, for raising any fabric, or edifice, is not sufficient to make

Moveable rights become heritable, 1st, By, destination; 2dly, By a supervening heritable security.

VOL. I.

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* While a house was building, the proprietor died; and a set of doors and windows, and other articles destined for the house, (and lying within it,) but not yet made part of the building, were found to be heritable; *Fac. Coll. Feb.* 25. 1783, *Johnston, &c.* DICT. p. 5443.

²⁹ See a case arising out of such a destination; *Veitch, 25th May* 1808, *Fac. Coll. DICT. v. SERVICE AND CONFIRMATION, App. NO.* 4.

³⁰ It is laid down by *Stewart, Ans. v. EXECUTORS*, "that the materials for building of a house, if the work was begun, should belong to the heir; for so they seem to be destined. But if the building were not begun, the man might have changed his mind, and his executors would have the better claim to the materials." See, to the same effect, 2. *Bell's Comm.* 3. The report of *Johnston's case, supr. not. **, seems likewise to support the general principle, that in all cases "where the will of the proprietor, so strongly marked, is actually carrying into execution by overt acts, such *animus* should have full effect."

them heritable *destinatione*, till they be united to the surface of the ground by actual building; but where the roof or walls of an house are thrown down, to be immediately rebuilt, the slates and other materials disjoined from it continue heritable notwithstanding their temporary disjunction, *arg. L. 18. § 1. De act. empt.* A moveable debt becomes heritable, *2dly*, By the supervening of an heritable security, *ex. gr.* by the creditor's accepting an heritable bond in corroboration of the debt, or by his obtaining a decree of adjudication upon it*. In these instances the alteration made in the quality of the right, in point of succession, proceeds not from any presumed intention in the creditor; for he only means to secure his payment, without any view of altering his succession; but from the nature of the additional security, which, because it affects land, is heritable; and this heritable bond, or adjudication, though it be but an accessory to the moveable right, yet, as it is the preferable and stronger right of the two, has the effect to draw the moveable, which is the inferior right, after it. For this reason, when a creditor in a personal bond executes a summons of adjudication against his debtor, the debt becomes not heritable from the citation, though if the creditor discover an intention, at any step of the process, to alter the nature of the debt, he does it at that period; but it continues in its first moveable state till pronouncing the decree of adjudication, by which an heritable right is constituted, *Fount. Jan. 16. 1700, Carnegie, (Dict. p. 5537.)*; and that is the deed of the judge, not of the creditor. This however is not to be so understood, as if the supervening security must be made real by seisin before the moveable debt become heritable: So soon as the creditor accepts the heritable bond, or obtains decree of adjudication, the moveable debt changes its nature, though seisin should not follow either on the bond or decree³².

15. By

* *Fac. Coll. Dec. 20. 1797, Davidson, Dict. p. 5597.*; or by its being declared a real burden upon land; *Fac. Coll. Dec. 4. 1789, Lamont, Dict. p. 5494.* But the same consequence will not follow, if the heritable security is taken, or the adjudication led, not by the creditor himself, but by a tutor or factor *loco tutoris*, for his behoof; *Fac. Coll. Jan. 31. 1793, Ross, Dict. p. 5545; Ibid. March 6. 1798, Lady Christian Graham, &c. Dict. p. 5599*³¹.

It was long ago found, in the case of a process of sale and ranking brought by an apparent heir, that the decree of sale was to be considered as an adjudication for behoof of the whole creditors, and that therefore it was unnecessary for the creditors to lead separate adjudications; *Kilk. NO. 4. voce Ranking and Sale, Maxwell against Irvine and Rome, Dict. p. 13349.* The same indulgence has since been extended to the case of ranking and sale at the instance of creditors; *Act of Sederunt, July 11. 1794, § 15.* But in neither of these cases, it is thought, can such constructive adjudication have any effect on the succession of the creditors. See *Fac. Coll. Dec. 14. 1796, Henderson, Dict. p. 5534.*

³¹ *Vid. supr. B. 1. t. 7. § 18. not.*²¹³; also *2. Bell's Comm. 10.* It was hence argued, in a recent case, that as "in the case of a fatuous creditor, the leading of an adjudication to secure his funds would not alter the legal succession; from parity of reason, where the debtor is fatuous, nothing which is done against his estate can be allowed to alter the nature of his legal succession." But the Court held, that adjudication led upon a moveable debt due by a fatuous person did render the debt heritable as to the succession of the debtor; *Spalding, 15th May 1811, Fac. Coll.*

³² By the law of Scotland, this has place as to the whole debt, though the heritable security be inadequate to the realizing of more than a portion: and, therefore, should the greater part be ultimately recovered from the debtor's personal effects, it would, notwithstanding, still be held heritable as to succession: *Munro, 21st May 1794, Fac. Coll. Dict. p. 5548.* This holds where the creditor dies domiciled in Scotland, though the personal effects of the debtor should have been situate in a foreign country; the succession in this case being still regulated by the Scots law; *Ibid.* Where the creditor dies domiciled abroad, and where the debt is partly recovered from property not subject to the law of Scotland, "the only mode by which questions of this sort can be extricated is, by giving effect to the law of each country, with regard to that part of the debt recovered from property situated within its jurisdiction;" *Campbell, 5th March 1805, Fac. Coll., Dict. v. HERITABLE AND MOVEABLE, No. 5.*

Book II.

Effect of requisition, or of a charge or decree for payment.

cure the payment of it. Neither does the demand of payment by a creditor in an heritable debt, though made judicially, afford any presumption of an intention to change the nature of it to moveable, but rather to employ his money when recovered from the present debtor, upon another heritable security more to his liking, or perhaps on a purchase of land³⁴. Thus a decree obtained by a creditor against his debtor, though a decree carries in it a demand of payment, has not the effect to render the debt moveable, *Fount. Feb. 27. 1712, Scot.* (DICT. p. 3362.). Thus also, a sum belonging to the wife not falling under the *jus mariti, ex. gr.* a bond bearing interest, continues heritable as to the husband, notwithstanding a demand of payment from the debtor, *Mack. § 7. h. t. **. Nay, though the wife should not only demand, but actually recover payment, there is no alteration in the heritable nature of the bond *quoad maritum*, unless a presumption shall arise, from her allowing the husband to apply the sum to his own use, or from other circumstances, that she truly intended a donation to him. In the same manner, though a charge used by a creditor on letters of horning, is the strongest indication of his purpose to recover payment; yet, by our latest decisions, neither a charge upon a bond that had been made heritable by adjudication, *Nov. 12. 1728, Reids*, (DICT. p. 5585.), nor on a bond secluding executors, *July 24. 1705, Gray*, (DICT. p. 5581.), was adjudged to alter the heritable nature of these sums; see *Falc. ii. 234.*, (*Douglas, Nov. 28. 1751, DICT. p. 5576.*) †. It must however be acknowledged, that, by our former law, requisition used by a creditor upon a right of wadset, or infestment of annualrent, made the sum in the right moveable, which before was heritable. This seems to have proceeded from the effect then given to requisition, of extinguishing the real security of the wadsetter or annualrenter; for while this was held for law, the debt, which after requisition was secured barely by a personal obligation against the granter and his heirs, could be no longer heritable: And though this doctrine ought to have been rejected, after custom had introduced a clause in those rights, that notwithstanding the requisition, the real security should still subsist, it continued long to be received as the law of Scotland, *St. B. 2. Tit. 1. § 4.*; *Mack. § 6. h. t.* But our late lawyers, more agreeably to the nature of requisition, and to the above-quoted decisions, are of opinion that such rights continue heritable even after requisition³⁵.

17. In applying the doctrine of this title to the sale of lands, a distinction ought to be made between voluntary and judicial sales. Where the proprietor sells voluntarily either a land estate, or a right affecting it for a determinate price; that price, as a moveable subject, descends to the seller's executors, if it be not heritably secured; because by the proprietor's own deed, in turning the right of his lands

* So the Court decided, where the demand had been made by action against the debtor with the wife's consent; *Fac. Coll. Dec. 2. 1792, Mackenzie*, DICT. p. 5778.

† A creditor secured by decree of adjudication having entered into a submission for ascertaining the amount of partial payments, and the true state of the debt,—a decree-arbitral pronounced for the balance, and a charge of horning given by a factor, was found to render the sums moveable; *Fac. Coll. June 17. 1761, Dame Elizabeth Mackenzie*, DICT. p. 5432.

³⁴ A bond secluding executors was found to remain heritable, "notwithstanding a process for payment at the creditor's instance, and notwithstanding an assignation in trust, under back bond to hold count for what should be recovered, or retrocess the creditor, his heirs and assignees;" *Monro, 29th July 1735, Elchies, v. HERITABLE AND MOVEABLE, No. 2.*

³⁵ After a wadset has been declared dissolved, the redemption money lying in the hands of the consignee appointed by the Court is moveable, and so attachable, not by inhibition, but by arrestment; *Stormonth, 24th May 1814, Fac. Coll.*

Price of a land estate voluntarily sold is moveable; but when judicially sold, the interest of real creditors remains heritably secured till they are paid.

lands into money upon a moveable security, he alters the nature of that fund from heritable to moveable³⁶. And it is not a formal disposition only, but even a minute of sale which has this effect; for the minute contains a conveyance of the lands to the purchaser *de presenti*, and the taking of security for the price in a moveable form makes the price moveable. As a consequence of this, though the seller should die before the execution of the minute³⁷, the price will descend to his executors, *Fount. Dec. 22. 1704, Cheislie*, (DICT. p. 5531.); while, at the same time, his heir may be compelled to fulfil the deed of his ancestor, and grant an ample right of the lands to the purchaser. But in judicial sales of bankrupt estates, the interest in the estate belonging to the real creditors continues to affect it, and consequently is heritable, not only after the decree of sale, but even after the purchaser is infest; for the sale which is intended for the benefit of these real creditors, cannot alter the nature of their several rights, by extinguishing the heritable security which they had before on the lands. Though therefore the lands themselves, that is, the property of them, belongs to the purchaser in virtue of his decret of sale, and infestment upon it; yet seeing the securities of the real creditors remain as a charge upon them, the shares of the price to which these real creditors are entitled continue heritable till their debts are discharged, or conveyed by them to the purchaser upon payment; and consequently they descend upon their death, in so far as their rights still subsist, not to their executors but to their heirs.—See more on the subject of this title, *Tit. 8. § 23.* and *Tit. 12. § 45.*

18. We may here shortly mention the general characters which distinguish heritable and moveable subjects, reserving the particular explication of them to their proper titles. *First*, Heritable subjects, or those which descend to the heir, may be attached at the suit of creditors by inhibition and adjudication only; whereas, the proper diligences for securing or recovering moveables are arrestment and poinding. *2dly*, Heritable rights or subjects cannot, by the law of Scotland, be conveyed by any deed of a testamentary nature: They can be transmitted only by deeds *inter vivos*, in the

Heritage is attachable only by inhibition and adjudication, conveyable only by disposition *inter vivos*, and requires a service to vest the heir.

VOL. I.

3 s

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³⁶ Accordingly, the creditor in an heritable bond, having, in virtue of special powers, brought the estate to sale for payment of the bond, the debt was found to have thereby been rendered moveable, though the creditor had died before the term of payment of the price; *Wilson, 29th Nov. 1808, Fac. Coll.*

The converse of the doctrine in the text also holds true: For, as the price of a land estate descends to the seller's executors, so, on the other hand, where the obligation to pay is merely personal, payment must be made by the executors of the purchaser. Thus, where one, (under a mere personal obligation,) purchases lands burdened with real debts, and afterwards dies before payment, his heir, if obliged to discharge the encumbrance, is entitled to relief against the executor; it being, in every case, "the nature of the obligation granted for the price of the lands," and not the character of the debts as affecting the real subject, "that regulates the relief, *quoad* these debts, "between the purchaser's heir and executor;" *Arbuthnot, 23d June 1779, Fac. Coll. DICT. p. 5225.* So also, (the obligation to pay being still personal,) where the purchaser is allowed, by the contract of sale, to retain a part of the price expressly "for the purpose of paying an heritable debt to that amount, secured on the said lands," it is the executor who must pay the sum thus retained; *Macnicol, 16th June 1814, Fac. Coll.* It is different where the price, or part of it, is declared a *real* burden affecting the lands; because here the purposed destination of the purchaser is made quite evident. Accordingly, in such a case, though the purchaser had taken no infestment on the disposition declaring part of the price a real burden, and though he had granted a personal bond for the amount, the executor, against whom this bond was put in force, was found entitled to relief against the heir; *Macnicol, 31st Jan. 1816, Fac. Coll.*

³⁷ More correctly, before execution of the obligation come under by the minute. The minute itself had here been executed; *i. e.* it had been subscribed and completed in due form.

form of a disposition: Whereas moveables may be bequeathed by testament, or by any deed which sufficiently discovers the owner's intention to transmit the property of them. *3dly*, Heritage cannot be conveyed, even by disposition, if the proprietor be on deathbed; whereas moveables may be made over or bequeathed in the last moments of life. *4thly*, The heir completes his titles to heritable subjects by a service as heir to his deceased ancestor; whereas the right of moveables is vested in executors by confirmation. It hath been already observed, that moveables fall under the *jus mariti* and *relictæ*, whereas heritage falls under neither.

Some subjects of a mixed nature partaking both of heritable and moveable.

19. There are particular subjects which may be called *mixed*, because they partake, in different respects, both of the nature of heritable and moveable. Personal bonds bearing interest, are, by 1661, *C. 32.*, declared moveable in respect of succession, but continue heritable as to the interests of fisk, husband and wife, *supr.* § 10. Such bonds are of a mixed nature in another view; for though they were accounted, even after the act 1661, heritable in every respect but that of succession, it was declared by act 51. of that year, that all obligations, even heritable, having a clause of interest, might, if no seisin had followed on them, be affected, not only by apprising, which was a diligence competent only against heritable subjects, but by arrestment, which is proper to moveables, *B. 3. T. 6. § 6.* Other sums may be heritable as to the creditor, but moveable as to the debtor, so that the debtor's executors are liable in payment, without recourse against the heir. This happens in every case where the creditor, who is absolute master of his own property, destines a moveable sum for his heir; for though such destination makes the sum heritable as to him: yet as the debtor, over whose succession the creditor hath no power, cannot be affected by the deed of the creditor, the sum continues moveable as to the debtor, and consequently the burden of payment falls upon the debtor's executors, as if the creditor had made no such destination, *Stair, July 25. 1662, Naemith*, (*DICT. p. 5483*). It appears to be a necessary consequence of this, that the destination of a creditor, who takes a bond to his heirs excluding executors ought not to alter the nature of the debt with respect to the debtor; nevertheless our Supreme Court demurred upon that question, *Feb. 22. 1681, La. Marg. Cunningham*, (*DICT. p. 5522.*). As a proprietor may transmit his property in any channel he thinks proper, he may also burden it at pleasure; and consequently he can throw the weight of any debt due by himself either on his heir or his executor. Thus, one who has borrowed a sum on a moveable bond, may, by a proper deed, burden his heir *primo loco* with the payment of it, by which the heir becomes the proper debtor, though the executors, and not the heir of the creditor, will have right to the bond; and this is an instance of a sum, moveable as to the creditor, and heritable as to the debtor. The arrears of feu-duty were never accounted a mixed subject, heritable as to the superior, and moveable as to the vassal; for the decision, *Kames, 14, (Wilson against Bell and Grant, July 29. 1718, DICT. p. 5455.)*, which, contrary to the doctrine formerly received, adjudged the payment of them to be a burden upon the vassal's heir, truly proceeded on the supposition, that the right of them descended to the superior's heir; and as by a posterior decision, *Tinw.* (not extant), *June 25. 1755, Martin**, these arrears were declared

* See this case reported by Lord Kames, *DICT. p. 5457.*

clared to be moveable as to the superior, they must now be moveable in all respects, *vid. supr.* § 7. A bond taken payable to a creditor, and failing him to a substitute, is, in the opinion of some lawyers, *Steu. Answ. v. Substitute*, so far moveable, that the creditor may bequeath it by testament: and nevertheless it is incontestably heritable as to succession: for it descends not to executors; and the substitute upon failure of the creditor must complete his titles to it by a service as heir of provision, which is a method of making up titles proper to heritage. But it appears to be a rule more agreeable both to the analogy of law, and to practice, that nothing which goes to the heir by service can be carried off to his prejudice, either by a deed on deathbed, or of a testamentary nature. —But of this see more below, *B. 3. T. 8. § 20.*

20. All questions, whether a subject be heritable or moveable in point of succession? must be determined according to the condition of it at the time of the ancestor's death. If it was then heritable, it belongs to the heir, because at that period the right of succeeding to the subject opened to him; if moveable, it must for the same reason descend to executors, without regard to any alterations that may have affected the subject in the intermediate period between the death of the ancestor and the competition*. But in judging, whether a subject be heritable or moveable in regard to the *jus mariti*? the time of entering into the marriage must be attended to; for if the subject fell at that point of time under the *jus mariti*, nothing that happens afterwards can alter its nature. Thus, as bonds before their term of payment are moveable in all respects, the husband acquires by the marriage a right to all the bonds due to the wife, the term of payment of which was not then come; and having once acquired it, in consequence of the wife's assignation implied in marriage, that assignation will support the husband's right to them, even after the term of payment is elapsed †.

The condition of the subject at the ancestor's death determines the succession, as does its condition at the time of the marriage, its nature with regard to husband and wife.

TIT. III.

Of the Constitution of Heritable Rights by Charter and Seisin.

AFTER having given a general view of the nature and properties of heritable and moveable rights, they fall now to be handled separately, beginning with the first, as the most eminent branch of the division.

2. Some writers pretend to have discovered traces of the feudal plan among the ancient Romans, who frequently sent colonies into the conquered countries, and divided the lands among the planters: But those grants were made, not to young robust men in consideration of future military services, but to worn-out veterans, as a reward of their past; neither had the obligations laid upon the grantees any resemblance to feudal ones. There was

Origin of the feudal system.

* So the Court found; *Fac. Coll. May 21. 1794, Munro, Dict. p. 5548.*

† Accordingly, where a bond of provision to a daughter was made payable at the term next ensuing the first of two events, her majority or marriage, and to bear interest from that term; on her marriage during minority, the bond was held to fall under *jus mariti*; *Fac. Coll. Nov. 30. 1773, Cowan and Company, Dict. p. 9142.*

was something which approaches nearer to the nature of feus, in the policy used by the Emperor Alexander Severus, who bestowed the countries taken from the enemy, on the *duces* and *milites limitanei*, to continue the property of them and their heirs as long as they could defend their right; with an express restriction, that they should not be at liberty to sell the lands, *Lampr. in vita Al. Severi*. Others have attempted to deduce the origin of feus from the usages of the ancient Germans and Gauls. The governors or rulers of the former exercised authority in their several boroughs and villages, with a right of jurisdiction over the inhabitants. Every ruler had a number of *comites* to attend upon and assist him, to whom different stations were assigned at the ruler's pleasure: And there was a mighty emulation among those *comites*, which should be most in his ruler's favour, and among the rulers, which of them should have the greatest number of brave men for his followers, *Tacit. De mor. Germ.* We are told by Cæsar, *De bell. Gal. Lib. 3.*, that the nobler Gauls had attendants, called in their language *soldurii*, who were so entirely devoted to their leaders, that, in their greatest dangers and misfortunes, they either underwent cheerfully a like fate with them, or voluntarily put an end to their own lives. But this devotion was in no respect feudal; for it was not annexed to lands, which is the only foundation of the proper feudal service. It seems to have borne a greater affinity to our Highland clanships, where the assiduous and unreserved obedience paid to the chiefs, proceeds, not from feudal obligations, or oaths of fidelity, but from the affection which all of the same tribe have to their head or chieftain; and as the first inhabitants of Britain agreed wonderfully in their customs and dispositions with their neighbours the Gauls, these voluntary dependencies were probably common to both nations.

Most probably derived from the Lombards.

3. We may therefore conclude, that it was the Longobards, or Lombards, who laid the foundations, or at least made the most early improvements of the feudal system. That people having early left their original seats in Pomerania, Magdeburgh, and the other northern parts of Germany, after many migrations seized upon Lombardy about the year 568. The better to secure their conquests, they found it their interest to divide among the chief captains the conquered country, reserving the superiority to their King; and these captains, after retaining what was proper for themselves, proportioned the residue among a lower rank of officers, under the conditions of fidelity and military service. These grants were bestowed by the King, or his principal commanders, as a sort of pay to their followers, in place of the *stipendia* given by the Romans to their soldiers in money. The policy of this system was so universally approved of in that military age, that even after an end was put to the reign of the Lombards in Italy, it was adopted by Charles the Great, and by most of all the princes of Europe. It may nevertheless be observed, that the word *feudum* is not once to be found, either in the laws of the Longobards, or even in the constitutions of Charlemagne; in all which, *beneficium* is the term uniformly used to express a feudal grant.

Feudal grants were originally precarious. Nature of the more ancient feus.

4. Feudal grants were originally precarious, revocable at the pleasure of the granter, *L. 1. Feud. T. 1. § 1.*; and when afterwards they came to be given for life, the feu returned upon the vassal's death to the superior. During this period, the feudal law may be considered as in its infancy; for while these grants lasted only for life, no casualties or fruits of superiority could arise to the overlord

overlord from the death of the vassal, or from the entry or marriage of the heir. In a short time, heirs of the first degree in the right line of descendents, *i. e.* immediate sons, were admitted to the succession of their father's feu; not the eldest, but at first he on whom the superior was pleased to bestow it, and afterwards all of them equally, *d. L. 1. Feud. T. 1. § 1.*; but where those sons happened to die before the father, the first vassal, grandsons were excluded. The Emperor Conrad the Salick, the more effectually to engage his vassals to his interest, in an expedition which he took to Rome, *anno 1026*, to repress the Guelf faction, *Otho Frising, L. 6. C. 29.*, extended feudal succession to grandsons; and even in the collateral line to brothers, where the right of the feu had been formerly in their common father, *L. 5. Feud. T. 1.* But in a *feudum novum*, or a feu originally acquired by a vassal who died without issue, his brother could not succeed, without an express clause in the grant, *L. 1. Feud. T. 1. § 2. and T. 20.*

5. Though the feudal law had early received considerable improvements from the many constitutions, both of the Lombard Kings, and of Charles the Great and his successors; yet the rules which governed feudal grants were but little known, as these constitutions were not, for a considerable time after their enactment, collected into one body. The Emperor Frederick, surnamed *Barbarossa*, therefore, directed an institute of the feudal system, and usages, to be compiled about the year 1170, which was entitled, *Consuetudines feudorum*, and has been subjoined to Justinian's Novels, in almost all the editions of the body of the Roman law. The first book of those usages was written by Gerardus Niger; the second, from the first to the twenty-fifth title, as the books are placed in the vulgar editions, by Obertus de Otho, both consuls of Milan; what remains of the second book was composed by an author whose name hath not reached to the present times; the third book is lost; the fourth was restored by Cujacius from the libraries of Ardizanus and Alvarotus, two Lombard lawyers; and the fifth was collected by the same Cujacius from the Imperial constitutions, which had been omitted in the former books.

6. This collection, in so far as it is the work of private hands, does not appear to have been confirmed by the express authority of any of the German Emperors, *Bitsch. De feud. in procem.* But it is generally agreed, that it had their approbation, and was accounted the customary feudal law of all the countries subject to the empire, except in a few particulars, where it appears from the collection itself that different or contrary usages were observed in different cities or districts. But no other state hath acknowledged the authority of those written usages. Every kingdom hath formed to itself such a scheme of feudal rules as best agreed with the genius of its own constitution; and the system received in Scotland differs so widely from the *Consuetudines feudorum* in the most important articles, that whoever studies them as common feudal rules, without duly attending to the special usages of our own country, will wish to unlearn them when he comes to practise in our courts. In the deciding therefore of feudal questions, every state is to have regard, in the first place, to its own statutes or customs; and in inquiring into the ancient feudal usages of Scotland, notable assistance may be had from the books of the Majesty. If there is neither statute nor custom to direct us, we ought to consult the practice of neighbouring countries, if the genius of their law suits with ours, as to the subject under debate; and should the question still remain dubious, we may properly enough

Consuetudines feudorum.

Every nation has its own system of feudal laws.

have recourse to the written feudal usages, as a treatise which contains the outlines at least, or general principles, on which all nations that have adopted the feudal plan have proceeded in forming their systems. No light can be received from ancient histories or writings, at what period the feudal law was first introduced into Scotland; for in the confusions into which our kingdom was thrown by its constant wars with England, its oldest records and monuments were either destroyed or carried off to that kingdom; so that there is perhaps no Scottish charter now extant dated before the year 1095 or 1096. The laws ascribed by historians to Kenneth II. & III. carry no just characters of feudal; and besides they are of uncertain credit: But it can hardly admit of doubt, that the feudal law must have been received in this country, at least as early as the laws which, in Skene's collection, are ascribed to Malcolm Mackenneth, but are now generally believed to have been enacted by Malcolm Canmore, who began to reign *anno* 1056 or 1057.

Meaning of the term *feu*.

7. *Feudum*, or *feodum*, is by Obertus derived from *fides*, *L. 2. Feud. T. 3. § 1.* But besides that that vocable sounds too harsh to have a Latin original, it is not likely that the Germans, who are held to be the first founders of the feudal system, would have borrowed that term from the language of another country. The opinion therefore of Craig, *Lib. 1. Dieg. 9. § 3.*, seems preferable, that it is a primitive German vocable, denoting a reward due for services; in confirmation of which, he observes, that the old French word *feaux*, signified those who received a determinate allowance from the masters whom they served; and to this day the wages due to servants are with us called *fees*; see *Spelm. Gloss. v. Feodum*. The word *feudum*, or, as we commonly translate it, *fee*, or *feu*, denotes sometimes the subject itself granted to the vassal. Thus it is said, that a vassal falls from his fee, or that a fee opens to the superior. But it is more properly used to express the right resulting from the feudal contract: And in this acceptation it may be defined, a gratuitous right to the property of lands, made under the conditions of fealty and military service, to be performed to the granter by the grantee, the radical right of the lands still remaining in the granter. It is called a *gratuitous right*, because feus were not, by their first condition, to be purchased with money; but those granted by the lower rank of vassals soon became the subject of commerce, equally with any moveable subject, *L. 1. Feud. T. 1. § ult. & T. 16.* Under lands, in this definition, are included all heritable subjects so connected with land that they are deemed part of it, as houses, fishings, mills, jurisdictions, patronages, &c. And nothing can be granted in feu or fee but heritable subjects: For moveables, because they seldom yield any profits otherwise than by being themselves destroyed, cannot be the subject of feus; since, where things perish in the use, the superior must by that extinction lose the right arising from his superiority. Though feus were at first granted solely in consideration of military service, yet services of a civil or religious kind were early substituted in the room of military, at the pleasure of the granter, *L. 2. Feud. 2. § 2.* And in the course of time services of all kinds were entirely dispensed with in some feudal tenures. But where this happens, the vassal who is exempted from services, must in their place be liable in the payment, either of a yearly sum of money, or of a quantity of grain, as in feu-holdings, or of something else, however inconsiderable, *cx. gr.* a penny money, a rose, a pair of spurs, merely in acknowledgment

knowledge of the superior's right, as in blanch holdings. In the definition, the radical right is said still to remain in the granter, because there is not in any feudal grant an absolute or total cession of the subjects disposed made by the granter: He reserves to himself, or rather the law reserves for him, an interest in it; of which more *infr.* § 10.

8. Allodial subjects, or subjects granted *in alode*, are opposed to feus. But by these are understood lands or goods enjoyed by the owner independent of any superior, or without any feudal homage. The word is probably derived from *a*, *privativa*, and *leode*, or *leude*, a German vocable used in the middle ages for vassal, or *fidelis*, (from whence the term *liege* probably draws its origin), *Leg. Wisig. L. 4. T. 5. C. 5; Addit. Leg. Burgund. 1. T. 14. § 2.; Du Cange, Gloss. v. Leudes*; for the proprietor of allodial subjects is laid under no obligations of fidelity to a superior. In this sense all subjects, immoveable as well as moveable, were allodial by the civil law; for the Romans were strangers to the rights of superiority. And even where the feudal system is received, all moveable goods are allodial. But no lands are so, unless the granter, who makes them over, expressly exempt the grantee from the obligations of homage and fealty, and renounce the rights of superiority which were formerly competent to him against the vassal, in the subject of the grant. Frequent instances of this exemption occurred in the first ages of feus; and the Roman Pontiffs have boasted (though without just grounds) of extensive allodial grants of lands made to their predecessors, by King Pepin and his son Charles the Great. By the usage of Scotland no lands are allodial, except, *first*, those of the King's own property; *2dly*, the superiorities which the Sovereign, as the fountain of feudal rights, reserves to himself in the property-lands of his subjects; and, *3dly*, churches, church-yards, manses, and glebes, the right of which is fully perfected by the designation of the presbytery, without any grant by the crown.

9. Feudal rights are to be strictly interpreted; *first*, Because the feudal law is customary, which consists in fact; and therefore ought not to be extended farther than the particular usage which constitutes it. *2dly*, Because feus are, or at least were originally, donations which ought to be confined within the precise bounds of the grant. Upon this principle, Craig asserts, *Lib. 1. Dieg. 10. § 7.*, that feus, where heirs are not expressly mentioned, return upon the vassal's death to the superior. But this carries the matter too far; for all feudal grants were, even without the mention of heirs, accounted hereditary as early as the reign of the Emperor Lotharius, in so far as concerned the descendents from the first vassal, *L. 1. Feud. T. 19, 20.* Some interpreters have affirmed, that feus granted by Sovereigns are *bonæ fidei*, because the favours of princes ought to receive a liberal interpretation. But it is as unreasonable to presume against the sovereign as against any subject, that he has given more than is expressed in his grant: And indeed feus granted by the crown are still more strictly interpreted by our customs, than those that are granted by subjects, in the article of warrandice, *infr.* § 27.

10. The granter of the feudal right is called *the superior*; because he stands in an higher rank than the grantee, who is styled *the vassal*. Craig, *Lib. 1. Dieg. 10. § 17.*, makes the word *vassal* a diminutive of *vassus*, which, he tells us, denoted in the middle ages a baron who held his lands immediately of the sovereign. But it is evident, from all the writers of that period, that *vassus* signified in general an attendant; and was applied indiscriminately with *vassallus*,

Allodial subjects opposed to feudal.

Feudal rights must be strictly interpreted.

Meaning of the word Vassal, *Dominium directum et utile.*

sallus, not to the King's vassals only, but to those of counts, abbots, and others of inferior rank, *Du Cange, v. Vassus et Vassallus*. Cujacius and Spelman fetch its origin, with greater probability, from the German *ghessel*, companion or fellow. The interest which the superior retains to himself in all feudal grants is called *dominium directum*, because it is the highest and most eminent right; and that which the vassal acquires goes under the name of *dominium utile*, as being subordinate to the other, and indeed the most profitable of the two, since the vassal enjoys the whole fruits which grow out of the subject. This distinction was contrived by feudal writers, that they might be able to give different names to the different interests which the superior and vassal have in the same subject. Cujacius disapproves of the distinction, on this ground, that there cannot be two *domini* of the same subject *in solidum*: He therefore affirms, that the vassal's right is a *jus utendi, fruendi*, a species of usufruct, which may be transmitted to heirs; which is not quite repugnant to the notion of usufruct, as it is sometimes understood in the Roman law, *L. 14. C. De usufr.*; and that the right of property remains with the superior, and consists in the homages and services due to him by the vassal, *Cuj. De feud. L. 1. in pr.*, and *L. 3. Tit. 1.* But our writers, particularly Craig, *Lib. 1. Dieg. 9. § 9. et seqq.*, have, after the example of the old feudists, expressed the interest retained by the superior by *dominium directum*, or, as we translate it, the superiority; and that conferred on the vassal, by *dominium utile*, or the property. The word *fee* is often used promiscuously for both.

Essential and natural characters of feus.

11. Some things are essential to a feu, some natural, and others only accidental. No feu can subsist without its essential characters; and upon the least alteration made in these, the right must resolve into one of another kind. Thus, in all feudal grants, the right of superiority remains necessarily with the granter, at the same time that the property is transferred to the vassal; and the vassal must acknowledge this superiority by some service or payment. Writing also and seisin are essential to the completing of a feudal grant. By the *naturalia feudi* is understood whatever arises from the nature of the contract; and so is deemed part of it, though it should not be expressly provided for. In this they differ from the essentials of a feu, that they may receive an alteration from the will of the parties, without destroying the feudal contract; but such will must be properly expressed in the grant or contract itself. Thus the obligation which lies on the granter of a feu to warrant it to the grantee, is implied in the grant, though it should not be stipulated: Notwithstanding which, that obligation may be discharged by an express clause to that purpose. In like manner, the casualties incident to feudal tenures are understood to make part of the feudal contract; insomuch that a provision expressly dispensing with them, when formed only in the terms of a personal obligation by the superior, hath no force against his singular successors, *Dec. 11. 1731, La. Castlehill*, stated in (*Folio*) *Dict. ii. 69. (Dict. p. 10275.)*. It may however be observed, that certain articles might have been natural to a feu originally, which are not so at present. Thus all feudal tenures were presumed to be military, if the grant did not express another manner of holding, till the late act, 20° Geo. II. abolishing tenures by ward-holding. Thus also females were originally excluded in every case from feudal succession, as unfit for military service; and even after they were admitted to it, where they were called by a special clause in the grant, all fees were presumed to be male, in which there

there was no destination in favour of females, *L. 1. Feud. Tit. 8. § 1.* Nevertheless feus are by the latter usage of this kingdom, and of the greatest part of Europe, presumed to be female, if they are not specially provided to heirs-male. As to the *accidentalia feudi*, the force of those depends entirely on the convention of parties; and so they are never presumed, but must be the subject of express stipulation. All provisions therefore in the feudal contract, which are neither of the essence, nor of the nature of a feu, fall under this last class.

12. It may not be improper barely to mention in this place the divisions of feus most used in our practice, with their general properties, which will be more fully explained afterwards. Feus are either real or personal. Personal are such as die either with the granter or grantee. Craig, *Lib. 1. Dieg. 10. § 11.*, numbers, among personal feus, the offices of chancellor, treasurer, register, &c. which, like the *feuda soldatæ*, or *custodiæ*, mentioned in the books of the feus, *Lib. 2. Tit. 10. &c.* were considered as feus of an annual pension, paid for services to be performed by the persons employed in those several offices. But, as Craig himself admits, *Lib. 1. Dieg. 10. § 23.*, the term thus understood is used improperly; for nothing ought to be distinguished by the name of a feu, of which it cannot be said that the fiar died last seised in the subject, and that it descends after his decease to his heir. Fees are also divided into *ligia* and *non ligia*. In a liege-fee, the vassal owes absolute fidelity to his immediate overlord without exception, which is the case of all fees granted by sovereigns; whereas, in those granted by subjects, a reservation is always implied with respect to the highest or liege lord; since no subject can at his pleasure throw off the obedience he owes to his sovereign. The obligations resulting from a liege-fee affect not only the lands granted by the sovereign, but the whole other estate of the vassal; for the person of the vassal is, in that kind of fee, subjected to the liege-lord; and, of consequence, all his estate, even his moveables *quæ sequuntur personam*. And hence our forfeitures have had their rise; the effect of which, when they fall upon a delinquency against the liege-lord, reaches to the offender's moveable estate as well as to his heritable. The written feudal usages divided feus into *antiqua* and *nova*, which nearly tallies with the division received by us, into heritage and conquest. *Feudum antiquum*, or heritage, is that in which one succeeds to his father, grandfather or other ancestor. A *feudum novum*, or conquest, comes not by succession, but hath its place only in him who first acquires it, by purchase, gift, or other singular title. We shall afterwards find this division of use in the doctrines of the Courtesy and Succession. Fees are also either divisible or indivisible. All fees are of their own nature divisible; and the right of property competent to the vassal actually admits of a division in our law, in the case either of female succession, or of an express clause in the investiture, dividing the succession of the property in certain events. But the right of superiority cannot be divided without the vassal's consent; for the superior has no power to make his vassal's condition worse, by putting him to the expence of double entries, or by increasing the number of the persons to whom the feudal services are due. Lastly, Fees are either redeemable or irredeemable. A fee is irredeemable when the right of it is vested absolutely, and without any condition of return, in the grantee. A redeemable fee is granted, either by the proprietor or by the judge, in security of a debt due by the granter or

TITLE III.
*Accidentalia
 feudi.*

Divisions of
 feus according
 to the practice
 of Scotland.

BOOK II.

It is competent to every proprietor to dispose of his estate in fee, unless naturally disqualified or debarred by statute.

debtor, which therefore returns to him when he redeems it by clearing off the debt, within the time prescribed either by law, or by the tenor of the right.

13. Every proprietor of an heritable subject, who has the free administration of his estate, and is not debarred by statute, or by the nature of his grant, may dispose of it in fee to another; for the right of property, where it is absolute, necessarily includes a power in the owner, not only to use the subject by himself, but to make it over to whom he will. Nay, a vassal, though he has barely the *dominium utile*, may make over his property to a subvassal by a subaltern right, and thereby raise a *dominium directum* in himself, subordinate to that which is in his superior; and so *in infinitum*. The vassal who thus subfeus is called the subvassal's *immediate* superior, because the subvassal's lands are holden immediately of him; and he of whom the granter holds, gets the name of the subvassal's *mediate* superior, because a superior intervenes between the subvassal and him. It is so true that a power of alienation is inherent in the right of property, that though the vassal's charter should declare, by a special clause, that any alienation of the lands to be executed by him, without making the first offer to the superior, should be null; yet the vassal's grant of the feu to another would be valid, if the clause contains no irritancy of the vassal's right upon counteracting that restriction, *Fac. Coll.* ii. 4. (*Stirling, Dict.* p. 2342.) *³⁷. A factor or steward, as he is not the proprietor, cannot, without special powers, make a grant of his constituent's estate, even for a just price; since commissions of factory import a power barely to manage, not to alienate. Wives must have the consent of their husbands, and minors that of their curators, in order to give a legal force to their grants. Idiots, pupils, and others incapable of consent, cannot alienate. Professed or known Papists are, by 1695, C. 26., debarred from granting gratuitous deeds to the prejudice of their heirs: And it is enacted, that all their deeds shall be held gratuitous, unless the granter, writer, and witnesses, shall concur in deposing to the satisfaction of the judge, that they were onerous †. A woman who has been divorced

* See a case where the efficacy of such a clause was discussed, *Preston against Creditors of Earl of Dundonald*, ultimately decided *Marsh* 6. 1805, *Dict.* App. 1. *voce* PERSONAL AND REAL, NO. 2.

† This, and other statutes against Papists, were ratified, revived, and confirmed, by act 1700, c. 3.; as to which, and the subsequent mitigation of these statutory penalties and disabilities, *vide infra*, § 16. and note subjoined.

³⁷ "This doctrine," (that without a clause of irritancy, the condition will not be availing) "seems to be questionable. Lord Stair entertains no doubt of the efficiency of the clause of pre-emption, or of the more sweeping clause *de non alienando*, by force of the provision merely;" 1. *Bell's Comm.* 27. Mr Bell proceeds in a note: "The authority which Erskine relies on for this doctrine, is the case of *Sir William Stirling v. Johnston*, 4th Jan. 1757. Of that case I may observe that it is very inaccurately reported. The superior who claimed the right had not made up titles to the superiority till after the vassal had sold the lands. But the circumstance on which chiefly the question turned is entirely omitted. The question arose with a stranger purchaser, and the condition was not inserted in the sasine. I hold this decision therefore to determine only this point, that in whatever manner the condition becomes effectual, it can have no operation against purchasers, unless it shall be entered on the record." These remarks of Mr Bell seem to be fully supported by the view taken by the Court in the case of *Preston*, *supr. not.* *. The law may perhaps be correctly stated thus: 1. The condition without any clause of irritancy will qualify the right, so long as that right remains personal. 2. It will qualify even the feudal right, provided it enter the infestment, and so appear on the record: But, 3. Where it is omitted in the infestment, and so does not appear in the record, it will not affect third parties; neither purchasers nor creditors adjudgers bringing the estate to sale; 1. *Bell's Comm.* 27—29.

forced for adultery, and afterwards cohabits or intermarries with the adulterer, cannot convey any heritable right, in favour of the issue of that marriage, so as to exclude her other lawful heirs, 1592, C. 119.

14. Though every one may dispose of his own heritage, or grant it in fee to another, under the exceptions above written; yet there are certain heritable subjects, which, though they are not of their own nature exempted from commerce, yet cannot be alienated by the proprietor; such as, *first*, The annexed property of the Crown, which is declared unalienable by the Sovereign, unless the causes of the grant be previously inquired into, and approved of by Parliament, 1455, C. 41. Annexations were introduced to restrain the unbounded liberality of our Kings in bestowing the Crown-lands upon favourites, and effectually to secure the Sovereign in a patrimony sufficient for the support of the royal dignity. If the King should alienate contrary to the directions of the statute, he is entitled to resume the grant, and enter summarily into the possession, without the necessity of bringing any action of reduction against the grantee. But this salutary institution was rendered in a great measure ineffectual by several acts of dissolution, authorising our kings to set the annexed property in feu-farm, provided the feu-duty should not be lower than the just avail of the lands, 1457, C. 71.; 1540, C. 116.; 1584, C. 6. &c.: And to prevent questions concerning the extent of that avail, it is, by the last of the said statutes, declared to be the duty to which the lands are, or may justly be, retoured for the new extent. In this the improvement of the revenue was speciously pretended, but it turned out greatly to its detriment: For, by the gradual increase of the nominal value of our coin, an ounce of silver, which was worth no more in 1457, when the crown-lands were first allowed to be feued, than about 8s. Scots, or 8d. Sterling, has gradually risen in nominal value to 64s. Scots, or 5s. 4d. Sterling; so that though our Kings still receive from the vassals of the annexed lands a feu-duty equal in name to the retoured duty by the new extent, that feu-duty is not above the eighth part of the retoured duty in the weight of silver. Those who have a curiosity to know the history of the gradual debasing of our coin, may easily collect it from the *Assisa Dav. De pond. et mens.* preserved in Skene's Collection, p. 161.; *St. Dav. II. C. 46.*; *St. Rob. III. C. 22.*; 1424, C. 23.; 1451, C. 33.; 1483, C. 93.; 1581, C. 106., N° 2.; 1597, C. 249.; 1696, C. 38.; and Mr Ruddiman's preface to *Diplom. Scot.* p. 61. to 84. Notwithstanding the above acts of general dissolution, by which those who had obtained grants of any part of the annexed lands in feu from the Sovereign after his majority, without diminution of the rental, seemed absolutely secure in their purchases; yet all alienations of the annexed property, even in feu-farm, granted without a previous dissolution in Parliament, (by which must be understood a dissolution of the special lands contained in the grant), are declared null, though they should be ratified by a subsequent statute, 1597, C. 233., and also all those granted by any other holding than feu-farm, except those that had been made in the way of excambion by James VI. or his predecessors, where the lands granted to them were equal in value to those which they had given in exchange, 1597, C. 234.

15. A *second* class of heritable rights which cannot be alienated, is that of entailed lands, granted under the express condition that they should not be sold; which must be subject to the prohibition in

TITLE III.

Annexed property of the Crown cannot be alienated unless under certain statutory limitations.

Other heritable rights which cannot be alienated.

BOOK II.

in the grant. *3dly, Res alienæ*, things which belong not to the granter, cannot be disposed of by him. No alienation therefore of an estate, *in hereditate jacente*, made by an apparent heir before his entry, is valid; at least its effect is suspended till the granter completes his titles by service and retour; because, till that period, such estate belongs neither to the apparent heir, nor indeed to any one else, *vid. supr. T. 1. § 4*. Leases for a longer term than three years, of the rents of the revenues of boroughs-royal, whether proceeding from lands, fishings, mills, or other subjects yielding a yearly profit, are prohibited by 1491, C. 36. But there is no limitation with respect to leases or feus of the lands or other subjects themselves; which therefore may be still lawfully granted by the magistrates and common council, as if the statute had not been enacted, *Fac. Coll. i. 22.*, (*Dean, &c. Dict. p. 2522.*)*. For no more was meant by the Legislature, than to forbid the granting of leases to those who thereby became entitled to the tack-duties payable by the proper tacksmen or tenants; and who, under the pretence of their undertaking the hazard of the deficiencies or bankruptcies of these tacksmen, frequently obtained such general leases at a considerable undervalue: Which sort seems to have been known in our law as early as *Iter Camerarii, C. 39. § 37*.

What persons are incapable of receiving a feudal grant.

16. Those only who could perform military service, were, by the first and genuine feudal rules, capable of receiving or holding a feudal grant; but women, and indeed every one not disabled by special statute, were soon admitted to acquire and to enjoy feus. Even fatuous or furious persons and infants, though they cannot grant, may receive feudal rights by donation, or succeed to them as heirs to their ancestors. By the *Consuetudines feudorum*, neither Jews, heretics, nor excommunicated persons, could enjoy feudal rights. By the ancient law of this kingdom, all who were excommunicated became thereby disqualified from holding or possessing the lands of which they were before the proprietors, either directly or under cover, 1609, C. 3.; and by the act immediately following, C. 4., the directors of the chancery were prohibited to issue precepts on appraisings deduced by them: and the treasurer, to receive resignations or grant confirmations in their favour. These acts were ratified under some limitations, 1661, C. 25. But all civil penalties consequent on excommunication are now taken off by 1690, C. 28. Papists are, by a posterior act, 1700, C. 3., disabled from purchasing by voluntary disposition any heritable right, either in their own name or that of third persons. Every grant executed in breach of this statute is declared void; and the property of the subject is declared to remain with the seller, as if there had been no grant, without subjecting him to any action at the suit of the Popish purchaser for recovering the price. But this irritancy has been looked upon as so rigorous, and so contrary to the Christian principles of toleration, that there has hardly been one instance of an attempt to take the benefit of it †. Though one who is attainted

* The same found as to a right of superiority belonging to the burgh; *Fac. Coll. and Kames Sel. Dec., Nov. 18. 1768, Magistrates of Glasgow, Dict. p. 2525*. Magistrates of a burgh of regality have the same power to grant feus of the common good of the burgh; *Kames Sel. Dec. No. 10. Cathie, Dict. p. 2521*.

† Stat. 33. Geo. III. C. 44. (3d June 1793), prescribes a certain form of oath of abjuration and declaration; upon taking and subscribing which, as thereby directed, all persons professing the Roman Catholic religion in Scotland are (§ 1.) relieved from the pains, penalties, and disabilities, imposed, enacted, revived, ratified and confirmed by

ed is incapable of acquiring a feu; yet, by the former practice, a feudal grant made by the sovereign in his favour was effectual to him; because the King was understood, by making the grant, to restore him against the forfeiture: But since the union of the two kingdoms, nothing less than an act of Parliament can enable a person attainted to hold the property of lands. Where a feu is granted to one who is thus disabled, if the disponent was ignorant of the grantee's attainder, the feu returns to himself; but if he knowingly makes a grant to a forfeited person, the fisk takes the subject. Those who are denounced rebels at the horn for civil debts, are not incapable of holding a feu. Lords of Session, and other members of the College of Justice, and all judges or members of any court of justice, are, by 1594, C. 220., prohibited to purchase claims of heritable rights concerning which an action is depending, under the penalty of losing their offices, with all the privileges they enjoy in virtue of them: But, notwithstanding this prohibition, the purchase stands good; the purchaser only incurs the statutory penalty, *Fount. Dec. 20. 1683, Purves*, (Dict. p. 9500.)*. A purchaser of an heritable right from a woman who had been divorced for adultery, and had afterwards married with the adulterer, cannot hold his purchase to the prejudice of the granter's heirs of her first lawful marriage, or of her other heirs whatsoever; who will, notwithstanding such alienation, succeed to the granter's heritage, 1592, C. 119. How far several of the persons mentioned in this section as incapable of receiving a feudal grant are incapable also of succeeding to heritage, is to be explained, *B. 3. T. 10. § 8. et seq.*, where the law of aliens, with respect to heritable rights, will be handled.

17. The feudal right is constituted by charter and seisin. By the first feudal customs of Scotland, there was neither charter nor seisin; and the right was completed by that form which was styled a *proper investiture*. *Investiture* is a feudal term, denoting the manner of constituting feus, from *vestis*, the vassal being, by the investiture, as it were *clothed* with the feu. Thus the French use the words *vêtu*, and *divêtu*, for infest and divested; and the symbols of robes made use of universally in the collation, not only of crowns, but of inferior dignities, as peerages, and other titles of honour, favour this etymology. These robes were, by the ancient usage of this kingdom, immediately after the ceremony of conferring titles of honour, returned to the sheriff, who had performed the investiture in the King's name; and the sheriff, as late as Craig's time, *Lib. 2. Dieg. 2. § 2.*, was entitled to a compounded sum in

Feudal right is constituted by charter and seisin. Ancient investiture proper and improper.

VOL. I.

3 x

their

by the statute 1700, c. 3. cited in the text, and are (§ 7.) "as fully enabled to take by descent, purchase, or otherwise, and to hold, enjoy, alien, settle, and dispose of any real or personal property whatsoever, within that part of Great Britain called Scotland, as any other person or persons whosoever; any thing in the aforesaid act, or in any other act or acts of the Parliament of Scotland, contained or implied to the contrary thereof, in any manner, notwithstanding."

* The common agent, in a process of ranking and sale, cannot lawfully become a purchaser at the judicial sale; *Fac. Coll. March 8. 1793, York-buildings Company*, Dict. p. 13367³⁸. See *A. S. Dec. 25. 1708*.

³⁸ In this case it was decided by the House of Lords, reversing a contrary judgment of the Court of Session, that the common agent could not become a purchaser; 13th May 1795. This judgment went, as has since been judicially observed by the present Lord Chancellor, "upon a great principle applicable to the high as well as the low, that,—as persons in these situations had an opportunity of knowing a great deal more about the subject than others, of which, though honourable men would not, yet men less scrupulous might, take an improper advantage,—persons in such circumstances ought not to be permitted to deal for the property at all;" 4. *Dow*, 390. See also 2. *Bell*, 309, 312.

their place. The ancient form of investiture in lands was extremely simple. The superior himself, who gave the right, delivered the possession to the vassal on the ground of the lands, and in presence of the *pares curiæ*, which of itself perfected the vassal's right. Nor was there any declaration in writing made by the superiors, who in those days could generally use their swords better than their pens. *Curia*, or *curtis*, is the place or court where the superior exercised his jurisdiction over his vassals; and all these vassals, being alike subject to him, and lying under the same obligations to attend his court, were therefore styled *pares curiæ*. Their presence was, by our ancient usage, so essential to a feudal grant, that it was void without it: And they also had a power of judging in most cases that fell under the superior's jurisdiction, whether civil or criminal, from whence the right which we retain to this day, of being tried in criminal prosecutions by a jury of our *pares* or peers, derives its original. If the superior had no other vassal than him to whom he was making the grant, the vassals of the neighbouring superiors were admitted to supply the place of the *pares curiæ*. In the course of time, it was judged reasonable, for better preserving the memory of the grant, that the superior should on the ground of the lands give a declaration of it in writing; and in token of his consent, both he and the *pares curiæ* appended their seals to it. This declaration is called in the books of the feus, *breve testatum*, an attested brief, L. 1. *Feud. T. 2, 3, &c.* and is of the same nature with a charter. When afterwards superiors came to have more frequent avocations, and could not always be present themselves at the investiture, they signed the *breve testatum* in favour of the vassal wherever they happened to be; and at the same time they ordained their bailie to enter the vassal to the possession with all convenient speed; Which new form was styled an *improper investiture*, where the charter granted by the superior was antecedent to, and distinct from the possession that the vassal afterwards received from the bailie in the superior's name.

Traces of the ancient investiture. Udal right of Orkney and Shetland.

18. Craig informs us, *Lib. 2. Diag. 2. § 16.*, that the traces of the old proper investiture, which was performed *unico contextu*, might in his time be perceived in some parts of our highlands, and in the lands bordering upon England, where the practice was retained of giving possession on the ground of the lands, by the symbol of a stone, a staff, or a bundle of grass, without any writing, in presence of the neighbouring inhabitants, who were assumed to fill up the place of the *pares curiæ*. The udal right of the stewartry of Orkney and Shetland is of the same nature. When these islands were first transferred from the crown of Denmark to that of Scotland, the right of their lands was held by natural possession, and might be proved by witnesses, without any title in writing; which had probably been their law formerly, while they were subject to Denmark: And to this day, the lands, the proprietors of which have never applied to the sovereign, or those deriving right from him, for charters, are enjoyed in this manner: But where the right of lands in that stewartry has been once constituted by charter and seisin, the lands must, from that period, be governed by the common feudal rules*; except church-lands whose valuation is no higher than L. 20 Scots, the proprietors of which are allowed, by 1690, C. 32., to enjoy their property by the udal right, without the necessity of renewing their infeftments. Infeftment,

or

* See *Had. March 29. 1624, Sinclair, Dic. p. 16398.*

or *infeudatio*, though in common speech it be only understood of the seisin, or instrument of possession, is, in its proper sense, synonymous with investiture, and comprehends both the charter, by which the superior signifies his will to grant, and the delivery of the possession in consequence of the charter, *Cr. Lib. 2. Diog. 2. § 18.* The word is frequently used for the charter alone, in the *Regiam Majestatem*, and the other old books of our law.

19. By a charter is here understood that writing which contains the grant or transmission of the feudal right to the vassal. It imports not, whether it be executed in the style of a disposition, or of a charter, which differs from the other only in form; or, barely, of a precept of seisin, or procuratory of resignation; for a precept of *Clare constat*, or other precept of seisin, or a bare procuratory of resignation, may supply the place of a charter, because any one of them expresses the present will of the granter to transfer the property. Nay, a disposition, though it should contain a clause obliging the granter to sign a charter, is a valid alienation without any charter following on it; and, on the contrary, a charter, though it should relate to a prior obligation, or though it should bear to be granted agreeably to the conditions contained in a former disposition, is good against the granter, without producing those former deeds. The granter may indeed insist in that case against the vassal to exhibit them, that the effect of the charter may be regulated accordingly; but if they be lost without fraud, the charter is effectual, *St. B. 2. T. 3. § 14. **

20. Charters by subject-superiors are granted either *a me* or *de me*. Charters *a me*, are those which are holden not of the granter himself, but of his superior; and such in an eminent manner are all those that are taken holden of the highest superior, or of the church, or in burghage, where the church or borough are no more than administrators for the King, *St. B. 2. T. 3. § 27. vers. The doubt is.* The words of such charters are, *Tenend. a me de superiore meo*; by which is meant, that the superiority is not reserved to the granter, but is transferred from him to his immediate lawful superior. Seisin, if it proceeds on a charter *a me*, is ineffectual till it be confirmed by the granter's superior; for no lands can be holden of a superior, till he, by some act of his own, shall receive the vassal, or confirm the holding. And it is because charters of this kind require the interposition, not only of the granter, but of his superior, and because vassals were in ancient times publicly received in the superior's court before the *pares curiæ*, that these charters have got the name of *public rights*. A charter *de me*, is that by which the lands are to be holden immediately of the disponer himself, from the words in the charter, *Tenend. de me et successoribus meis*. These rights are sometimes called *base*, from *bas*, lower; because charters holden of the granter are of a kind inferior to those which are holden of the granter's superior; and sometimes *private*; because they may be executed in a latent way, without the knowledge of any other than the granter and his vassal; and consequently, before the establishment of the records, might have been the more easily concealed from singular successors. Charters *de me* are also styled *subaltern*, because they are subordinate to the right which is

Charter.

Charters *a me*
and *de me*.

* Charters, as well as most other legal deeds and instruments, had been anciently written in Latin. During the Usurpation, that custom was discharged by the Commissioners for administration of justice; but by act of sederunt, June 6. 1661, the Court of Session ordained all charters, &c. which had been usually written in Latin, to be continued in the same language as formerly before the year 1652. Crown charters alone are now by custom written in that language.

Book II.

Charters original and by progress.

in the granter himself, in opposition to charters which are either holden of the granter's superior, or confirmed by him. Charters are either original, or by progress. An original charter is that by which the fee is first granted, and it must be the rule for explaining all posterior charters; so that charters by progress are, in dubious clauses, to be interpreted agreeably to the original one; and all clauses in the original charter are, in the judgment of law, implied in charters by progress, if there be no express alteration, *Cr. Lib. 2. Dieg. 2. § 27.* and *Lib. 2. Dieg. 12. § 9.* All subfeus or charters to be holden of the granter, are original; because a new fee is thereby created, which before had no existence. A charter by progress is a renewed disposition or transmission of a fee formerly granted, which proceeds, either on retour or resignation, or confirmation; all which will be considered under their proper heads. Thus, charters by the superior to the heir of his vassal, or by a vassal to a singular successor, to be holden of the granter's superior, or charters of adjudication, are all rights by progress; for they are barely transmissions of a former right. Charters are also divided into voluntary and necessary. Voluntary charters are granted by the superior, of his own free will, without compulsion. A necessary charter, or a charter upon obedience, is that which the law obliges the superior to grant. Thus, where a creditor who adjudges his debtor's lands, gives the superior a charge to receive him as his vassal, the superior is laid under a necessity to give obedience to the charge, and to receive the adjudger by giving him charter and seisin.

Charter begins with the grant-er's name. What if a charter is granted by one not proprietor, but to which the proprietor consents.

21. Charters begin with the name and designation (or addition) of the granter, who is the proprietor of the lands disposed. Where there is an uncertainty in whom the property is vested, the grantee may desire, that, for his security, every one who has a claim to the subject may concur in granting the deed; for though the right can be transmitted only by the true proprietor, yet the concurrence of another who is supposed to have also a title to it, is, without vitiating the charter, held as superfluous, or *pro non adjecto*. It has been disputed, whether a charter be valid which is granted by one who is not truly the owner, but to which the owner subscribes as consenter? Craig's distinction upon this question, between a granter who has no shadow of right, and one who has some appearance of a claim to the subject of the grant, *Lib. 3. Dieg. 1. § 29.*, seems to be without a real difference. It is a more probable opinion, that as the transference of property is grounded on the proprietor's consent, that consent in whatever form adhibited, must have the effect, either of transmitting the property, or at least of creating an obligation against the consenter, on which the grantee may bring an action of adjudication in implement; and that this must hold, though he who takes upon him to grant the charter should not have the least colour of a title. In questions which concern the effect of one's subscribing a deed as consenter, a distinction may reasonably be made, between a right of property in land, and that of a debt or sum of money secured upon land. If one who has a claim of property in an heritable subject, consent to a disposition of that subject granted by a third party, his consent is, in the judgment of law, equivalent to a total conveyance of his claim, or at least to an obligation to grant a conveyance; since, if the consent were not so interpreted, it would be quite elusory. But if one who has a sum secured on lands consent to a disposition granted by another of any lands on which he is secured, his consent imports only, that he is not to use his security to the disturbing of the dis-
ponee

ponee in the possession of his purchase ; but by no means to cut himself off from a personal action against the debtor, or from a real action against any other lands, upon which also his debt may be secured, *Home*, 129. (*Buchan*, Dict. p. 6528.)

22. After the name and designation of the granter, follows that clause in the charter called *the narrative*, or *recital*. In charters granted by the Crown, this clause commonly expresses the merit or services of the grantee, as the cause inductive of the grant, if it be an original charter ; and as these narratives may be false, our sovereigns have always claimed a power of revoking deeds granted on the suggestion of a false narrative. In charters granted by subjects, the cause of granting is also set forth in the narrative, whether it be for a price³⁸, or in implement of a former contract, or a donation, &c. If it bears to be granted for a price, the granter's acknowledgment of the payment, and his discharge of the price consequent thereupon, is full evidence of its being paid ; for in rights granted by subjects, a recital, however false, is presumed true against the granter, who himself asserts the truth of it. Yet if it shall appear that the grantee, after having got the signed charter in his hands, *spe numerandæ pecuniæ*, has fraudulently detained it without paying the price, he is liable *ex dolo*. A charter which proceeds merely from the love and favour which the granter hath for the grantee, is said to be granted for a lucrative or gratuitous cause. If the grant has been made for a price paid, or other valuable consideration, the cause is called *onerous*. To these a third may be added, *viz.* a rational cause, where it appears reasonable for the granter to execute the deed, though he lies under no legal obligation to it. The different effects of each of these as to the disponent, either in questions with the disponent himself, or with his creditors, shall be afterwards explained. If the narrative expresses no cause, *Craig* is of opinion, *Lib. 2. Dieg. 3. § 18.*, that the question, whether the grant be onerous or gratuitous ? may be judged of by the words of alienation. The words *give, grant and dispo*ne, he thinks, import a donation ; but the words *sell and dispo*ne, imply an onerous cause. *Lord Stair*, who favours this distinction, *B. 2. T. 3. § 46.*, affirms, that if no cause be either expressed or implied, the right is to be accounted gratuitous, *B. 2. T. 3. § 14. vers. 1.* An instance of which he gives in a right where the dispositive deed is barely a precept of seisin, without reference to any charter or formal disposition, *ibid. vers. 4.*

23. The next clause is the *dispositive*, beginning with these words, *To have given and granted*, or *To have sold, alienated, and dispo*ned. Here the grantee must be described by his name and designation ; and also the particular subject dispoⁿed, by its special boundaries or marchstones, or by its situation, or other characters, so that it may be distinguished from all others ; for the conveyance of an uncertain subject is inept and ineffectual. In this clause is also inserted by our present style, the order of succession, and the limitations upon the fee, which, by our ancient forms, were inserted in the clause of *Tenendas*. All subjects which fall not under the appellation of *part and pertinent* of that which

Narrative or recital. What faith due to it. Cause of granting onerous, rational, or gratuitous.

Dispositive Clause. Charter of *Novodamus. Quæquidem* of charters.

³⁸ By *stat. 48. Geo. III. c. 149.* an *ad valorem* stamp-duty is, with a few exceptions, imposed upon every "conveyance, whether grant, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim, in, to, out of, or upon, any lands," &c. And it is enacted, § 22. *et seq.*, under various penalties and forfeitures, that "the full purchase or consideration money, which shall be directly or indirectly paid, or secured or agreed to be paid, for the same, shall be truly expressed and set forth in words at length, in or upon the principal or only deed or instrument."

is disposed, must be particularly mentioned in the dispositive clause, in order to their being carried by the grant. Nor is it sufficient for that purpose, that they be specially expressed in any other clause; for the chief intention of the dispositive clause is to mark out and convey to the grantee the whole subjects to which he is to have right by the grant; the other clauses serve for quite different purposes*. In charters by progress, whether granted by the crown or a subject superior, a clause is sometimes subjoined to the dispositive, called *De novo damus*, by which the superior grants *de novo* the subjects, rights, or privileges, therein described. These clauses are commonly inserted, where a vassal, sensible of a defect in his former right, or of heavy burdens chargeable upon it for the casualties remaining due to the superior, applies to have his right renewed by the superior, with a clause of *novodamus*; by which the vassal is effectually secured against the defects of his former right, and against the consequences of all arrears formerly incurred by him. For a charter of *novodamus* is, in the judgment of law, an original right; and an original grant implies a release to the vassal from all burdens affecting the property previously to the date of it. One might imagine, from the words of this clause, that it ought to contain a grant of no subject which had not been made over to the vassal in a former charter; for the expression *de novo damus* seems to import, that the right of that very subject had been formerly made over to the vassal, and that the superior then granted it to him of new; and indeed they are for the most part no more than renewed rights; yet it has been adjudged by repeated decisions, that a charter of *novodamus* may be itself a first grant, as well as the renovation of a former; and that every subject or right expressed in the clause of *novodamus* is deemed to be effectually conveyed to the vassal, though there had been no antecedent title to it in his person; *Stair, 29th, Fount. 28th Feb. 1680, Scot.* (Dict. p. 9339.); *July 14. 1737, Heritors of Spey*, (Dict. p. 9342.) †. In all charters by progress, there is a clause immediately after the dispositive, styled, from its first words, *Quæ quidem*, which expresses who the former vassal was, and in what manner the right was transmitted from him to the granter, whether by resignation, or by what other form of conveyance.

Clauses of *Tenendas* and *Reddendo*.

24. The next clause in a charter is the *Tenendas*, so called from the first words, *Tenend. prædictas terras*; which points out the superior of whom the lands are to be holden, and the particular tenure under which they are enjoyed, whether by blanch-farm, feu-farm, &c. In this clause, the lands disposed are not only repeated, but, for the vassal's greater security, as seems probable, an anxious enumeration is subjoined of several particulars not expressed in the dispositive clause, *with houses, buildings, tofts, crofts, &c.* But this adds nothing to the right of the grantee; for such of the articles as were truly part or pertinent of the lands disposed would have been carried by the charter, though no mention had been made of them, either in the dispositive or any other clause of the charter; and such as were neither part nor pertinent of the subject could not,

* Where a subject was conveyed to one person by the dispositive clause, and warrant given for infesting another by the precept of seisin, the former was found to carry the property; *Fac. Coll. Jan. 27. 1797, Shanks*, Dict. p. 4295.

† See a decision to the same purpose, *Fac. Coll. June 27. 1758, Riddell*, Dict. p. 9346³⁹.

³⁹ It seems incorrect to cite this decision as "to the same purpose." On the contrary, as appears from Kames's report, "it was yielded, that, in the present case, the *novodamus* imported no more but a renovation of the former right; and consequently is *no good title* to the patronage, supposing Lord Herries to have had no "right *ab ante*;" *Sel. Dec.; Dirl.* p. 9346.

by the rule laid down, *supr.* § 23., be carried, though mentioned in the *Tenendas*, since they were not contained in the dispositive clause. The next clause in a charter is the *Reddendo*, which takes its name from the first words of it, *Reddendo inde annuatim*. By this is fixed the nature and extent of the particular service or duty to be performed or paid by the vassal to the superior; for in all feudal tenures, even the least rigorous, some duty or acknowledgment is due by the vassal. Because the clause of *Reddendo* points out the particular duty to which the vassal is subjected, the duty itself frequently gets the name of the *Reddendo* in our law language.

25. After the clause of the *Reddendo*, follows that of warrandice, or warranty, by which the granter becomes obliged, that the subject made over shall be effectual to the vassal, and not evicted from him by any one as having a better or preferable right to it. The obligation of warrandice is, without any special or express clause, implied in all deeds either in a more extended, or in a more limited degree, according to the nature of the deed. In donations, an obligation is implied that the donor shall grant no contrary deed, by which the donation may be rendered ineffectual. But as he who makes over a subject gratuitously, is understood to transfer it barely as it was vested in himself when he made the grant, without disabling himself from fulfilling his former obligations, according to the rule, *L. 149. De reg. jur.*, the obligation of warrandice extends, in such case, neither to past deeds already granted by the donor, nor even to future, where they are necessary, *i. e.* such as the donor may be compelled to fulfil in consequence of an anterior obligation or promise. Where the deed is granted for a cause, onerous indeed, but below the true value of the subject; or where a doubtful right is, by transaction, conveyed for a compounded sum; warrandice is implied, not only against the granter's future deeds, but his past. In sales of land, or in dispositions for a just and adequate price, an obligation is implied against the granter, to warrant the subject, not only against his own acts, whether past or future, but against all defects that may appear to have been in his right to it antecedently to the grant; for an adequate onerous cause implies always absolute warrandice. Nor is it repugnant to this last rule, that in the assignation of a debt, decree, or other personal right, the implied warrandice does not extend to the solvency of the debtor, but barely to the validity of the debt, though the cedent should, at assigning the debt, have received from the assignee the whole sums contained in it; see *Fount. March 4. 1707, Riddel*, (*Dict.* p. 16615); for the assignee's loss in such case arises not from any defect in the debt or decree assigned, but from the insolvency or disability of the debtor. And this is also agreeable to the Roman law, by which the granter of the conveyance of a debt was bound in no higher warrandice than *debitum subesse*, that the debt was legally due; but he was not understood to warrant *debitorem locupletem esse*, that the debtor was able to pay, *nisi aliud convenerit*, *L. 4. De hered. vel act. vend.* A bare consentor to a charter or disposition is liable in no degree of implied warrandice; for he is not the seller; he only gives his consent at the desire of the purchaser; which, though it imports a conveyance of all right that he the consentor can claim in the subject, cannot be stretched to an obligation of warrandice against him.

26. Warrandice, when it is expressed in the charter, is either personal or real. Personal warrandice, where the granter is bound only personally, is either general or special. A general clause of warrandice is that by which the granter warrants the deed, but

Clause of warrandice.

Warrandice either personal or real. Personal warrandice is either simple from fact and deed, or absolute.

without

without specifying by what kind or degree. And this clause infers no stronger obligation upon the granter, than if the clause had been omitted; for it is explained into an higher or lower degree of warrandice, according to the rules set forth in implied warrandice. Special warrandice is, either, *first*, Simple, that the granter shall do no act inconsistent with the grant; which is of the same nature with that implied in donations. *2dly*, Warrandice from fact and deed, that the granter neither shall do, nor hath done, any contrary deeds; which answers to the warrandice implied in transactions. And this kind is sometimes so expressed as to extend also to the deeds of the granter's ancestors and authors, from whom he himself derives right. *3dly*, Absolute warrandice *contra omnes mortales*, or, as it is commonly translated, *against all deadly*; by which the granter becomes liable, though he or his authors have done no deed counteracting the warrandice, if, through any defect in the right, the subject warranted be evicted either wholly or in part, from the disponee, by a third party. The clause of absolute warrandice is sometimes so conceived, that the granter is not bound farther than to the extent of the sums received by him in consideration of the right ⁴⁰.

To what extent implied warrandice reaches. Who not liable in warrandice.

27. As, in assignments of debt, implied warrandice reaches not to the solvency of the debtor, because that does not proceed from any defect in the right; so also, though the cedent should bind himself expressly in absolute warrandice, his obligation would import barely, that the bond is a valid deed, not to be impeached by any legal exception, *Stair, Nov. 24. 1671, Barclay, (Dict. p. 16591.)*; even though it should be conceived in the following words, *that the sum shall be effectual to the assignee, ibid. Dec. 12. 1671, Liddel, (Dict. p. 16594.)*. And this doctrine holds in every case where the principal subject conveyed is a bond, account, decree, or other voucher of debt, though the granter should, in farther security of the assignee, make over to him an apprising led upon the debt assigned, with absolute warrandice, *Harc. 1015, 1016, (Fife against White, March 1683, Dict. p. 16607; White against Fife, Nov. 1683, Dict. p. 16607.)*. Express warrandice prevails over that which is implied, though Craig seems to affirm the contrary, *Lib. 2. Dieg. 4. § 1, 2.*; for all obligations in lawful matters must be binding on the parties obliged. And therefore, if one who makes a gratuitous grant, shall, *sciens et prudens*, bind himself in absolute warrandice, he ought both in law and equity to be tied by his obligation. And, on the other hand, where a subject is made over for an onerous cause, the grantee may without doubt undertake the hazard of all the defects in the right, by accepting of the disposition, with warrandice from fact and deed; *Jan. 1732, Craig, (Dict. p. 16623.)*; for in all these cases, *pacta dant legem contractui*, and *volenti non fit injuria*. Yet, *first*, a clause exempting the granter from warrandice in the most express terms, is not sufficient to secure him if he shall afterwards grant an inconsistent deed; for no agreement, let it be ever so explicit, ought to protect against the consequences of fraud or deceit. *2dly*, In grants by the crown, no action of warrandice lies against the sovereign, though they should contain an express obligation to warrant; for such clause is presumed to have crept in *per incuriam*, through the carelessness of the crown's officers, by whose negligence the King himself ought not to

⁴⁰ An heir of entail in possession having granted a lease, with absolute warrandice, to commence at a future term, and before the arrival of that term having contravened the entail and forfeited his right to the estate, he was found liable in damages to the tenant, the next heir refusing to implement the lease; *Downie, 31st Jan. 1818, Fac. Coll.*

to suffer. But the sovereign, when he grants a charter, not in consideration of the grantee's services, as sovereign, *jure coronæ*, but *tanquam quilibet*, for a just price, must be liable to the common rules; *utitur jure communi*; and therefore he, and his heirs who succeed to him in his private patrimony, are liable in the same degree of warranty as other granters, according to the nature of the right; yet such warrandice cannot affect the patrimony of the crown. *3dly*, Churchmen, who had feued or let in lease any part of their church-lands, which were afterwards annexed to the crown in 1587, were not obliged in warrandice, except from their own fact or deed, to the feuers or tacksmen, though they had, by an express clause, warranted their rights; because these lands were, by a public law posterior to their grants, annexed to the crown, 1587, C. 29. vers. 4.

28. Warrandice is real only in two cases: *First*, Where some lands are principally and presently made over to a purchaser; and others, which get the name of *warrandice-lands*, are disposed only eventually in security of the principal lands. The purchaser who has this security, may have recourse to the warrandice-lands, in the event that the principal lands are evicted or carried off from him; but except in the case of eviction, the purchaser acquires no right in them; for they are disposed merely to secure him in the lands, the property of which is presently transferred to him. The purchaser, if the principal lands be evicted from him, must obtain a decree, declaring, that the warrandice is incurred by the eviction, before he be entitled to recourse on the lands disposed to him in warrandice*. *2dly*, Warrandice may be real, by the excambion or exchange of one piece of land for another; for if, after the excambion, the lands exchanged be evicted from any of the contracting parties, he who suffers the eviction hath recourse upon his own original lands which he gave in exchange for the lands evicted, not only against the heirs of the party with whom he made the exchange, but against his singular successors; that is, all who have acquired any right to them since the excambion, though such right may have been granted previously to the eviction, *Durie, Nov. 25. 1623, E. Melrose contra Ker*, (Dict. p. 3677.). And this recourse is competent, not only to the excamber himself, and his heirs, but to all to whom he shall make over the subject excambied by singular titles. This kind of warrandice is constituted by the law itself, without the convention of parties, and may therefore be called *implied*: For though no right should be reserved on the subject exchanged, yet the moment after eviction, the right that the party distressed had before to his own original property *eo ipso* revives. Nor is he under any necessity to prove his right in that subject, otherwise than by the recital in the contract of excambion; because it is to be presumed, that when the exchange was made, he delivered his title-deeds to the other party contracting, *Durie, July 14. 1629, L. Wards*,

Real warrandice.

VOL. I.

3 Z

Dict.

* *Vide* Kilk. No. 1. voce WARRANDICE, and Clerk Home, Nov. 6. 1741, *Blair* against *Hunter*, Dict. p. 16624³⁹.

³⁹ It was here found, "That the infestment of warrandice gave the pursuer a real right and security in the warrandice lands, not only to the extent of the value of the principal lands at the time of the eviction, but also that the said real security extends as far as the personal obligation of warrandice,—to all his damages, arising before or after the eviction, without any fault in the pursuer."

Book II.

Contravention
of warrandice
by what incur-
red.

(DICT. p. 3678.). To constitute this sort of warrandice, the deed by which the lands are exchanged must expressly bear to be an excambion.

29. Warrandice, though only from fact and deed, may, in some cases, be incurred from the nature of the obligation, without either any defect in the right, or any deed of the granter. Thus, if in a marriage-contract, the rent-roll of the lands allocated for the widow's jointure should be warranted to amount to a determinate yearly sum, the warrandice is incurred by every accident or misfortune by which they are reduced to a lower rent, *ex. gr.* by inundation or famine, let the right itself be ever so unexceptionable; because, in the case stated, the granter is precisely obliged that the widow shall in no case have a less jointure than the yearly sum mentioned in the contract, *St. B. 2. T. 3. § 46.* All losses or burdens befalling the subject disposed, after the date of the grant, and which had no cause anterior to it, whether by fatality, *Durie, March 10. 1636, La. Dunipace,* (DICT. p. 16581.); or by a statute imposing an additional tax on the subject, *St. ibid.; July 12. 1667, Watson,* (DICT. p. 16588.); are upon the purchaser's hazard, and so infer not contravention of warrandice: For as the whole benefit resulting from the improvement of the lands after the purchase, accrues to the purchaser as proprietor, he must also run all the hazards of their becoming worse. Nay, this doctrine obtains, though the supervening burden should be imposed under the authority of a public law prior to the grant, *Stair, July 1. 1676, L. Auchintoul,* (DICT. p. 16603.)⁴⁰, unless the grantee, who knew, or ought to have known, the burden which might be imposed by law on the subject, hath taken care to secure himself, by the granter's express obligation to warrant the right to him against that special burden; see *Harc. 963, (Lumsden against Gordon, Jan. 6. 1682, DICT. p. 16606.)*.

What is the extent of the obligation of warrandice.

30. No action upon warrandice lies against the granter, till the subject be actually evicted from the grantee, either in consequence of deeds of the granter counteracting the warrandice, if it be warrandice from fact and deed, or of a defect in the right, if the warrandice be absolute. Yet if a plain ground of distress shall appear from such inconsistent deeds of the granter, he may be sued, even before eviction, to purge all such encumbrances; and if he either cannot, or refuses to purge, immediate action of recourse lies

⁴⁰ The authority of this particular case, as being any support to the general principle laid down in the text, seems destroyed by opposite decisions pronounced both before and after; *Gilm. July 1663, Elphinstone,* DICT. p. 16585; *Diri. 15th July 1667, Watson,* DICT. p. 16588; *Harc. 20th Feb. 1683, Bonar,* DICT. p. 16606. In these cases, as in that of *Auchintoul*, the question turned upon the effect of absolute warrandice in a disposition of church lands: And the Court decided, that the disponent was liable in recourse, where the lands, ("under the authority of a public law prior to the grant,") were evicted by the subsequent designation of a glebe.

In another class of cases, the text appears to be more completely supported. It is held to be settled, that stipend being a natural burden on all teinds, "a clause of warrandice to be effectual against augmented stipends must specially bear a relief from all augmentations;" *Alexander, 9th June 1812, Fac. Coll.; E. Hopetoun's Trustees, 8th Dec. 1819; Ibid. Plenderleath, 31st Jan. 1800, Ibid. DICT. p. 16639.* In the case of *Plenderleath*, recourse against the disponent was maintained, on the authority of the above decisions in the designation of glebes: it being argued, that "the burden of a glebe is not more inherent on church lands than stipend is on teinds." The analogy, however, was disregarded by the Court.—For an example of a clause held sufficient to warrant not only from the payment of present stipend, but from all future augmentations, *vid. Earl of Hopetoun, 3d July 1811, Fac. Coll.* The authority of this case, has, however, since been called in question; *E. Hopetoun's Trustees, supr.*

lies against him at the suit of the disponee, *Stair, Feb. 17. 1672, Smith*, (Dict. p. 16596.). It is incontestable, that absolute warrandice, after the subject is evicted, founds the grantee in an action of recourse against the granter, for making up to him the full damage he has suffered, either through the contravention of the warrandice, or any defect in the right. An offer by him who warrants a right, therefore, to put the grantee in his own place, by making him full payment of the price he paid for it, with the interest from the time of eviction, is not sufficient: For though this would indemnify the grantee, so that he would be no loser by the bargain; yet the obligation to warrant is not intended barely for indemnifying the purchaser, but for securing him against all the consequences of contravention; and, of course, for making payment to him, in case of eviction, of the full value of the subject at that period, together with the loss he has sustained through the want of it from that time. All writers admit this to be the law in the warrandice of irredeemable rights of heritable subjects; because there the buyer accepts of the right, with the chance of the lands becoming better or worse: and as he must suffer the loss upon their sinking in value, he ought also to have the benefit arising from their improvement*. But in redeemable and personal rights, *Stair, B. 2. T. 3. § 46. vers. Warrandice hath no*; and *Bankton, B. 2. T. 3. § 124.* are of opinion, that the effect of warrandice ought not to rise higher than the sum paid for the right; because in these the matter is more liquid. This position, if it is to be restricted to the case of implied warrandice, may perhaps be founded in equity: But if it is meant of absolute warrandice expressed in the grant, it appears inconsistent with the nature of that obligation, which strikes against all defects in the grant itself, whether it be redeemable or irredeemable, unless where the clause of warrandice is limited to the sums received by the granter in consideration of the grant; and no decisions of our supreme court are brought to support that opinion.

31. As warrandice is penal, at least on the part of him who warrants, it is *stricti juris*; and consequently, contravention of warrandice is not easily presumed, nor the obligation to warrant extended beyond the strict letter of it; see *Br. 51. (Ogilvy against Lesly, Feb. 2. 1715, Dict. p. 4154.)*⁴¹. Upon this ground, absolute warrandice is not incurred by every light servitude that the granter or his authors may have imposed upon the lands conveyed, such as lands are usually charged with; *ex. gr.* aqueducts, passages, or even a moderate thirlage, *Stair, June 21. 1672, Sandilands*, (Dict. p. 16599.)†. But if the servitude be uncommonly heavy, the granter, who makes over the estate *tanquam optimum maximum*, incurs the warrandice. The observation made by *Stair, B. 2. T. 3. § 46. vers. 1.*, that the obligation of warrandice in dispositions, because it is personal, is not transferred by the vassal who is vested with it, to his disponee or singular successor, unless it be either especially assigned in explicit words, or generally in the assignation of the title-deeds, seems not to be founded in law; for the right of recourse upon the warrandice being part of the right of the subject vested in the dis-

Warrandice is *stricti juris*, and contravention is not easily incurred.

* See *Rem. Dec. vol. i. NO. 4., Houston against Corbet, Feb. 22. 1717, Dict. p. 16619.*

† See this applied (as to thirlage) in a case between landlord and tenant; *Fac. Coll. Jan. 14. 1780, Symington, Dict. p. 16637.*

⁴¹ *Reid, 21st Feb. 1822. (S. and B.)*

BOOK II.

The grantee ought to intimate the danger of eviction to the granter.

Precept of seisin.

poner, ought, as such, to be carried from him, who divests himself of all right he can claim to it in favour of the disponee, though it should not be conveyed *per expressum*. But indeed this observation can be of little use in practice; because dispositions, by their uniform style, bear a clause, conveying all the title-deeds of the subject disposed in favour of the disponee. Where a person who makes a grant of lands warrants them to the purchaser, but excepts from the warrandice a special right, which he apprehends may be preferable to his own, that exception cannot hinder the purchaser from strengthening his title, by bringing a reduction of the right excepted; for the import of such exception is merely to cut off from the purchaser all claim of recourse against the granter, in case that right should have the effect of evicting the subject from the grantee, without the least intention to favour third parties, or to make that right a good one to him in whom it is vested; *Forbes, July 18. 1710, Gibson of Dury, (Dict. p. 5695.)*

32. Where lands are threatened to be evicted from a purchaser by a right preferable to that which he got from the seller, the purchaser ought in prudence to intimate to the seller his distress, that so he may defend the right granted by himself; and this prevents the seller from pleading, that the purchaser had suffered the lands to be evicted from him by collusion or negligence; for if it shall appear that the eviction was occasioned by a fact or omission imputable to the grantee himself, he cannot be allowed to throw his loss upon the granter, who was not to blame, let his obligation of warrandice be ever so strong. Yet intimation of distress is not precisely necessary⁴¹; for the purchaser's right of recourse continues competent to him, without such intimation, if evidence is not brought, that in the action of eviction he had submitted to some irrelevant defence, or subjected himself to an incompetent mean of proof, *Stair, June 23. 1681, Clerk, (Dict. p. 16605.)** And upon this ground it was decided, that though no intimation of distress was made, the purchaser, from whom the lands were evicted, might in his action of recourse found his plea upon the proof that was brought in the former process of eviction pursued against himself, reserving to the granter of the warrandice all objections against the validity of that proof, *tanquam in libello, Fac. ii. 2. (Nov. 2. 1748, Gordon against Gordon, Dict. p. 14045.)*

33. Long after the proper manner of investiture fell into disuse, in which the possession was delivered to the vassal *unico contextu* with the charter, notorial instruments of seisin were unknown in Scotland. The feudal right was accounted complete, if the superior's bailie, who had given possession to the vassal, affixed his seal to

* See on this head, *Fac. Coll. July 17. 1780, Dewar, Dict. p. 16637*⁴².

⁴¹ Neither is it necessary for the purchaser to defend his right, when untenable, by process at law; *Downie, 31st Jan. 1815, Fac. Coll.*

⁴² In this case, an heritable bond granted by the disposer's author,—and which, having been allowed to remain a personal deed, neither the disposer nor disponee seem to have been aware of,—was, considerably posterior to the date of the disposition, which also remained a personal deed, constituted a real burden on the subject by infestment. Action having then been brought on the warrandice of the disposition, the disposer argued, that, because eviction had arisen solely from the disponee's "delay in not completing his right by infestment," he ought not to be liable. But the Court did not hold the disponee under any obligation to get the start of his competitors, and therefore decided that the disposer was "bound to clear the subject of the encumbrance."

to the charter, in testimony that possession was truly given, *Cr. Lib. 2. Dieg. 7. § 2.*; or if the bailie signed a declaration, even in a separate writing, that he had given possession; of which declarations some are yet extant, dated about the year 1400. And indeed, as in those early times, before the attestation of a public notary was made an essential part of the investiture, the express will of the superior, joined to the natural possession of the vassal, was, by the general rules of law, sufficient to vest the full property in him, a proof brought of the vassal's immemorial natural possession of the lands contained in the charter, founded a presumption, that he had been lawfully entered into it by the superior, though there was no declaration, either by the superior or his bailie, attesting that fact; *Durie, June 24. 1625, Bor. of Stirling, (Dict. p. 6621.)*. At last, after the beginning of the fifteenth century, a practice was introduced, which soon became universal, that the superior delivered to the vassal, along with the charter, a precept of seisin, which for above two centuries together was made out in a writing separate from the charter, till it was enacted, by 1672, *C. 7.*, that all precepts, on charters granted by the crown, should be engrossed in the charter, towards the end of it; that is, immediately before the testing clause. This provision was soon after extended, by uniform custom, to precepts flowing from subject superiors. Now, therefore, all charters, without exception, conclude with a precept of seisin; which may be defined, a command by the superior who grants the charter, to his bailie, to give seisin or possession of the subject disposed to the vassal or his attorney, by the delivery of the proper symbols. *Bailie* is derived from the French *bailler*, to deliver, because it is the bailie who delivers the possession at the superior's command. Though the name of the bailie to whom the precept is directed is left blank, and any person whose name may be lawfully inserted in the blank can execute the precept, by giving seisin to the vassal; yet the precept must contain a special mandate to infest the vassal*, which cannot be supplied by any general powers, however ample; because a power granted by the superior

to

* And the vassal must be specially named and designed. A seisin in favour of the heirs or the representatives of a person deceased, is null; *Kilk. No. 2. voce SASINE, Nov. 7. 1740, Blackwood, Dict. p. 14327; Fac. Coll. Feb. 24. 1794, Melvill, Dict. p. 14327* 44. Where the warrant directed seisin to be taken on certain lands specified,—and on other lands generally referred to, as (the same) are enumerated in the granter's infestments,—the notary comprehended in the instrument of seisin certain of the lands generally referred to 45; but the seisin *quoad* these was found null; *Kilk. No. 4. voce SASINE, June 23. 1742, Wallace against Dalrymple, Dict. p. 6919.*

44 So also, a disposition and infestment “to A. B., and the other partners of a company, is not a valid investiture to the company, but only to A. B. individually;” *Denistoun, Macnair and Co., 16th Feb. 1808, Fac. Coll.; Dict. v. TACK, App. No. 15.*

45 It seems, however, material to observe, that Kilkerran here adds,—“but without expressing any such infestments to have been produced to him.” On this principle, objection to a seisin was again sustained,—where it “proceeded upon a charter which did not contain a description of the lands sufficiently specific to certify the notary taking the infestment, that the lands in which the infestment was taken were truly those contained in the charter,—and where it did not appear from the instrument, that any other written evidence of that fact was produced to him;” *Hepburn Belches, &c., 21st Jan. 1815, Fac. Coll.* Had the defect of specification in the immediate warrant of seisin been supplied by production of the infestments referred to, and this production been narrated as the evidence on which the notary proceeded, a different decision would probably have been pronounced in both of these cases. In one case accordingly, “the Lords were all of opinion, that a precept, to give infestment in lands described in general to belong to the granter of the precept, is a sufficient warrant to give infestment in every particular tenement, which, by production of the granter's infestment, is vouched to come under the general description;” *Kames, Sel. Dec. 3d August 1753, Graham's Creditors, Dict. p. 49.*

Book II.

to divest himself of heritage, is not to be presumed. Whoever hath this precept in his hand, is, on the contrary, presumed to be the vassal's attorney, for receiving possession in his name, without any special power for that purpose, because the receiving of possession is an act beneficial to the vassal. But this presumption does not exclude a contrary proof, where the taking of seisin appears hurtful to the vassal in whose favour the precept was granted. An example of this is given by Craig, *Lib. 2. Dieg. 7. § 6.*: A creditor of a person deceased had procured seisin to be taken upon a retour in the name of an apparent heir, without his knowledge, in order to subject him to the ancestor's debts: On evidence of the fraud, the seisin was declared void.

Instrument of
seisin.

34. This precept or warrant for taking infestment is executed by an instrument of seisin; which may be defined, the attestation of a public notary, that possession was truly given by the superior, or his bailie, to the vassal, or his attorney, in pursuance of the precept, by delivery of the proper symbols. By *instrument*, in the Roman law, is frequently meant any voucher or evidence in writing; but we use it in a limited sense, to denote the written attestation of a particular fact or facts, under the hand of a public notary. Craig conjectures, *Lib. 2. Dieg. 2. § 18.*, that instruments of seisin were not used in Scotland till the return of James I. from England; but many seisins are yet extant, dated about the beginning of that century, before his return, the style of which differs little from the present. After notorial instruments were first used with us, they were not only sustained as full evidence of the vassal's entry into possession, but have been accounted a necessary solemnity for perfecting the feudal right, not to be supplied by a proof, either of natural possession, or even of that special fact asserted in all seisins, that the vassal was entered into the possession by the superior or his bailie; and hence the maxim hath arisen, *Nulla sasina nulla terra*. This rule suffered, by our more ancient usage, an exception in the case of charters granted to communities, which were adjudged to require no seisin; *Hope, Seisin, July 9. 1628, Bor. of Peebles*, (Dict. p. 6885.); but by later decisions, seisin is essential to the first constitution of feudal grants, even where they are made to corporations; because, without it, the granter cannot be divested*. But infestment need not be renewed at any time after; for seisin is never renewed, except upon the change of a vassal; and communities never die, but continue always the same, after the death of the present members, in the persons of their successors.

What particu-
lars it certifies.

35. An instrument of seisin recites the whole ceremony observed at the taking of infestment. First, Either the vassal or his attorney

* The contrary was found, July 3. 1740, *Kirk. voce SASINE*, No. 1. *Marquis of Tweeddale* against *Town of Musselburgh*, Dict. p. 6896⁴⁵.

⁴⁵ This point seems only to have come under consideration incidentally. The whole report is as follows: "It was laid down, as a proposition certain in law, though there was no occasion to give a direct judgment upon it, that an *original charter erecting a burgh* requires no sasine, because there is no person in being at the time who can receive it." How far this is sound may, perhaps, be doubted. There is, in the eye of law, the same *person* to receive seisin who receives the charter; or rather, the charter of erection, by constituting the burgh into a corporation, creates this person. The corporation is, from that moment, capable of acting in every thing else; and there seems no reason, therefore, why it should be incapable of taking seisin. At any rate, the observation extends no farther than to the "*original charter*" of erection. So that, where the corporation already exists, the doctrine in the text remains entire,—that "seisin is essential to the first constitution of feudal grants, even where they are made to corporations." It was so found accordingly, *Harc. Findowry, March 1682*, Dict. p. 6887.

torney appears on the lands of which seisin is to be given, holding in his hand the precept, which he delivers to the superior, or, in his absence, to the bailie. The bailie immediately delivers it, in the presence of witnesses, to the notary, who is to extend the instrument. Then the notary reads the precept; after which, the superior, or his bailie, delivers to the vassal, or his attorney, earth and stone of the lands, or the other proper symbols, if the right granted be not a right of property in lands. Lastly, The vassal, by himself, or his attorney, takes instruments in the hand of the notary, before witnesses, that he hath received state and seisin of the lands in due form. On this whole transaction, an instrument is extended in writing by the notary, who, after reciting in it the precept of seisin *⁴⁷, and as much of the charter as is necessary for understanding the precept †⁴⁸, subjoins his own attestation, That he having been specially called for that purpose, knew, saw, and heard, that these facts were so done as they are recited in the instrument, to which he and the witnesses adhibit their subscriptions. Seisin, when given by the superior himself, and not by his bailie, is called seisin *propriis manibus*, of which we have few instances, except in rights which are granted to the wife, children, or other persons who are most intimately connected with the granter ‡.

36. The symbols by which the delivery of a feudal subject is expressed, are different, according to the different nature of the subjects that may be made over by a superior. The symbols for land are earth and stone; for mills, clap and happer; for fishings, net and coble; for parsonage-tithes, a sheaf of corn; for tenements of houses, within borough, hasp and staple; for patronages, a psalm-book, and the keys of the church; for jurisdictions, the book of the court, &c. Sometimes symbols are authorised by custom to stand in place of delivery, which have no resemblance to the subject conveyed. Thus, the symbol in resignations, which was originally a pen, has been now, for centuries past, staff and baton; which hath nothing analogous, either to the subject resigned, or the act of resigning. *Stair, B. 2. T. 5. § 3.* and *Mackenzie, B. 2. T. 8. § 15.* are of opinion, that the symbol of a right of annualrent is either a penny money, if the annualrent be payable in money, or a parcel of corn, or victual, if it be payable in victual: And though others maintain,

Symbols of infestment and of resignation. Seisin must be taken on the ground.

* *Stair, Dec. 29. 1680, Lady Lamerton, Dict. p. 14309* ⁴⁷.

† And if the seisin is taken in favour of any other person than the grantee in the charter, the right of that person must be specified. See on this point, *Fac. Coll. May 14. 1796, Proctor, Dict. p. 8871.*; also *Feb. 24. 1796, Mackay, Dict. p. 8726.* ⁴⁸.

‡ Precepts of seisin may be executed after the death of the granter and grantee. *Vid. infra, B. iii. tit. 3. § 42.*

⁴⁷ The precept, with the testing clause, should be engrossed *verbatim*. In the case cited, *not. **, a seisin was indeed sustained where the precept was merely referred to: but this is scarce to be regarded as a precedent. See *Stair, B. 2. t. 3. § 17.* and *18.*; *Bankton, B. 2. t. 3. § 41.*; *2. Ross's Lectures, p. 183-4.* Where, however, distinct subjects are disposed, it is no objection to the instrument of seisin, that it only contains that part of the precept which relates to the lands on which infestment is taken; *Don, 4th Feb. 1813, Fac. Coll.*

⁴⁸ By *stat. 1693, c. 95.* it is declared, "that all sasines in favour of a disponee different from the person to whom the original precept is granted, shall be null, unless the titles, by which the former has right to it, are deduced in the instrument." The cases referred to, *not. †*, decide, that where the precept is conveyed by parties acting in behalf of others, *ex. gr.* by commissioners, or by a factor *loco tutoris*, the commission and faculty under which these parties act are not to be deemed "titles" in the sense of the statute. See *Election Cases*, (published by Mr Gillon, as a supplement to *Wight*), p. 8, 9.; *Bell's Election Law, p. 42, 43.*; also p. 250, *et seq.*, where a detailed report will be found of the Judges' opinions.

maintain, that the symbol for all rights of annualrent ought to be earth and stone, because they are rights annexed to land; and that the additional symbol of a penny, or a parcel of corn, ought to be joined to that other symbol, as the annualrent is payable in money or in victual; yet no good reason can be assigned, why earth and stone should make any part of a right of annualrent, since the property of land is not thereby intended to be conveyed, but merely a rent issuing from it; which is aptly enough figured by a penny of money, or an handful of grain. Doubtless custom is sufficient to decide this point; and till long uniform custom shall have fixed it in one way, seisin taken in either way will be received*. Though seisins ought regularly to bear the special delivery of the proper symbol, yet the Court of Session have, in consideration of particular circumstances, sustained seisins which mentioned barely, that actual, real, and corporal possession of the lands was given, *Durie, June 17. 1630, E. Wigtoun*, (Dict. p. 2246.); or which bore delivery of the ground of the lands according to the precept, *Stair, Dec. 23. 1680, L. Lamerton*, (Dict. p. 14309.); or of earth and stone of the land and mill *cum omni juris solennitate, Durie, March 15. 1631, L. Smeiton*, (Dict. p. 14320.) †. Seisin must be taken on the ground of the lands contained in the precept: But this rule may, in cases of necessity, be dispensed with by proper authority; as it was in the seisin of Nova Scotia and Canada in favour of Viscount Stirling, which, by the King's special appointment, was taken at the gate of the Castle of Edinburgh, *Stair, B. 2. T. 3. § 18.*, and afterwards ratified by Parliament, 1633, C. 28.

And given by the superior's bailie.

37. Seisin of all lands, whether holden of the crown, or of a subject, might, by our old law, have been given in consequence of the precept, by any person whom the superior appointed for bailie; and the instrument might have been extended by any notary⁵⁰: But by 1540, C. 77., and 1555, C. 34., all seisins upon precepts issuing from the King's chancery are ordained to be given by the sheriff as bailie; and to be extended by the sheriff-clerk, or his deputy, as notary ‡. These statutes are restricted by a posterior declaratory one, 1606, C. 15., to seisins on such precepts issuing from the chancery as pass to *heirs upon retour*; because when an heir is to enter by retour to lands holden of the crown, he becomes debtor to the crown in the casualties of non-entry and relief; and therefore the

* See *Kilk. SASINE*, No. 6. *Dempster against Kinloch, June 1730*, Dict. p. 14313⁴⁹.

† See *Edgar, Jan. 26. 1725, Pringle*, Dict. p. 14312.

‡ See another exception in the case of burgage-seisins, *infra*, § 41.

⁴⁹ In this report, Lord Kilkerran observes, that "in all sasines on annualrent rights, it is necessary that there be a sasine, by its proper symbol, in the subject out of which the annualrent is payable; of earth and stone, where it is payable out of the lands, and of grass and corn, where it is payable out of teinds; insomuch that though the Lords have, on some occasions, sustained a sasine upon a right of annualrent, where there was a symbol of the subject out of which it was due, though no mention was made of a penny money, the proper symbol of an annualrent; yet in no case has ever a sasine on an annualrent right been sustained without a symbol of the subject out of which it was due." No judgment, however, was pronounced on this point; and, therefore, as has been well remarked, with reference to an annualrent secured on land, (and if secured on teinds, &c. it is but substituting the symbol proper to the case), "it is our best method to adhere to the old opinion, and to insert earth and stone, with the penny money, which leaves no room for dispute. If the money be an apt symbol for the annualrent, the earth and stone are equally apt to indicate that it is to come from the particular lands, of which they are a part;" 2. *Ross's Lectures*, p. 375.

⁵⁰ *Vid.* as to burgage seisins; &c. *infra*. § 41 and *not. Ibid.* 54.

the precept ought to be executed by none other than the King's sheriff, as his bailie; whose duty it is to receive payment, or take security for these casualties, and to account to the crown for them; whereas precepts issuing from the chancery *upon resignation* are not directed to the sheriff of the shire, (because in these the crown's demands on him who is applying to be infeft are fully paid at passing the signature of his charter), but to sheriff in that part, *i. e.* to any one who may be filled up in the blank; and who is perhaps called *sheriff in that part*, because he is to perform the sheriff's office in that special matter. This reason of the difference between the two was suggested by *Craig, Lib. 2. Diog. 7. § 22.*, before the declaratory statute in 1606 was passed.

38. A seisin is barely a relative writing, referring to the precept on which it proceeds as its warrant, and therefore is not received as evidence, unless the precept referred to, which is its warrant, be produced; *non enim creditur referenti, nisi constet de relato.* Yet there are some seisins which admit of no precept; *first*, Seisins by a husband or father *propriis manibus*, which are not given in consequence of any precept or mandate from the granter, but by the granter himself. These are sustained *per se*, without any previous deed under the granter's hand, where the provision is rational, in a question with the granter's heir, *St. B. 2. T. 3. § 19. Mack. § 15. h. l.* But in order to give validity to a seisin *propriis manibus*, where there is no antecedent deed to support it, it must be signed not only by the notary, but by the granter; for there cannot be in any case an effectual conveyance of a feudal right, without some deed signed by the proprietor divesting himself; and the law gives no credit to a notorial seisin *per se*, which is but the assertion of a third party, as evidence that the proprietor was divested, *Pr. Falc. 28, (King against Chalmers, Nov. 15. 1682, Dict. page 12523)*⁵¹*. And hence it is, that a seisin on the superior's precept of *Clare constat*, in favour of an apparent heir, is not valid, unless it be supported by writings which prove that the lands contained in the precept have been vested in the heir's ancestor. *2dly*, A seisin of burgage-tenements, given by the magistrate of a borough to an heir by hasp and staple, can have no precept for its warrant; because in that form of entry the magistrate, after the heir's propinquity to his ancestor is proved, gives them seisin by his own hand †. These seisins are therefore full evidence, both of the heir's propinquity, and of his being entered into the possession, without any adminicle, *St. B. 2. T. 3. § 19. vers. Seisins within b.*; but the ancestor's titles to the subject must be proved *aliunde*. Seisins *propriis manibus*, even of burgage-tenements, when they proceed upon resignation in favour of singular successors, are accounted null, without proper adminicles or vouchers supporting them, *St. ibid.*; *Harc. 592⁵²*. An instance will be given, *infr. T. 7. § 25.*, in which one who possesses under a seisin which had a precept for its warrant, is exempted from the necessity of producing the precept.

Instrument of seisin is no evidence without its warrant. Exceptions to this rule.

VOL. I.

4 B

39. Instruments

* Same found, *Fac. Coll. Jan. 27. 1797, Shanks, Dict. p. 4295.*† See *Fac. Coll. Feb. 4. 1784, Houston, Dict. p. 14420.*

⁵¹ The seisin *propriis manibus* having all the effects of a proper deed of conveyance, it might naturally be supposed requisite that the granter's subscription should be authenticated by the same solemnities. It has, however, been decided, that, though the seisin be silent as to the name and designation of the writer, the time and place of subscription, and though it do not bear to have been subscribed before witnesses, still all this affords no objection; *Kibble, 4th Dec. 1804, Fac. Coll. Dict. p. 14314.*

⁵² This case seems to have been omitted in *Mor. Dict.*

BOOK II.

Seisins must be registered.

39. Instruments of seisin were, for a long time, not discoverable by creditors or purchasers, after the strictest inquiry. The protocol books given by the clerk-register to notaries at their admission, in which it was their duty to insert, in their own handwriting, copies of all the instruments made out by them, could contribute little towards the publication of seisins to the lieges; both because the protocols were not ordained to be lodged in any proper office for public inspection, till the year 1587, and because notaries at this day, even when they keep protocols, seldom insert in them any instruments which are not thought of more than ordinary importance. They were truly calculated for no other end, than to make the use of all notorial instruments more certain to the proprietors, by their having access to the notary's protocol for recovering them, if through any misfortune they should have been lost. This latency, as we express it, of seisins, rendered all conveyances of heritable rights most insecure; for purchasers could not know, by any research, whether the lands for which they were to give their money, had not been formerly sold, or charged with debts. The first statutes enacted for publishing seisins were 1503, C. 89. and 1540, C. 79.; by which sheriffs who gave seisin of lands holden of the crown, were obliged to bring yearly to the exchequer a note, subscribed by themselves, of the dates of those seisins, and of the description of the lands contained in them, to be entered into a record of that court. This was with some additions extended, by 1555, C. 46. and 1587, C. 64., to all seisins even of lands holden of subjects: But as no abbreviate was thereby directed to be taken of any other real right than of seisins, and as, in the abbreviate of seisins, it was not made necessary to insert any of the conditions or limitations affecting the right, a more certain provision was made for the security of purchasers and creditors, by two unprinted statutes³³; the one passed at Falkland, July 31., and recorded in the books of session, November 3. 1599; the other at Edinburgh, Nov. 1600, contained in the list of the unprinted acts of that parliament, No. 34. and referred to in the act of sederunt, Jan. 6. 1604, enacting, That the full tenor, not only of seisins, but of several other real rights therein mentioned, should be registered within forty days after their dates, in the register of the secretary, under the sanction of nullity.

Seisins must be registered within sixty days of their date in the register of the district where they are taken.

40. As it appears by the before-cited act of sederunt, Jan. 6. 1604, that those unprinted statutes were but little observed, a third act passed, 1617, C. 16., printed in our statute book; by which all reversions, regresses, bonds for making reversions, and regresses, assignments and discharges thereof, renunciations of wadsets, grants of redemption, and instruments of seisin, are ordained to be registered within sixty days after their dates. The whole kingdom is by this act divided into a certain number of districts, and a special register appointed for each of them, without precisely observing the limits of our counties. Thus, seisins taken of lands within the stewartry of Monteith, which lies locally in the shire of Perth, must be recorded in the register of the county of Stirling. Thus also, one register is made to serve for the three shires of Aberdeen, Banff, and Kincardine; and so of some others. It is left to every one's option to record his seisins, reversions, &c. either in those particular registers, or in the general register at Edinburgh appointed for

³³ Now printed in the "Acts of the Parliaments of Scotland," publishing under authority of the Commissioners of the Records, vol. iv. p. 184 and 237.

for that purpose; and if the lands lie in two or more different districts, the right must be recorded either in the particular register of each of those districts, or in that general register at Edinburgh, which will serve for all. If seisins are not thus recorded, the act 1617 declares, That they shall make no faith in judgment to the prejudice of those who have acquired right to the lands contained in them; reserving liberty to the obtainer of the seisin to use it against the granter and his heirs. The not registration, therefore, does not avoid the seisin; it is only a ground for postponing it in a question with third parties, who may claim the same subject under a title which has no dependence upon that seisin. Hence tenants sued by their landlord for rent, cannot object against the pursuer, that his seisin is not registered; for, let the landlord's right be ever so lame, it is the only foundation of theirs. And this is also the case of a vassal, who cannot object the want of registration against his superior's seisin, upon which alone his own right is grounded*. Neither can this exception be moved, even by one who has a preferable title, if he be heir to the granter of the unregistered seisin; for the statute expressly reserves the full effect of such seisins, not only against the granter himself, but against his heir, *Forbes, June 30. 1705, L. Ludquhairn, (Dict. p. 13563.)*. The history above related of this part of our law serves to explain a passage in Craig, *Lib. 3. Dieg. 3. § 25.*, which might otherwise embarrass the reader, and seems to have misled Lord Stair in his reasoning, *B. 2. T. 11. § 11.* Craig in that passage takes it for granted, that a seisin not registered within forty days after its date is void; whereas, by the only printed statute relative to that matter, seisins may be registered within sixty days; and though they should continue unregistered, they are not utterly void, since full effect is reserved to them by the act against the granter and his heirs. But no obscurity remains, when it is attended to, that the printed statute in 1617 had not passed when Craig's treatise was composed; and that the unprinted acts then in force required the registering of seisins within forty days, under the sanction of absolute nullity †.

41. From this act, ordaining the registering of seisins, burgage-seisins are excepted. It had been enacted by a former law, 1567, *C. 27.*, That all seisins of burgage-lands and tenements should be given by the bailie of the borough, and the instrument made out by the common clerk⁵⁴; otherwise that they should be void. After the passing of this statute, the common clerks, who alone could be notaries to burgage-seisins, were tolerably exact in booking them in their protocols; which Mackenzie, in his observation on that statute, assigns as the reason, why seisins within borough were excepted from the posterior act 1617. But as the security of singular successors remained still imperfect by this exception, depending entirely on the diligence and probity of the common clerks, and as their exactness was sometimes perceived to fail, particularly in a case, *Stair, June 30. 1668, Burnet, (Dict. p. 13550.)*, the court of session, by act of sederunt, *Feb. 22. 1681*, declared, that they would hold all seisins granted within borough, which were

Burgage-seisins must be registered in the borough books.

* So found, *Stair, June 12. 1679, Faa, Dict. p. 9307.*

† See an analysis of the act 1617, c. 16. by Lord Kames, *Elucidations*, art. 35.

⁵⁴ The clerk of a burgh of *regality* has no such exclusive right to act as notary in taking the infeftments of the vassals of the burgh; nor can he acquire it by usage; *Magistrates of Edinburgh, 2d Feb. 1814, Fac. Coll.*

were not registered in the borough-books after the manner prescribed by the act 1617, as fraudulent deeds : And immediately after a statute passed in parliament, 1681, C. 11., extending the regulations of 1617, C. 16. to seisins within-borough⁵⁵. In this act, it is also declared, that the books of the town-clerks of boroughs shall depend on their own magistrates, and not on the clerk-register^{56*}. Though, when a borough happened to be without magistrates, seisin of the tenements within that borough, given by the Sheriff of the county, has been sustained from the necessity of the case, *Dirleton*, 19. *Stair*, 21, *July 1666, Thomson*, (DICT. p. 6892.), yet the expedient mentioned, *supr. B. 1. T. 3. § 23.*, is now generally made use of for supplying that temporary want.

Seisins are preferable according to the date of their registration.

42. Where seisins, or other real rights, were recorded in pursuance of the act 1617, the principal writings, after they were entered into the record, were delivered back to him who presented them for registration, with an attestation, signed by the keeper of the register, that they were so entered : And because the keeper sometimes neglected to enter them in the register-book, it was enacted by 1686, C. 19., That though no entry should be truly made, the writings were to be held as registered, if they were given back to the party, with the usual attestation subscribed by the keeper. This act was, as Lord Stair justly argues, *B. 2. T. 3. § 22.*, utterly inconsistent with the former law, which it pretended barely to explain ; and at the same time destroyed the security of singular successors, who could not, by any search, discover seisins, or other real rights, which had never been inserted in the record. It was therefore found necessary to declare, by 1696, C. 18., that no seisin, nor other real right, appointed to be recorded by act 1617, should be of force, if it was not booked and inserted in the register⁵⁷ : And the party who shall lose his preference by the negligence of the clerks or keepers, in not registering the writings presented to them, is, by that statute, entitled to an action of damages, not only against the clerks themselves, but against their heirs, though no such action should have been commenced in the clerk's lifetime ; which penalty against the heir of the clerk is introduced in odium of such negligence, contrary to a rule to be explained *B. 4. T. 1. § 14 †*⁵⁸. It was long made a doubt, whether in a competition

* The other registers of seisins, both general and particular, depend upon the clerk register thus far, that it is the sole province of that officer to mark the books of record, and to keep those books when filled up at the different offices ; *Fac. Coll. March 3. 1795, Lord Fred. Campbell*, DICT. p. 13140. In that report, the operation of marking is distinctly explained.

† The keepers of the registers of sasines were in use to omit part of the notary's doquet ; and the Court, in respect of the erroneous practice, for some time sustained sasines so recorded ; but it was declared by act of sederunt, *January 17. 1756*, " That the full seisin, and particularly the full doquet of the seisin, shall, from and after " 12th June 1756, be engrossed in the registers ;" under the sanction of nullity to the sasine, and of subjecting the keeper in damages, besides deprivation of office and incapacity to resume the same.

⁵⁵ Where a subject does not hold burgage, it is incompetent to record the seisin in the burgh register, even though the vassal be taken bound by his *reddendo* to the performance of burgage services ; *Davie, 2d June 1814, Fac. Coll.*

⁵⁶ By *stat. 49. Geo. III. c. 42.*, a change in this respect has been introduced.

⁵⁷ Where a clerical error is committed in recording a seisin, the Supreme Court will, on petition, authorise its correction ; but this correction will only have effect from its own date ; *Innes, 20th Dec. 1816, Fac. Coll.*

⁵⁸ Parole proof of irregularity in recording a seisin found incompetent, so far as respects the legal consequences and privileges of the record, though sufficient to found proceedings against the clerk and keeper of the record ; *Adam, 19th June 1810, Fac. Coll.*

competition between two seisins, both registered within sixty days after their dates, in pursuance of the act 1617, the seisin first in date, or that which was first registered, though posterior in date to the other, ought to be preferred, *Steu. Ans. v. Seisin*. But this doubt is removed by 1693, C. 13., which enacts, that all real rights, on which seisin shall be taken, shall be preferred according to the priority, not of the seisins themselves, but of their registrations: the reason of which is given in the act immediately following, C. 14., viz. that though real rights should be registered within sixty days after their dates, they continue latent, as to singular successors, till registration; for the date of a seisin cannot be known till it be registered *⁵⁹. Though a competition between two seisins of lands holden of the granter is determined solely by this rule of preference, something more is required in rights which hold of the granter's superior; for as no seisin upon a public right is valid, till it be confirmed by the superior, the preference, in a competition between two such rights, depends, not on the date of the registration of the seisins, but of the superior's confirmation, 1578, C. 66.; *vid. infr. T. 7. § 14, 15.; St. B. 4. Tit. 35. § 10.* But if seisin was not taken upon the public right till the superior had confirmed it, the date of the registration of the seisin is the rule of preference, *St. ibid. § 11., and Append. § 2.* From this rule, that seisins are preferable according to the dates of their registration, several exceptions are at length mentioned by Stair, *B. 4. Tit. 35. § 13. to 25.*; all of which shall be explained under their proper heads.

43. An instrument of seisin cannot be supported against an allegation of forgery, by producing an extract of it from the register of seisins; for as the principal seisins are, upon the registration, delivered back to him who presented them, that register serves only
for

An extract from the register, is as probative as the principal instrument, unless forgery be alleged.

* The statute last cited in the text (1693, c. 14), made a most substantial improvement on the regulations of 1617, c. 16. It directs, "That all the keepers of the said registers shall keep minute-books of all writs presented to them, to be registered in their several registers, expressing the day and hour when, and the names and designations of the persons by whom the said writs shall be presented, and that the said minute be immediately signed by the presenter of the writ, and also by the keeper, and patent to all the lieges, who shall desire inspection of it, gratis: And that the writs shall be registered exactly conform to the order of the said minute-book." A regulation to a similar purpose had been appointed by 1672, c. 16. § 32., and act of sederunt, July 15. 1692. Lord Stair complains loudly of the abuses arising from the want of such an institution; and both the act of sederunt and the statute 1693, c. 14., were probably made at his Lordship's suggestion. Compare B. ii. tit. 3. § 22., with B. iv. tit. 35. § 22.

A sasine is held as recorded from the time of its being entered in this minute-book, provided it remains with the keeper until the operation of transcribing into the register has been completed; and this rule can never be attended with hazard to any party, because the keeper, by having the sasine itself in his custody, can always afford the best information concerning it, whether recorded or not. Wight, 4to edit. p. 221, and 222, *Election Cases*, p. 59. Where the question is, Whether the seisin has been properly recorded or not, in terms of the stat. 1696, c. 18.? recourse must be had to the principal register. *Election Cases*, p. 61. See *Dict. voce MEMBER OF PARLIAMENT, Div. 4. § 5.*

⁵⁹ An erasure in the attestation of the date of recording a seisin, together with an erasure of the date in the record itself, and the insertion of the seisin in that record out of the order of the minute-book, held, by the Second Division of the Court, to infer a nullity of the seisin, at least in a question of inrolment; *Drummond, 24th June 1809, Fac. Coll.* The contrary decided by the First Division in another case, which, however, was distinguished by this important difference, that there had been no erasure in the attestation of registration; *Adam, 19th June 1810, Fac. Coll.*

Book II.

for publication to the lieges, not for the custody or preservation of the original instruments: But in every other case, the extract of a seisin is as probative as the principal itself*. Where the principal seisin is lost, it may be renewed by the notary in whose hand it was taken, from his protocol, if the witnesses be still alive to attest it; and this instrument will be as effectual in all respects as the one lost, since both are the attestations of the same facts, by the same notary and witnesses. It is therefore the duty of the keeper of the register, to mark the renewed instrument as registered of equal date with the registration of the instrument lost, *Stair, Jan. 2. 1678, Ramsay, (Dict. p. 13553.)* †. If the notary or witnesses be dead, the seisin may be transumed upon production of the protocol; which is likewise deemed to be as sufficient as the original seisin, *St. B. 2. Tit. 3. § 25*. It was chiefly with a view to those transumpt, that all protocols were ordained, upon the notary's death, to be lodged in the register of the session for public use, 1587, *C. 45*. If the notary neglected to keep a protocol, the tenor of the seisin may be proved on proper adminicles.

The crown's right is complete without seisin. One seisin may serve for several contiguous subjects.

44. In particular cases, seisin is not required to a right of land. Thus, as the sovereign is, by the feudal system, the highest superior of his whole territories, and the common fountain from which every feudal grant flows, the right in the crown over all the lands within the kingdom, is constituted *jure coronæ*, without seisin. His being King completes his right as fully as a seisin does the rights of subjects. And, in truth, seisins in favour of the crown are not only unnecessary, but inept; for seisin supposes a superior by whom it is given; which supposition can have no place as to the sovereign. As a consequence of this, lands holden of the crown, when they fall to the King by forfeiture, are *eo ipso* consolidated with the superiority. But where the King succeeds in a feudal right to any of his subjects, it behoves him to be served heir in special to the deceased, as Charles I. was to Queen Anne his mother in the Lordship of Dunfermline, and Charles II. to the Duke of Lennox, in the earldom of Lennox. And this service, after it is retoured to the chancery, establishes of itself a perfect right in the sovereign. It is affirmed by *Stair, B. 2. Tit. 8. § 35. vers. Ecclesiastical benefices*, that though patronages are ordinarily conveyed as annexed to lands, yet they may pass by separate gifts, as *jura incorporalia*, without seisin; and he instances particularly in the crown's patronages, which the King may transmit to any of his subjects by separate grants. As to which it would seem, that though in the first constitution of a patronage, *ex. gr.* in the founding of a church, the founder acquires the patronage, *ipso jure*, without seisin, and may transmit his right in the same way to another; yet if that patronage comes afterwards to be conveyed in a disposition annexing it to lands, and followed with seisin, all subsequent disponees must also complete their right to it by infestment, *Fac. Coll. i. 84., (Urquhart, July 28. 1753, Dict. p. 9919.)*. In other cases, one seisin may serve for many different lands. In several parcels of land which lie contiguous to one another, one seisin serves for all, with the following exceptions. *First*, Lands, though contiguous, which are holden of different superiors, being distinct tenements, require

* So the statute expressly enacts.

† Where the keeper dies without having signed the attestation of registration on the back of the seisin, the Lords authorise his successor to supply the defect; *Kilk. ii. and iii. voce Registration, Young, Dec. 20. 1749, and Ballantyne, Nov. 15. 1750, Dict. p. 19575.*

require each of them a distinct seisin. *2dly*, Contiguous lands, though they hold of the same superior, if they have been conveyed by him to the vassal by different tenures, are truly distinct fees; and therefore seisin must be taken separately on the ground of each of them. *3dly*, Two conterminous tenements possessed by two different vassals, one of whom becomes afterwards proprietor of both by purchase, require each of them a separate seisin, though both tenements should be holden of the same superior, whose right to them is contained in one and the same charter; since though both are united in the superior's person, yet as to the vassal, who enjoys them under different titles, they are distinct subjects, *July 1729, Bank of Scotland*, (Dict. voce UNION, p. 16404.). It is a common opinion, that though two conterminous tenements should be contained in the same right, yet if they are of different kinds, each must have a separate seisin; and tenements are said to be of different kinds when they have different symbols of possession. Whence it is inferred, that if a land-estate be transferred, together with a mill, the mill, though it stands on the ground of the lands contained in the grant, must have a separate seisin from the lands, because their symbols of possession are different, *Mack. § 17. h. t.* But this doctrine, though it be both taught by writers, and observed in practice, is hardly reconcilable to principles. Doubtless, where a mill is disposed of without the lands, the purchaser must be infeft in the mill by its proper symbol, clap and happer: But where a charter carries right both to the lands, and to the mill which stands upon them, why should not a seisin of the lands include the mill, which is a proper part of them, by the same reason that it includes houses, orchards, and even coal? For though, when a right is granted to the coal by itself, without the lands, the coal becomes a separate tenement, and so must have a separate seisin; yet where a charter is granted of lands where there is coal, it was never doubted but that the full feudal right to the coal is carried by a seisin of the lands, because the coal is truly *pars fundi*; *Stair, Jan. 30. 1662, Lo. Burleigh*, (Dict. p. 9630.).

45. Where lands lie discontinuous, though all the tenements should be of the same kind, and holden by the same tenure, and derived from the same author, under the same superior, there must be a special seisin for each, unless the King shall have united them into one tenantry, by a charter of union, *i. e.* by a charter in which the sovereign dispenses with the necessity of taking a separate seisin upon every discontinuous tenement, and declares, that one seisin shall be sufficient for the whole. If the charter of union expresses the special place where seisin is to be taken, that must be the rule; and a seisin taken any where else, reaches only to the contiguous lands, *March 19. 1636, L. Laurieston*. But if no place be expressed, seisin taken on any part of the lands united will serve for the whole, *St. B. 2. Tit. 3. § 44.*; for it is implied in the very notion of union, that the lands united by the charter, receive the same quality as if they had been conterminous, or naturally united; and if a clause of union be not allowed to have this effect it can have none. Bankton affirms, *B. 2. T. 3. § 40.*, that in lands holden of the crown, lying in different counties, the precept of seisin upon the heir's retour must be directed to all the sheriffs of the several counties where the united lands lie. But this appears to be a mistake in fact: For, by the constant usage, the precept is only directed to the sheriff of that county where the heir intends

Discontiguous subjects require separate seisins, unless they are united by charter of union.

Book II.

intends to take seisin ; and seisin taken in consequence of that precept serves for the whole. Where lands are derived from different authors, or holden of different superiors, or of the same superior by different tenures, such lands are incapable of union : For union has this only effect, to give the discontinuous lands the same quality as if they were naturally united or contiguous. In consequence of the received opinion, that separate seisins are always necessary in tenements of different kinds, *ex. gr.* lands, mills, fishings, &c. seisin was by the uniform practice taken of each of these tenements, though they were united by a charter of union ; but now it is, by the constant style, expressed in all charters of union, that the symbols of earth and stone shall serve for the delivery, not only of the lands themselves, but of all the other feudal rights or subjects conveyed by the charter, let them be ever so different in their natures. Craig maintains, *Lib. 2. Dieg. 7. § 19.*, that the disposing of any one part of the lands united, dissolves the whole union, just as a bundle of arrows tied together will fall asunder if but one arrow be drawn out. But the doctrine laid down by Stair, *B. 2. T. 3. § 45.*, appears better founded, that a grant of part of the lands united dissolves not the union as to the part which remains unsold⁶⁰; because the sovereign, when he unites discontinuous lands, unites every part of them to every part : so that the disuniting of one part operates only as to the part withdrawn from the union by the alienation ; and though numberless instances have occurred where that objection might have been made to a seisin, after part of the lands united had been sold, it was never doubted, but that the parts not made over continued united so as one seisin should serve for the whole*.

Or by erection
into a barony.

46. The erection of lands into a barony confers an higher degree of right on the grantee than a charter of union, *vid. infr. T. 6. § 18.* It hath therefore not only the effect of uniting subjects that are naturally separated from each other by situation, but it makes one seisin serve for all, though the subjects erected should be ever so distinct, as lands, patronages, &c. which could not be done by a bare charter of union, without a special dispensation. No other feudal privileges, higher than those of barony, are included in the erection of lands into an earldom, or a lordship, &c. ; for these last are only titles of greater dignity conferred upon a barony ; but all have precisely the same feudal effects. Craig seems to think, *Lib. 2. Dieg. 7. § 17, 18.*, that any superior, for he does not distinguish between king and subject, may, in the charter which he grants to his vassal, unite discontinuous tenements ; probably because he accounted union to be a privilege of less importance than barony † ; but Mackenzie's opinion, § 20. *h. t.*, which is supported by a decision, *Durie, Jan. 16. 1623, Aitken, (Dict. p. 16397.)*, appears more agreeable to law, that no charter by a subject-superior can confer that

* It is equally fixed by repeated decisions in the last resort, that the same quality passes with the part conveyed, and that it makes no difference though, in virtue of the dispensation, sasine is taken at a place not conveyed to the disponent. See Wight on Parliament, 4to edit. p. 224, 225, and 226. *Election Cases*, p. 66. See *Dict. voce MEMBER OF PARLIAMENT.*

† Lord Kames seems inclined to the same opinion. *Historical Notes* subjected to statute law abridged, Note 19.

⁶⁰ This doctrine again made the rule of decision; *Montgomerie, 2d March 1813, Fac. Coll.*;—where it was also found, that a clause of dispensation, permitting seisin to be taken *pro integris dict. terris aliisque*, is a sufficient warrant for infeftment upon a part, as well as on the whole of the barony.

that privilege on lands, unless the charter be confirmed by the sovereign; because by union the several tenements united acquire a new quality, which exempts them from the common rules. Nevertheless the quality of union, after it is once conferred upon lands by the sovereign, may be transferred or communicated by his vassal to a subvassal, *Durie, Jan. 25. 1627, Steuart, (Dict. p. 6623.)*. It is agreed on all hands, that a barony can neither be erected by any other than the king, nor after its erection be communicated by any base or subaltern infestment to be holden of the baron himself; because no feudal erection which imports any degree of dignity, as our baronies formerly did, can be granted but by the crown, nor are capable of being enjoyed but by those who hold immediately of the crown. Though a baron, therefore, may make over his barony to be holden *a me, i. e.* to be holden immediately of the crown, on which grant, when it is perfected, either by resignation or confirmation, the grantee acquires the right of the barony itself, with all its consequent privileges; yet he cannot divest himself of the barony by any grant in which he reserves to himself the superiority of the lands; *vid. supr. B. 1. T. 4. § 27.*, though he may convey to a vassal the privilege of union, which is implied in barony, in so far as concerns the lands conveyed, *St. B. 2. T. 3. § 45. vers. 1.*

47. Though an erection into a barony was intended merely for uniting the lands as to the vassal, but not for altering their jurisdiction with respect to the shires or stewartries where they lie; yet where lands thus erected were situated in different counties, the inhabitants of that part of the barony which lay in a different shire from the manor-place claimed anciently an exemption from the jurisdiction of the sheriff within whose territory the lands lay, on pretence that the barony to which they were united was in a different shire. It was, for cutting off this pretence, enacted, by 1503, *C. 93.*, That the inhabitants of all barony-lands should be amenable, or obliged to answer, to the respective courts within which the lands were situated. And this statute is *a fortiori* applicable to lands united by a bare charter of union; for union being still a lesser degree, ought not to have stronger effects, with respect to the exemption of the lands united, than the statute hath given to barony-lands. All feudal privileges intended to be conferred on lands by the sovereign, whether of union, barony, *regalia*, &c. because they are part of the subjects conveyed to the grantee, must be expressed in the charter which is the deed of conveyance in his favour. The seisin which follows upon the charter is not designed to confer any new right, but barely to perfect such rights as have been before granted by the charter.

48. A charter or disposition which is not yet followed by seisin, creates in the dispositive a right barely personal. It lays the grantee, and his heirs, under an obligation to divest themselves agreeably to the tenor of the grant: But it has not the effect of transferring to the acquirer the feudal right of the lands; and consequently the subject may be affected and carried off from the dispositive, before his taking infestment, by any debt or diligence which is capable of divesting the dispositive, in whom the feudal right of the lands still continues vested. A creditor or purchaser, therefore, contracting with one who has a bare personal right to the subject, rests not on the security of the records, but contracts at his peril, and must accept of the right as it stands, with all its burdens, and be affected with every declaration or deed, however latent, that

This erection does not withdraw them from the jurisdiction of the proper courts of the district.

It is by seisin alone that the feudal right is perfected.

could affect his author⁶¹. But from the moment that the author perfects his right by seisin, the grantee, if he purchases from the true proprietor, acquires a complete real right in the subject; which therefore secures him, as soon as his own right is perfected by seisin, against the consequence of all deeds, even seisins themselves, the registration of which is posterior, though the charters that they proceed upon should be prior in date to his. No singular successor, therefore, whose right is thus made feudal by seisin, can be affected by an incomplete or personal right of lands granted by his author to a third party, *ex. gr.* a charter, or an adjudication on which no seisin hath been taken; nor *a fortiori*, by the assignation of any such right, *Stair, June 20. 1676, Brown, (Dict. p. 2844.)*; nor by any backbond or declaration whatsoever, not discoverable in the registers appointed for real rights, unless inhibition, or other legal diligence, shall be used upon them prior to the seisin taken by the singular successor, which may render the matter litigious, *St. B. 3. T. 1. § 21*⁶². If it were otherwise, creditors and purchasers would reap no benefit from the security intended for them by the establishment of the records. And though the translation of a disposition, adjudication, or other personal right of lands, may, as long as the right continues personal, be burdened with the assignee's backbond or declaration, which will be effectual against his singular successors, *Stair, July 6. 1676, Gordon, (Dict. p. 7167.)*; yet so soon as the singular successor is in seisin upon his translation, the burden or limitation which was laid upon the conveyance flies off, and that right, which was before qualified, becomes absolute; *vid. infr. T. 12. § 36*. This rule secures purchasers, not only in the lands themselves, but in all the privileges which pass as part thereof. Though therefore a landholder should renounce the right he has to insist for a sale of his tithes, such renunciation, however obligatory it may be against the granter and his heirs, cannot affect singular successors; since no personal deed can deprive a singular successor of any right which law considers as inherent in the lands, except where it is contained in the deed making them over, or recorded in the proper public register, or by diligence made real, so as to burden or qualify the right transmitted. If the real right of an heritable subject cannot be completely vested in him to whom the fee is made over, without seisin, it follows that any impropriety or mistake in the words of the seisin must have full effect against the dispositive, since it is by the seisin only that the feudal right is perfected: And hence, where a seisin expressed no more, than that liferent state and seisin of the subject was delivered to the dispositive, the court adjudged that the bare liferent was the only right that could be carried by such seisin, *Fac. Coll. ii. 189, (Graham's Children, Dict. p. 6931.)*.

A feudal right cannot be charged with a real burden unless expressed in the grant.

49. The conditions and qualities with which a proprietor intends to burden his grant, ought to be expressed in the deed itself in such words as are proper to constitute a real charge or burden upon the lands; or, as it is called of late, a *lien*, a vocable borrowed from the French, signifying a tie or bond. Where the deed is expressly granted with the burden of a determinate sum therein mentioned, *Fount. Dec. 14. 1698, Count. of Rothcs, (Dict. p. 10288.)*; or with the burden of the payment of that sum, *July 1719, Cred. of Coxtan, (Dict. p. 10244.)*; *Jan. 10. 1738, Cred. of Smith, (Dict. p. 10246.)*, stated in (Folio) *Dict. ii. 66, 67.*; or where there is a clause, declaring the right void if payment be not made against a precise day therein specified, *Dirl. 41. (Cuming against Johnston, Nov.*

⁶¹ *Preston, 6th March 1805, Fac. Coll. Dict. v. PERSONAL AND REAL, App. No. 2.*

⁶² *Wulie, 8th Dec. 1803, Fac. Coll. Dict. p. 10269.*

Nov. 7. 1666, Dict. p. 10234.) ; the burden is accounted real. But where the grantee is, by his acceptance, barely taken bound to make payment of a sum, without any clause, either charging the right itself with it, or declaring the right null upon the failure of payment against the day fixed, the burden is only personal, *Pr. Fac.* 101, (*Ballantine* against *Dundas*, Nov. 19. 1685, Dict. p. 10238.) ; which is indeed obligatory on the acceptor of the grant and his heirs, but constitutes no real encumbrance on the lands⁶³. The creditor, in whose favour this burden is imposed, hath no immediate access to the rent of the lands for his payment, since he has no title of possession : The grant burdened, which is his only title, is made, not in his favour, but in favour of the grantee, whose property is charged with the debt ; and therefore, in order to make the real debt or burden effectual, the creditor must deduce an adjudication against the lands ; the preference of which, and of other adjudications proceeding upon *debita fundi*, in a competition with adjudications led upon personal debts, is to be explained, *T. 8. § 37.*

50. A clause charging the lands contained in the grant with the disponent's debts in general terms, without mentioning the names of the creditors, was, by repeated decisions, in the cases of the creditors of Lovat, Coxton, and Kersland, adjudged to constitute a real burden on the lands disposed, in consequence of the right competent to all proprietors, of disposing of their property under such conditions and limitations as they shall judge proper. But two of those judgments having been reversed by the House of Lords, the court of session did, in *July 1734, Cred. of Maclellan*, (not reported), and by several later decisions, alter their former rule, upon this principle, That no perpetual unknown encumbrance ought to be created on lands ; because the purchaser cannot, by the strictest inquiry, know who the creditors in that burden are, so as, by a proper process, to force the production of their grounds of debt, in order to clear it off*. Like to this is a clause in a charter or disposition, by which a faculty is reserved to the granter, to charge the lands with a fixed sum therein specified, to any whom he shall afterwards think fit to name. By the former style used in such clauses, the disponent reserved a power to charge the lands with infestments of wadset, or of annualrent, for a certain sum to his creditors, or others whom he should incline to favour ; in which case, a personal bond granted afterwards by the disponent in consequence of the reserved faculty, though it was good against the grantee and his heirs, was not effectual against singular successors ; see *Stair, July 12. 1671, Learmont*, (Dict.

No perpetual unknown encumbrance can be created on lands.

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* The course of decision has continued uniformly to support the learned author in the doctrine here laid down ; *Fac. Coll. Nov. 14. 1789, Creditors of Stein*, affirmed in the House of Peers, *Feb. 25. 1791, Dict. p. 1158.* ; *ibid. Feb. 1. 1793*, same parties, affirmed on appeal, *March 10. 1794, Dict. p. 14127.*

As to the competency of granting infestment in security of a cash-account, *vide infra*, B. iv. tit. 1. § 45.

⁶³ In a recent case, land was disposed "with and under the reservations, burdens, &c. under written ;" and the precept of seisin directed infestment in the lands, but "always with and under the burdens, &c. before specified, which are hereby directed to be ingrossed in the infestments to follow hereupon." Infestment was taken *in terminis* ; yet the Court held the burden not to be real, the clause imposing it merely expressing,—"that the grantee, by acceptation, should be bound to pay." It was observed on the bench, as the principle of the decision—"that without requiring any technical form of expression for the constitution of a real lien, it is necessary that the intention to impose a burden on land by reservation, should be expressed in the most explicit, precise, and perspicuous manner. In a clause, by which onerous singular successors are to be affected, there must be no room for ambiguity : but the present instance admits of a doubt ;" *Martin, 22d June 1808, Fac. Coll. Dict. v. PERSONAL AND REAL, App. No. 5.*

See farther on the subject of the text, 1, *Bell's Com. p. 585. et seq.*

p. 4099.), both because the granting a personal bond is not a *modus habilis* of constituting a real right by infeftment, and because the grantee cannot, by any search, discover who the creditor in the bond is. And even, when, by the more modern style, the power of burdening reserved by the granter was left in general, without restricting the granter in the manner of exercising it, it was adjudged on the same grounds, that the granter, who, in place of an heritable bond and infeftment, which would undoubtedly have constituted a real burden on the lands, granted a personal one, had not properly exerted his powers or faculty, and consequently, that the personal bond, though it bore an express reference to the faculty, was ineffectual against the grantee's singular successors, *Home*, 58. (*Ogilvies*, June 21. 1737, Dict. p. 4125.). Yet a contrary judgment was soon thereafter pronounced in a case nearly similar, *Home*, 134, (*Cunningham*, Nov. 14. 1739, Dict. p. 4132.). Where the faculty expresses, not only the special sum, but the name of the creditor in whose favour the reservation is made, a bond granted to that person, though only personal, appears to be a proper manner of creating a real burden; because there the purchaser may know the extent of the burden, and how to extinguish or clear it off, with as great certainty, as if the granter, in place of reserving a faculty to burden, had in the grant itself charged the lands disposed with a particular sum to be paid to a person therein specially described⁶⁴.

It is not sufficient that the seisin refers to the burdens in the charter.

51. No real burden can be constituted on a feudal right, which is not expressed in the investiture; and a question has been frequently moved, What is meant in such case by the investiture? It was adjudged, July 26. 1737, *Cred. of Smith*, (Dict. p. 10307.), stated in (*Folio*) Dict. ii. 71., that a general reference in the seisin to the burdens and conditions specially inserted in the charter, was sufficient to create a real burden on the lands effectual against singular successors; upon this medium, That the charter is part of the feudal right or investiture, as well as the seisin. But this judgment is not only contrary to three decisions pronounced since the beginning of this century, *Forbes*, July 17. 1706, *Campbell*, (Dict. p. 10303.); *Fount*, Nov. 27. 1711, *La. Monboddo*, (Dict. p. 10304.); and Feb. 13. 1730, *Duke of Argyle*, (Dict. p. 10306.); finding, that all the conditions and limitations of the grant ought to be particularly recited in the precept and instrument of seisin; but appears also destructive of the principal view of the legislature in establishing the records; and is hardly to be reconciled to the rule now universally admitted, That there can be no real burden upon lands, which is incapable of being discovered by creditors and purchasers*; for though a general burden may appear from the seisin, which is upon record, yet it cannot be known by any record what the nature and extent of it is, since charters granted by subjects need

* This doctrine was confirmed in case of *Creditors of Broughton*, June 20. 1739, reported by *Kilk.* No. 2. voce PERSONAL AND REAL, and *Kames*, *Rem. Dec.* No. 10, Dict. p. 10247. A disposition burdened with all the just and lawful debts of the granter, referring to an heritable bond which mentioned the names of the creditors, but not the sums due to them, found not to create a real burden, *Fac. Coll.* Feb. 21. 1765, *Stenhouse*, Dict. p. 10264. Other judgments have proceeded on similar grounds, *Fac. Coll.* July 19. 1780, *Allan*, Dict. p. 10265; *Ibid.* July 4. 1781, *Clark*, Dict. p. 10226. See as to a claim of real warrandice not specified in the warrantor's infeftment, *Fac. Coll.* Jan. 14. 1788, *Balfour*, Dict. p. 10267.

⁶⁴ Mr Bell remarks, that "this opinion may be questioned. The true doctrine seems to be"—that in this, as in the general case, "the real right remaining by reservation in the disponent or his nominee, shall be transferred by a voluntary conveyance made real by sasine, or by adjudication duly completed;" 1. *Comm.* p. 34 and 35.

need not enter into any record*, and the chancery-record of charters granted by the crown, which are to pass under the great seal, is not intended for the publication of real rights.

52. Mention is made of some real burdens on houses within borough, under the names of *ground-annual*, *top-annual*, and *feu-annual*, in 1551, C. 10. ; the very meaning of which words, Sir John Skene, not above forty years after the statute was enacted, professes himself utterly ignorant of; *Sk. De verb. sign. v. Annual*. See the conjectures of Craig, *Lib. 1. Dieg. 11. § 38.*, and of Stair, *B. 2. T. 5. § 7.*, concerning the signification of those terms.

TITLE IV.

Ground-annual, &c.

TIT. IV.

Of the several Kinds of Holding.

FEUDAL grants have been, in the law of Scotland, distinguished from one another, according to the different tenures or manners of holding under which vassals enjoyed them. These were, 1st, Tenures by military service; 2dly, Tenures in feu-farm; 3dly, In blanch-farm; 4thly, In burgage; to which most writers add a 5th, viz. Holding by mortification. This title, which is merely preparatory to several of the following, serves only to explain the general properties of those different tenures, reserving a more particular consideration of them to their proper heads.

Different feudal tenures by the law of Scotland.

2. From what has been already observed concerning the origin of feus, it is evident, that the most ancient feudal tenure was by military service; for all vassals were at first obliged, by the nature of their grant, to serve the superior in war, in such manner, and as often, as his occasions called for it; whence it arose, that the proper *Reddendo* in their charters was, services used and wont, or services indefinitely. And even after feus came to be given in consideration of annual payments to be made in money, grain, &c. or of yearly services to be performed by the vassal, which had no resemblance to military ones, so great attention continued to be paid to the primitive and genuine nature of feus, that the tenure by ward was still accounted the most proper holding; and consequently all feudal grants were, *in dubio*, presumed to be military. By this rule, though the *Reddendo* of the charter had required only some special service, or yearly payment, from the vassal, in place of *servitia solita et consueta*, the tenure was considered as military, if the charter did not express that it was due in name of feu-farm or blanch-farm. This military feu was by the feudists called *feudum rectum*. In the books of the Majesty it got the name of *feudum militare*, L. 2. C. 27. § 1.; and the vassal who was liable to the service was styled *miles*, *ibid.* § 2. Ward-holding is now abolished by 20° Geo. II. C. 50.

1st, Military service, or ward-holding.

3. As in this tenure the superior, during the nonage of his vassal's heir, while he was yet unfit for war, lost the benefit of that service, in consideration of which the grant was made, the minor was, in the opinion of some feudal writers, obliged to serve the superior by a substitute; but however that question may have stood as to his obligation to service, this is certain, that by an express text in the feudal usages, L. 2. T. 26. § 4. *vers. Si minori, et § 5.*, he continued, notwithstanding his lesser age, in the possession

Nature of the tenure of ward.

VOL. I.

4 E

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* But such charters "may bear a clause of registration, as well as dispositions, and on the said clause registration may follow, but only in the books of Council and Session, and in no other record," 1693, C. 35.

sion of his ancestor's fee. Agreeable to this was the ancient usage of England ; by which, not the superior, but some near kinsman of the heir, managed his estate during his minority, who was to be accountable for the rents, *qui justus esse debet* ; see *Magna Charta* of Henry I. preserved by *Matth. Paris, edit. 1684, p. 46*. It has however obtained in Scotland as early as the laws ascribed to Malcolm Mackenneth, that the superior, to compensate for his loss through the want of his vassal's services, was entitled not only to the full rents of the heir's estate, but to the custody of his person, and the management of his whole affairs as tutor, while he was under age, *Reg. Maj. L. 2. C. 42. § 7.*, from which guardianship that tenure got the name of *ward-holding*, *Skene, v. Varda*. In this full extent was the right of tutory exercised by the superior downwards to the beginning of the last century, *Cr. Lib. 2. Dieg. 20. § 13*. But superiors grew at length weary of an office which brought no profit ; and therefore what is now called the casualty of ward, is not the ward of the heir's person, but of his estate.

Taxed ward
and Black ward.

4. Because the casualty of ward seldom failed to draw after it, in the case of frequent minorities, the utter ruin of the vassal's family, ward-vassals found it their interest to charge the ward-fee with a determinate sum, to be paid yearly to the superior, in place of that casualty, where the superior could be brought to accept of it. The usual way of executing this agreement was by a charter granted by the superior to his vassal ; in the *Reddendo* of which that yearly sum was made payable to the granter, as the valued or taxed duty of the ward. This holding was therefore called *taxed ward* ; and when the ward was taxed, the casualty of marriage, which is to be explained in the next title, was also taxed. A vassal who held a fee ward of a subject-superior, who likewise held the same fee ward of his superior, was said to hold his lands by *black ward*. This was the most rigorous holding known in our law : For the subvassal's heir in that holding lost the whole rents of the fee belonging to his ancestor, not only during his own minority, in which case they fell, by the nature of his grant, to his immediate superior ; but also during the minority of that superior's heir ; because then the rents fell to the highest superior, who, as he was not obliged to regard any subaltern right granted by his immediate vassal to a third party, to which himself had not consented, was entitled, during the minority of that vassal's heir, to the ward of all the lands contained in the charter granted by himself, even of those which his vassal had made over to a subvassal by a base infeftment.

2d, Feu-farm.

5. As no kingdom can flourish under an utter neglect of agriculture, which was much obstructed by the vassal's obligation to military service, many landholders perceived the necessity of making feudal grants of small portions of land under the condition, that the grantee should, in place of serving the granter in war, cultivate and sow the grounds which the granter kept in his natural possession. These were called tenures by *soccage* ; which it has been proved, *supr. B. 1. T. 1. § 35.*, were anciently common to us with our neighbours of England, though they are now fallen altogether into disuse. From the same view of improving the lands by agriculture, the tenure by feu-farm was introduced into Scotland as early as the *Leges Burgorum, C. 100*. The vassals who held by that tenure were obliged to pay or deliver to the superior a fixed yearly rent, either in money or grain, *nomine feudifirmæ* ; and sometimes

sometimes also they were bound, like soccagers, to perform services proper to a farm, as plowing, sowing, reaping, carriages, &c. But the words usually adjoined to the *Reddendo* of feu-farm charters, *pro omni alio onere*, imported an exemption to the vassals from all services, of whatever kind, which were not specially contained in that clause. This holding, after it had been in a manner forgotten, was again revived by 1457, C. 71. *vid. infr. T. 5. § 7.* If there be no special provision in the *Reddendo* of a feu-charter, at what place the feu-duty shall be paid or delivered to the superior, payment or performance ought, in the general case, to be made on the ground of the lands which are charged with that duty, *Cr. Lib. 2. Dieg. 4. § 37.* But if the *Reddendo* consist of a quantity of grain for the use of the superior's family, of which many instances occur in the feu-charters granted by abbots and other churchmen, it behoves the vassal to carry the grain to the manor-place of the superior, because it was for the use of that house that the delivery was stipulated. Yet if the superior choose to reside without the barony, the vassal is not bound to follow him with the grain *extra curtem domini* *.

6. Though the body of the Roman law was finished before the Feudal law had its existence, Craig, and other writers, with great propriety, express a grant in feu-farm by the Roman vocable *emphyteusis*; for, on comparing the two rights, a close resemblance must appear between them in their most essential characters. *Emphyteusis* gave to the *emphyteuta*, or purchaser, a *jus dominio proximum*: And though it was sometimes called a perpetual location, it conferred a higher right than location could give. An *actio in rem* was competent to the *emphyteuta*; he might at his pleasure alter the face of the ground; he was entitled to the whole profits arising from it, and could impignorate the land for debt without consent of the *dominus*; all which rights are competent to vassals by feu-farm: He paid to the *dominus* a yearly rent or pension for his grant, called *canon emphyteuticus*, which corresponds to the duty payable in a feu-holding to the superior; he forfeited his right, if he did not pay that rent regularly, in the same manner as is provided in our feu-holdings by 1597, C. 250.; and he was not at liberty to sell without making the first offer to the *dominus*; which bears some analogy to the limitation frequently laid on vassals in their feu-charters, not to alienate without the superior's consent. Mackenzie, § 6. *h. t.* would make the two differ in point of succession; for that our feu-charters go by seisin to heirs. But it is obvious, that the right of the *emphyteuta* descended also to heirs; though indeed it did not pass by service and infestment; because the Romans were strangers to that manner of transmitting rights from the dead to the living, and to the difference between the succession in heritage and in moveables. It must be attended to, that when mention is made of a feu or subfeu, we are not necessarily to understand a grant of lands holden in feu-farm, but a feudal grant in general, a *feudum* or *subfeudum*, unless where the subject treated of naturally confines it to a feu-holding; yet the word *feu-charter* is never made use of, but to denote the special tenure by feu-farm.

Resembles the *emphyteusis* of the Romans.

7. Blanch-holding is generally defined to be, that in which the vassal pays a small duty to the superior, in full of all services, as

3d, Blanch-farm.

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* *Fount. Feb. 25. 1696, Treasurer of Edinburgh, Dict. p. 4188.* Where the castle, at which a quantity of peats was deliverable annually, had been destroyed, the prestation was still found due; *Fac. Coll. June 20. 1763, Monro, Dict. p. 14497.*

an acknowledgment of his right, either in money or in some other subject, as a penny money, a pair of gilt spurs, a pound of wax, or of pepper, &c. *nomine albæ firmæ*. It bears a near resemblance to the *feudum francum*; which, though not expressly mentioned in the *Consuetudines feudorum*, was much used over Europe in the middle ages; but with this difference, that in the *feudum francum* all services were remitted to the vassal, so that it was by the oath of fealty alone that the right was known to be feudal; whereas, in our blanch-holdings, some duty is always payable to the superior, most frequently trifling, but sometimes more considerable, when the *Reddendo* is payable in money. It often happens, that the duty, especially where it is elusory, is, by the *Reddendo* of the charter, made payable *si petatur tantum*; that is, as the words have been constantly explained by practice, *si petatur intra annum*; and in that case the vassal is free, unless the duty, whatever the quality of it may be, is demanded within the year; because the demand of the duty within that time is made an express condition of its becoming due. But though the *Reddendo* should carry this particular limitation, Stair is of opinion, *B. 2. T. 3. § 33.*, that the holding is not to be accounted blanch, if the duty be not at the same time expressed to be payable *nomine albæ firmæ*; which is grounded on this principle, That blanch-holdings, which of all others deviate the most from the original nature of feus, ought never to be presumed, but must always be specially mentioned in the grant. The words *si petatur*, are interpreted as favourably for the vassal, as if the taxative word *tantum* had been subjoined, *Durie, Feb. 16. 1627, Lo. Sempill, (Dict. p. 5447.)* Where the words are wholly left out, lawyers make this distinction, that if the duty be payable in a subject not of a yearly growth, as a pair of gloves, or of gilt spurs, it may be exacted at any time within the years of prescription; but where it consists in a thing which is produced from year to year, *ex. gr.* a stone of wax, it is understood to be passed from if it be not demanded within a year after it becomes payable by the *Reddendo, St. B. 2. T. 3. § 33.* By act 1606, C. 14., which proceeds on a recital, That the blanch-duties due by the crown-vassals were originally intended, not as a burden on the vassals, but as an acknowledgment by them of the crown's right, the vassals holding of the Crown in blanch-farm are declared not to be liable in payment of their yearly blanch-duties unless they be demanded. The court of exchequer does however exact them, though they have not been demanded within the year: for which this reason is assigned by Lord Stair, *ibid.*, That by a prior statute, 1600, C. 14., it had been enacted, That the crown is not to suffer by the negligence of its officers. The same statute 1606 also provides, That if the blanch-duties be not valued to a fixed sum in the vassals' infestments, the vassals are not to be charged for any sum as their estimated prices. By our practice for many years past, blanch-duties due to the crown are generally converted in the investitures themselves to a fixed sum; but even when they are not, their values continue to be exacted by the exchequer.

4th, Burgage-holding.

8. Burgage-holding is that tenure by which royal boroughs hold of the sovereign the houses and lands that lie within the limits described in their several charters of erection. Where the sovereign intended to erect a borough which held of a subject superior into a royal borough, the superior's consent was sometimes adhibited, that so the lands might hold of the crown, and be subject to such jurisdiction as might be specified in the charter of erection. And hence, in the charters of several royal boroughs that were after-

wards

wards ratified in parliament the ratifications contain an express salvo of such lands, lying locally within the erection, as were holden of a subject-superior. When, therefore, boroughs of regality were erected into royal boroughs, as St Andrew's, Dunfermline, Glasgow, Culross, &c. or boroughs of barony were so erected, as Dysart, the lords of regality, or barons, preserved their rights of superiority, if they did not consent to the erection; see *Stair*, July 14. 1676, *Bor. of Arbroath*, (Dict. p. 1870.); and consequently the borough thus erected, and all the tenants of it, held not of the crown, but of a subject superior, contrary to the general rule of burgal tenements, *Hop. Min. Pr. p. 96. § 233.* But even where the lands erected into a royal borough are holden of a subject, the borough holds of the crown all the liberties and privileges contained in their charter. Craig delivers it as the common opinion, *Lib. 1. Dieg. 10. § 31. & 36.* that burgage-holding does not, or at least did not, constitute a separate manner of holding, but that it was a species of ward-holding; with this only difference, that in a proper ward-holding the vassal is a single person; whereas in a burgage-tenure it is a community. Accordingly, in the erections of the most ancient royal boroughs, and particularly in a charter by Robert III. erecting the borough of Inverkeithing, the *Reddendo* is *servitium solitum et consuetum*, which the law interprets to be military service: And in most of the later charters erecting boroughs-royal, the service specially expressed is watching and warding; which might properly enough be said, some centuries ago, to be of the military kind. This service of watching and warding is one of the *naturalia* of the burgage-tenure, and is due by the burgesses within the liberties or territory of the borough, though it be not expressed in the charter. Without doubt, boroughs must be free from the casualties incident to proper ward-holdings, of ward, non-entry, relief, and marriage: But that arises, not from the nature of the right, but from the particular condition of the vassal; for the borough, who is the vassal, neither marries, dies, nor is minor.

9. As the royal borough is the King's vassal, all the burgage-holders hold immediately of the crown, with the exception already mentioned; and accordingly all burgage-charters bear, that the lands hold of the King *pro servitio burgali*. Though the bailies of the borough have a superiority, in point of dignity and jurisdiction, over their fellow-burgesses, they are not for that reason superiors of the borough in a feudal sense. Their powers in receiving the resignations of burgage-holders, and giving them seisin, are barely ministerial: For in those matters they act merely as the King's bailies specially authorised by statute 1567, *C. 27.*, for completing the titles of the burgage-holders, *St. B. 2. T. 3. § 38.*; *St. Martin's Styles*, p. 39. & 528.: And hence they have no right to any composition for the entry of singular successors in burgal lands, *Durie*, July 22. 1634, *Hay*, (Dict. p. 15031.). If any part of the common lands of a borough are feued by the magistrates to a private purchaser, such lands hold not of the crown in burgage, but of the borough in feu-farm, *Hop. Min. Pr. p. 97. § 235.* Neither are lands purchased by a borough *tanquam quilibet*, out of their common stock, to be accounted burgal tenements, not being contained in their charter of erection. In relation to these, the borough *utitur jure privato*, i. e. is considered not as a borough but as an ordinary purchaser; and so must hold them under that tenure which is expressed in the grant by the seller; consequently the seisins of

Burgage-tenants hold of the crown.

Book II.

5th, Mortification.

such lands must be registered, not in the borough books, but in the books of the county or district where they are situated, according to the directions of 1617, C. 16.

10. Feudal subjects granted in donation to churches, monasteries, or other corporations, for religious, charitable, or public uses, are said to be given in mortmain, or, in our law-style, to be mortified; either because all casualties must necessarily be lost to the proprietor, where the vassal is a corporation, which never dies, *Cr. Lib. 1. Dieg. 10. § 35.*; or because the property of those subjects is made over to a dead hand, which cannot, contrary to the donor's intention, transfer it to another⁶⁵. *Craig, Lib. 1. Dieg. 10. § 32. et seqq.*, distinguishes between donations of land made to prelates for the behoof of the church, and those granted in mortification, or *in puram eleemosynam*. He affirms, that in the last no services were due, because they were given merely in consideration of the prayers and masses to be performed by the donees, for the souls of the granter and his departed friends; but he is of opinion, that the first sort was truly holden ward, and that the only difference between a church-fee and a common ward-holding arises from the different conditions of the vassals. Thus the superior loses his casualties in a church-fee, because the church, who is truly the vassal, being in the judgment of law a corporation, never dies. Thus also prelates, where they were the vassals, though the Canon law disabled them from fighting in person, *Decretal. L. 3. T. 34. C. 9. § ult.*, were yet bound to serve by a substitute, as if they had enjoyed the lands by military service. But however this might have been the case in the infancy of feus, the only service due to the superior in church-fees, for some centuries before the Reformation, were of a spiritual kind; so that if donations to churches or monasteries constituted no distinct holding by itself, the service required from the donees approached nearer to blanch-holding than to ward.

The power of mortifying is now considerably limited.

11. The purposes for which lands had been given to the church in the times of Popery, were, after the Reformation, accounted superstitious, and therefore (*those lands were*) declared to belong to the crown by the act of annexation 1587, C. 29.; so that now the only lands which continue mortified to the church are the manses and glebes of parochial ministers, which by that statute are appropriated to the use of the reformed clergy. But mortifications may still be granted in favour of hospitals, either for the subsistence of the aged and infirm, or for the maintenance and education of indigent children, or in favour of universities, or other public lawful societies, to be holden either in blanch or in feu farm; and whatever the society be to whom the donation is made, the superior must lose all the casualties of superiority for the reason before assigned. As a consequence of this, lands cannot be mortified without the superior's consent, *Cr. Lib. 1. Dieg. 11. § 21.* And the Barons of Exchequer,

⁶⁵ A piece of ground gratuitously feued for building a church, with a provision in the charter that it shall revert to the superior, if at any time applied to secular purposes, may yet be sold, when it becomes necessary to have a larger church than can be built on the area, provided the price be applied towards the purchase of another area of proper dimensions, and a title taken to this new subject under the same conditions with the original grant; *Johnston, &c. 30th May 1804, Fac. Coll. Dict. p. 15112.* Where lands holding of the crown are vested in trustees for charitable purchases, they are entitled to dispose of the superiority,—as being a “transaction beneficial for the trust;” *Trustees of Moore's Mortification, 25th June 1814, Fac. Coll.*

quer, upon this ground, refuse to pass signatures of lands in favour of corporations, that so the crown-revenue may not be impaired by the loss of its casualties.

TITLE V.

TIT. V.

Of the Rights of Superiority, and its Casualties.

CERTAIN rights are, in a feudal grant properly constituted, retained by the granter, who is the superior; and others are acquired by the grantee or vassal. The rights retained by the granter are either fixed or casual. The fixed rights of superiority are various. The superior, by the grant to his vassal, is not truly divested of the lands contained in it; his right continues unimpaired, except in so far as the grant conveys the *dominium utile*, or property, to the grantee: His infestment subsists as to every other respect, both in questions with his own superior, and with third parties. *First*, In questions with his own superior. Thus, on the death of a vassal who had made over, by a subaltern grant, part of his lands in favour of another, that vassal's heir can compel his ancestor's superior, upon his entry, to infest him in the whole lands conveyed by the ancestor's charter, even in those, the property of which the ancestor had disposed to another, in the same manner as if no such subaltern grant had been made; for as no superior can be hurt by any subaltern grant of his vassal, without his own consent, neither can he avail himself of it, so as, upon that pretence, to refuse entering his immediate vassal's heir in all the subjects specified in the charter granted by himself to that vassal's ancestor. Yet sometimes, through oversight or inadvertency, those infestments by the superior to the vassal's heir, in so far as relates to the lands of which the property had been conveyed over by the vassal's ancestor, are given, not of the lands themselves, but barely of the superiority. *2dly*, The granter's infestment still subsists, notwithstanding the grant made to his vassal, in all questions with third parties. Thus the granter, or superior, is, in consequence of the *dominium directum*, which he retains to himself, entitled to pursue all real actions concerning the lands, against every person, other than the vassal to whom he has made the grant, or such as derive right from him. On this ground, an action was found to be competent to one who was infest barely in the superiority, for removing a possessor from the lands, if he could not produce an heritable right affecting them in his favour, sufficient to maintain himself in the possession, *Durie, Nov. 19. 1624, L. Lagg, (Dict. p. 13787.)*⁶⁶.

Rights retained by the superior, after he has conveyed the property.

2. Superiority carries likewise a right to the yearly feu-duty payable by the vassal to the superior in his *Reddendo*; and because this, and all other rights of superiority, where the superior is not in possession of the lands themselves, are *debita fundi*, or real burdens affecting the fee, an action for pointing the ground lies at his instance for the payment of them, against all singular successors

His right in the feu-duty. Personal services.

⁶⁶ One infest in the superiority merely, cannot pursue a declarator of non-entry; *Park, &c. 16th May 1816, Fac. Coll.* But such an infestment is sufficient to constitute a freehold qualification; *Ibid. Lord A. Hamilton, 23d Feb. 1819*; unless where an objection arises from there not being a proper feudal separation of the property and superiority; *Ibid. Norton, 6th July 1813; Redfearn, 7th March 1816.*

Book II.

sors in the land ; which, however, is no bar to a personal action for recovering them, against such as have either come under an obligation to pay them, or have intermeddled with the rents of the lands out of which they are due*. The superior is also entitled to the personal services which the vassal is bound to perform by his charter. The rule laid down concerning the payment of blanch-duties, *supr.* T. 4. § 7., obtains in all feudal grants, with regard to personal services, *viz.* That where they are annual, *ex. gr.* the reaping of corns, cutting of hay, &c. the vassal is free unless they be demanded within the year, *Durie, Jan. 30. 1624, L. Carnousy, (Dict. p. 14493.) †.* In our more ancient charters, vassals were frequently taken bound to attend on their superiors at huntings and hostings ; but as those clauses were thought to heighten too much the authority and influence of superiors over their vassals, all such personal services, whether due by charter or custom, were abolished by 1. *Geo. I. St. 2. C. 54. ‡.* And though the title of this statute be confined to the Highlands of Scotland, yet that part of the enactment which abolishes those services is unlimited, and so must extend over all Scotland, wherever the lands of the vassal liable in them may happen to be situated. To make up for the superior's loss through the want of these services, an annual sum is appointed to be paid by the vassal, which, if it cannot be fixed by the parties themselves, is to be settled by the court of session. In a case decided in 1721, between the Duke of Gordon and Hay of Rannes, who is none of the most inconsiderable of the Duke's vassals, the court awarded 5s. Sterling as the annual value of the vassal's personal services.

Action of shewing the holding.

3. It may be mentioned as another fixed right of superiority, that all superiors are entitled to know the nature of the deeds they may have granted to the vassal, in case they have neglected to keep copies of them ; and though they be furnished with copies, they may bring an action to have the deeds themselves judicially exhibited, that their validity or import may be ascertained. This was, in our ancient law, called an action for shewing the holding, *Q. Attach. C. 25. ; St. Rob. III. C. 36.* The superior's title in it was his charter, containing the lands possessed by the vassal. But if he had once forced the production of his vassal's title-deeds, he could not bring a new action of the same kind during that vassal's lifetime.

* *Durie, Feb. 24. 1632, Bishop of Galloway, Dict. p. 4186.* It has been found, that a vassal continues liable, even after he has sold the lands, until the purchaser be received by the superior ; *Kilk. No. 2. voce FEU-DUTIES, Wallace against Ferguson, Dict. p. 4195.* But the superior's personal claim against all intromitters, except the vassal himself, is limited to those years in which the intromission has taken place, and to the extent of the feu-duty, in each year ; *Durie, March 26. 1629, Rollo, Dict. p. 4185 ; Ibid. penult. Jan. 1639, Cockburn, Dict. p. 4187.* See also *Kilk. No. 1. voce FEU-DUTIES, Biggar' against Scott, Dict. p. 4191* ⁶⁷.

† See *Fount. Dec. 13. 1699, Feuars of Kinross, Dict. p. 13071* ⁶⁸.

‡ An obligation in a feu-charter to maintain a boat, and to uphold the mansion-house for the reception of the superior, does not fall under the statute ; *Fac. Coll. Feb. 5. 1762, Duke of Argyle, Dict. p. 14495.*

⁶⁷ It was, in this case, found, that personal action for payment of feu-duties does not lie against a tenant of the vassal, "the tenant being removed before the process was raised." Several of the Lords, however, dissented ; thinking, "that if once action lay, it remained while the tenant was debtor in the rent to his master the vassal."

⁶⁸ It was here found, "that carriages, and other such indefinite prestations and services, prescribed every year ;" but that this did not extend "to kaim-fowls and other casualties."

lifetime. This action, though it continued in use till the reign of James I. 1424, C. 9., hath been now long laid aside; but the purposes of it are fully answered by an action of reduction-improbation, which is to be explained *infr. B. 4. T. 1. § 19. et seqq. **

4. A subject-superior, though he may sell his right of superiority to another by a public infestment, to be holden of the King or his own immediate superior †, cannot dispose of it by a subaltern grant to be holden of himself; because by that method he interposes a new vassal between himself and his former vassal, and so renders that former vassal's condition harder than before, by increasing the number of superiors between the crown and him; upon which medium, it was taken for granted, that an infestment of this sort was invalid; *Stair, Jan. 30. 1671, Douglas, (DICT. p. 9306.) ‡*. And though several ancient charters are yet extant, in which our sovereigns, who thought themselves free from such restraints, granted rights of superiority to third parties, in prejudice of the crown vassals, who were thereby made to hold of a subject-superior, such grants were prohibited by special statute, *Rob. III. C. 4*. This rule however, hath no force, where lands fall to a superior on the forfeiture of his immediate vassal, who happens to have a subvassal under him; for such superior is entitled, by the nature of the feudal contract, to provide a new vassal for himself in the room of the forfeiting person, and consequently to interpose a vassal between himself and the subvassal, unless he has, by some deed, accepted the subvassal as his immediate vassal; *Stair, Nov. 26. 1672, E. Argyle, (DICT. p. 15013.)*. And indeed, in this and the like cases, the reason of the rule ceaseth; for the subvassal's condition is no worse than it was formerly; he only changes one superior for another, without having a greater number of superiors interposed between the crown and him than he had before.

5. Besides the fixed constant rights inherent in superiority, the superior hath several advantages, which, because they depend on

VOL. I.

4 G

uncertain

* It may still be by action of exhibition; *Fac. Coll. Dec. 5. 1781, Rose, DICT. p. 3971* ⁶⁴.

† *Fac. Coll. Aug. 5. 1774, Dreghorn, DICT. p. 15015.* (See *not.* ⁶⁵.)

‡ It is equally unlawful to dispoſe the *dominium directum* to different persons, and so render the vassal's situation worse, by increasing the number of his immediate superiors; *June 9. 1741, Maxwell, reported by Kilk. No. 4. voce SUPERIOR AND VASSAL, and by Clerk Home, DICT. p. 8817; Fac. Coll. Jan. 31. 1781, Duke of Montrose, &c. DICT. p. 8822* ⁶⁵. These defects can be challenged by the vassal alone; *Fac. Coll. Feb. 17. 1781, Campbell, DICT. p. 7786.*

⁶⁴ The action, in this case, was not properly one for *shewing the holding*. It was brought at the instance of the Crown's donatary of the duties and revenues which had belonged to certain chaplainries, against the "proprietors of lands holding of these " chaplainries, for payment of the arrears of the duties, and for exhibition of the " charters containing the lands subject to them, in order that the amount might be " ascertained."

⁶⁵ This last decision was affirmed on appeal, *19th Feb. 1782.*—The principle was stretched so far, in one case, that even where there had been originally *two* separate parcels of land, acquired from different sources, and at different times, the mere including of them afterwards in *one* charter, though under two distinct clauses both of *quæquidem* and *reddendo*, was held sufficient to prevent the superior from again dividing the superiorities, and selling or disposing of them as distinct subjects; *Lamont, 23d June 1812, Fac. Coll.* This was, however, reversed on appeal; *8th Feb. 1819.* It is undoubted, that where the titles of subjects, originally distinct, have never been thus blended, no bar is thrown in the way of a separate sale, merely by the circumstance of the several superiorities coming into the person of one single individual, while the several properties come into the person of another; *Dreghorn, supr. not. † h. p.* See farther on this subject, *Wight, p. 228. et seqq.; Bell (Election Law) p. 77. et seqq.*

Superiors cannot, by subaltern grants of superiority, make the vassal's condition worse.



Casualties of superiority; and 1st, of ward.

uncertain events, get the name of *casualties*. Some of these are common to all tenures, and others incident to particular tenures. The casual rights proper to a ward-holding were three; ward, recognition, and marriage; as to which, now that that tenure is abolished, with all the casualties incident to it, a general account of their nature and effects may suffice. The casualty of ward entitled the superior, during the heir's minority, to the whole profits of the ward-fee which formerly arose to the deceased vassal, either from the natural product of the ground, or from the rent payable by tenants. As to the profits accruing from woods, collieries or other such casual rent, the superior, whom it behoved to exercise his temporary right as a liferenter, *salva rerum substantia*, or without committing waste, could not exceed the measure formerly used by the deceased; *vid. infr. T. 9. § 57, 58*. Upon this ground he was obliged to uphold the tenants' houses, orchards, inclosures, &c. in as good condition as he at first received them, and give security for that purpose, 1491, C. 25.; 1535, C. 15. The right of this casualty was perfected by the death of the vassal, and the minority of the heir, without the necessity of a decree of declarator, (because it was due by the genuine nature of the contract, and by the *Reddendo* of the charter); and, consequently, upon the concurring of these two events, the superior might immediately grant leases, remove tenants when these leases determined, sue them for their rents, and, in general, exercise all other lawful acts of administration during the continuance of his right. But if the ward was taxed, the minor retained the possession, and the superior had nothing to demand but the yearly taxed duty.

Ward was burdened with the heir's alimony and widow's terce, and excluded by the courtesy.

6. The casualty of ward, while that tenure subsisted, was burdened or restricted, either by law, or by the consent of the superior. It was burdened by law, *first*, With an alimony to the minor heir, 1491, C. 25. Though by the words of this statute, the heir was entitled to an alimony, in every case where he had no blanch or feu farm land sufficient for his maintenance, equity interposed for the superior, if the heir had either an employment or an estate in money, which might serve that purpose, *infr. T. 9. § 62.*; but in so far as such separate estate or income fell short of a reasonable subsistence, the superior was to make up the deficiency. In taxed ward the superior was free from this obligation: for the duty payable to him in case of taxing the casualty was restricted to a liquid yearly sum, and the vassal's heir had the whole surplus for a fund of subsistence. *2dly*, The law restricted the ward by the terce of widows; for the terce was a provision given to widows by the law itself, (except where it was excluded by an entail), and therefore operated without the superior's consent: But it behoved the widow, in this case, to relieve the superior of a share of the heir's alimony, in proportion to the value of the terce-lands enjoyed by her. Thus also, the courtesy, or the husband's legal liferent over the whole estate in which his predeceased wife was seised, totally excluded the ward.

If the possession of a subvassal of adjudger is affected by the falling of the ward of the vassal.

7. *3dly*, The ward was for a certain period restricted *ex lege*, by subaltern grants made to vassals holding their lands in feu-farm. For understanding this, what was formerly said, *T. 4. § 4.* must be attended to, that the superior was entitled, by our ancient law, to the ward of all the lands contained in the grant made to the vassal, even of those lands that the vassal had subfeued to another. For this

this reason, when the King's ward-vassals were, for the encouragement of agriculture, allowed to grant subaltern infeftments, to be holden in feu-farm, 1457, C. 71., it became necessary, for the subvassal's security, to enact in the same statute, That notwithstanding the ward's falling to the King by the minority of his immediate vassal, the subvassal should retain the possession of his feu, upon paying to the crown the yearly feu-duty contained in his subaltern right while the ward continued. By this means, the King, in place of enjoying the full rent of his vassal's fee during the ward, as he might have done by the former law, was limited, in so far as related to the subvassal's lands, to the feu-duty contained in the subvassal's charter. This statute seemed to require the King's subsequent approbation, in order to give effect to the subfeus granted by his immediate vassals; for the words are, that "the King shall ratify and approve the said assedations:" But as the statute was truly an invitation by the legislature to the King's vassals to feu out their lands for promoting the public policy, it was itself held as equivalent to the King's ratification; *Stair, Feb. 12. 1674, M. of Huntly*, (Dict. p. 4170.). This right of subfeuing competent to the crown's vassals, was renewed by two temporary acts, 1503, C. 90, 91., which were to expire upon the demise of James IV.; but it continued to be exercised after that period; and, in the course of time, came to be assumed by all proprietors, even those who held of subjects, to the great detriment of their immediate superiors. The vassals of subject-superiors were therefore, by 1606, C. 12., prohibited to subfeu without the consent of their superiors; and this prohibition was extended, by 1633, C. 16., to the King's ward-vassals. The right of these last was indeed restored to them by an act passed during the Usurpation, 1641, C. 58.; but that act having been rescinded upon the Restoration, 1661, C. 15., the law which regards the right of subfeuing was, after the act 1633, brought back to the same state it was in before the year 1457. *4thly*, Though it has been universally admitted, that an appriser or adjudger, allowing him to be both infeft and in possession, is not truly constituted vassal to the superior of the lands adjudged, during the currency of the legal, for the reasons assigned below, T. 12. § 46., and though this doctrine has been approved by *July 24. 1739, Cred. of Bonhard*, (Dict. p. 16453.); yet it was held for the law of Scotland, in that very decision, that where the adjudger was in possession, and actually infeft by the superior, the casualty of ward, falling afterwards to the superior by the death of his vassal, the adjudger's debtor, was burdened with the adjudger's debt, against which the ward had no operation: And even a charge given by the adjudger to the superior to infeft him, in consequence of 1469, C. 36., had the same effect, if he was *in mora*, or blameable in not giving obedience to the charge. But if the superior had good reason for not entering him, *ex. gr.* if the adjudger neglected to offer him a year's rent for his entry in terms of that statute, the superior continued to have full right to the ward falling afterwards by his vassal's death, *Stair, Feb. 9. 1669, Black*, (Dict. p. 6911.). If the ward had actually fallen by the death of the adjudger's debtor before the charge given to the superior, the adjudger's debt could be no burden on the ward; because, in that case, a right was acquired to the superior by the vassal's death previously to the charge.

Book II.

Ward excluded
or limited by
the superior's
consent.

8. Ward might also have been excluded or restricted by the consent of the superior; for *volenti non fit injuria*. Hence the same statute which prohibited subfeus of ward-lands by superiors holding of subjects, 1606. C. 12., authorised them, where the superior consented to the grant, provided his consent appeared from some positive act or deed; in which case they still continued to exclude the ward falling afterwards by the vassal's death, in so far as concerned the subvassal. Grants therefore by the vassal to be holden of the superior, perfected either by resignation or confirmation, excluded the superior from the claim of the ward by the granter's subsequent death: For from the moment of the superior's confirming the right, or accepting the resignation, the disponee became vassal by the superior's own consent; and consequently, it was by the disponee's death alone that the casualty could fall. But no debt contracted, or voluntary right granted by the ward-vassal, without either the authority of law, or the superior's consent, could have the effect of restricting the ward to his prejudice. Thus, servitudes constituted by the vassal on the ward-fee, were not effectual against the superior, when the lands fell to him by the ward, unless they had been established by prescription. Nay, a decree of the sheriff fixing the marches of the ward-lands was not effectual against him in that case, if he had not been made a party to the suit; *Stair, Feb. 8. 1662, Lo. Torphichen*, (Dict. p. 2199.). In consequence of this rule, the superior was not bound to pay, even the interest growing during the ward, of any debts contracted by the deceased vassal; which, in the case of long minorities, proved frequently the ruin of the vassal's family, in contradiction both to a more equitable rule established by our ancient law, That the superior should pay during the ward a certain proportion of the vassal's debts, *pro quantitate hereditatis et temporis, Reg. Maj. L. 2. T. 42. § 5, 6.*, and to the customs of Normandy, *art. 215*, which, from the same consideration of equity, obliged the superior to pay all the yearly burdens chargeable on the estate, and the interest that should fall during the ward, of all the heritable securities or *hypotheques* affecting it, that had been granted by the vassal.

Duration of the
superior's right
to the ward.

9. The casualty of ward lasted, in the case of male heirs, to their age of twenty-one, because till then they were not accounted able to endure the fatigue attending military service; and in females, till fourteen, 1547, C. 5.; 1571, C. 42., because these could not before that age, by our ancient law, marry an husband capable of serving the superior, *Reg. Maj. L. 2. C. 48. § 1.*, which continued to be the law of Scotland till towards the beginning of the last century, *Skene, v. Varda*. And even after women were, by our later practice, allowed to marry at twelve, it was thought proper not to shorten the duration of the ward, probably to give the greater benefit to the superior, whose case was in those days accounted more favourable than it hath been since. In co-heiresses, the ward determined when the eldest attained the age of fourteen; for as the right of superiority was a *jus individuum*, belonging solely to the eldest, the casualties due by two or more vassals ought also to be regulated by the age of the eldest. Besides that heirs-portioners were heirs *pro indiviso*, each of them had a property in every *gleba terræ*; and therefore, when the eldest came to be fourteen, the superior had a vassal fit for marriage, who was truly vassal in every inch of ground in the ward-fee. The ward determined also in male heirs

heirs before their age of twenty-one, if they had committed treason. This the law considers persons to be capable of, as soon as they are presumed to be *capaces doli*; that is, according to the general opinion, at the age of sixteen. In that case, however, it may be observed, that the lands fell not to the superior by the casualty of ward, but to the crown by forfeiture.

10. Recognition, though ranked by some writers among the casualties of superiority, was indeed a total forfeiture of the fee; since the vassal who incurred it fell from the whole lands contained in his grant. The word, as it was anciently used, included under it all the ways by which the superior returned to his fee, or claimed it again as his own. Thus, the over-lord was said to recognise the lands by the falling of the vassal's escheat, or by the non-entry of the heir. But the term came afterwards to be used in a more limited signification, to express that special casualty, by which the fee returned to the superior, in consequence of the alienation made by the vassal of the greatest part of it to a stranger, without the superior's consent. It was first introduced, that if the vassal should, by alienating his lands, disable himself from feudal services, the superior might have it in his power to name another in his room capable of performing them, *L. 2. Feud. T. 52. pr.*; and to this, all the other reasons commonly assigned for that casualty, drawn from the vassal's ingratitude, and the transmission of the fee to a family at enmity with the superior, may be easily reduced. In the infancy of feus, vassals were left at liberty to alienate part of their lands without the consent of the superior, and to subfeu the whole of them, *L. 1. Feud. T. 21. vers. Si quis*; *L. 2. T. 9. pr. vers. Si vero*; and even after the alienation of any part was prohibited, it was only the part alienated that was forfeited to the superior, *L. 2. Feud. T. 38.* The law of Scotland gave more liberty to the vassal than the written usages of the feus; for it allowed him to sell to the extent of the half; but our penalty was severer; for the vassal, if he exceeded the half, forfeited not only the part sold, but the whole.

11. Recognition, notwithstanding these severe consequences, fell, not on the vassal as the proper penalty of a crime or delict, but rather as a feudal right implied in ward-holdings, which the superior reserved to himself in the feudal grant, and which the vassal subjected himself to, by accepting of it. Hence it followed, *first*, that that casualty, though it had been incurred by the minor's ancestor, might have been declared, upon the ancestor's death, in a proper action against the minor, even during his nonage, notwithstanding the rule, *Minor non tenetur placitare*, *Stair, Jan. 28. 1681, L. Dun*, (*Dict. p. 9098.*); for the superior's plea in such case would not have been founded on a right preferable to that which was in his deceased vassal; but upon this, that the vassal had not fulfilled the condition implied in his right, and that therefore the lands returned to him the granter; *vid. supr. B. 1. T. 7. § 46. 2dly*, If this casualty was a right inherent in a ward superior, he was consequently entitled to an action against his vassal's heir, declaring that it had been incurred by the ancestor, though no action had been brought against that ancestor in his lifetime, *Stair, Feb. 19. 1662, Lo. Carnegy*, (*Dict. p. 10339.*); *vid. infr. B. 4. T. 1. § 14. 3dly*, It was a consequence of this principle, that recognition was incident to all ward-fees, though the casualties of ward and marriage should have been taxed, (for by the taxing of these, the

Recognition:

Recognition, rather a reserved right to the superior, than a penalty on the vassal.

What sort of alienations inferred recognition.

quantum of them was only ascertained, without altering the nature of the holding); and indeed in every case where there was no express clause cutting it off. But it had no room in any other holding than ward; and therefore tithes fall not under recognition, because tithes were not enjoyed by ward-holding.

12. All voluntary deeds, whether public or base, inferred recognition, even such as were granted for an onerous cause; because whoever accepts of a grant prohibited by law, though he may have given a valuable consideration for it, has no title to the rights of a lawful creditor. Hence it required a special statute, 1503, C. 91., to secure subvassals against that casualty, when the crown-vassals were invited to grant subaltern rights of their ward-lands. Under voluntary alienations were included all grants that became a charge upon the property, *ex. gr.* wadsets; for the vassal thereby disabled himself from serving the superior as effectually as by a direct alienation of the property itself. But infestments of warrandice fell not under this rule, because they were not present deeds of alienation; their effect was suspended, till the lands principally made over were evicted: And this reason being equally strong in infestments of relief, which have no effect till the cautioner is distressed for the debt, these infestments did not infer recognition, unless the right was purified by distress; see *Stair, July 7. 1681, Hay, (Dict. p. 6500.)*. Necessary or legal alienations by apprising or adjudication led for the payment of debts contracted by the vassal, drew no forfeiture after them, which proceeded from favour to lawful creditors; yet adjudications deduced against the vassal after the fee had actually fallen by recognition, could not hurt the right that had been previously acquired by the superior.

Recognition not incurred, where the property was not transferred *cum effectu* by the vassal's alienation.

13. It is a favourable doctrine, which is taken for granted by Mackenzie, § 5. *in fin. h. t.*, that where the property was not transferred *cum effectu* by the vassal's alienation, this casualty had no place. Hence, *first*, It was not incurred, either if the deed was not perfected by seisin, (and this is admitted by all), or if the seisin was null. *2dly*, Recognition could not fall against an heir upon a deed granted by the ancestor *in lecto*, since all deathbed deeds affecting heritage are subject to reduction at the suit of the heir. Hence, *3dly*, A disposition granted by the vassal, to be holden, not of himself, but of his superior, if the seisin following upon it should not be confirmed by the superior, could not infer recognition; for a right to be holden of the superior is null before confirmation. Yet see upon this head, *Cr. Lib. 3. Dieg. 3. § 25.; St. B. 2. T. 11. § 11, 12.*

No alienation of the vassal could be secure, without the superior's consent.

14. Though alienation by the vassal of less than the half of his ward-fee was a lawful act, inferring no forfeiture; yet neither the seller nor purchaser was secure without the superior's consent, or confirmation; for the purchaser acquired under the tacit condition, That if the vassal should afterwards sell as much as, when joined to the first alienation, would exceed the half, his purchase should resolve, or become void. And indeed, in such case, the whole ward-fee fell under recognition, both the first and last alienations, and all likewise that remained unsold, *Stair, Feb. 23. 1681, Hay. (Dict. p. 6513.)*. This head of our law hath given rise to several questions; in what cases one deed of alienation should be joined to another, to make up the half of the ward-fee? and what was to be deemed the half? Let it suffice to mention two or three. A public infestment granted by the vassal before his prior base infestments

ments had amounted to the half, could not be brought, in any shape, *in computo* with these prior base rights, so as to infer recognition against them; because the subsequent public right, proceeding either on resignation to the superior, or upon confirmation by him, being truly the superior's own deed, could not justly draw any penal effects after it against the vassal; *Forbes, Mar. 21. 1707, L. Grant, (Dict. p. 6503.)* A charter of *Novodamus* by the superior to his vassal being an original right, implied a confirmation of all prior deeds of alienation; and, consequently, hindered them from being conjoined with those that were granted by the vassal posterior to the *Novodamus*, so as to infer recognition; *Pr. Falc. 53. (King's Advocate against Creditors of the Laird of Cromarty, Feb. 23. 1683, Dict. p. 6467.)* Though the whole ward-fee should have been alienated by the vassal to be holden of himself, recognition was not incurred, if the yearly-feu duty payable by the subvassal was equal to the half of the rent of the lands; for, in that case, the vassal retained, not only the *dominium directum* of the whole ward-fee, but the full rent of the half of it, *St. B. 2. T. 11. § 14.* On a like ground, a right of annual-rent, or of wadset, though granted by the vassal over all the ward lands, inferred not recognition, if the sum secured by the right fell within the half of their value, *Steu. Ans. v. Recognition; Stair, July 7. 1681, Hay, (Dict. p. 6500.)*

15. It was not every vassal whose deeds of alienation drew recognition after them. For, *first*, A vassal whose lands were subject to a right of redemption in favour of another, could not grant any deed inferring recognition, to the prejudice of that other; *ex. gr.* if the wadsetter of a ward-fee should have alienated the half of it before the right became irredeemable, though the lands would without doubt have recognised, in so far as concerned his interest in them, the alienation could not hurt the right of reversion; which, by the constitution of the wadset, was vested in the debtor. *2dly*, Recognition was not incurred by deeds granted by a vassal interdicted, without consent of his interdictors; because they might have been declared null and ineffectual to transfer property, as having been to the great prejudice of the granter, and because persons interdicted, in that as in all other penal questions, fell to be considered in the same light with idiots, or others naturally incapable of making grants, through a defect of judgment. *3dly*, Creditors who had used inhibition upon their grounds of debt, were secured by 1686, *C. 15.* against the effect of all deeds of alienation granted by their debtor, after publishing that diligence, which might otherwise have inferred recognition; and the lands falling under recognition were, by that statute, declared to be burdened with the debt on which the prior inhibition proceeded.

16. No deed of alienation granted by a vassal inferred recognition, if it was not made in favour of a stranger; and all were deemed strangers to the vassal but those who were *alioqui successuri*, *i. e.* those who, if they had survived the vassal, would have necessarily succeeded to him, though there had been no grant in their favour. Hence recognition was inferred by a vassal making over his lands to a son of his own, if he was not the eldest; or to a brother, though he should have been, at the date of the grant, next in succession to the granter; because the granter might have had afterwards issue of his own body; *Stair, July 29. 1672, Lo. Halton, (Dict. p. 13384.)* Nay a husband was, in this question, adjudged a stranger to his wife; *Edg. Jan. 13. 1725, Hall, (Dict. p. 13395.)*

It was not every vassal whose deeds induced recognition.

The alienation must have been to a stranger.

17. Recognition,

BOOK II.

This casualty might have been passed from by the superior.

17. Recognition, even where it had been actually incurred, might have been passed from by the superior; either, *first*, by his express consent; for instance, if he should have expressly confirmed a seisin given by his vassal, upon which recognition had already fallen; or, *2dly*, by his presumed consent, *ex. gr.* by his granting to the vassal a charter of *Novodamus*, which implies a discharge of all casualties incurred by the vassal prior to the charter; *vid. supr.* § 14. Thus also, a precept of *Clare constat*, granted by the superior to the vassal's heir, imported a passing from the penal effects of all deeds granted by the ancestor inferring recognition. But a precept granted, not voluntarily, but in obedience to a charge given to the superior upon a retour, had not this effect; because a superior's granting a precept in obedience to the law, ought not to deprive him of any right competent to him before granting it. In general, every voluntary act of the superior, from which an approbation of the vassal's right might be presumed, was construed to purge recognition already incurred.

Marriage.

18. Marriage, in the feudal sense of the word, or *maritagium*, is that casualty by which the superior was entitled to a certain sum of money, to be paid by the heir of his former vassal, who had not been married before his ancestor's death, at his age of puberty, as the avail or value of his tocher. In some cases, the single avail of marriage was due; in others, the double. Though this casualty be no where mentioned in the written feudal usages, it was received in Scotland as part of the feudal plan, as early as the books of the Majesty, *L. 2. C. 48.*; *Q. Attach. C. 91. et seqq.* Lord Stair affirms, *B. 2. T. 4. § 45.*, that it was introduced as a recompence to ward superiors for the burden which lay upon them of alimending the heir; and yet he acknowledgeth, that there was no law charging them with that burden till 1491, *C. 25.*; that is, upwards of four centuries after the time that marriage was introduced by Malcolm into our law, according to his Lordship's own opinion, *ibid.* § 37.

Nature of this casualty.

19. This casualty, if we are to rest on the authority of *Q. Attach. C. 93. § 2.*, took its rise chiefly from the right which superiors were understood by our old law to have over the person, as well as the estate of the minor heir; in virtue whereof, they claimed the sole power of giving him a wife, and at last demanded, as their due, what the heir might have got by her in name of tocher. Anciently, therefore, the heir was not subjected to it, if he was either major when the succession opened to him, or not required by the superior to marry, *ibid.* § 1.; because, in this last case, he showed no contempt. But, by the later practice, marriage was accounted a right inherent in the feudal grant, accruing to the superior, in every case where the heir was not married at the time of his ancestor's death, whether major or minor, and whether required by the superior to marry or not; *Stair, Jan. 3. 1677, Campbell, (Dict. p. 8535.)*; *Dirl. 415., (the same case, Dict. p. 8538.)*. This casualty fell, though the heir, when required to marry, should have accepted of the superior's choice, *Q. Attach. C. 93. § 1. in fin.*; but the superior's express consent to the marriage was, by our later practice, construed as a renunciation by him of the casualty; *Dirl. 434. (Sequel of the case, Campbell, Dict. p. 8539.)*. Marriage did at no period of time take place, if the heir died before puberty; because, till then, he was incapable of marriage; nor if he married during the life of his ancestor; because while the ancestor lived,

lived, the superior had no right to dispose of his heir in marriage : But the casualty was not excluded, where circumstances made it presumable, that the former vassal had fraudulently precipitated or hurried on the marriage of his heir, on purpose to cut off the superior from his casualty ; *Stair, Feb. 20. 1667, Lo. Treasurer, (Dict. p. 8529.)*. If the vassal had divested himself of the fee in his heir's favour, and the superior had received that heir as his vassal, during the life of the former vassal, this casualty could not be demanded from the new vassal after the death of the first : For it was only to the heir's marriage that the superior was entitled ; and the heir, after having been entered by the superior, was no longer heir, but vassal. In the case of heirs-portioners, one marriage only was due, according to *Stair, B. 2. T. 4. § 56.* ; because heirs-portioners enjoy the estate as if they were one person : Yet the practice stood otherwise not long before, *Hop. Min. Pr. p. 47, 48.*

20. It was not the precise tocher which one got by his wife that fell to the superior as the single avail of marriage, but what his estate might have been reasonably supposed to entitle him to, *Stair, June 14. 1673, Gibson, (Dict. p. 8534.)* ; and in estimating this estate for fixing the worth of either of the two avails, not the ward-lands only were computed, but all the heir's other estate, real and personal. At first, the computation was made without regard to the heir's debts, *St. B. 2. T. 4. § 46.* ; but afterwards, all debts were deducted, *ibid. § 47.* ; *Durie, June 19. 1630, Somervell, (Dict. p. 8527.)*. The court of session, in 1674, modified the single avail to three years' free rent, *Dirl. 202. (Mowbray, Dec. 12. 1674, Dict. p. 8535.)* ; and afterwards they brought it down to two, *St. ibid. ; Fount. Nov. 7. 1701, Baird, (Dict. p. 8545.)*. *Stair* was of opinion, *ibid. § 55. vers. But this*, that the estimation of the estate ought to be made as at the time of the vassal's marriage, when he did marry ; and if he did not, as at the time when he was required to marry : But it seems more agreeable to law, that the avail should have been estimated according to the value of the estate at that period when the heir first became *pubes*, or capable of marriage ; because it was then that the casualty fell due. *Craig, Lib. 1. Dieg. 21. § 28.*, is of opinion, that the superior was, in strict law, entitled to almost the whole ward-lands, as the value of the marriage, where the heir was a female ; because the tocher which a man gets by marrying an heiress is her whole estate : But this reason is inconclusive : for by the casualty of marriage was understood the tocher which the heir, whether male or female, might have reasonably expected by the marriage ; and in the case of an heiress, nothing can be considered as tocher, but the sum which she had reason, from her fortune, or other circumstances, to hope for by a husband.

Single avail of marriage.

21. It is probable, from the name, that the double avail was estimated originally at two single avails ; but *Craig* affirms, that it was reduced, out of favour to the vassal, to little more than a heavy single avail, *Lib. 1. Dieg. 21. § 24.* And as, by the later practice, the single avail was estimated at two years' free rent, it is probable that the double, if the quantum of it had been lately brought into dispute, would not have exceeded three. The double avail was not due, except in the precise case where the superior, having offered to the heir a wife without disparagement, the heir, not contented with refusing the match offered, intermarried with another woman without the superior's consent, *Q. Attach. C. 91. § 2.* To entitle the

Double avail.

Book II.

superior to this heavy avail, he must have required the vassal, under form of instrument, to treat with him in some unsuspected place, upon the marriage offered; *Durie, July 3. & 11. 1622, French, (Dict. p. 2179, and 8524.)*. If the heir refused at that interview to name a day for celebrating the marriage, the superior did it for him; and upon the day appointed, brought the lady to church, who must have openly declared her willingness to accept of the heir for her husband. As it can hardly be figured, that a woman of character would have stooped so low in favour of a man who had declined making addresses to her, it cannot be matter of wonder, that no instance occurred since the institution of the College of Justice, in which the double avail of marriage was adjudged against an heir, *St. B. 2. T. 4. § 47.*

Where the vassal held of different superiors, marriage was due only to one.

22. Where a vassal held different ward-fees of different superiors the marriage was due only to one of them; because the heir could be married but once, and so could get but one tocher. The eldest superior was, in this case, preferred to the casualty: And he was deemed the eldest from whom the vassal's ancestors in blood had received the first grant by the tenure of ward, *Q. Attach. C. 94.*; for since he alone was entitled to that casualty at the time of the original grant made by him or his author to the vassal's ancestor, he could not be deprived of it by any posterior fact of the vassal purchasing ward-lands from another. But where one of the ward-fees was holden immediately of the crown, the King, because he is the fountain of all feudal grants, was accounted the eldest superior, though the right granted by the crown to the ancestor of the vassal whose marriage fell had been posterior in date to the grants of the vassal's other lands holden *cum maritagio*. Though the sovereign, as eldest superior, excluded all others from this casualty; yet where he changed the holding of any of his immediate vassals from ward to feu, he was no longer their ward superior, and consequently he could be no longer entitled to the marriages of the vassals whose holdings he had thus changed; and when this happened, the case of these vassals became harder than before the change of their holdings, as the King is justly accounted the gentlest superior. To obviate this inconveniency it was enacted, 1661, *C. 58.*, that every vassal holding ward, or feu *cum maritagio*, of the King or Prince, who should get his holding changed from ward, should be exempted from the marriage that might be claimed from him by other superiors, in the same manner as if the lands had still continued to be holden ward of the crown.

It was a casualty peculiar toward, and *debitum fundi*.

23. This casualty was not due in any other tenure but ward-holding, unless the clause *cum maritagio* was in the vassal's charter, which, in feu-charters, was not uncommon. It was in all cases *debitum fundi*; for it arose, either from the nature of the grant, if it was a ward-holding, or from the express words of the investiture, if the holding was feu or blanch; *Stair, Dec. 17. 1673, Haldane, (Dict. p. 10648.)*. But though, in fixing the amount of it, the value of the vassal's whole estate was considered, by whatever tenure it might be holden, it was a real burden only upon the ward-lands: The heir was not liable for it, if, instead of entering to these lands, he abandoned them to the superior, *Stair, Jan. 5. 1681, L. Dun, (Dict. p. 4175.)*; for no heir ought to be compelled to make up titles to an estate by which he necessarily subjects himself to burdens which exceed the full value of it.

Ward-holding abolished by act 20. *Geo. II. c. 50.*

24. By the late British statute, 20^o *Geo. II. c. 50.*, the tenure of all lands in Scotland by ward-holding, whether simple or taxed, and the casualties of ward, marriage, and recognition, consequent upon

upon that tenure, are utterly abolished. The tenure of the lands holden ward of the crown is, by that act, turned into blanch-holding, for the payment of one penny Scots yearly, *si petatur tantum*; and the tenure of those that are holden of subject-superiors, into feu-holding, for the payment of a determinate yearly rent in money, cattle, or grain, in place of the said casualties, and of all services. The court of session is, by the act, authorised to consider the difference in value to the vassals, arising from the change of their holdings from ward to feu, and what constant yearly rent may be a just recompence to the superior for that difference, and make an act of sederunt upon it, according to which parties are to settle the quota of the feu-duties; and in case of difference, the court is to determine: And whatever they shall so modify, is to be the yearly feu-duty payable for such lands, in the same manner as if feu-characters had been granted of that date by the superiors to their respective vassals, on the resignation thereof into their hands. Till such modification shall be made, the vassal is to incur no irritancy for the not payment of the feu-duty, and these modifications are to be inserted as the feu-duty, in the future renovation of the infeftments by the vassals and their heirs. In consequence of the above-mentioned powers, the session, by an act of sederunt, *Feb. 8. 1749*, established the following rules: In lands that are holden simple ward of a subject, one *per cent.* of the constant yearly rent is to be paid as a yearly feu-duty on account of the marriage, and one *per cent.* as the value of the other casualties incident to ward-holdings; but where the vassal holds other lands ward of the crown, he is not liable to his subject-superior in any feu-duty on account of the marriage. In lands holden taxed-ward of a subject, two *per cent.* of the sum taxed by the charter of the lands is to be paid yearly as the value of all the casualties, whether the vassal holds other lands ward of the crown or not. A doubt having arisen, Whether the principality-lands, *i. e.* the lands holden ward of the Prince of Scotland, were included under this statute? and in what manner the vassals of the Prince were to be entered? an act was passed, *25° Geo. II. c. 20.*, giving to the King the same powers which had been formerly exercised by the Kings of Scotland over the principality-lands, when there was no Prince; in pursuance of which, his Majesty, by warrant under the privy seal, dated *Jan. 1753*, signified his pleasure, that all lands, which were formerly holden ward of the Prince, should for the future be holden blanch.

25. The only casualty, or rather forfeiture, proper to feu-holdings, is the vassal's loss of his feu-grant, by his failing to pay the feu-duty for two years together. Because this casualty may fall in consequence either of a legal or conventional irritancy; the nature and effects of an irritant clause may be shortly explained. A clause irritant is that which expresses a condition or event, on the existence of which the charter, contract, or other deed, to which it is annexed, is voided. No irritancy, whether legal or conventional, if it be properly penal as to him against whom it is pointed, has any operation till a decree of the session shall have declared it to be incurred, *infr. T. 8. § 14.* But where it is not penal, it has full force as a condition or provision affecting the right or contract, without the necessity of any previous judicial sentence. Hence, irritancies are most strictly observed against the grantee in gratuitous deeds; for as that sort proceeds from the mere liberality of the granter, who had full power over the subject to dispose of it to whom he pleased, the grantee, who paid no valuable consideration for

Nature and effects of a clause of irritancy.

Legal and conventional irritancy proper to feus, *ob non solutum canonem*.

If there is no conventional irritancy, the legal one may be purged before declarator.

for the grant, truly suffers nothing though it be irritated or annulled. On this ground, where creditors-adjudgers had gratuitously restricted the sums due to them, and prorogated the legal reversion of their adjudications for four years, under an irritancy, that if the restricted sums were not paid within that time, the restriction and prorogation should be null, no action was adjudged necessary for declaring that the irritancy took place upon the failure of payment to the creditors-adjudgers; that clause having been truly beneficial, not penal to the debtor; *Br. 17. (Dundas, Dec. 14. 1714, Dict. p. 7269.)*.

26. No irritancy, or other penalty, lay, from the nature of the grant, against vassals in a feu-holding for not making regular payment of their yearly *Reddendo*: But by 1597, C. 246., all vassals by feu-farm, failing to pay their feu-duty for two years, haill and together, are declared to lose their right, in the same manner as if an irritant clause had been specially engrossed in their charter. The act refers to the Roman law, which irritated the right of an *emphyteuta*, if he ran in arrear of his *canon emphyteuticus*, or yearly duty, for three years, L. 2. C. *De jure emph.*; or two, if the right was derived from the church, Nov. 120. C. 8. This casualty was styled in our old language *the tinsel of the feu-right*, (from *tyne* to lose); and as it is in every case penal upon the vassal, whether it arise merely from the legal irritancy, or also from a conventional, the superior must in either case obtain a decree declaring the tinsel of the vassal's right before the forfeiture can fall.

27. But though the aforesaid act gives, by the letter of it, the same force to a legal irritancy as to a conventional one, the following distinction has been observed by the court of session. Where no irritant clause is inserted in the feu-charter, the vassal is allowed to purge the legal irritancy at the bar, before sentence; *i. e.* he is allowed to prevent his forfeiture, by making payment at any time during the dependence of the action of declarator, before judgment pronounced in it*. But where the legal irritancy is fortified by a conventional, the vassal cannot, or at least by the old practice could not, purge, without his being able to assign a reasonable cause why payment was not regularly made; *Stair, Feb. 13. 1666, Wedderburn*⁶⁶; or unless an obscurity appeared in the words of the irritant clause; *Stair, Feb. 18. 1680, E. Mar*⁶⁷. Where the irritant clause was conceived in these words, *That the feu-right should fall if two years' duty happened to run into a third*, which was long the usual style, the irritancy was not incurred by our older practice till the whole of the third year's duty was due; *Stair, June 19. 1673, Smith*, (Dict. p. 7185.). But that expression is now understood to infer an irritancy when two years' feu-duty is fully in arrear, and the third year's duty has begun to run; more agreeably, not only to the statutory irritancy, but the conception of the clause †.

28. Till

* Where a decree of declarator of irritancy had been extracted, the vassal was not permitted to get it recalled, on payment of the arrears, in a reduction; *Fac. Coll. July 6. 1792, Ballenden*, Dict. p. 7252.

† A superior cannot pursue both for payment of bygone feu-duties, and for tinsel *ob non solutum canonem*, but must be content with seeking the one remedy or the other; *Kilk. No. 7. voce SUPERIOR AND VASSAL, Macvicar*, Dict. p. 15095.

⁶⁶ This case seems to be omitted in *Mor. Dict.*

⁶⁷ *Stair's* report seems to be omitted in *Mor. Dict.*, but another from *Fount. M.S.* is there given, p. 7184.

28. Till of late, two conditions were frequently adjected to charters granted in feu-farm, viz. That the vassal should be liable in the casualty of marriage; and, That it should not be lawful to him to alienate his lands without the superior's consent; and these clauses were effectual. But by the before-mentioned act, 20. *Geo. II. C. 50.*, they are declared to be of no force, even where they had been inserted in grants prior to the statute; and the court of session are directed to modify an additional feu-duty, as a recompence to the superior for the loss of those special rights, if the parties themselves cannot agree upon the sum. In consequence of these powers, the session, by an act of sederunt, *March 10. 1756*, declared, That a feu-duty equal to a fourth of one *per cent.* of the valued rent of the lands subjected to the clause, prohibiting alienations without the superior's consent, where the lands were valued, or if the lands were not valued, then a feu-duty equal to a sixth part of one *per cent.* of the real rent, should be deemed a recompence to the subject-superior for the discharge of such prohibitory clause. As there is no prohibition against that clause which was always inserted in the Roman *emphyteusis*, That the lord of the ground should have the first offer of the lands where the vassal intended a sale, it would seem that such clause continues effectual, notwithstanding the statute, as it is quite different from a clause *de non alienando*; and so ought to have the same force when adjected to feu-charters, as it had when adjected to the emphyteutical grants of the Roman law. Yet by our feudal rules a clause declaring any sale of the lands that shall be made by the feuar, without offering them first to the superior, to be null, is not of itself sufficient to invalidate the sale, unless there be also a clause irritating the feuar's right in that event, *Fac. Coll. ii. 4. (Stirling, Dict. p. 2342.)*; the reason of which is fully explained; *infr. B. 3. T. 8. § 29. * 68.*

29. The casualties which arise from the general nature of feudal rights as modelled by our customs, and which therefore have place in every holding, are nonentry, relief, disclamation, purpresture, and liferent-escheat. Nonentry is that casualty which arises to the superior out of the rents of the feudal subject, through the heir's neglecting to get the investiture renewed after the death of his ancestor. By the most ancient feudal law, when the vassal held his grant only for life, his heir had no right to demand a renewal

VOL. I.

4 K

of

TITLE V.

An additional feu duty is modified to the superior, in lieu of the marriage and of the penalty for alienating *sine consensu.*

Casualties which are common to all feudal holdings. Nonentry, its nature in the ancient feus.

* See *Preston against Dundonald's Creditors, March 5. 1805, Dict. App. I. voce PERSONAL AND REAL, No. 2.*

⁶⁸ The necessity of a clause of irritancy has already been called in question; *supr. T. 3. § 13. not. 37.* And as to the reference made in the text to *B. 3. T. 8. § 29.* it seems sufficiently met by the following observations of Mr Bell: "There is a distinction to be taken between this feudal contract of superior and vassal, and the prohibitions of an entail. In the former case, the vassal's right cannot be maintained without continually recurring to the contract with the superior, and the obligations incumbent on him by the contract are conditional:—In the latter, there is no contract affording an immediate and direct remedy, but a perfect fee is bestowed on the heirs of entail, which will be effectual, if not irritated and resolved;" 1. *Bell's Comm. 27.*

The case of *Irving, 6th March 1767, Fac. Coll. Dict. p. 2343.* (which in the former edition was cited by mistake in place of *Stirling, Dict. p. 2342.*, as corresponding to the reference, *Fac. Coll. ii. 4.*) does not touch the question, whether a clause of irritancy be or be not necessary: but it is a direct authority in support of the doctrine in the text,—that a clause of pre-emption is effectual notwithstanding the statute. That doctrine is also maintained by *Bell, 1. Comm. 29.*; and though at one time thrown into doubt by *Fac. Coll. 2d Dec. 1800, Farquharson v. Keay, Dict. App. v. CLAUSE, No. 3.*, this decision, since the opinions delivered in *Sir R. Preston's case*, seems now in its turn to have become questionable.

BOOK II.

of the investiture upon the ancestor's death; for the feudal right ended with the life of the grantee, on whose decease the lands returned to the superior. After feus became hereditary, the investiture of the right was, by the first feudal usages, to be renewed upon every change, either of the superior or vassal. Upon a change of the superior, either by his death, or by granting over his right of superiority to another, the vassal was obliged to apply to his new superior for a renovation of the investiture; and upon the vassal's death, it behoved his heir to apply to have the investiture renewed in his own name; and if the vassal, or vassal's heir, neglected this, he forfeited the fee; *L. 2. Feud. T. 24. pr.* As for the usage of Scotland, it has at no time required the renewing of the investiture on the superior's death; and when the vassal died, the superior, who is the *dominus directus*, and whom nothing excluded from the lands but the grant he had made to the vassal, might, by our ancient custom, resume the possession of them without any form of law, in virtue of his own radical right, till the vassal's heir should be served by an inquest, and demand to be received by the superior; *St. Rob. III. C. 19. § 1, 2, C. 38.* But as the heir has been now of a long time indulged in the possession, even before his entry, the superior's right is consequently turned into a claim, which must be made effectual by an action for declaring that the lands have fallen in nonentry. This casualty was introduced, that the superior, while he was without a vassal, might be enabled by the fruits of the feu to provide himself with a person fit for his service. But because the forfeiture of the heir to perpetuity, imposed by the written feudal usages, appeared too severe a penalty on the heir to compensate for the superior's temporary loss, the heir, by our customs, forfeits the rent no longer than while the fee is void, *i. e.* without a vassal; so that as soon as he becomes by his entry capable of serving the superior, he returns to the full enjoyment of his fee.

What is meant
by it at present.

30. While the tenure by ward subsisted, the lands truly fell in nonentry as often as the heir happened to be minor, because an heir in ward-lands could not enter during his minority; but this necessary casualty got the special name of *ward*. What falls under the proper appellation of *nonentry*, arises from the voluntary neglect of the heir, who is in a capacity to enter, yet declines to enter. The superior is entitled to this casualty in every case where the vassal last infeft is dead, or has resigned, and the heir or resignatory not yet entered. Hence lands continue in nonentry, though the superior should grant a precept for infefting the heir, till seisin be taken upon it; or though he should accept of a resignation from his vassal in favour of a third party, till seisin be taken by the resignatory, *St. B. 3. T. 2. § 12.*; for one cannot be said to be entered to lands, till he be infeft by the superior. Nay, though seisin be actually taken by the heir or resignatory, yet if his retour on which the seisin proceeded be set aside upon any nullity, the lands become again void, and of course fall in nonentry from the date of the decree of reduction; for a retour declared null, is equal to none, *Durie, July 12. 1625, Lord Cathcart⁶⁹; Ibid. Feb. 29. 1628, E. Nithsdale, (Dict. p. 5192.)*. The rents forfeited by nonentry are computed in the most favourable way for the heir, in the period from the death of his ancestor till he himself be cited by the superior

⁶⁹ This case seems to be omitted in *Mor. Dict.*

rior in an action of general declarator of nonentry; for till then the superior must be contented with the retoured duties of the lands. For this reason, before proceeding farther, the nature of retoured duties must be explained.

31. It was necessary that the lands in Scotland should be valued, both for adjusting the proportion of the public subsidies at which every individual landholder in the kingdom was to be rated, and for ascertaining the quantum of the nonentry and relief duties payable to superiors. Alexander III. who, about the year 1280, had occasion for an extraordinary subsidy, towards the payment of his daughter's tocher, who was then to be married to Eric King of Norway, is the first who now appears to have settled a general *census* or valuation of our lands*⁷⁰. In the parliament 1326, an indenture passed between Robert I. and his freeholders, (an extract of which, from the records of the parliament 1327, is preserved in the Advocates' library), whereby, upon a recital, That the crown revenue was much lessened by the late wars with England, the freeholders granted to the King the tenth part of their rents according to the old extent, as it was fixed by Alexander III., with this provision, That in lands which had sunk in their rents by the devastation of the late war, the proprietors were to be allowed such an abatement of the subsidy as should be settled by an inquest. This brought on a revaluation of the particular lands that the proprietors pretended had suffered by the war, by which it might appear that they were truly entitled to an abatement; and the value of these lands, as thus reduced by the inquest, was called *the new extent*, in contradistinction to that of Alexander III.

Valuation. Old and new extent.

32. That those valuations might be of more certain and perpetual use, a custom soon crept in, that the inquest on the service of heirs were required, by the brief directed to them from the chancery, to engross in the retour the valuation of the lands in which the heir's ancestor died seised. In the lands where no revaluation was demanded on account of the sinking of the rent in the reign of Robert I., no other valuation could be inserted in the retour, than the old one of Alexander III.; but in the retour of lands which had been revalued, both the old extent, *quantum valuerunt tempore pacis*, and the new, *quantum nunc valent*, were inserted; and it is obvious, that from this period, to the establishing of some posterior general valuation of lands, the new extent might be lower, (and indeed was so in most retours), but could never be higher than the old. The author of *Hist. Law-Tracts* †, from whom this short abstract of the history of extents is borrowed, conjectures, that the two extents continued on this footing, till a new valuation of our lands was settled in 1424, on occasion of a subsidy to be raised

History of these different valuations.

* Lord Hailes (*Annals*, vol. 1. p. 202. 8vo. edit. Edin. 1797,) points out evidence of a valuation prior to the reign of Alexander III. In the chartulary of Aberdeen (101.) this entry is found: "Rentale Regis *Alexandri Tertii* vicecomitat. de Aberdene "et de Banff;" and it contains, among other articles, the following: "De Thanagio "de Nathdole, *secundum antiquam extentam*, xlix. lib. et xvi. denar." It is obvious, that the terms *Old Extent* could not, with any propriety, be applied to a *census* taken in the course of the same reign.

† Tract IV. OLD and NEW EXTENT.

⁷⁰ For much valuable information on the history of extents, and many suggestions in modification and correction of the short abstract adopted in the text on the authority of Lord Kames; *Vid. Cranston*, 16th May 1818, *Fac. Coll.* See also *Wight*, p. 160., *et seqq.*; *Bell (Election Law)*, p. 154., *et seqq.*; where the subject, as connected with the enrolment and qualifications of freeholders, is very amply discussed.

Book II.

ed for the payment to England of the costage, as it was called, of James I., *i. e.* of the cost due to England for his subsistence and education; *Black Acts*, 1424, C. 10, 11. But as in many retours prior to that time, several of which lie in the charter-chest of the family of Keir, the new extent is higher than the old, a general valuation must have been established in the interval between the reigns of Robert I. and James I. And no time appears more likely for this than the year 1365 or 1366, when a tax was to be imposed for the ransom of David II., long after the lands that were revalued in consequence of King Robert's indenture had, under the sunshine of his long and peaceable reign, fully recovered, and several of them far exceeded their first value.

New extent came to be estimated at quadruple the old;

33. Though the extent taken in 1424 was considerably higher than the old, yet from the improvement of our country by agriculture, and a well-ordered police, it soon became too low a standard for the casualties of superiority; especially considering, that by the gradual heightening of the nominal value of our coin about that time, superiors, though they got the same nominal value for their casualties as formerly, truly lost, upon every such rise, part of the weight in silver which they were originally entitled to. It was therefore enacted, by 1474, C. 56., (but without setting on foot any new general valuation), that retours should specify both the old extent, and the precise avail that the lands contained in the retour were worth at the time of the inquest's serving the heir; and this last has been ever since called *the new extent*, or the *nunc valent*. For some time after passing this act, a proof by witnesses was brought before the inquest, at the service of every heir, to fix the present rent of the lands to which he was to be served. But inquests did not long continue a practice, so troublesome in itself, and so unfavourable to landholders, as stretching the value of their lands to the utmost height upon every new service. When, therefore, lands had been once retoured in pursuance of this statute, the inquest fell gradually into the custom of inserting in all subsequent retours thereof, as the *nunc valent*, or new extent, the precise sum to which it was fixed by the former retour. And where there had been no former retour specifying the new extent, Skene informs us, *voce Extent*, that it was, by an almost general rule, fixed to the quadruple of the old; for which reason it was usually called *the fourth mail*; *Hist. Law-Tracts*, v. 2. p. 217. *et seqq.*

Which however still remained in use.

34. Even after passing the act 1474, the old extent established by Alexander III. long continued the rule for proportioning the subsidies chargeable upon private landholders, as appears by a tax imposed by parliament in 1633, which was levied by that standard. But the old extent settled by Alexander could not be of universal use in subdividing the subsidies upon all the lands of Scotland. It could not be applied to those that were enjoyed either by the church or by boroughs; for as churches and boroughs die not, their lands cannot pass by retour; so that their proportions of the subsidies were fixed by other rules. The church was, as far as we can trace its history upwards, subjected to the equal half of all our subsidies; the burden of which half was subdivided among the several church-beneficiaries, according to the value of the several benefices, as they stood settled by Bagimont's roll, many copies whereof are yet extant: And to that proportion of subsidies church-

lands

lands continued to be subjected even after the Reformation, 1597, C. 277.; *Act convention* 1665. The estate of boroughs paid a sixth part of every taxation for their burgage-lands and their trade; which sixth was at first proportioned among the several boroughs by express enactments in the statutes imposing the taxations, but now by the boroughs themselves, who are authorised to alter these proportions from time to time in their annual conventions, according to the flourishing or declining state of the particular boroughs, 1702, C. 6. Neither could the old extent be the rule in the King's property lands; for these were originally subjected to no public taxation. The first tax with which they were charged was imposed by 1597, C. 277., by which act therefore special rules are prescribed, according to which the stewards and bailies of the King's lands were to conduct themselves in retouring them.

35. It appears, by several acts passed during the Usurpation, 1640, C. 34.; 1645, C. 6.; *Aug.* 1649, C. 21., that in the levying of public taxes at that time, the rule of the old extent was laid aside as unequal; in place of which, new valuations were substituted, that were made, or to be made, for every shire, by commissioners appointed for that purpose. By two acts of the Usurper's parliament, holden at Westminster, 1656, C. 14. & 25., imposing taxations upon Scotland, the rates laid upon the several shires are precisely fixed, and the equal assessment of those rates, among the individual landholders in every shire, is left to the adjustment of commissioners. The first tax after the Restoration, which was charged properly on land, was imposed by the convention 1665, and levied by the rule of the old extent. The next was imposed *anno* 1667, by an act of convention of that year; which, after affirming in its preamble, that it was directed to be levied according to the valuations 1660, proceeds to specify the proportions on each shire and borough, which are nearly the same as those that had been fixed at Westminster in 1656. It is however worth observing, that no mention is made of any general valuation in 1660, to which the act of convention 1667 seems to refer, in any of our statutes or records. The commissioners appointed for levying this last tax, imposed in 1667, were by the act directed, in so far as concerned the proportioning of the total sums to which every shire was subjected, upon the individual landholders of that shire, to proceed according to the former valuations of their respective lands, where they appeared equal and just; and where the commissioners were of opinion, that the lands of any particular landholder were over-rated, to rectify their valuations according to equity, but without altering the total sums charged by the act upon every shire. All the taxations upon land granted since the year 1667, are, by the acts imposing them, to be levied according to the rules and valuations settled by the act of convention of that year, 1670, C. 3., &c. The rent thereby fixed gets the name of the valued rent, in opposition to the old and new extents; and this valuation is the rule observed at this day, not only in levying the land-tax upon the individual landholders of the several counties, but in proportioning the payment of several public burdens relating to manses, &c. among the landholders or heritors of the parish.

36. Though both old and new extents may, without impropriety, be styled *retoured duties*, because both are inserted in retours; yet where retoured duties are mentioned indefinitely, that appellation denotes the new extent, by which the rates of the superior's casual-

Valued rent.

Retoured duty
in feu-holding.

Book II.

ties are regulated, and particularly the nonentry-duties before citation. In feu-holdings, the yearly feu-duty contained in the *Reddendo* is retoured as the new extent; because the law presumes, that superiors in the charters granted to their feu-vassals reserve to themselves a *Reddendo*, or yearly pension, adequate to the rent; and feu-grants by the crown, of the annexed property, are not effectual to the vassal, where the yearly feu-duty is less than the former rent. In this holding, therefore, the superior gets in effect nothing in name of nonentry before citation; for he would have been entitled to the yearly feu-duty by the *Reddendo* of the charter, though the fee had been full; *i. e.* though a vassal had been infest in the lands. The doctrine held by some, that when nonentry falls in a feu-holding, one year's duty in the *Reddendo* ought to be paid by the heir to the superior in name of nonentry, before citation, and another properly as feu-duty, carries this absurdity with it, that where the feu-duty exceeds the half of the true rent, which is not a rare case even at this day, the vassal would be liable in the yearly payment to his superior of a sum exceeding the full rent of the subject contained in his charter; and consequently his condition would be harder before than after citation. In tithes, where the right of them is holden blanch, the superior gets the fifth part of the retoured duty of the lands, in name of nonentry, before citation; because the law considers the yearly tithe to be worth a fifth part of the rent of the lands: But where the right is holden feu, he is, by the foregoing rule, entitled only to the yearly feu-duty payable by the vassal until citation.

Where there is no retour, the superior, for nonentry-duties, is entitled to the valued rent.

37. It is because the new extent or retoured duty is, by a favourable construction, presumed to be the rent, that the nonentry-duties due before citation are governed by it. If therefore no retour of the lands in nonentry shall appear, the superior is entitled, even before citation, to the real rent; or, which is more favourable for the vassal, to the valued rent, as ascertained by the books of the land-tax: Yet if the retoured duties be discoverable any how, though not by a formal retour, the casualty will be restricted. Thus, if a barony, whose retour appears on record, has been sold by different parcels to different purchasers, in a question concerning the nonentry-duties of a particular parcel, the gross retour of the whole barony is to be proportioned among the several parcels into which it is divided, according to the present rent, and the heir not entered is liable before citation, only in that share of the retoured duty of the whole which corresponds to his part, *Feb. 5. 1623, Ker*, (Dict. p. 9290). A rule has been lately laid down by the court of exchequer, *Feb. 17. 1731*, that the old and new extent of lands, of which the *valent* is not known, shall be adjusted according to the valued rent, and to the old and new extents of other lands within or adjacent to the county in which the lands to be retoured lie.

Annualrents retoured to the blanch-duty in the infestment.

38. Infestments of annualrent, of which *vid. supr. T. 2. § 5.*, are usually granted by the debtor to be holden of himself; a most absurd practice, seeing the creditor becomes thereby vassal in that feudal right to his debtor; and consequently the right must fall in nonentry upon the creditor's death. Because annualrents arising out of lands had no distinct valuation or extent, therefore they were said in the *valent* clause of the retour, *valere seipsum*; *i. e.* the annualrent itself was accounted the retoured, and consequently the nonentry-duty: and thus the creditor's heir, as long as he lay

lay out unentered, lost the whole interest of the debt due to him by the superior his debtor. To prevent this, it was enacted by 1690, C. 42., that such annualrents should, for the future, be only retoured to the blanch or other duty contained in the infestment. But as that act regulates only the retoured duties due before citation, the creditor still continues to lose the whole interest which may grow on the debt, from his being cited in the general declarator, till he enter, unless it be guarded against by a special clause, obliging the debtor to make over to the vassal's heir the nonentry-duties *gratis*, as often as the right shall fall in nonentry by the vassal's death.

39. From the rule that nonentry-duties before citation are to be ascertained by the retoured duties, where the lands appear to have been retoured, there was an exception while the tenure by ward subsisted,—That where the lands had been, immediately before their falling in nonentry, in the superior's possession by the casualty of ward, he might, on the expiration of that casualty, without the necessity of a declarator, continue his former possession while the heir lay out unentered, which was called the *nonentry subsequent to the ward*; to which possession the law gave the same extent as it did to the ward itself. But if the superior had not attained possession in virtue of the ward, *ex. gr.* if the lands were holden taxed ward, he was entitled to no more than the retoured duty, till the heir was cited in the action of general declarator. This rule admits of another exception by the present law, in the case of lands holden formerly ward of the crown; for it is declared by 20^o Geo. II., which changes the tenure of all those lands into blanch, that as often as they fall in nonentry, they shall, in place of the new extent, or the retoured duty, be only liable in the annual payment of one *per cent.* of the valued rent, according to which they are now liable for the land-tax; and the more effectually to ascertain the quantum of the nonentry-duty, the same act directs, that all retours of such lands shall set forth, not only their old and new extent, but their valuation of valued rent.

40. The casualty of nonentry, when restricted to the retoured duties before citation, falls, not as a penalty of the heir's transgression, or as a punishment of his *mora* or *culpa*, but as a casualty naturally accruing to the superior in consequence of his radical right; from which, therefore, he cannot be excluded, whatever the cause of the nonentry may be, and though no degree of blame may be imputable to the heir. Hence the superior is at this day entitled to the nonentry-duties of that very year which the law has indulged to the heir, as a time for deliberating whether he will enter or not, though his availing himself of that legal benefit cannot be construed as a contempt of the superior. But where the heir's not entering proceeds from a defect in the superior, equity will not suffer him to claim a forfeiture against his vassal, of which he himself is the sole occasion, *infr.* § 45. After the heir is cited by the superior in the general declarator, the rent of the lands falling in nonentry is computed in a way the most unfavourable for the heir, so as to extend to the full rent; because the heir's delay, after he is required to enter, argues a higher degree of blame, and gives more ground to presume a contempt of the superior. Yet as this severe casualty appears, even after the delinquency is thus aggravated, to be too heavy, where there is the least ground for an excuse, therefore, if the heir lie under a legal incapacity, *Stair, July 24. 1677, Lo. Melvil, (Dict. p. 9321.)*; or has, by a probable

Nonentry-duty
in lands that formerly held ward
of the Crown.

Nonentry-duties after citation.

BOOK II.

Pursuer's title
in the declara-
tor of nonentry.

bable mistake, believed himself already entered, *Forbes*, Jan. 22. 1706, *Maitland*, (Dict. p. 9329.); or if he offer any reasonable apology for still declining to enter, *Dirl.* 273, (*Douglas*, June 23. 1675, Dict. p. 9318.); no more than the retoured duty will fall to the superior, even after citation, as long as such probable ground of doubting shall subsist.

41. In the action of general declarator, the superior must produce as his title his seisin in the lands, to prove his right of superiority; and if it be a donatary who sues, he ought to produce his gift from the superior⁷³. But neither superior nor donatary need bring evidence that the lands were without a vassal from the time libelled, because that is a negative, which proves itself, unless the defender make it appear that the lands were full. Where the superior executes a grant of any casualty without limitation, the donatary ought, by the common rules of law, to hold the grant as long as the casualty subsists; yet in gifts by the crown, the donatary of the ward, and of the nonentry subsequent to it, was not entitled to all the nonentry-duties so long as the heir lay out, but only to the three terms' duties immediately ensuing the ward, probably that the King might have it in his power to oblige a second donatary. But such gifts by subject-superiors were interpreted in their full extent, according to the natural meaning of the words; *St. B.* 4. *T.* 8. § 9.; *Fount.* Feb. 25. 1696, *E. Cassilis*, (Dict. p. 9309.).

What nonentry
duties are *debi-
ta fundi*.

42. The libel in a general declarator bears no personal conclusion against the apparent heir, though he must be made a party to the suit; for the action is directed against the lands themselves. Nothing can be comprehended in the libelled summons but the retoured duties; because the full rent is not due till the heir be cited upon that summons; and to make these retoured duties effectual, the pursuer may throw into the libel a conclusion of pointing the ground. A decree proceeding on this action entitles the superior, not only to a pointing of the ground as a real creditor, for recovering the retoured duties due before citation, but to enter into the total possession of the lands⁷⁴, and levy for his own use the full rents from the citation downwards to the heir's actual entry. And if the tenants refuse payment, he may recover the rents by a petitory action against tenants and other intromitters, which is improperly called an action of *special declarator**. These declarators were anciently brought by the superior before his own court, agreeably to a general rule laid down in *Reg. Maj. L. 2. C. 63. § 8.*; which practice began to fall into disuse in Craig's time, *Lib. 2. Dieg.* 19. § 11., and was soon after quite laid aside. From these observations, it appears, that all nonentry-duties are not, without exception, *debita fundi*. With regard to the duties before citation, which constitute a right of credit upon the vassal's lands to the superior for a liquid sum, he may doubtless recover payment of these by a pointing of the

* See *Fac. Coll.* Feb. 15. 1782, *Collart*, Dict. p. 9313.

⁷³ One infest in the "superiority" merely, cannot pursue a declarator of nonentry: "for unless the pursuer," it was pleaded, "be infest in the lands, he cannot bring an action to declare the *dominium utile* to be his;" *Park*, 16th May 1816, *Fac. Coll.*

⁷⁴ The vassal's tenants have no protection against this from *stat.* 1449, c. 18. *Vid. infr.* *T.* 6. § 26. Nor do the subvassals, in case of subinfeudation, seem to be in a better situation. On this principle rests the decision, *Collart, not. * h. p.*, where it was found, that the superior, in a question with the subvassal, is not restricted to the mere subfeuduties, but may insist for the full rents and duties of the lands.

the ground, which is an action competent to every real creditor: But the right he has to the full rents which become due after citation, does not accrue to him in the character of creditor, but as *interim dominus* or proprietor of the rents; and consequently the action for making those effectual must be the same that a proprietor is entitled to for recovering the rent of his estate, which can be directed only against tenants and other possessors; for it would be incongruous and inept in a proprietor, to use real diligence by pointing the ground of his own lands, for a debt due to himself, *St. B. 2. T. 4. § 22.*

43. It yet remains to be considered under this head of our law, *first*, How the casualty of nonentry is excluded; and, *2dly*, What deeds of the superior are accounted a passing from nonentry-duties already incurred by the heir. As to the first, it is obvious, that there can be no place for nonentry in lands where a community or corporation is vassal; for a corporation never dies, *supr. T. 3. § 34.*; and, consequently, after seisin is once given to a corporation, the fee must continue full as long as the corporate body subsists; *Harc. 588, (Findowry, March 1682, Dict. p. 6887.)*. This is the case of grants, not only to hospitals and universities, but to royal boroughs: For though every individual burgess is said by his charter to hold of the crown the special tenements of lands or of houses expressed in it, and consequently ought, in the general case, to be equally subject to nonentry as vassals whose lands lie in no borough; yet in truth it is not the particular burgesses who are the vassals, but the borough itself, or the corporation of inhabitants, to whom the King grants, in their charter of erection, all the lands and tenements within the limits of it, to be holden burgage of the crown. If, therefore, no nonentry can fall against the borough itself, because it is a corporate body, neither can it fall against individuals, *Cr. Lib. 2. Dieg. 19. § 26.*; for if nonentry be excluded with regard to the whole, it cannot obtain with regard to any part. This doctrine, that nonentry is excluded where a corporation is vassal, cannot be applied to those villages which have been erected by the crown into boroughs of regality or barony: For such boroughs had, by their erection, no grant made over to them of lands, or any feudal subject capable of falling in nonentry, as royal boroughs had; but barely a right to such privileges or immunities as the crown was pleased to confer on them; and particularly that of having magistrates appointed from among themselves for preserving good order within the borough, and exercising a certain degree of jurisdiction over the inhabitants. Now these rights were holden, not of the crown, but of the lord of regality, or baron, in whose favour the erection was made: And as the boroughs so erected were formerly parts of the regality or barony, and the lord of regality or baron was entitled to the same casualties out of the lands and houses situated within the borough, as out of the rest of the regality or barony lands, they still continue parts of the regality or barony; because the erections could not impair or weaken the right of the superiors, at whose desire the boroughs were erected; *Cr. Lib. 2. Dieg. 19. § 27, 28.*

44. Lands cannot fall in nonentry as long as the fee is full, *i. e.* as long as the vassal last seised in them by the superior continues alive. Hence, *first*, Infeftments of property, either granted or confirmed by the superior, exclude nonentry, during all the days of the grantee's life, though the vassal infeft should have afterwards

The casualty of nonentry is excluded where a corporation is vassal.

In what other cases it is excluded.

made over the fee to another. *2dly*, Nonentry is excluded by an infeftment in conjunct fee and liferent, granted by a husband to his wife, and confirmed by the superior, which though properly it be no better than a liferent in the wife, saves from the nonentry during her life. And this holds, though the wife should, after the husband's death, formally renounce her conjunct fee, and restrict her right to a bare liferent, *Balf. p. 263. § 27, (Dict. p. 9333.)*. Lord Stair affirms, *B. 4. T. 8. § 7.*, that nonentry is not excluded by a common liferent-infeftment; yet he admits, *B. 2. T. 4. § 23.*, that because an heir can have no benefit by his entry, while he is excluded from the whole profits of the fee by a liferenter, no declarator of nonentry can pass against him, by which the superior may point the ground or enter into the possession of the lands from which he is thus barred by the liferenter, till the liferent falls. *3dly*, Subfeus, which have been granted under the authority of the above-mentioned statutes authorising them, 1457, *C. 71.*, and 1503, *C. 90. & 91.*, excluded the nonentry, which would otherwise have fallen by the death of the immediate vassal; and even after the repeal of these statutes, a superior, who himself confirms a base infeftment granted by his immediate vassal, is thereby understood to renounce the benefit arising from such nonentry, and must be contented, upon that vassal's death, to demand as in his right, from the subvassal, the yearly duties, and whatever else might have been demanded from him by his immediate superior, had he been alive, *Bankt. B. 2. T. 4. § 25.* Stair admits as to this article, *B. 2. T. 3. § 28.*, that the superior's confirmation of a subfeu secures the subvassal against such casualties falling by the death or delinquency of the immediate vassal, as entirely carry off the property, *ex. gr.* recognition, while ward-holding subsisted; but he affirms, that it ought not to abridge the superior of his other casualties, which infer only a temporary right to the rents, such as a ward or nonentry: And it is certain, that his Lordship's doctrine obtains in the confirmation of base infeftments granted by the crown. *4thly*, Nonentry is excluded by the superior's confirmation of public infeftments granted by his vassal; for since public rights are holden from the disponent of the superior, the superior by his confirmation accepts the grantee as his vassal, and consequently the fee must be full during that vassal's life. *5thly*, It is excluded by the terce, during the widow's life, as to a third of the lands; and by the courtesy, during the life of the husband, as to the whole of them; these being legal provisions, which require no seisin to perfect them: Yet the wife, through whom the husband claims the courtesy, or the husband, whose widow claims the terce, must have been infeft in the lands; for without their seisin there can be no terce or courtesy; *infr. T. 9. § 51.*

Where the superior is *in mora.*

45. A superior is barred, *personali exceptione*, from nonentry-duties, after he is *in mora, i. e.* after it is owing to himself that the heir is not entered. Upon this ground nonentry is excluded from the time that an heir retoured has charged the superior, on a precept issuing from the chancery, to seise him in the lands, *Stair, July 18. 1678, Fullarton, (Dict. p. 9293.)*; but such charge hath no effect, unless the heir do *simul et semel* offer to the superior the relief and the nonentry-duties, in so far as they are yet unpaid; see *Gosf. Feb. 10. 1671, L. Kilkhead, (Dict. p. 9292.)*. Thus also, this casualty is excluded by an adjudication of the vassal's lands, and a charge given upon it to the superior, provided the adjudger at the same time offer him a year's rent, according to the injunction of 1469,

C. 37.; *Stair, Feb. 3. 1681, Ker*, (DICT. p. 6915.). In like manner, the superior, where he is not himself infest, and so not in a capacity to enter the heir, and nevertheless refuses to complete his titles upon a charge, forfeits the nonentry-duties during his life, 1474, C. 58. *Lastly*, Upon a similar ground, nonentry is excluded, even as to the retoured duties before citation, in every case where either the heir of the superior has not perfected his right to the superiority by a service, or where, from the involved situation of the superior's affairs, the heir of the vassal cannot, with any degree of certainty, know to whom he is to apply for his entry; *Falc. i. June 29. 1745, Chalmers*, (DICT. p. 9230.). As to the question, Whether leases granted by the vassal to tenants exclude the superior from this casualty over the lands let? see *infr. T. 6. § 26.*

46. As to the instances in which the superior is presumed to pass from his claim of nonentry-duties already fallen due; *first*, Craig, on the authority of some decisions pronounced before his time, while yet the act 1617, concerning prescriptions, was not passed, affirms, *Lib. 2. Dieg. 19. § 17.*, that the fee having been full for thirty-six years backwards, presumed that the superior had received payment or satisfaction for all preceding nonentry-duties; which presumption is, since the act 1617, more applicable to the term of forty years*. *2dly*, A charter of *Novodamus* by the superior, imports a release to the vassal of all former casualties, *supr. Tit. 3. § 23.*, and consequently of all nonentry-duties prior to the grant, *Forbes, Feb. 12. 1713, Erskine*, (DICT. p. 6515.). *3dly*, Three seisins granted by the superior to three consecutive heirs, proceeding either on retours or on precepts of *Clare constat*, presume that all preceding nonentries are paid, or passed from, in the same manner that three consecutive discharges of rent or interest presume a release of all arrears, *Cr. Lib. 2. Dieg. 19. § 16.* *4thly*, Entry by the heir, upon a precept of *Clare constat* voluntarily granted by the superior, even without a clause of *Novodamus*, imports a passing from all nonentry-duties incurred previously to the death of the ancestor; because the superior's affirmation in the precept, that the ancestor died seised in the lands, includes an acknowledgment that the fee was full at his death, *St. B. 2. T. 4. § 23.* But charters or precepts by the superior, in consequence of legal charges directed against him, exclude not his claim for duties already incurred; for these charters or precepts being granted not from choice, but in obedience to the law, imply a reservation of all claims formerly competent to him. Yet seisin upon such charter or precept will bar nonentry for the future; because, by the seisin, the fee is full.

When the superior is presumed to pass from the non-entry duties.

47. Relief is that casualty which entitles the superior to an acknowledgment or consideration from the heir of the deceased vassal, for receiving him as vassal in the lands; and it gets that name, because by the heir's entry his fee is relieved or recovered from the superior. Craig, after Cujacius, derives the origin of this casualty from the thirteenth constitution of Leo, by which the administrators of the church were prohibited to exact more from their tacks-men for the renewing of a lease than two years' rent of the subject: But it may with greater probability be derived from the acknowledgment given by the singular successor of an *emphyteuta* to

Relief.

* Though the arrears of casualties may be lost by the negative prescription, the casualties themselves, or the superior's right to them, when they fall due in future, cannot be lost; for being inherent in the property, they must subsist with it. See *Kames, Elucidations, Art. 11.*

to his *dominus*, upon the renewing of his right, *L. 3. C. De jur. emph.* First, after feus were descendible to heirs, the superior was obliged to receive his vassal's heir without any acknowledgment; and he could in no case be compelled to receive singular successors. No mention therefore is made of relief in the *Consuetudines feudorum*, nor indeed of any thing resembling it, except in *L. 1. Feud. T. 24.*, which provides, in the special case of the vassal's death without male issue, that the daughter shall redeem the feu from the superior.

When due in feu-holdings.

48. This casualty hath, however, been early received in most of the countries in Europe. It has indeed been made a doubt, whether it ought to be reckoned among those that by our law are common to all feudal tenures; and it must be admitted, that by a decision in 1610, observed by *Hope, v. Vassal*, (*Kincaid* against *Hatton*, *DICT.* p. 13579.); and a later one, *Nov. 24. 1736, E. Dundonald*, (*DICT. Ibid.*), it was adjudged, that the relief was not due in feu-holdings flowing from subject-superiors, without a special provision in the charter, for doubling the feu-duty at the entry of every heir. But the reasons that may be urged against these decisions appear strong: *First*, The Norman customs, from which both parts of this island have borrowed many feudal usages, admit this casualty, not only in military or ward-fees, but in ignoble, and in *maures*, or those granted for the vassal's alimony, *art. 158, 159. 2dly*, Our neighbours of England have received it, not only in tenures by ward, but by soccage, *Glanv. L. 9. C. 4. 3dly*, This also appears to have been the law of Scotland by *Reg. Maj. L. 2. C. 71. § 3.* And indeed, the doctrine, That relief is incident both to feu and blanch holdings, hath been asserted by every Scottish writer who has treated of that subject; by *Craig*, indeed, with greater diffidence, *Lib. 2. Dieg. 20. § 32.*, who nevertheless quotes a former treatise of our law in support of it; by *Skene*, in his note upon the aforesaid passage of the books of the Majesty; by *Hope*, who adopts the words of *Craig, v. Varda*; by *Stair, B. 2. T. 4. § 27.*, and *Mackenzie, § 22. h. t.* *Lastly*, This doctrine is strongly supported by the analogy of our law. For, *first*, not only proper vassals, but tenants and naked possessors of land, were obliged, on the entry after the death of their ancestors, to pay to the landlord a duty much resembling relief, *Q. Attach. C. 23.*; *Skene, v. Herezeld. 2dly*, Where relief is specially expressed in a holding by feu-farm, the words *uti mos est in feudifirmis*, are commonly subjoined; which plainly import, that the casualty would have been due though it had not been expressed. *3dly*, The sovereign, who is never presumed to exact arbitrarily from his vassals, does in all the precepts directed to sheriffs for infesting heirs in a feu-farm fee, uniformly require them to take security of the heir for the payment of the double feu-duty as the relief, though the charter should bear no such clause, *St. B. 2. T. 4. § 27.*

Its quantum, how estimated in different holdings.

49. In ward-lands holden of the crown, the relief of a knight's fee was anciently taxed to 100s. Scots, *Reg. Maj. L. 2. C. 71. § 2.*; that of a baron's fee was left uncertain, *ibid. § 4.* But the later practice fixed the *quantum* of that casualty in all ward-holdings universally to a year's rent of the fee, computing it in the favourable way, by the new extent, or the retoured duty, where the heir happened to be major at the ancestor's death, *Cr. Lib. 2. Dieg. 20. § 33.* In case of the heir's minority at that period, the superior, if he was in possession

possession of the lands in virtue of the ward, had a right to a full year's rent in name of relief, for which he continued his possession another year after the heir's majority, *Cr. ibid.* : But no relief was due, in case the heir entered to the lands before the expiration of that year, either by our ancient law, *Reg. Maj. L. 2. C. 68. § 3.*, or by the usage of England, *Glanv. L. 9. C. 4.*, or of Normandy, *art. 225.*, in which it is equitably suggested, that the rents accruing to the superior from the ward ought also to serve him for the relief. It is agreed by all lawyers, that the relief in blanch and feu holdings, at least where the charter expresses that casualty, is estimated to the double of the blanch or feu duties. But this is not to be so understood, as if double of the *Reddendo* were paid properly in name of relief: For one year's *Reddendo* goes to the superior, as the constant yearly feu-duty payable out of the lands; it is the other only that is paid as an acknowledgment to him for relieving the feu out of his hands.

50. This casualty, as it cannot extend to the full rent since the statute abolishing tenures by ward, is a *debitum fundi* affecting the ground of the vassal's lands; and consequently may be made effectual to the superior by a pointing of the ground: But it cannot be exacted while the vassal's heir lies out unentered, because it is intended merely as a present or acknowledgment to the superior for receiving the heir as vassal in the lands. Hence, where lands hold of a subject, the heir, though he obtain a precept of seisin from the superior, is not liable in payment of the casualty of relief so long as seisin is not taken upon it: For till he be infest, he is not received as vassal: But in lands holden of the crown, the heir subjects himself to the relief, barely by taking a precept from the chancery; because the sheriff is in all such precepts required to take security of the heir, for the sums due to the crown for the nonentry and relief duties, which are all stated in the *responde* book kept by the directors of the chancery, and are chargeable upon the sheriff, who must account or answer for them to the exchequer, by 1587, *C. 78.*; and hence that book hath got its name. In consequence of this statute, the crown may demand the relief-duties, either from the heir or from the sheriff, by a personal action: and if payment be made by the sheriff, he has recourse, in the character of cautioner, against the heir, whose proper debt it is, either by a personal action, or by a pointing of the ground, *Durie, March 12. 1628, L. Lauriston*, (*DICT. p. 10163. and 13579.*) No composition can be received in exchequer for this casualty, by 1587, *C. 73.*; and it is from this enactment, that, as Sir George Mackenzie, in his observations on that statute, informs us, the rule of exchequer has arisen, by which, though a donatary should obtain a gift of nonentry and relief from the crown, the Barons of Exchequer demand the casualty from the vassal, as if no gift had been granted to a donatary.

It is debitum fundi.

51. Disclamation, in a large sense, signifies a vassal's disowning or disclaiming one for his superior, whether he who is thus disowned be the true superior or not. Thus, where one who claims the superiority of a feudal subject, sues the person whom he alleges to be his vassal for exhibition of his title-deeds, the defender must either exhibit, or disclaim, that is, deny judicially, that the pursuer is his superior; and if he deliberately disclaim upon frivolous grounds, he forfeits his fee: so that disclamation is not so properly a casualty, as a total forfeiture. It obtains in all feudal tenures;

Disclamation.

BOOK II.

for a vassal who wilfully disclaims his true superior, acts contrary to the homage and fealty which is implied in every feudal grant; and disclamation, even when it was confined to a small detached part of the fee, drew after it by our old law the forfeiture of the whole, *Reg. Maj. L. 2. C. 63. § 4. 6. 9.* But now a probable ground of ignorance, or specious colour of excuse, saves the vassal from this heavy penalty; as, if the vassal should deny one to be the superior's heir, through any dispute relating to the order of the deceased superior's succession; or if, in the case of several conterminous tenements belonging in property to the vassal, and holden of different superiors, he should, from a mistake, either of law or of fact, affirm a field to belong to one tenement which truly belonged to another. Craig moves a question, Whether there can be any disclamation that is not judicial? But without doubt certain extrajudicial acts may infer disclamation as strongly as judicial, *ex. gr.* if the vassal should accept of a seisin from any other than his true superior.⁷⁵

Purpresture.

52. Purpresture, or purprision, is also a feudal delinquency, inferring a total forfeiture of the fee; and was incurred by the vassal's encroachment on the streets, highways, or commonities, belonging to the King or other superior, *Reg. Maj. L. 2. C. 74. § 1. 8. &c.* The old penalty of purprision was, by 1600, *C. 5.*, inflicted upon those who, without proper authority, inclosed or tilled up any part of the King's commonities; but it has long fallen into disuse, *Mackenz. Obs. on act 1477, C. 80. p. 85.* The word is derived from the French, *perprison*, which signifies the taking possession of waste or common grounds without the order of law; see *Cotgrave's Dictionary, v. Perprison*, and *Du Fresne, v. Porprendre*.

Escheat.

53. Liferent escheat is also a casualty incident to all or to most feudal tenures. Escheat, from the French *échoir, to happen, or fall*, was used in the old books of our law, to denote all forfeiture or confiscation, by which any part of a man's estate fell from him, and all casualty or obvention accruing to the superior, *Reg. Maj. L. 2. C. 55. § 2. Q. Attach. C. 48. &c.* But in the more modern acceptance of the word, it is restricted to that particular confiscation which most commonly falls through the denunciation of a person at the horn; and it is either single or liferent. This is not the proper place for explaining the doctrine of single escheat, because it accrues to the King, and not to the superior; but as the coincidence between the two is so close, that the one cannot be well understood without the other, both shall be handled under this title, beginning with single escheat, which precedes the liferent escheat in the order of time.

Foundation of diligence on obligations.

54. It is a general rule, That no creditor can use diligence on his obligation, without the previous sentence of a judge. But because it was thought unnecessary, where the obligation was clear, to have a formal warrant in order to diligence, the expedient was fallen upon; that most deeds should bear a clause, by which the grantor consents to their registration in the books of any competent court. This registration, in consequence of the grantor's consent, is in the judgment of law a decree as to the special effect of execution: And indeed it carries the essential characters of a decree; for the deed bears to be registered by the authority of that judge in whose books it is recorded: The extract is signed by the clerk of

⁷⁵ *Ross* says of disclamation and of purpresture, § 52. that "they are now happily exploded from our practice;" *Lectures*, vol. ii. p. 177.

of court, and mentions the appearance of the granter's procurator or advocate consenting to the decree. Bills of exchange, and inland bills, are registrable by statute, 1681, C. 20.; 1696, C. 36; though their style admits no clause of registration. In every other obligation which bears no such clause, a warrant must be granted by the judge for a foundation of diligence: But if the ground of debt be liquid, and not clogged with conditions, the warrant may proceed on a bill or short petition preferred by the creditor to the court of session, which passes of course without citation of the debtor, unless where diligence by horning is to be used, which cannot be obtained on such obligation without a previous decree.

55. After a debt is constituted, either by a formal decree, or by registration of the bond, or other ground of debt, the creditor may obtain letters of horning, issuing from the signet, and directed to a messenger, who is required to charge the debtor to pay the debt, or perform the obligation, within a limited time, under the pain of rebellion. The number of days, or the *induciæ legales*, which, by the letters, are indulged to the debtor for fulfilling his obligation, if he be within the kingdom, are different in different cases, according to the rules set forth, *infr. B. 4. T. 3. § 10.* The messenger must execute these letters against the debtor, either personally, or, if he cannot lay hold of his person, at his dwelling-house. Though any house where one resides for forty days together, is, in the common case, accounted his domicil, or dwelling-house, *vid. sup. B. 1. T. 2. § 16.*; yet in consideration of the severe consequences of escheat, an inn does not constitute such a dwelling-house as to be the ground of denouncing a person rebel; *Stair, Nov. 20. 1672, Paterson*, (Dict. p. 3724.). If the messenger get access to the house, he must, by 1540, C. 75., deliver a copy of the letters, (which is generally called the *citation* or *charge*), to the debtor himself, if he appear, or otherwise to his wife, or any of his children or servants; and if they refuse to take the copy from him, he must affix it on the gate or principal door of the house. If he be not admitted into the house, he must give six knocks at the door, so audible that those within may hear, and afterwards he must affix a copy of the letters to it. If proof be brought, either that no knocks were given, or that they were so given that they could not reach the ears of those in the house, the execution will be improbated or annulled, and the messenger subjected to the pains of falsehood; *St. B. 2. T. 3. § 4.* These statutory rules are not limited to the execution of hornings, but extend to that of all summonses, and letters of diligence*. By the messenger's execution is meant the written attestation signed by him, that he has given a citation or charge on the warrant according to the usual solemnities: And it was, in the style of our old statutes, sometimes called an *indorsation*, because it was written on the back of the summons, or letters of horning; 1540, C. 74, 75, *et passim.* All the above-mentioned solemnities required by statute ought to be expressed in the execution; and the omitting to insert them particularly has been adjudged fatal to the diligence; *Stair, Nov. 19. 1680, Hay*, (Dict. p. 3790.). It must be allowed, that our decisions

Letters of horning, their *induciæ* and mode of execution

* An arrestment used in the hands of a merchant, by leaving a copy at his counting-house, which was apart from his dwelling-house, was found null; *Fac. Coll. Jan. 14. 1795, Fraser*, Dict. p. 3706⁷⁶. Where a party had a house in town, though his chief residence was in the country, arrestment at the former was found effectual; *Edgar, July 30. 1725, Home*, Dict. p. 3704. See *Rem. Decis. No. 74, Dunbar, July 27. 1745, Dict. p. 3705.*

⁷⁶ So found again; *Sharp, Fairlie, & Co., 21st Feb. 1822.*

sions have not been uniform upon the import of objections made to executions founded upon the aforesaid act: But these two particulars may be observed: *First*, That our former practice appeared more inclined to multiply, by a large interpretation, these statutory solemnities, and more rigorous in requiring the observance of them, than it has been of late years; *2dly*, That greater liberty may be taken in dispensing with the omission of the less essential forms, in the execution of a common summons, which, without loss to either party, saves to the pursuer the necessity and expence of a new action, than in the execution of letters of diligence, where each party is struggling hard *de damno vitando*, to support his own ground of debt, and make the payment of it effectual. If the debtor has no dwelling-house, or if the messenger cannot go safely thither, the court of session grant warrant to charge him at the cross of the head borough of the shire where he most commonly resides, under the penalty of being holden as confessed if he fail to appear. Where the debtor is not in Scotland, he must be charged on sixty days, at the market-cross of Edinburgh, and pier and shore of Leith.

Form of denunciation.

56. If the debtor obey not the will of the letters within the days mentioned in them, the messenger may immediately after publish the diligence by denouncing the debtor rebel. This publication must be made at the market-cross of the head borough of the shire where the debtor dwells, *arg.* 1592, C. 128.; or if he lives in a separate jurisdiction, as a regality or stewartry, at the head borough of that jurisdiction, 1597, C. 268. There the messenger must, before witnesses, first make three several Oyesses with an audible voice; *Stair*, Feb. 15. 1681, *Gordon*, (Dict. p. 3768.). Next, he must read the letters, also with an audible voice, and afterwards blow three blasts with an horn; by which the debtor is understood to be proclaimed rebel to the King for contempt of his authority, and his moveables to be escheated to the King's use. Hence the letters of diligence are called *letters of horning*, and the debtor is said to be denounced at the horn. Lastly, he must affix a copy of the letters and execution to the market-cross; *St. B. 3. T. 3. § 8., Dir.* 413. (Dict. voce EXECUTION, No. 97. p. 3756.). All those forms being by our customs essential to the publication, must, as in the case of statutory solemnities, *vid.* § 55., be inserted in the execution; and if this be neglected, an offer to prove, by witnesses, that the forms were precisely observed, will not be admitted to supply the defect, *Stair*, July 11. 1676, *Stevenson*, (Dict. p. 3788.)*. Yet slighter omissions are sometimes overlooked, *Nov.* 30. 1711, *Lady Sempill*, (Dict. p. 3764.), especially in points where the practice has varied; *Fount.* Dec. 7. 1698, *Yeaman*, (Dict. p. 3768.). If the debtor be not within the kingdom, the publication must be made where the charge was given, at the market-cross of Edinburgh, and pier and shore of Leith, and copies affixed at all those different places. Denunciations, wherever they may be used, are declared null, if the letters of horning, and executions, be not registered within fifteen days in the books of the shire, or other separate jurisdiction, where the party was denounced, 1579, C. 75.; 1597, C. 268. But by a posterior act, 1600, C. 13., registration, either in the books of that shire, or in the general register at Edinburgh, is declared sufficient. Letters of horning, which get the name of general, sometimes issue from the signet without any previous

* This has been strongly exemplified in a late case, *Fac. Coll.* June 2. 1797, *Hog*, Dict. p. 8346.

previous decree, or so much as citation against any particular party; of which more *infra*. B. 4. T. 3. § 11. But hornings are, by 1592, C. 142., declared to be no foundation for denouncing any person who has not been previously cited to hear and see the letters directed against him.

57. Denunciation may proceed, either on civil debts, or on crimes. Denunciations on debts are void, if they be not used within a year after the charge is given to the debtor upon the horning, or if the ground on which the diligence proceeded be insufficient, or if the debt have been paid previously to the denunciation. But to preserve the crown's right against the consequences of collusion between the debtor and creditor, *first*, the officers of state must be made parties to all such actions of reduction, *Spot. p.* 104, 105, *Douglas*, (Dict. p. 2714.), and, *2dly*, No discharge granted by the creditor to the person denounced, though it bear a date prior to the denunciation, can be pleaded as a ground of reduction, in prejudice of the crown's right, unless the denounced make oath before the session, that it is of a true date, 1594, C. 213. In criminal cases, denunciations may be used against persons cited to the court of justiciary, either, *first*, if they appear there with a greater number of followers than is permitted by statute; or, *2dly*, if, by failing to appear, they are declared fugitives from the law. In the first case, the denunciations must be made at the cross of the head borough of the shire where the court is held, and registered, either in the books of the shire of the domicil, or in the books of adjournal of the justiciary. In the last case, the denunciation, if used at the market-cross of Edinburgh within six days after the sentence of fugitation, is declared as effectual as if it had been made at the cross of the county-town of the rebel's domicil, 1592, C. 128. Single escheat may fall without any denunciation by a messenger. Thus it falls, by our customary law, upon sentence of death pronounced in a criminal trial; and by special statute, upon one's being convicted of certain crimes, though not capital, *ex. gr.* perjury and bigamy, 1551, C. 19.; deforcement, and breach of arrestment, 1581, C. 118.; and usury, 1597, C. 247.

58. The effects of denunciation thus orderly used, or of conviction in the criminal trials before mentioned, are, first, that the moveable estate of the person so denounced or convicted falls as escheat to the king: and it is doubtless the natural consequence of proper rebellion, that the rebel's whole estate should fall to the crown, *supr.* T. 3. § 12.; but it seems inconsistent, both with humanity and justice, to fix the consequences of high treason upon any man, merely because he is unable to pay his debt; and at the same time, to bestow upon the crown even the smallest part of the debtor's funds; all of which ought to be applied, in the first place, towards the creditor's payment. Upon this ground, some lawyers have been led to conjecture, that this doctrine was originally devised, not for enriching the crown, but as a means of doing justice to the creditors of obstinate and wilful debtors: that the king is not truly proprietor of the escheat goods, but barely a trustee accountable to the creditors; and that it is for this reason gifts of single escheat are always granted by the officers of the crown, not to strangers, but to the creditors of the denounced, according to fixed rules. But this favourable hypothesis has little support from our statutes; on the contrary, the right of the escheat goods in the crown is expressly established by several acts, 1551, C. 7.; 1579,

It may proceed either on civil debts, or on crimes.

Its consequences.

C. 75. ; 1592, C. 145. ; with this only proviso in favour of creditors, that the creditor complaining or offended, that is, the creditor on whose diligence the escheat falls, shall be entitled *ante omnia* to the payment of the debt contained in his letters of horning. And this burden upon the crown's right is most just ; for no right would have arisen to the crown, had it not been for the diligence of that creditor. Hence it may be concluded, that the preference given by the Barons of Exchequer to the other creditors of the rebel, in their nomination of a donatary, is merely an act of equity or humanity, and could not be demanded by those creditors as of right.

Probable origin of denunciation. Escheat on civil debts now abolished.

59. Towards forming a judgment, or at least a probable conjecture, concerning the origin of denunciation for civil debts, it may be observed, that by the ancient laws, a most reasonable distinction was made between the effect of obligations for liquid debts, which the debtor may, by misfortunes, be sometimes disabled from discharging, and of those for the performance of facts in one's own power. To recover payment of the first, the creditor might have attached the debtor's estate, real and personal, but without treating him as a criminal in default of payment ; whereas obligations *ad factum præstandum* might have been made effectual by letters of four forms, or of horning ; two diligences nearly of the same nature ; both of which drew after them the heavy pains of rebellion upon the party's failing to perform. This rigour might perhaps have been necessary, in those ages of licentiousness, to enforce obedience to the law ; and it could not be taxed with injustice, because it affected none but those who refused to comply with the directions of the law, where it was in their power to have given obedience to it. That this distinction was observed, appears not only from 1535, C. 9., which, in obligations to perform, authorised the issuing of letters of four forms ; and in obligations of debt, the diligences of apprising and pointing ; but likewise from a letter of Q. Mary, recorded in the books of sederunt, March 1. 1564 *, requiring the session to grant letters of horning on the decrees of commissaries, where the sentence relates to the performance of facts in the debtor's power, and letters of pointing where the decree was pronounced on a civil debt. When afterwards horning came to be granted for payment of debt, whether in virtue of the debtor's own consent in the clause of registration, or in consequence of the statute 1584, C. 139., the heavy consequences of denunciation fell equally on all persons denounced, whether the denunciation proceeded on an obligation for debt, or for the performance of a fact, the legislature having neglected to distinguish between the effects of the two. Thus it is plainly taken for granted in 1612, C. 3., that it was till then accounted a sufficient defence against slaughter or mutilation, that the person slain or mutilated had been denounced rebel, though only for a civil debt : And thus it also obtained, that the moveables of a person denounced, even for a civil cause, continued, long after that period, to be forfeited to the crown, as if he had been in actual rebellion, till passing of the late statute for abolishing ward-tenures ; which for ever extinguished, not only the forfeiture of single escheat incurred by denunciation upon a civil debt, but the casualty of life-rent escheat ; which is soon to be explained. Nevertheless, as both single and life-rent escheats are still incurred in the case of crimes,

* The date in edit. 1790 is March 1. 1563.

crimes, notwithstanding that British act; and as all the consequences of denunciation, escheat excepted, remain still in force, even where it is used upon a civil debt, it is necessary to proceed in explaining them.

60. The second effect of denunciation is, that the denounced, being in the construction of law a rebel, is not personable; or, in other words, he cannot appear judicially in any court, either as pursuer or defender. Where indeed he is cited to appear for proving of any fact, upon oath, either as witness or party, or for exhibiting writings called for in an action of reduction, the pursuer cannot bar him from appearing in these and the like cases, after he himself has cited him; *Stair, July 12. 1676, Purves, (Dict. p. 5740.)*. But his denunciation precludes him from all defences, to the pleading of which he was not specially summoned. And hence a defender at the horn was not suffered to object to the pursuer's proof, in an action of spuilzie and oppression; *Falc. ii. 113., (Macombie against Duguid, Jan. 3. 1750, Dict. p. 4775.)*. This exception against the denounced, being most unfavourable, is personal: It is only competent against the rebel himself, and cannot be pleaded against the assignee, though the assignation should be dated after the commencement of the suit; since the adverse party is not, by such assignation, barred from any defence or method of proof otherwise competent to him against the cedent, and so can suffer no prejudice by it.

61. All moveables belonging to the rebel at the time of his rebellion, and all that may be afterwards acquired by him till relaxation, fall under his single escheat, whether the rebellion proceeds on denunciation, or on conviction in a criminal trial; and even tacks, though they be heritable in point of succession, *T. 2. § 6.*, fall under the tacksman's single escheat, unless they be liferent tacks, which are declared, by 1617, *C. 15.*, not to fall by the single, but by the liferent escheat. From this general rule, That moveables are the proper subject of single escheat, may be excepted, *first*, Bonds bearing interest; which, though they are made moveable as to heir and executor, by the act 1661, continue heritable as to the fisk, and so fall not under the creditor's single escheat. *2dly*, Though all moveables that are or shall be acquired by the rebel fall under his single escheat, where he either dies, or is relaxed within a year after denunciation; yet where he lies at the horn unrelaxed for a year, that rule, as to future acquisitions, is confined to those particular moveables which are not the fruits of heritable rights; for such of the fruits arising from heritage, whether natural or civil, as become due after the term next ensuing the rebellion, are in that case reserved as the proper subject of the liferent escheat, *infr. § 66.* Yet all rents, or profits, arising even from heritable subjects, which are not vested in the rebel during his own life, but depend upon the life of another, fall, notwithstanding this exception, under the single escheat; not only those that were due at the time of rebellion, or became due within a year after it, but all that shall become due while the rebel continues unrelaxed. This is the case of a liferent lease assigned by the tacksman to the rebel, or of any other liferent right assigned to him by the liferenter, and of the right that the rebel has *jure mariti* to the profits of his wife's heritable estate during the marriage; all which profits, arising from those and the like temporary rights belonging to the rebel, make part of the single escheat, *infr. § 70, 71.*

62. Our

TITLE V.

Effect of denunciation with regard to the *persona* of the rebel.

What subjects fall under the single escheat.

BOOK II.

With what
debts it is bur-
dened.

62. Our former law authorised the treasurer to levy the escheat goods summarily, and bring them into exchequer in virtue of letters of intromission, which were raised in the name of the treasurer, and directed to the sheriff of the shire where the rebel resided, or to officers at arms, 1579, *C.* 75., without giving him an opportunity to object, either against the order used in the process of horning, or against the ground of debt on which that diligence proceeded. But this method was neither just of itself, nor agreeable to the rules of our law; for single escheat is truly a legal conveyance of the rebel's goods in favour of the crown, which, like other conveyances, ought to be completed by some publication that may serve for an intimation, *infr. B. 3. T. 5. § 3.* This old and oppressive usage is therefore justly gone into disuse; and by the later practice, our kings, in place of retaining the escheat to themselves, make it over to a donatary; whose right to the escheat goods is not perfected, till upon an action of general declarator, to which the rebel himself must be made a party, a decree be extracted, declaring that the right of the rebel's escheat is fallen to the king by his denunciation, and that that right is now transferred from the king to the pursuer, as his donatary; *Forbes, 8. (Fount. 10.) Nov. 1710, Borthwick, (Dict. p. 3655.)* Gifts of single escheat granted by the sovereign, though in the form of words absolute, had by the older practice a limitation implied in them with respect to their duration; *Durie, Feb. 2. 1627, Somervel, (Dict. p. 5074.)*; for though such gift had contained an express clause, making over all which the rebel had then acquired, or should afterwards acquire till relaxation, it was adjudged to carry no more than what he should acquire within a year after the gift; *Pr. Falc. 76. 113, (Neilson against Kennedy, Dict. p. 5085, and Macintosh against Primrose, Dict. p. 5087.)*; but by later decisions, those gifts have received a full interpretation, according to the natural meaning of the words; *Feb. 8. 1712, Lo. Minto, observed by Forbes, (Dict. p. 5090.)*, where, for *arrestor*, (the last word), read *donatar*.

Gifts of escheat.

63. The creditor on whose diligence the escheat falls, seeing that forfeiture is burdened with the payment of his debt, may, in an action for payment, sue all donataries and intermeddlers whatever with the escheat goods, on a summons of six days, 1592, *C.* 145: And it has been adjudged, that, let the defender's intromission be ever so small, the creditor has a right to recover from him the full payment of his debt, even though the rebel's whole funds should not be sufficient for clearing it; *Durie, March 15. 1631, Fletcher, (Dict. p. 3614.)* The Barons of Exchequer, therefore, never refuse a gift of the rebel's escheat to such creditor, when he demands it, upon his granting backbond that he shall be accountable for his intromissions; and that as soon as his debt is cleared off, he shall divest himself in favour of the person whom the Barons may name. Though there is no statutory restraint on the sovereign in the nomination of a second donatary, *supr. § 58.*, yet the Barons, from a just favour to lawful creditors, never name a stranger, so long as any debt due by the rebel remains unpaid. This second donatary, who is in effect assignee to the backbond granted by the first donatary, is entitled to call that first to account, in so far as his intromissions have exceeded the amount of his debt. Second gifts require no declarator, because, by the declarator of the first gift, the rebel has been already declared to be duly denounced; but if any nullity should afterwards appear in the process of horning and denunciation

nunciation upon which the first gift has proceeded, the first gift and declarator would become destitute of a foundation; and the second gift, which thereby would become the first, must be declared, as if there had been no former declarator.

64. It was much contested by lawyers before the abolishing of heritable jurisdictions, whether the single escheat of rebels who resided within a regality-jurisdiction belonged to the sovereign according to the rule now explained, or to the lord of the regality in virtue of a right implied in all regalities erected by the crown. Stair confined the right of escheats to such lords of regality as were infest expressly with that privilege; *B. 3. T. 3. § 20.*; and the reasons offered for this opinion by Dirleton, *Doubts, voce REGALITY*, were strong, *viz.* that it was contrary to the nature of jurisdiction, that any judge should, without a special grant, claim forfeitures arising from sentences pronounced or denunciations used without the limits of his territory; and far less the forfeiture by single escheat, which is a right proper to the king, arising from the obedience due to him by his subjects, and which is therefore in all letters of horning declared to belong to the crown, without any restriction. Mackenzie, on the other hand, *Crim. Treatise, Part 2. Tit. 11. § 9.*, affirmed, that every lord of regality, though that right was not expressed in his grant, was entitled to the single escheats of those who resided within the regality, even though the moveables belonging to the rebels should have been situated elsewhere; which doctrine rests upon this ground, that no argument drawn from the general nature of jurisdiction ought to be applied against a regality, which is a jurisdiction *regalem habens dignitatem*, and therefore not to be circumscribed by common rules.

To whom belonged the escheat of rebels residing within a regality.

65. A person denounced for a civil debt may obtain letters of relaxation from the horn, by which he is relieved from the consequences of denunciation; either, *first*, where he offers any sufficient objection or ground of suspension against the validity of the debt, or the formality of the diligence; or, *2dly*, where the creditor, upon payment or satisfaction made to him, consents in his acquittance to the relaxation of the debtor: But those letters, whether they proceed on the creditor's consent, or the debtor's reasons of suspension, must be published at the same market-cross where the debtor was denounced, and registered within fifteen days after publication, in the same books in which the horning was recorded, 1579, *C. 75.* Relaxation, when it proceeds on a nullity in the ground of debt or diligence, has the effect of restoring the denounced to his former state in all respects; for a denunciation which is void can have no legal consequences. But where the relaxation is grounded barely on the creditor's consent, which cannot hurt the interest of the crown, it has no retrospective quality, restoring to the rebel the right of the moveables which had belonged to him previously to his relaxation; for all those are already forfeited to the King, and may therefore be given to any donatary, notwithstanding the relaxation, if the letters bear no special clause restoring them to the rebel. Hence letters of relaxation cannot be granted till the King be satisfied for the escheat, *Act of sederunt, Dec. 3. 1601*; and they commonly bear the payment by the rebel of a particular sum to the exchequer, in consideration of which he is restored to the whole subject escheated. As to the moveable subjects which the rebel may afterwards acquire, the relaxation carries in its own nature a right to them; or, to speak more properly, they do not fall as escheat.

Letters of relaxation.

Book II.

Liferent escheat.
Difference between it and
single escheat.

66. If the rebel continue unrelaxed for year and day after denunciation, his liferent escheat falls to his immediate superior or superiors, *i. e.* each of them, where there are more than one, acquires a right to the rent or other profits of such of the rebel's heritable subjects as hold of himself, during all the days of the rebel's life, while he continues unrelaxed, whether those subjects belong to the rebel in property, or barely in liferent. Though, therefore, it is a common expression, that heritable rights fall under liferent escheat; it is only the liferent, or the profits arising from those rights during the rebel's life, that are carried by that casualty; which profits, though they be in themselves moveable, are the fruits of heritable subjects. This right is fully ascertained by 1535, C. 32., which declares, that by our former practice, the rents of the lands belonging to those that were year and day denounced, returned to the superior during the rebel's life, except when he was guilty of treason; and that our law should be so interpreted for the future. The reason assigned for this casualty is, that the vassal continuing rebel for year and day, ceaseth to be vassal, being in the judgment of law civilly dead; that during the rebel's natural life, no heir can be served to him, so that the superior must be without a vassal till his death; and that, therefore, he is entitled to the rents of the rebel's lands, (from which nothing ever barred him but the grant he had made to the vassal), that so with these he may in the mean time make up for the loss he sustains through the want of a vassal. From the descriptions now given, of single and liferent escheat, it is easy to distinguish between the different natures and properties of the two. Single escheat is a legal penalty arising from disobedience to the will of the King's letters, and therefore accrues to the King alone, who is the party offended. But liferent escheat falls not so much by way of penalty, as from the condition of the vassal, who, by being *civiliter mortuus*, can be no longer considered under the character of vassal. Stair, B. 2. T. 4. § 64, 69., and Mackenzie, § 28. *h. t.*, in treating of the time in which escheat falls, express themselves as if liferent, as well as single escheat, falls from the time that the party is denounced rebel; but say, that by the indulgence of the law a year is given to the denounced, within which he may obtain relaxation. One might be apt to draw it as a necessary inference from thence, that the casualty of liferent escheat is suspended during that period; but that, if the rebel be not relaxed within the year, the liferent has full effect from the time that the casualty truly fell, so as to entitle the superior to all the profits of the rebel's lands due after the term immediately ensuing the denunciation: Nevertheless it seems to be held as the law of Scotland, both by our writers and decisions, that liferent escheat has no retrospective quality, so as to include any rents of the rebel's heritable subjects, but such as fall due after year and day from the denunciation; Stair, B. 3. T. 3. § 15. *vers. For clearing*, and B. 4. T. 9. § 7.; Bank. B. 2. T. 4. § 39.; Durie, July 1. 1626, Haliburton, (Dict. p. 3618.).

No act of the rebel can defeat the superior of this casualty once incurred.

67. As the superior acquires a full right to this casualty, merely by the act of the vassal's continuing unrelaxed for a year after denunciation, no voluntary act done by the rebel afterwards can cut off the superior from the right he hath thus acquired to the rents of his vassal's lands while the casualty shall subsist. Hence, even where the lands were laid under the strictest entail, an irritancy incurred by the proprietor, after the falling of his liferent escheat to the

the superior, by suffering adjudication to pass against his lands upon a personal debt he had formerly contracted, was adjudged to have no effect against the superior's casualty; *Kames*, 34., (*Scot*, July 18. 1722, *DICT.* p. 3673.). Nor can the rebel's relaxation after the year have force to carry off from the superior any of the intermediate rents due to him preceding the relaxation; to which he hath the same right as if the rebel had not been relaxed. But none of the subjects acquired by the rebel after relaxation, or fruits thereof, fall either by the single escheat to the King, or by the liferent to the superior; for after relaxation, he is no longer either rebel to the king, or civilly dead as to his superior. If one who had been denounced for not appearing in a criminal trial, and who, upon his relaxation, had given new security for his appearance, should again suffer himself to be denounced for the same cause, the year is computed as to the liferent escheat from the first denunciation, as if there had been no relaxation.

68. It is the superior alone who is entitled to this casualty, as he is to all other rights connected with the superiority; and, consequently, where there is no superior, no liferent can fall. In feudal rights belonging to the rebel, which require no seisin, the escheat accrues to him who would have been superior to the rebel had the right required a seisin; the disposition of the law supplying in that case the want of a seisin. By this rule, the liferent escheat of a minister's manse, glebe, and stipend, falling during the minister's life or incumbency, accrues to the King; because, if seisin were essential to those rights, the King would be the natural superior, both as he is sovereign, and as the subjects liferented by the incumbent are presumed to have been originally granted by him; *Durie*, March 28. 1628, *Fletcher*, (*DICT.* p. 3633.). In like manner, liferents by courtesy or terce, which are legal rights complete without seisin, fall to the superior of the lands liferented; because had seisin been necessary to perfect them, the dispoonee in the liferent right would have been made to hold of that superior; *Hope*, (*Horning*), July 12. 1622, *Maxwell*, (*DICT.* p. 3636.). It is from this principle, that landlords have right by that casualty to the profits of liferent tacks granted by themselves in favour of the tacksman who has been year and day denounced: for the tacksman derives right from the landlord alone, and is bound to acknowledge no other; and if tacks had required seisin, the right would naturally have been taken to be holden of the granter, *St. B. 2. T. 4. § 52.*

69. In heritable rights which have been perfected by seisin in the person of the ancestor, the liferent escheat of the apparent heir (or heir not yet entered) falls to the superior of the right, as if he were entered; for the heir's neglecting what was in his power to perform, ought to be neither profitable to himself, nor hurtful to the superior; *Durie*, July 3. 1624, *Mure*, (*DICT.* p. 3638.). But if the rebel has acquired right to an heritable subject, not as heir, but as singular successor, and is not infest on his charter, he cannot be deemed vassal in the subject till he be seised; and of course, the superior of the lands, since he is not superior to the dispoonee, cannot be entitled to his liferent escheat. The rents therefore of such lands, while the rebel continues unrelaxed, accrue to the King, *Stair*, July 22. 1675, *Menzies v. Kennedy*, (*DICT.* p. 3639.); not indeed by the liferent escheat; for the King, though he be the rebel's sovereign, is not his superior; but in the right of single escheat, or more properly as a penal consequence of rebellion, by which the whole

Where the feudal right is such as to require no seisin.

Where the right requires seisin, but the rebel is not infest.

BOOK II.

whole of the rebel's moveable estate, which is not by special statute or custom appropriated to the superior by the liferent escheat, falls to the King. On this ground, the interest due to a creditor, after his being year and day denounced upon a bond bearing a clause of infestment, but without mentioning either lands or superior, was adjudged to belong to the King or his donatary, *Durie, July 1. 1626, Haliburton*, (Dict. p. 3618.). Hence also, though personal bonds bearing interest are, by the act 1661, heritable *quoad fiscum*; yet the whole interest that is due upon them falls to the King; not only what may have become due before the expiration of the year immediately ensuing the denunciation, (which falls properly under single escheat), but all that may become due afterwards till relaxation; for it cannot accrue to any superior by the liferent escheat.

All rights are subject to this casualty, of which the vassal is either fiar or proper liferenter.

70. By this casualty, the superior is entitled to the profits of all heritable rights, of which the rebel vassal is either full fiar, as an infestment of property, a right of annualrent, &c.; or even bare liferenter, as a liferent of lands by the courtesy or terce, a liferent tack, a liferent office, &c.; but with the following difference between the two: In liferent rights, the casualty cannot fall, if the rebel has acquired them by assignation; for in such case, he can have no proper right to them in his own person, by which he may be entitled to the fruits during his own life: And hence a liferent infestment, or a liferent tack, when it is assigned by the liferenter to another, falls not under the assignee's liferent escheat, but his single, *Durie, July 29. 1625, Ker*, (Dict. p. 5071.), *supr.* § 61.; because a proper liferent right cannot be communicated to the assignee, whose right by the conveyance reaches no farther than to the rents during the cedent's life, not during his own, *infr. T. 9. § 41.* Whereas heritable rights of property on which seisin has followed, fall under the liferent escheat, even in the person of an assignee, *ex. gr.* a disposition of lands, or an assignation of an infestment of annualrent; because the right of these is as fully vested in an assignee upon a proper conveyance, as it was before in the proprietor or original creditor, and does in no degree depend on the life of the cedent. If liferent leases, when assigned, fall under the single escheat, much more must leases for a definite number of years; for these fall under the single escheat in the person of the tacksman himself: But it would seem, that a lease granted for a determinate time longer than the natural life of man, ought to fall under liferent escheat, both in the person of the tacksman and of his assignee, *Steu. v. Single escheat*; because such lease is as permanent in every respect as a liferent lease, and its duration of as long continuance in the person of the assignee as in that of the tacksman.

A liferent vested in the wife cannot fall under the husband's liferent escheat.

71. On the principle of the preceding section, no liferent right vested in the wife, to the profits of which the husband is entitled *jure mariti*, falls under the husband's liferent escheat, but under his single: for the *jus mariti* is a legal assignation to the husband, which transfers to him the fruits of the subjects belonging to her merely during her life. By the same rule, the casualty of liferent escheat, when it is transmitted to a donatary, becomes moveable in his person, and so falls under his single escheat, *Durie, March 10. 1631, Stewart*, (Dict. p. 3623.). Hence, if we suppose the liferent escheat of a subvassal to fall first, by his being year and day denounced, and then that of the vassal, his immediate superior, the subvassal's liferent, after it has accrued to the vassal, must make part of that vassal's single escheat; because the vassal's right to the

the subvassal's liferent is not a liferent right in his (the vassal's) person, since it depends, not on his own life, but on that of the subvassal; and therefore necessarily falls to the King by the single escheat, and not to the vassal's immediate superior as liferent. But if the liferent of the vassal should fall first, and afterwards that of the subvassal, the subvassal's liferent must fall, not as single escheat to the King, but as liferent to his mediate superior, who, by coming in place of the immediate one, acquires the same right to the subvassal's liferent that such immediate superior would have had, if he had not been disabled from taking it, by being year and day rebel, *Durie, Feb. 26. 1623, Sibbald, (Dict. p. 3616.); July 24. 1632, Rule, (Dict. p. 3624.)*, near the end, also observed by *Durie*, where the word *albeit* ought to be read *because*.

72. Liferent escheat, though common to ward, feu, and blanch holdings, hath no room in burgage tenures, nor in mortifications or mortmains; for as that casualty continues only during the life of the vassal, it cannot with propriety be applied to holdings, where the vassal is a corporation, which never dies. This furnishes us with one obvious reason, why the liferent escheat of a borough should not fall, on the magistrates being denounced rebels for a debt due by the incorporation. Another is, that whatever effect such denunciation may have in certain cases against the persons denounced, the borough ought not to suffer for the negligence of the magistrates in not clearing off its debts, *St. B. 2. T. 4. § 67*. It can admit no doubt, that when a private burges is denounced upon a debt due by himself, his single escheat must fall as a consequence of the rebellion implied in denunciation: And though it should be allowed, that the liferent escheat of his burgage-lands cannot, in proper speech, fall to the King as superior, because liferent escheat never falls but from the want of a vassal; yet the rents of all the heritable rights belonging to the rebel, which fall not to the superior as liferent, must be forfeited to the King as sovereign, according to the rule set forth *supr. § 69*. No heritable right belonging to any number of persons who are constituted into a corporation can fall, either in whole or in part, upon the denunciation of any individual member of the society, for his own proper debt, *ex. gr.* lands belonging to a bishop's chapter, or to any corporation of tradesmen within a borough; because none of the profits of such rights can be said to belong to the person denounced, but are common to the whole corporate body: Yet if a churchman, who has a benefice proper to himself, be denounced for his own debt, his liferent escheat falls, *i. e.* the profits of the benefice during his life or incumbency; because, though the fee of such benefice be not in him, he hath a liferent right proper to himself in the subject; whereas, in the former case, both fee and profits are in the society, *St. B. 2. T. 4. § 68*.

73. In liferent escheat, as in single, the right is made over to a donatary. But though the superior's right to the liferent is truly completed, by the elapsing of a year after the rebel's denunciation, *supr. § 66, 67.*; yet, before the donatary can take possession of the heritable rights falling under the escheat, he must get his gift judicially declared, upon an action of general declarator, for the two following reasons: *First*, That it may appear that a year is run from the rebel's denunciation; till which, the superior's right of liferent does not take place; *2dly*, That the gift made over to the superior may

There is no liferent escheat of rights belonging to a community.

The donatary cannot take possession without a decree of declarator.

BOOK II.

fully established in the donatary; for his gift is no other than a conveyance of the escheat from the superior; which has not the effect of divesting him, or transferring his right to the donatary, till it be intimated, or made public, by a decree of declarator, see *Stair, June 19. 1669, Scot, (Dict. p. 5100.)*, in the same manner that a general declarator of single escheat serves for declaring, that the rebel's escheat is fallen, and for intimating the donatary's right thereto from the crown, *St. B. 3. T. 3. § 23*. Hence, in a competition between donataries, whether of single or liferent escheat, (for the rule holds in both), the gift which is first declared is preferable to the other, though that other should be the first in date. Hence also, a discharge granted by the superior to his vassal, of the casualty of liferent escheat, is preferable to a gift of the same date; because a discharge or acquittance is a complete deed in itself, whereas a gift requires a decree of declarator to complete it. In a competition between two donataries, before either of them has obtained decree of declarator, that donatary is preferred whose summons of declarator was first executed; because citation is the first step towards declarator, and so ought to be considered as a begun diligence, which, in many instances, lays the foundation for a preference, *Jan. 31. 1635, L. Renton, (Dict. p. 5097.)*. Where all other things are equal in such competition, priority in date is the rule of preference; and the date is fixed, not by the time of the gift's passing in exchequer, but by its passing the seals, *Stair, Dec. 6. 1662, Steuart, (Dict. p. 5098.)*. As a decree of general declarator of liferent escheat is declaratory in a proper sense, it has retrospective powers as to the superior; and does not so much confer a new right as declare the right to have been formerly vested in him as far back as the civil death of his vassal. Hence, after the donatary has got this decree, the fee is void, from the end of the year immediately ensuing the denunciation; and consequently he has access to the rents from that time, and may exercise his temporary right to the lands, in the same manner that the vassal himself might have done before he was denounced.

Both general
and special.

74. Though the decree of general declarator entitles the donatary to the possession, without farther process, it is usual, and frequently necessary, for putting the tenants *in mala fide* to pay to others, to sue them for payment in an action, which is called of *special declarator*; though most improperly; for it has none of the characters of declaratory, but is merely a petitory action, of the same nature with that of mails and duties. In this action, the intromitters with the escheat goods are the proper defenders, without any necessity of calling the rebel or his representatives. Both declarators may be insisted upon in the same summons; but before the pursuer proceeds upon that branch of his libel which relates to the special declarator, he must obtain sentence in the general one, and extract his decree.

Rules of preference between the superior and the creditors of the rebel.

75. From the above mentioned observations, the rules of preference between the crown or superior on the one part, and the rebel's creditors on the other, may be easily collected. *First*, it is a rule, common both to single and liferent escheat, That no debt contracted by the rebel after denunciation can give the creditor a preference, to the prejudice of him who is in right of the escheat; nor can such debt receive force, either by grants made by the rebel for the creditor's security, or even by legal diligence used by the creditor for recovering payment, lest it should be in the rebel's power to disappoint

point the crown of the single escheat, or the superior of the liferent, by contracting debts after denunciation which might exhaust the subject; *Stair, Feb. 24. 1669, Count. of Dundee*, (DICT. p. 8360.). Hence, where the King had confirmed an heritable right granted by the rebel after denunciation, the donatary, who had by his gift acquired a right to the escheat previously to the confirmation, was preferred to the right confirmed; *Forbes, Feb. 10. 1710, Leslie*, (DICT. p. 6498.). In denunciation proceeding on a criminal cause, no debt contracted by the rebel after the criminal act, though before his denunciation, could, by our old practice, affect the escheat; *St. B. 3. T. 3. § 16.*: But Bankton, *B. 3. T. 3. § 36.*, justly observes, that since, by act 1690, *C. 33.*, the creditors of persons, even guilty of treason, were secure, if the debts due to them were contracted before the citation given to the traitor in the process of forfeiture, by stronger reason, the falling of escheat for lesser crimes ought not to have the effect of excluding such creditors, whose debts were contracted before the denunciation, whereby the crime is rendered public.

76. If the rebel can contract no new debt after denunciation to the hurt of the donatary, neither ought he, *2dly*, to have the power of granting any voluntary deed after that period, in security even of a debt contracted previously to it; for the granting such right is, in effect, the contracting of a debt, and is equally hurtful to the donatary. But a deed granted to a creditor after denunciation, in consequence of, or for perfecting a right to which the rebel was obliged before he was denounced, is not accounted voluntary, because he might have been compelled to it by law; and is therefore effectual to the rebel's creditor against the donatary; *Stair, July 9. 1662, Bones*, (DICT. p. 3653.). Though voluntary securities granted after rebellion in favour of creditors, cannot affect the right of escheat; yet actual payment made by the rebel to the creditor after that period, or some deed equivalent to payment, *ex. gr.* the acceptance by the creditor of a voluntary assignation granted by the rebel in full satisfaction of the debt, before declarator obtained on the gift, secures the creditor against any action for repayment at the suit of the donatary, if the debt had been contracted previously to the rebellion, *Stair, Dec. 10. 1673, Veitch*, (DICT. p. 8367.); which arises both from favour to the creditor, who receives no more than his just debt, and because payment is an extinction of the debt, after which no *termini habiles* for a competition remain between the donatary and one who had indeed been a creditor to the rebel, but by having received either actual payment, or full satisfaction of his debt, before the donatary had got his gift perfected by declarator, continued no longer his creditor. In like manner, one who has bought goods *bona fide* by voluntary purchase from the rebel, even after denunciation, and has paid the price previously to the gift, cannot be compelled either to restore to the donatary the subject purchased, or to make a second payment of the price to him; because the transmission of moveables is, for the encouragement of commerce, rendered by the law as easy as possible; *St. B. 3. T. 3. § 16. vers. ult.* But if the purchaser has not attained possession of the goods purchased before the date of the gift, the donatary is preferable, from a presumption that the sale was collusive.

77. The rules which are peculiar to competitions in single escheat, are, *first*, That the creditor upon whose diligence the escheat falls, is in all cases preferable to the donatary, *supr.* § 58. *2dly*, That every

The rebel after denunciation can grant no voluntary deed to the donatary's prejudice.

Rules of competition in single escheat.

every creditor of the rebel, whose debt was contracted before denunciation, and who has used diligence before declarator, is also preferable to the donatary: whether such diligence be complete in its kind, as poiding, or confirmation as executor-creditor, &c. *Forbes*, Nov. 8. 1710, *Borthwick*, (Dict. p. 3655.); or though it be only begun, as arrestment, *Stair*, Feb. 19. 1667, *Glen*, (Dict. p. 3645.), without regard to the time of obtaining the forthcoming, by which the arrestment is completed; because the right of escheat is not truly vested either in the King, or his donatary, until declarator, *supr.* § 62.; which therefore has no retrospective quality, so as to exclude any diligence used by the rebel's creditor previously to that period. *3dly*, Where no legal diligence has been used by the creditor before declarator, the donatary is preferable, though the debt should have been contracted before denunciation: because in all competitions of debt, regard is had to the priority, not of the ground of debt, but of the diligence used upon it; *Durie*, Feb. 22. 1628, *Anderson*, (Dict. p. 3643), *vid. infr.* B. 3. T. 6. § 1. From the second rule above mentioned, relating to single escheat, it may be observed, that though it is owing to the benignity of our sovereigns, that gifts of single escheat are bestowed on the rebel's creditors, and not upon strangers, there is no room for ascribing to that favour, (as *Stair*, B. 3. T. 3. § 16. *vers.* *But the question*, and *MacKenzie*, § 35. *h. t.* do) the limited extent of such gifts in questions with the rebel's creditors. The sovereign has never passed from any of the rights or rules of preference in single escheat arising to him or his donatary, but hath left them to the determination of our supreme court; and our judges have uniformly given the question against the crown, where the debt due by the rebel to his creditor has been contracted before rebellion, and diligence used upon it before declarator.

In liferent
escheat.

78. The rules which govern competitions in liferent escheat are shortly these: *First*, No disposition, or obligation to infeft, granted by the rebel, though before his rebellion, and for an onerous cause, is effectual against the superior or his donatary, unless seisin has been taken on such obligation within the year after denunciation, or, as we express it, *in cursu rebellionis*; nor is it enough, that the seisin has been taken previously to the date of the gift; *Forbes*, *Fount.* Nov. 28. 1710, *Lo. Al. Hay*, (Dict. p. 3669.), because the full right of liferent escheat was constituted to the superior, before the gift was granted by him to the donatary, from the moment that the vassal became civilly dead; which therefore cannot be affected by any posterior seisin. As a consequence of this, *2dly*, Not even legal diligence by adjudication deduced by the creditor against the rebel's estate, though begun *in cursu rebellionis*, can exclude the liferent, unless such diligence be also completed within that period, either by seisin, or by a charge against the superior, if the lands are holden of a subject; or by a signature presented in exchequer, if they are holden of the crown; because adjudication without either of these, is not accounted a perfect diligence; *Durie*, Feb. 16. 1631, *Lo. Cranston*, (Dict. p. 3661.). But if the adjudication be thus completed *in cursu rebellionis*, it excludes the donatary, though it had not been begun to be led till after denunciation, *St. B.* 2. T. 4. § 66.

This casualty
is charged with
every burden to
which it was
subject at the
time of the vas-
sal's denuncia-
tion.

79. When the fee returns to the superior, on the falling of any casualty or forfeiture implied in the nature of a feudal grant, as nonentry, (and formerly ward and recognition), his right is doubtless affected with such burdens as are established by the law itself,

as the terce, &c. and with all deeds granted by the vassal to which the superior hath consented; but he is not bound to regard the voluntary grants made by the vassal without his consent, though these grants were effectual against the vassal himself, as long as the fee remained in him; because in casualties arising from the genuine nature of feus, the superior is understood, when he first made the grant, to have stipulated, that the right of fee should return to himself, in the event of their falling, as ample as he granted it. But liferent escheat, though it has been of long standing in Scotland, is only superinduced upon feus by our special customs; and indeed it seems extraneous and foreign to the true nature of feudal grants, as it is entirely founded on denunciation, which proceeds, not from any feudal delinquency against a superior, but from an offence against the sovereign. For this reason, no higher right accrues to him by that casualty, than was vested in the vassal himself at the time of its falling. And hence also the casualty is charged with all subaltern infeftments and leases granted by the vassal, on which possession hath followed before denunciation, though they had not been consented to by the superior himself; *Stair, Jan. 19. 1672, Beaton*, (DICT. p. 3664.); and with such leases granted even after denunciation as have been entered into without diminution of the rental; because the granting of leases is a necessary act of administration, profitable both to the superior and vassal, *St. B. 2. T. 4. § 66.*; and in general, with every burden that might have been charged at the time of the denunciation upon the vassal, in whose place the superior comes.

80. Gifts of escheat are null, if granted before denunciation, by 1567, C. 23. And indeed, in rights which depend on the death, delinquency, or act of another, no grant is effectual by the common rules of law, if made before the existence of the contingency which constitutes a present right in the granter; see *Stair, Feb. 24. 1666, Sinclair*, (DICT. p. 7972.). Hence a gift of escheat was adjudged null, because it did not mention any particular horning on which denunciation had proceeded; *Durie, Nov. 20. 1628, Weston*, (DICT. p. 5069.). A gift of escheat, whether single or liferent, may be also set aside on simulation, *i. e.* when it is upon false pretences, or misrepresentations, obtained by the donatary, for the behoof of the rebel himself, to cover his effects from the creditors, 1592, C. 147. But the act declaring this nullity, restricts it to the time of the rebel's continuing unrelaxed; so that, after relaxation, either himself, or any in trust for his use, may be constituted donatary. Yet as no right in the debtor ought to exclude his creditors, such right is ineffectual against the rebel's creditors, even against those who have used no diligence on their debts: It only secures the rebel from the claim competent to the crown against him; and so is considered merely as an extinction of the forfeiture, in questions with the King or superior.

81. Simulation may be objected against a gift, not only by a posterior donatary in competition with a prior, but by the rebel's creditors. Yet it is not competent to one whose only title is a voluntary right from the rebel posterior to the gift, to plead this nullity; because he had no interest at the date of the gift to object to it; *Fount. Jan. 10. 1712, Whyte*⁷⁶. The rebel's possession of the escheat goods, either by himself, wife, children, or near friends, founds a presumption by the aforesaid act 1592, that the gift is

VOL. I.

4 B

simulate.

Simulate gifts
of escheat.To whom the
objection of si-
mulation is com-
petent.

⁷⁶ *Fountainhall's* report seems omitted in *Mor. DICT.*; but another by *Forbes* is there given, p. 37.

simulate. By the words *near friends*, may be understood, such near kinsmen of the rebel as are incapable of judging in his cause; for the similar term of *conjunct persons* in the act 1621, against the alienations of bankrupts, has been so explained, *Forbes, Feb. 8. 1712, Lo. Elibank*, (DICT. p. 12569.). The donatary must be allowed a reasonable time after the gift, to turn the rebel out of possession; but how long, is an arbitrary question; see *Stair, Dec. 4. 1669, Jaffray*, (DICT. p. 11598.). If the mere possession by a child of the rebel is sufficient to set aside the gift, one might think, that a gift taken directly in the child's own name, ought by stronger reason to presume simulation; but this presumption is elided, either if such child lived in a separate family from his father at the date of the gift, *Stair, Dec. 4. 1669, Jaffray*, (DICT. p. 11589.); or if it appear that the gift was not obtained for the father's behoof; *Durie, March 20. 1623, Dalgarno*, (DICT. p. 11593.); or if the child was truly his father's creditor. Neither is simulation inferred, where the gift is taken directly to the wife or children of the rebel, from considerations of compassion, and expressly bears to be for their alimony and subsistence, *Bankt. B. 3. T. 3. § 28*. But in this last case, the gift will have as little effect against the rebel's creditors, as a gift to the rebel himself would have after relaxation. Another presumption of simulation is, that the gift was procured by the credit and interest of the rebel, and at his expence. This fact may be proved *per membra curiæ*, by the officers and clerks of exchequer, and by the keepers of the seals; *Durie, Nov. 28. 1626, E. Kinghorn*, (DICT. p. 5072.). But if the gift be taken in the name of a creditor, it is effectual, in so far as concerns the debt due to him, though the rebel's money or interest was used in procuring it; *Durie, March 11. 1624, Douglas*, (DICT. p. 3638.). And where such donatary has given back-bond to the exchequer in favour of the rebel's other creditors, the presumption, even from suffering the rebel to possess for four years after the gift, though it be a statutory one, is elidable by the donatary's oath, that the gift was taken for the payment of his own debt; *Stair, Dec. 12. 1673, Dickson*, (DICT. p. 11600.).

Signatures.

82. This title may be concluded with a short account of signatures, and of the different seals used in completing all royal grants, whether of gifts of casualty, or of offices, charters of lands, or other subjects flowing from the crown; all which proceed upon signatures that pass by the signet of the session. By *signature*, taken in a large sense, is understood a subscription or mark set to a writing; and in this acceptation it is frequently used, to denote those interlocutors of a Lord Ordinary, where, without dipping into the cause itself, something is ordered in point of form. But the word, in its most proper meaning, signifies a writing indorsed by a clerk or writer to the signet, and presented to the King, or the Barons of Exchequer as the King's commissioners, importing a grant of some subject, office or right, to him by whom, or in whose name, it is presented. Before the union of the two crowns in 1603, all signatures passed under the King's own hand; but when our Kings took up their residence in England, the Lords of Exchequer got powers from the crown to pass certain sorts of signatures in the King's absence, *vid. supr. B. 1. T. 3. § 32.*; which powers are now transferred to the new court of exchequer, which was established in Scotland after the union of the two kingdoms in 1707⁷⁷. And because our
ancient

⁷⁷ *Vid. supr. B. 1. T. 3. § 18*; and *Dickson, 6th March 1815, Fac. Coll. cited in Not. 49 Ibid.*

ancient forms required the royal superscription to be prefixed to all signatures, a cachet or seal was made, having the King's name engraved on it, imitating the manner of his superscription, in pursuance of an act of privy council, *April 4. 1603*, with which all signatures were to be afterwards sealed that the Lords of Exchequer had been, or should be, authorised to pass*.

TITLE V.

Such as pass by the great seal.

83. Signatures, according to their different subjects, pass either by the great seal only, or by the privy seal only, or both by the great and privy seals, or both by the great and quarter seals; which however is not to be so understood, as if the same individual writing passed under different seals; but that after one part of the right has passed by one of the seals, another passes by another. Every signature must specially mention through what seal or seals it is to pass. If the signature is to convey the right of a land-estate, or other feudal subject, holden immediately of the crown, which requires a formal charter and seisin, the precept, of which it is the warrant, must pass by the privy seal, and the charter itself by the great seal. Hope in his *Min. Pr.* 86—89., has given us a most distinct account of the forms observed in passing a charter under the great seal; which forms continue to this day, with the two following variations; *first*, That whereas by the old practice, the privy seal was usually appended to the precept directed to the great seal before it was registered, it is now enacted, by 1672, *C. 7.*, that all writings passing under the great and privy seals shall be registered in the registers of the great and privy seals respectively before the seal be appended to them. *2dly*, That signatures and charters of the vassals of kirk-lands, where their valuation does not exceed L. 10 Scots, pass by the great seal *per saltum*, without passing any other seal, 1690, *C. 32.* All grants of prelacies and church-dignities, when the government of our church was Episcopal, passed by the great seal; and the commissions to the principal officers of the crown, as Justice-Clerk, King's Advocate, Solicitors, &c. do so at this day. Mackenzie affirms, § 41. *h. t.*, that commissions of Justiciary are by special statute ordained to pass by the quarter seal: He has probably had in his eye the act 1587, *C. 82.*; but that statute relates to the commissions of the justice-deputes, not of the justiciary-court as modelled by the act 1672; for the commissions of that court have always passed by the great seal.

84. If the signature be intended to confer the right of a moveable estate, or of any temporary casualty which requires no seisin, as nonentry, escheat, &c. it passes by the privy seal only; for the privy seal is proper to assignable rights; and whatever rights are transmissible by subjects by simple assignation, the sovereign transmits by his privy seal. Yet the right of moveables may be transmitted in the same signature which contains a grant of lands, and consequently passes by the great seal, if these moveables be specially expressed in the signature; because the great seal virtually comprehends under it the privy seal; *Mack. Obs. on act 1571, C. 36. p. 181.* Grants of, or presentations to, inferior offices, whether ecclesiastical, as chaplainries, or civil, as commissary-clerkships, &c. pass also by the privy seal, without the necessity of being presented in exchequer⁷⁸.

Such as pass by the privy seal.

85. The quarter seal is kept by the director of the chancery. It is,

Quarter seal.

* But if the charter contains an original grant from the crown, it must still be superscribed by the King.

⁷⁸ It was lately found not to be necessary that a presentation to a professorship should pass the privy seal; *Lockhart Muirhead, 16th May 1809, Fac. Coll.*

is, in shape and impression, the fourth part of the great seal; and is, both in our old statutes, and in the signatures themselves, called *the testimonial of the great seal*, because anciently it was never appended but to that kind of rights to which the great seal had been first appended. Thus, in charters, and precepts of seisin proceeding upon them, the charter passes by the great seal; and the precept, which by our former custom was made out in a separate parchment, passed by the quarter seal; but by 1672, C. 7., the custom of writing precepts of seisin apart, and passing them under the quarter seal, is prohibited, and those precepts are ordained to be engrossed in the charters, which is declared to be as sufficient a ground for taking seisin, as if the precepts had passed under the quarter seal, *supr. Tit. 3. § 33.* Commissions of tutory, and of brieves issuing from the chancery, pass also by the quarter seal; and all gifts and letters of presentation to lands, proceeding upon bastardy, forfeiture, or *ultimus hæres*, where the lands are holden of a subject: But where they are holden of the crown, such grants must, agreeably to the former rule, pass by the great seal.

Seals are to royal grants what subscription is to grants from subjects.

86. By art. 24. of the treaty of Union, all public acts, instruments, and treaties, are to be from thenceforth sealed with the great seal of the united kingdom of Great Britain; and by the same article a new seal was appointed to be made for Scotland, to be used in all matters of private right, offices, and grants, which formerly passed by the great seal of Scotland. The privy seal and quarter seal continue on the same footing as before the Union. Seals are necessary for giving authority to, or authenticating, the grants which pass under them; and so are to royal grants what subscription is to grants by subject-superiors. The passing of grants by the seals is also of use in giving to the King's officers a reasonable time to inquire whether the right applied for ought to be granted; for if it should appear that it is solicited *subreptione vel obreptione*, by concealing the truth, or affirming a falsehood, the Barons may stop it, even after passing the signature, at any time before it has gone through all the forms.

TIT. VI.

Of the Right which the Vassal acquires by getting the Feu.

Dominium utile,

AFTER explaining what is contained under the *dominium directum*, or right of superiority, which the superior reserves to himself in the feudal grant, the *dominium utile*, or right of property, which is thereby conferred on the vassal, offers itself naturally to our consideration. The vassal acquires the property, *first*, of all the baronies, tenancies, fields, and other lands whatsoever, which are either expressed in the charter, or which the law construes to be carried by it, though not specially mentioned; and, *2dly*, of whatever is accounted part or pertinent of land, whether above the surface, as houses, trees, &c. or under it, as minerals, coal, limestone, &c. *a cælo usque ad centrum* ⁷⁹.

Comprehends, 1^{mo}, All lands expressed in the charter.

2. As to the first, differences can seldom arise concerning the extent of the lands conveyed in a bounding charter, which points out the

⁷⁹ Even a general reservation by the superior of "the haill mines and minerals of whatever nature and quality," has been found not to comprehend a quarry of stone, though "of a rare species, peculiarly fitted for architectural purposes;" *Mansie's*, 10th June 1818, *Fac. Coll.*

the limits of the grant by march-stones, the course of a river, or other obvious and indubitable boundaries. Though it cannot be proved at what time march-stones were fixed, their having been reputed the boundary will support the right of the vassal who grounds a claim upon them, if he has not lost it by prescription. Where a charter, without referring to any boundary, describes the lands or baronies by special names or designations, it can only be known by the common opinion of the country, what lands fall under the designations expressed in the charter, and by what limits those lands are circumscribed. Controversies of this kind are determined upon an action of molestation, to be explained, *B. 4. Tit. 1. § 48.*

3. Sometimes separate farms or tenancies, though they had not been formerly reputed to belong to, or, as it is commonly expressed, to be pertinent of the lands specially mentioned in the charter, are carried by it, if they have been possessed by the grantee as pertinent past memory of man, *Stair, Nov. 17. 1671, Young, (Dict. p. 9636.)*; for by the grantee's immemorial possession, such tenements are considered to have belonged originally to the lands expressed in the grant. In this matter, the following rules are observed by our practice: *First*, In a bounding charter, no possession can establish to the vassal a right of lands without the bounds specified in his charter; for he is circumscribed by the tenor of his own grant, which excludes whatever is not within these bounds from being pertinent of the lands disposed, *said Nov. 17. 1671.* But nothing hinders a landholder who has not himself a bounding charter, from acquiring, by prescription, lands which lie within the boundaries of another proprietor, as part and pertinent of his own lands; for he cannot be limited by the bounding charter of another. *2dly*, Where a tenement of land is possessed by one barely as pertinent, and by another in virtue of an express right, he who possesses under the express right is in dubio to be preferred to the other. *3dly*, Where neither party is expressly infeft, but both possess the same subject as pertinent, the mutual promiscuous possession of both resolves into a commonalty of that subject. But questions of this nature depend much on the different kinds of the possession had by the two competitors; for if one has had the exclusive possession of pasturing cattle on the ground, and has also been in use to cast feal and divot, and perhaps to turn up part of the field with a plough, while the possession of the other was confined to the casting of feal and divot only, he who hath exercised all the different acts of property the subject is capable of, is accounted the proprietor; and the other, whose possession was more limited, is entitled merely to a servitude upon the property. *4thly*, The possession of a tenement not contiguous to the lands specially conveyed, seldom carries right to the subject as pertinent; and though it may, in some singular cases, for which see *Craig, Lib. 2. Diog. 3. § 24.*, this at least is certain, that another who is infeft in lands lying contiguous to the subject in dispute, will be preferred upon a more slender proof of possession*.

or such as have been possessed immemorially as pertinent of the lands.

2do, Every thing connected with the land is part or pertinent.

4. As to the second point, it is universally admitted, that every thing which, from its close coherence or connection with land, is considered in law as part or pertinent of it, goes to the vassal as an accessory of the subject contained in the feudal grant. Most of these are, however, anxiously enumerated in the *Tenendas* of every charter; and it may not be amiss to explain, shortly, such of them as require illustration. *Cum demibus, edificis*: Under these words are included, not only dwelling houses, stables, barns, and other

* See Balf. p. 175. See *Dict. voce* PART AND PERTINENT.

Book II.

out-houses, but walls, inclosures, &c. ; all which being proper *partes soli*, are carried by every charter, *St. B. 2. T. 3. § 75*. As to inclosures, the vassal has a superadded right, by positive statute, to compel proprietors whose lands lie conterminous with his own to bear half the expence of building, ditching, and planting a dike upon the limits which divide their grounds, or otherwise fence the march, 1661, *C. 41* *. As this statute may, if taken in its greatest latitude, be used as a cover for oppression, it is not in practice extended against feuers whose property exceeds not five or six acres, *Home, 123, (Penman against Douglas, July 3. 1739, (Dict. p. 10481.)*. Several other cases may be figured, where equity requires a similar judgment †, and indeed some lawyers have considered that part of the act as temporary, though the contrary has been found by repeated decisions, *Forbes, July 28. 1713, Dunbar, &c. (Dict. p. 10477.) ‡*. Landholders who are to inclose their grounds, may, if the march be crooked, apply for a visitation of the grounds to the judge-ordinary, who is authorised to adjudge, from the one proprietor to the other, such parts of the conterminous lands as may be necessary to make straight the inclosure, and at the same time to determine and decree what compensation may be due from the one to the other, 1669, *C. 17. §*.

If mills are carried by a charter of the grounds?
If a proprietor can build a mill on his own property?

5. Mills are also mentioned often in the *Tenendas* of charters. As to these, two questions have been moved, *first*, Whether mills already built are carried by a charter of the grounds on which they stand? *2dly*, Whether proprietors have a right of erecting new mills upon their own property? As to the first, a mill has been, by the general opinion, accounted a separate tenement from the lands, not to be carried by a charter, without either a special grant of it in the dispositive clause, or the erection of the lands into a barony. And it must be admitted, that a mill is capable of being made a separate tenement, by actually separating it from the lands, *cx. gr.* by a grant of the mill without the lands, since, in that case, it is not only susceptible of, but requires a separate seisin. But while the right of the lands and mill continues vested in the same proprietor, the question, Whether a charter of the lands ought to carry the mill? is a *questio voluntatis*, depending entirely on the granter's intention, which must be gathered from circumstances. If one who has built a mill on his lands should entail his estate, the mill would no doubt be carried by the entail, though there should be no express mention of mills in the deed: and in the same manner, an heir would carry the right of mills by a special service and retour, though the retour should only mention the lands ¶. There is as good ground for maintaining, that mines of coal are a separate

* Ratified by 1685, *C. 39*. The same rule is applicable to the repairing or rebuilding of a march-dike; *Fac. Coll. Jan. 20. 1758, Lockhart, Dict. p. 10488*.

† See *June 15. 1784, Earl of Peterborough, Dict. p. 10497. 78*.

‡ *Fac. Coll. Dec. 5. 1769, Riddel, Dict. p. 10489*.

§ *Vid. supra, B. 1. Tit. 4. § 3*.

¶ Found, that mills are carried by a disposition of the lands with parts and pertinents; *Fac. Coll. June 1777, Rose; Dict. p. 9645, and App. No. 1. voce PART AND PERTINENT*.

⁷⁸ In this case, "the opinion of the Court was, that this act of Parliament ought to be interpreted as respecting cases, in which mutual, though not therefore equal advantages were to accrue to the conterminous tenements; and as in no instance authorising an act of oppression or of injustice to any individual." And still more recently it was held, that the act applies only where the advantage from the dike is at least equal to the expence of building and keeping it up; *Earl of Cassillis, 28th Feb. 1809, Fac. Coll.* The report of this case mentions only the act 1669, *C. 17*. But the arguments of the parties, and the observations from the Bench, had reference chiefly to 1661, *C. 41; Sess. Pap. in Bibl. Fac.*

separate tenement from land, as that mills are; for coal is not more properly part of the land than mills; and a coal mine, like a mill, is sometimes made a separate tenement from the land, by conveying the coal without the land⁷⁹: Yet both our judges and lawyers are agreed, that a charter of the land includes the coal as a natural part thereof, *Cr. Lib. 2. Dicg. 8. § 17.*; and consequently, that he who is first seised in the lands hath a right to the coal of these lands, preferably to one afterwards seised *per expressum* in the coal; *Jan. 30. 1662, Lord Burleigh, (Dict. p. 9630.)*. As to the second question upon this article, relative to the proprietor's right of erecting mills, a purchaser has, in the common case, an undoubted right of building mills on his own property, though there be no clause *cum molendinis* in his charter; because that is a right consequential to property: But where the grain growing on his lands is thirled to a mill belonging to another, law hath restricted his property in that respect, in consequence of the servitude of thirlage with which the lands are burdened; so that the restraint on the proprietor from building a corn-mill within the thirl is implied, *inest de jure*, without any explicit clause*. Nor will his offer of security, that no grain subject to the astriction shall be grinded at it, be sufficient for taking off this limitation; because the admitting such a security would open a wide door to frauds; *Fount. Feb. 28. 1684, Macdougall, (Dict. p. 8897.)*; *Fac. Coll. i. 54. (Urquhart, Dec. 26. 1752, Dict. p. 16028.)*. But this implied prohibition extends not to mills that are incapable of manufacturing the special sort of grain which is thirled, or are particularly adapted to some other purpose, as barley or lint mills, *Fac. Coll. ii. 48, 49., (Macleod, July 29. 1757, Dict. p. 16037.; Lockhart, eod. die. Dict. p. 16039.)*; because the persons entitled to the thirlage, for whose sole benefit the limitation was introduced, cannot be hurt by the building of any mill, which by its construction is altogether unfit for manufacturing that kind of grain which is astricted. And hence, even where the lint or barley mill may, by a small variation in the machinery, be fitted for grinding any of the species of grain that falls under the astriction, the proprietor cannot be compelled to demolish the mill, provided he give security that he shall not use it for grinding any grain of the kinds astricted.

6. *Cum aucupationibus, venationibus, piscationibus*: The right of hunting, fowling, and fishing, within one's own ground, naturally arises from one's property in the lands⁸⁰; but it is restricted by sundry statutes. Among these, persons who have not a plough of land in heritage⁸¹, are denied the liberty of hunting and hawking, 1621, C. 31., without distinguishing between grounds which are, and those which are not, part of their own property. No proprietor whose valued rent does not amount to L. 1000 Scots, can use setting-

Clause *cum aucupationibus, venationibus, piscationibus*.

* See *Sel. Dec. No. 54, E. of Hopetoun, Nov. 21. 1753, Dict. p. 16029.*

⁷⁹ Where the property of the soil has thus been separated from that of the coal, the proprietor of the coal cannot control the proprietor of the soil in his use of it, whether in building or otherwise, on the plea that his ultimate liability in surface damages may thereby be increased; *Dunlop's Trustees, 20th June 1809, Fac. Coll.*

⁸⁰ A right of hunting over a separate estate, not belonging to the vassal, is not validly conveyed by insertion in the *tenendas* clause only of an old charter: Nor is it capable of being acquired as part and pertinent; *Earl of Aboyne, 16th Nov. 1814, Fac. Coll.*; affirmed on appeal, 22d April 1818.

⁸¹ A lease successively renewable every 19 years at the demand of the tenant, does not constitute *heritage* in the intendment of the statute; *Earl of Hopetoun, 17th Jan. 1810, Fac. Coll.* A tenant is not entitled to the privilege of pursuing game upon his farm, without permission from the landlord; *Ibid.*; also *Marquis of Tweeddale, 18th June 1808, reported in a note subjoined to the above case.*

setting-dogs, 1685, C. 20. *: nor is any proprietor, whatever the extent of his property may be, permitted to shoot, hunt, or hawk, within six miles of the King's woods, parks, or palaces, 1594, C. 214.; or to kill muirfowl or tarmagan from November 10. to July 25., or partridge from February 1. to September 1., or pheasant from February 1. to October 1., or heathfowl from December 1. to August 25., 1. Geo. III. C. 21 †. It has been lately made a doubt, whether

* It has been found by the High Court of Justiciary, after a solemn trial, that the statute 1621, c. 31., contains the only subsisting qualification to kill game⁸²; and that the qualities required by the statute 1685, c. 20. cannot now be enforced; *Fac. Coll. June 27. 1780, Kelly, Dict.* p. 4995.

† It is enacted by statute 13. Geo. III. c. 54., That every person who shall wilfully take, kill, destroy, carry, sell, buy, use, or have in possession, any muirfowl or tarmagan, between 10th December and 12th August in any year; or any heathfowl between 10th December and 20th August in any year; or any partridge between 1st February and 1st September in any year; or any pheasant between 1st February and 1st October in any year; shall, for every offence, forfeit L.5 Sterling: And in case of not payment within ten days after conviction by a final sentence, shall suffer imprisonment for two months, for each L.5 Sterling thereof.

The act does not extend to pheasants or partridges taken in the lawful seasons, and kept in a mew or breeding place.

The forbidden time for killing partridges, was altered by statute 36. Geo. III. c. 54. (passed April 26. 1796), and declared to be between 1st February and 14th September annually; but by 39. Geo. III. c. 54., (April 19. 1799), the same rule is laid down for the whole of Great Britain; and the time prohibited is again declared to be between 1st February and 1st September in any year, under the penalties contained in 2. Geo. III. c. 19., which originally applied to England alone.

Every person whatsoever not qualified to kill game in *Scotland*, who shall carry, or have in his or her custody, at any time of the year, upon any pretence whatsoever, any hares, partridges, pheasants, muirfowl, tarmagans, heathfowl, snipes or quails, without the leave or order of a person qualified to kill game in *Scotland*, for carrying such hares or other game, or for having the same in his or her custody, shall, for the first offence, forfeit 20 s. Sterling; and for the second, and every other subsequent offence, 40 s. Sterling: And in case of not paying the sum decreed within the space of ten days after conviction by a final judgment, shall suffer imprisonment for six weeks for the first offence, and three months for the second, and every other subsequent offence, 13. Geo. III. c. 54. § 3.

Every person making muir-burn, or setting fire to any heath or muir in *Scotland*, from 11th April to 1st November in any year, shall forfeit and pay the sum of 40 s. Sterling for the first offence, L.5 Sterling for the second offence, and L.10 Sterling for the third and every other subsequent offence: And in default of payment within ten days after conviction by a final judgment, shall suffer imprisonment for six weeks for the first offence, two months for the second, and three months for the third and every other subsequent offence. *Ibid.* § 4.

Sections 5. 6. and 7. respect muir-burning alone.

All offences against this act may be inquired into and determined, either by the oath or oaths of one or more credible witness or witnesses, or by the confession or oaths of the parties accused, before any two or more justices of the peace, or before the Sheriff or Steward depute or substitute of the county where the offence shall be committed, or where the offender shall be found⁸³. Complaint may be by the fiscal of court, or any person⁸⁴ who chooses to prosecute. *Ibid.* § 8.

See a later statute for preservation of the game, 39. and 40. Geo. III. c. 50.⁸⁵.

⁸² It was again found, that this statute is in observance, and that it applies to the apprehension of game by means of shooting; *Earl of Hopetoun; Marquis of Tweeddale; ut supr. not.* ⁸¹; *Trotter, 8th July 1809, Fac. Coll.*

⁸³ By a special clause in *stat.* 13. Geo. III. c. 54., there is given a power of appeal to the Circuit Courts of Justiciary, from the sentences both of the Justices and Sheriffs; and this appeal may be taken by the prosecutor equally as by the defender; *Gray, 23d Jan. 1816, (Justiciary.) Fac. Coll. App. No. 1.* But where the matter rests entirely on the general enactment contained in *stat.* 20. Geo. II. c. 43., an appeal from the Justices is not competent; *Maxwell, 5th June 1820, Fac. Coll.*

⁸⁴ Complaint was brought, at the instance of "John Gray, solicitor at law, Edinburgh, agent for the preservation of game in the county of Edinburgh, for himself."—"It was objected, that this was truly a prosecution for the association, who could not prosecute;" and Mr Gray "admitted, that the expence and risk of the prosecution were borne by the association, and that the penalty would be accounted for to them." The Court, however, "were unanimously of opinion, that the prosecutor, though he designated himself 'agent for the association,' was entitled to prosecute as a *common informer*; and that it was not competent to inquire at whose expence, or for whose behalf, the prosecution was carried on;" *Gray, 23d Jan. 1816, (Justiciary.) Fac. Coll. App. No. 1.*

⁸⁵ By 57. Geo. III. c. 90. persons having entered into any open or inclosed ground, with

whether a person qualified to kill game, may hunt or shoot with, in another man's property without a trespass; and indeed the act 1707, C. 13., which prohibits all without exception to come within their neighbour's property "with setting-dogs and nets," without the proprietor's consent, seems to take it for granted, that a person qualified may hunt in any ground with hounds or grey-hounds, or shoot with a fowling-piece, provided he does not use a net: But surely such privilege carries with it a most severe limitation upon property; and besides, hath a manifest tendency to destroy the game; the preservation of which our lawgivers seem to have had so much at heart⁸³ *. Stair is at a loss, B. 2. T. 3. § 69., to comprehend the meaning of the clause *cum piscationibus*; because he considers the right of fishing for white fish, as cod, trout, perch, &c. either at sea, or in rivers or lakes, as common to all, without the necessity of any grant from the King or superior. But this opinion may be called in question; and if it were admitted, appears inconsistent with what his Lordship affirms in the same section, that a vassal infest *cum piscationibus*, may, by interrupting others in the exercise of that right for the years of prescription, constitute to himself an exclusive property in the fishing; for no
right

* The learned author's opinion accords with the other authorities; *Craig*, B. 2. *Diog.* 3. § 13.; *Stair*, B. 2. Tit. 3. § 76.; *Bankton*, B. 2. Tit. 1. § 7.: And it is now perfectly settled, that the qualification required by law, only enables a proprietor to kill game upon his own grounds: and that it gives him no right to hunt on the property of others without their permission, whether that property be inclosed, *Fac. Coll. March 3. 1778, Marquis of Tweeddale*, *DICT.* p. 4992.; or not, *Ibid. June 16. 1790, Earl of Breadalbane*, *DICT.* p. 4999. See to the same purpose, *Fac. Coll. August 9. 1769, Watson, &c.* *DICT.* p. 4991.—The following cases have lately occurred relative to the subject of game:—*Campbell and Stewart against Campbell*, *Jan. 24. 1809, Fac. Coll.* Found, that one of two co-proprietors of a commonity is not entitled to grant, for rent, a lease of it for shooting upon, without consent of the other co-proprietor⁸⁴. —*Forbes against Anderson*, *Feb. 1. 1809, Ibid.* Found, that a servitude of pasturage does not include a right of killing game on the servient tenement.—*Trotter against Macewan*, *July 8. 1809, Ibid.* Found, that the statute 1621, establishing the qualification of a plowgate of land for hunting and hawking, is not in desuetude, and is applicable to shooting; and that a qualified person may communicate the privilege over his own lands to another.

with intent illegally to destroy, take, or kill game or rabbits, and who shall be found at night, (i. e. between six in the evening and seven in the morning, from 1st October to 1st February, and between seven in the evening and five in the morning, from 1st February to 1st April, and between 9 and 4, during the remainder of the year) armed with any gun, cross-bow, fire-arm, bludgeon, or other offensive weapon, are declared guilty of a misdemeanour, punishable by seven years' transportation, &c.

By 58 *Geo.* III. c. 75. a penalty of L. 5 is imposed on all persons, qualified or not qualified, who shall buy any hare, pheasant, partridge, muir or heath game, or grouse.

It was enacted by 1707, c. 13., "that no persons whatsoever shall shoot hares," under a penalty; but this is repealed by *stat.* 48. *Geo.* III. c. 94.

A pretty comprehensive summary of the statute, connected with this subject, will be found in *Tomlin's Law Dictionary*, v. GAME LAWS.

⁸³ A tenant is not entitled to prevent his landlord from hunting upon his farm; but he has a good action "for any damage which he can show he has sustained;" *Ronaldson*, 21st Nov. 1804, *Fac. Coll. DICT.* p. 15270.

A person having a *jus aucupandi* over a forest, the property of another, may exercise the same, either personally, or by his gamekeeper, or by any qualified friends whom he may permit, whether his tenants or not, or whether he be present or not; provided he do not exercise it abusively, or encroach unreasonably, or absorb the general right of fowling, as well as hunting, belonging to the proprietor of the forest; *Earl of Aboyne*, 22d June 1813, *Fac. Coll.*; affirmed on appeal 10th July 1819.

⁸⁴ One of several co-proprietors of a commonity, immemorially used for pasturage, is entitled, notwithstanding the dissent of another co-proprietor, to drive off deer, and to prevent them from resting and pasturing upon it; *Robertson*, 22d May 1810, *Fac. Coll.* affirmed on appeal, 1st Dec. 1814.

Book II.

Clauses *cum cuniculis, &c. columbariis, &c.*

right common to mankind can be taken away from one, and acquired by another, by interrupting particular persons from the use of it for the longest course of time*. As to salmon-fishing, *vid. infr.* § 15.

7. *Cum cuniculis et cuniculariis*; "with rabbits and warrens." The right to these is also implied in property. Craig, *Lib. 2. Dieg. 8. § 22.*, though he acknowledges that it is not cut off by any statute, seems to be of opinion, that no proprietor can make new warrens on his estate, unless he inclose them on account of the great damage they may bring to the neighbouring corns. But that author has overlooked an act of James IV. 1503, C. 74., which in place of restraining that natural right, enjoins landholders to exercise it, by making parks with deers, cuninghars, and dovecots. Some lawyers say, it was meant that such cuninghars were to be inclosed or emparked; but according to that interpretation, dovecots, which is the next particular in the act after cuninghars, ought also to be inclosed; which is evidently absurd. *Cum columbis et columbariis*; "with doves and dovecots." Though the last-quoted statute commanded also the building of pigeon-houses, pigeons were at last found so destructive to corns, that, by 1617, C. 19., no landholder is allowed to build one, unless he has in yearly rent ten chalders of victual lying within two miles of it; and even then, he can build one dovecot only upon such estate. This act, though it denies to proprietors the right of erecting a dovecot, unless they have ten chalders victual yearly rent lying within two miles of it, has been found to lay no restraint on such as are possessed of a greater rent, suppose forty or fifty chalders, provided they build only one within the limits of that ground which yields ten chalders yearly rent, *Fac. Coll. i. 23.*, (*Brodie. July 3. 1752, Dict. p. 3602.*). It is hard to guess at the reason why Craig, who died before the passing of that act, should have affirmed, *Lib. 2. Dieg. 8. § 23.*, that no landholder could build a dovecot who had not six acres of land in property; whether he did it on the authority of custom, or of an act of council. This statute extends not to dovecots which had been then built: And if positive evidence be not brought that the dovecot under challenge was built after the statute, the presumption is, that the building was lawful, *i. e.* that it was built before passing the act. If an estate is purchased with a pigeon-house upon it, from a person who was qualified to build one, the purchaser is entitled to the benefit of it, though he have not the same legal qualification; but if it become ruinous, he cannot rebuild it; *Jan. 19. 1731, Kinloch, (Dict. p. 3601.)*.

Cum fabrilibus, brasinis et brueriis.

8. *Cum fabrilibus, brasinis, et brueriis*; "with forges, malt-kilns, and breweries." Though the right to these be a natural consequence of property, we are assured by Craig, *Lib. 2. Dieg. 8. § 25.*, that no vassal had anciently the right of brewing, or of a smith's forge, where horses might be shod, or plough-irons made, without a licence from the superior: For which this reason is assigned by Stair, *B. 2. T. 3. § 72.*, that as the inspection of inns, or whatever contributed to the accommodation of travellers, or to the improvement of the public police, was committed to magistrates of boroughs and to barons, 1535, C. 18.; barons, from that occasion, assumed to themselves the exclusive right of licensing forges and breweries, even within that part of their baronies which they had feued to others. But, by the later practice, feuers, more agreeably to the nature

* See as to the right of trout-fishing, *Fac. Coll. Nov. 20. 1787, Carmichael, &c. Dict. p. 9645.*

ture of their grants, are entitled to brew within their own property, without either an express clause in their charter, or a licence from the superior; *Pr. Falc.* 14. (*Nisbet, Dec. 24. 1681, Dict. p. 15007.*) Though a baron cannot withhold from his feuers the privilege of brewing, as a natural right attending the subject feued, he can hinder them, and, by still stronger reason, every stranger, from importing and vending within the barony, ale which has been brewed without it: For, by the erection of the lands, a prohibition is implied against the importation of foreign ale into the barony, by which part of the profits which might be reaped from the growth of the barony-lands is drawn by strangers to the detriment of the baron, for whose sole behoof the lands were erected*. And upon this ground, the magistrates of Musselburgh, a village erected into a barony by the crown, were found to have a right to prohibit the importation of ale into the grounds contained in their charter. But even boroughs-royal have no such privilege, if the right of barony be not expressed in their charter: For grants to boroughs are not, like those granted to private persons, erected for the behoof of any particular grantee; they are established for the general interest of the kingdom: The lands erected cannot be alienated, and indeed continue *inter regalia*; and the extent, both of their jurisdiction and other privileges, are precisely ascertained by the grants made to them; and nothing is implied in these grants, which is not essential to the constitution of a borough royal, *Fac. Coll.* i. 25. (*Miller, July 7. 1752, Dict. p. 1936.*) It may be worth observing, that though the word *bruarium* in our charters has been, for some centuries past, used to denote the right of brewing; yet, in our most ancient charters, it signified heath, from the French *bruyere*. Thus, "Thomas filius Thomæ de Gordon," granted to the monks of Kelso, "licentiam vellendi bruarii in territorio de Thorndyke," *Chart. of Kelso*. See also *St. Rob. III. C. 11.*; *Du Fresne Glossar. v. Bruarium, Bruera, Brueria*; *Sibbald's State of the shire of Fife, p. 151.*

9. *Cum libero exitu et introitu*; "with free ish and entry." This clause must without doubt import a right to all ways and passages, in so far as they may be necessary for the vassal's access to kirk and market, through the adjacent grounds of the granter, who is, by the clause, laid under that obligation. But though the ground through which the vassal must necessarily pass should belong to another, and though it should not be subjected to any conventional servitude, the vassal is entitled to free ish and entry, because without it property would be useless. It therefore arises from the rights and obligations essential to property, that every proprietor may claim from, and afford to, his neighbour all necessary ways and passages. But it would be both unjust in itself, and most destructive to the public quiet in its consequences, to extend that right, which is founded in necessity, to all convenient passages, or to roads by the nearest line, or through different parts of the grounds belonging to the conterminous proprietor, *Stair, B. 2. T. 7. § 10.*

10. *Cum herezeldis*. By *herezeld* is meant the best moveable, or rather the best thing which moves itself, horse, or ox, or cow, belonging to the deceased tenant, which, by ancient custom, was due upon his death to the landlord. The word comes from *here* and *zeld*, both Saxon vocables; the one signifying master or lord, and the other relief or subsidy; for which see *Black acts, Ja. I. Parl. 1. C. 10.*; and *Skene, v. Herezeld*. As this was a composition due by

Cum libero exitu et introitu.

Cum herezeldis.

* See *Kames, Select Decis. No. 194, Orrock, Nov. 27. 1762, Dict. p. 15009.*

BOOK II

by the natural possessor of the ground, not to any superior, but to the landlord, the superior could not be understood to reserve that right for himself to the landlord's prejudice, though the right of herezeld had not been specially expressed in the feudal grant; see *Br.* 105, (*Simson, June 23. 1715, Dict. p. 5409.*). Craig derives its origin from the obligation which, in his opinion, lay upon tenants to bequeath to their landlords the most valuable moveable belonging to them, in which he has probably had an eye to *Reg. Maj. L. 2. C. 36. § 2.*; but that passage appears to relate to vassals rather than to tenants, and has the appearance rather of a direction to the dying person what he may lawfully do, than of an injunction of what it behoves him to do. It was not demandable if there was a tack current at the death of the tenant, because the landlord was in that case obliged, by his own deed, to continue the representative of the tenant in the possession, without any composition or acknowledgment, *Balf. p. 200, C. 6. (Logie, October 17. 1470, Dict. p. 5407.)*. Neither was it due where the deceased tenant was under warning, and a decree of removing recovered against him, *Hope, v. Herezeld*; so that there was no place for it, except where the deceased tenant possessed, either by tacit relocation, or by a verbal tack, without having been warned by his landlord to remove; in which case, the herezeld might be demanded, though the tenant's heir was willing to quit the possession. But it was not lawful to the landlord, after having received the herezeld, to remove the heir for a year after, *Cr. Lib. 2. Dieg. 8. § 32.*; *Durie, March 20. 1629, L. Auchinleck, (Dict. p. 5409.)*. Though this right obtained anciently over the whole kingdom, and is still expressed in many charters, it is, by our present practice, understood to be local, and consequently not due where it is not the custom of the barony, *July 1733, Ferguson, (Dict. p. 5411.)*. And, in fact, it is now seldom exercised any where but in some highland countries.

Natural fruits, sown grass, and church area, pass as pertinents to the vassal.

11. Some rights, though not commonly expressed in the *Tenendas*, are carried to the vassal, either as proper *partes soli*, or as appurtenances or pertinents of the land, in virtue of the general words in the dispositive clause of the charter, *cum pertinentiis*. Thus, natural fruits, which grow up *sine cura et cultura*, and which are not yet separated from the ground, are carried by the charter as part of the lands to which they are still united, *ex. gr.* apples, grass on pasture grounds, or natural grass intended for cutting: But corns, and in general all *fructus pendentes*, which require annual industry and culture, remain as moveable subjects with the granter. As for sown grasses, which produce several successive crops before they run out, these ought to pass to the purchaser: For if the crops arising from such grass seeds for a number of years subsequent to the purchase, were to continue with the seller, the purchaser, if he has purchased by a rental or rent-roll, would be excluded from the rent of those very years for which he is presumed to have given an adequate value⁸⁵. The right in the area of the parish-church, though it cannot properly be called part of the lands contained in the charter, is yet so closely connected with them, that it is carried to the purchaser as pertinent, in virtue of the natural right that every landholder has in such a proportion of it as corresponds to the valuation of his lands in the parish, *Fac. Coll. June 29. 1769, Duff, (Dict. p. 9644)*; and consequently, the owner of a right to a seat in

⁸⁵ *Vid. supr. t. 2. § 4.*

in his parish-church cannot dispose of it as his absolute property, though he may of the materials of which the seat is composed. If the area of the church has never been legally divided, a division will be ordained at the suit of any proprietor, by which the area may be parcelled out among the several landholders in the parish by the proportions above mentioned; nor will the former possession by any proprietor, of a greater share of area than his valuation entitled him to, stand in the way of such division*. In churches where part of the area is taken up by the inhabitants of a borough or village, an inhabitant, who had bought a seat for the use of his family, may perhaps be permitted, if he intends to change his residence to another parish, to sell it to any other residenter, at the sight of the kirk-session, or the magistrates of the borough⁸⁵. But as to that part of the area which was by the division appropriated to the several landholders according to their valuations, it appears reasonable, that the right of the seller's share thereof ought to be carried by his disposition to the purchaser, as a right essentially connected with the lands disposed. And indeed if a landholder had it in his power to separate the two, either by expressly reserving the area to himself in his disposition, or by making over the lands and the area to different grantees, a church might soon be made the property of strangers, to the utter exclusion of the inhabitants of the parish; see *Fount. Jan. 15. 1697, Lithgow*, (DICT. p. 9637.) †⁸⁶. Upon the same ground, the right of a burial-place ought also to be carried by a grant of the lands, in virtue of the clause *cum pertinentiis*.

12. Till towards the beginning of this century, landlords, the better to enable their tenants to cultivate and sow their farms, frequently delivered to them at their entry, corns, straw, cattle, or instruments of tillage, which got the name of *steelbow-goods*, under condition, that the like in quantity and quality should be redelivered by the tenants, at the expiration of the lease. This claim competent to the proprietor could not, in the case of a sale of the lands, pass with them to the purchaser, from the nature of the subject; for the landlord's right to the steelbow is moveable; and for that reason is arrestable, *Durie, Dec. 4. 1638, La. Westmoreland*, (DICT. p. 14779.); and falls under the single escheat, *St. B. 2. T. 3. § 81*. But an assignation of that right in favour of the purchaser is implied from equity, if the purchase be made by a rental;

Steelbow-goods do not, unless the purchase is made by a rental.

* See a case where a division of the area was presumed from long possession; *Fac. Coll. Nov. 24. 1785, Cathcart*, DICT. p. 7928.

The valued rent is also the rule in another respect, that of giving the heritors their choice of place in the area; the largest valuation having the first choice, &c. This rule, however, is subject to certain reasonable modifications. Thus, it has been found, that every heritor, in proportion to his valued rent, must have a seat for himself and family distinct from the share allotted to his tenants, though in dividing the whole area, the allowance for each heritor's seat must be taken *in computo*, in making up such a share as corresponds to his valued rent, *Fac. Coll. Dec. 17. 1776, Earl Marchmont*, DICT. p. 7924, and App. 1. *voce KIRK*, No. 2. Thus also the patron, where he is an heritor, however small his landed interest in the parish, has the first choice; *Fac. Coll. Feb. 13. 1765, Lo. Torphichen*, DICT. p. 9936. (*Vid. supr. B. 1. t. 5. § 13.*)

† A late decision has been pronounced on similar principles; *Fac. Coll. June 21. 1796, Skirving, &c.* DICT. p. 7930⁸⁶.

⁸⁵ Seats in a burghal church having been disposed by the magistrates "to the grantee, his heirs and other nearest representatives whatever, residing within the town or parish," they were found not to descend exclusively to the heir-at-law, but (when sufficient to accommodate the whole) to divide between the heir and the other members of the deceased's family; *Watson, 9th July 1760, Fac. Coll.* DICT. p. 5431.

⁸⁶ On the same ground of an essential connexion between the church and lands, the burden of repairing and even rebuilding the parish-church is laid on the heritors; *infr. t. 10. § 63.*—in whom also, and not in the minister and kirk-session, is vested the disposal of the area of the church; *Kilk. Heritors of Faulkland, 20th Feb. 1739*, DICT. p. 7916.

Book II.

rental; because the tenant having been enabled by the steelbow-goods to pay an advanced rent, for which the purchaser is presumed to have given a just price, the purchaser would lose that additional rent which he has paid for, if the right to the steelbow were not deemed part of the purchase. But if the bargain be made in the lump, without reference to a rental, it would seem that the steelbow, which is of its own nature a moveable subject, ought not to be carried by the charter. Steelbow can in no case be exacted from the tenant, by the condition of the right, till the determination of the lease; *Durie, Dec. 6. 1628, Lawson, (Dict. p. 14777.)**

Regalia.

13. No right in lands which is by our feudal customs appropriated to the sovereign, and therefore goes by the name of *regale*, is presumed to be conveyed by the charter unless it be expressed. By *regalia*, in a large sense, are understood all rights that the King has in or over the estates or persons of his subjects. And they are either *majora* or *minora*. The *majora* are so inseparable from the royal dignity, that they are incommunicable to subjects absolutely and without exception, as the several branches of the royal prerogative, and the King's right of superiority over all the lands within his dominions; or at least they are not communicable without the interposition of the states of the kingdom, *ex. gr.* the annexed property of the crown, which is declared not alienable without consent of parliament. The *regalia minora* are those rights which the sovereign can by himself communicate to his subjects at pleasure, *ex. gr.* the right of waifs, or of goods confiscated, and those which accrue to the crown from the vassal's want of an heir, or from bastardy, or forfeiture, or from feudal casualties. But the *regalia* now to be explained are truly parts or pertinents of land, and as such would naturally go to the vassal by his charter, if they had not been by our feudal customs appropriated to the sovereign, and so understood to be excepted from the grant.

Jurisdictions,
forests, woods
and parks.

14. Jurisdiction is, by the generality of writers, numbered among the *regalia* of this last sort; but improperly; for though it be a royal right, it is not included necessarily in the notion of property, and therefore cannot be said to be, by the construction of law, excepted from a grant of property. How far jurisdiction hath been by the law of Scotland, or is now, conferred on vassals, has been considered, *B. 1. T. 4. § 25,—28.* Forests are *inter regalia*; or, in other words, no charter of lands granted by the crown, within which any forest lies, carries the property of it to the vassal, without a special clause in the grant. By a forest is understood a large tract of ground inclosed, where deer have been in use to be kept. Because the hunting of deer in those forests was accounted a right proper to the crown, forests themselves have been brought under the same class; and they remain in that state though the trees in the forests should fail. Lands erected by the crown with the right of forestry, had all the privileges of a King's forest; which were so grievous to the country, from the heavy penalties inflicted by our statutes enacted for securing forests against encroachments, that our supreme court gave their opinion, that application should be made to the crown against such grants for the future, *Stair, June 24. 1680, M. Athol, (Dict. p. 4653.)* Woods or parks which are inclosed by private persons for the running of deer, are *juris privati*, and consequently are carried in charters as part of the lands disposed, though they be not expressed.

Salmon-fishings.

15. Salmon-fishing is also a *jus regale*, and therefore is not carried by a charter, without an express clause. Yet by our uniform practice,

*The landlord has a preference on the steelbow in case of the tenant's bankruptcy, *Fac. Coll. July 27. 1764, Butter, Dict. p. 6208.*

practice, the common clause, *cum piscationibus*, is a sufficient title for constituting a right to salmon-fishing by prescription; so that where the vassal hath been in the uninterrupted possession of it for forty years, such possession, joined to the general clause, establishes a right to that *regale*. As this right, in consequence of its being *inter regalia*, remains with the sovereign after he is divested of the property of the lands on both sides of the river, the crown may make a grant of the salmon-fishing in a river, or any part thereof, in favour of one who has no lands on either side. The whole estate of such grantee consists in the fishing; and this right entitles him to draw his nets on the banks of the adjacent grounds, without the proprietor's consent, as a pertinent of the fishing⁸⁵. The fishing of salmon is prohibited, from the feast of the Assumption of our Lady, August 15. to the feast of St Andrew, November 30., by 1424, C. 35. The special manner of fishing by cruives or zairs, where they are set in that part of a river where the sea ebbs and flows, is absolutely prohibited⁸⁶: And where the proprietor has a right to use cruives in fresh water, he must make their hecks three inches distant from one another, that the young fry may have free access to pass and repass; and must also observe the Saturday's stop, that is, the hecks of all the cruives must be pulled up the height of an ell on every Saturday at six in the evening, and continue so till Monday at sun rising, 1424, C. 11.; 1477, C. 73.; 1489, C. 15*. The last of these acts directs, that the hecks shall be

* A special commission was appointed to the execution of the laws for preservation of fishings, 1581, c. 111.; but this statute is now in desuetude, *Fac. Coll. Nov.* 20. 1793, *Bor. of Stirling*, *DICT.* p. 14299.

⁸⁵ A reservation, by the proprietor of a salmon-fishing, in the charters granted to his vassals, of drawing and drying his nets on the vassal's grounds, conform to use and wont, is regulated by the prior acts of the superior and his predecessors, and not by the practice of fishers in general; *E. of Kinnoul*, 18th Jan. 1814, *Fac. Coll.*

⁸⁶ Under this description of cruives and zairs, with their attendant prohibition in rivers where the sea ebbs and flows, would seem to fall almost every device for fishing by means of fixed or stationary nets. Thus it has been found illegal to fish by means of stent nets; *Fac. Coll. D. of Queensberry*, &c. 19th Nov. 1771, *DICT.* p. 14279; *Ibid. Colquhoun*, 21st Dec. 1799, *DICT.* p. 12827 and 14281, and 4th July 1804, *DICT.* p. 14283; *Ibid. Dirom*, &c. 25th Nov. 1797, *DICT.* p. 14282:—Or by hang-nets; *Dirom*, &c. *supr.*:—Or by a bulwark, or loose dike erected across the channel, with a creel or pock net to intercept the fish; *Fac. Coll. E. of Fife*, 18th June 1807, *DICT. v. Salmon-fishing*, *App. No. 2.*:—Or by stake nets; *Ibid. E. of Kinnoul*, &c. 26th Jan. 1802, affirmed on appeal 9th May 1804, *DICT.* p. 14301; *Ibid. D. of Athol*, &c. 7th March 1812, *Buchanan's Reports*, p. 254, affirmed on appeal 20th June 1816, 5. *Dow*, p. 282; *Fac. Coll.* same case, 4th Feb. 1817; *Magistrates of Dumbarton*, 16th Jan. 1813, *Fac. Coll.* affirmed on appeal 19th June 1816. See, however, one exception, perhaps peculiar to the river Tweed, in the case of *Scott*, &c. 11th Dec. 1812, *Fac. Coll.*

As to the interpretation to be put upon the expression, "where the sea ebbs and flows," see a very ample discussion, *D. of Athol*, &c. *supr.* It would seem to extend to every situation not in the open sea. One Judge was even of opinion, "that the prohibition against stake-net fishings was directed not only against those in rivers, but wherever the tide ebbs and flows;" *Ibid.* But in the special case before the Court, it had previously been found by the House of Lords, "that attending to the nature of the judgment in this cause, no judgment ought to be given with respect to any rights of fishings in the sea." No express decision, therefore, has yet been pronounced on the point, though it is not likely that the prohibition will ever be carried farther than was done in the above case, in regard to the Frith of Tay, viz. "down to the *fauces terræ* at the mouth of the Frith, and upon the sands which are dry at low water, as well as in the mid channel of the river;" *Ibid.*

Fishing "at dam-dykes" is likewise declared illegal, 1696, c. 33.; but in a late case upon this statute, the Court were of opinion, "that it would be too extensive an interpretation to include under it a prohibition of all fishings near dam-dykes," and "that the statute was only directed against those cases where the dam-dykes were immediately *subservient* to, or made use of in the fishings;" *Copland's Trustees*, &c. 13th June 1810, *Fac. Coll.*

Where an illegal mode of fishing is used, every heritor having a right of salmon-fishing, whether superior or inferior, is entitled to pursue for its removal; *Colquhoun*, 4th July 1804; *D. of Athol*, &c. 7th March 1812, *supr.*

he five inches wide; but it was adjudged, that the number *five* was wrong transcribed from the record into our statute-book, and ought to be corrected into three, according to the reading of the two former acts, *Stair, Jan. 26. 1665, Her. of the fishing of Don*, (Dict. p. 10840, and p. 14286.)*. *Stair* affirms, *B. 2. T. 3. § 60.*, that the killing of swans is so much a regal right, that it is not carried by the vassal's charter, though the lands should be erected into a barony; but nothing appears, either in our statutes, law-books, or practice, in support of the opinion, that swans were ever accounted *inter regalia*.

Gold and silver mines.

16. Gold-mines are, by 1424, *C. 12.*, declared to belong to the King without limitation; and silver-mines, when they are of such fineness that three halfpennies of silver can be extracted from the pound of lead. Three halfpennies were, in the reign of James I., equal in intrinsic value to about two shillings and five pennies of our present Scots money, according to *Ruddiman, Pref. to Dipl. Scot. p. 82.* It appears by an unprinted act in 1592, mentioned in the list of the unprinted acts of that year, N^o 12., that not only mines of gold and silver, but of tin, copper, and lead, had been formerly annexed to the crown, and so not alienable without consent of parliament; but they are by that statute dissolved from the crown; and it is made lawful to the King to set in feu-farm, not to any of his subjects indiscriminately, but to the baron or other freeholder of the ground, all metals or minerals that may be found within his own lands, on payment of the tenth part to the king, without any deduction of charges; and in case the freeholder should refuse to work them, the King may then, and then only, either cause work them for his own use, or feu them to others. The meaning of this statute is, in two material articles, now fixed by decisions; *first*, That by the words, *it shall be lawful to his Majesty*, a positive right is conferred on the freeholder, by which he may demand a grant from the crown, in pursuance of the statute, *Falc. 2. 120. (E. of Hopetoun, Jan. 4. 1750, Dict. p. 13527.)*; *2dly*, That by the word *freeholder* is understood, in this question, not the superior of the lands in which the mines lie, who holds immediately of the crown, but the proprietor, though he should hold of a subject, *Dec. 7. 1739, D. Argyle, (Dict. p. 13526.)*.

Res publicæ; rivers, ports, ferries, highways, fortalices, seagreens, and shores.

17. All the subjects which were by the Roman law accounted *res publicæ*, are, since the introduction of feus, held to be *inter regalia*, or *in patrimonio principis*, as rivers, free ports, and highways, leading from one city, borough, public port or ferry, to another, which for that reason are called *the King's highways*. From hence, the narrowing of a highway, or altering the course of a river, is said by our most ancient law to infer the crime of purpresture, *Reg. Maj. L. 2. C. 74. § 1 †*. Hence also, an obligation lies on those who unload ships in rivers, to pay somewhat in name of *vectigal* or custom to the sovereign. In the same manner, the right of a public ferry,

or

* An older law had appointed a different mode of estimating the distance to be left in these cruives: "Quod filum aquæ seu medium aquæ, *lie streame*, debet esse liberum usquequaque in tantum, adeo quod unus porcus trium annorum, bene pastus, posset se vertere infra filum aquæ: Ita quod neque rostrum porci, nec cauda, appropinquat sepi vel ripæ." Stat. Alex. II. c. 16. See Stat. Rob. I. c. 11.

† *Stair, B. 2. Tit. 1. § 7.* says, "The commony that is of grass and fruits growing upon the highways, followeth the commony of the ways themselves."

The public streets of a burgh are also *inter regalia*, and cannot be appropriated either by the magistrates, *Kilk. 2. voce BURGH ROYAL, Miller, Nov. 3. 1740, Dict. p. 13527.*; *Fac. Coll. Feb. 27. 1762, Magistrates of Montrose, Dict. p. 13175* ⁸⁷; or by private individuals, *ibid. March 3. 1783, Forbes, &c. Dict. p. 13185.*

⁸⁷ So found, also, *Young, 2d Feb. 1816, Fac. Coll.*

or of a free port, which was formerly *juris publici*, now belongs to the King, and cannot be transferred from him without a special grant. This grant lays the grantee under an obligation to keep sufficient boats on the ferry for the use of travellers, or to maintain the port in a condition fit for receiving shipping; in consideration of which, the grantee of a free port has either an express or an implied power to levy anchorage, shore-dues, and other such reasonable impositions, on ships which receive benefit from the port or harbour, *Cr. Lib. 1. Dieg. 15. § 15*⁸⁸. But as the *regalia* of this sort are little capable of property, and chiefly adapted to public use, the King's right in them is truly no more than a trust for the behoof of his people; for he cannot hurt the navigation of rivers, or shut up highways, or demolish bridges, unless that measure shall become necessary for the public security, in times of general distress*. It is public rivers only which are *inter regalia*; by which writers generally understand navigable rivers, or those on which floats may be carried to navigable rivers. Smaller rivulets or brooks are, according to the general opinion, *juris privati*, *L. 1. § 4. De flumin.*; and consequently, the landholder within whose grounds they run may divert their course, unless he be restrained by a servitude, or other positive right in favour of the inferior tenement, *L. 21. De aqua et aq*⁸⁹. On the same ground our ancestors formerly accounted fortalices among the *regalia*; not the King's castles only, which were always erected on the King's property-lands, and the right to them conferred by his special commissions on those in whom he could most confide; but places of lesser strength, which had been, during our wars with England, or intestine commotions, built by private gentlemen upon their own estates, chiefly near the border, as a defence against the incursions of smaller parties. Because the defence of the kingdom was a right proper to the sovereign, these fortalices were in ancient times understood not to be conferred on the vassal by a simple charter; but they now pass as part of the lands, without either the privilege of barony, or a special clause in the grant. Doubts have been moved, whether sea-greens ought to be reckoned *inter regalia*, *i. e.* grounds in some measure gained from the sea, but which still continue to be overflowed in spring-tides? Some maintain the affirmative, in regard that these grounds are deemed part of the sea-shore, which by the Roman law was *juris publici*; but though by that law the sea-shore reached as far from the sea as the highest spring-tide, it goes no farther, by the custom of Scotland, than the sand over which the sea flows in common tides; and by our constant practice, proprietors who border on the sea, inclose as their own property grounds

VOL. I.

4 x

far

* Found, that the King cannot, by a grant of fishings, hurt the navigation in a public river; *Fac. Coll. March 9. 1781, Grant, Dict. p. 12820. See Fac. Coll. Dec. 21. 1793, and July 4. 1804, Colquhoun, Dict. p. 12827, and p. 14283*⁸⁹. As to the right of the crown to vest an exclusive right to a mussel-scalp, see *Kames, Sel. Decis. No. 218. Grant, July 6. 1764, Dict. p. 12801.*

⁸⁸ The managers or proprietors of a ferry are entitled to complain of any person who establishes another ferry, without an express grant to that effect, either within, or so near the old one, as in any respect to injure it; *Campbell, 18th Jan. 1815, Fac. Coll.; Ferguson, &c. 18th Jan. 1815, Ibid.* Where there is a regular ferry-boat, a person who resides on one side of the river, and has a coal-work on the other side, is not entitled to use his private boat for hire, nor to carry over in it, even gratuitously, any other person than "himself, his family, servants, visitors, and persons employed "in his own works;" *Martin, 16th June 1818, Fac. Coll.*

⁸⁹ See also *Murray, 6th July 1821, (S. and B.)*

⁹⁰ See the law more correctly stated on this point, *infr. T. 9. § 19.*

Book II.

Privileges of a barony, and what carried by a general conveyance of a barony.

far within the sea-mark, *Br. 10. (Bruce, Nov. 25. 1714, Dict. p. 9342.)* * ⁹¹.

18. The vassal is, or was by our former law, entitled to sundry superadded rights by the erection of his lands into a barony, *vid. supr. B. 1. T. 4. § 25. ; T. 3. § 46.* Barony is, in the language of our law, *nomen universitatis*, that includes under it all the different subjects or rights of which it consists, though they be not expressed, and incorporates them so strongly together as to make them *unum quid*, one individual right. From this quality the rule arises, that possession of any part of a barony is reputed possession of the whole, and preserves to the baron his possession as entire as if it had been total. On the same principle, the general conveyance of a barony is sufficient to carry all the different tenancies and tenements which truly belong to it, or have been possessed as part and pertinent of it, though they be not specially enumerated; and the same rule holds with respect to lands which, without erection into a barony, have been joined by a simple charter of union under a special name, *Durie, March 23. 1622, Lo. Borthwick* ⁹²; but the several tenements erected or united, ought regularly to be distinguished in the original charter of barony or of union by special names or characters. It arises also from this known quality of barony, that where the baron has by his charter a particular right to any of the *regalia, ex. gr.* to a borough of barony, a special retour or grant of the barony, without the enumeration of these *regalia*, is effectual to transmit them to his heir or singular successor, *Stair, Jan. 15. 1668, E. Argyle, (Dict. p. 9631.)* Lord Stair, *B. 2. T. 3. § 60.*, and after him Mackenzie, § 3. *h. t.* carry this point higher, and maintain, that the erection of lands into a barony, *eo ipso* entitles the baron to most of the *regalia*; from which rule Stair seems only to except minerals, and treasures hid under ground: But this position appears not to have been at any period the law of Scotland. A charter of barony never carried to the baron the rights inherent in a free port, of exacting shore-dues, and other such petty customs, nor those which are included under a free forestry. Lord Stair himself admits, that no immediate right is acquired to salmon-fishing by the privilege of barony; and that it affords to the baron barely a title of prescription. Mills were never *inter regalia*, nor has the sovereign claimed them as such; it is only from their being accounted a separate tenement, that it has been doubted, whether they are carried, without the erection of the ground on which they stand into a barony; and fortalices were, long before Lord Stair's time, ranked in the same class with common country-seats, which passed to all purchasers indiscriminately.

19. The doctrine which seems to be taught by Craig, *Lib. 2. Dieg. 8. § 37.*, That no right of patronage can be conveyed by itself, without conveying part at least of the barony or lands to which it had been originally united, is neither supported by the rules of law, nor by practice: For the special symbol of seisin established for

* See *Fac. Coll. June 20. 1760, Earl of Morton, Dict. p. 13528. ; Ibid. June 15. 1769, Town of Culross, Dict. p. 12810. Balf. p. 626.*

⁹¹ A proprietor, whose lands are described as bounded by the sea, or sea-shore, or by a navigable river, is entitled to gain ground from them, as far as is not inconsistent with the rights of the public; *Campbell, 18th Nov. 1813, Fac. Coll. ; Boucher, 30th Nov. 1814, Ibid.* See also the first of these cases, as to the mode in which the line of the march-fences of conterminous proprietors on the shore is to be adjusted in thus gaining ground from the sea.

⁹² This case seems to be omitted in *Mor. Dict.*

Right of patronage transmissible without the lands.

for a right of patronage, is sufficient evidence, that the law considers that kind of right as transmissible by itself, without the necessity of conveying along with it any lands or other separate tenements; and there is nothing more frequent in practice, than for a baron or landholder, to whose lands a patronage happens to be united, to make over a grant of the patronage to another, without the least intention of conveying at the same time any part of his lands; and in such case the grantee is, after seisin taken on his grant, vested in the full and unquestionable right of the patronage⁹³.

20. The vassal has a right, in consequence of his property, to receive the rents of his own lands from his tenants, and to recover the arrears of rent from them, in default of payment, by an action for rent before his own court; or, if they have changed their domicile, by an action before the sheriff within whose territory they now reside. He can also remove from his grounds tenants who have no leases, and grant leases to whom he will. A tack, or lease, is a contract of location, by which the use of land, or any other immoveable subject, is set to the lessee or tacksman, in consideration of a determinate yearly rent or duty, to be paid or performed to the lessor or landlord, either in money, the fruits of the ground, or services. It is necessary to explain the doctrine of leases in this place, though they are truly contracts, because they have by statute received special qualities which distinguish them from the common contract of location. They are in our law-books frequently called *assedations*; an appellation also given in some old statutes to grants holden in feu-farm, 1457, C. 71, &c. They were at first granted in the form of charters by the proprietor, without any written obligation signed by the tenant, *St. B. 2, T. 9, § 5*.: But because no deed could bind the tenant to his part of the bargain, which was not subscribed by himself, they were afterwards drawn in the form of mutual contracts.

Tack or lease
of lands.

21. The granter of a lease must be either the proprietor of the subject let, or the administrator of it⁹⁴. Leases granted by life-renters, wadsetters, or adjudgers, who have only a temporary or a redeemable right to the lands, determine the moment the granter's right expires, or is extinguished by payment; *resoluto enim jure dantis, resolvitur jus accipientis**. As administrators given either by the law, as tutors,—or by the judge, as factors on sequestrated estates,—are never appointed but from necessity, their powers are limited to necessary acts of administration; and consequently they cannot, by the aforesaid rule, grant leases to endure for a longer term than

By whom it may
be granted.

* *Fac. Coll. Feb. 29. 1780, Gordon, Dict. p. 7008. See as to leases granted by a husband of his wife's property, Ibid. June 15. 1797, Grieve, &c. Dict. p. 5951*⁹⁵.

⁹³ *Vid. supr. B. 1. t. 5. § 15. in fin.*

⁹⁴ A proprietor is not barred from granting leases, by the execution of inhibition against him; *Gordon, 29th Feb. 1780, Fac. Coll. Dict. p. 7008*. Neither is a real creditor entitled to interfere with a lease, though subsequent to the completion of his security by infestment, if entered into *bona fide*, and without the collusive design of defeating his right; *L. Elibank, &c. 11th July 1821, (S. and B)*. The principle of these decisions is the same with that laid down in the text, *supr. t. 5. § 79*, on the subject of denunciation, viz. that the liferent escheat is charged "with such leases granted even after denunciation, as have been entered into without diminution of the rental; because the granting of leases is a necessary act of administration, profitable both to the superior and vassal."

As to the powers of heirs of entail, in the granting of leases, *vid. infr. B. 3. t. 8. 29.*

⁹⁵ It was, in this case, observed on the bench, that "a husband may, without his wife's consent, grant a lease of her property, to last during his administration of it."

than their own right of administration. But this rule is not applicable to commissioners specially authorised by the proprietor himself to grant leases. The powers given to such commissioners must be understood to authorise all leases that do not exceed the ordinary term of endurance; and which therefore, when granted, must subsist for the whole years contained in the lease, though the proprietor should recall his commission during the currency of it. A written minute of tack, or an obligation by the proprietor to grant one, hath equal force with the formal tack; for upon that minute or obligation an action lies against the granter, and his heirs for fulfilling it *⁹⁶. Hence arises the rule, *Pactum de assedatione facienda et ipsa assedatio æquiparantur*; and this rule obtains in most rights which essentially require nothing to their constitution, but bare consent, or consent accompanied with possession. Thus, an obligation to grant a conveyance, an acquittance, or a servitude, is as effectual as the right itself when executed, *St. B. 2. T. 7. § 1.*

It conveys only the yearly fruits.

22. In a lease of lands, the use which the lessee acquires in the subject let, is not understood to comprise every right which was before competent to the landlord, but is limited to those yearly fruits which either naturally, or by the lessee's industry, spring up from the surface. He is not therefore entitled to any of the woods or growing timber above ground, nor to the minerals, coal, limestone, &c. underneath the surface, the use of which consumes the subject, except in so far as the proprietor has given him right by a special clause in the tack; *Gilm. 103. (Laird of Touch, June 16. 1664, Dict. p. 15252.)*; *Stair, Feb. 15. 1668, Colquhoun, (Dict. p. 15253) †.*

Leases, formerly personal rights, are now secured by statute 1449.

23. Leases are, like other contracts, personal rights in their own nature, and therefore effectual against the granter and his heirs only, but not against purchasers from the granter, or his other singular successors: For those who succeed to lands by a singular title, have, in consequence of their property, a right of removing all possessors whomsoever; from grounds which are their own, notwithstanding

* *Kilk. voce TACK, No. 9. Garioch, Feb. 8. 1750, Dict. p. 15177.* The same thing has been repeatedly found in the case of missives and minutes of tack, clothed with possession, although not formally executed according to the rules of the act, 1681, *Fac. Coll. July 10. 1788, Grant, Dict. p. 15180*; and many others.

† The landlord is entitled to work the coal, but must indemnify the tenant of the damage; *Fac. Coll. June 21. 1768, Smith, Dict. p. 15266.* The tenant has no right to work shell-marl found in the farm; *Ibid. Feb. 10. 1778, Bethune, Dict. p. 15267*; nor to cut sea-ware for the manufacture of kelp; *Ibid. June 2. 1795, Campbell, Dict. p. 9646.* It has also been found, that a tenant is not entitled to set up an ale house on his farm; *Ibid. Feb. 23. 1787, Miln, Dict. p. 15254.*

⁹⁶ So found where possession had followed, though the missive was subscribed by only one of the parties; *Fac. Coll. Countess of Moray, 23d July 1772, as reversed on appeal 24th March 1773, Dict. p. 4392*; *Ibid. Macarthur, 6th July 1804, Dict. p. 15181*; *Ibid. Macpherson, 12th May 1815*; in the first of which cases the tenant alone had subscribed; in the other two, the landlord alone.

Rei interventus, if to a sufficient extent, has, in this respect, the same effect with possession. Thus, improvements made on the subject, in contemplation of a lease, and under the eye and observation of the proprietor, will give effect to an irregular missive, though no possession has followed upon it, the term of entry not arriving till after the date of the improvements; *Murdoch, 18th June 1812, Fac. Coll.* So also, *rei interventus*, by the payment of a grassum, has been sustained as giving effect to a missive, though no term of endurance was therein specified, this resting entirely on a verbal stipulation; *Macrorie, 18th Dec. 1810, Fac. Coll. Nay, rei interventus*, by the payment of a grassum, and a considerable expenditure in improvements, has been found to give effect to a verbal lease for nineteen years, without any writing whatever; *Ibid.* On the other hand, where no sufficient *rei interventus* had taken place, a missive, silent as to the term of endurance, was, like an ordinary verbal lease, found good only for a year; *Clark, 27th Jan. 1816, Fac. Coll.*

standing any lease they may have got from the former proprietor; agreeably not only to the Roman law, which conferred no *jus in re* upon the lessee, *L. 9. C. De loc. cond.*; but to our feudal rules, which suffered no right of lands to have effect against singular successors without seisin. While leases were considered as bare personal rights, tenants who had on the faith of their leases employed their stock in furnishing or improving their farms, might be turned out of their possessions upon a sale of the lands to a new proprietor; and it was to secure them in their farms, that in ancient times seisin proceeded on their leases, the lessee thereby imagining to give them the effect of real rights against the grantor's singular successors: But to complete their security beyond the possibility of challenge, it was at last enacted, by 1449, *C. 18.*, That all tenants having leases for a term of years, should hold their farms till the expiration of that term, for payment of the rent contained in their leases, into whose hands soever the lands should fall.

24. To give a lease the benefit of this statute, it must, *first*, be reduced into writing; for all rights and obligations relating to land must be perfected by writing, *infr. B. 3. T. 2. § 2^o*. It must, *2dly*, like all other deeds, mention the contractors' names, with their designations or additions, and describe the subject let, so as it may be distinguished from all others. *3dly*, It must express the special duty payable by the tenant, either in money or grain, or services to be performed to the landlord, as cutting down his corns, mowing his grass, carriages, &c.; which tack-duty, though it should be below the true value, affords to the tenant an absolute security against removing. Though the term of the tenant's entry be not specified, the tack is good against singular successors, and the entry understood to commence at the term next ensuing its date; in the same manner, that one who obliges himself to pay a sum, without mentioning any term of payment, must pay it the next lawful day, *infr. B. 3. T. 1. § 6*. A lease in which the term of endurance, or ish, is not expressed, is considered as granted for a year; and if the intention of parties that it should continue for more than one year, appear by any clause in the tack, *ex. gr.* if the tenant be obliged to bring to his landlord's house yearly a certain quantity of coals, the tack is sustained for two years only as the *minimum*, *Nov. 22. 1737, Redpath*, (*Dict. p. 15196.*); during which two years it is good against singular successors²⁸. A tack granted to perpetuity, is ineffectual against singular successors, who cannot possibly know tacks to be perpetual, either from the nature of the tenant's possession, or from the records; see *Durie, July 26. 1631, Crichton*, (*Dict. p. 11182.*)*. And this reason strikes also against tacks with an indefinite ish, *ex. gr.* tacks to endure till the tenant receive payment of a debt due to him by the proprietor; *Gilm. June 1666, Dobie*, (*Dict. p. 1283.*)†. But backtacks in wadsets, which ex-

Requisites of a
real tack by stat.
1449.

VOL. I.

4 Y

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* A tack granted for two terms of nineteen years, with an obligation on the granter and his heirs and successors to renew it from nineteen years to nineteen years, in all time coming, on payment of a grassum at each renewal, was found binding against a singular successor in the lands; *Fac. Coll. Nov. 17. 1763, Wight*, *Dict. p. 10461*. But, it is believed, the Court went chiefly upon the exception in the clause of warrandice contained in the granter's disposition to the purchaser.

† *Dirleton, voce Tack*, considers such tacks effectual. *Stair, B. 2. Tit. 9. § 11.* leans to the opposite opinion; and it was confirmed by decision, *Kilk. No. 6. voce Tack*,

²⁸ *Vid. not* ²⁶, as to the effect of *rei interventus*.

²⁹ See the cases of *Macrorie and Clark, supr. not.* ²⁵.

Book II.

To secure it against singular successors, it must be clothed with possession.

press no other term of duration than the not-redemption, are valid against singular successors, *infra*. T. 8. § 28.

25. A tack must be also accompanied with possession, in order to secure the tenant against the singular successors of the granter: For though leases, in the form in which they have been executed for several centuries past, admit not of symbolical possession by seisin; yet natural possession is required for giving them this effect of a real right: And hence a posterior lease followed by possession is preferable to a prior upon which there has been no possession. Though therefore the granter was proprietor at the date of the tack, yet if he shall be divested of his right before the term of the tenant's entry, the tack cannot affect singular successors; because a tenant can have no possession upon his tack till the term of his entry, *Dirl.* 346, (*Johnston, Feb. 24. 1676, Dict.* p. 15231.)*. Possession is as necessary for securing the transmission of a tack or subtack to an assignee or subtacksman, as for securing the tack itself to the original tacksman; or, at least, there must be some publication by which the conveyance may be made known, that so third parties may not be ensnared by latent or private conveyances; and because the adjudication of a lease is a public and judicial act of the supreme court, transferring the right of tack to the adjudger, *St. B.* 3. *Tit.* 2. § 16, a creditor adjudging that right from the tacksman, before the tacksman's voluntary assignee has obtained possession upon his conveyance, is preferable to the assignee; *Nov.* 16. 1750, *Campbell, (Dict.* p. 2805.)¹⁰².

26. This

TACK, *Auchenbreck, Feb. 11. 1748, Dict.* p. 15248¹⁰⁰. On the same ground the Court rejected a lease granted to endure so long as the tenant could pay the rent; *Durie, March 2. 1626, Hamilton, Dict.* p. 15188. But if the endurance be specified, there seems no authority for setting any limit to the power of granting leases so as to be effectual even against singular successors. Thus, the Court sustained a tack for 1140 years; *Fac. Coll. Dec. 6. 1758, King's Advocate, Dict.* p. 15196; and another for 1260 years; *Ibid. June 27. 1760, Irvine, Dict.* p. 5276 and 15199.

* This rule is applied to prorogations of leases, *Fac. Coll. January 4. 1757, Creditors of Lord Cranstoun, Dict.* p. 15218; *Ibid. July 2. 1757, Creditors of Douglas, Dict.* p. 15219; *Ibid. Nov. 30. 1769, Scot, Dict.* p. 15220, contrary to an older decision, *Edgar, Jan. 7. 1725, Richard, Dict.* p. 15217¹⁰¹. But it has not been held to annul a lease, that, subsequently to its date, but before the term of entry, a sequestration of the letter's estate had been awarded in a process of ranking and sale, *Ibid. Nov. 30. 1785, Campbell, Dict.* p. 15223.

¹⁰⁰ See to same effect, *St. and Gosf. 15th June 1664, Thomson, Dict.* p. 15239; *Ibid. 27th June 1674, Peacock, Dict.* p. 15244.

¹⁰¹ Mr Bell cites the cases of *Lord Cranstoun* and *Douglas*, as having settled the point against the tenant "on just principles;" 1. *Comm.* p. 51.

¹⁰² To the same effect it is laid down by *Stair*, that "possession is requisite, not only to the conveyance of the property of moveable goods, but also of liferent rights, tacks, and rentals, servitudes, pledges, &c.; which tacks, though they be truly personal rights of location, and constitute only as real rights by statute, yet intimation will not transmit them; but there is a necessity of possession;" *B. 3. t. 2. § 6.* So also *Kilkerran*:—"The transmission of the property of moveables is completed by delivery;—of lands, by infestment;—of nomina, by intimation;—of tacks, and other rights which require no infestment, by possession:—And, therefore, between two tacks, or between two assignments to a tack, or between two subtacks, it is the first possession that determines the preference;" *No. 6. v. COMPETITION, 16th Nov. 1750, Dict.* p. 2805. Where, from circumstances, natural possession of the subject is impossible, as, for example, in the case of a lease assigned during the currency of a sublease, civil possession, by levying the rents from the subtenant, will be sufficient; *Syme's Trustee, 23d May 1806, Fac. Coll. Dict. v. TACK, App. No. 13.*: Or in the case supposed, the assignee being, in fact, merely an assignee to the mails and duties, his right may be completed by intimation to the subtenant; *infra. B. 3. t. 5. § 5.*; *Kilk. ut supr.*; 1. *Bell's Comm.* p. 51.; 2. *Ibid.* p. 11. See also what fell from the Bench, in *Hardie, Douglas, &c. 6th June 1794, Fac. Coll. Dict.* p. 2802; the decision itself having turned on

26. This statute 1449 gives no security to the tenant against the superior, when the fee opens to him by nonentry¹⁰³, though the words, *into whose hand soever the lands shall come*, extend in proper speech to superiors as well as purchasers. For since the feu ought, by the nature of feudal rights, to return as entire to the superior upon the falling of any feudal casualty, as when he first made the grant, superiors are not bound to regard any deed granted by the vassal without their consent, before the casualty was incurred. Yet the tenant cannot be turned out of the possession summarily, but may continue in it till the Whitsunday immediately following the decree declaring the casualty, upon payment made to the superior of the stipulated tack-duty, 1491, C. 26. And though he may after that term be compelled to remove, his right is not lost; it only lies dormant during the nonentry: So soon therefore as the heir enters, the tenant may resume the possession, and continue in it for as many years as the lease had to run when he was first excluded by the superior. Our law was the same in the casualty of ward, while the tenure by ward subsisted.

27. No mention is made in the act 1449, but of leases of land; and its narrative bears, that the law was enacted in favour of poor labourers of the ground. A lease therefore of the profits of a whole estate already under tenantry, is not effectual against singular successors; for such tacksman neither labours the ground, nor is indeed tenant of any land, but barely farmer of the rents and profits payable by the several tenants on the estate; a distinction which has been formerly stated, *Tit. 3. § 15 **. But custom has from analogy extended the enactment of the law to tacks of mills, and of casual rent, *ex. gr.* salmon-fishings, collieries, &c. and of such other subjects as are *fundo annexa*. Tacks of houses within borough are ineffectual against singular successors; not chiefly because the statute has left them out of the enactment, but because such tenements are generally let only from year to year, *Fount. Feb. 5. 1680, Rae*, (Dict. p. 10211. and 15216.); cited in (Folio) Dict. ii. p. 417†. Mackenzie, in his observations on this statute, affirms, that it extends not to rentals, because in these the tack-duty is generally low. This reason, if good, strikes with greater force against leases where the tack-duty is plainly elusory; which surely fell not under the intendment of the legislature, though they are not specially excepted.

28. Since this statute secures the tacksman in the possession of his farm, it must consequently entitle him to all actions against possessors necessary for removing them, or for recovering the fruits they have intermeddled with. And if the tenant has been in the
peaceable

* See judgment of the Court in a case analogous to this, *Fac. Coll. Nov. 16. 1774, Gordon*, Dict. p. 15221.

† The contrary has been unanimously decided by the Court, *Fac. Coll. Dec. 10. 1794, Waddel*, Dict. p. 10309¹⁰⁴.

on a specialty. In a late case, the assignee's right was, by the First Division of the Court, held completed by intimation to the landlord; *Yeoman, 2d Feb. 1813, Fac. Coll.*; but this decision has always been considered as questionable; *Bell, ut supr.*; and a contrary judgment has since been pronounced by the other Division; *Brock v. Glasgow Bank, 15th Nov. 1821*. This judgment, however, is not yet final, and the question remains still in dependence. It is probable, that the ultimate decision, whatever it may be, will finally set the point at rest.

¹⁰³ *Vid. supr. t. 5. § 42.*

¹⁰⁴ So also, again, *Macartur, 6th July 1804, Fac. Coll. Dict. p. 15181; 2. Bell's Comm. p. 11.*

TITLE VI.

But it will not defend against the casualty of nonentry.

Act 1449 properly secures only tacks of land.

Possession under a tack for seven years entitles to a possessory judgment.

Clause of retention, if good against singular successors.

peaceable possession of the lands for seven years under the title of a lease, that title, though it should, from some nullity or defect, be subject to reduction, entitles him to a possessory judgment; by which he may continue his possession till his tack be formally set aside; *Stair, Dec. 1. 1676, Hume, (Dict. p. 10641.)*; *vid. infr. B. 4. Tit. 1. § 50.*

29. Purchasers, though they cannot call in question the leases granted by their authors, are entitled, in consequence of their property, to the whole tack-duties contained in them¹⁰⁵. Though therefore the tack-duty be made payable not to the landlord himself, but to one of his creditors, or even though the tacksman be allowed by the lease, retention of the tack-duty, or any part of it, in payment of a debt due by the landlord to himself, such clauses are unavailable against the landlord's singular successors, *Falc. i. 240. (Mactavish, Feb. 11. 1748, Dict. p. 1736. and 15248.)**. This doctrine is indeed contrary to a decision, *Stair, June 15. 1664, Thomson, (Dict. p. 15239)*†; by which a tenant was allowed, in virtue of a special clause in the tack, to retain, in a question with a purchaser from the landlord, such part of his tack-duty as corresponded to the yearly interest of a debt due to him by the landlord: But it appears to be grounded, both on the statute, and the known rules of our feudal system: For the retention was, in the case of the decision, claimed by the tenant, not *qua* tenant, but in the character of a creditor to the landlord; with which last character it is obvious that the statute hath no concern, since the only view of it was, to secure tenants in the possession of their farms, but not the landlord's creditors in the payment of their debts¹⁰⁶. Besides, if such retention were admitted to the prejudice of a purchaser from the landlord, leases would be raised up to rights of wadset, or other real right upon land, which requires seisin to their completion; and the security intended for singular successors by the records would dwindle to a mere name, as tacks need not be registered. Though therefore writers rank leases among real rights, because they secure the tacksman against singular successors, no real effect ought to be ascribed to them, which the statute has neither given, nor intended to give them; see *St. B. 2. Tit. 9. § 11. & 28.* This, however, must be admitted, that those clauses of retention, though they be personal, will defend the tacksman against the setter's singular successors, if he should be sued by them for the payment of any rent that had fallen due before they had properly inter-
pelled

* If the clause of retention be connected with the lease itself, and intended as in security of the counter obligations come under by the landlord, it will be effectual against singular successors, *Fac. Coll. Feb. 5. 1772, Arbuthnot, Dict. p. 10424*; *Ibid. Feb. 16. 1780, Walpole, Dict. p. 15249.*; *Ibid. Feb. 3. 1787, Morison, Dict. p. 10425.*

† See also *Stair, June 27. 1674, Peacock, Dict. p. 15244.*

¹⁰⁵ On the other hand, a purchaser is, generally speaking, liable in no obligation to the tenant, but what appears on the face of the lease, or is implied from the ordinary operation of the law. "But how is the effect of the lease to be determined, in relation to particular claims and rights of the tenant, arising not under the written lease, nor from the general law, but from local custom? If, for example, it should be the custom of a particular district, that the tenant may remove the houses on the farm, or all that can be removed, and claim the value of what he leaves, will that affect a stranger purchaser? In a case of this sort, the Court, distinguishing well between a local usage and a verbal bargain or understanding as to a particular farm, held the stranger bound by the former;" 1. *Bell's Comm. p. 55*; 14th June 1814, *J. and A. Bell, Fac. Coll.*

¹⁰⁶ In support of the doctrine in the text, *Vid. 1. Bell's Comm. p. 58.*

pelled him. And, upon this footing, a right of retention was sustained to a tacksman, in a question with the factor appointed for the landlord's creditors, as to all the tack-duties fallen due prior to the decree that had been obtained by the factor against him before an inferior court, *Falc. i. 240. (Mactavish, sup. cit.)*

30. A lease, if it has the essential characters of a contract, and carries nothing in it inconsistent with the nature of location, is effectual against the granter and his heirs; who may be sued, either to fulfil the bargain, or make good the damage, though it should be destitute of the solemnities necessary to bring it within the statute; *ex. gr.* a lease with a clause of retention, or upon which there has been no possession. Verbal tacks must however be excepted from this rule, *Durie, July 16. 1636, Keith, (Dict. p. 8400.)*; for though these constitute a species of location, which may in the common case be perfected verbally, *infr. B. 3. T. 3. § 1.*; yet they have no effect even against the parties themselves for more than one year; because, by another rule of our law, no obligation or contract relative to land is considered as finished till it be reduced into writing, *B. 3. T. 2. § 2. ** Yet if an alternative be stipulated in a verbal lease for a term of years, that the parties shall either stand to the bargain, or subject themselves to a penalty, action is sustained for the penal sum, *Durie, July 15. 1637, Skene, (Dict. p. 8401.)*; because an obligation to pay a sum, upon failing to perform a possible fact, hath no relation to or connection with land. Some have affirmed, that leases granted either to perpetuity, or with an indefinite ish, are ineffectual even against the granter or his heirs; because it is contrary to the nature of property to restrain a proprietor for ever, or even for an indefinite time, from the full exercise of what is his own: But there is nothing more inconsistent with property in such leases, than in those granted for life, or for a term of years exceeding the common period of life; and any proprietor may lawfully bind himself to dispose of his property, or of the use of it, in what manner he may think most proper, *Durie, July 26. 1631, Crichton, (Dict. p. 11182.)*; *Jan. 23. 1717, Carruthers, (Dict. p. 15195.)*, stated in (*Folio Dict. ii. p. 419.*)

31. In all leases there is a *delectus personæ*. The proprietor chooses a tenant, such as he judges fit for cultivating his farm. Leases therefore are *stricti juris*; and consequently the granter is understood to depart from no right but what is expressed in the tack. This doctrine was formerly stretched so far, that, by some old decisions, the right of a tack was adjudged not descendible to heirs, where heirs were not mentioned †. Assignees are at this day excluded by the nature of the right, in tacks which are not expressly granted to assignees¹⁰⁷; so that an assignation by the tenant without

Verbal leases and such as are granted to perpetuity, or with an indefinite ish.

Tacks are *stricti juris*.

* This found, *Fac. Coll. Nov. 25. 1766, Stewart, Dict. p. 15178*; *Fac. Coll. Dec. 15. 1773, Buchanan, Dict. p. 8478.*; *A. v. B. June 26. 1791, Dict. p. 15181*, from *Folio Dict. vol. iv. p. 322*¹⁰⁶. A verbal promise to grant a tack cannot be proved by the master's oath, *Clerk Home, No. 187, Braco, Jan. 15. 1742, Dict. p. 15176.*

† The right of the heir was reckoned *a new case*, so lately as the days of Lord Kilkerran. See *Kilk. No. 10. voce TACK, Thomson, Nov. 25. 1750, Dict. p. 10337.*

¹⁰⁶ So again, *Neill, 22d Nov. 1810, Fac. Coll.* As to the effect of *rei interventus* in giving effect to verbal leases, *vid. supr. § 21. not.*⁹⁶.

¹⁰⁷ A contrary rule prevails in the case of urban tenements, *infr. § 32. not. †.* See also § 32. as to the distinction which subsists between legal and voluntary assignations, where the lease does not contain an express seclusion of assignees.

From an erroneous report of *5th March 1785, D. of Roxburghe, (4. Fol. Dict. p. 75.)* Dict.

without the landlord's consent, though it infers no forfeiture of the right of tack itself against the tacksman, can transmit no right from him to the assignee*. Marriage is a legal assignation of a tack by the wife to the husband: For though a tack be deemed an heritable

* A tack granted to heirs secluding assignees may yet be conveyed to the tenant's eldest son, who would at any rate succeed by law, *Fac. Coll. Feb. 14. 1759, Hepburn, Dict. p. 10409.* But it was found that the tenant had it not in his power to disappoint the succession of the heir-at-law by a family-settlement; although it had been argued, that the grantee in such settlement is to be held as falling under the general description of heirs. So the Court decided in one case where the heir of provision was son-in-law to the original tacksman, *Fac. Coll. Nov. 20. 1798, Deuchar, Dict. p. 15295.* See also *Grieve against Cunningham*, finally decided *June 29. 1804*, after a remit from the House of Lords, *Dict. App. 1. voce TACK, No. 9¹⁰⁸*. Where, through failure of heirs, the lease falls to the Crown, it cannot be transferred to the Crown's donatary, and therefore reverts to the landlord, *Fac. Coll. July 29. 1789, Falconer, Dict. p. 1355.*

In case of the tenant's bankruptcy, the appointment of an overseer or manager for the behoof of the creditors has been sustained, *June 30. 1791, Laird, Dict. p. 15294.* The same question has frequently since come under consideration of the Court¹⁰⁹.

Dict. p. 10412, and a mistaken view of other authorities, an opinion for some time prevailed, that when a lease excluded assignees and subtenants, "without consent of the landlord," this contemplation of consent so far alters the rights of parties, that the landlord must assign some reasonable cause for his refusal. The law is accordingly so laid down, *1. Bell's Comm. p. 57. et seq.; Bell on Leases, p. 145.* But in a late case, after a very full argument, it has been solemnly decided in the contrary; the Court unanimously holding, that under such a lease the landlord "is not bound to assign any reasons for withholding his consent;" *Muir, 20th Jan. 1820, Fac. Coll.; 1. Bell's Comm. p. 654. Addenda, No. 4.; Bell on Leases, p. 337.*

¹⁰⁸ It was so decided in this case, *8th March 1809, Dict. p. 15298*, and again, after a remit from the House of Lords, *21st Nov. 1805, Ibid. v. TACK, App. No. 9.* So also it was again found, *Lowden, 21st Nov. 1805, Fac. Coll. Dict. v. TACK, App. No. 10.*, notwithstanding the lease was conveyed to the tenant, "his heirs and executors, secluding assignees;" the Court holding, "that the addition of 'executors' was a mere blunder, and must be held *pro non scripto*, in the same way as if it had occurred in the settlement of a landed estate; for if executors be admitted, the anxious exclusion of assignees is unavailing."

It is to be observed, however, that the clause excluding assignees is pleadable only by the landlord; *Hay, &c. 8th Dec. 1801, Fac. Coll. Dict. p. 15297; Deuchar, supr. not. **; and so far objection seems to lie against the above judgments in the case of *Cunningham*, which were pronounced at the sole instance of the tenant's heir. The ultimate decision, however, even in that case, shows how entirely it is *ius tertii* in the heir of the tenant to bring the challenge; for the landlord having at last appeared, and stated his acquiescence in the deed of assignation, the previous judgments in favour of the heir were recalled, and the assignee absolved from the removing; *Cunningham, 25th Feb. 1806, Dict. v. TACK, App. No. 9.*

¹⁰⁹ It seems now to be "settled, that a mandate of this sort, intended to give the creditors the entire benefit of a lease, under the administration of a manager, is to be regarded as a covered assignation; and, above all, it is held, that the lease is forfeited by the tenant's removal from Scotland; *1. Bell's Comm. p. 61.* Accordingly it has been found, that when a tenant, whose lease secludes assignees and subtenants, becomes bankrupt, and leaves the country, he is not entitled to put the trustee for his creditors in possession as his manager; *Monro, 11th Dec. 1811, Fac. Coll.;* nor to commit the management to a steward or factor, accountable in the first instance to his creditors, and when the debts are all paid off to himself; *Watson, 13th Dec. 1811, Ibid.; Buchan Sydsersf's Assignees, 8th March 1814, Ibid.* See also *E. of Dalhousie, 1st Dec. 1802, Ibid. Dict. p. 15311.* Where the tenant does not leave the country, Mr Bell suggests the following mode, as likely to secure the interests of the creditors:—"Bankruptcy does not of itself annul a lease. The tenant, though bankrupt, may still continue in the possession, provided he pay the rent regularly, and perform the other stipulations of the contract. All that the landlord is entitled to do, in case of his tenant's failure to pay the rent, is to have recourse to the hypothec, and the proceedings prescribed in the *A. S. 1756*; and as the tenant's capacity of acting still remains to him after bankruptcy, his creditors seem to be entitled, by agreement with him, to possess the farm upon accounting to them for the profits,—a certain allowance being made to him for his subsistence;" *1. Comm. p. 59.* A stipulation, however, that the tenant's bankruptcy shall be "an *ipso facto* voidance of the tack," will, in all cases, exclude the creditors, whom they have not taken the precaution to avoid rendering the tenant bankrupt; and may be enforced by summary removing, without an action of declarator of irritancy;

ritable subject as to succession, yet as it is granted *propter curam et culturam*, and as the whole stock of ploughs, oxen, horses, wains, and other utensils of a farm, go by the marriage to the husband as moveable, the marriage also transfers to him the right of the tack, which cannot in that view be separated from the implements of tillage, *Jan. 1734, Hume*, (DICT. p. 5700, and p. 7199, and App. II. *voce* HUSBAND AND WIFE.). A lease, therefore, to an unmarried woman, falls by her marriage, because the marriage, which constitutes the assignation, cannot be annulled*.

32. From this rule, That leases cannot be assigned, liferent tacks are excepted, which carry a power to assign, though it should not be specially granted; both because they import an higher degree of right in the tacksman than those whose endurance is only for a definite number of years, and because in liferent leases there is no *delectus personæ*, but barely the constitution of a right in the liferenter, *July 16. 1672, Duff*, (DICT. *voce* PERSONAL AND REAL, p. 10282.). *Craig* affirms, *Lib. 2. Dieg. 10. § 6.*, that even a liferent lease, if it be granted to a widow, falls by her marriage to a second husband. But this position appears to be ill grounded: For if that kind of lease implies a power in the tenant to assign, the widow, who is tenant, may doubtless assign it to a stranger: And shall her husband be the only person to whom the law will not suffer her to convey it? This power of assigning was adjudged to be implied in a lease granted for a definite term of years exceeding the period of human life, *Spot. p. 326, Ross*, (DICT. p. 10368)¹¹⁰†. The position received by our former customs, That though leases are not assignable, they may be adjudged, holds not universally in our present practice. Where indeed a lease does not expressly bear to assignees, the exclusion of assignees, which in that case springs merely from the nature of leases without any secluding clause, reaches not to adjudications, which are judicial transmissions; and therefore such lease, though it cannot be voluntarily assigned by the tenant, may be adjudged by his creditor, in favour of whom many things are indulged contrary to common rules: But where a lease bears an express conventional exclusion of assignees, every assignee is excluded without excepting even adjudgers, who are judicial assignees; *Falc. 1. 217.*, (*Elliot, Dec. 4. 1747, p. 10329.*)

Liferent-tacks
are assignable.

33. Though it be incontestable, that tacks are not assignable where they are not granted to assignees, it remains a doubt, whether
the

Power of sub-
setting.

* The contrary has been adjudged, and the point fixed, by a solemn decision, *Fac. Coll. March 9. 1775, Gillon*, DICT. p. 15286.

† It was decided, That tacks of urban tenements are assignable, though not bearing to assignees, *Kilk. TACK, No. 5.*, *Falc. i. No. 226.*, *Aitchison, Jan. 7. 1748*, DICT. p. 10405.

Forbes, 2d June 1812, Fac. Coll.; 1. *Bell's Comm.* p. 61. Nay, the irritancy has been held incurred against the tenant himself, though he had, before decree, obtained a discharge from his creditors, on a composition of his debts; *Gordon, 7th Dec. 1805, Fac. Coll. DICT. v. TACK, App. No. 11.*

“ Where in consequence of the tenant's bankruptcy, and a clause of exclusion or of forfeiture, the lease is forfeited, the creditors seem to be entitled to claim from the landlord the worth of meliorations which have been made in contemplation of possessing during the whole term, but which the tenant's misfortunes have now thrown into the landlord's hands;” 1. *Bell's Comm.* p. 62. But to make good such a claim it seems necessary to establish that the landlord is *lucratus* by the meliorations, as “coupled with the desertion of the farm;” *Morton, 22d Feb. 1822, (S. and B.)*.

¹¹⁰ The length of the lease, which thus implies a power of assigning, is the same as that which implies a power of subsetting; *vid. infr. § 33. in not.*

the power of subsetting is implied in the nature of a tack without a special clause. By the Roman law, that power was implied in a lease, *L. 24. § 1. Loc. cond.; L. 6. C. De loc. et cond.*: And indeed there is not the same reason against the power of subsetting as of assigning; because by a subset the principal tacksman is not changed, and a subtacksman is not generally of an higher rank than the principal. If a decision observed by Harscare, 955, (*Rothead, March 1687, Dict. p. 10392.*), and the others there referred to, be agreeable to law, adjudging, that even a clause expressly secluding assignees was no bar to subsetting; far more ought a tacksman to have that power where the exclusion of assignees is barely implied. Yet Lord Stair, *B. 2. T. 9. § 22.*, and Mackenzie, § 8. *h. t.* are of opinion, that no tacksman can subset, if the tack be not granted either to him and his subtenants, or with a special power to output and input tenants *¹¹².

Effects of a
subtack.

34. A subtack requires the same solemnities as a principal tack; and is as effectual, if it be followed by possession, to defend the subtacksman against singular successors, as the principal is to defend the tacksman; and therefore no action of reduction brought by the proprietor against the tacksman for setting aside his lease, can hurt the subtacksman in possession, if he be not made a party to the suit; *Dec. 13. 1626, E. Galloway, (Dict. p. 7833.)*. The subtacksman is tenant, not to the proprietor, but to the principal tacksman¹¹³; and as the right of the principal lease cannot be withdrawn from the tacksman at the pleasure of the proprietor, neither will a subtacksman lose his right, though the principal tacksman should desert his lease, or renounce his right to it in favour of the proprietor; *July 14. 1625, E. Morton, (Dict. p. 15228.)*. But the subtacksman has no active right to sue possessors on his subtack, unless the principal lease be produced, or has been by some former act or deed acknowledged by the defender, *St. B. 2. T. 9. § 22.* From what has been observed, one difference may be perceived between an assignee to a lease and a subtacksman. The subtacksman lies under an obligation to pay his tackduty, not to the proprietor, but to the principal tacksman, whose tenant he is; and upon such payment his obligation is extinguished, though the original tacksman to whom he has made payment should have fallen ever so much in arrear to the proprietor †. But an assignee to a lease is bound directly to the proprietor, in payment, not

* It has been repeatedly found, that a lease of nineteen years implies no power of subsetting; *Fac. Coll. Jan. 22. 1788, Alison, Dict. p. 15290.*; *Ibid. March 8. 1791, Earl of Peterborough, Dict. p. 15293*¹¹⁰. But the contrary has been held as to a lease for thirty-eight years, *Ibid. May 22. 1794, Simson, Dict. p. 15294*¹¹¹.

† Where the principal tacksman had become bankrupt, a subtack from him was sustained, the subtenant having found caution to the landlord for the whole rent, *Fac. Coll. June 28. 1758, Crawford, Dict. p. 15307.* The same found, *July 6. 1791, Ogilvie*, mentioned in a note under the case of *Crawford*, from *Folio Dict. v. 4. p. 329.*

¹¹⁰ The same has been found as to a lease of twenty-one years; *E. of Cassilis, 5th Dec. 1806, Fac. Coll. Dict. v. TACK, App. No. 14.*

¹¹¹ In a lease of such endurance, as thus, in the ordinary case, to imply a power of subsetting, it would seem, that "an exclusion of assignees does not comprehend an exclusion of subtenants;" *Trotter, 22d Nov. 1770, Fac. Coll. Dict. p. 15282*; *1. Bell's Comm. p. 56.*; *Bell on Leases, p. 154.*

¹¹² The lessee of an urban tenement is entitled to subset it, provided the nature of the possession is not changed; *Anderson, 10th July 1811, Fac. Coll.*

¹¹³ Upon this principle, it was decided, that, in the case of a lease granted for a term of years, and after the expiration of this term, "for the lifetime of the person then in possession,"—it was the life of the principal tenant, as being in the civil possession, and not of the subtenant, though in the natural possession, which regulates the duration of the lease; *Ronaldson, 18th Dec. 1812, Fac. Coll.*

not only of the tack-duties fallen, or that may afterwards fall due, during the subsistence of his right, but of those that had remained unpaid at the date of the assignation; for he is by his assignation substituted in place of the cedent, and so becomes obliged to fulfil all the articles which were laid on him by the lease*; yet without extinguishing the obligation against the principal tacksman himself †.

35. If a landlord suffer his tenant to continue in the possession after the years of the tack are elapsed, the parties were, by the Roman law, understood to have entered into a new tack, upon the same conditions as the former, *L. 14. Loc. cond.* This doctrine we have adopted into our law, and given it the name of *tacit relocation*. The consent of both parties for thus continuing the lease, is, by our usage, inferred from the concurrence of these two negatives, the proprietor not executing a warning or intimation against the tenant to remove, and the tenant not renouncing or giving up the possession to his landlord in proper time; and therefore the tacit relocation is broken or interrupted, when either the proprietor warns the tenant, or the tenant renounces his possession. But if the proprietor do not bring an action against the tenant for removing upon the warning, or if the tenant, notwithstanding his renunciation, still continue in the natural possession without disturbance from the landlord, the parties are understood to have again changed their purpose, and the tacit relocation revives and subsists till a new warning or renunciation.

Tacit relocation.

36. The doctrine of tacit relocation obtains in the case, not only of proper tacksman, but of moveable tenants who possess from year to year under verbal tacks; and even in tacks granted by life-renters or wadsetters, after the granter's own right has determined; *St. B. 2. T. 9. § 23.*; *Stair, Jan. 16. 1663, E. Errol, (Dict. p. 15318.)* †. But it has no place in judicial tacks of sequestrated estates granted by the court of session: *First*, Because there is no deed of the court interposed in judicial tacks, from which the consent of the judges to continue the lease may be inferred; for warning is never used by the court of session, and it is the omission of this form in voluntary leases, by landlords who were wont to use it, which is one of the grounds of tacit relocation: *2dly*, Because in judicial leases, where the tacksman must give security to the creditors for the tack-duties during the lease, the relocation or new lease cannot subsist on the same precise footing with that which was first granted by the court, and reduced into writing; for the tacksman's cautioner in the lease is loosed from his engagement

Does not take place on judicial tacks

* This was decided, *Durie, July 8. 1626, Turnbull, Dict. p. 15273; Fac. Coll. Feb. 5. 1786, Ross, Dict. p. 15290* ¹¹³.

† *Lord Bankton, B. 2. Tit. 9. § 14.*, concurs with Mr Erskine, in holding the original tenant still liable after assignation; but no direct judgment appears on the subject, though the question has been under the consideration of the Court; *Kilk. 2. voce TACK, Grant, Feb. 24. 1743, Dict. p. 15279.*; *Fac. Coll. July 5. 1796, Low, Dict. p. 13873* ¹¹⁴.

‡ It likewise has place in tacks of feu-duties; *Kames, Rem. Decis. No. 15., Kilk. No. 1. voce TACK, Darnley, Dict. p. 15322.*

¹¹³ And again, *Fac. Coll. 10th Dec. 1802, Nisbet's Trustee, Dict. p. 15268.*; *Cuthill, 21st Nov. 1818, Fac. Coll.*; *Fairlie, 18th Dec. 1821, (S. and B.)*. See also *2. Bell's Comm. p. 39; Bell on Leases, p. 306 and 345.*

¹¹⁴ In this last case, notwithstanding the authorities of *Ersk., Bankt.* and *Kilk.* "the Court considered the question to be attended with difficulty, and one upon which there was no precedent." In the last edition of *Bell on Leases*, the point is also noticed as undecided, p. 343.

ment after the expiration of the term expressed in the judicial tack, to which term only he had bound himself. Judicial tacksmen are therefore accountable for the rents they have received after the expiration of the term expressed in the judicial lease, not as tacksmen but as factors or stewards, *Dec. 1709, Bethune* *. As the proprietor's consent to the new lease is founded on the continuance of the tacksmen with whom he had contracted in the natural possession after the term expressed in the original lease is expired, there can be no tacit relocation where the tacksmen had before that period quitted the natural possession in favour of a subtacksmen; nor can the consent of both parties implied in relocation be in such case presumed as to the principal tacksmen, whom we suppose to have given up the possession. If therefore the proprietor should, without warning the principal tacksmen, bring an action of removing against the subtacksmen after the expiration of the lease, it is no sufficient defence, that the principal tacksmen ought to have been also warned, as having the right of tacit relocation; *Durie, March 6. 1632, La. Lauriston*, (Dict. p. 13810.); *St. B. 2. T. 9. § 23. vers. Tacit. relocation* ¹¹⁵.

Tack by rental.

37. A rental is a particular species of tack, now seldom used, granted by the landlord, for a low or favourable tack-duty, to those who are either presumed to be lineal successors to the ancient possessors of the land, or whom the proprietor designs to gratify as such: And the lessees are usually styled *rentallers*, or *kindly tenants*. The tack must expressly bear, that the lands are set in rental. If the proprietor barely enrol a tenant in his rental-book, among his list of rentallers, the enrolment is sufficient to defend the tenant against the lesser and his heirs; *Durie, July 5. 1625, Aiton*, (Dict. p. 7191.); but cannot operate against singular successors, unless a signed rental be delivered to the rentaller himself. Rentals had no ish expressed in them; and there has been a great discrepancy of opinions concerning their endurance, where they were granted personally to the rentaller, without mention of heirs; as to which, see *Craig, Lib. 2. Dieg. 9. § 24.*; said *July 5. 1625*; *Mack. § 9. h. t.* It is the most probable opinion, that as rentals were granted from a special regard to the rentaller, they were accounted rights of liferent, which subsisted during his life. This opinion is supported by the analogy of rentals granted by the church or by the King; both which were considered as liferent rights, 1587, *C. 68.*; *Cr. ibid.*; *St. B. 2. T. 9. § 20.* And if the law regarded them in this light, it was natural to give them effect against singular successors, though they had no ish expressed in them. Rentals, when they were thus granted personally, were, upon the tenant's death, frequently renewed in favour of the heir; but this could not be demanded as of right. On such renewal, the heir paid to the landlord a grassum or fine, in name of entry, the quantity of which was regulated by the custom of the barony; and it behoved the landlord, after receiving the grassum, to continue the heir in the farm during his life. On this ground, Stair and Craig affirm, that **kindliness**

* Not reported.

¹¹⁵ So found, (with reference to a removing brought during the currency, but not to take effect till the expiration of the lease,) where the subtenant had been accustomed to pay his rent directly to the landlord; *D. of Queensberry, 7th July 1810, Fac. Coll.* But in a previous case, where perhaps the same speciality did not exist, "the Lords" were of opinion, that subtenants could not be removed, unless their authority were "called;" *Falc., 18th Jan. 1745, Lockhart, Dict. p. 13814.* See on this subject, *Bell on Leases, p. 472.*

kindliness or a rental, is to be presumed from the payment of a grassum; but grassums are now frequently given by tenants on their entry, when neither the landlord nor tenant means to constitute a rental.

Nature of such tacks.

38. Where a rental was granted to the rentaller and his heirs, the term of endurance was, by our older practice, the same as if no heirs had been expressed; said *July 5. 1625, Aiton*, (Dict. p. 7191.); but afterwards, more agreeably both to the Roman law, *L. 14. C. De usufr.* and the tenor of the right, such rentals were adjudged to subsist only during the lives of the rentaller and his first heir; *Durie, March 15. 1631, E. Galloway*, (Dict. p. 7193.); *ibid. March 13. 1632, Ahannay*, (Dict. p. 15191.); because that made the least deviation from what was accounted the genuine nature of rentals; and if they had been made to extend to all succeeding heirs, they would have become proper heritable rights, which, by the feudal rules, could not be constituted but by seisin*. Rentals commonly bear a clause, that the rentaller shall neither assign nor subset; and though, in the assignation of a common tack, the only penalty upon the tacksman is the avoiding of the assignation, without his forfeiting the right of tack, *supr. § 31.*; yet in the assignation or subset of a rental, the deed is not only void, but the right of rental is forfeited. Nay, the rentaller, even where he had an express power of subsetting, was adjudged to forfeit his whole right, by assigning more than the half of it, as in recognition; *Durie, March 21. 1623, L. Craigie Wallace*, (Dict. p. 7191.). A rentaller also, by exchanging his rental lands for those of a like quantity, incurs the forfeiture of his right, if the excambion be followed by possession, though it be declared to be made under the express condition that the proprietor shall agree to it; *Durie, March 15. 1631, E. Galloway*, (Dict. p. 7193.); see *Stair, B. 2. T. 9. § 21.* These forfeitures were enacted, to punish the ingratitude of such rentallers, as, notwithstanding the special regard shewed to them by the proprietor, might be disposed to transfer the possession of the lands to another without his consent.

Obligations on the granter of a tack, and on the tenant.

39. Certain obligations are, by the contract of tack, laid on both parties, whether it be a tack of lands or of houses. In a tack of lands the landlord is understood to be bound to warrant the right to the tenant, and to defend him in the possession. He is usually obliged to put all the houses and offices necessary for the farm in sufficient condition at the tenant's entry, and sometimes the tenant accepts of them as sufficient by a special clause; and in whatever condition the tenant owns he has received them, he must also maintain them during the tack, and leave them in the same repair at his removal¹¹⁷, unless the landlord himself undertake that burden in

* Found, that a perpetual rental is not good against a purchaser of the lands; *Kames, Sel. Decis. No. 8. Ker, Feb. 29. 1752, Dict. p. 15185*¹¹⁶.

¹¹⁶ *Mackenzie, 4th July 1781, Fac. Coll. Dict. p. 10310.* The Crown rentallers of the four towns of Lochmaben, form, however, an exception to the general rule, *2. Ross's Lectures, p. 481*; for it has been found, that they have "such a right of property in the lands, that they cannot be removed;" *Kindly Tenants of Lochmaben, 24th Nov. 1726, (4. Fol. Dict. p. 419.), Dict. p. 15195*; and that they may either transmit their rights by infestment, *Irving, 4th Feb. 1795, Fac. Coll. Dict. p. 10316*; or impignorate them by a written deed, with delivery of earth and stone on the lands, without recording, and without intimation to the landlord, or entry in his books; *Mounsey, 30th Nov. 1808, Fac. Coll.*

¹¹⁷ The tenant is under a similar obligation to uphold the fences on the farm.—When erected during the currency of the lease, a distinction has been drawn between ordinary subdivision fences, and those exterior fences which form the march between contiguous

in whole or in part; *Fount. Dec. 20. 1707, Whites*, (Dict. p. 15258)*. The tenant though he should enlarge the house, or build new offices, as stable, barn, coach-house, &c. during the lease is entitled to no abatement of rent on that score, without a previous agreement with the landlord¹¹⁹. He is, when the term of entry comes, obliged to enter immediately into the possession, to furnish the grass-grounds with a sufficient stock of cattle, and to cultivate and manure the corn-grounds, *Durie, Feb. 27. 1623, L. Randiford*, (Dict. p. 15256.) He is, by the nature of the contract, obliged to use the power given him over the surface *tanquam bonus vir*, without running out or wasting the soil¹²⁰; and consequently, he is, under
sundry

* Even where the tenant has undertaken to uphold the houses, his obligation does not bind him to repair extraordinary damage, such as the devastation occasioned by a hurricane; *Clerk Home, No. 168. Annuitants of York-buildings Company, June 5. 1741, Dict. p. 10127; Kilk. No. 1. voce PERICULUM, Clerk, July 10. 1741, Dict. p. 10128*¹¹⁸.

“contiguous estates. “A march-fence is different from an ordinary fence, in this respect, that where there are no stipulations in a lease, with regard to the erecting or upholding of fences, a landlord is not entitled to increase the natural and legal burdens of the tenant by inclosing the farm during the currency of the lease, and thus laying the burden of preserving the fences upon the tenant. “But, with regard to a march-fence, this is not a thing which a landlord may do or not, just as he pleases. He may be compelled by the neighbouring proprietor to erect a march-fence; and when a tenant takes a farm, he knows, or is bound to know that this is the law; that he takes the farm under the burden of the acts 1661 and 1669; and that when a march-fence is erected he must preserve it. “It thus matters not, whether a march-fence existed at the time he took the farm or not. Whenever it does (exist), the obligation of keeping it up devolves on him.” A majority of the Court, accordingly, held, that the tenants of contiguous properties are bound, *at common law*, to keep up the march fence between their respective farms; *Dudgeon, 23d Nov. 1813, Fac. Coll.*

¹¹⁸ So far as there exists any obligation in such cases, it seems to lie on the side of the landlord. It was, accordingly, found by the Courts of this country, that the landlord was liable, on the demand of the tenant, to rebuild a farm-house destroyed by accidental fire; *Swinton, 16th Jan. 1810, Fac. Coll.; Walker, 30th May 1811, Ibid.* This decision seems to have proceeded mainly on the maxim, *res perit suo domino*. But on an appeal of the case of *Walker, 3. Dow, p. 234*, it was well observed, both by the Lord Chancellor and Lord Redesdale, that “the meaning of this maxim is,—that where there is no fault any where, the thing perishes to *all concerned*; “that all who are interested constitute the *dominus* to this purpose; and if there “is no fault anywhere, then the loss must fall on all;” *Ibid. p. 245*. The decision of our Courts was therefore reversed, by an express finding, that the landlord “is “not liable to rebuild.” A reservation was added—“without prejudice to any “question, whether the tenant is entitled to *any other relief*,” and the relief suggested by Lord Redesdale, as all that the tenant could be entitled to, was, either “that he may abandon, as he cannot enjoy the subject as before,—or, “that he “should have an allowance equal to the diminution in value of the subject, by the “loss of the house during the term;” *Ibid. p. 241*.

¹¹⁹ Nay, it was found in one case, that a tenant who had thus, at his own expense, erected fences, must, at his removal, either put them in a state of repair, or clear them away, and leave the ground free from incumbrance; *Andrew, 19th Jan. 1811, Fac. Coll.* But, in a later case, where the tenant had built some house on the farm, it was more equitably held, that while he was not entitled to remove the houses, yet neither was he bound to put them in repair; *Thomson, 8th Feb. 1822, (S. and B.)*.

Where the landlord is taken bound by the lease to pay for meliorations, it has, in one instance, been held, that the erection of a new house, though even larger than the old one, yet, if not of a size improper and unreasonable, considering the extent of the farm, is, in the sense of the contract, such a melioration as the landlord is liable for; *Ducat, 14th May 1803, Fac. Coll. Dict. p. 15264*. Perhaps, however, the opinion expressed by the minority of the Court, may be considered the sounder one:—They “did not feel “themselves entitled to consider so much what was proper and reasonable for the size “of the farm, as what had been bargained between the parties. If the old house was “ruinous, the erection of a new one of the same dimensions would be a melioration, “for which the landlord had agreed to pay the tenant; but, in so far as it was larger, “they considered it as a new subject, and not a melioration of the old.”

¹²⁰ It is upon the same principle, that in a coal-lease, the tenant is “bound to “leave

sundry circumstances which must be left *in arbitrio judicis*, tied down, without any express clause, both with respect to the grounds which he may turn up with a plough, and as to the method of cultivation and husbandry, *L. 25. § 3., Loc. cond.; Durie, Feb. 6. 1633, L. Haddo, (Dict. p. 7539.); Nov. 19. 1762, Stirling, (Dict. p. 9403.)**; *St. B. 2. T. 9. § 31.*; see also *Gilm. 144, (Feb. 1665, Murray, Dict. p. 15257.)* †¹²¹.

40. A

* The report of this case in the *Fac. Coll.* is dated *Dec. 4. 1762, Dict. p. 9403.*—The tenant had been prosecuted for cutting trees standing in his farm-yard and garden; and the court found him obliged, by the act 1698, *c. 16.*, to have preserved, and secured all growing wood and planting upon his farm, and therefore found him liable in the value of the sixteen trees cut at the rate of *L. 20 Scots* for each, and found it unnecessary to determine whether it was competent to prove the cutting of the trees by the suspender's oath. See what is said upon the case of *Stirling*, in the case, *July 21. 1775, Logan, Dict. p. 10492*, where a case, *Jan. 24. 1712, Justices of Ayr, Dict. p. 9398*, is also mentioned.

† Thus, he is not entitled to sell any part of the straw raised from the farm, *Fac. Coll. June 30. 1796, Pringle, Dict. p. 6575; Ibid. Feb. 2. 1797, Earl of Northesk, Dict. p. 15254*, except that of the last crop; *March 5. 1785, D. of Roxburgh, Dict. p.*

“leave part of the coal for sufficient pillars to support the roof of the working;” as also “to leave a barrier against the water of the adjacent coal.” And the tenant of two adjacent fields of coal belonging to different proprietors is not entitled to break through this barrier, for the purpose of communicating the drain or level of the one to the other; *E. of Wemyss, 7th Feb. 1809, Fac. Coll.*

In general, the tenant must restrict himself to such uses of the subject as are consistent with the purposes of the lease, and the original understanding of parties. He cannot, therefore, without consent of his landlord, set up an ale-house on a subject let as a “farm;” *Miln, 23d Feb. 1787, Fac. Coll. Dict. p. 15254*; nor establish a manufactory on one let as a “corn-mill and mill-lands;” *Ford, 20th May 1808, Fac. Coll.; Dict. v. Tack, App. No. 17.*; nor erect a dwelling-house on a piece of ground “intended as a flower-plot;” *Inglis, 22d July 1778, Ibid. in not. to last case.* On somewhat similar grounds, it has been held, that the privilege of charring is not implied in a lease of coal; *Heriot, 31st Jan. 1804, Fac. Coll. Dict. p. 15255.*

¹²¹ A clause is frequently inserted in leases, binding the tenant to a certain mode of culture; and enforcing this, in some instances, by a penalty,—in others, by the stipulation of an additional rent. There is this distinction between the two cases:—Where an additional rent is stipulated, it is subject to no modification; and the Court will not interpose to restrict it, even where a deviation from the conventional rotation has, in a great measure, been rendered *expedient*, by circumstances not imputable to the tenant; *Fraser, 25th Feb. 1813, Fac. Coll.; Graham, as decided on appeal, 11th May 1789, reported in note to Wortley Mackenzie, 13th Dec. 1811, Fac. Coll.* A penalty, again, is, in every instance, subject to modification, and will be restricted to the damage actually sustained; *Muir Mackenzie, 18th June 1811, Fac. Coll.; Wortley Mackenzie, supr.*; though in one case, where the clause was conceived thus, “under a penalty of *L. 3 Sterling* for each acre laboured otherwise than as above, to which the damages are hereby estimated, without power to any judge to modify them on any pretence whatever;” the Court, by a narrow majority, holding this to be a mere form of stipulating a conventional rent, refused to restrict the penalty or investigate the actual damage; *Henderson, 24th Feb. 1802, Fac. Coll. Dict. p. 10054.* Where the landlord does not, at the time, object, but allows the deviation to go on for many years, acquiescence will be presumed, and the damage incurred during this period cannot afterwards be insisted in; *Murray's Trustees, 26th Feb. 1806, Fac. Coll. Dict. v. Tack, App. No. 12.*

Another question here occurs, Is the landlord,—before contravention has as yet taken place,—entitled to prevent the tenant from violating the system of management laid down? Or has the tenant, on paying the penalty or additional rent, a right to follow his own course? In the case of a penalty, no doubt has ever been entertained: for, as our author afterwards lays down, “Penalties have no tendency to weaken the obligation itself, being adjoined purely for quickening the performance of the debt—” or, who therefore cannot get free by offering payment of the penalty;” *infr. B. 3. t. 3. § 86.* In the case of an additional rent, there has been much difference of opinion; but it seems now to be settled, that wherever an express *option* has not been given to the tenant, as in the case of *Graham, supr.*; but where, on the contrary, it appears, on a broad view of the whole lease, to have been the intention of parties to enforce and secure observance of the conventional rotation,—the landlord may insist for

Book II.

Payment of
rent.

40. A tenant, if the landlord refuse to receive his victual-rent when offered to him in due time, is liable only for the prices as fixed by the sheriff-fiars of that year; and if the grain perish by lying in his hands, the landlord must suffer the loss: But if he do not offer his rent in kind, when obliged to it by his lease, he must account to his landlord according to the ordinary prices of the country, *Harc.* 900*. And if the landlord should enter into a contract of sale with a merchant, for any part of his farm wheat or barley, and be disabled from performance through the tenants' not delivering to him their several proportions of grain according to their leases, they must make good to the landlord the damage recovered by the merchant against him for not fulfilling his bargain.

Abatement on
account of ster-
ility.

41. By a rule which may be collected from § 39., no rent is due where the tenant, through any occasion not imputable to himself, is debarred from the possession of his lands. When therefore the lands are possessed by an enemy, or happen to be overflowed by the sea, the landlord loses his tack-duty, *L. 15. § 1, 2. Loc. cond.* And though the tenant should have got possession, and sown his arable grounds, the landlord cannot, by the Roman law, claim any part of the rent of that year, if inundation, the calamity of war, the corruption of the air, or the inclemency of the weather by earthquakes, lightning, &c. hath brought upon the crop a damage *plusquam tolerabile*; but if the loss be more moderate, he may exact the full rent, *L. 25. § 6. eod. tit.* It is no where defined in that law, what degree of sterility or vastation makes a loss that cannot be borne; but, by the common opinion, the tenant is liable for the rent, if the produce of the crop exceed the expence of the seed and tillage. Though the landlord cannot in equity demand the tack-duty

p. 15263; *May* 16. 1792, *Jamieson*, *DICT.* p. 15263¹²². Thus also he cannot sell any dung produced on the farm, previously to bear-seed time, in the concluding year of his possession, *Fac. Coll. Jan.* 27. 1767, *Finnie*, *DICT.* p. 15260¹²³.

* *Barclay* against *Simson*, *March* 1682, *DICT.* p. 4413.

for specific performance, and may obtain an interdict against the tenant attempting to contravene. It was so found, where the obligation come under by the tenant was to crop in a certain way, "or an additional rent to be paid for each acre they shall neglect to crop as above specified;" *Muir Mackenzie, supr.* And again, where the primary obligation was conceived in similar terms, "declaring, that in case the tenant shall fail," &c. he shall be bound to pay an additional rent; *Wortley Mackenzie, supr.*

See further, in reference to this subject, *Bell on Leases*, p. 199. *et seqq.*; *infr.* *B. S. t. S. § 86.*

¹²² A tenant having two farms, in the immediate vicinity of each other, belonging to different proprietors, is not even entitled to consume the green crop or fodder of the one upon the other; *Scott*, 27th *May* 1813, *Fac. Coll.* Neither is he entitled to carry his grain from the farm where there is no thrashing-machine, to be thrashed by the thrashing-mill on the other, though he should find caution to return the fodder to the farm upon which it grew; *Ibid.* But it has been held, that "although no tenant is entitled to carry off his crop to another farm, by which means the landlord might not only be deprived of his hypothec, but the right of having the fodder consumed upon the farm might be disappointed, yet this rule could only apply, where there were means, by a proper farm-steading, of manufacturing the grain, and by proper offices of consuming the fodder upon the farm;" *Gordon*, 8th *March* 1822, (*S. and B.*).

¹²³ To that part of the dung made after the bear-seed time, the incoming tenant has a preferable right, on payment of the value; *Forrester*, 19th *Feb.* 1808, *Fac. Coll.* *DICT.* v. *TACK*, App. No. 16. Where the lease contains a special stipulation, that the tenant shall "consume upon the ground of the said lands, the whole straw and fodder of every kind, except hay, produced by the said lands, and lay the whole dung thereby produced upon the said lands," the tenant is not entitled even to the dung produced after bear-seed time; *E. of Wemyss*, 16th *June* 1801, *Fac. Coll.* *DICT.* v. *TACK*, App. No. 7. Should the tenant withhold from the lands any part of the dung, which, either by the obligation of law, or the stipulations of his contract, he is bound to consume on the farm, he must, without payment, leave to the incoming tenant the quantity so withheld; *Forrester, supr.*

duty in the case above mentioned, yet as to the expence of seed and labour laid out voluntarily by the tenant on the subject, the profits of which were to accrue wholly to himself, the landlord is not obliged, even in equity, to indemnify him of that expence, either in consequence of his right of property in the lands, or from the nature of the contract, *arg. L. 15. § 2. eod. tit.* If the tenant's loss arise, not from the want of increase, but from the bad quality of the grain, *ex. gr.* from his corns having been blighted, or spoilt by rain after reaping, or from the running out of his grounds, or the decay of his fruit-trees, he is not entitled even to an abatement of rent on that account, *ibid.* If the next crop be uncommonly rich, it is burdened with the payment to the landlord, both of the rent of that year of plenty, and of the former year of sterility, *d. L. 15. § 4.* No exemption can be pleaded on account of an extraordinary sterility by a *colonus partiaris*, who pays a certain share of the increase in name of tack-duty: for he, being considered as co-partner with a proprietor, rather than as tenant to a landlord, must, in that character, divide the loss with the proprietor, according to the proportions settled by the contract, *L. 25. § 6. eod. tit.* These rules have been adopted into the law of Scotland, not only in the opinion of writers, but by our decisions, so far as they have gone in that matter, particularly by *Dirl. 108. (Tacksman of Customs, Nov. 20. 1667, Dict. p. 10121.)*; *Home, 213. (E. of Eglinton, Dec. 3. 1742, Dict. p. 10128.)**

42. Tenants are exempted from the payment of all taxations, or public burdens, to which they are not expressly subjected by their leases: But the law itself divides the burden of the schoolmaster's salary between the landlord and the tenant; so that, without any paction, the landlord pays the one half, and the tenant the other, 1696, C. 26 †. Clauses are frequently inserted in the leases, obliging tenants to indefinite services, under the name of *arriage and carriage*, or *services used and wont*; but, by the act 20. *Geo. II. C. 50. § 21. and 22.*, abolishing ward-holdings, no tenant can be compelled to perform any services, but such as shall be specified, and the number and kinds of them enumerated, either in the lease itself, or in a separate writing; but there is a proviso, that that enactment shall not extend to mill-services, which are to continue upon the former footing.

Public burdens
and services.

43. In the lease of a dwelling-house, the landlord must deliver the subject set to the tenant in an habitable condition at the time of his entry, unless the tenant himself do, in the lease, undertake the burden of repairing it; for where a subject is let for a particular purpose, the nature of the contract implies that it should be fitted for that purpose. The landlord must also, if it be not otherwise stipulated, uphold the house in tenantable repair during the lease. Where, therefore, a house becomes insufficient in whole or in part while a lease is current, the rent must be either entirely remitted, or at least abated, in proportion to the damage sustained by the tenant, though the insufficiency should happen by an accident not imputable to the landlord, *Stair, Jan. 2. 1667, Hamilton,*
(Dict.

Tack of a dwelling-
house.

* See a decision as to a lease of fishings, *Kames, Sel. Decis. No. 199, Foster, July 16. 1762, Dict. p. 10131.*

† The tenant also pays a proportion of the poor's rates. See 1963, c. 16., and other statutes, exhibited in one view by Lord *Kames, Statute law of Scotland abridged, voce VAGRANT.*

(DICT. p. 10121.); *Harc.* 948, (*Deans*, 1681, DICT. p. 10122.); yet see a later decision observed by *Harcarse*, 956, (*Deans*, 1688, DICT. p. 10123.). But a slight inconveniency is not to be regarded, *L. 27. pr. Loc. cond.* Where the insufficiency arises from the inconsiderate or culpable act of the landlord, he not only loses his rent, but must make up to the tenant the full loss which he has suffered through that fault, *L. 30. pr. eod. tit.*; and if the house should tumble down, or the tenant be debarred from the possession, even without any rashness or unjustifiable omission in the landlord, no rent is due for the time that it is uninhabitable, *L. 33. eod. tit.*; nor if the tenant should abandon the house from a just suspicion of its insufficiency, *L. 27. § 1. eod. tit.* The tenant himself, when he disburses the expence of repairing without consulting his landlord, may retain out of the rent such part of the charges as shall appear to have been necessary for upholding the house; but he has no retention for the sums expended for ornament, or even greater conveniency, unless the landlord has previously consented to that expence. In tenements within a royal borough, where the necessary repairs require a considerable sum, and the landlord appears backward, it is usual for the tenant, the better to secure his indemnification, to apply to the dean of guild; whose warrant, proceeding on the estimate of tradesmen, is a legal evidence, both of the necessity and amount of the expence of repairing. On the other hand, the tenant of an house is bound to use a reasonable degree of diligence in preserving it from harm. By the Roman law, if, in default of the tenant's diligence, the house should have received damage, the landlord had not only a personal action against him for the amount of it *, but a right of hypothec on the furniture for his farther security, *L. 2. In quib. caus. pign.*

Determination
of tacks.

44. Tacks may determine or cease, either during their currency, or when the years of the tack are expired. They may be evacuated while they are yet current, *first*, by the tenant running two full years' rent in arrear, in the same manner that a feu-right is irritated by the feuar failing to pay; which is also agreeable to the Roman law, not only in the case of an *emphyteuta*, but of a proper tenant, or *colonus*, *L. 54. § 1. L. 56. Loc. cond.* This irritancy, though it was by our former practice cognisable only by the court of session, may, by act of sederunt, *Dec. 14. 1756, § 4.*, be now declared by the judge-ordinary, *i. e.* the sheriff-depute or sheriff-substitute; who has also power to pronounce judgment against the tenant in the removing. But the irritancy will be prevented if payment be made by the tenant at any time before it be declared †.

2dly,

* See *Fac. Coll. July 5. 1797, Maclellan*, DICT. p. 10134 **.

† Yet if the tack expressly provides, that payment shall not be received during the action, the Court will give effect to the stipulation; *Fac. Coll. June 30. 1761, Finlayson, &c.* DICT. p. 7239. And after a decree of removing has been extracted, a conventional irritancy cannot be purged; *Fac. Coll. March 6. 1759, Clerk*, DICT. p. 7237 ¹²⁵.

¹²⁴ The lessee of a malt-kiln was here found liable in damages, the kiln having been burned in consequence of his negligence.

¹²⁵ There is no distinction in this respect between a conventional and a legal irritancy; the tenant after extract is equally excluded from purging both; *Kinloch*, 16th June 1812, *Fac. Coll.* And *vid. supr. t. 5. § 27.*; *Ballenden*, 6th July 1792, *Fac. Coll.* DICT. p. 7252; *Bell on Leases*, p. 183, *et seq.*, *Ibid.* p. 414. *et seq.*

Is the rule equally strict in the case of decrees in absence? It was once observed on the Bench, that "in decrees of absence, where the defender had made no appearance," and

2dly, Though the tenant had been but one year's rent in arrear, he might by the former custom have been decreed by the session to remove, if sufficient security was not given for the rents that had fallen, or should fall due, during the tack; *Durie, Feb. 27. 1627, Lawson, (Dict. p. 15302.)*; which was extended also to tenements within borough; *Dirl. 429, (Cunningham, Jan. 16. 1677, Dict. p. 15305.)*. But it is now provided by § 5. of the above-mentioned act of sederunt, that where the tenant shall either fall one full year's rent short in his payment, or shall desert his possession ¹²⁶, or neglect to cultivate his farm at the usual season, the judge-ordinary shall, at the suit of the landlord, ordain the tenant to give security for the preceding arrears, and for the rent of the five following crops, if the tack shall subsist so long, or during the currency of the tack, if it be of shorter endurance than five years; and upon the tenant's failure, shall decree him to remove summarily, as if the years of the lease were expired, and the tenant had been legally warned *. *3dly*; Leases may cease or determine before their ish, by the mutual consent of both parties, either expressed or implied ¹²⁷. A lease determines by express consent, when a renunciation of it, signed by the tenant, is delivered by him to and accepted by the landlord; whose acceptance is commonly proved by a notarial instrument taken by the tenant at the time of delivery, but verbal renunciations may be resiled from in the same manner as verbal tacks. The consent of parties to give up a current tack is presumed, when the tenant accepts of and uses a posterior tack, in which any variation is made from the first, either as to the tack-duty, term of endurance, or other provisions relating to it; much more when he acquires an heritable security, or other real right in the subject

* It is a settled point, that this irritancy, like the former, may be prevented by payment made before decree, though the landlord is not bound to accept partial payments; *Kames, Sel. Decis. No. 211, Campbell, Dec. 1763, Dict. p. 13867; Fac. Coll. July 5. 1796, Low, Dict. p. 13873; Jan. 19. 1780, Carruthers, Dict. p. 13869*. Consignation *pendente processu* has the same effect, *Jan. 16. 1777, Campbell, Dict. p. 7252, and App. voce IRRITANCY, No. I.* Nor will debts of the landlord, or public burdens affecting the farm, paid by the tenant without authority, be brought *in computo* to diminish the arrear; *Carruthers, supr.*

“ and had not therefore an opportunity of purging the irritancy, it would be extremely hard to prevent him from doing so, after the decree had been extracted;” *Campbell, 16th January 1777, Dict. v. IRRITANCY, App. No. 1.* But, though there is no reported case on the point, it is believed to have been repeatedly decided, that even against a decree in absence, the tenant will not be reponed, if he have been regularly cited, and due opportunity of purging the irritancy afforded before pronouncing decree.

¹²⁶ *Vid. supr. not. 109.*

¹²⁷ So also, where the lease contains a conventional irritancy on any event, as in case of the *bankruptcy, non-residence, &c.* of the tenant, such irritancies are strictly enforced. Thus, the Court held a conventional irritancy, founded on the tenant's bankruptcy, to be incurred, although the tenant before decree had obtained a discharge from his creditors; *Gordon, 7th Dec. 1805, Fac. Coll. Dict. v. TACK, App. No. 11.* Nor is it necessary to raise declarator of irritancy, or reduction of the lease; the landlord may proceed against the tenant by summary removing; *Ibid. Forbes, 2d June 1812, Fac. Coll.*

A lease was set aside on a conventional irritancy for non-residence; *Drummond, 9th July 1799, Fac. Coll. Dict. v. TACK, App. No. 6., Cameron, 18th Dec. 1810, Fac. Coll.* Where one abroad or at a distance succeeds to a lease containing such an irritancy, a reasonable time will be allowed him to come and take possession, but he will not be permanently absolved from the condition, on any plea of ill health; *Stirling, 29th June 1813, Fac. Coll.* See some other cases on this subject, *supr. not. 109.*

There is sometimes a clause inserted in leases, reserving right to the landlord to resume possession of part of the farm. The landlord, in such a case, is not bound to explain his reasons for exercising the privilege; *E. of Rosebery, 7th March 1811, Fac. Coll.*

ject let, these being titles of possession incompatible with the former; for the same person cannot be landlord and tenant; *Cr. Lib. 2. Dieg. 10. § 7.* But if the second tack, or the heritable right, should be declared void, the tenant may resume his first title; because the implied renunciation of the first tack is only provisional, not to take place, if the second tack, or heritable right, should prove ineffectual to him, *Cr. ibid.; St. B. 2. T. 9. § 36.* A tack ceases or determines by the elapsing of the years contained in it, if either the tenant renounce his possession to the landlord, or the landlord warn the tenant to remove, *i. e.* in every case where there is no room for tacit relocation. The tenant's renunciation ought, in the opinion of Craig, *Lib. 2. Dieg. 9. § 2.*, to be signed, and delivered to the landlord, forty days before the Whitsunday at or immediately preceding the ish; and to bear a consent, that the landlord may, at the ish, enter into the possession *brevi manu*: But by the present practice, tenants seldom or never execute written renunciations, except when they are intended to have immediate effect before the expiration of the years of the tack. Where the tenant is resolved not to quit his tack during its currency, he contents himself with a verbal declaration to his landlord, that he is to give up the possession at the ish.

Removing of tenants. Statutory solemnities.

45. Little ceremony was observed some centuries ago in the removing of tenants. The landlord came to the door of the tenant's house at any time of that year wherein the tack was to expire, with a wand in his hand, which having broke in two, as an evidence of his resolution to put an end to the tack, he warned the tenant verbally to remove at the ish; and if the tenant did not then remove voluntarily, the landlord might the very next day have ejected him, with his family and goods, *viâ facti*, *Cr. Lib. 2. Dieg. 9. § 4. ** To repress the frequent violences occasioned by this oppressive and barbarous custom, it was enacted by 1555, *C. 39.*, That previously to the removing, the landlord should sign a precept of warning, commanding his officer to intimate to the tenant, forty days before the Whitsunday at or immediately preceding the term of the ish, to remove at that term from his possession, with his subtenants, family, and effects; and that this precept should be executed against the tenant, either personally, or at his dwelling-house, and a copy, if he was not personally warned, delivered to one of his family, or affixed on the door of his house. This precept must, by the statute, be also executed on the ground of the lands, a form used in all real executions affecting land, and afterwards read in the parish-church where the lands lie, on a Sunday before noon, in the time of preaching or prayers, and a copy affixed on the most patent door of the church. But warnings are *de praxi* sustained, though the publication at the parish-church be prior to the execution upon the ground of the lands, provided that both one and the other be used forty days before Whitsunday; *Forbes, Dec. 2. 1712, Stirling, (Dict. p. 13836.)*; and by immemorial usage, they are now always read at the church-door immediately after the forenoon's service, and not in the church in the middle of the service †.

Warning forty days before the Whitsunday preceding the ish.

46. This whole process of removing must be used forty days before Whitsunday, though the term of the ish should be Martinmas or Candlemas, *Durie, June 15. 1631, Ramsay, (Dict. p. 13857.)*; because

* See Balf. tit. REMOVING.

† The Court have sustained a warning affixed to the door of the church-yard; *Fac. Coll. March 1. 1793, Campbell, Dict. p. 13849.*

because as Whitsunday is, at least was at the date of this statute, the ordinary term of entry over the greatest part of Scotland*, tenants would not otherwise have had a reasonable time for providing themselves in a farm elsewhere †. The forty days before Whitsunday must be so computed, as to include neither the term-day, nor the day on which the warning was used, *Cr. Lib. 2. Dieg. 9. § 2.* As warning is not a citation on a summons, but a bare intimation to the tenant, that an action is to be brought against him in a certain event, the statute requires no more, but that forty days intervene between the warning and the next term of Whitsunday, without considering whether the tenant be within the kingdom or in foreign parts, *Stair, Feb. 20. 1666, Macbrair, (Dict. p. 13861.) ‡*; but the common *induciæ* must be allowed to him in the citation upon the subsequent action of removing¹²⁸. Whitsunday was formerly a moveable term, which frequently reached far into summer; so that the tenant who was to enter, suffered considerable damage through the eating up of the early grass by him who was to remove; but by 1690, *C. 39.*, the legal term of removing is declared to be the 15th of May, which the act extends to borough tenements, as well as rural: And by a still later act, 1693, *C. 24.*, which is truly declaratory of the former, the term of Whitsunday is fixed to that precise day, not only in questions of removing, but in every other civil respect¹²⁹.

47. The solemnities of the act 1555 are not required in the warning of tenants from tenements which have no relation to a country farm §. In these, *ex. gr.* in dwelling-houses, that have no connection

Removing in urban tenements.

* See *Craig, Lib. 2. Dieg. 9. § 4.*; *Stair, B. 2. Tit. 9. § 39.*; *Kames's Elucidations, art. 34.*; *Foulis, 8th July 1626, Dict. p. 13855.*

† Where the tack contains two terms of removing, *ex. gr.* at Whitsunday as to the houses and grass ground, and at the Martinmas or separation of the crop ensuing as to the lands in culture, warning must be given forty days before the Whitsunday: And even where the term of removing from the land is prior to that from the houses, *ex. gr.* at the Candlemas, the warning must take place at the Whitsunday preceding that Candlemas, *i. e.* a year and forty days before the final term of removal; *Kilk. No. 2. voce REMOVING, Hay, Dict. p. 13837.*; *Fac. Coll. Feb. 14. 1765, Macnaughton, Dict. p. 13857.* An error as to the term of removing vitiates the warning, *E. of March, March 6. 1754, Dict. p. 13843*; *Campbell, Feb. 11. 1780, Ibid. in not. to last case.* In a later instance a slight inaccuracy has been disregarded by the Court, *Fac. Coll. March 1. 1793, Campbell, Dict. p. 13849.*

‡ *Mack. Obs. p. 155.*

§ The statute makes mention of "lands, milnes, fishings and possessiones quhat sumever;" and it has been expressly found, that a warning to remove from fishings must be given within the same period as in the case of lands, *Fac. Coll. Feb. 25. 1783 Gordon, Dict. p. 13859*; contrary to the opinion of Lord Bankton, *B. 2. Tit. 9. § 53,*

¹²⁸ See the case of *Hay, infr. not* ¹³².

¹²⁹ Where the entry to an arable farm is at the term of Whitsunday, the crop of that year is generally reaped by the outgoing tenant. In this case, the new tenant is entitled, at the issue of his lease, to an outgoing crop,—“that is, to the crop sown before the term of removal, but reaped after it;” *Bell on Leases, p. 473*; *Fullarton, 4th March 1814, Fac. Coll.* A remit was, in one case, made, with a finding to the contrary, by the House of Lords; but, in afterwards giving effect to this finding, “the Court delivered an unanimous opinion, that an error had crept into the proceedings, which however, could not now be remedied in this Court;” *Scott, 2d March 1803, Fac. Coll. Dict. v. TACK, App. No. 8.* Where there is a piece of meadow land, “quite detached from the arable farm,” a tenant who, at the term of Whitsunday, enters to it in that state, though it should afterwards have been ploughed up with the landlord's consent, “is not entitled to an outgoing corn crop, but the same belongs to the landlord, upon paying of the price and expence of seed and labour;” *Brodie, 7th Feb. 1777, Fac. Coll. Dict. v. TACK, App. No. 3.*

connection with a rural tenement, it is sufficient that the tenant be warned to remove forty days before the ish of the lease, whether the term of the ish be Whitsunday or Martinmas, *Stair, Nov. 21. 1671, Riddel*, (DICT. p. 13828.)*. And in the case of houses within borough, whether boroughs royal or of regality, the ceremony of chalking the door by a borough-officer is held for a legal warning, without any execution at the parish-church, *Durie, July 18. 1634, Hart*, (DICT. p. 3783).¹³⁰ By the usage in Craig's time, the officer obtained a warrant for this purpose from the magistrate; but now he may use that form even without a verbal warrant, *Forbes, June 24. 1709, Bartoun*, (DICT. p. 13832.); for as a precept, signed by the proprietor, is sufficient for the warning of tenants from rural tenements, without the interposition of a judge, the proprietor's verbal order ought to be sufficient within borough, without the warrant of a magistrate †. In what respects inhibition of tithes resembles a warning to remove, see *infr. T. 10. § 45.*

Whether the effect of warning transmits to the heirs of the landlord.

48. Warning is, in the common case, a necessary step previous to the action of removing; and the effect of it is not lost by the death either of the landlord or of the tenant. If the landlord shall die before bringing his action of removing, his heir may insist in that action upon the warning used by the ancestor, *Durie, July 28. 1637, E. Hadinton*, (DICT. p. 3173.); and if the tenant who has been warned, shall die before a removing be commenced against him, his heir may be sued by the landlord to remove, upon the warning used against the deceased, without the necessity of renewing it, *Durie, Jan. 27. 1630, Hume*, (DICT. p. 3173.)¹³¹. It has been affirmed, that an executor may sue tenants in a removing, upon a warning used by the deceased, to the special effect of recovering the violent profits, explained, *infr. § 54.*, which, being a moveable subject, can be claimed by no other than the executor: But, *first*, An action for removing tenants from lands is competent to such only as have a real interest in these lands: *2dly*, It is absurd to admit a right in two different persons to bring a removing at one and the same time against the same defenders; and it is incontestable, that, in the case supposed, the landlord's heir hath a right to insist in a removing, upon the warning used by his ancestor: From which it appears, *3dly*, That the violent profits belong to the landlord's heir, not to his executor; for if the landlord transmit to his heir the right of prosecuting the removing, he must also transmit to him the right of the violent profits, which are truly appurtenances of that right of action, and so cannot be separated from it. In every case where warning was necessary, it behoved the landlord, by our former law, to observe strictly the whole order prescribed by the act

* The statute does not apply to houses though in the country, *Fac. Coll. Dec. 19. 1758, Lundin*, DICT. p. 13845. But if any portion of land be annexed, the warning even as to the houses must be in the precise terms of the statute. This may be inferred from *Macnaughton, Feb. 14. 1765, Fac. Coll. DICT. p. 13857.*

† There seems just as little authority for requiring the intervention of a borough-officer, provided the tenant get timeous notice either verbally or in writing from the landlord, *Fac. Coll. July 23. 1766, Tait*, DICT. p. 13864; *Ibid. July 10. 1781, Jollie*, DICT. p. 13865. In such cases, warning forty days before the term of removing is held sufficient, though there have been a local custom of giving more early notice, *Ibid. June 20. 1795, Jack*, DICT. p. 13866.

¹³⁰ Formal warning is not necessary in the case of *grass parks* let from year to year; *Macharg, 9th March 1805, Fac. Coll. DICT. v. REMOVING, App. No. 4.*

¹³¹ So also, a tenant dying after decree of removing, but before extract, his heir may be charged on the decree without a transference; *E. of Kintore, 9th Dec. 1809, Fac. Coll.*

act 1555; but because tenants frequently took occasion, from the multitude of forms prescribed by that act, to object nullities in the order of warning, which was attended with numberless inconveniences, both to landlord and tenant, an option is, by the before-cited act of sederunt 1756, given to landlords, either to follow the directions of the statute, or to bring their action of removing before the judge-ordinary, so as it may be called in court forty days before the Whitsunday preceding the ish, which is by the said act of sederunt declared (as it is indeed in common sense) equivalent to a warning executed according to the directions of the statute *¹³².

49. In sundry cases, actions of removing might, even before the statute 1555, have been insisted on without any previous warning. This kind of removing is competent either by law or paction. It is competent by law, *first*, Against vitious possessors who have seized the possession by force, or intruded into it, after the former possessor had given it up: for no statute can be construed to give countenance or protection to acts of violence or deceit: *2dly*, Against precarious possessors, who have no more than a tolerance to possess during pleasure. Yet even in this case the proprietor will not be suffered to eject the possessor instantly, without giving him a competent time to look out for a place of abode to himself and his family. *3dly*, Summary removing is competent against tenants who have been sued to give security for the rent already due, or which may fall due during the lease, and have given none; for the landlord is in danger of losing his rent by the delay, and the tenant has himself to blame for neglecting it, or putting it off, *Pr. Fac.* 13. (*Bethune's Tenants*, Dec. 22. 1681, *DICT.* p. 7307.). *4thly*, Warning is not necessary against one who had sold lands to the pursuer, and who nevertheless holds the possession after the term of the pursuer's entry; for such possession is destitute of all title. On the same ground, when a liferenter who was in the natural possession, dies, the fiar may enter to it without any form of law; and if he be hindered, he may sue the possessors of the liferented lands to remove without warning; for the right of liferent, which is the only title of their possession, being extinguished by the liferenter's death, can no longer support the possession; but if the liferenter possessed by tenants or tacksmen, these tenants, though they derived their only right of possession from the liferenter, cannot after his death be turned out of it till the next Whitsunday, that according to the spirit of the act 1491, C. 26., they may have time to provide themselves in other farms, *Cr. Lib.* 2. *Dieg.* 9. § 13. Yet upon an action brought against them, they may be compelled to remove at that term; *Durie*, Feb. 16. 1628, *Thomson*, (*DICT.* p. 8252.). In the case of a liferent-tack granted by the landlord, no action of removing was, prior to the late act of sederunt, competent on the tacksman's death against his representatives, without

Summary removing, when competent by law.

VOL. I.

5 D

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* But the action of removing must be specially laid upon the act of sederunt, *Fac. Coll.* July 4. 1764, *Carruthers*, *DICT.* p. 13868.

¹³² An action of removing, upon the act of sederunt, is not competent in the first instance before the Court of Session; *Cameron*, 30th June 1804, *Fac. Coll.* *DICT.* p. 13875. Removing may proceed on summary petition, if served more than forty days before the term. It was argued, that, "in the act of sederunt, reference was always made to an action preceeding on certain *inducia*, and being subjected to the formality of being called in Court;" but the objection was disregarded; *Hoy*, 2d June 1810, *Fac. Coll.* It is said, however, "that doubts have been expressed of this decision, by an authority entitled to great respect;" *Bell on Leases*, p. 461.

a previous warning, agreeable to the act, 1555, *Durie, Feb. 13. 1630, L. Rowallan*, (DICT. p. 13825.); for in every case where a tack is granted by the proprietor, warning is necessary; and as warning must be used in order to remove a tenant in a common lease, even after the term of its endurance is elapsed, though the lease carries no proper right to the tenant beyond that term, it must be also used upon the death of a liferent-tacksman against his representatives, though the right of such lease is truly extinguished by the tacksman's death. By a late judgment, however, *Fac. Coll. ii. 214, (Feb. 22. 1760, Tenent against Tenent*, DICT. p. 13845.), warning was found not to be necessary for removing the representatives of a liferent-tacksman, who had been bound by his lease to pay the nominal duty of one merk, for a subject which might have been reasonably let at the yearly rent of two hundred: but whether this decision was grounded on the elusory duty payable by the tacksman, which brought it out of the common case of a lease, or upon what other medium, does not appear by the decision*¹³³. Stair is of opinion, without exception, *B. 2. T. 9. § 23. and 38.*, that a tacksman of a colliery may be sued to remove summarily, or without warning †¹³⁴.

If competent
by paction.

50. The action of removing was competent, in the opinion of Craig, *Lib. 2. Dieg. 9. § 11.*, without previous warning, where the tenant became expressly obliged by his tack to remove, and deliver the void possession to the landlord, against a precise day or term without warning; which opinion is supported by a late decision, *Jan. 1736, Dickson*, (DICT. p. 13880.). But the dispensing with a solemnity established on considerations of public policy, and for protecting poor tenants against the oppression or severity of their landlords, seems to elude the law, and counteract the rule, *Pactis privatorum publico juri derogari nequit* ‡¹³⁵. And indeed the late
act

* The decision, according to *Kames's report*, DICT. *ibidem*, went on the general point. It is supported by *Stair*, *B. 2. Tit. 9. § 38.*; *Mack. Observ. p. 155.*; and is now fixed, *Fac. Coll. Dec. 13. 1794, Gordon*, DICT. p. 13851; *June 24. 1796, Stewart*, DICT. p. 13853. In these cases it was found that the heirs of a liferent-tacksman, having no title of possession, might be summarily removed¹³³. In so far, however, as the tenant has laboured and sown the ground, his representatives must either be allowed to reap, or must be indemnified.

† See *Fac. Coll. Dec. 15. 1767, Wauchope*, DICT. p. 13847. See as to a tack of feu-duties, *Kilk. No. 3. voce REMOVING, Darnley*, DICT. p. 13839¹³⁴.

‡ See the effect of such a stipulation discussed, *Kilk. No. 4. voce REMOVING, Bartlet*, DICT. p. 13882. Clerk *Home*, No. 274. *Edmonston*, DICT. p. 12415 and 13884¹³⁵.

¹³³ It is different in tacks granted "during all the days of the life of the landlord;" for there, the tenant in possession at the landlord's death must, in all cases, be legally warned to remove; *Johnston's Trustees, 2d July 1803, Fac. Coll. DICT. p. 15207; Udny, 1st Dec. 1802, ib. cit.*

¹³⁴ As to grass parks; *Vid. supr. not*¹³⁰.

¹³⁵ *Kilkerran* observes on this subject, that "it was agreed, that though a formal warning was not requisite, yet still some notice or intimation to the tenant was necessary, in time for the tenant's providing himself; which, in common cases, probably might be thought to be forty days before the term;—though that was not spoke to;" *Bartlet, supr. not. † h. p.* To the same effect, it is reported recently to have been found, that "where a tenant binds himself to remove, without warning, an action at common law, on this obligation, is competent, provided it be executed and called against the tenant forty days prior to Whitsunday;" *Stevensons, 23d June 1821, (S. and B.).*

An agreement to remove without warning may be proved by the oath of the tenant; *Edmonston, supr. not. † h. p.* So also it may be proved by the landlord's oath, "that he had verbally agreed the tenant should have leave to remove without renunciation;" *Carlisle, 24th Jan. 1734, ib. cit.* Where an actual agreement is not admitted, the Court will not infer it from a few equivocal circumstances in the conduct of either party; *Gordon, 13th Jan. 1803, Fac. Coll. DICT. p. 13854.* But it will be otherwise, if a substantial *rei interventus* has taken place, "such, for example, as ceding part of the
" possession

act of sederunt, 1756, seems to have considered the matter in this light; for though that act declares it lawful for the landlord, where the tenant has expressly bound himself to remove without warning, to charge him with horning on his obligation; yet it is only in the precise case, that he actually charges the tenant forty days before the Whitsunday, and produces the tack, and horning duly executed in court, that the judge-ordinary is authorised to eject him in six days after the ish. If the landlord shall suffer a tenant who is bound by a clause of this kind, to possess longer than the term expressed in his tack, the paction to remove without warning is no longer of force; and consequently the tenant possesses from that time by tacit relocation*. In all removings which require no previous warning, the court of session had the sole cognisance, because such removings are extraordinary remedies, *Pr. Falc.* 13. (*Bethune's Tenants*, Dict. p. 7307.); whereas the judge-ordinary was always competent in those common removings which were brought in consequence of the statute 1555¹³⁶.

51. A landlord's title to prosecute a removing, be it good or bad, cannot be questioned by a tenant who derives his possession from him, if he has not been formally decreed by the sentence of a competent judge to acknowledge another landlord, *St. B. 2. T. 9. § 41.* Thus, a proprietor, though he hath a bare personal right to the lands by a grant not perfected by seisin, may sue tenants to remove, whose tacks have flowed immediately from himself; for however defective his title may be, it is the only foundation of theirs. But if a proprietor is to insist against tenants or possessors who derive their right from others, seisin is, by our customs, a necessary title in removing: and in that case he must make those others parties to the removing, if they have been in the possession; but if not, the pursuer need not regard them. Seisin is not necessary where the pursuer's right is founded on the terce or courtesy; these being legal rights, which are perfected without seisin. A seisin is of itself a sufficient title for removing possessors who cannot show a better; but if the defenders have a real right in the lands, the seisin is not held as sufficient, without producing the relative charter. The pursuer must be infest, not only before the action of removing be commenced, but also from the date of the precept of warning: For if the landlord's right in the lands be not completed by seisin at the time he issues his orders for warning the tenant, the precept itself is null, as proceeding *a non habente potestatem*; and consequently the removing, which is grounded on it †¹³⁷. This however

Title to prosecute a removing.

* The doctrine here laid down does not seem to be supported by the act of sederunt, which authorises a charge of horning against the tenant forty days "preceding the term of Whitsunday in the year in which his tack is to determine, or forty days preceding any other term of Whitsunday thereafter."

† See *Ferguson against Morison*, June 24. 1802, Dict. p. 19806.

"possession to the landlord, or receiving payment of a certain sum as a consideration for removing without warning, or receiving another farm on that condition, or being allowed to depart from a prescribed course of cropping;" *Bell on Leases*, p. 488, and cases *ib. cit.*

¹³⁶ In the case of *Stevenson*, *supr. not.* ¹³⁵, the action was raised in the Sheriff-court.

¹³⁷ Infestment prior to the period of forty days before the term, and prior to the calling of the summons of removing in Court, sustained, though posterior to the date and execution of the summons, as a sufficient title in an action of removing; *Campbell*, 2d March 1808, *Fac. Coll.* Dict. v. REMOVING, App. No. 5. In a later case, it was observed, that by the A. S. 1756, the calling in Court, not the execution of the summons, was declared to come in place of the warning; *Johnston*, 3d March 1810, *Fac. Coll.*

Book II.

ever admits of an exception in the case of an apparent heir; for though he be not served heir at the date of the precept, yet if he be served, and infeft on his service, before commencing the removing, the bare right of apparency, which law accounts a sufficient title for possessing the ancestor's estate, serves to support the warning on which the removing is grounded, *Durie, July 28. 1637, E. Hardinton*, (DICT. p. 3173.) *¹³⁸. It would seem that a seisin upon a precept of *clare constat* is not a good title in a removing, unless either the predecessor of the heir in whose favour the precept is granted, or the superior himself, had been in possession; because a pursuer who enters to the lands upon such precept, brings no other evidence of his being heir, than the superior's affirmation in the precept, *St. B. 2. T. 9. § 41. vers. Though infestment* †.

If seisin is a necessary title.

52. The common opinion, that seisin is a necessary title in all removings where tacks have not flowed from the pursuer, is not clear of difficulties. It is doubtless true, that those who have barely personal rights to land, cannot, by the genius of the Scottish law, hold courts, not even for the payment of rent; because the holding of courts is an act of jurisdiction, which, being incident to a feudal tenure, cannot be exercised without seisin. But though for that reason a proprietor not infeft cannot insist in a removing before his own court, he seems entitled by common law, in consequence of his property, to bring a removing against tenants before the sheriff, whether their leases have flowed from himself, or from others, in every case where they cannot shew a better right than his: For as a disposition to lands carries an express right to mails and duties, or to the rents, the right of removing tenants appears to be a necessary consequence resulting from thence.

If a joint undivided interest in lands gives a title.

53. A proprietor who has no more than a joint interest with another in a land-estate *pro indiviso*, cannot by himself remove tenants from his part of the land, without the concurrence of the joint proprietor, as long as the land is undivided¹⁴⁰; because every inch of the ground belongs to both proprietors *pro indiviso* in indeterminate proportions; and consequently it is impossible for the tenant to remove from the share of the lands belonging to the pursuer, in the removing, without also removing from that which is vested in the other proprietor; to which the law cannot compel him, unless that other concur in the suit. This is the case of co-heiresses,

* But without such infestment the action cannot legally proceed, *Fac. Coll. Dec. 15. 1757, Paton*, DICT. p. 13806.

† *Craig* mentions those cases in which action of removing is competent to a tacksman: "Si modo aut sit vitalis assedatio, aut conditionem expressam continent, ut colono tenentes removere liceat, aut saltem assedatarius sive colonus in possessione fructuum percipiendorum fuerit." *Lib. 2. Dieg. 9. § 22. Stair*, in the passage cited by Mr Erskine, lays down nearly the same doctrine; and *Durie* reports a case, *March 12. 1629, L. Gallowsheils*, DICT. p. 15251., where removing was sustained at the instance of a tacksman who had no power to input and output tenants, though it is not stated whether the tacksman was in possession¹³⁹. In a later case the Court found, "That the tack not being for more than nineteen years, and the tacksman not in possession, he had no title to pursue a removing," *Feb. 19. 1747, Gentle; Kirk. No. 6. voce REMOVING; Falc. vol. 1. No. 169, DICT. p. 13804.*

¹³⁸ Found, that an heir has a sufficient title to insist in a removing, provided he be infeft before the calling of the case, although he had not been infeft before the execution of the summons; *Johnston, 3d March 1810, Fac. Coll.*

¹³⁹ It is implied in *Durie's* report, and expressly stated in one by *Spotiswood*, DICT. p. 15252, that the tack was not "clothed with possession;" but it does not appear what was the extent of its duration. If it was for more than nineteen years, the decision is quite reconcileable with that in the case of *Gentle*.

¹⁴⁰ So found, *Bruce, 16th Nov. 1808, Fac. Coll.*

heiresses, of joint purchasers, and of a widow entitled to a terce, till there be an actual division of the lands.

54. The tenant, before he be admitted to plead any defence against the removing which cannot be instantly verified, must give security to pay the violent profits to the pursuer in case his defences should be repelled, 1555, C. 39. *Violent profits* are so called, because they become due on the tenant's forcible or unwarrantable detaining the possession after he ought to have removed; for whatever is done without proper warrant or authority, is, by the law, accounted violence; L. 13. *Quod. met. caus.* In tenements of houses within borough, they are estimated to the double of the rent or tack-duty; in lands, it is the full profits the pursuer could have made either by possessing them himself or letting them to others: So that, in either case, the violent profits are made higher than the rent payable before the warning, the more effectually to discourage the holding of possession where the right to possess hath ceased*. But if the tenant has had a *probabilis causa litigandi*, the decree will be restricted to the yearly tack-duty payable by the tack. It is a usual defence against a removing, That the defender has given obedience to the warning by removing voluntarily. But this is not sufficient by itself, if he hath not also given timely notice of it to the landlord, that he may either enter into the possession of it himself, or give it to another; for if, by neglecting this, a stranger hath been suffered to intrude, the tenant will be liable in damages; *Forbes, July 21. 1713, Budge, (DICT. p. 13890.)*. It is no good defence against passing judgment in this action, That no judgment ought to be pronounced against the tenant till the term at which he is bound by the lease to remove; *Stair, Nov. 21. 1671, Riddel, (DICT. p. 13828.)*; for if that plea were good, there could be no ready execution, when that term came on, against tenants who shew a backwardness to remove; and thus the new tenant might be disappointed: But the execution of the sentence must, in this case, be suspended till after the term. If the action of removing shall be passed from, or if the landlord shall, at any time after using warning, accept of rent or services from the tenant for years or terms posterior to that at which he was warned to remove, he the landlord is presumed to have changed his mind, and tacit relocation takes place: for his acceptance of such rent implies his consent, that the tenant shall continue tenant for that year, or term, in consideration of which he has received part of the rent or services¹⁴¹: But the landlord's accepting of services which the tenant is not obliged to perform by the tack, infers no prorogation of it, and so can afford no defence against removing; for in these, the tenant cannot be considered as fulfilling an obligation under which his tack laid him to his landlord, but as making a present to one whom he was willing to oblige.

55. It is declared by the aforesaid act of sederunt 1756, § 3., that in all leases where the tenant had subset the lands in whole or in

VOL. I.

5 E

part,

* Violent profits have been found to comprehend damage done to the subject of the tack; *Fac. Coll. Nov. 21. 1783, Morton and Company, DICT. p. 13893.*

¹⁴¹ But the implication goes no farther than tacit relocation for such year or term. Where decree of removing, therefore, has once been obtained,—whether on the ground of forfeiture of the lease,—or of its being no longer obligatory on any ground whatever,—the tenant's title of possession, as under such lease, is extinguished: and the landlord by receiving rent, and allowing the tenant to remain for another term, does not revive the lease, or to any extent derelinquish the effect of his decree, as establishing the defective character of the tenant's right; *Grierson, 17th Nov. 1812, Fac. Coll.*

TITLE VI.

The tenant, before defences, must find security for violent profits.

Warning against the principal tenant effectual against subtenants and assignees.

The landlord's
right of hy-
pothec.

part, or where the leases have been assigned, and the assignation not intimated to the landlord, warning used against the principal or original tacksman, and action of removing brought, and decree recovered thereupon, shall be effectual also against the assignees and subtenants, though neither warned nor made parties to the removing. By the same act, § 6. and 7., no bill of advocation, or of suspension, in a removing, can be passed but by three Lords in vacation-time, or by the whole Lords in time of session: And all removings, whether brought before the session originally, or by advocation or suspension, are entitled to a summary discussion without abiding the course of the roll.

56. The landlord has, in security of his tack-duty, not barely the tenant's personal obligation expressed in the lease, but a real right in the fruits of the ground, and in the cattle brought upon it by the tenant. A subject may be given to a creditor in security, either when it is put under his power; and this sort was called by the Romans *pignus*, and by us a *pledge*; or the debtor may, notwithstanding the security, be allowed to retain the possession of the subject; and then the right is called *an hypothec**. Hypothecs are either express, constituted by the explicit convention of parties; or tacit, otherwise styled *legal*, which, without any positive covenant, are established by the law itself from presumed consent. Of this last kind is the landlord's hypothec for his rent. It is not only competent to the landlord himself, but to any to whom he may assign the rents; for the assignation of rents is, in the judgment of law, a conveyance of every legal right, by which the payment of those rents is secured; *Forbes, July 23. 1707, Wedderburn*, (Dict. p. 10399.). But an adjudger hath no title to it, unless he be infest, and hath used diligence to attain possession upon his adjudication; *Stair, July 29. 1675, E. Panmure*, (Dict. p. 14088.).

On the fruits of
the farm.

57. All fruits, while growing, belong truly to the proprietor of the ground, in consequence of his right of property; and though they become the tenant's by his reaping, or otherwise separating them from the ground, with the landlord's consent; yet by the Roman law they continued, even after being reaped, to be charged with the payment of the yearly tack-duty, and so became the subject of the landlord's hypothec; because his consent to the reaping implied a condition, that the stipulated rent should be paid out of those fruits to himself, *L. 7. pr. In quib. caus. pign.*; *L. 61. § 8. De furt.* By that law, the landlord had no hypothec on the cattle pasturing on the ground, without express covenant, *L. 4. pr. In quib. caus. pign.*; because these never belonged to the proprietor. Nevertheless, not only the fruits, but the cattle brought on the ground, are, by the law of Scotland, subjected to this hypothec, partly for the landlord's greater security, and partly because, in grass-grounds where little or no corn is sown, the subject of the hypothec would be frequently reduced to a trifle if there were none upon the cattle †. These two, as they have different properties and effects, shall be handled separately.

58. In

* See the origin of the landlord's right of hypothec ingeniously traced by Lord Kames, *Elucidations*, art. 10.

† See *Kilk. No. 6. voce HYPOTHEC, Alison, July 1748, Dict. p. 6246.*; where the question is stated, but not decided, Whether, in a lease of lands, the landlord has also a hypothec to a certain amount on the tenant's household furniture¹⁴³?

¹⁴³ In the above case, "the Lords rather hesitated than gave any positive opinion; they, however, seemed to think, that though the hypothec might not extend to the household

TITLE VI.

It entitles the landlord, *first*, to retain them on the ground,

58. In virtue of the hypothec upon the corns, and other fruits, the landlord can, either, *first*, retain them on the ground, against all who shall attempt to carry them off, whether purchasers, or even creditors upon legal diligence ready to be executed by poinding; or, *2dly*, he can recover them from those who have intermeddled with them¹⁴³. The first right, *viz.* of retention, is confined to the fruits which remain in the tenant's possession, that are by law impignorated for that year's rent only that is current, when the landlord exercises his right*. All these fruits, whether yet growing, or in the tenant's granaries, are, by the present practice, without distinction of crops of which they are the growth, understood to fall under the landlord's hypothec, as a security for that year's rent, in so far as relates to this right of retention. Thus a landlord may stop a creditor who offers to poind his tenant's corns, from carrying off even such of them as are the growth of a year, the rent of which has been already paid, unless he shall leave a quantity sufficient for the payment of the rent of that year in which the creditor useth his diligence¹⁴⁴.

59. The right to retain is much stronger before the term of payment of the tenant's rent than after it¹⁴⁵. If a creditor of a tenant shall attempt to poind any part of the fruits for the payment of his debt *currente termino*, the landlord can stop the poinding, though the creditor should leave as much on the ground, whether cattle or even corns, as would be sufficient for the year's rent; because, before the term of payment, the landlord can barely retain the subject of the hypothec, but cannot put forth his hand to make it his own; and the cattle left on the ground may die, the fruits may be rotted with rains, or both may be clandestinely carried off before that term †. His right of retention thereof continues till

Till payment or security.

* From this, and another passage near the end of § 60., it seems to have been the author's opinion, that the right of *retention* of fruits is less extensive than the right of *recovery*, if the year be passed in which the fruits were produced. But it is doubted, if there be any good ground for this distinction. The author himself, in his *Principles of Law*, B. 2. Tit. 6. § 26., lays it down in general terms, "That the corn and other fruits are hypothecated for the rent of that year whereof they are the crop;" and they ought to be more easily retained than recovered. See also *Mack*. B. 2. Tit. 6. § 12.; *Stair*, B. 1. Tit. 13. § 15.; *Bankt.* B. 1. Tit. 17. § 8.; *Kilk.* No. 1. *voce* HYPOTHEC, *Crawford*, Jan. 21. 1737, *DICT.* p. 10531.; *Elucid.* art. 10.; *Infr. not.*¹⁴⁴.

† This doctrine is supported by a decision, *June* 30. 1736, *Pringle*, *DICT.* p. 6216. See also *Crawford*, Jan. 21. 1737, *DICT.* p. 10531. and 6193.

"household furniture, the master had a right of retention thereof."—"Meantime the Court was clear, that, as in this case the tenant was a gentleman, and whose household furniture exceeded that of an ordinary tenant, in no event, be it hypothec, be it right of retention, could it go farther, than to the extent of such furniture as might be suitable to an ordinary tenant;" *Kilk. ut supr.*

"This point is left unsettled;" 2. *Bell's Comm.* p. 33., and see *Bell on Leases*, p. 292, *et seqq.*; *Elchies, v. HYPOTHEC*, No. 13., being the same case which is reported by *Kilkerran*. As to the landlord's hypothec on the furniture of *urban tenements*, *vid. infr.* § *ult. h. t.*

¹⁴³ The claim of a farm-servant for his current wages, is preferable to the landlord's hypothec; *McGlashan*, 29th June 1819, *Fac. Coll.*

¹⁴⁴ This doctrine is incorrect. Hypothec is not competent for the current rent, over the produce of another year. "The produce of the farm is hypothecated for the rent of the year whereof it is the crop, and for none else; the right remaining to the landlord as long as the crop is extant;" 2. *Bell's Comm.* p. 37.; *Durie, Kerse and Had.* 25th July 1623 and 3d Feb. 1624; *Hay*, *DICT.* p. 6188; *Kilk.* and *Kilck Home*, 21st Jan. 1737; *Crawford*, *DICT.* p. 6193. and 10531, and *Elchies, v. HYPOTHEC*, No. 6.; *Bell on Leases*, p. 277, *et seqq.*; *supr. not.* * *h. p.*

¹⁴⁵ The distinction may be shortly stated thus:—"If the rent be due, the landlord may insist on detaining on the ground the full value of that rent:—If not yet payable, he may insist that the whole crop and stock shall remain subject to his claim;" 2. *Bell's Comm.* p. 37.

till the creditor shall either make payment to him of the current year's rent, which necessarily extinguishes the hypothec; or shall offer him sufficient personal security for it, which the law, from a consideration of equity, obliges the landlord to accept, Clerk *Home*, 49, (*Crawford*, Jan. 21. 1737, Dict. p. 6198 and 10531.)*. But if the rent be payable in kind, *ex. gr.* in wheat, barley, &c. the landlord may stop the pouding, though a general offer should be made by the creditor of security for the rent; because he hath a right by his lease to demand the *ipsa corpora*: And if he has already sold his farms, he may be made subject to the damage sustained by the purchaser by his not delivering the full quantity of grain sold. The creditor, therefore, in that case, cannot lawfully proceed to poud, unless he shall give to the landlord security to deliver, in kind, the quantities of grain specified in the lease granted to the tenant, against the day or term therein stipulated; *Falc.* i. 252. (*Hall*, June 2. 1748, Dict. p. 6228.). After the term of payment of the rent is come, the landlord has not only a right of retention, but he may, like any other creditor, appropriate to himself, by his diligence, as much of the subject of the hypothec as amounts to the rent: From that period, therefore, *i. e.* after Candlemas, when the rent is payable in grain, the creditor, if he leaves on the ground a quantity of corns sufficient for that purpose †, may proceed to poud the residue, and the tenant's other goods.

60. The landlord hath, in virtue of his hypothec on the fruits, not only a right of retention, but of recovery: For though they should be carried off from the ground, whether by a purchaser or a creditor, he may bring them back to the tenant's granaries, there to remain for his own security, if the term of payment of the rent be not come; and if that term be passed, he may appropriate them to himself; *Durie*, July 25. 1623, and Feb. 3. 1624, *Hay*, (Dict. p. 6188, 6189.). Though it seems inconsistent with equity to sustain this right of recovering the fruits in a corn-farm where the tenant pays nothing but money-rent, since the chief fund for the payment of such rent must arise from the sale of his corns; yet, *de praxi*, the landlord is entitled, even in that case, to an action against the purchaser, for recovering either the corns sold or their price: And an old decision carried the point still farther, against purchasers in a public market, *Durie*, March 29. 1639, *Hay*, (Dict. p. 6219.). But that judgment is justly censured by writers, seeing the very subsistence of fairs and markets depends on the security of purchasers, who cannot possibly know the condition of every man they may happen to deal with there. If the landlord use this right of recovery *de recenti*, he may bring back the corns *via facti*, without the authority of a judge; because, in such case, the law considers them as still in the tenant's possession, *Stair*, Dec. 11. 1672, *Crichton*, (Dict. p. 6203.), unless where the tenant's creditor has made them his own by complete lawful diligence, *Falc.* i. June 24. 1745, *Currie*, (Dict. p. 6206.). But after the corns have been carried to and settled on the grounds of the purchaser or creditor, by which he acquires the lawful possession, the landlord cannot *sibi jus dicere*, by forcibly recovering them out of his hands; but must make good his right upon the hypothec, by an action against the possessor before the judge-ordinary, *Stair*, Feb. 9. 1676, *Park*, (Dict. p. 6203.).

This

* In such case, the creditor may make his offer, on condition of the landlord assigning his rent and hypothec, *Ibid.*

† Or offer to pay the rent.

It entitles,
2dly, to recover them from
third parties.

This right for the recovery of the corns is not restricted, as that of retention is, to a security for any one year's rent *; but the several years' corns stand hypothecated for the rent of that year of which they are respectively the crops, though the landlord should not have attempted their recovery by an action for many years together, *Durie, July 25. 1623, Hay*, (DICT. p. 6188.) †; see also the style of a summons on the hypothec, *St. B. 4. T. 25. § 5. ‡*. It is a good defence against this action, that the defender, when he poynded or intermeddled with the corns of a particular crop, belonging to the tenant his debtor, left upon the ground at the term of Candlemas as many fruits as might fully satisfy the landlord for the rent of that year of which these corns were the crop, *Durie, Feb. 3. 1624, Hay*, (DICT. p. 6189.) ¹⁴⁷.

61. The landlord has an hypothec, not only on the fruits, but on the cattle. As this kind does not, like the Roman hypothec on the corns, arise *ex natura*, but is an arbitrary constitution introduced by custom, our lawyers are agreed, that it is not so strong as that on the fruits, *St. B. 1. T. 13. § 15. &c.* The chief difference between the two seems to lie in this, that the hypothec on the cattle is not, like that on the corns, special so as to affect every cow, or sheep, or lamb; but is general, upon the whole flock or herd; and is, by its nature, subject to the administration of the tenant; who, upon the one hand, may enlarge the subject of the hypothec, by purchasing a new parcel of cows or sheep, and, on the other, has a discretionary power of diminishing it, by selling part of his stock; and if the landlord suspects the tenant's management, he may, by sequestration or poynding, make his right, which before was general on the whole stock, special upon every individual ‡. Hence, though the landlord hath the same right of retention, in virtue of his hypothec, on the cattle as on the fruits; for that is a right common to all hypothecs, *June 30. 1736, Pringle*, (DICT. p. 6216.); yet where any number of the tenant's cattle is carried off in consequence of a purchase, the landlord has no right of recovery, the property of the goods purchased being by the sale lawfully transferred

The landlord's hypothec on the cattle.

* See Note on § 58., as to the right of retention.

† This decision relates to the case of a donatar of the tenant's escheat, intermeddling with the crop. It may be doubted whether the same rule would apply to a purchaser, unless where the right is used *de recenti*.

‡ The diligence of sequestration, by warrant of the judge-ordinary, is the legal remedy on every kind of hypothec. On the landlord's application, a warrant is granted for service on the tenant, and in the mean time for sequestration, which is executed by an inventory of the tenant's crop or stocking, made under authority of the judge, to whom it is immediately reported. If the tenant fail to make answer to the petition within the time limited by the first deliverance, warrant of sale will be awarded, before the term of payment, on special cause shown to have arisen from the tenant's insolvency, or otherwise. See *Fac. Coll. June 25. 1784, Dow*, DICT. p. 6202.; *Ibid. March 10. 1784, Grant*, DICT. p. 6201 ¹⁴⁶.

¹⁴⁶ The grain, &c. sequestrated, remains at the risk of the tenant. It has accordingly been found, "that by the mere act of sequestration, the custody and possession of the growing crop sequestrated is not transferred from the tenant to the landlord: nor does the landlord by that act become proprietor, at whose risk the crop must stand, nor responsible for any deficiency occasioned by embezzlement or otherwise." *Brims, infr. not. 147*;—2. *Bell's Comm.* p. 38.

¹⁴⁷ Even where the landlord has attached by sequestration such part of the crop as at the time seemed sufficient to answer his claims, yet if afterwards there shall really turn out a shortcoming, it is held that "any person purchasing the remaining part of the crop must have done so under the condition, that it must be liable for any deficiency, in case the crop sequestrated, when sold, did not amount to the rent." *Brims, 31st May 1815, Fac. Coll.*

ferred to the purchaser, unless where special circumstances may presume collusion between the buyer and seller to the landlord's prejudice. As the tenant has not the same power of disposing of the cattle for the payment of debt, as he hath in the way of a proper sale, it is more doubtful whether a creditor who hath carried off the tenant's cattle by poinding, be secure against the landlord's action of recovery*. Though no action for recovery lies against a poinder after the term, if he has left sufficiency of corns for payment of the year's rent, he is not secure if he has left nothing but cattle on the ground, though exceeding in value the year's rent; for the landlord is not obliged to accept the payment of his rent in cattle, which wastes the tenant's stock that may be necessary for the farm, *St. B. 4. T. 25. § 6.*; see *Durie, March 31. 1624, La. Dun, (Dict. p. 6217.)*.

Limited to three months after the term of payment of the rent.

62. The cattle, when considered as an *universitas*, are not the produce of any one year, and so cannot be hypothecated for the crop of a particular year. They are therefore subject to the landlord's hypothec, only for one year's rent, at one and the same time, which is the rent of the current year, and when that is past, for the rent of the next year, and so successively, one after another. This right cannot be exercised by the landlord before the conventional term of payment of the year's rent, because he can have no pretence to apply the hypothec to the payment of a debt which cannot yet be demanded; and if he were tied down to apply it precisely on the term-day, under the penalty of forfeiting his right, the consequence might be, both the laying waste his farms, and the ruin of his tenants. Practice therefore hath fixed on three months after the last conventional term of payment of the rent, as a reasonable time to avail himself of his right, with some forbearance to the tenant; which three months being expired, the hypothec ceaseth for the rent of that year, *Kames, 76. (Hepburn, Jan. 1726, Dict. page 6205.)* †¹⁴⁸. Yet cases may occur, where this rule cannot be conveniently applied; *ex. gr.*, where a lease contains very distant terms of payment, perhaps two or three years after the legal term.

Where the lands are subset.

63. As a tacksman cannot hurt his landlord's right by subsetting part of the lands, the hypothec, both on the fruits and the cattle, is as strong over the grounds subset, as if the whole lands had been possessed by the principal tacksman, unless the landlord hath, by some deed, acknowledged the subtacksman, *Fount. June 25. 1700, Lo. Saltoun, (Dict. p. 1821.)*; and even as to the tack-duty payable by a subtacksman, whom the landlord had accepted of, it was adjudged, that though the subtacksman was liable directly in payment of his tack-duty to the principal tacksman, whose tenant he is; yet the landlord falls to be preferred upon it, in so far as it is yet unpaid, in a competition with the other creditors of the principal tacksman, *Stair, Jan. 31. 1665, Anderson, (Dict. p. 6235.)* †¹⁴⁹. He

* The Court have given effect to the landlord's right of recovery in such a case, *Fac. Coll. Feb. 15. 1781, Macdowal, Dict. p. 6215.*

† *Kilkerran, No. 1. v. Hypothec, Crawford, Jan. 21. 1737, Dict. p. 10591*, subscribes to this doctrine; and it is confirmed by *Fac. Coll. June 19. 1766, Rorison, Dict. p. 6211.*; *Ibid. July 26. 1775, Cathcart, Dict. p. 6212.*

‡ Where a tenant has made a subset, in consequence of powers, either expressed in his lease, or implied from the length of its endurance, it seems not yet a decided point, whether the subtenant is exonerated by payment of his stipulated rent to the principal tacksman. The subject is fully discussed in *Fac. Coll. March 8. 1785, Blane, Dict. p. 6232* ¹⁴⁹.

¹⁴⁸ *Vid. Christie, infr. not. 151 ad fin.*

¹⁴⁹ The case of *Blane* seems to be an express authority in favour of the subtenant, where

He seems to have the like ground of preference on the grass-rent due to the tenant by strangers whose cattle have been pastured upon the tenant's grounds. But the opinion that the landlord hath as proper an hypothec on the cattle themselves belonging to the strangers, as on those which are the tenant's own property, appears neither to be founded in equity, nor supported by practice^{* 150}. The superior hath also an hypothec on the fruits for his feu-duty, of the like general nature with that of the landlord, *Mack. § 12. h. t.*: But in a competition between the two, the superior's right prevails over the other; for where a vassal lets his land to a tenant, it is to be understood with the burden of all feu-duties payable to the superior, whose right cannot be impaired by any act of the vassal.

64. The landlord of a *prædium urbanum* has an hypothec on the goods brought into it by the tenant for a year's rent, *Durie, Dec. 7. 1630, Dick*, which is called by the Romans the hypothec of *invecta et illata*, *L. 6. In quib. caus. pign.* This right is competent, not only in tacks of dwelling-houses, but of all tenements which have no natural fruits, as mills, shops, breweries, collieries, &c. In tacks of dwelling-houses it extends to household stuff, plate, paintings, books, and whatever else is brought into the house; *Fount. June 12. 1703, Count. of Callander*, (*Dict. p. 6244.*); stated in (*Folio Dict. i. 419*)¹⁵¹. In mills, breweries, collieries, &c. it includes all the utensils

Hypothec on the *invecta et illata* of urban tenements.

* It is perfectly understood that no such hypothec exists; *Edgar, Nov. 19. and Dec. 1. 1724, Brown, Dict. p. 6204.*; *Fac. Coll. Dec. 4. 1780, Mackye, Dict. p. 6214.*

where the lease confers "a special power to subset;" and the inference is unavoidable, that the same must hold, where the lease is of such a nature as necessarily to imply that power. It is true, "It was observed on the Bench, that this decision was not to be viewed as determining, in general, that the landlord's hypothec, when subsetting was *not prohibited*, could be excluded in consequence of payments made, after the legal term, to the principal lessee." But the observation appears to have reference merely to those cases, in which the tenant had no power to subset, either express or implied, and where the landlord, instead of altogether preventing, only thought it requisite not formally to sanction the sublease. In such case, "the landlord is not bound to recognise the subtenant at all in any other character than as intermitter with the fruits of the farm; while the subtenant makes payment of his subrent to the principal tenant, at his own risk, aware, as he must be, of the landlord's right;" *2. Bell's Comm. p. 36.* But where the landlord has recognised the subtenant, or, without recognising him, has given a power to subset, or where, as in the case of an urban tenement, such power is inherent in the lease,—this "is held as a tacit liberty to the subtenant to pay his rent to the principal tenant, if not interrupted by the landlord;" *Ibid.*

It has been questioned, whether the subtenant of a part is exposed to the hypothec for the whole of the principal tenant's rent? From what has been said, this question can arise, only where the sublease has not received the sanction or authority of the landlord. *Mr Bell* remarks, with almost more than necessary diffidence,—“Much may be said on both sides; but I see no clear principle on which the subtenant can oppose the exercise of the universal right of the landlord; or demand more than an assignment of that right, in equity, that he may operate his relief against the principal tenant, or against other subtenants;” *Ibid.*

There is another question, Has the tenant an hypothec against the subtenant? And as the power to subset, whether express or tacit, may be considered as an assignation to the tenant of all the landlord's rights and remedies for payment of rent, this seems to be a sufficient ground on which to admit hypothec to the tenant;” *Ibid.* This doctrine was strongly confirmed in a late case; *Christie, 14th Dec. 1814, Fac. Coll.*

¹⁵⁰ *2. Bell's Comm. p. 33.*

¹⁵¹ The hypothec reaches furniture let out to the tenant for hire; *Penson and Robertson, 6th June 1820, Fac. Coll.*, where a hired musical instrument was held to fall under it; *Stewart, 31st May 1814, Ibid.*, as reported in *Appendix to vol. 1814-15; Bankt. B. 1. t. 17. § 10. vers. "It is only;" 2. Bell's Comm. p. 34.* According to the last of these

sils and instruments brought thither by the tenants, for carrying on their respective branches of business. But this right in the *invecta et illata* is not accounted a special hypothec: For all the tenants of those several tenements may dispose of such pieces of household furniture, or other goods brought into the house, as they have no farther occasion for *; and in the case of a shop, the tenant must, from the nature of the lease, have an unlimited power of selling his shop-goods; for he rents the shop for that very end, that he may have it as a place of sale. By the shopkeeper's alienation of his goods, therefore, the property of them is lawfully transferred from him to the purchaser, and so remains no longer part of the hypothec: And if the landlord entertain any suspicion that the tenant is disposing of the shop-goods to his prejudice, he may, as in the case already stated, § 61. secure for his own payment, by sequestration or arrestment, what yet remains in the shop not sold. Hence also it follows, that purchasers of shop-goods from a shop-keeper are secure against any action for restitution at the suit of the landlord †.

TIT.

* As to a pointing of such goods; *Vid. Fac. i. July 9. 1745, Jackson, Dict. p. 6245*¹⁵².

† The bankrupt act (33. Geo. III. c. 74. § 6.) saves "the landlord's right of hypothec for rents, or any other hypothec known in law, which shall be nowise hurt or impaired by any thing contained in this act"¹⁵³. The Court had previously found, that the landlord's right was not affected by the prior bankrupt statute, 12. Geo. III. c. 72.; *Fac. Coll. Nov. 24. 1772, Baird, &c. Dict. p. 6271; Ibid. Aug. 10. 1781, Buchan, Dict. p. 6272.* See on the same subject, *Ibid. June 21. 1780, Creditors of Wright, Dict. p. 6272.*

In a note to B. 1. Tit. 3. § 31. it is stated, that the prerogative suit or process of the Crown prevails over the landlord's right of hypothec. The statute 33. Hen. VIII. c. 39. § 74., under which (as extended to Scotland by 6. Ann. c. 26.) the Crown enjoys this preference, makes it a condition that "the said suit be taken and commenced, or process awarded, at the suit of the king, before judgment given for the said other person or persons;" and it has been made a question, What shall be held as a "judgment" at the landlord's instance? In a case where the prerogative process had been obtained after a sequestration and warrant of sale, but before the day of sale had arrived, the Crown was found preferable; *Fac. Coll. July 6. 1802, Robertson, Dict. p. 7891*¹⁵⁴.

these authorities, "furniture which is not let out, but merely deposited in the house, or lent to the tenant, *without a rent*, seems not to be comprehended under the same principle; and accordingly was in one case held free from hypothec;" 2. *Bell's Comm. p. 35, citing Cowan v. Perry, 31st Jan. 1804.* But see, on the other hand, *Wilson, 17th Dec. 1813, Fac. Coll.*, where it is reported to have been found that the hypothec extends even "over furniture lent to the tenant *without hire*;" which last decision however, is disregarded by Mr Bell, who appears to consider it as having proceeded in some sort on a specialty; 2. *Bell's Comm. p. 35. not.*²

Goods of third parties deposited in a warehouse,—property sent to a workshop for the purpose of being manufactured,—effects belonging to travellers in an inn or hotel, &c. are not subject to hypothec for the rent of the warehouse, &c.; 2. *Bell's Comm. p. 35.*

The hypothec, in urban tenements, (like that over farm stocking) continues for three months after the term; within which period the landlord is entitled even "to follow the property into the possession of another landlord, and there sequester the *invecta et illata* that had formerly been in the sequestering party's house;" *Per Curiam in Christie, 14th Dec. 1814, Fac. Coll.*

¹⁵² It was here found, that a creditor "could not point in prejudice of the landlord's right of hypothec, unless actual payment had been made of the rent for which the goods stood hypothecated." He was therefore ordained "instantly to restore the goods pointed, or make payment of the year's rent;" and "summar warrant" was granted "to apprehend and incarcerate him until he should obtemper the sentence."

¹⁵³ This saving clause is repeated 54. *Geo. III. c. 137. § 5.* The landlord has another security, for payment even of arrears not covered by his hypothec. *Vid. Nisbet's Trustee, &c. supr. § 34. not.*¹¹³; 2. *Bell's Comm. p. 39.*

¹⁵⁴ The Crown has been held preferable, even after sale of the goods, the prerogative process being prior to a warrant for payment to the landlord; *King v. Johnston, 29th June 1809, (Exchequer) reported 2. Bell's Comm. p. 64.*

TIT. VII.

Of the Transmission of Rights by Confirmation or Resignation.

AFTER having considered the nature and extent of the right acquired by the vassal in consequence of the feudal contract, the forms of transmitting that right may be explained. A vassal may transmit his right, either upon his death, to heirs, of which afterwards; or while he is yet alive, to those who acquire by gift, purchase, adjudication, or other particular title. He who thus transmits a feudal right in his lifetime, is called *the disponent* or *author*; and he who acquires it, *the singular successor*, because he succeeds to that subject by a singular title; in opposition to an heir who succeeds to the whole estate of the deceased by the title of universal representation. Transmission *inter vivos*, by one person alive to another person alive, is either voluntary, by disposition, which is treated of in this title; or necessary, by adjudication.

Transmission of rights by the vassal to singular successors.

2. Though the terms *disposition* and *assignation* may be either of them apt enough to express the alienation of any right whatever; yet in their common use, conveyances of debt, or of particular moveable subjects, go by the name of *assignations*. The property indeed of a number of moveable subjects, considered as an *universitas*, *ex. gr.* household stuff, is sometimes said to be transmitted by disposition: but that word, in its proper sense, is applied only to the grant of heritable subjects, and is a deed containing procuratory of resignation, and precept of seisin. It is a rule in all conveyances of heritable rights, whether real or personal, that he who makes over the property, makes over virtually all lesser rights in the subject, as servitudes, liferents, reversions, &c. though none of these should be expressed: And though the disponent should not himself be vested with the property, still these lesser rights, in so far as they are truly in him, are carried to the disponent by such transmission; for *majori minus inest*, *Stair, Dec. 5. 1665, Beg.* (Dict. p. 6304.).

Difference between assignations and dispositions.

3. By a second rule, common to all voluntary transmissions in which absolute warrandice is either expressed or implied, *jus superveniens auctori, accrescit successor*; every right in the subject that the author or disponent may acquire after the transmission, accrues to the grantee. The supervening right is, by a fiction of law, considered to have been in the disponent at the date of the transmission, and at that time made over by him to the disponent; and, therefore, it accrues *ipso jure*. Hence, though the author, after having acquired the supervening right, should transfer it to a third party, such conveyance could not hurt the first acquirer. This rule is founded in the nature of warrandice: For if a right by which a subject may be evicted from the disponent, infers warrandice against the disponent while it is vested in a third party; such right, after it is acquired by the disponent himself, ought not to hurt the disponent, to whom he is bound in warrandice: And it holds even without a

Jus superveniens auctori, accrescit successor.

BOOK II.

Exceptions to
this rule.

formal clause of warrandice, where the granter disposes *for all right which he hath acquired or shall acquire*; for such clause implies a conveyance of all supervening rights.

4. Where the disposition is granted for a sum below the full value, and so is limited to a *particular* title of property, or to *the titles presently in the disponent*; or where the warrandice is barely from fact and deed; the above-mentioned rule fails, and the disponent may lawfully use any title he may afterwards acquire in the subject against the disponent, *Stair, July 19. 1664, Douglas, (Dict. p. 7748.)*. Neither does it hold against a bare consenter to a disposition, if he hath not expressly bound himself in warrandice; for no warrandice can be fixed by implication against a consenter, whose implied obligation can only be understood to bar him from objecting to the disposition upon any right then in his person, *Dirl. 128., (Dict. p. 6524.)*; *Stair, July 7. 1681, Steuart, (Dict. p. 7762.)*. Nor is there place for it in legal transmissions by adjudication; for the debtor or his heirs from whom the lands are adjudged, though they may be said in some sense to be the judicial disponers, yet are by no means bound to warrant the transmission; because the law, when it transmits a right by adjudication, transmits it barely as it stands at the time of the diligence, *Fount. Jan. 11. 1699, Duncan, (Dict. p. 7772)*, stated in *(Folio) Dict. i. p. 515.*; *July 1746, Hunter, (not reported)**. These rules serve to fix the true extent of a grant in a dispute between the granter and grantee. In grants of the same subject to two different grantees, a question may frequently occur, To which of the two the supervening right acquired by the granter ought to accrue? which, where the right made over is a personal right of lands, depends chiefly on rules to be explained below, § 26.

Anciently no
transmission
was effectual
without the su-
perior's consent.

5. By the genuine principles of the feudal system, no vassal had a power to transfer the right of his feu to another without the superior's consent; for in rights merely gratuitous, the grant, together with all its conditions and limitations, must depend entirely on the granter's pleasure; and agreeably to those rules the superior was not bound to receive any person in the lands, other than the heirs to whom he himself had limited the descent by the investiture, though the greatest sum should have been offered him in the name of entry, *Fount. Feb. 24. 1685, Cleland, (Dict. p. 15032.)*. Hence Craig with reason affirms, *Lib. 2. Dieg. 16. § 20.*, that no entail is effectual without the superior's consent; because the fee is thereby made to devolve on a different order of heirs from that which was contained in the original grant: And even where the lands are made over in the superior's grant to the vassal and his assignees, the superior is obliged to receive the assignee only while the right continues personal, *i. e.* before seisin be taken upon it, but not after perfecting it by infeftment; for the word *assignee*, in a feudal grant, ought to be applied only to personal rights, *Stair, Feb. 5. 1663, La. Carnegie, (Dict. p. 10375. and 13380.) †*.

6. This

* See *Fac. Coll. November 14. 1792, Keith, Dict. p. 7767, and 2998* ¹⁵⁵.

† *Stair, January 29. 1673, Ogilvie, Dict. p. 10384.*

[Now that the superior is obliged to receive all singular successors, *infra*. § 7. *h. t.*, the interpretation of the word "assignee," in the text, has still effect in regulating the rate of entry.] This interpretation was given to the term "assignee," [and the superior found entitled to "a full year's rent,"] where the grant provided only for duplication of
the

¹⁵⁵ The cases, *Norton, 6th July 1813, Fac. Coll.*; *Redfearn, 7th March 1816, Ibid.* are further illustrative of situations in which the rule does not apply.

6. This right of refusal in the superior was disavowed or taken away by special statute in the following cases: *First*, That creditors might have free access to affect the estates of their debtors, superiors were required, by 1469, C. 36., to receive creditors-apprisers as their vassals, on payment by the apprisers to them of a year's rent of the lands; and after adjudications were substituted in the room of apprisings, the benefit of that statute was communicated to adjudgers, on payment of a year's rent, by 1672, C. 19. *2dly*, Purchasers of bankrupt estates at judicial sales before the session, are, by 1681, C. 17., (joined with 1690, C. 20.), entitled to the same method of infestment as adjudgers. Notwithstanding these particular statutory restrictions on the superior's right, which were enacted merely for the behoof of creditors, the general right of refusal competent to superiors in the case of voluntary transmissions by the vassal long continued from the most early times of our feudal plan, unimpeached by statute, except one in the reign of Robert I. soon to be taken notice of. But from the period that commerce began to be attended to as a point essential to the public interest, vassals were considered in a more favourable light, not as simple beneficiaries, but as proprietors, who ought to have full power over the feudal subject contained in their charters. Hence our sovereigns did, by several acts of privy council mentioned in 1578, C. 66., give up this right for the public utility; so that purchasers of lands holden of the crown were from that period secure of being received as vassals by the King, upon their reasonable expence, *i. e.* on a composition to be paid by them to the treasury, which is fixed by practice to a sixth part of the valued rent of the lands. In like manner, in lands holden of subject-superiors, expedients were fallen upon which received the countenance, or at least the indulgence of law, for evacuating the superior's right, and enabling the vassal to sell the lands to a stranger without his consent. One usual way was, by a bond granted by the vassal to him who intended to purchase, for a sum fully equal in value to the lands; on which bond the creditor deduced an adjudication of these lands against the granter; for it behoved the superior to enter such creditor as his vassal, under the character of adjudger. Another method, which was universally considered as a new limitation of the superior's right, was established by act 1685, C. 22., authorising entails: For since it is made lawful to the vassal to alter the order of succession contained in the investiture granted by the superior, and to settle it on a different series of heirs, the superior is not

TITLE VII.

But this right of the superior was, in certain cases, taken away by statute, and in others eluded by indirect methods.

the feu-duty, "primo anno introitus cujuslibet hæredis aut assignati;"—the Court would not hold this as applicable to a purchaser from a vassal infest, *Fac. Coll. February 2. 1769, Magistrates of Inverness, Dict. p. 15059. See also Fac. July 25. 1751, Salmon, Dict. p. 4181.* The same question, however, has since been variously decided, according to circumstances. In the case of *Ogilvy against Kinnaird, Dec. 1779, (not reported)*, the claims of the superior were rejected. In the case of *Sir William Hamilton against Earl of Lauderdale, in 1778, (not reported)*, *Duke of Queensberry against Smith, February 15. 1792, (not reported)*, and *Brisbane against Lord Sempill, June 6. 1794, Fac. Coll. Dict. p. 15061*, the superior's claim to a year's rent was sustained. The case of *Mercer against Grant, June 30. and November 18. 1790, (not reported)*, was compromised after one interlocutor had been pronounced in favour of the superior ¹⁵⁶.

¹⁵⁶ There has been no variance of decision as to the general rule. The superior's claim has been overruled, only where the special terms of the grant established a renunciation of it.

Book II.

The superior is now obliged to receive all singular successors.

not left at liberty to refuse the entering of those heirs whom the vassal hath named under the authority of a public law¹⁵⁷.

7. The necessity that purchasers from a vassal were laid under, of pursuing indirect methods to obtain themselves entered by the superior, is now removed by 20. *Geo. II. C. 50. § 12.*; by which it is made lawful, not only to heirs, but to any person who shall purchase lands from a proprietor by a disposition containing procuratory of resignation, to apply for letters of horning for charging the superior to grant new infestment in his favour. The superior is however allowed by the act, § 13., to offer suspension of that charge, if the charger shall not tender to him such fees or casualties as he hath by the law a right to receive on the vassal's entry¹⁵⁸: By which must be meant a year's rent of the lands; for that was the proportion which appraisers were to pay for their entry by the act 1469, and which was, from the analogy of that act, demanded from voluntary purchasers by such superiors as were willing to enter them*. The British statute appears to have been enacted merely for the more expeditious completing the titles of purchasers, without the least intention of impairing any of the just rights of superiority: And therefore it may be doubted, whether it ought to be so interpreted as to lay superiors under an obligation of receiving incorporations or communities, which never die; the consequence whereof must be the loss of all the casualties of superiority; more especially as the words of the act, *any person who shall purchase*, do not, in their proper acceptation, include corporate bodies¹⁵⁹. Though singular successors, whether adjudgers or voluntary purchasers¹⁶⁰, are liable in payment of a year's rent¹⁶¹ to the superior for changing the former investiture; yet where a proprietor entails his lands, the superior is not entitled to the composition of a year's rent

* The year's rent is subject to deduction of "the feu-duty and all public burdens, and likewise of all annual burdens imposed on the lands by consent of the superior, with all reasonable annual repairs to houses and other perishable subjects." So the Court determined, after a hearing in presence, and upon considering reports relative to the practice; *Fac. Coll. Feb. 14. 1775, Aitchison, Dict. p. 15060.*

¹⁵⁷ See *Magistrates of Aberdeen, 17th June 1803, Fac. Coll. Dict. v. SUPERIOR AND VASSAL, App. NO. 4.*

¹⁵⁸ The superior is also entitled to give the entry in such a way as that his legal rights may not be evaded. Thus, a vassal infest, having disposed the subject to his heir, with procuratory and precept, the superior, though bound on the vassal's death to enter the heir upon a precept of *clare constat*, which cannot be assigned, is not obliged to grant a charter upon the procuratory, to the effect of enabling the heir to assign it away before infestment, and thereby to disappoint the superior of his casualty of a year's rent from the singular successor; *Magistrates of Musselburgh, 21st Feb. 1804, Fac. Coll. Dict. p. 15038.* So also, the trust-disponees of a deceased vassal, to whom the estate was disposed in trust for the heir, whom failing to strangers, are not entitled to demand an entry without paying as singular successors; *Griñdlay, 18th January 1810, Fac. Coll.* So also, a superior is not bound to enter a vassal whose author was not entered, unless that author who held the lands by a personal title shall take an entry also; *Gordon, 29th June 1814, Ibid.*

¹⁵⁹ A superior was held not bound to enter a corporation; *Hill, 17th Jan. 1815, Fac. Coll.*

¹⁶⁰ A clause in the original grant, binding the superior to enter "the heirs and successors" of the vassal, at a certain taxed rate, "as the composition to be paid for the entry of each vassal," does not exclude the superior's claim to a full year's rent on the entry of a singular successor; *Thomson, 22d May 1810, Fac. Coll.* The same strict interpretation is applied where the term "assignees" occurs in the grant; *sup. § 5. in not †.*

¹⁶¹ When a vassal subfeus his possession for its full adequate value at the time, it is only a year's subfeu-duty, not a year's rent, which a singular successor is bound to pay the superior, as a composition for his entry; *Cockburn Ross, 6th June 1815, Fac. Coll.*

rent from every successive heir of entail, who is not heir of line to him who stood last infeft, on pretence that he is a singular successor. The heir of the last investiture cannot be called a singular successor; and he is founded in a right to demand an entry, upon payment to the superior of the sum due to him by law, in name of relief, upon the entry of an heir, *Fac. Coll.* ii. 231, (*Lockhart, July 10. 1760, Dict.* p. 15047.)*.

8. The general nature of transmissions by subject-superiors, whether *a me* or *de me*, hath been already explained, *T.* 3. § 20. Though Mackenzie affirms, § 4. *h. t.*, that the granting of rights to be holden base, or of the disponent, is repugnant to the principles of the feudal law; it is certain that subinfeudations were allowed as early as the written usages of the feus, *Lib. 2. T.* 34. § 2. &c. It appears, that before the reign of Robert Bruce those subaltern rights were not only frequent, but so highly favoured by our customs, that effects were ascribed to them quite inconsistent with feudal maxims, no less than depriving the superior of the casualties of ward, marriage, escheat, &c. that might be incurred by the granter. To remove this hardship, an act passed, *St. 2. Rob. I. C.* 24., which, though it still allowed to vassals the same power that they had before, to sell their lands to whom they would, yet entirely abolished subinfeudations; and declared that the purchaser should hold the lands, not of the granter himself, but of the granter's superior, by the same manner of holding, and upon performing to him the same services, that the granter himself formerly did. But this statute, if ever it was in observance, fell soon into disuse, not having been so much as once mentioned in any posterior statute or law-book, notwithstanding the great alteration it must have made in our law-system: And the act 1469, *C.* 36., requiring superiors to enter apprisers, affords the strongest evidence that it had lost its force before that time: For if superiors had, by the then usage of Scotland, been obliged to enter voluntary purchasers from the vassal into the lands, (which was a necessary consequence of Robert's statute), they must have been also obliged, without any new enactment, to receive those who had appraised the vassal's lands; apprisers being of all singular successors the most favoured. It is nevertheless probable, that though subaltern infeftments soon recovered force after the statute of Robert which abolished them, yet the rectifying of our former erroneous notions concerning their effects has been owing to the authority of that statute; for it hath been admitted by all our writers, that the rights of superiors have suffered no encroachments since that time,

by

Changes of the law with regard to subaltern rights.

* The decision referred to has not been considered as settling the general point. The statute 1685, c. 29., bears to be enacted without prejudice "to his Majesty, or any other lawful superiour, of the casualties of superiority which may arise to them out of the tailzied estate;" and it therefore seems to follow, that the casualties of superiority remain exactly as before. The Court have not had any opportunity of giving a direct judgment on this point; but have found the superior entitled to insert a clause reserving his right to demand a year's rent, as from a singular successor, whenever he shall be called to enter an heir of entail not heir of line to the last vassal. This course has been followed in two cases: *July 4. 1777, Mackenzie, Dict.* p. 15053, and *App. No. 2. voce SUPERIOR and VASSAL; Fac. Coll. Nov. 19. 1796, Duke of Argyle, Dict.* p. 15068 ¹⁶².

¹⁶² The reservation in the case of *Argyle* was only to the effect of "keeping the question open for future discussion when the case should occur." In the case of *Mackenzie*, there was no reservation in the charter, but one similar to the above was inserted in the interlocutor of the Court.

BOOK II.

Base or subal-
tern rights,
whether they
require confir-
mation.

by the subinfeudations of the vassal, unless where special statute hath directed the contrary; as to which see *supr.* T. 5. § 79.

9. Base or subaltern rights are transmissions merely of the property; for the superiority is reserved by the granter; and consequently the granter's superior continues to have the same immediate vassal in the lands as formerly. And this makes a considerable difference between the effect of base and of public infeftments. In a public right, the seisin taken by the disponent is null, or rather its effect is suspended, till the granter's superior shall, by a deed confirming the grant, acknowledge the disponent as vassal; a doctrine clearly deducible from the rule explained *supr.* § 5.; whereas base rights did at no time require such confirmation by the granter's superior to give them validity; because in these, there is no change of the vassal, the disponent still continuing vassal in the lands in regard to his superior, notwithstanding the subaltern right granted by him to the subvassal. Nevertheless, as the subvassal's property is exposed to the hazard of all the casualties falling by the death or delinquency of his immediate superior where there is no confirmation, it is frequently applied for; and such confirmation, when granted, effectually secures the subvassal against all casualties falling as aforesaid, which entirely exhaust the property, *ex. gr.* recognition, while that casualty was received; but it can hardly be explained into a renunciation by the superior of his other casualties arising from the nature of the feudal contract, which infer only a temporary right to the rents, or to any part of them, *ex. gr.* nonentry, *St. B. 2. T. 3. § 28. supr. T. 5. § 44.*

Base rights
postponed by
our former law
to public ones.

10. Base rights had, by our ancient law, as strong effects as public; but as, before establishing the registers, they might have been kept quite concealed from all but the granter and the grantee, a device became frequent among proprietors, of first selling their estates for a valuable consideration, and afterwards granting a base infeftment to a confident person; to which they gave a false date prior to the sale, with a view to defraud the first onerous purchaser. To put a stop to such fraudulent practice, it was enacted by 1540, C. 105., that whoever purchased lands on an onerous title, and attained peaceable possession, should be preferred to those who claimed under a private or base right, though it should bear a date prior to the other. Though the opposition runs, by the words of this act, between onerous rights followed by possession, and private rights, it was so explained by subsequent custom, that an onerous and public right, whether followed by possession or not, was preferred to a private right on which no possession had followed. Because the presumption of simulation or fraud, arising from the latency or private manner of executing base rights, lost its force by the disponent's possession, a base right was from that period, *i. e.* as soon as the disponent attained possession, as effectual as a public one: And hence possession was, to a base right, while this distinction continued, what the superior's confirmation was to a public; for the preference in a competition between the two, depended, not on the dates of their respective seisins, because neither of the rights was truly perfected by seisin, confirmation being necessary to complete the one, and possession the other.

But are other-
wise completely
valid.

11. Base rights were not simply annulled by this act; they were only declared ineffectual in competition with rights followed by possession; which were by custom interpreted to be public rights. When therefore these were out of the question, the old law took place; which considered base rights as completely valid. Hence also

also they were sustained, to force production of all seisins, whether public or private. They also continued effectual, in competition with posterior gratuitous infeftments, even public; and in a competition between two base rights, neither of which was accompanied with possession, the first seisin was preferable.

12. Natural possession, by cultivating the ground, and receiving the rents for a year, is made an essential requisite, by the letter of the statute, for making base rights effectual; and this continued necessary by the subsequent practice, till registers were established; but from the 1617, when all seisins were ordained to be published in the records, the slenderest acts, even of civil possession, were sustained for that purpose; such as, a simple citation, in a suit commenced on a title of a base infeftment, or payment of interest, by the debtor in a base right of annualrent, to the creditor. Thus also the possession of the principal lands was construed to be the possession of the warrandice-lands; because till the principal lands be evicted, there can be no access to the warrandice-lands. The husband's possession was, upon the same ground, deemed the wife's; for the wife cannot attain the natural possession of her jointure-lands during the husband's life; and the liferenter's possession was accounted that of the fiar, because the fiar was excluded from the natural possession by the liferenter. Yet this doctrine was not applicable to the case of a base right granted by a father to his son with the reservation of his own liferent, though the son was excluded from the possession by the father's liferent; *Stair, June 14. 1666, Home, (Dict. p. 1312.)*; because a design to disappoint creditors was presumed, both from the nearness of the relation between the disponent and disponee, and from the father's manner of executing the deed, by reserving his own liferent, and under that title continuing his former possession, which naturally ensnared creditors into the belief that he had made no alienation which might be hurtful to them. Thus the rules of preference stood, where base rights were competing with public, in consequence of the act 1540, C. 105. But by that distinction, the right of lands became precarious, and was frequently made to depend upon an uncertain proof by witnesses of the disponee's possession; and there was no pretence for continuing it after the establishment of our public records; wherefore it was enacted, by 1693, C. 13., that all seisins should, for the future, be preferable according to the dates of their several registrations, without respect to the former distinctions of base and public, or of being clad or not clad with possession*.

13. Public rights to be holden of the granter's superior, may be perfected, either, *first*, by the superior's confirmation of them; or, *2dly*, by his granting a charter to the disponee upon the resignation of the former vassal; of which *infr.* § 17.; and for this reason, the grant by him to the grantee contains both procuratory of resignation and precept of seisin. When the grantee intends to perfect his right in the first way, by confirmation, he takes seisin on the precept, and then procures the superior's confirmation¹⁶³; by which,

Both public and private rights must by act 1617 be registered.

Public rights are perfected by confirmation or resignation.

* It has been found that even an heritable office pertaining to the King's household may be transmitted by base infeftment; *Fac. Coll, Jan. 17. 1782, Stewart, Dict. p. 6925.*

¹⁶³ It was argued, that confirmation of the precept or disposition on which the seisin proceeded, without confirmation of the seisin itself, was sufficient to constitute the right public; but this seems to have been disregarded by a majority of the Court; *Adam, 12th June 1610, Fac. Coll.* See, however, *Bell's Election Law, p. 242.*

Book II.

and no sooner, the grantor is divested, and the right established fully in the grantee; *vid. supr.* § 9. This confirmation used formerly to be written on the back of the charter or disposition granted by the vassal; but doubts having arisen since the statutes imposing certain duties on deeds written on stamped paper or parchment, that the superior's confirmation, were it now written on the back of the charter, might be set aside as a separate deed annexed to the same sheet of parchment, it has been thought necessary, for removing all grounds of challenge, to make out the confirmation in a charter apart; in which the superior recites, at full length, the charter confirmed, and then subjoins his own confirmation or ratification of it.

Preference of public rights determined by the date of the confirmation.

14. Where two several public rights of the same subject granted by a vassal to different grantees, are confirmed by the superior, the preference between the two must, by the general rules of law, be determined by the dates, not of the rights confirmed, but of the confirmations; because as public rights have no validity till confirmation, it is the confirmation which perfects them; and the right first perfected ought to be preferred. This was expressly declared in confirmations by the crown, 1578, C. 66. But as that act was barely declaratory of our former law, without introducing any new rule, therefore though the letter of it be limited to confirmations by the crown, the same doctrine holds in those granted by subject superiors, that the confirmation first obtained is preferable to the second, though that second should have confirmed the first infestment. The same statute directs, that no double confirmation of lands holden of the crown should be granted for the future: But this injunction was improper: for the Barons of Exchequer, not being competent judges in the question of double confirmations, nor to the nullities that may be objected to a first, cannot refuse granting second and third confirmations, *periculo petentium*. As to the question, What is to be deemed the first charter of confirmation by the crown? It is evident, that as the presenting a signature to the Barons, and the procuring it to be passed by them, are only previous steps to a charter, neither of these are to be regarded, unless it appear that the grantee who presented the first signature has used all due diligence to perfect his right, and hath been obstructed by the indirect practices, or, as it is commonly expressed, by the nimious diligence of his competitor; *Stair, Dec. 6. 1678, Miln, (Dict. p. 3038.)* Upon this ground, not even the date of the charter of confirmation can afford any ground of preference, because the dates are inserted in charters by the crown according to the time that the signatures on which they proceed are passed in exchequer. It is therefore that charter which first passes the great seal that is to be preferred; for it is the seal which perfects the confirmation, and serves in place of the royal superscription; *Stair, Feb. 26. 1680, L. Clackmannan, (Dict. p. 3029.)*; *Harc. 589. Cardross, March 1682, (Dict. p. 1337.)*.

Effects of confirmation.

15. The charter which confirms a public right has effect from the date of the right confirmed, and gives that right the same force as if it had been confirmed immediately after making the grant; for it is of the nature of all confirmations to operate *retro*, *St. B. 2. T. 3. § 28**. But if any mid impediment shall intervene between the date of the charter granted by the vassal, and that of the confirmation, it hinders the confirmation from having that retrospective quality. Thus, if the vassal, after he had granted a charter to one to be

* *Fac. Coll. Jan. 19. 1793, Macdowall, &c. Dict. p. 8307.*

be holden of the superior, has granted a second to another to be holden of himself, on which second charter seisin has been taken by the disponee before the superior's confirmation of the first, that confirmation has no operation upwards to the date of the charter confirmed, being obstructed by the intervention of the base right, which was fully perfected by the seisin taken upon it, but has effect only from its own date; and consequently the base right will carry the property of the lands preferably to the public. Yet the public right must, in the case supposed, carry the superiority; because, as to that, the base right, which is incapable of transmitting the superiority to the disponee, can be no impediment, *Hope, Min. Pr. p. 62, § 151, 152.* For the obtainer of the public right is, upon its confirmation by the superior, fully substituted in the place of the vassal who made it over to him; and consequently he becomes superior to the receiver of the base right, who before held the fee of that vassal*. A right which is not perfected prior to the superior's confirmation, cannot hinder the retrospective effect of the confirmation, *ex. gr.* a base right on which sasine hath not been taken, or an adjudication which hath been neither followed by sasine, nor by a charge against the superior previously to the confirmation of a public right: Far less can the heir of him who has granted a public right, plead his ancestor's death, as an impediment to prevent the effect of a confirmation granted by the superior after that period; for though the disponent's singular successor may object to a public right granted by his author to another, as not properly confirmed, that plea is by no means competent to the disponent's heir, who is bound to fulfil the deeds of his ancestor; yet Craig seems to approve of a contrary decision, *Lib. 2. Diag. 4. § 19.*¹⁶⁴

16. By the more common style of dispositions, the disponent grants an obligation to infest, and a precept of seisin, both *a me* and *de me*, in the option of the disponee; and seisin is generally taken upon such dispositions indefinitely, without specially referring to either of the two precepts. In that case, the law, which construes the seisin in the manner most beneficial to the disponee, who has the right of option to ascribe it to either of the two kinds, considers it as a seisin *de me* or base right; because if it were accounted a public right, it would be ineffectual until the superior's confirmation. But if the superior afterwards confirm the right, it is held from that period as if it had been from the beginning a public right; see *Stair, July 15. 1680, Bish. of Aberdeen, (Dict. p. 3011.)* It is universally agreed, that a right which only holds base of the granter, is not by the superior's confirmation rendered public, so as to make the grantee whose right is confirmed, immediate vassal to the superior confirming; for the superior's confirmation of base rights is intended for purposes quite different, *vid. supr. § 9.* It is to the difference here stated, between base and public rights, that the frequent use of base rights in our practice has been owing: For many purchasers avoided taking a public infestment, not chiefly to avoid the expence of confirmation, but the better to secure their purchase; because a purchaser by accepting



When seisins taken indefinitely on a precept both *a me* and *de me*, the right is presumed base.

* See this doctrine well illustrated, *Fac. Coll. June 1. 1791, Mackenzie, &c. Dict. p. 275.*

¹⁶⁴ A seisin recorded and confirmed, but subject to a nullity from an error in the record, does not divest the disponent so as to prevent the purchaser from afterwards completing his title by resignation; *Kibble, 16th June 1814, Fac. Coll.*

a public right from the disponent, which is not effectual till it be confirmed by the superior, was in danger of being excluded by a seisin taken before his, upon a base right in the person of another. The numerous subaltern rights descending from one down to the other, which are sometimes to be found affecting the same lands, are the source of great intricacy in the conveyances, and of difficulty in completing the proper titles: And, notwithstanding the British statute before cited, directing charges against superiors, which was the remedy long ago proposed by Lord Stair against this evil, *B. 2. T. 4. § 6.*, base rights have abated little of their frequency*.

Resignation, its symbols.

17. Public rights or transmissions *a me*, may be also perfected by resignation, which is that form of law by which a vassal surrenders the feudal subject to his superior. This act is sometimes performed by the vassal himself, which is called *resignation propriis manibus*; but most frequently by his attorney, in virtue of the procuratory or warrant to resign contained in the grant, and is the warrant of all resignations which are not made *propriis manibus*. The proper symbols of resignation are staff and baton; but a pen has, by immemorial custom, been made use of to represent that symbol in the act of resignation. Resignation of borough tenements in the city of Edinburgh, was, by a long erroneous custom, made in the hands of one of the bailies by the symbol of earth and stone; which was sustained upon account of the universal error, *Fount. Feb. 7. 1708, Young, (Dict. p. 3105.)*; but by an act of sederunt the 11th of that month, the use of any symbol in resignation, other than staff and baton, is prohibited under the sanction of nullity †.

Form of resignation.

18. The necessity of using special symbols in resignation, is owing to the genius both of the Roman and Feudal laws, which, in general, refuse to admit either the acquisition or transmission of property without tradition. As feudal rights cannot be acquired without seisin, which imports a delivery of the subject to the disponent, neither can they be transmitted or extinguished without resignation; by which the subject is understood to be redelivered to the superior. And hence simple renunciations, being only personal, have no operation in the transmission of real rights followed by seisin, *Craig, Lib. 3. Dieg. 1, § 21, 22.; Durie, Nov. 23. 1627, Dunbar, (Dict. p. 570.)*; except perhaps in such redeemable infestments as are not so truly rights of property as burdens on it; as to which, *vid. infr. T. 8. § 34. & 36.* The form of resignation is extremely simple: The vassal, or his procurator, appears before the superior or his commissioners, and on his knee surrenders the lands to him by the delivery of a pen, which is accepted by the superior; and upon this act a notorial instrument is taken by him in whose favour resignation is made, called the *resignatory*; which the notary reduces into writing, and signs before witnesses. But there is no written instrument of resignation extended in the transmission

* Where a vassal grants a disposition containing procuratory and precept, he is held so far completely denuded, that his heir cannot be compelled to enter with the superior; *Fac. Coll. Feb. 10. 1769, Dundas, Dict. p. 15035.*

† Upon this act of sederunt, the Court found the resignation of an annual rent out of a tenement in Aberdeen, *anno 1720*, was null, as made with the symbol of a penny *utole*, and not with the lawful symbols of staff and baton, although the practice had been very general in that borough; *Kilk. No. 5, voce SASINE, E. of Aberdeen, June 25. 1742, Dict. p. 14316.*

mission of burgal tenements, as the whole facts relative to the surrender are recited in the instrument of seisin following on it. Though seisin must be taken on the ground of the lands, resignation may be made any where.

19. Lands are resigned, either *ad perpetuam remanentiam*, or *in favorem*. Where the superior is to purchase the property, the vassal resigns the feu to the superior to remain with himself; by which surrender the property is consolidated with the superiority; *i. e.* he who before the lands were surrendered to him, was vested with the bare superiority, acquires by the resignation the property also of the lands surrendered. And as the superior's original seisin still subsisted, notwithstanding the right by which he had given the property to the vassal, the superior's former right of property revives on the vassal's resignation, and consequently is united to the superiority without the necessity of a new investiture. The vassal, on the other hand, where he purchases the superiority from his superior, must perfect his right upon his disposition by seisin, as any stranger purchaser must have done who was not the proprietor: And after it is thus vested in the vassal, he must resign the lands *ad perpetuam remanentiam* to himself as superior, if he wants that the property and superiority should go to the same series of heirs*. But as the same person cannot act in the resignation, under the two inconsistent characters of superior and vassal, the purchaser, as vassal, must grant a procuratory to another for surrendering the lands to himself as superior; and the resignation proceeding thereupon consolidates *eo ipso* the rights of property and superiority. It is obvious that resignations *ad remanentiam* are, in either of those views, extinctions rather than transmissions of the property¹⁶⁵.

Resignations *ad perpetuam remanentiam*.

20. Since a resignation *ad remanentiam* vests the property fully in the superior, without any subsequent seisin, it must be a real right in the strictest sense. Nevertheless, when the registration of real rights was made necessary by the act 1617, C. 16., instruments of resignation *ad remanentiam* were not expressed in the statute; by which omission the security of purchasers was left imperfect, who, though they might discover from the records whether the vassal disposing stood invest in the lands, could not know by the narrowest inquiry whether he had not again surrendered them to the superior. This defect is now supplied, by 1669, C. 3., which declares resignations *ad remanentiam* null, if the instruments be not registered within sixty days from their date, in the same manner as seisins and reversions. Resignations *ad remanentiam* of tenements holden in burgage, are excepted from this last statute, provided the instruments be recorded in the court-books of the borough; but if they are not so registered, the resignations are null, according to the general rule of the act. In resignations *ad remanentiam*, made, not by a procurator, but by the resigner himself, a special solemnity is introduced, by 1555, C. 38., not essential to other resignations, *viz.* that the resigner, as well as the notary, must sign the instrument of resignation. This rule was perhaps intended to be limited to that case only where the resigner had subscribed no previous obligation or warrant for resigning, that the resignation might not rest solely on the credit of the notary; and Stair, leaning to this conjecture, gives his opinion, that though the statutory words be

Their nature and effects.

* See *Fac. Coll.* March 8. 1786, *Bald*, Dict. p. 15084.

¹⁶⁵ *Vid. M. of Abercorn*, 26th June 1817, *Fac. Coll.*

Book II.



The superior's acceptance of the resignation is equivalent to a confirmation of all the burdens with which the vassal has charged the right.

Resignations in favorem.

Create an obligation on the superior to perfect the right; but till it is perfected the resigner is not divested.

be general, expressing no limitation, yet the instrument given *propriis manibus* of the resigner, even without his subscription, is sufficient, where he has granted any previous obligation to resign; which opinion, abstract from its equity, may derive some support from 1563, C. 81.

21. Though upon the emerging of feudal casualties the property returns to the superior, by the nature of the feudal contract, as free from burden as when the right was first granted, T. 5. § 79.; yet when it returns to him upon his own acceptance of a voluntary resignation by the vassal, his consent to the surrender is deemed equivalent to a confirmation of all such burdens charged upon the feu by the vassal as would have been effectual against his singular successors, as subfeus, leases, rights of annualrent, &c.; for the right arising to the superior from such resignation, since it flows, not from the nature of the feudal grant, but from an act of the vassal consented to by the superior, can be no better than the vassal's right: And if the law stood otherwise, all securities competent to the real creditors of the vassal, or his tacksman, might be evacuated at once by his resignation*.

22. Resignations *in favorem* are those which are made, not with an intention that the property of the lands resigned should remain with the superior, but that it may be again given by him, either to the resigner himself, or to a third party. When the resigner surrenders the lands in favour of himself, without proposing any alteration in the former investiture, there is no proper transmission; because the right immediately returns in its former condition to him from whom it came: But if he resigns from himself and a certain order of heirs, in favour of himself and a different order of heirs, or if he resigns a wardholding, that it may be returned to him feu or blanch, the right changes its nature in these respects, and so is truly a transmission. In resignations *in favorem*, the superior, after receiving the symbol of resignation from the vassal, must again deliver it, either to the resigner himself, if he resigned in his own favour, or to any third person in whose favour the lands were truly resigned; whereas, in resignations *ad remanentiam*, the bare acceptance of the symbol by the superior completes the act of resigning.

23. The instrument which bears the superior's acceptance of the vassal's resignation *in favorem*, creates a personal obligation on the superior to perfect the right, by giving charter and seisin to the resignatory: But till it be thus perfected, the resignation cannot have the real effect of a resignation *ad remanentiam*, so as to establish the property in the resignatory; because seisin is essential to the completing of the feudal right of heritable subjects. Neither can the property be transferred to the superior by the surrender of the lands to him; because delivery itself, if it be not accompanied with an intention, or *animus*, to transfer the property upon some sufficient or habile title, as sale, donation, &c. can have no such effect; and in resignations *in favorem*, there is not only no *habilis causa transferendi domini*, but, on the contrary, the surrender is made with a special view to convey the property to another, and under the express quality, that the right shall not remain with the superior. The fee, therefore, continues vested in the resigner, in the intermediate period between the resignation and the perfecting the resignatory's right from the superior by seisin, Cr. Lib. 3. Dieg.

* See Kames's Elucidations, Art. 11. *Dominium directum et utile*.

Dieg. 1. § 17.; for the resigner cannot possibly be divested, till he in whose favour the resignation is made be invested*. It is because our law has considered such resignations as personal and incomplete rights, till seisin, that when instruments of resignation *ad remanentiam* were ordained to be registered, because these were real rights, no such provision was made for resignations *in favorem*: And from hence it follows, that the first seisin on a second resignation is preferable to a posterior seisin upon the first resignation. Yet as the superior's acceptance of a first resignation lays him under an obligation to perfect the resignatory's right, he becomes liable to him in damages, if he shall counteract this obligation by accepting a second surrender, on which a prior seisin may be taken to the prejudice of the first resignatory.

Consequences of this with regard to the casualties.

24. If the resigner is not truly divested by the resignation, and consequently continues vassal, till seisin, the casualties of superiority must necessarily fall by the death or delinquency of the resigner, *ex. gr.* ward and recognition, while these subsisted, *Stair, Nov.* 14. 1677, *Purves*, (Dict. p. 6890.). And from the same doctrine one might be apt to conclude, that the lands cannot fall in nonentry, by this resignation; for nonentry is excluded while there is a vassal in the lands not divested: Yet all our writers assert the contrary, upon this ground, that the services due by the vassal cannot be exacted from the resigner by the superior who has accepted a resignation from him; and as no superior ought to be deprived of the feudal services, merely for doing an act at the vassal's own desire, the superior therefore is entitled to the nonentry-duties from the resigner till he get a vassal from whom he can with congruity demand these services. But if any obstruction is thrown in the way of the resignatory's seisin by the superior himself, he can from that period have no claim to the nonentry-duties; for he has himself to blame that he is not provided with another vassal; *Cr. Lib.* 3. *Dieg.* 1. § 16. *et seqq.*; *Diri. v. Resignation*; *St. B.* 3. *T.* 2. § 12.

25. If one who stands infeft in lands or annualrents, and has been in the possession of them for forty years, shall be afterwards called in question, for want of procuratories to resign, of instruments of resignation, or of warrants to take seisin, it is declared by 1594, *C.* 218., that the possessor cannot be compelled to produce any of those in the action brought against him after the forty years; and that the want of them shall be no ground for setting aside his right, if the charter and seisin on which his possession proceeded be extant. By the uniform custom about the date of that act, procuratories or precepts were written on paper or parchment apart from the charters or dispositions, of which they were truly a part; and the view of the act was, that the validity of seisins which had taken effect by forty years' possession should not depend on the preserving detached writings that consisted mostly in form, and might therefore be thought by the parties little worth the keeping. Though therefore procuratories for resigning, and precepts of seisin, must by the present law be engrossed in the charter, or other deed of alienation, a seisin cannot by itself constitute a valid right on the footing of this act, upon pretence that it lays no necessity on the possessor to produce these procuratories or precepts; for the statute, far from dispensing with the production of the fundamental deeds which divest the granter, or from resting the whole grant on the faith of a notary, requires the existence of the charter, of which

Statute 1594, dispensing with the production of resignations.

* See *Fac. Coll. Feb.* 22. 1760, *Grant*, Dict. p. 8740.

the procuratory or precept make a part, as an express condition of the enactment. Nay, though an estate should be settled by a bare procuratory of resignation, without any charter or disposition, which is now frequently practised, the procuratory must be produced to support the right, even after the forty years; because the procuratory is in that case the only deed of conveyance, and so supplies the place of the charter. This statute relates only to resignations *in favorem*; for resignations *ad remanentiam* are of themselves effectual to extinguish the right of the resigner without any subsequent seisin. In burgage-tenements, a seisin which bears resignation to have been made, is always sustained without producing any instrument on which it proceeded; because in these no written instrument is extended upon the act of resigning; *vid. supr.* § 18. This act 1594 is not rendered useless by the posterior statute of prescription in 1617, which in certain events secures the possessor after forty years, upon production of a seisin or seisins, though he should not produce the charters, or other warrants, on which they have proceeded: For that last act requires peaceable and uninterrupted possession, upon successive seisins, standing for forty years together; whereas possessors may be entitled to the benefit of the first act, without either of these requisites, *St. B. 2. T. 3. § 19.*—Hitherto of transmissions executed voluntarily by the granter. But creditors in real rights may sometimes be compelled by law to make conveyances of them, either to judicial purchasers or postponed creditors; as to which see *infr. Tit. 12. § 66.*

Observations on the transmission of personal rights.

26. Not only complete feudal rights, but incomplete personal ones, as dispositions or charters not perfected by seisin, are subjects capable of transmission. Upon this article the following observations may be proper: *First*, Where one who has a bare personal right of lands makes it over to another, the disponent is not by that conveyance vested in the feudal or real right of the subject disponent. As the granter's right was personal, so must that of the disponent be; for one cannot transfer a right to another which is not in himself: And though dispositions granted by those who are not themselves infeft, usually contain precepts of seisin, as if the granters could give seisin; yet such precepts, being granted *a non habente potestatem*, must be ineffectual to the disponent. *2dly*, Though seisins proceeding on such precepts are originally invalid, they may acquire validity upon seisin taken by the disponent; because from that moment he is in a capacity to infeft the disponent; so that his seisin accrues to the disponent by the rule explained above, § 3. *St. B. 3. Tit. 2. § 2.* *3dly*, By our former practice, where a person not infeft in lands, disponent his right, first to one, and afterwards to another, the first disponent was preferred to the subject, upon this ground, that one whose right to lands was merely personal, which is no more than a *jus obligationis*, may divest himself fully by any personal deed properly expressing his will to transfer the right; so that after the first disposition, no right is left in the disponent which can be carried by the second; *Dec. 8. 1710, Rule*, (*Dict. p. 2844.*); *Dec. 19. 1710, Erskine*, (*Dict. p. 2846.*); both reported by *Forbes*. But this rule, besides that it is not justly applicable to feudal rights, which require seisin to perfect them, rendered the security of singular successors precarious, since there is no necessity of registering any personal right. It is therefore fixed by the later practice, that the granter of a personal right of lands is not so divested by a first disposition, but that he may effectually



fectually make over the right to another, either by voluntary or judicial conveyance; and that the preference between the two disponees ought to be settled, not according to the dates of the several grants, because they cannot be discovered by the records, but according to the priority of the seisins following on them, Clerk *Home*, 59. (*Bellof Blackwoodhouse*, June 22. 1737, Dict. p. 2848.)*¹⁶⁶. Nor can it hurt the preference of the disponee first infest, though his author's right should continue personal till seisin be also taken by his competitor, Clerk *Home*, 111., (*Neilson*, Dec. 22. 1738, Dict. p. 7773.). Nor even though it should remain personal till the competition: for it is in his power to infest his author when he will; and at what time soever the author's right is thus perfected, his seisin accrues, not equally to both disponees, but to him alone who obtained the first seisin upon his disposition.

TIT. VIII.

Of Redeemable Rights.

FEU DAL rights have been hitherto discoursed of as they are simple and absolute: But because sundry heritable rights are conditional, or limited, it may be proper to explain in what respects these differ from absolute rights. The conditions most usually inserted in charters, either regard the order of succession; or, *2dly*, they are limitations imposed on the grantee in the use of his property; or, *3dly*, they set bounds to the duration of the right. The first two shall be afterwards handled, under the head of tailzies, *B. 3. T. 8.* The last sort, which is applicable only to rights which in the law of Scotland are called *redeemable*, is to be the subject of this title.

Conditional and limited rights, opposed to absolute.

2. A redeemable right is defined by Mackenzie, that which returns to the disponent or granter on payment of the sum for which it was granted. But this definition is formed *ex eo quod plerumque fit*; for rights may be granted redeemable upon the payment of any determinate sum by the granter, though no value whatever hath been given for them; *ex. gr.* a gratuitous disposition by a father to his son, redeemable on payment of a rose noble. Nay, nothing hinders a right from returning to the granter without the payment of any sum; as if one should make over lands to a stranger, with a clause of return to himself on the existence of issue of his body. And though a right of this sort cannot be called redeemable in the strict grammatical sense of the word, since no price is paid for recovering it, it carries with it all the properties of a redeemable right. Under the appellation, therefore, of *redeemable rights*, all those may be included, in which a power or faculty is, in a certain event, or within a certain period of time, or without any restriction in point of time, competent to the debtor, or the granter of the right. This power to redeem is called *a right of reversion*, because it is by that power that the subject granted is made to revert to the granter.

Redeemable rights.

* Same rule applicable to adjudications followed by first infestment; *Fac. Coll. Feb. 13. 1781, Mitchels*, Dict. p. 10296. See also case of *E. of Roseberry's Creditors*, Nov. 8. 1744, *Kilk. p. 384*, Dict. p. 10288.; *Jan. 31. 1792, Russell, &c.* Dict. p. 10300.

¹⁶⁶ See this subject followed out, 1. *Bell's Comm.* p. 23.

granter. Reversions are either legal, which arise from the law itself, as in appraisings or adjudications, which by statute are declared redeemable within a certain term after their date; or conventional, which are constituted by the agreement of the parties, whether they be incorporated in the body of the right, or granted in separate writings. A reversion, when adjected to a proper sale, is truly the *pactum de retrovendendo* of the Roman law, by which it is stipulated, that the seller has a power of buying back his property within a time particularly specified, at the price he got for it. But reversions were, by the usage of Scotland, used most frequently in rights granted by a debtor in security of the sums advanced to him by his creditor; which are chiefly three, wadsets, infestments of annualrent, and those which get the special appellation of *rights in security*.

Wadset.

3. The nature of a wadset may be known by its name. *Wad*, in the old Saxon language, signified a pledge; and *set* is a word made use of to denote a temporary right of lands, or its fruits. Thus, tacks are called *sets*; so that a wadset is a temporary right by which lands or other heritable subjects are impignorated by the proprietor to his creditor in security of his debt. A wadset differs in nothing, as to its constitution by seisin, from other heritable rights: Its specialties lie only in the right of reversion. As the names of *debtor* and *creditor* are seldom made use of but in the case of moveable debts, the debtor who receives the money, and grants the wadset, is called *the reverser*, because he is entitled to the right of reversion; and the creditor to whom the wadset is granted gets the name of *wadsetter*, because the right of the wadset is vested in him.

Changes in the nature, and in the form of wadsets, which are now real rights.

4. Originally the property of the lands wadset remained with the debtor agreeably to the genuine nature of impignoration: it was the possession only which was transferred to the creditor for his security, *Reg. Maj. L. 3. C. 2, 3, &c.* Wadsets continued to be proper pledges for some centuries. It appears from the style of a right of wadset granted in the year 1419, preserved by Skene, *voce REVERSION*, that they were then executed in the form of a charter; by which the reverser impignorated the lands to his creditor, to be enjoyed by him till payment of the sum lent; so that the debtor was sufficiently secured in his right of reversion, it having been expressed *in gremio* of the charter granted by himself. But not long after, the form changed gradually from a right of pledge to a deed of alienation; the property of the lands was given by the charter absolutely to the creditor; and the debtor, in place of being secured in his right of redemption by a clause in the charter, as was the former practice, got letters of reversion from the creditor in a separate writing. By these means, wadsetters who appeared from the face of their rights to be the irredeemable proprietors of the wadset lands, had it in their power, by alienating them in favour of a stranger, to evacuate the reversion competent to the debtor, which being in its genuine nature a personal right, was indeed obligatory on the wadsetter and his heirs, but could have no force against his singular successors. To obviate this fraudulent practice, all reversions, though granted in writings apart, were, by 1469, *C. 27.*, to be afterwards explained, declared to be effectual to the reverser against all singular successors in the wadset right. Creditors seldom choose, by the present practice, to secure their debts by way of wadset; but when they do, the right is commonly executed in the form of

a mutual contract ; in which the reverser does not barely impignorate, but alienate the lands, in consideration of the sum borrowed by him ; and the wadsetter, on the other part, grants the right of reversion.

5. The opinion delivered in general terms by all our writers, that rights of reversion are *stricti juris*, and that therefore they go neither to heirs nor assignees where these are not expressed, *Cr. Lib. 1. Dieg. 9. § 33., vers. Sed ut.* and *Lib. 2. Dieg. 6. § 3. ; Hop. Min. Pr. § 171. ; St. B. 2. Tit. 10. § 7. ; Mack. § 4. h. t. ;* is hardly reconcilable, either, *first*, to the known rules of law, or, *2dly*, to our practice. Though a reversion adjected to a proper sale of lands ought not perhaps to be stretched beyond the words expressed in it, because it tends to weaken or suspend the right of property, which the purchaser hath acquired for a valuable consideration, *infr. B. 3. Tit. 3. § 12. ;* yet in wadsets, where the value of the lands seldom fails greatly to exceed the amount of the debt for which they stand impignorated, a right of redemption ought to receive the most liberal interpretation ; because the favour lies altogether for the reverser : And hence the *actio pignoratitia* of the Romans, for making the redemption of a pledge effectual, was deemed an *actio bonæ fidei*.

6. As to our practice in this article, it has been adjudged by repeated decisions, that reversions need not, like rights of a strict interpretation, be fulfilled in their precise terms, *Durie, Dec. 11. 1638, Finlayson, (Dict. p. 2170.) ; Stair, Feb. 1. 1667, Creditors of Murray, (Dict. p. 13465.)*. And in a late case, where the reversion required consignation in gold and silver, consignation upon an order of redemption, though in bank-notes, was adjudged effectual to found the reverser in a right of redeeming the lands at the next term, upon payment of the redemption-money in current specie, without the necessity of using any new order ; *Fac. Coll. i. 194., (Duke of Gordon, March 2. 1756, Dict. p. 16543.)*. Thus also, though the reversion should not express a power of redeeming from the heir of the wadsetter, as well as from himself, redemption is competent against the heir, if the words can admit of that construction ; *Durie, Feb. 6. 1630, Muir, (Dict. p. 10339.)*. And reversions, even when they are adjected to proper sales, are found to be descendible to the reverser's heirs, if there be no clause discovering the intention of parties, that the right of reversion should be personal to the reverser himself ; *Stair, Jan. 9. 1662, E. Moray, (Dict. p. 10322.)*. Thus, lastly, though the clause of reversion should be explicit, that the reverser shall have no right to redeem but with his own proper money, such clause is disregarded, as catching an undue advantage of the debtor's necessities ; and consequently it is competent to him to redeem the wadset, either with his own or with borrowed money ; *Fac. Coll. ii. 182, (Macintosh, March 8. 1759, Dict. p. 7845.)*.

7. It cannot be dissembled, that our supreme court have, in their deliberations upon this point, assumed the position, that reversions are not transmissible by any voluntary conveyance, unless they bear expressly to assignees ; *Stair, Dec. 6. 1661, Home, (Dict. p. 10373.) ; Fount. Jan. 2. 1696, Burnet, (Dict. p. 10393.) ;* upon this medium, that reversions are mere faculties, which are personal, and consequently not transmissible by those who are entitled to them till they be exercised. But, *first*, If rights of reversion be truly personal to the reverser, why has our practice made them descendible to his heirs ? for the reason why leases, though they de-

If rights of reversion are *stricti juris*.

They are not so in our practice.

If they are transmissible without bearing to assignees.

scend to heirs, cannot be transmitted by assignation, *supr.* T. 6. § 31., is by no means applicable to reversions. *2dly*, The distinction between rights and faculties appears, in so far as relates to this particular, to be without a real difference; for what are the most part of our predial servitudes, and numbers of other rights, but powers vested in one person over the property of another? which rights are nevertheless universally understood to go to assignees, though assignees should not be mentioned.

Reversions may be adjudged by creditors.

8. But however this point might be determined, the following positions are incontestable: *First*, That where an order of redemption is used by the reverser, in consequence of which the redemption-money is consigned, that order is assignable, though assignees should not be expressed in the reversion, said *Dec.* 6. 1661, *Home*, (Dict. p. 10373.); because the faculty to redeem is by the consignment actually exercised, and so is converted into a proper and established right; and as the consigned money is transmissible to an assignee, the assignee must be entitled to a prosecution of the redemption by an action of declarator. *2dly*, It is a fixed point, that reversions, though they should not bear to assignees, may, out of favour to creditors, be carried by adjudication, which is a legal assignment, *Fount.* July 30. 1680, *Bruce*, (Dict. p. 10415.), observed (*Folio*) *Dict.* ii. p. 79. Nay, it may be maintained, though Hope inclines to the contrary opinion, *Min. Pract.* said § 171., that even where assignees are excluded, reversions may be adjudged by creditors; for as the reverser hath it in his power to use an order of redemption upon his right, by which all are agreed that the right of reversion becomes transmissible, if he shall refuse to exercise that faculty for the benefit of the creditors, the law ought to supply that defect by the proper diligence of the creditor himself. This distinguishes the case of reversions, from leases where assignees are excluded; for the reason why such leases are not adjudicable is, that the tacksman's right to possess is, by the lease, made personal to himself; so that he cannot, by any circuit, transfer that possession to another; nor, consequently, be accused of injustice for not conveying to his creditor a right which that creditor cannot hold.

Reversions to be effectual against singular successors must be recorded.

9. Sir George Mackenzie, in his observations upon act 1469, C. 27. (p. 67.) which first declares reversions, though not engrossed in the body of the wadset, effectual against the wadsetter's singular successors, contrary to their genuine nature, affirms, that it behoves the reverser to record his reversion, in order to give it the effect conferred on it by the statute. But that doctrine seems to have no foundation in the enactment; for the first part of it gives to reversions the force of real rights, without the least mention of registration; and the last part of it contains barely an injunction to the clerk-register to receive them into his record, if the reverser shall demand it, in order to preserve his right from perishing, together with a declaration, that the production of an extract of them from the register shall be as effectual to the reversers as if their principal rights were produced. By this means, though the reverser was by that statute secured against the fraudulent alienation of the lands by the wadsetter in favour of a stranger, the security of purchasers was rendered most precarious; who, after having acquired lands on the faith of a right which appeared *ex facie* irredeemable, might nevertheless have been obliged to yield them up to a reverser; whose right they could not, after the narrowest search, find out, by the records. And it was on account of this insecurity, that

that reversions were, by a later statute, 1617, C. 16., not only allowed, but directed, to be registered in the register of seisins and reversions; without which registration, they continue ineffectual against singular successors: So that now a purchaser of lands from one whose right appears to be absolute, is safe in his purchase, though his author should have granted a reversion in a writing apart, if he perfect his disposition by a seisin duly registered before the registering of the reversion; because a reversion unregistered being merely a personal right, cannot come in competition with a right thus completed by seisin, which is real.

10. This last statute, 1617, requires the registration of reversions, assignments, and discharges of reversions, renunciations of wadsets, and grants of redemption; and even enjoins the registering of bonds or obligations for granting reversions; which proves, that the legislature understood bonds of reversions to be, in consequence of the act 1469, real rights, in as proper a sense as formal reversions. Reversions themselves must, by the statute, be recorded within sixty days after their date: but it is declared sufficient, that bonds of reversion be registered within sixty days after seisin taken by the wadsetter upon his wadset; because till then the wadset continues a right merely personal, and consequently may be affected by any deed, though not registered. Grants of redemption, (*i. e.* grants declaring the lands to be redeemed), and renunciations of wadsets, when consigned in an action of declarator, may, by the statute, be registered at any time within sixty days after the date of the decree by which they are ordained to be given up to those having interest in them. An eik, or addition, to a reversion does not, as one might conjecture from its name, enlarge the right of the reverser; but is, on the contrary, a limitation of it. It is a deed granted by the reverser, acknowledging the receipt of a farther sum borrowed from the wadsetter, and declaring, that the wadset shall not be redeemable, till the payment of the last debt as well as the first. These eiks, though they are not specially mentioned in the statute, yet being conditions adjected to the reversion, must be governed by the same rule that governs the reversion itself, of which they make a part; and are therefore real rights affecting the reverser's singular successors, provided they be registered according to the directions of the act.

11. An assignation of a reversion, if it be intimated to the wadsetter, interpellates sufficiently the wadsetter to whom the intimation is made, from renouncing the wadset in favour of the original reverser, though he should offer payment. But to make the assignation effectual against the wadsetter's singular successors, it must be registered in the same manner as the reversion itself; and in that case it requires no intimation; *Stair, Dec. 5. 1665, Beg, (Dict. p. 6304.)*. This registration founds a preference to the assignee, in competition with eiks, discharges, or assignments granted by the reverser, whether before or after his right, if they have not been registered before it. Thus, a second assignation of a reversion first registered, is preferable to an assignation prior in date which is last registered: And thus an eik granted by the reverser after he is divested of his right by an adjudication, the abbreviate of which is on record, or by a registered conveyance, is not effectual to the wadsetter against the adjudger or assignee, whose transmission was made real by registration before the granting of the eik.

12. The act 1617 excepts two kinds of reversions, which are declared real without registration: *First*, Reversions inserted in the body of the right granted to the wadsetter; because the singular
successor

Within sixty days after seisin taken by the wadsetter.

Eik to reversions.

Assignations of reversions must likewise be recorded.

Some reversions require no registration. Preference of rights of reversion.

successor in the wadset is sufficiently certified of the reversion, though it should not be registered, by looking into his own right, which bears it *in gremio*¹⁶⁶. 2dly, Reversions of lands within borough are likewise excepted from the act; the reason of which is not so obvious. Mackenzie's conjecture, that the exception from the statute of seisins of burgage-lands was founded on the exactness of town-clerks in recording them in the borough-books, is not applicable to reversions; for these may be granted without the knowledge of the common clerk. But that exception, whatever its reason may have been, was soon perceived to weaken the security of the purchasers of burgage-tenements. This occasioned the passing of the act 1681, C. 11., which extended the necessity of registration to reversions of tenements within borough. A doubt may be moved, which has not been hitherto cleared by any decision, whether rights of reversion, when duly registered, fall under the act 1693, C. 13., entitled, *Act concerning the preference of real rights*, so as to be preferred according to the dates of their several registrations? or whether their preference ought to be governed by their own dates? The words of the act, *real rights, whereupon seisins shall be taken*, have the appearance of excluding reversions from the rule of preference thereby established, since these admit not of seisin; yet the extension of the act to reversions is favoured, not only by the rubric of the title, but by the reason of the law, which is explained above, T. 3. § 42., and is alike applicable to all real rights. Neither is this extension inconsistent with the clause of the act descriptive of the rights falling under it; the first words whereof may be reasonably interpreted to comprehend every real right, whether of property, annualrent, servitude, &c.; the taxative words which follow having been possibly added for no other reason, but that real rights for the greater part are constituted by seisin.

13. It was usual in wadsets to add a condition to the reversion, that even after the redemption of the lands, the wadsetter should hold them in lease for a certain number of years, for payment of a tack-duty equal to the interest of the sum lent. As this tack-duty was most frequently far below the rent of the lands, it was enacted by 1449, C. 19., that where lands were granted in wadset, and afterwards taken in lease by the wadsetter for a fixed term of years, for half mail, or thereby, such leases should not be valid if they were not set for the very mail, or thereby. Though there be an apparent incongruity, or rather inconsistency, in the words of this act, its intention is obvious, that leases granted to continue after redemption, shall not be valid if the tack-duty be not in some degree proportioned to the value of the rent; and by comparing the two expressions, it would seem, that such leases are to be sustained as are granted for more than the half of the true rent. In those leases, the rent of the lands is to be considered, not as it stood at the time of the redemption, but the time of granting the wadset: For wadsetters, in the view of such low leases, frequently improve the lands at a considerable expense during the subsistence of the wadset; and it would be hard to deprive them of the benefit of that improvement made with their own money and industry; especially since that benefit is to accrue to the reverser at the expiration of the tack; *Stair, Feb. 17. 1672, Douglas, (Dict. p. 16412.)*. Leases thus granted, being in effect eiks to a reversion, are effectual not only

against.

¹⁶⁶ The words of the statute are, "Reversions incorporate in the body of the ~~instit-~~ments made to the persons against whom the saids reversions are used." And with reference to the mode of incorporation, "it is not necessary that the right of reversion be *verbatim* inserted. It is enough that there be such a clear and explicit expression of the nature of the right, as is capable of putting people on their guard;" *Fac. Coll. Geddes, 28th May 1819.*

Tack by the reverser to subsist after reversion.

TITLE VIII.

against the heir, but against the singular successors of the reverser who grants them, provided they be recorded as the law directs.

14. Rights of reversion are for the most part perpetual, leaving the reverser at liberty to redeem at what time soever he pleases, without restriction. These being mere faculties, can be exercised *quandocunque*, and therefore are not lost by any prescription of time, *infr. B. 3. T. 7. § 10.* But a condition is adjected to some reversions, called in the Roman law *pactum legis commissoriae in pignoribus*, by which it is stipulated, that if the debt be not paid against a determinate day, the right of reversion shall be irritated, and the subject impignorated become the irredeemable property of the creditor-wadsetter. This condition was accounted by the Romans *contra bonos mores*, and therefore absolutely reprobated by their law, *L. ult. C. De pact. pign.* But as such clauses, however rigorous they may be, cannot be called unlawful, it was declared by act of sederunt, *Nov. 27. 1592*, that they were to be explained according to their express words and meaning; see also *1661, C. 62. vers. And as to.* Agreeably to this act of sederunt, no conventional irritancy could be purged by our old practice, even by the offer of payment before sentence, *Had. Feb. 19. 1611, L. Barskeoch*, (DICT. p. 7202.). But by the more modern decisions, a distinction hath been made between irritant clauses penal and not penal. Where the clause is not penal, as in an irritancy adjected to a sale for a just price, it is strictly adhered to, and the irritancy is incurred without any previous declarator, *Stair, Jan. 17. 1679, Beatson*, (DICT. p. 7208.) *supr. T. 5. § 25.*: But in penal irritancies, and particularly in those adjected to wadsets, where the sum lent falls always short of the value of the lands, the law has less regard to the words of the contract, than to that equality which ought to be preserved between the parties, and therefore softens the rigour of the act of sederunt, by indulging to the reverser a power to redeem, even after elapsing of the term of redemption, as long as the irritancy is not declared; *Stair, Feb. 1. 1667, E. Tullibardine*, (DICT. p. 7206.)*. Yet the reverser may be cut out of his right without any previous declarator, by prescription, whereof the course begins to run from the expiration of the term of redemption; for if he do not redeem for forty years after, and suffer the wadsetter to continue for that whole space in the possession of the lands, he is for ever foreclosed by prescription, though the wadsetter should have obtained no declarator †.

15. Rights of reversion, where they are subjects capable of being conveyed, are transmitted sometimes by simple assignation, and sometimes by disposition and seisin. If the wadset be executed in the old form of impignoration to the creditor, which is quite consistent with the right of property in the debtor, the reversion, because it includes in that case the right of property, ought to be transmitted by a deed bearing precept of seisin: But where it is granted in the form of an alienation, and the reversion founded solely on the wadsetter's obligation, the wadsetter is proprietor; and the only right remaining in the reverser being a right to redeem,

Reversions when transmissible by assignation, when by disposition.

VOL. I.

5 M

deem,

* See *Nov. 26. 1760, Macdonald; Fac. Coll.* DICT. p. 7286.

† *Nov. 10. 1738, Pollock, Clerk Home, No. 102, Kilk. No. 1, voce IRRITANCY*, DICT. p. 7216. (*Elchies, v. WADSET, No. 4.*) Where from circumstances the transaction fell to be regarded rather as a sale than as a wadset, the Court found the right of reversion was cut off after forty years from the expiration of the term, though on account of minorities there was no room for the plea of prescription; *Kilk. No. 2. voce IRRITANCY; Kerscallan, July 21. 1749, DICT. p. 7219; (Elchies, v. WADSET, No. 7.)*

Book II.

Extinction of wadsets.

Order of redemption. Premonition.

Voluntary redemption of a wadset. Letters of regress.

deem, which is personal, may, like other personal rights, be transmitted by assignation. Hence an adjudication of a reversion of a wadset of this kind, though not followed by seisin or by a charge against the superior, carries the full right of the subject adjudged; and is therefore preferable to a posterior adjudication of that reversion upon which a charge hath been given to the superior; *Kames*, 91. (*Duchess of Argyle*, Jan. 31. 1727, Dict. p. 209.)

16. Rights of wadset are extinguished, either, *first*, when the wadset lands become the irredeemable property of the wadsetter; *ex. gr.* when the wadsetter obtains a discharge or renunciation of the right of reversion from the reverser, and registers it in the manner prescribed by act 1617; or where the reverser forfeits his right, by not redeeming the wadset within the time limited by the deed, or indulged by the law. *2dly*, A wadset is extinguished by the reverser's redemption of the lands, on payment of the sums for which it was granted. This redemption proceeds, either on the reverser's own motion, when he offers to the wadsetter the payment of his debt, by which his property may be disburdened of the wadset, or upon the wadsetter's demand or requisition of the wadset-sums from the reverser.

17. When the reverser wants to redeem his lands by payment, he must use an order of redemption against the wadsetter; the first step of which is premonition. This premonition is an act of the law, by which the reverser, or his procurator, gives notice to the wadsetter, under form of instrument, to appear at the place, and upon the day and hour specified, then and there to receive payment of his debt*. If the wadsetter receive his money upon this intimation without compulsion, and renounce his right in favour of the reverser, the redemption is voluntary. In the redemption of wadsets which have not yet been made real by seisin, a simple discharge or renunciation by the wadsetter, though not registered, is a proper extinction of the right; because as long as a right remains personal, it may be effectually renounced by a personal deed. But where seisin has proceeded on the wadset, it must be distinguished, whether the right be holden base of the reverser who grants it, or of the reverser's superior.

18. When the wadset is holden of the reverser, it is usual to insert in the wadsetter's renunciation a procuratory for resigning the lands to the superior, granter of the wadset, *ad remanentiam*; and after the surrender is made, to register the instrument of resignation, together with the renunciation, in the register of seisins; which, without any new infeftment, extinguishes the wadset, and consolidates the property with the superiority in the reverser. But a simple renunciation properly registered has the same effect, even without resignation; because the reverser, who is superior, continues infeft in the lands, notwithstanding the wadset with which his seisin is burdened; and consequently as soon as his seisin is discharged of that burden, by the wadsetter's registered renunciation, he must of course be reinstated in the full right of the lands, *Hop. Min. Pr.* § 170. In a wadset holden of the reverser's superior, the reverser is, by the seisin proceeding upon it, divested of all right in the lands; and therefore the superior, to whom the reverser is after that period no better than a stranger, lay under no obligation,

* If the wadsetter has granted subaltern infeftments, those who hold them must likewise be premonished; *Fac. Coll. Feb. 25. 1794, Younger Children of Macneil*, Dict. p. 16555.

ligation, as the law formerly stood, to receive him again as vassal, though the wadsetter should have been willing to renounce or dis-pone in his favour. For obviating this inconveniency, letters of regress were frequently obtained from the superior, by which he became obliged to give the reverser, his former vassal, full regress to the property upon his redeeming the lands. The necessity of these letters is now in a great measure superseded, by 20. *Geo. II. C. 50.* § 12. and 13., obliging superiors to receive every one as vassal, who shall produce a grant by the former vassal, containing procuratory of resignation, upon payment of the composition due by long custom. The only benefit, therefore, that can now accrue to the reverser by letters of regress is, that the superior must in that case receive him without any composition. But if these letters be not registered in the same record, and within the same time as is prescribed by statute in the case of reversions, the singular successor in the superiority is not obliged to regard them, but will be entitled to the usual composition of a year's rent, for again receiving the reverser, as if no such letters had been granted.

19. If the wadsetter appear not at the time and place to which he was cited by the premonition, or if he refuse to accept of payment and to renounce, the reverser must consign it in current specie in the hands of the person named in the right for that purpose; and if none be named, in the hands of a responsal person, *infr. B. 3. T. 1. § 31.* On these facts, a notorial instrument must be taken by the reverser; which ought to bear, *first*, the production of the right of reversion; and where the reversion is contained *in gremio* of the wadset-right, which is in the possession of the wadsetter, and so cannot be produced by the reverser, that special fact ought to be related in the instrument. *2dly*, It must also bear the production and consignment of the wadset-sums. Bonds of borrowed money, or other liquid obligations for debt due by the wadsetter to the reverser, cannot be sustained as grounds of compensation, so as to supply the place of consignment *pro tanto*; because all such equivalents are excluded by the tenor of the reversion, which requires consignment to be made in current money. But compensation, where it is grounded, not upon an extrinsic obligation, but on an article contained in the right of wadset, will be received as consignment *pro tanto*, *Stair, Jan. 2. 1667, Hodge, (Dict. p. 13464.)* An instrument of consignment, though it affords legal evidence that all the proper solemnities were used in depositing the redemption money, *infr. B. 4. T. 2. § 5.*, yet being but the assertion of a notary, cannot fix the receipt of it on the consignatory, without a written acknowledgment of it signed by himself. But though, where no receipt is taken, the consignatory will get free, by denying upon oath that he received the consigned sums, the law pays such regard to the instrument, that the reverser is not laid under the necessity of renewing his order of redemption; the order already used will be sustained, on his again producing and consigning the redemption money judicially. This instrument of consignment completes the order of redemption, stops the further currency of the interest of the wadset sums against the reverser, subjects the wadsetter to account for the rent of the wadset-lands, from the time the order was used, and founds the reverser in an action for declaring the order to be formal, and the lands to be redeemed in consequence of it.

Consignment of the redemption-money.

20. This kind of redemption therefore requires the sentence of a judge to its full consummation, and may on that account be called judicial

Declarator of redemption.

dicial or necessary*. The declaratory action on which this decree proceeds, is competent to the reverser, not only against the wadsetter himself, but, upon his death, against his heir, though he be not entered; for the reverser's right of action ought not to be evacuated without any fact done by himself, merely because the wadsetter's heir declines to enter; and in choosing a defender, no more is necessary than that he have an interest to oppose the suit. At the same time, because an heir before entry is not vested with the right of his ancestor's lands, and so cannot effectually pass them over to another, the wadsetter's apparent heir, against whom a decree of declarator is obtained, hath no claim to the redemption-money till he serve himself heir, and afterwards renounce the wadset, and make over the lands to the reverser, *Stair, Jan. 10. 1665, Campbell, (Dict. p. 16521.)*. And for the same reason, if such heir should die before the right of wadset is vested in him, the redemption money would belong not to his executors, but to such heir as should make up a complete title to the lands, and so be capable of reinstating the reverser in them.

To whom and against whom competent.

21. Lord Stair, *B. 4. T. 5. § 3.*, affirms, that in the general case, the wadsetter's apparent heir may be made a party to this action, without a previous charge against him to enter, because charges are not necessary in those declarators which have neither any petitory nor possessory conclusion against the heir. According to the reason of this rule, the action of declarator may, in wadsets holden base of the reverser, be prosecuted against the wadsetter's heir, without charging him to enter, because the libel in such action contains nothing personal against him; seeing the sentence declaratory of itself relieves the reverser's seisin from the burden of the wadset, and so restores him fully to his former right in the lands. But where the wadset is holden of the reverser's superior, by which the reverser is entirely divested, the scope of the action is to compel the defender to reinstate him in the right of the lands; who therefore must be previously charged to enter heir, without which he cannot be in a capacity to transfer any right to the pursuer. Though action of declarator be sustained against the wadsetter's apparent heir, it is not competent to the apparent heir of the reverser, who has no title to sue upon his ancestor's rights before he enters heir to him. Nay, it is not sufficient for founding the action that he has been served heir before commencing it, if he was not also served at the time of using the order of redemption, *Stair, Jan. 19. 1672, Lo. Lovat, (Dict. p. 13278.) †*.

Where the wadset has been assigned or disposed, who must be cited as parties.

22. Where the lands have been conveyed by the wadsetter to a singular successor, it has been made a question who ought to be cited by the reverser as parties to the declarator? Craig affirms, *Lib. 2. Dieg.*

* An action of declarator of redemption is sufficient without any previous formal order of redemption, even where such formal order has been stipulated in the wadset-right. See *Fac. Coll. March 10. 1786, Campbell, Dict. p. 16552.*; *Jan. 1791, Lord Alva, Dict. p. 16555.*

† See on this subject, *Fac. Coll. Jan. 22. 1769, Robson, Dict. p. 16199*¹⁶⁷. It has been found, that a purchaser of the right of reversion *quoad* a part of the lands, cannot sue out a partial redemption, *Kilk. No. 1. voce WADSET, Sinclair, Dec. 1741, Dict. p. 16541*; (*Elchies, v. REDEMPTION, No. 6.*)

¹⁶⁷ It was here found *jus tertii* for the wadsetter to object, "that the proof on which the service proceeded was defective;" and a reduction of the service on this ground was dismissed.

"Order of redemption was sustained, though the premonition was only by an apparent heir, who was served before consignation;" *Crock, 9th December 1736, Elchies, v. REDEMPTION, No. 4.*

Dieg. 6. § 13., that by the old practice it was sufficient, if premonition in the order of redemption was made to the present possessor for receiving the redemption money; neglecting the original wadsetter and his heirs. This doctrine seems to be taken for granted. in a case soon after Craig's death, *Durie, July 9. 1630, Fisher*, (DICT, p. 2204.); but it was adjudged in the same decision, that in the action of declarator proceeding on that order, it behoved also the reverser to cite the heir of the original wadsetter, or at least the person whom the present possessor alleged to be his heir; but that it was unnecessary to take notice of any of the intermediate possessors ¹⁶⁸.

23. The reverser may pass from his order of redemption, and again demand the consigned money, at any time before declarator, *Durie, June 21. 1626, Sir J. Murray*, (DICT. p. 14093.); for if that order be considered as an offer of the redemption money made by the reverser, all offers may be retracted before acceptance by him to whom they are made; or if it be looked upon as a step of diligence, every one may at pleasure pass from any diligence used by himself. From this position another flows, that the consigned sum continues the property of the reverser till declarator, otherwise he could have no right to redemand it from the consignatory; and as long as the property of the consigned money remains with the reverser, so long must the wadsetter's interest in the wadset continue heritable. If therefore the case be put, that the wadsetter should die after an order of redemption used by the reverser, and that, upon his death, a decree should be obtained against his heir, declaring the lands redeemed in consequence of the order, the consigned money, which comes in place of the lands, would belong, not to the wadsetter's executor, but to his heir; because, at the time of his death, while there was yet no declarator, the wadsetter's interest in the lands was heritable, *supr. T. 2. § 20.*; *Stair, Jan. 21. 1673, Nicol*, (DICT. p. 14095.). This position is also supported by a separate ground of law, *viz.* that the intention which the wadsetter has discovered to make his money heritable by securing it on land, cannot be defeated by a deed of the reverser to which the wadsetter himself is no party; and consequently the consigned money must continue heritable till the law changes its nature; *i. e.* till either the wadsetter renounce his right, or there be a sentence of the supreme court declaring the wadset redeemed. After that period the feudal right of wadset is dissolved, and the consigned money becomes moveable, because it is no longer secured on land. The moment, therefore, that the decree of declarator is obtained against the wadsetter's heir, the money continues no longer heritable in the person of that heir; and consequently it descends on his death, not to his heir, but to his executors. As a corollary from the above doctrine, a wadsetsum consigned by a reverser in consequence of an order of redemption, cannot be arrested by any creditor of the wadsetter till a declarator of redemption be actually obtained; because it is not till declarator that the sum consigned is accounted the property of the wadsetter, descendible to his executors, *Stair, B. 3. T. 1. § 37; Fac. Col. ii. 102, (Cunningham, Feb. 15. 1758, DICT. p. 727.)* ¹⁶⁹. The fore-

The reverser may pass from his order of redemption before declarator.

¹⁶⁸ *Vid. supr. § 17. not. **

¹⁶⁹ So also in *Macleod, 20th February 1735, Elchies, v. REDEMPTION, No. 1.* On the same principle, after declarator, the sum consigned is not attachable by inhibition; arrestment being then the proper diligence; *Stormonth, 24th May 1814, Fac. Coll. ; 2 Bell's Comm. 156; supr. t. 2. § 16.* The act of sederunt, *19th Feb. 1680*, has no application, where the feudal right of wadset has thus been dissolved, *Ibid.*

Book II.

Orders of redemption need no registration.

When the wadsetter chooses to give up the lands and recover his money.

Wadsets proper and improper. Usurious wadsets.

going observations may be applied to orders of redemption used in appraisings and adjudications. After decree of declarator is obtained by the reverser, the wadsetter, who thereby becomes proprietor of the consigned money, may charge the consignatory, upon letters of horning, to deliver it up to him.

24. Orders of redemption, together with decrees of declarator proceeding upon them, are undoubtedly of the nature of renunciations, being judicial deeds appointed by the law to supply the room of voluntary renunciations; and as such, have the effect of evacuating the right of wadset in questions even with the wadsetter's singular successors, *Mack. Obs. on 1617, C. 16*. The security, therefore, of purchasers, appears to call for the registration of the one as well as of the other; since it cannot be known but by the records, whether lands which appear vested in a wadsetter are redeemed from him, or continue still in his person. Yet orders of redemption are neither expressed in the act 1617, nor have been in use to be recorded by the reverser; and the decrees of declarator proceeding upon them enter into no record, other than the common register of decrees; so that in this respect the records afford little or no security to singular successors in wadset-rights.

25. Hitherto of the redemption of wadsets when it proceeds on an order of redemption used by the reverser. When the wadsetter chooses to have his money rather than the wadset-lands, he must demand from the reverser the sums due upon the wadset under form of instrument; and this is, in the most proper sense, an instrument of requisition, though the instrument taken by the reverser, when he intimates to the wadsetter to receive his money, passes sometimes by the same name. It is obvious, that requisition cannot be made by the wadsetter, if either the reverser may redeem *quandocunque*, without restriction in point of time, or if the term to which the reversion is limited be not yet expired. Though requisition of the wadset-sums should be made by the wadsetter, he may, without doubt, upon changing his mind, and choosing to let his money continue with the reverser, pass from it, either directly by an express declaration in writing, or indirectly, by intermeddling with the rent of the wadset-lands, or doing any other act inconsistent with the requisition. But it has been doubted, whether he can pass from it in the special case where the reverser hath, in consequence of the wadsetter's requisition, consigned the redemption-money: for by the consignment *res non fit integra*; the reverser comes to have a joint interest in the requisition with the wadsetter, seeing consignment, when lawfully made, imports, in the judgment of law, a release of the debtor, and an extinction of his obligation; and if his obligation be once extinguished, it ought not to be revived against him by a fact of the wadsetter not consented to or approved by him. By a decision, *Forbes, Nov. 14. 1710, Ross*, (Dict. p. 14099.); the wadsetter was allowed to pass from his charge, reserving to the reverser liberty to follow out a declarator of redemption in common form. The question, Whether requisition by the wadsetter makes the sum contained in the right of wadset moveable? has been fully explained, *T. 2. § 16*.

26. Wadsets are, by the usage of Scotland, either proper or improper. A proper wadset is truly of the nature of a redeemable right of property, and not barely of pledge; by which it is covenanted, that the use of the lands possessed by the wadsetter shall during the not-redemption, go for the use or interest of the money lent

lent by him to the reverser, so that the wadsetter enjoys the rents without accounting in satisfaction, or *in solutum* of his interest. As, on the one hand, such wadsetter subjects himself to all the cross-accidents which may hinder these rents from being effectual to him, and consequently is obliged, let them be ever so deficient, to divest himself of his right, upon payment by the reverser of the bare principal sum, without any claim for past interest: So, on the other, he ought to have the whole benefit that may result from the increase of the fruits, by his industry or otherwise; and therefore, though they amount to more, he is not obliged to impute any part of the surplus towards payment of the capital, but appropriates the whole to himself. An improper wadset is nothing more than a *pignus*, or right of security; in which the wadsetter is accountable to the reverser for the neat yearly sums which he hath, or might have received out of the wadset-lands. He undertakes no part of the hazard of the rents on himself: He is secured by the nature of his contract, that if they do not fully amount to the interest of the sum lent, the deficiency shall be made up to him, and that he shall not be compelled to renounce, or divest himself, in the reverser's favour, till the whole sums, principal and interest, shall be cleared off by his intromissions. When therefore the rent exceeds the yearly interest, equity will not allow him to pocket up the excrescence for his own use. He must state it to the reverser's credit, as payment *pro tanto* of the capital¹⁷¹. Upon this ground, a clause adjoined to a proper wadset, providing that the wadsetter shall not be subjected to the hazard of the rents, is justly declared usurious by 1661, C. 62. *vers. And in regard*. Where a lender runs no risk of losing any part of his interest, he ought to have no chance of getting more: And the wadsetter in a proper wadset undertakes the *periculum* of the rents in so high a sense, that though he should be forcibly turned out of the possession by the reverser, the wadsetter's claim for the rents, from that period downwards, would be barely personal against the reverser, who did the wrong, but not real against the lands, so as to prejudice the singular successors or creditors of the reverser, who should affect them by proper diligence, *Fac. Coll.* ii. 22.*. The ruling difference, therefore, between an improper and a proper wadset, is this, that, in the first, the wadsetter acts merely in the reverser's name, and must account to him for what he receives, as if he were his steward or factor; whereas in a proper wadset, the wadsetter acts *tanquam interim dominus*, as a temporary proprietor; what he receives of the rents, is his own, with this only deduction, that every year's rent received by him, be it high

* *Gordon against Ogilvie*, Feb. 17. 1761, DICT. p. 14070.¹⁷².

¹⁷¹ In an improper wadset, and where the question occurs not with creditors, but with the representatives of the reverser, the wadsetter, being also a creditor of the reverser in certain *personal debts*, is "entitled to impute his intromissions with the wadset towards extinction, in the first place, of these personal claims;" and that whether they are prior or posterior to the date of the wadset; *Sturgeons*, 20th Jan. 1813, *Fac. Coll.* It was decided in the same case, that where the wadsetter conveys his right of wadset in separate parcels to different individuals, with assignation to portions of the debt effecting to the extent of the wadset-subject held by each, the purchasers are not liable to account for their intromissions with the rents, *singuli in solidum*, but only *pro rata*.

¹⁷² This is not the case referred to in the text; and it has no application to the point there treated. Mr Morison seems to have turned, by mistake, to *Fac. Coll.* iii. 22., in place of *Fac. Coll.* ii. 22.: This last, which is the proper case, is *Macleod*, 9th March 1757, DICT. p. 16546.

Book II.

Characteristics
of proper and
improper wad-
sets.

high or low, extinguishes a year's interest of the debt due to him by the reverser.

27. The subjecting of the wadsetter to the payment of the public burdens chargeable on the lands, does not appear to be a character essentially belonging to a proper wadset, though Mackenzie has made that a part of its definition, § 12. *h. t.* : For, where lands are suspected not to be sufficient to produce a rent answerable to the interest of the wadset-sum, over and above the public burdens, it is most equitable, even though the parties intend a proper wadset, that the reverser should undertake the payment of those burdens, otherwise the wadsetter must lose part of his interest, *Dirl.* 436, (*Home, Jan. 24. 1677, Dict.* p. 16414.); *Pr. Falc.* 114, (*Dowie against Cuninghame, Dec. 1685, Dict.* p. 16417.). Neither is it inconsistent with the nature of property, as some have affirmed, that the purchaser should agree with the seller, to be relieved by him of particular yearly burdens affecting the subject of his purchase, as feu-duties, land-tax, minister's stipend, &c. ; and frequent instances of such stipulations occur in sales by feu-holding, where the public burdens continue a charge upon the seller. Because the reverser, in an improper wadset, lies under an obligation, flowing from the nature of his right, to uphold the rent to the interest of the wadset-sum, it has been maintained, that where he is bound to uphold it, not precisely to that interest, but to a determinate quantity of corns, whose value may, at the ordinary conversions, be expected to amount to it, a proper wadset is constituted ; because, though the full quantity specified in the right should be delivered to the wadsetter, the price may fall short of the interest ; and consequently, as the wadsetter runs some degree of risk, *viz.* that of a low market, that risk ought to be compensated, by giving him a chance of an high market. But such wadset was adjudged improper, *Kames*, 12. (*Doul, July 18. 1718, Dict.* p. 16423.); as it might be of bad consequence to give the wadsetter a pretence to secure himself from all accounting, by undertaking an inconsiderable hazard*.

28. All wadsets which are made redeemable upon payment of the principal sum and interest, must be improper, *Dirl.* 57. (*Urquhart, Dec. 8. 1666, Dict.* p. 16525.); because in these the wadsetter has the reverser bound for the payment of his whole interest, and therefore must account to the reverser for the excrescent rent over and above what corresponds to that interest. Wadsetters, even in a proper wadset, sometimes choose, in place of possessing the lands by themselves, to grant a back-tack of them to the reverser, which is made to continue during the not-redemption of the wadset, for payment of the interest of the wadset-sum as the tack-duty. After granting such back-tack the wadset becomes improper ; for the wadsetter, in that case, has no chance of getting more of the rent than answers the interest of his debt †. Where the right of reversion bears expressly, that all the back-tack duties shall be paid up before the lands are redeemed, the payment of them, as well as of the capital

Back-tack
granted by the
wadsetter to the
reverser.

* See two decisions somewhat different in cases nearly similar ; *Fac. Coll. Nov.* 17. 1775, *Buchanan*, p. 16548. ; *ibid.* Feb. 9. 1790, *Fraser's Trustees*, *Dict.* p. 16553. See also *Fac. Coll. March* 6. 1754, *Campbell* ; *Dict.* p. 2439. ; *ibid.* Feb. 22. 1760, *Grant*, *Dict.* p. 8740.

† In such a case where there was a conventional irritancy of the back-tack on the non-payment of the tack-duty, the right was found to have become a proper wadset on declarator of the irritancy ; *Falc.* v. 1. NO. 218, *Grays, Dec.* 8. 1747, *Dict.* p. 16541. The same decision was given where the wadsetter had virtually passed from the back-tack, *Fac. Coll. Jan.* 22. 1777, *Ayton, &c.* *Dict.* p. 16551, and *App. voce WADSET.* No. 1.

capital sum, becomes a real burden upon the redemption, effectual against the reverser's singular successors. But, though these singular successors cannot redeem the lands, without paying off all the arrears of tack-duty, that being a condition of the reversion; yet, if they choose not to redeem, they are liable for nothing more than the payment of the current tack-duties during their own possession; the arrears incurred before that period not being *debita fundi*, but barely a personal ground of debt against the reverser and his representatives, except only in the event of redemption, *Stair, Jan. 16. 1677, Haliburton*, (Dict. p. 13801.). Back-tacks granted by a wadsetter, if they be neither engrossed in the wadset, nor registered in the register of reversions, are ineffectual against the wadsetter's singular successors; for no real right can be charged with any burden, which is not either incorporated in *gremio juris*, or recorded in the above register, according to the directions of 1617, C. 16.*.

29. It was provided by 1661, C. 62. *vers. And because before*, that whereas many proper wadsets had been granted, both before and after the year 1650, in which unreasonable advantages had been taken of the debtors, the wadsetter in the said wadsets should, during the not-requisition of the sum lent, be obliged, upon an offer of security made to him by the reverser for the payment of his interest, either to quit his possession of the lands in favour of the reverser, or to impute the excrescent rents, after payment of the interest, towards extinguishing the capital. This clause of the act has, not without the appearance of reason, been construed by some to be limited to such wadsets as had been granted previously to the act, both from the recital of the clause, and the enacting words. However, *de praxi*, all reversers have, by an extended and equitable interpretation of it, been admitted to sue for possession in pursuance of that statute, without distinguishing whether the wadsets were dated before or after it. It is the reverser who is entitled to make this offer of security, and all who come in his right, *ex. gr.* an assignee or adjudger of the reversion; but his personal creditors cannot compel the wadsetter to quit the possession in their favour, because their debts are no titles of possession, *Forbes, Feb. 10. 1713, E. Leven*, (Dict. p. 12502.). If the wadsetter, on such offer, choose to retain the possession, the wadset becomes improper; for from that period he must account for the surplus rents, *Gosf. June 16. 1671, Lo. Lovat*, (Dict. p. 16528.).

30. An eik adjected to the reversion of a wadset which had been burdened previously to the eik with a back-tack to the reverser, was adjudged not to have the effect of a real right against the singular successors of the reverser; because it did not express an augmentation of the back tack-duty, in proportion to the farther sum lent to the reverser. And hence a wadsetter, against whom an action was brought for declaring his right extinguished by possession, was not allowed to ascribe his intromissions to the sums contained in the eik; upon this ground, that the eik was to be considered as a mere personal obligation, which was not a proper title of possession; and

All proper wadsetters must quit the possession on the reverser's finding security for the interest of the wadset sum.

Eik to a reversion previously burdened with a back tack.

* Where a proper wadsetter had been forcibly turned out of possession, his claim for the rents of that period was found personal against the reverser and his heirs, and not real in a question with singular successors; *March 9. 1757, Macleod*, Dict. p. 16546. ¹⁷².

¹⁷² This is the case, *Fac. Coll. ii. 22.*; noticed in the text, *supr.* §. 26. It is also reported by *Kames, Sel. Dec. No. 128*.

Book II.

Infertment of
annualrent.

Its bygone interests are *debita fundi*.

and that as the wadsetter's right to the rents was limited to the tack-duty expressed in the back-tack, the reverser's singular successor might, to the world's end, frustrate or postpone the payment of the sum in the eik, if, in place of redeeming, he should choose to continue his possession upon the footing of the back-tack, *Forbes, Feb. 18. 1708, Sir H. Dalrymple, (Dict. p. 10174.)*¹⁷³.

31. Infertments of annualrent, the rise and nature of which have been already explained, *T. 2. § 5.*, are also redeemable rights. Though they had their origin from the prohibition of the Canon law, against the taking interest for the use of money, they have continued in practice ever since the taking of interest became lawful; because the creditor, or, as he is called, the *annualrenter*, gets not only a personal security from the debtor, but a real security, or a right of hypothec on his lands. *Craig, Lib. 1. Dieg. 10. § 37.*, considers this right as a proper feu, not indeed of lands, but of an annual payment out of lands; but it is truly no more than a burden or servitude, affecting the feudal subject over which it is constituted. Nevertheless, it has some effects of a feu; for the annualrenter infert is not only said to have died in the fee, as well as the proprietor, but, which is more material, he enjoys the privileges of a baron; by which his heirship moveables descend not to his executors, but to his heir.

32. Though a right of annualrent does not carry the property of the lands, or other heritable subject, it creates a *onus* or burden upon the rents for payment of the interest contained in the right; and hence the arrears of interest become, after seisin, *debita fundi*. The annualrenter may therefore insist for the payment of the past interest, not only in a personal action against the debtor or his representatives, but in a real action of poinding the ground, before the court of session or sheriff. On the decree pronounced in this action, letters of poinding the ground issue of course; in virtue of which the annualrenter may distrain the corns, cattle, or other moveables on the lands burdened, that had been the property of the debtor, though he be divested of them in favour of a singular successor; but in so far as the goods on the ground belong to the debtor's tenants, the creditor can poind them only to the extent of the rent due by them to their landlord; *vid. next section*; to which extent he may, if he pleases, sue them, in a personal action, towards the payment of his past interest; and all other possessors whomsoever, to the extent of their intromissions*. Yet the preference of the right of annualrent, in a competition with other creditors, depends not on the annualrenter's actual poinding; for he is entitled to the poinding by the antecedent preference which his seisin had acquired to him; of which he cannot be deprived, though he should not exercise his right; which is *meræ facultatis* as to the annualrenter, and quite unnecessary, if payment can be otherwise got. Hence, in a competition between an annualrenter and arrester, the annualrenter was preferred, though he had only insisted in a personal action as if he had been pursuing upon a poinding of the ground,

- *Falc.*

* The older decisions respecting the remedy competent on a right of annualrent, appear to have fluctuated for some time about the beginning of the 17th century, though they fully support the doctrine of the text. A distinct view of them is given in *Dict. voce ANNUALRENT, INFERTMENT OF*.

¹⁷³ It would be different in a question, not with singular successors, but with the reverser's representatives; *Sturgeons, supr. not.*¹⁷¹.

Falc. ii. 1. (*Kelhead*, Nov. 2. 1748, *DICT.* p. 2785.)*. Where different annualrenters on the same lands are insisting at the same time in the diligence of pointing the ground, the preferable annualrenter is allowed to use his diligence of pointing for a certain number of days fixed by the judge; after which, the second, for a like number; and so successively through the rest, *Stair*, Feb. 5. 1662, *La. Mousewell*, (*DICT.* p. 3486.); *Ibid.* July 26. 1662, *Sir J. Ayton*, (*DICT.* p. 3487.). As it is no more than the interest of the sum lent which is a burden affecting the lands, the annualrenter, if he want his principal sum, cannot recover it by pointing, or by a personal action against the tenants, or other possessors of the lands; but must demand it from the debtor himself, upon a personal obligation in the bond, either by a formal instrument of requisition, or by a charge on letters of horning, according as the right is framed; or he may adjudge on the bond in common form.

33. By our ancient practice, all creditors, whether by real rights, as infeftments of annualrent, or even by personal bonds, might have carried off by pointing, on a brief of distress, not only such fruits, or other moveables, upon the ground of their debtor's lands, as belonged to himself, but those also which belonged to his tenants; both corns, cattle, and implements of husbandry, brought by him upon the ground, to the full amount of his debt, though the tenant had not been so deep in arrear to his landlord the debtor, as the value of the pointed goods amounted to. By these means, tenants were frequently ruined by debts contracted, not by themselves, but their landlords. To put a stop to so rigorous and unjust a practice, it was provided by 1469, *C.* 36., that the goods of tenants should not be pointed for the landlord's debt, farther than their term's mail extended to. As this act was correctory of our former law, it was at first strictly interpreted, so as barely to prevent the unlimited pointing of the goods of tenants upon personal debts; and upon this interpretation of the act, real creditors continued their former course of pointing to the full extent of their debts; *Durie*, July 11. 1628, *La. Ednam*, (*DICT.* p. 8128.); but by the later practice, the restriction has been, from equity, extended also against *debita fundi*, *Stair*, Feb. 4. 1674, *La. Pitfoddels*, (*DICT.* p. 10548.). The words of the act are, that the tenant shall not be pointed for more than his term's mail; by which, in the proper sense of the words, the current year's rent must be understood: But, *de praxi*, tenants are pointed by real creditors, not only for the current rent, but for all the arrears of rent which are due by them to their landlord; because the law was designed merely to protect the goods of tenants from being subjected to the diligence of creditors for debts due by their landlords, farther than the rent they owed for past terms, and that which should become due at the next. There can be no doubt but that an annualrenter may point the ground in the landlord's natural possession, to the full extent of the interest due upon his right, agreeably to the known rules of obligations and diligences; neither does the act 1469 stand in his way.

34. As the debtor in a right of annualrent continues proprietor notwithstanding the impignoration of the rents to the creditor, it is

And recoverable by pointing of the ground.

Extinction of rights of annualrent.

* This has been confirmed by later decisions; *Fac. Coll.* July 13. 1780, *Webster*, *DICT.* p. 2902; *ibid.* Feb. 5. 1783, *Parkers*, *DICT.* p. 2868. See also a decision on the same principle; *Stair*, Jan. 9. 1668, *La. Clerkington*, *DICT.* p. 10646.

is not necessary, nor indeed congruous, for the creditor, to make over or surrender the lands after his right is extinguished by payment; for resignation cannot be made, nor a disposition granted, but by him who is at the time vested with the property of the lands to be made over or resigned¹⁷⁴. Rights of annualrent therefore may be extinguished by a simple discharge or renunciation of the annualrenter*. These renunciations were, by our former usage¹⁷⁵, ineffectual against the creditor's singular successors, unless they were registered in the register of reversions; because rights of annualrent conceived in the old form, were not truly bonds, but rights of wadset, by which a yearly interest payable out of the debtor's lands was secured to the creditor; and all renunciations of wadsets were ordained to be so registered by the act 1617. Partial discharges, indeed, if they contained no more than the arrears of interest due on the right, were always good without registration, even against singular successors: But where the payment encroached on the capital, registration was necessary, since the discharge upon such payment imported an extinction of part of the original right of annualrent; *Stair, Jan. 7. 1680, Maclellan*, (Dict. p. 571.) †. But as those rights have, by a variation in the style, now become accessory to personal obligations, they are no longer considered as wadsets, but bonds; so that they cannot fall under the act 1617; and of course may be extinguished, as other proper debts, not by renunciations or discharges only, though not registered, but by payment or intromission with the rents of the debtor's estate; *Stair, July 8. 1680, Rankine*, (Dict. p. 572.); which intromission being *facti*, can enter into no record, and may even be proved by parole evidence ‡¹⁷⁶. Hence the purchaser of a right of annualrent cannot be secured by any search into the records, but must rest on the seller's warrandice, if he does not, as Lord Stair advises, *B. 2. T. 3. § 22.*, procure the consent of the debtor to the purchase.

Infestments in security and of relief.

35. Infestments in security are another species of redeemable rights, now frequently substituted in the room of annualrent-rights, by which the granter becomes obliged to infest the creditor, not barely in an annualrent or interest payable out of the lands contained in the right corresponding to the principal sum lent, but also in the lands themselves, for security of the principal, interest and

* See *Durie, Nov. 23. 1627, Dunbar*, Dict. p. 570.

† *Fount. Jan. 2. 1705, Hope, &c.* Dict. p. 574.

‡ So found,—*Stair, Feb. 4. 1671, Wishart*, Dict. p. 9978; *Forbes, Jan. 25. 1711, Baillie*, Dict. p. 9990.

¹⁷⁴ See this passage commented on, 2. *Ross's Lectures*, 390.

¹⁷⁵ It is thought, that perhaps even at this day, were a question occurring as to an annualrent right framed strictly after the old style, it would be attended with all its former effects, so that no discharge or renunciation of it would be effectual against singular successors infest, unless duly recorded in the register of reversions:—But compare *Dunbar, sup. not. **; *Hope, sup. not. †*, and Dict. p. 9989, where it was so found, with *Baillie, sup. not. ‡*, where the contrary was decided. The case of *Wishart, sup. not. ‡*, occurred not with a singular successor, but with the creditor's representative; in which situation, there can be no doubt as to the extinction of the annualrent right by simple payment. See further, *Ersk. Princ. h. t. § 16.*; 2. *Ross's Lectures*, 378.

¹⁷⁶ In this way, however, the right is not so extinguished, as that on a renewed advance it may not be revived by redelivery of the creditor,—that discharge being still unrecorded, and there being no intervening real right nor other mid impediment; *Falc. and Kames, Rem. Dec. Campbell, 19th June 1745*; Dict. p. 14101; *Elchies, v. INFESTMENT, No. 1.*; 2. *Ross's Lectures*, 390.

and penalty ; and he assigns to the creditor the whole rents during the not-redemption. These rights, because they contain a warrant for seisin in the lands themselves, and an assignation to the rents, not only entitle the creditor to poind the ground for the interest, but afford him a proper title of possessing the lands, for payment both of the capital and interest ; which makes a considerable addition to his security. Rights of the same nature are also granted to cautioners, for making their relief effectual against the debtors for whom they have become engaged ; and then they get the name of *infestments of relief*. But in the following respect the two securities differ, that where such right is granted to a proper creditor, it has full effect from its date, or at least from the term of payment of the debt, so as the creditor may enter into the immediate possession of the rents for his payment ; whereas such security granted to a cautioner is conditional : It is only intended for securing the cautioner's recourse in the event of his suffering ; and therefore, till he either pay the debt, or be distressed by diligence for payment, he cannot be entitled to the possession of the rents, except in the special case to be explained, *B. 3. T. 3. § 65.*

36. *Infestments of relief* are granted solely for the security of the cautioner. The creditor to whom the debt is due, acquires no right by it : For since he took not care to get the same security for his debt that the cautioner got for his relief, he may blame himself ; and cannot profit by a right granted, not for his behoof, but for that of his cautioner, who may therefore renounce it at pleasure, *Harc. 617, (Creditors of Langton, July 8. 1691, Dict. p. 33.)*. Yet the creditor, by adjudging the right from the cautioner, may make it his own, so as it shall be no longer in the cautioner's power to renounce it, to the prejudice of the creditor who has affected it by legal diligence. Where a right of security is granted, either for payment or for relief, not only of debts already contracted, but of debts to be contracted by the granter, the effect of it as to future debts is, by 1696, *C. 5.*, limited to such as may be contracted previously to the date of the seisin upon the right ; such rights having been by experience found to be frequently used as covers to fraud¹⁷⁷. Rights in security, and *infestments of annualrent*¹⁷⁸, as they have

Their nature
and effects.

¹⁷⁷ By 54. *Geo. III. c. 137. § 14.*, the following exception to the rule of 1696, *c. 5.* is enacted : " That it shall and may be lawful for any person or persons, possessed of
" lands or other heritable subjects, and desiring to pledge the same in security of any
" sums paid, or balances arising, or which may arise upon *cash accounts* or *credits*, or
" by way of relief to any person or persons, who may become bound with him or them
" for the payment of such sums or balances, although posterior to the date of the in-
" festment, to grant heritable securities accordingly, upon their said lands or other
" heritable estate, containing procuratory of resignation and precept of seisin for
" infesting any bank or bankers, or other persons who shall agree to give them such
" cash accounts or credits, or for infesting such persons as shall become cautioners
" for them, or jointly bound with them in such cash accounts or credits : Provided
" always, that the principal and interest, which may become due upon the said cash
" accounts or credits, shall be limited to a certain definite sum, to be specified in the
" security ; the said definite sum not exceeding the amount of the principal sum, and
" three years' interest thereon, at the rate of 5 per cent. : And it is hereby declared,
" that it shall and may be lawful to the person to whom any such cash account or
" credit is granted, to operate upon the same, by drawing out and paying in such sums,
" from time to time, as the parties shall settle between themselves ; and that the seisins
" or infestments taken upon the said heritable securities shall be equally valid and ef-
" fectual, as if the whole sums advanced upon the said cash account or credit had
" been paid prior to the date of the seisin or infestment taken thereon ; and that any
" such heritable securities shall remain and subsist to the extent of the sum limited,
" or any lesser sum, until the cash account or credit is finally closed, and the balance
" paid up and discharged, and the seisin or infestment renounced."

¹⁷⁸ *Vid. supr. § 34. h. t. and not, 175.*

have the same general nature and properties, are alike extinguishable, not only by renunciations, but by intromission with the rents of the debtor's estate, without the necessity of any seisin, or new constitution of the right of property in favour of the debtor.

37. Stair lays it down, *B. 4. T. 35. § 24.*, and *B. 4. T. 51. § 11.*, that an adjudication upon an infestment of annualrent, infestment in security, or whatever constitutes a real burden on the property, is preferable to all adjudications, or other diligences, intervening between the date of the right and of the adjudication deduced on it, not only for the principal sum¹⁷⁹, and interest remaining due on the right, but for the interest of the accumulate sum in the adjudication*. This preference, in so far as concerns the interest of the capital, is due to the creditor in an infestment of annualrent from the real nature of his right, though he have deduced no adjudication upon it, because that interest is, after seisin, *debitum fundi*: Yet when the *pari passu* preference of adjudications was established by 1661, *C. 62.*, there was an express reservation in favour of *debita fundi*, and adjudications proceeding on them, that there might be no doubt that the Legislature did not mean to encroach on the preference naturally due to real rights, by the *pari passu* preference of adjudications established by that statute. In order to obtain preference to the creditor in a real right for the interest of the interest accumulated in his adjudication, the adjudication must be founded on a real action, a pointing of the ground, and not merely on the personal obligation in the original right, *Dabr. 12.* (*Mackenzie, Jan. 27. 1669, Dict. p. 259.*) †.

TIT.

* And for the penalty to the extent of their necessary expences, *Fac. Coll. June 24. 1782, Creditors of Jarvieston, Dict. p. 14132*; See, however, *Kilk. NO. 1. voce PENALTY, Trustees of Menzies, Feb. 2. 1739, Dict. p. 10044.*

† In the ranking of the *Creditors of Auchinbreck*, the adjudgers upon personal obligations in preferable heritable bonds having insisted, that, after drawing their principal sums and interest in virtue of their infestments, they should be ranked *pari passu* with the adjudgers upon personal bonds for their whole accumulated sums, so as to entitle them to draw their full penalties and accumulations, the Lords of Session, *July 12. 1769, Dict. p. 14131*, found, That the heritable creditors-adjudgers were entitled to be ranked upon the funds *pari passu* along with the other adjudgers, only for what should remain due of their accumulated sums, after deduction of what they should draw in virtue of their infestments¹⁸⁰.

Where the security was granted for relief of a cautionary obligation, the cautioner was found preferable, not only for the principal sum and interest in the original debt, but for interest on the whole sums paid, as due *ex lege* upon sums paid by cautioners on distress, *July 7. 1801, Ford and Smith, Assignees of Boyd, against Riddel, Dict. App. I. voce ANNUALRENT, NO. 3.*

¹⁷⁹ It may be doubted, perhaps, Whether, in a proper annualrent right, after the old style, under which (*supr. §. 32.*) the *principal sum* does not constitute "a real burden on the property," an adjudication for such *principal sum* would have the preference noticed in the text? The negative answer seems favoured by what is laid down, 2. *Ross's Lectures, 378.* "The creditor," in an annualrent right, "had no title to uplift more than the sum of interest agreed upon, or to demand the principal sum until he had executed a requisition. This requisition gave access to the person of the debtor, but gave no farther right over the lands. If the annualrenter wanted his principal sum out of these, it behoved him to apprise or adjudge, and follow the same course as any other creditor."

¹⁸⁰ In the above case of *Auchinbreck*, both the heritable bonds and the adjudications affected the same estate. But it has been well observed, that although, where double securities are thus "held over the same estate," "there can be no ranking on the one posterior in date, except for the balance, after applying the produce of the other towards extinction of the debt; it is otherwise with separate estates. They are considered as distinct debtors: each as truly liable for the whole debt, and every part

TIT. IX.

Of Servitudes.

Servitudes,
negative and
positive.

AFTER having explained how heritable or feudal rights are constituted, either absolutely or under reversion, the law of servitudes may be fitly considered, by which the proprietor of an heritable subject may be, in certain respects, fettered in the exercise of his property for the benefit of another. A servitude may therefore be defined, a burden affecting lands or other heritable subjects, by which the proprietor is either restrained from the full use of his property, or is obliged to suffer another to do certain acts upon it, which, were it not for that burden, would be competent solely to the owner. Hence it may be perceived, that he whose tenement is subject to a servitude, is not, in the common case, bound to perform any act for the benefit of the person or tenement to which it is due: His whole burden consists, either in being restrained from doing, or in being obliged to suffer something to be done upon his property by another. In the first case, in which the proprietor is barely restrained from acting, the servitude is called *negative*; in the last *positive*.

Servitudes,
natural, legal,

2. This burden arises sometimes from the natural situation of the ground, sometimes from statute, or *ex lege*, and sometimes from covenant; and hence civilians divide servitudes into natural, legal and conventional. Where two contiguous fields belong to different proprietors, one of which stands upon higher grounds than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior, in the natural use of his property, for draining his lands, or otherwise improving them, the owner of the inferior tenement is, without the positive constitution of any servitude, bound to receive that body of water on his property, though it should be endamaged by it. But as this right may be overstretched in the use of it, without necessity, to the prejudice of the inferior grounds, the question, How far it may be extended under particular circumstances? must be arbitrary. Legal servitudes are those which are constituted by statute, or by long custom, from the consideration of public necessity or utility. Of this kind may be reckoned a regulation, by which no house within the city of Edinburgh can be built higher than five stories from the ground, 1698, C. 8. *; and another, by which the proprietors of that city are prohibited to cover

* This act found to be in force, *Fac. Coll. Aug. 5. 1760, Buchan, Dict. p. 13173.*; and it extends to the suburbs situated beyond the jurisdiction of the Dean of Guild, though the statute seems to grant special authority to that magistrate for putting it to due execution; *Ibid. June 20. 1789, Dott, Dict. p. 13187.*

“ of the debt; as if it were secured over the whole of each subject, without any other security. There is a lien over each for the whole debt; and the creditor claims and is ranked on each for the whole, to the effect of drawing ultimately no more than the true amount;” 2. *Bell's Comm. 281*: and *Douglas, Heron & Co., 2d August 1781, and Ranking of Grant's Creditors, 2d March 1791*, there referred to: the last of these cases is unreported: and a report of the former in the Faculty Collection is silent on this point. *Dict. p. 14131, and 14139.*

and conven-
tional.

cover their houses with thatch or straw, 1621, C. 26¹⁸¹. The terce and courtesy may be also numbered among the legal servitudes. But servitude, in the more common acceptation of the word, denotes that kind only which is established, either by the express or the presumed agreement of parties; and of those conventional servitudes there may be as great variety as there are ways by which property can be burdened, or the exercise of it restrained, in favour of another.

3. Conventional servitudes are constituted either by grant, where the will of the party burdened is expressed in a written declaration by which the servitude is imposed; or, 2dly, by prescription, where his consent is presumed, from suffering the party claiming the servitude to continue in the exercise of it for forty years together, without any attempt to interrupt him¹⁸². No right affecting land, though it be incapable of proper possession, can be completed without such use as the subject can admit of. As servitudes are incorporeal rights, affecting lands which belong to another proprietor, few of them are capable of proper possession. Thus, where one has acquired the servitude of a road through his neighbour's grounds, such right cannot be properly apprehended or possessed. The lands indeed which are charged with the servitude may be possessed, but it is the owner of the servient tenement who possesses these, and not he who claims the servitude. The use, therefore, or exercise of the right, is in servitudes what seisin is in a right of lands; which exercise we improperly call possession, and is in the Roman law styled *quasi possession*, L. 10. *pr. Si serv. vind.*; and consequently a grant or obligation of servitude, though it be, like all other obligations, good against the granter and his heirs, without the least use had by him who claims it, can have no effect against his singular successors, unless the grantee has been in the exercise of the right¹⁸³. A servitude constituted by prescription, or by the uninterrupted exercise of it for forty years, may be acquired without any deed or title in writing, other than a charter and seisin

¹⁸¹ The regulations as to the height of buildings in the New Town of Edinburgh, which were introduced by Act of Council, 14th February 1761, and enlarged and explained by certain subsequent acts, seem to combine the characters both of legal and conventional servitude. *Vid. Fac. Coll. Campbell, 17th Feb. 1803, Dict. v. BURG ROYAL, App. No. 18; Ib. Reid, &c. 24th May 1808, Dict. v. BURG ROYAL, App. No. 21.*

¹⁸² The constitution of positive servitudes seems well laid down in a report of Kilkerran's. "The Lords at advising were of opinion, that although a real servitude may be constituted by long possession, because such a possession presumes a title, yet such a servitude cannot be constituted by verbal agreement to be proved by witnesses; nay, though a verbal agreement were admitted, there is *locus poenitentiae* till writ be adhibited; yet if in consequence of such verbal agreement, an important *rei interventus* take place,—as for example in the case quoted from the building of a dam-dike, the very object of the servitude,—the party will be barred *personali exceptione*, "as it is out of time to repent when the thing is done;" *Kilk. v. PROOF, No. 13, 12th Jan. 1750, Kincaid, Dict. p. 8404.* See also reports of this case by *Fac. vol. 2. No. 121, and Elchies, v. SERVITUDE, No. 4.*

Servitudes are sometimes reserved in favour of the seller's other property in the conveyances of the servient tenement. See *Fac. Coll. Cleghorn, 17th May 1805, Dict. p. 16141.*, and 2. *Dow, 40.*; *Dinwiddie, 23d Nov. 1821, S. and B.*; *Davidson, 15th May 1822, Ibid.*; or by the insertion of a clause in a charter, whether original, or by progress from the superior; *Clelland, 21st Feb. 1789, Clerk Home, Dict. p. 14506.*

¹⁸³ A personal deed is sufficient with possession to establish a servitude against singular successors; *Garden, 27th Nov. 1734, Dict. p. 14517, Elchies, v. SERVITUDE, No. 1.*

seisin of the lands to which the servitude is claimed to be due; for the long acquiescence of the owner of the lands burdened, fully supplies the want of a written declaration constituting the servitude * 184.

4. The following differences may be observed between a servitude by grant and by prescription. A servitude by grant is not effectual to the grantee, in a question with the superior of the lands charged with the servitude, unless he has consented to it; *Stair, Dec. 11. 1666, E. Cassilis*, (DICT. p. 5005.); for no superior is bound to acknowledge a burden imposed on the lands by his vassal, when they return to him in consequence of any feudal casualty: But when the servitude is acquired by prescription, the superior's consent is presumed, from his not using acts of interruption; for his right of superiority gave him a good title to interrupt. *2dly*, A servitude by grant, though accompanied only with a partial possession, must be governed, as to degree, by the tenor of the grant, so as to entitle the possessor to the exercise of the right, as ample as it was at first granted, when he thinks fit to use it in its full extent: But a servitude by prescription is generally limited to the measure of the use had by the acquirer of it, agreeably to the rule, *Tantum præscriptum quantum possessum*. Yet a servitude by prescription may be sometimes justly extended beyond former usage, if, without such extension, the right would be unprofitable to the acquirer. Thus, where one has acquired by prescription a servitude of building a damhead, as a reservoir for water, on the property of another, he may raise it higher than any former usage; or he may extend the bank farther on the servient grounds, than it had reached before, if the servitude would be otherwise ineffectual; *Stair, July 20. 1677, L. Garleton*, (DICT. p. 14535.); *Bruce of Kennet* 185: For in such case, the servitude truly acquired is a right of collecting water; and that of building a damhead is only a consequential right, the true measure of which, therefore, is the utility of the mill, colliery, or other subject to which the servitude is due.

5. Servitudes are either real or personal. The first kind is also called *predial*, from *prædium*, a tenement of lands or of houses. In all servitudes, whether predial or personal, the subject burdened is a *prædium*, or *res*; in which respect, both branches of the division may be alike termed *predial*: But the names of *predial* and *personal* are taken, not from the subject burdened, but from that in favour of

Servitudes by grant and by prescription.

Servitudes, real or predial, and personal.

* Where a proprietor of grounds had been in use for forty years of bringing home his corns after harvest through a ridge of ground belonging to another, after it had been cleared of corn, this was found to be no servitude; *Kilk. No. 3, voce SERVITUDE, Purdie, July 20. 1749, DICT. p. 14511.*

184 *Vid. Munro, 23d Nov. 1821, S. & B.*

185 Reported by *Elchies, 4th Nov. & 11th Dec. 1741, v. SERVITUDE, NO. 2*. It may be doubted, perhaps, whether this decision does not carry too far the principle of extending servitudes beyond former usage. It was there found, that a dam-dike, which, beyond the forty years, had been but "three feet high," yet quite adequate for every use of the dominant tenement at the time, might, within the forty years, be extended, so as at last to be "three ells high," if by an increase in the works for which the servitude was originally acquired, an enlarged supply of water had become necessary. The decision in *L. Garleton* appears to rest on a sounder basis; it being there found, merely, that the proprietor of the dominant tenement, having lost the benefit of his dam as it stood originally, in consequence of "the ground being washed away from the end of the dam, by a spout of water," he was entitled to restore the dam to its former utility, by extending the dike till it touched firm ground. *Elchies*, however, remarks as to *Bruce's* case,—“The interlocutor seemed pretty unanimous. I observed none against it but “Royston and myself.”

of which the burden is imposed : So that the servitudes styled *personal*, are constituted principally in favour of a person ; and the real or predial, principally in favour of a tenement, and only by consequence to a person, as the owner of that tenement. In predial servitudes, therefore, there must be two tenements ; a dominant, to which the servitude is due, and a servient, which owes the servitude, or is charged with it. And hence predial servitudes cannot pass by sale, or other just title, from the proprietor of the dominant tenement to another, unless the acquirer shall either purchase that tenement, together with the right of servitude, or has already the property of another tenement capable of receiving benefit by it, *Nov. 24. 1732, Feuars of Dunse* ¹⁸⁶ *. Perhaps the only instance where

* The decision here quoted seems to be the same with that, which is reported by Lord Kames in his *Remarkable Decisions*, *Nov. 22. 1732, Feuars of Dunse contra Hay of Drummelzier*, *DICT.* p. 1824 ; but it is not the last judgment in the cause : The following is a transcript of the different interlocutors pronounced by the Court : *Nov. 22. 1732, The Lords* “ found, That the erecting of Dunse into a borough of barony doth “ not afford a title to acquire a servitude of pasturage by prescription.”—*Nov. 24. 1732, Found*, That the infetment of a house, with or without a yard, was a sufficient title “ to prescribe a servitude of pasturage.”—*Nov. 28. 1732, Found*, That the pursuers were entitled to the servitude of fuel, feal, and divot, in any part of the commonities libelled not inclosed ; and also found the pursuers entitled to a servitude of “ digging, quarrying, and away-taking of stones and slates, for the use of their houses, “ out of the quarries of the commonities, but not in the parts inclosed, &c. ; but found, “ that the heritor of the muir might legally inclose and labour part of the said commonities, providing what he left out thereof should be sufficient for the pursuer’s “ servitudes ; and remitted to the Lord Ordinary to hear parties further on the nature of the possession, for acquiring and preserving a right of servitude of pasturage, “ and to determine or report ; with power also to grant warrant for a further proof “ if he shall see cause.”—*Feb. 1. 1733, Found*, That the proof of the possession of “ pasturage of cattle, &c. upon the commonity libelled, led by the pursuers and others, “ whose titles are produced, being general and indefinite, is not sufficient to entitle “ these persons to a servitude of pasturage ; and in regard that there is no special “ proof of the number of cattle that each person by himself, or his predecessors or “ authors, were in use to pasture on the said commonity, assoilzied the defender “ from the declarator of servitude of pasturage.”—*See Fac. Coll. Feb. 18. 1755, Jeffrey, &c. DICT.* p. 2340, where the burgesses, inhabitants of a borough of barony, were found to have acquired a servitude of washing and drying their linen-clothes upon certain grounds near the town : but the decision was reversed on appeal, probably upon the circumstances of the case, which denoted merely a tolerance or precarious possession, without any established servitude. It has however been found, that a royal borough could, for the use of the burgesses and other inhabitants, acquire such a servitude, either by purchase, or by immemorial usage and prescription, *Ibid. Feb. 10. 1779, Sinclair* ; affirmed in the House of Lords, *March 8. 1780, DICT.* p. 14519. *See (contra,) Fount. Feb. 13. 1708, Carmichael, DICT.* p. 10916 ¹⁸⁷.

¹⁸⁶ It is inconsistent with the nature of a servitude, that the proprietor of the dominant tenement should have power to communicate the benefit thereof to any third party not possessing the dominant tenement ; *Murray, 8th Dec. 1808, Fac. Coll.* On the same principle, a servitude of digging slate and stone must be confined to the uses of the dominant tenement, and the proprietor is not entitled under it to dig slates and stones for sale ; *Ibid.* See to same effect, the cases of *E. Breadalbane, infr. § 14. h. t. in not. Brown and Leslie ; infr. § 17. h. t. in not.*

¹⁸⁷ In this case the Court held that “ there was no such servitude known in our “ law” as a servitude of bleaching, and therefore decided against it ; but since the judgment in *Sinclair*, there can no longer be any hesitation on that ground. As to all servitudes of an acknowledged character, the case of *Carmichael* is a decided authority for holding that a burgh may acquire for the use of the community : And to this effect it has since been confirmed by *Murray, supr. not.* ¹⁸⁶.—In another case, the Magistrates of St Andrew’s having feued out the links, with a reservation in favour of “ the “ inhabitants and others, who shall resort thither for the purpose of golfing,” the inhabitants at large were found entitled to enforce the reservation ; *Fac. Coll. Cleghorn, &c. 17th May 1805, DICT.* p. 16141. On appeal, however, it occurred, that “ it was a “ strong thing to say that all who chose to do so might play at golf on a man’s ground ;” and that it must be a privilege of a very peculiar description, which was “ not merely “ in the corporation and inhabitants, but also in all others.” On this and other grounds arising from a critical construction of the interlocutors of the Court of Session, the case was remitted for review, 2. *Dow*, 40. Had the burgh been originally a party, or had the action been formally sustained upon their title, on their afterwards sisting themselves, and had the conclusion been confined to a right of servitude in favour of the proper community of the burgh, it is probable a more successful issue would have been attained.

where a servitude is constituted upon a predial tenement, without a proper dominant tenement to which it is due, is in the case of pasturage, fuel, feal, divot, and the other rights to which ministers are entitled by statute, 1593, C. 165. ; 1663, C. 21. ; not as the proprietors or possessors of any dominant tenement, but simply in the right of their benefices ; for which reason, these privileges, if they are to get the name of servitudes, fall more properly under the class of those that are personal*.

6. Predial servitudes may be divided by the law of Scotland, after the example of the Romans, into *rusticæ* and *urbanæ*, rural and city servitudes. City servitudes, or of houses, are those which are constituted in favour of a tenement of houses, though such tenement should not be within the gates of any city. Rural servitudes, or of land, are acquired for the use of a rural or country tenement, as a farm, field, inclosurè, garden, though they should be situated within the liberties of a city ; for it is not the place, but the matter and use of the tenement, which makes this distinction, L. 198. *De verb. sig.* ; and for this reason, dwelling-houses, and offices built for the use of a farm, are the subjects, not of city servitudes but of rural.

7. The chief servitudes of houses in the Roman law, were *oneris ferendi*, and *tigni immittendi* ; both of which may be called servitudes of support. The first was the right one had of resting the weight of his house upon his neighbour's wall or pillar, L. 33. *De serv. pr. urb.* : so that it nearly resembled that of *tigni immittendi* ; by which one was obliged to receive into his wall a beam, or joist from his neighbour's house. The general nature of both were the same. The essential difference between them lay in the precise form of words that the Romans used in constituting the servitude *oneris ferendi* : *Paries oneri ferundo, uti nunc est, ita sit* : By which express words, the owner of the servient tenement became obliged, not only to suffer the weight of the neighbouring house to rest on his wall, but to repair that wall when it became unable to support the load, L. 6. § 2. *Si serv. vind.* ; L. 33. *De serv. pr. urb.* ; contrary to the general nature of servitudes, which laid the proprietor of the servient tenement under no obligation to do any positive act, but barely to suffer. Yet he who owed the servitude had an option to abandon his property if he did not choose to uphold it in a condition fitted for the use of the dominant tenement, d. L. 6. § 2. *Si serv. vind.*

8. Where a servitude of support is constituted in writing, by which the wall of one tenement is subjected to bear all, or any part of the weight of another, Stair, B. 2. T. 7. § 6., with reason, holds it to be the law of Scotland, that the owner of the servient tenement is not bound to repair it for the use of the dominant, unless an obligation to repair be inserted in the right ; conformably to the Roman law, which laid the expence of repairing upon the servient tenement, not from any anomalous property in the nature of that special servitude, but from the words expressed in the stipulation. He also affirms, from the same principle, that where such servitude is constituted, not by grant, but by prescription, it imports no more than a tolerance to lay the weight of the dominant tenement on the servient, and a power to the owner of the dominant to repair the servient for his own use ; for the owner of the servient tenement is not obliged to do this, unless he has bound himself by paction ; and servitudes,

Predial are either rural or urban.

Chief urban servitudes of the Roman law, *Tigni immittendi et oneris ferendi*.

Corresponding servitudes of our law.

* See an instance where a personal servitude (*spatiandi*) was rejected by the Court; *Fac. Coll. Feb. 8. 1759, Cochran, &c. Dict. p. 14518.* (As to personal servitudes, *vid. infr. h. t. § 39.*)

tudes, being *strictissimi juris*, ought not to be extended by implication. This doctrine is confirmed by practice, *Br.* 108. & 117. (*Murray, June and July 1715, Dict.* p. 14521.).

9. *Stillicidium* is the rain-water that falls from the roof or eaves of an house by scattered drops: When it is gathered into a spout, it is called *flumen*: The servitudes, therefore, by which one is obliged to receive on his property the water which falls from his neighbour's house, are called in the Roman law *stillicidii* or *fluminis*. Without the constitution of one or other of these servitudes, no proprietor can build so as to throw the rain that falls from his house directly on his neighbour's grounds; for it is a restriction upon all property, *Nemo potest immittere in alienum*; and he who in building breaks through that restraint, truly builds on another man's property; because to whomsoever the area belongs, to him also belongs whatever is above it: *Cujus est solum, ejus est usque ad cælum**. But every proprietor may build, be it ever so near his own boundary, provided the rain descending from the roof fall within his own property; because there, the builder, without encroaching on his neighbour, is making the natural use of what belongs to himself; and therefore, the stillicide or *flumen*, after falling on the builder's property, must be suffered to run whither the situation of the ground shall carry it. Yet as the building too near another's property may be attended with inconvenience, the Roman law obliged proprietors to keep at a certain distance within their own property in building; see *L. 14. De serv. pr. urb.* We have no statute regulating this matter; but, by the usage of several boroughs, proprietors are obliged to keep a foot, or a foot and a half within the extremity of their several properties: And where the usage is not fixed, the dean of guild, or other magistrate who is charged with the police, appears to be trusted with a discretionary power of directing the buildings within borough, subject to the review of the court of session; see *Fac. Coll. 2. 226. (July 8. 1760, Clark, Dict.* p. 13172) †¹⁸⁹.

10. A proprietor may raise an house, or other building, within his own property, to what height he pleases, though he should ever so much obscure the light, or obstruct the prospect of his neighbour's house. To prevent this, two servitudes were introduced by the Roman law: *first*, the servitude *Non officiendi luminibus vel prospectui*, *L. 4. De serv. pr. urb.*; by which a proprietor is restrained from raising any building, if it were but a garden-wall, that may either darken the light, or break the view, of his neighbour's house or pleasure grounds ‡: And a servitude of this kind is sometimes constituted, rather for obstructing the prospect of the servient tenement than for enlarging that of the dominant; *ex. gr.* when the owner of the servient tenement is tied up from striking out a window in any building

* *Fac. Coll. July 8. 1781, Halkerston, Dict.* p. 10495¹⁸⁸.

† Found, That although the space of eighteen inches must be left between two buildings in borough, where there are two eave-drops, yet nine inches are sufficient where there is only one eave-drop; *Fac. Coll. March 7. 1769, Garriochs, Dict.* p. 13178. See on this subject, *Ibid. June 11. 1752, Stirling, Dict.* p. 14526.

‡ See Clerk *Home*, NO. 116. *Cleland, Dict.* p. 14506. (as to the constitution of such servitude.)

¹⁸⁸ This was a question, "Whether a person is bound to allow his property to be "overshaded by the trees belonging to a conterminous heritor?" It was decided that the latter "is bound to prune his trees in such a manner as they may not hang "over the mutual wall."

¹⁸⁹ A Dean of Guild has no power, for the sake of widening a street, to prevent a proprietor from building on the limits of his property; *Fac. Coll. Smellie, 12th May 1803, Dict.* p. 7588.

ing which may look into the house or garden of the dominant*. The other is, *Altius non tollendi*, L. 12. § 21. *De serv. pr. urb.*; by which a proprietor could not add to the height of his house to the prejudice of the dominant tenement. The Romans had a city servitude quite distinct from this last, called *Altius tollendi*; which, in the opinion of Donellus, Baro, and some other interpreters of note, was that by which one had a right from the owners of the neighbouring houses, to raise his house higher than was permitted by the regulations made by Augustus, and some of the succeeding Emperors, against the excessive height of buildings in Rome to prevent the mischievous consequences of accidental fire, *Strab. Geogr. L. 5.*; *Tacit. Annal. L. 15. C. 43.*; *Sext. Aurel. Epit. C. 13.* But it is most unlikely, that the Romans should have given countenance to a right of servitude, by which enactments so essential to public policy might have been evacuated by the private consent of individuals, contrary to the rule, L. 38. *De pact.* And it will hardly be affirmed, that such consent, granted by any proprietor of houses in Edinburgh to his neighbour, to build beyond the statutory height, could authorise the grantee to act in defiance of a statute, made, not in favour of private men, but for the benefit of the public.

11. Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the property of the house cannot be said to suffer a full or complete division. The proprietor of the ground-floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight; for in that case, as the roof remains a common roof to the whole, and the area on which the house stands supports the whole, a communication of property necessarily arises; by which the proprietor of the ground-story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower, *St. B. 2. T. 7. § 6. †.* Where the property of the highest story is divided into separate garrets

Obligations on proprietors of a house in floors, belonging to different persons.

* *Edgar, July 1. 1724, Forbes, Dict. p. 14505.*—See on this subject *Glassford, May 12. 1808, Dict. App. 1. voce PROPERTY. (supr. t. 1. § 2. in not. 1.)*

† But this will not prevent the proprietor of the ground-story from making such alterations on his property as do not endanger the whole building; *Fac. Coll. March 3. 1784, Robertson, &c. Dict. p. 14534* ¹⁹⁰. See on this subject, *Reid, Nov. 16. 1799, Dict. App. I. voce PROPERTY, NO. 1.*; *Sharp, Feb. 5. 1800, Dict. App. I. voce PROPERTY, NO. 3.*

¹⁹⁰ This question occurred again in two recent cases, when it was found that the proprietor of a story is not entitled to make such alterations, as, though reported by tradesmen to be safe, may naturally and reasonably excite apprehension; *Ferguson, 12th November 1816, Fac. Coll.*; *Pirnie, 5th June 1819, Ibid.* It was held in both of these cases, “that the right of the owner of a story over the walls below him was “not properly either a servitude, or a right of common property;” but a sort of common interest in the safety and sufficiency of the building. Where the principle of common property is superadded, the right to object against alteration is of a broader character; so that, in a house of several stories, belonging to different proprietors, and all entering by a common passage, no alteration can be made on that passage without the consent of the whole; *Fac. Coll. Anderson, 20th June 1799, Dict. p. 12831*; *Ibid. Reid, supr. not. †.* To this latter class of cases, must be referred the decision, *Fac. Coll. Sharp, supr. not. **; for though it would seem from the report, to have been there decided as a general point, that “the proprietor of the upper story “and garrets, cannot raise the walls and alter the shape of the roof, so as to convert “the garrets into an attic story, without consent of the inferior proprietors;” it has since been stated, that the case was truly a *special* one, inasmuch as it “related to “an attempt to add a story to a house, and introduce an additional family into a

“common

Book II.

Rural servitudes, *iter*, *actus*, *via*, *aquæductus*, &c.

garrets among the different proprietors, each proprietor must, by this rule, uphold that part of the roof which covers his own garret.

12. The chief rural servitudes of the Roman law are, *iter*, *actus*, *via*, *aquæductus*, *aquæhaustus*, and *jus pascendi pecoris*. *Iter* is a right that a landholder has of a horse or foot passage for himself, his family, and tenants, through his neighbour's property. *Actus* is a right also of carriages drawn by men, and of driving cattle. *Via* comprehends the other two; and, besides, includes a right of driving carriages, with horses, or other beasts of draught. The road which made the *via* was considerably broader than that of the *iter* or *actus*. There are servitudes by the usage of Scotland analogous to these; of a foot-road, an horse-road, a cart or coach road, and ways or loanings by which cattle may be driven from one field to another; but an horse-road is not, by our practice, included in a foot-road, as it was by the Roman law. The right of a public road, or King's highway, is not properly a servitude, but *publici juris*, common to all the members of the state, whether they are, or are not, proprietors of any tenement; and indeed to all strangers who have the freedom of trade, or of travelling through the country: And if they are to be considered as servitudes, they fall under that kind of them which get the name of *legal*; for sundry statutes have been enacted for preserving highways, and regulating them, both as to their breadth, as to those liable to repair them, as to the grounds through which they may be carried, and as to the magistrates who are charged with the care of them, and vested with the powers necessary for that purpose, 1669, C. 16.; 1670, C. 9.; 1686, C. 8.; 5. Geo. I. C. 30. *. Though a right of private roads, in so far as they are necessary, be the genuine consequence of property, *supr.* T. 6. § 9.; yet after they have been settled and fixed by custom, they ought not, without the express constitution of a servitude, to be enlarged, under the pretence of greater conveniency. Where the right of a private road is constituted by way of servitude through the grounds of a neighbouring proprietor, it cannot be altered to the prejudice of the dominant tenement; yet if it be only a foot-road, the owner of the servient may inclose the ground through which the road passes, provided he leave a style at each end of the inclosure for the foot-passage †.

13. The servitude of aqueducts is the right that one has of carrying water in conduits or canals, along the surface of the servient tenement,

Servitudes, *aquæductus*, and *aquæhaustus*.

* See also 11° Geo. III. C. 53. &c.

† A foot-path is generally not fixed to one precise line, but may admit of being shifted. See a case in which this was done, *Kilk. 2. voce SERVITUDE*; *Bruce, Dict.* p. 14525 ¹⁹¹.

"common stair;" *Ferguson, supr.* In the absence of such a specialty, there can be no ground for distinction between the operations on an upper, and those on an under story; both may alike be carried on, without consent of the other proprietors, wherever they are such as to create no reasonable apprehension of danger.

A tradesman living in a court, or *cul de sac*, is not entitled to put up his sign-board on the wall of another person's tenement, fronting the street; *Lowrie, 13th May 1812, Fac. Coll.*; *Thomson, 21st November 1776, Dict.* p. 13182. The case of *Murdoch, 27th Feb. 1783, Fac. Coll. Dict.* p. 13184, is not a conflicting authority; all that was there found being, that the proprietor of the front tenement has no right, at his own hand and without competent authority, to take down or carry off the sign-board, when once put up.

¹⁹¹ *Kilk.* remarks, "Whether or not this decision shall be held as laying down a general rule with respect to all private roads, one cannot positively say, as this case had some specialties in it." Judgment to the same effect had been refused to be given in a previous case; *Kilk. Urie, 25th June 1747, Dict.* p. 14524. But later than either, it was decided, that a servitude road for leading home turf and peats might be shut up, provided another road was furnished as good and sufficient, and "not
" more

tenement, for the use of one's own property *. Much like to this is the servitude of a dam or damhead; by which one acquires a right of gathering water on his neighbour's grounds, and of building banks or dikes for containing that water ¹⁹³. These servitudes are generally constituted for the use of water mills or engines; and the owner of the dominant tenement, as he has the benefit of the servitude, is obliged to preserve the aqueducts and damheads in such condition, that the adjacent grounds may suffer no prejudice by the breaking out of the water. *Aquæhaustus* is a right competent to a landholder, of watering his cattle at any river, brook, well or pond, that runs through or stands upon his neighbour's grounds ¹⁹⁴. Where a running water is the boundary which divides between two tenements belonging to different proprietors, the one cannot divert the course of it without consent of the other, though that other should not allege any prejudice by it to himself, but the depriving him of the pleasure of trouting, and the chance that he may have occasion for the water at some future time, *Durie, June 25. 1624, Bannatyne*, (Dict. p. 12769.) †. Nay, the proprietor of both sides of a running water, though he be subjected to no servitude in favour of the inferior tenement, cannot alter its bed, if the alteration should bring any real prejudice to the owner of that tenement, *Hope Action. in factum, Bairdy*, (Dict. p. 14529.) ¹⁹⁵.

14. The *jus pascendi pecoris*, a servitude well known in the Roman law, *L. 4. De serv. pr. rust.*, is a right by which the owner of the dominant tenement is entitled to the use of the grass-grounds of the servient, for pasturing a determinate number of cattle proper to the dominant ¹⁹⁶. This right is not to be so stretched as to exclude the owner of the servient tenement from pasturing his own cattle on them, if there be grass enough for both, unless where the

Common pasturage. Clause *cum communi pastura*.

* Such a servitude may be acquired by immemorial possession; *Fac. Coll. June 16. 1761, Wallace*, Dict. p. 14511.

† The same decision given after full deliberation, *Fac. Coll. March 5. 1793, Hamilton*, Dict. p. 12824.

“ more than 300 yards about;” *Ross, 18th January 1751, Elchies, v. SERVITUDE*, No. 5. Dict. p. 14531.

The tenant of a servient tenement was found entitled to put swing-gates on a servitude road for carts and cattle, to a moss and common pasturage, without consent of the dominant proprietor; the number and situation of the gates being restricted to what was necessary for the use of the servient tenement, with as little inconvenience as possible to the use of the dominant; *Wood, 9th March 1809, Fac. Coll.*

A party having a *servitus itineris* to one farm, is not entitled to use the road for the purposes of another farm lying beyond; no regard being paid to an argument, that this was deciding “ in substance, that the defenders have a right to go through the pursuer's lands to part of their own, but that they have no right afterwards to go from one part of their own land to another;” *Scott, 6th July 1809, Fac. Coll.*

¹⁹³ *Vid. supr. § 4. ad fin. & not.* ¹⁸⁵.

¹⁹⁴ The proprietors of a stream, liable to such a servitude, may cover over the rest of the stream so as to exclude cattle, provided they leave open a part of it sufficiently extensive to admit a reasonable exercise of the servitude; *Beveridge, &c. 18th Nov. 1808, Fac. Coll.*

¹⁹⁵ The law is here stated with more correctness than *supr. t. 6. § 17*. Accordingly, the same was again found; *Fac. Coll. Lord Glenlee, 10th March 1804*, Dict. page 12834. Where, however, a party has been in the immemorial use of converting a spring or stream of water to his own purposes, how injurious soever to the inferior tenement, a servitude will thereby be constituted in his favour; *Wallace, supr. not. °*. How far a superior heritor can reclaim the course of a stream, after a prescriptive enjoyment of it by the inferior heritor, *vid. Kincaid, 11th June 1752, Elchies, v. SERVITUDE*, No. 6. Dict. p. 12796.

¹⁹⁶ The proprietor of the dominant tenement is not entitled to communicate the servitude to cattle and sheep not his own; *e. g.* he cannot let the right of pasturing to drovers, or others not actually possessing the dominant tenement: *Murray, supr. § 5. not.* ¹⁸⁶; *E. Breadalbane, 22d Nov. 1743, Elchies, v. SERVITUDE*, No. 3.

the full and exclusive benefit of the grass is, by the express constitution of the servitude, granted to the dominant tenement. This right of common pasturage may be established either by grant or by prescription. In the first case it is sometimes constituted by a personal obligation granted by the owner of the servient tenement, which, when it is followed by possession, is effectual against his singular successors¹⁹⁷; but most frequently, by a clause of common pasturage, contained in the charter of the dominant tenement. This clause, *cum communi pastura*, is often indefinite, without mentioning any servient tenement to be burdened with the pasturage; and is merely intended to convey all pasturage which had been appropriated to the lands disposed previously to the date of the charter, whether it was due out of the lands belonging to the granter, or out of other lands. If the clause be special, expressing the particular lands which are to be burdened, the servitude is effectually constituted on these lands, if the granter of the charter was proprietor of them, and so had a power to burden them: But if they were the property of a third party, the clause carries no farther interest in them to the grantee than the granter himself was entitled to.

When it obtains, action of sowing and rowming is necessary to ascertain the different proportions.

15. Most frequently common pasturage obtains, in the case of several proprietors of lands adjacent to the same heath or common, all of whom claim a right of pasturage against the proprietor of that common. Where different purchasers of different farms lying contiguous to the common, get a right of common pasturage upon that tenement, indefinite as to the number or kinds of cattle to be fed upon it, each purchaser is not understood to have got an unlimited right; but the extent of their several claims is to be proportioned to the rent of their several farms, and to the number of cattle that each of them can fodder in winter upon his own dominant farm. The action by which these proportions are to be ascertained is called *an action of sowing and rowming*, two old words denoting the form of law by which the number of cattle that each proprietor may put on the common is fixed, according to the different kinds of cattle that are to pasture upon it: And this action lies, even against such of the claimants upon the common as have had an indefinite promiscuous possession, without challenge, for forty years together; because such possession is contrary to the nature of the right, and if carried by any one of the dominant tenements to a certain height, without control, must make the servitude quite unprofitable to the rest. But it lies not against the proprietor of the servient tenement who, it is presumed, will be careful not to overstock, and so to impoverish his own property; *Stair, Jan. 23. 1679, Dunlop, (Dict. p. 14531.)*.

How common pasturage may be constituted.

16. Common pasturage may be constituted by prescription alone, *i. e.* by the acquirer's uninterrupted exercise of that right for forty years together, upon lands contiguous to his own, under no other title than a general clause in his charter *cum communi pastura*, even though no such right had been competent to his author in those lands¹⁹⁸. Nay, a right of pasturage may be effectually constituted by the common clause of *part and pertinent*, without the aid, either of prescription, or of a clause of pasturage. Thus, where a baron sold part of his lands, the former possessors of which had a right of pasturage

¹⁹⁷ *Vid. Garden, supr. § 3. not. 183.*

¹⁹⁸ It may be thus acquired "even upon the King's forests;" *E. Breadalbane, 22d Nov. 1743, Elchies, v. SERVITUDE, NO. 3.*

turage on a common belonging to the barony, the purchaser was adjudged to have acquired by the sale a right of pasturage on the common equal to what had been appropriated to the tenement sold before the sale; *Stair, Feb. 14. 1668, Borthwick*, (Dict. p. 9632.); for though the right competent to the baron upon his own common was not exercised as a right of servitude, *infr.* § 36.; yet by selling the lands with the privileges formerly annexed to them, that right became due to the purchaser as a servitude, which was before exercised by the baron or his tenant in consequence of his property. And this rule is alike applicable to lands not erected into a barony; for it arises from the plain import of the grant.

17. Two predial servitudes are received by the usage of Scotland, to which there was nothing similar in the Roman law; feal and divot, and thirlage. The servitude of feal and divot is the right one has of turning up feals or divots from the surface of the servient tenement, and carrying them off, for thatch to his house, or for the other uses of the dominant tenement. Much like to this is the servitude of fuel, which is a right of raising turf or peats from the servient moss or peat land, for fuel to the inhabitants of the dominant tenement*. Both these servitudes imply a right to use the nearest grounds of the servient tenement, on which to lay and dry the turf, peats or feal; and to a way or passage by which they may be carried off to the dominant. Though it be affirmed in general terms by writers, *Cr. Lib. 2. Dieg. 8. § 35. &c.* that all the lesser servitudes of fuel, feal, and divot, are included under the greater one of common pasturage, those servitudes are nevertheless quite distinct: For it is not in every case that the greater or heavier servitude comprehends the lesser; it is only where the greater is of the same kind with the lesser, so that the one cannot be figured to subsist without the other. But though one should grant to his neighbour a right of pasturing cattle upon his common, he is not for that reason understood to have also given him the right of breaking up the servient tenement for fuel to his fire, or for a cover to his house; and there are many instances of grants of pasturage with an express seclusion of the lesser servitudes. Nay, though such grant should be indefinite, the question, Whether the lesser servitudes are included? must depend on the nature of the possession; for they will be excluded, if either he who is entitled to the pasturage has never attempted to extend his right to the casting of feal, &c. or if he has been interrupted in that attempt, *Stair, Feb. 15. 1668, L. Haining*, (Dict. p. 2459.)

Servitude of feal and divot, and of fuel.

18. Thirlage is that servitude by which lands are astricted or thirled to a particular mill, to which the possessors must carry the grain of the growth of the astricted lands to be grinded, for the payment of such duties as are either expressed or implied in the constitution of the right. Wheat, corn, or other grain, was at first grinded by hand-mills, or querns; which are not quite in disuse at this

Thirlage.

* See *Fac. Coll. Dec. 20. 1775, Brown*, Dict. p. 14542¹⁹⁹.

¹⁹⁹ It was here decided, "that the use of the servitude is not to be extended farther than what is sufficient to answer the purposes of those who possess and have their actual residence upon the grounds found entitled to the servitude." Nor can it be extended to unusual or extraordinary purposes even by possessors; *e. g.* it was found in one case, that it may be used "for all family purposes, and for drying, malt-ing, or brewing the grain of their own lands, and burning limestone for the use of the lands, and other accommodations of the like nature, but not to burn limestone for sale, nor to carry on a trade of brewing or distilling for sale;" *Fac. Coll. Leslie*, 27th Nov. 1793, Dict. p. 14542.

this day in some of the highland parts of Scotland. It was soon perceived, after the use of water-mills was introduced, that that manner of grinding not only saved much labour, but made better flour or meal: Hand-mills were therefore prohibited except in time of frost, or in places where water-mills were not erected, *St. Gild. C. 19.*; and the twenty-fourth peck, *i. e.* a peck out of six firlots, was by that regulation settled as a reasonable price for grinding. But no lands were then astricted to any particular mill: The grinding of corns constituted the proper contract of *locatio operarum*, the miller letting out his labour for a certain hire to all who should be willing to employ him. Thirlage, however, was soon introduced into most countries which received the Feudal law, whereby a multure or hire was exacted far exceeding the value of the work. Its origin was owing to the prospect of the great benefit which landholders imagined was to accrue to themselves, by drawing thereby a considerable rent for their mills, and so raising the value of their lands. But this was a vain conceit; for the heavier the rate of multures was that tenants were obliged to pay for manufacturing their grain, the less rent they were able to pay to their landlord. And in truth thirlage is a great obstruction to the improvement of land by agriculture; for besides the money and time spent in lawsuits for recovering abstracted multures, tenants, however industrious, cannot but grudge laying out money in meliorating their farms, when the profits are so heavily taxed in favour of those who bear no part of the expence. In this servitude, the servient tenement is bound not only to suffer, but to do; for the possessors of the lands astricted must carry their corns to the dominant mill; and in the general case must also perform several services necessary for upholding the mill in sufficient repair.

19. In thirlage, the mill is the dominant tenement, and the lands astricted the servient. The duties to which those lands are liable are, multures, sequels, and services. The multure is a quantity of grain, sometimes in kind, as wheat, oats, peas, &c.; and sometimes manufactured, as flour, meal, sheeling, due to the proprietor of the mill, or his tacksman, the multurer, for manufacturing the corns. The sequels are the small parcels of corn or meal given as a fee to the servants, over and above what is paid to the multurer; and they pass by the name of *knaveship*, (from *knave*, which in the old Saxon language signified a servant), and of *bannock*, and *lock*, or *gowpen*. As the quantum of these is not usually expressed in the constitution of the right, it is regulated by custom*. Services are a kind of accessory to thirlage; and consist in those duties or obligations to which the servient tenement is liable for the use of the dominant; as bringing home the mill-stones, upholding the mill-house, with the dams and aqueducts, &c. †²⁰¹.

20.

* So the Court found, *Kilk. Nov. 24. 1738, Ramsay, Dict. p. 16017* ²⁰⁰.

† These likewise seem to be regulated by custom. See *Brown, June 17. 1740, Dict. p. 16018.*

²⁰⁰ So also, *Bruce, 19th Nov. 1741, Elchies, v. MULTURES, No. 7.*

²⁰¹ “ Found, that personal services of bringing home the millstones, and keeping up the dams, were inherent in a thirlage established by constitution;” *Kilk. Miller, 19th, Dec. 1740, Dict. p. 16019*; “ but that furnishing thatch to the mill was not, nor “ could be exacted without special constitution or possession;” *Ibid.* This last point was afterwards decided differently, and the service of furnishing thatch found equally inherent with the others; *Kilk. Bruce Stuart, 17th Nov. 1741, observed in the report of Miller.—Vid. infr. § 31, h. t.*

The dominant tenement has a right to the multures and sequels. Mill-services.

TITLE IX.

Outsucken and
insucken mul-
tures.

20. The astricted lands are called *the thirl* or the *sucken*; and the persons subjected to the astriction get the name of *suckeners*. Hence the duties payable by those who come voluntarily to the mill are called *outsucken*, or *out-town multures*; and those that are due by tenants within the *sucken*, *in-town* or *insucken multures*. The rate of *outsucken* multure, though it is not the same every where, is more justly proportioned to the value of the labour than that of the *insucken*, except in those parts of the country where the tenants, from the penury of mills, have no choice of any other nearer to which they may carry their corns. It generally continues what it was originally fixed to, by the *St. Gild. C. 19.*—the twenty-fourth peck. The rate of *insucken* is frequently a peck in the boll, and at some mills considerably higher. Those who carry their grain to a mill voluntarily are presumed to agree, if no special bargain be made, to pay the accustomed *outsucken* multures of that mill.

21. Thirlage is constituted by writing, either directly or indirectly. It may be constituted directly, *first*, by the proprietor thirling his tenants to his own mill by an act or regulation of his own court, *Stair, B. 2. T. 7. § 16.* But this kind of thirlage is ineffectual without the tenant's consent: for tenants who have written tacks prior to that regulation are entitled to hold their lands, while their tacks are current, free from every burden which is not specified in them. And even in the case of verbal leases, which subsist only from year to year, the landlord cannot make the condition of the tenants worse by imposing new burdens on them, while they continue in their farms, which they had not agreed to. It must appear that they have consented, therefore, either by an express written obligation to comply with that act of court, or by constantly carrying their corns to the mill to which the act directs them, and paying the accustomed multures. Tenants who have either entered to the lands, or have begun to possess by tacit relocation, after such acts of court, may possibly be tied down by the regulations made previously to their entry, if they be properly intimated, and not objected to by them when they enter. *2dly*, Thirlage is constituted directly, when in the grant of lands to a purchaser the thirlage of the lands disposed is expressly reserved by the granter to his own or any other mill; and the servitude may be constituted in this way, though the lands disposed should be holden of the granter's superior; for it is not necessary that the proprietor of a mill be superior of all the lands astricted to it. *3dly*, It is a most direct and indubitable way of constituting thirlage, when the proprietor of a mill makes it over to a purchaser, together with the multures of his own lands *per expressum*. The grant of a mill, with the multures used and wont, though it should not specify the lands astricted, is sufficient to constitute a thirlage over such of the granter's lands as were, at the date of the grant, in use to pay *insucken* multures to the mill disposed; and it also imports a conveyance of the thirlage of all lands belonging to others which were at that date astricted to the mill disposed, *St. B. 2. T. 7. § 16.* But it extends to no part of the granter's property which was then in his own natural possession, and which therefore, by a rule to be explained, § 36. was not at that time subject to any servitude, *Harc. 728, (Lady Kincarrachy, Feb. 2. 1686, Dict. p. 15987.)* It is unnecessary to mention other methods of establishing thirlage directly, since every landholder can astrict his own lands by any proper obligation, even in a writing apart, with the consent of such of his tenants as have subsisting leases:

And

How thirlage is
constituted. By
writing, 1st, Di-
rectly.

Book II.

And though such personal deeds cannot hurt singular successors in the lands without the possession of the dominant tenement, acquired previously to the right of the singular successor, *Harc. App. 3. (Pittarro, Dec. 12. 1673, Dict. p. 14503.)*; yet the most slender acts of possession have been adjudged sufficient for that purpose, *Forbes, July 26. 1712, Blair, (Dict. p. 14505.)*.

2dly, Indirectly.
Thirlage of barony-lands.

22. Thirlage is said to be constituted by writing indirectly, where the words of the grant bear no explicit constitution of that servitude, but nevertheless imply it in the construction of law. It appears that all barony lands had been formerly understood to be naturally astricted to the mill of the barony, in consequence of the union formed between the lands and the mill,—by the erection into a barony without any written constitution. Hence it was found, *Durie, July 17. 1629, L. Newliston, (Dict. p. 10852., and 15968.)*, that a feuar of part of a barony was subjected to thirlage for the lands feued, in a question with one who had afterwards purchased the mill itself from the baron *cum astrictis multuris*, notwithstanding the feuar's right, which, too, bore the *Reddendo* of a special duty *pro omni alio onere*, in respect that it did not bear *cum molendinis et multuris*. But as this constructive servitude appeared inconsistent with the legal presumption for liberty, it soon suffered limitations. *First*, Though the mill of the barony be made over as such, yet if the grant bear *with multures used and wont*, those taxative words confine the servitude to former usage, and therefore import a bare conveyance of the former thirlage; and even that is not presumed, without some proper constitution previously to the defender's right, *Durie, July 13. 1632, E. Morton, (Dict. p. 10853.)* *. *2dly*, If before the baron's conveyance of the mill of the barony *cum multuris*, the baron should have feued part of the barony to another, for a special feu-duty in the *Reddendo, pro omni alio onere*, and with a clause of multures, though only in the *Tenendas*, the feuar will enjoy his lands free from astriction, notwithstanding the posterior grant of the mill of the barony; because a right of lands with multures naturally imports, that they are not subject to thirlage; and no landholder, after he is divested of the property of lands, can afterwards charge them with a servitude from which they were formerly free, *Harc. 721, 722, (Macpherson, Dec. 1. 1681, Dict. p. 15985, Buntin, Jan. 17. 1682, Dict. p. 15986.)* †. If this doctrine is well founded in the grant of a barony-mill, it must obtain *à fortiori* where there is no erection.

The extent and effect of thirlage are regulated by the tenor of the grant.
Thirlage of *grana crescentia*.

23. Thirlage when constituted by writing, differs considerably in its extent and effects, according as the grant happens to be conceived. The grant usually expresses what part of the corns is astricted; but sometimes it is made out in general words, astricting the lands. In the *first* case, where the nature or quantity of the corns astricted is expressed, thirlage is either of all growing corns, *omnia grana crescentia*; or, *2dly*, of grindable corns; or, *3dly*, of *invecta et illata*, all corns brought within the thirl. The thirlage of all growing corns comprehends the whole grain of the growth of the astricted lands, even barley, unless where it is specially excepted

* This decision does not seem to be supported by later practice. Thus, the thirlage of a barony was sustained without any constitution in writing; *Stair, Jan. 14. 1662, Nicolson, Dict. p. 10856*. The same was done where the lands and mill of the barony had been disposed, *cum multuris et eorum sequelis*; *Hopeton, Nov. 21. 1753, Dict. p. 16029*. See *Durie, July 12. 1621, Douglas, Dict. p. 10851*.

† See *Rac. Coll. June 25. 1766, D. of Buccleuch, Dict. p. 16053*.

ed, or where an exemption of that grain is proved for a full course of prescription, *Gosf. July 3. 1673, Oliphant*, (DICT. p. 15979.); *Harc. 730. (Feuars of Gaitmillmill, June 13. 1688, DICT. p. 10770.)*. Nevertheless, certain parts of the corns are understood to be excepted without a special clause: *First*, the seed-corn, and that which is necessary for feeding the horses or other cattle employed in cultivating the ground; for both these are destined for raising corns for the next crop, which is a use inconsistent with grinding. *2dly*, The farm duties, or rent payable in grain to the landlord; for it is not presumable that the landlord, who must dispose of at least part of his farms for money, meant to burden the grain deliverable to himself with any servitude. Yet, in this matter, practice has made a reasonable distinction. Where the corn-rent is deliverable to the proprietor in grain not grinded, as in wheat, oats, barley, pease, &c. there is no astringency*. The proprietor is left at liberty to sell that grain to persons without the sucken, unmanufactured, as he received it from the tenants; and though he dispose of it within the thirl, the purchaser has the same power, to sell it to whom he will, that the proprietor had, without being subjected to any multure. But where the rent is deliverable to the landlord in grain already manufactured, as flour, meal, &c. the tenant must grind the corn, of which that meal is made, at the mill to which he is astringed. If the landlord, after receiving his corn-rent unmanufactured, consume any part of it within the thirl, in meal or in malt, such part falls under the thirlage; since, when in place of selling it, he grinds it for his own use, he ought to carry it to that mill, *Fount. Jan. 7. and Feb. 1. 1709, L. Rathillet*, (DICT. p. 15997.). Though the tenant's whole rent should be payable in money, he must not sell his corns unmanufactured without the sucken, under the colour of raising a fund for the payment of his rent; otherwise he is liable in the same rate of multure to the dominant mill, as if he had grinded them there²⁰³.

24. Thirlage may be constituted, *2dly*, of all the grindable corns growing on the lands; which, in the proper sense of the words, is precisely of the same import with the former, but is, from the unfavourableness of thirlage, restricted to such of the corns as the tenants have occasion to grind, whether for the support of their families, or their other uses within the thirl, all which must be ground at the dominant mill †; but the surplus may be lawfully exported by

Thirlage of
grindable corns.

* The same rule is applied to victual-duty payable to the titular; *Kames, Sel. Decis. No. 246. Maxwell, June 26. 1766, DICT. p. 16057.*

The feu-duty forms a third exception, whether it be payable in grain, or by a composition in money; *Fac. Coll. June 17. 1788, Lo. Macleod, DICT. p. 16070*²⁰².

† Comprehending even farm meal; *Millar, Dec. 19. 1740, DICT. p. 16019*²⁰⁴; *Law, July 14. 1742, DICT. p. 16021.*

²⁰² This is an inaccurate statement of the decision. The Court held, that where the feu-charter stipulated "for payment of certain quantities of grain," the feu was to that extent free from thirlage, though the superior, by a subsequent arrangement independent of the charter, should agree to take his payment by a money composition. — A feu-duty payable in oats was found not astringed; *Bruce, 19th Nov. 1741, Elchies, v. MULTURES, No. 7.*

²⁰³ So found in regard to sales, whether "for payment of rent or servants' fees;" *Kilk. Landal, 22d February 1745, DICT. p. 16023.* Neither can the tenant "sell the *grana crescentia*, and buy others in their place, otherwise the corns so bought are "astringed;" *E. of Wigton, 15th Dec. 1736, Elchies, v. MULTURES, No. 3.* This likewise holds in the thirlage of grindable corns; *Musselburgh, § 24, not **.

Not only multures, but knaveship and other sequels are due, for all corns falling under the astringency, "whether abstracted and carried to other mills, or sold by the thirl;" *Kilk. Forbes, January 1744, DICT. p. 16022.* See *infra*. § 32, h. t.

²⁰⁴ *Elchies, v. MULTURES, No. 6.*, reports *Millar's* case thus: "A superior having thirled his vassal's lands to a mill also feued out by him, and the astringency express-

by the tenant in kind, without subjecting him to any multure, *Feb.* 1731, *Lockhart*, (DICT. p. 16015.); *Feb.* 17. 1736, *Lockhart*, (DICT. p. 16016).²⁰⁵ * The tenant, whose corns are astricted in either of those ways, may, notwithstanding the servitude, lay his grounds in grass, if it be not done *in fraudem* of the thirl; for he is laid under this only obligation by the thirlage, to carry his corns, when he has corns, to the dominant mill, *July* 1731, *Macfadzen*; (DICT. p. 16016.), *Fac. Coll.* 1. 166, (*Grant*, *Nov.* 28. 1755, DICT. p. 16034.) †.

Of *invecta et illata*.

25. By a *third* kind of thirlage, the *invecta et illata* are astricted; by which are understood all corns that are brought into the thirl or servient tenement, though they be not of the growth of the astricted lands. This thirlage is commonly imposed on the inhabitants of a borough or village, and binds them to grind all the corns imported thither, at the dominant mill. When this thirlage is constituted, the words of style describing the subject astricted are *all grain brought within the ground that tholes* (or suffers) *fire or water therein*. *Stair*, B. 2. T. 7. § 19, 20., and *Mackenzie*, § 26. *h. t.*, interpret these words of steeping and kilning, that is, of malting and drying, the corns within the thirl, but not of baking and brewing; for though grain suffers fire and water in baking and brewing as truly as in malting and kiln-drying, the clause can only be understood of such use of fire and water as prepares the grain for the mill; and so cannot be applied to baking and brewing, which is not done till after the corns are grinded. In Sir R. Spottiswood's opinion, *v. Mills and multures*, baking and brewing ought also to be included; because otherwise the servitude might be easily evacuated, by grinding malt or wheat at a mill without the thirl, and afterwards importing it to the servient borough to be brewed or baked. Our decisions favour the first opinion, *Fount. Feb.* 22. 1707, *Heriot's Hosp.* (DICT. p. 15994.) †. And on this principle, multure is not due in the thirlage of *invecta et illata* for flour or oatmeal brought into the servient tenement.²⁰⁶, unless where the importer himself has

* Found, that thirlage of all grindable corns does not comprehend wheat, where the mill is not properly constructed for grinding it; *Fac. Coll. Couston*, *July* 16. 1760, DICT. p. 16047.; *Ibid. Wright*, *Dec.* 13. 1768, DICT. p. 16057. In a thirlage of this kind, the Lords found, that if the possessors of the astricted lands sold their own grain, and bought other grain without the thirl for their own use, they were bound to grind this grain at the thirl-mill, paying insucken multure, if it was not already manufactured; or, if it was, that still they were obliged to pay multure for it; *Musselburgh*, *Dec.* 20. 1743, DICT. p. 16021., (*Elchies*, *v. MULTURES*, No. 11.). See a case where, from the state of possession, a thirlage of grindable corns was held to amount to the same as that of *omnia grana crescentia*; *Fac. Coll. June* 14. 1781, *Greig*, &c. DICT. p. 16066.

† Found also, that the lessee of the mill is not entitled to any deduction from his rent, on account of part of the astricted lands being laid in grass, even by the owner of the mill himself; *Fac. Coll. Stowan*, *Feb.* 20. 1765, DICT. p. 16052.; *Ibid. Chalmers*, *Feb.* 16. 1769, DICT. p. 16060.

‡ The Court gave an opinion to the same purpose in a later case, though there was no opportunity of giving an express judgment on the point; *Brewhouse*, *Dec.* 11. 1741, DICT. p. 16020, (*Elchies*, *v. MULTURES*, No. 8.). See *Stair*, *Nov.* 24. 1680, *Ramsay*, DICT. p. 15984; *Fac. Coll. July* 20. 1757, *Arnot*, DICT. p. 16035.

“ly limited to the corns grinded for the sustentation of their families; notwithstanding of that restriction, the Lords found the farm meal payable to the feuars by their tenants, though the feuars do not now reside within the thirl.”

²⁰⁵ *Elchies* reports this case, *v. MULTURES*, No. 2. And see a precisely similar case; *Law*, 14th *July* 1742, *Ibid.* No. 9. (DICT. p. 16021.)

²⁰⁶ Nor for ale imported, *Arnot*, *supr. not.* †, *h. p.*; nor for malt imported in a ground state, *Town of Haddington*, and *M. Abercorn*, *infr. not.* * p. seq.; *E. of Wigton*, 1744 *Dec.* 1736, *Elchies*, *v. MULTURES*, No. 3.

has bought it in grain, and grinded it at another mill, *Falc.* ii. 61. (*Bakers of Perth, Feb. 22. 1749, Dict.* p. 16025.) ; for such act is presumed to be done *in fraudem* of the servitude. * 207.

Where the same corns are subject to double thirlage.

26. It happens frequently that the same grain is subjected to a double thirlage. It may first pay multure, as *granum crescens*, to that mill to which the lands where it grew are thirled ; and if afterwards it shall be carried into a thirl where the *invecta et illata* are astricted, it must there pay a second multure as *invectum*. But where the owner of a mill has got the right of those two thirlages constituted on different tenements, that individual grain which has already paid the first multure to the dominant tenement, is not liable to the same mill in the second ; for multure, in the consideration of law, consists either in the price paid at a mill for manufacturing the grain, or in the penalty inflicted for carrying it elsewhere ; and as the same corns cannot be twice manufactured at a mill, the rational construction of these two servitudes, when vested in the same proprietor, must be, that not only the corns growing on the one tenement, but those brought into the other, shall be grinded by the dominant mill, but not that the same individual corns should pay multure twice to that mill, *Kames, (29.) 30. (Steedman, Jan. 17. 1722, Dict.* p. 16013.) †.

27. In thirlage constituted in indefinite terms, astricting lands to a mill, without mentioning by what kind of thirlage, usage must determine the nature and degree of the servitude ; and where there has been no sufficient time to discover its nature by the subsequent possession, *presumendum est pro libertate*, that meaning ought to be received which forms the lightest servitude. But where the words of astriction are capable only of one meaning, the extent of it must be fixed solely according to that meaning ; so that the servitude, if not entirely lost, by a total nonusage for forty years, will be preserved in its full extent, though during all that time the dominant tenement possessed only a lighter degree of thirlage ; *Durie, June 26. 1635, L. Wauchton, (Dict.* p. 15971.). When a village or borough is astricted, the thirlage of *invecta et illata* must be necessarily understood ; for in a village there are no *grana crescentia* which can possibly be the subject of thirlage, *Dec. 27. 1717, L. Grange, (Dict.* p. 16012.). stated in (*Folio*) *Dict.* ii. p. 466, 467. ; *Falc.* i. 133, (*Mackie, July 18. 1746, Dict.* p. 16023.).

Where thirlage is indefinitely constituted, the easiest is presumed.

28. It is a general rule, That thirlage cannot be acquired by prescription alone, without the aid of some title in writing : For, *in iis quæ sunt meræ facultatis nunquam præscribitur* ; mere faculties, or powers to act, cannot be lost by not exercising those powers. Corns must be grinded at some mill to make them fit for use ; and therefore, though a landholder should have carried his corns to one particular mill, and even paid the high insucken multures for time past

Thirlage constituted by prescription.

* See to the same purpose, *Fac. Coll. June 19. 1788, Town of Haddington, Dict.* p. 16071. ; *Ibid. Feb. 13. 1798, Marq. Abercorn, Dict.* p. 16074.

† It was found, that though dry multure be paid for bear, yet if it be grinded at the mill, the ordinary multure paid for oats is also due ; *Elphingston, June 14. 1749, Dict.* p. 16026.

207 Purchasing grain unground, getting it ground at a mill without the thirl, and bringing it to be consumed within, was again held an evasion of the servitude ; *Fac. Coll. E. Fife, 1st July 1807, Dict.* v. THIRLAGE, *App.* NO. 2. But where a baker, residing without the thirl, imports grain at a seaport within, and carries it beyond to be ground into flour and baked into bread, it is not *in fraudem* of the servitude, though the bread be brought into the thirl, and retailed there to the inhabitants, by persons who purchase it from the baker ; the thirlage of *invecta et illata* having no application to such a case ; *Bakers of Dundee, 23d February 1813, Fac. Coll.*

past memory, the presumption is, that he did so because he could not be better served elsewhere; and therefore such use cannot lay him under any servitude. But thirlage may, contrary to this rule, be constituted by mere prescription, without a title in writing; *first*, in mills belonging to the King in property, *Balf. p. 494. C. 9. **; in which immemorial possession must of itself be sufficient to constitute thirlage, since the sovereign can have no title-deeds to produce, his original right to all feudal subjects being established *jure coronæ*, *Stair, Jan. 8. 1662, Stewart*, (Dict. voce PRESCRIPTION, p. 10855.) Nay, though the King should have purchased the thirlage from another on the seller's resignation, *tanquam quilibet*, it is presumed from his possession, that the title-deed has been lost, and the sovereign must not suffer through the negligence of his officers. This exception hath been, from parity of reason, extended to mills or church-lands, *Jan. 22. 1740, Lo. Maxwell*, (Dict. p. 16017.), marked in (*Folio*) *Dict. ii. p. 462. ²⁰⁸*, because churchmen were presumed to have lost their title-deeds at the Reformation; which gave rise to an act of sederunt, *Dec. 16. 1612*, preserved by *Spotiswoode, v. Kirkmen*, declaring that a churchman's right to church-lands is to be sustained without written titles, upon a possession of thirty years, to be computed backward from the time of bringing the action against him. The *second* exception is of dry multures; by which is meant a yearly sum of money, or quantity of corns, paid to a mill, whether those liable in payment should grind any grain at it or not; for such payment cannot be construed as voluntary, since no man is to be supposed fool enough to pay, for forty years together, a duty for which he receives no work, if he could not be compelled to it; *Stair, July 23. 1675, Kinnaird*, (Dict. p. 10862.).

Titles of prescription of thirlages.

29. There are certain titles, which, though they are so lame that they cannot of themselves constitute thirlage, yet have that effect when they are followed by long possession. The constant acts of going to the same mill for forty years together, are in such case construed to have been in consequence of a proper antecedent right of servitude. The *aliqualis* title, therefore, and the long possession together, do establish the thirlage, though neither of them could do it alone. Those imperfect titles are styled *titles of prescription*; and the thirlage thus constituted gets the name of *prescriptive thirlage*. If the servient tenement be in use to pay only the outsucken multures, which are accounted barely as a suitable reward for the grinding, it ought to require a stronger title to constitute prescriptive thirlage: but where the insucken multures have been paid, the slenderest titles are sustained; *ex. gr.* a decree against tenants, in which the owner of the grounds was not made a party to the suit, *Stair, June 24. 1665, Montgomery*, (Dict. p. 10857), or an act of thirlage of a baron court, *Ibid. Jan. 11. 1678, Lo. Balmerino*, (Dict. p. 10870.); because persons are hardly to be presumed willing to pay those heavy multures for forty years together without a servitude.

* The words of Balfour are: "Gif ony tenent or occuparis of ony landis, and thair foirbearis, has bene in continual use, be the space of threttie zeiris, on coming to ony miln pertenant to our soverane Lord, and in paying thair multures to the fermoraris of the samen miln, or otheres havand richt thairto, gif they pass away fra the said miln, they aucht and sould nevertheless pay the said multure after the modification of the Judge; *5th Feb. 1521, The King's Comptroller and Fermorar of the Miln of Rothesay contra the Tenentis of Rothesay.*"

²⁰⁸ This case is also reported by *Elchies, v. MULTURES*, No. 4. who says, "This indeed is against the decision, *17th July 1677, Ross v. Mackenzie*, (Dict. p. 10866.) which I showed them, and was read. But we thought it not law."

tude. Hence the seisin of a mill, with the multures of certain lands, joined with forty years' possession of the insucken multures of these lands, was adjudged sufficient to constitute a prescriptive thirlage against the owner, though he was, previously to that seisin, infest in his own lands *with mills and multures*, which in the general case imports a freedom from thirlage, *June 29. 1665, L. Keithick*, (DICT. p. 11292.), as stated by Stair in his Institutions, *B. 2. T. 7. § 17.* Indeed it is not always necessary that there be a title of prescription in writing: Payment, for instance, of the insucken multures, when it is accompanied with the constant performance of mill-services during a whole course of prescription, is as little capable of bearing a construction consistent with the freedom of the lands, as the payment of dry multure, and therefore may be justly accounted sufficient to constitute prescriptive thirlage, *June 1745, L. Broughton**, (not reported.). In this kind of thirlage, the course of prescription is not considered as interrupted, though the astricted corns should be sometimes carried to another mill; for abstractions are too frequent, even where the thirlage is not disputed. The servitude, therefore, is effectually established, where the abstractions have been few, and commonly performed in a clandestine manner; said *June 29. 1665*, (DICT. p. 11292.); also *Stair, Jan. 11. 1678, Lo. Balmerino*, (DICT. p. 10870) *Ibid. Dec. 7. & 11. 1677, Henderson*, (DICT. p. 10867.).

30. Though thirlage itself cannot, in the general case, be established by mere possession, the quantity of multure due by the servient tenement may, where the rate of the multure is not specified in the deed of thirlage; for in such case, usage is the only rule left for determining the question. Yet the owner of the mill will not be put to prove, what the usage was *retro* to the date of the right; for when custom is proved as far back as the memory of man, the same custom is presumed beyond memory, upwards to the constitution of the servitude. If, in such indefinite thirlage, the rate of multure be proved for the last forty years, that must be the rule of judgment, though before that period the rate had varied, and will accordingly either increase or diminish the servitude from what it had been before †²⁰⁸.

Quantity of multure may be fixed by mere possession.

31.

* The Court had sustained a thirlage in such circumstances; *Fac. Coll. March 10. 1769, Brute*, DICT. p. 16061 ²⁰⁷.

† It has been decided that thirlage does not comprehend astriction to a kiln; *Fac. Coll. Dec. 20. 1775, Skene*, DICT. p. 16062.

²⁰⁷ This case related to the mill of a barony, and the charter conveyed the mill, "and pertinents thereof;" in addition to which, and besides the mere usage of "paying insucken multures," and "performing mill services," during the period of prescription, "sundry decrees had, in the course of that time, been recovered against the "feuars for abstractions." It is scarcely correct to cite such a case, as an authority for the doctrine with which it is here immediately connected. It belongs more properly to the class of *Montgomery* and *Lo. Balmerino*, noticed in the beginning of the section; as appears, indeed, still more clearly from what is stated in the report,—that the Court were "moved, not so much by the use of coming to the mill, which might "have arisen from motives of conveniency, as by the decrees which had been taken in "the baron court for abstractions, and the presumptions in favour of the mill of a barony." That "coming immemorially to a mill, and paying intown multures," &c. would not, *per se*, be held sufficient to constitute thirlage, may be inferred from *L. Maxwell, 22d Jan. 1740, Elchies, v. MULTURES*, No. 4.; *Stair, 7th July 1677, DICT. p. 10866.* But see this point discussed with much ingenuity, *Kames, Sel. Dec. E. Hopetoun, 21st Nov. 1753, DICT. p. 16029*; reported also by *Elchies, v. MULTURES*, No. 12.

²⁰⁸ A person bound by thirlage to grind malt at a certain mill, and to give for the grinding a certain proportion of the malt grinded, is entitled to repayment, from the person

BOOK II.

Possession likewise ascertains the services where writing is wanting.

31. The services of thirlage described above, § 19., may be classed among the *naturalia* of that servitude. For in thirlage constituted by writing, mill services are always implied as an accessory without a special clause; and may therefore be exacted by the dominant tenement, if they be not taken off either by paction or prescription, *Stair, Feb. 27. 1668, Mailland, (Dict. p. 15978.)* * 200. And even in prescriptive thirlage, where the suckeners have been in use to perform a particular kind of mill-services, such partial use implies an obligation to perform all those that are usually demanded in that servitude, *Dec. 16. 1732, Craufurd, (Dict. p. 16016.)*. But where there is neither written constitution of thirlage, nor evidence of services of any kind performed by the thirl, the suckeners are bound to no services whatever, for in such case the rule holds, *tantum prescriptum quantum possessum*; the dominant tenement may claim what it hath acquired by possession, and no more, *Kames, Rem. Dec. 12. (Brown, June 17. 1740, Dict. p. 16018.)*; *Tinw. (not extant), Dec. 1744, L. Inches.*

Declarator of astriction and action of abstracted multures.

32. Two distinct actions are competent to those who have a right of thirlage, viz. a declarator of astriction, and an action of abstracted multures. Where the owner of the servient tenement questions the right of thirlage, and perhaps directs his tenants to carry their corns to another mill, an action for declaring the astriction of the lands to the pursuer's mill is necessary; to which the owner of the servient tenement must be cited as defender, *Dyrie, Feb. 9. 1628, L. Wardhouse, (Dict. p. 2201.)*. If the right of thirlage be acknowledged, but nevertheless the tenants clandestinely abstract or withhold part of their corns from the dominant mill, the proprietor of the mill may, without bringing a declaratory action, which is proper to the court of session, be relieved by suing the abstracting tenants before the judge-ordinary. But even in that process it may be prudent to cite the owner of the astricted lands for his interest; because a decree for abstractions, if the proprietor be not made a party to the suit, cannot have the effect of barring him from prescribing an immunity from the thirlage. The quantity of abstractions is commonly referred to the oaths of the abstracters, because, by the nature of the offence, no other full evidence can be had of the different abstractions, and of the extent of them. Not only the multures, but the sequels, or the small quantities of grain or meal due to the multurer's servants for their work, may be sued for in this action; because, though the servants perform no work to the tenant when he carries his corns to another mill, yet the multurer must hire servants whose only business is to give attendance, and to serve the suckeners when they are called upon †. The owner of the astricted lands is not accountable to the multurer for the abstractions made by the tenants

without

* See *Kilk. No. 5. voce THIRLAGE, Miller, Dec. 19. 1740, Dict. p. 16019.*

† See on this point, *Kilk. No. 11. voce THIRLAGE, Forbes, Jan. 1744, Dict. p. 16022, (Supr. § 23. h. t. not. 203.)*

person receiving this multure, of the duties paid to Government on the malting of that proportion; the duties being imposed subsequent to the constitution of the thirlage; *Fac. Coll. Magistrates of Forfar, &c. 17th May 1808, Dict. v. THIRLAGE, App. No. 3.* Same found, whether the duties were imposed prior or subsequent to the constitution of the thirlage; *Meiklejohn, 31st Jan. 1815, Fac. Coll.* The contrary seems to have been unanimously decided, in an older case, *Arnot, 12th Feb. 1736, Elchies, v. MULTURES, No. 1.*

200 So also *Lockhart, 16th Jan. and 25th June 1736, Elchies, v. MULTURES, No. 2.* It was found in this case, that where the charter expressly bears services, immunity cannot be acquired even by prescription; *Ibid.—Vid. supr. § 19. h. t. not. 201.*

without his knowledge ; for as the tenants are the only offenders, they alone ought to suffer : And even though the abstractions have been made by the proprietor's warrant or connivance, the tenants are primarily liable, and so must be first sued, *Stair, Dec. 10. 1667, E. Cassilis*, (DICT. p. 15977.). In one case of abstractions, the multerer had, by our ancient law, a remedy which he might apply without the interposition of a judge : Upon intelligence that any of the astricted corns were to be carried to another mill, he might seize them by the way, together with the sacks, *brevi manu*, not merely to detain them as a security for the payment of his multure, but to be adjudged in a proper court as lawful prize to himself, or at least to his landlord, *St. Gul. C. 9. § 8*. This doctrine obtained in Craig's time, with little variation, *Lib. 2. Dieg. 8. § 9, 10.* ; and it appears, that the remedy was not quite in disuse in certain counties or districts in Scotland so late as a century ago, *Durie, Jan. 22. 1635, Menzies*, (DICT. p. 1815.) ; *Pr. Falc. 72. (Thin, Dec. 1. 1683, DICT. p. 1820.)*. It is indeed censured as harsh and oppressive by some writers ; but both the nature and frequency of the crime, and the difficulty of a full discovery of abstractions, call for a severe penalty*.

33. After having enumerated the several predial servitudes which are most in use, a few observations may be subjoined, relating to the general properties and effects of servitudes. As all servitudes are restraints upon property, they are *stricti juris*, and so not to be inferred by implication. Neither does the law give them countenance, unless they have some tendency to promote the advantage of the dominant tenement. No man, therefore, who has not acquired an interest in his neighbour's grounds by an antecedent right of pasturage, can, by any stipulation, restrain him from pasturing on his own property as many cattle as he shall think fit to set upon it ; for *malitiis hominum non est indulgendum*. Upon this ground, the Roman law required, towards the constitution of a servitude, vicinity in the dominant and servient tenements, *L. 5. § 1. De serv. pr. rust.* Yet this is not always precisely necessary ; for though the two tenements be not contiguous to one another, a servitude

General qualities of all servitudes.

* The persons astricted are debarred from erecting a mill within the thirl, as that may in many cases afford an opportunity of acting *in fraudem* of the thirlage ; *Stair, b. 2. tit. 7. § 23 ; Feb. 28. 1684, Macdougall, DICT. p. 8897. ; Feb. 28. 1695, Crawford, DICT. p. 8898*. On this head the Court have observed a reasonable distinction. If the new erection is either entirely unfit, or unfit without a radical alteration in the machinery, for grinding the corn astricted, it will be permitted to remain, upon its owner finding caution not to interfere with the thirl, *Fac. Coll. July 29. 1757, Macleod, DICT. p. 16037 ; Ibid. eod. die, Lockhart, DICT. p. 16039*. But if it be fitted also for grinding in the manner astricted, it must either be utterly demolished, or altered so as to be unfit for such purposes, *Fac. Coll. Jan. 21. 1761, Millar, DICT. p. 16048 ; Ibid. Dec. 26. 1752, Urquhart, DICT. p. 16028*, likewise reported by *Kilkerran, DICT. p. 16027*, (and by *Elchies, v. MILL, No. I.*)²¹⁰.

²¹⁰ This was again found, where the thirlage was only of *grana crescentia*, notwithstanding an offer of security that the new mill should not infringe on the rights of the thirl, but should be restricted to the grinding of *grana invecta et illata* ; *Magistrates of Glasgow, &c. 11th Feb. 1813, Fac. Coll.* See also *supr. t. 6. § 5*, where the whole subject is fully discussed in the text. The right of complaint, however, on the part of the dominant tenement, may be cut off, by long acquiescence, or by direct acts of homologation. Thus, the proprietor of a barony mill was found not entitled, at the distance of eleven years, to object to the erection of another mill within the thirl, " in respect that before the mill mentioned in the libel was erected, he was in the knowledge of the defender's purpose to erect the same ; and in respect of the acquiescence on his part at that time, in the erecting the same, and also his acquiescence in the possession since held on the part of the defender ;" *M. Abercorn, 20th May 1820. Fac. Coll.*

servitude may be constituted, if the distance between the two be not so great as to obstruct all benefit from the servitude, *L. 38, 39. De serv. pr. urb. ; L. 5. L. 6. pr. Si serv. vind.* Thus a proprietor of land may acquire a right of pasturing his cattle upon another's common, though the dominant tenement should not be contiguous to the common, if he has a servitude of passage upon the interjacent grounds, through which he may drive the cattle from the one tenement to the other.

They must be used in the way least burdensome to the servient tenement.

34. As servitudes are limitations of the property, it is a rule, that they must be used in the way least burdensome to the servient tenement²¹¹. Thus, the servitude of a road, whether a coach or foot road, constituted through the grounds of another indefinitely, without describing through what particular part of the ground the road shall pass, must be continued in that line in which it has either been used before by the owner of the servitude, or which has been marked out for the road by authority of the magistrate; and the rest of the servient tenement is free, *L. 13. § 1. vers. At si. De serv. p. rust. †*²¹². And even though the whole grounds appear to be subjected, the owner of the dominant tenement must use his right *civiliter*, with moderation: So as not to carry the road through his neighbour's garden or orchard; nor, after having made choice of one road, and used it for some time, can he abandon it, and wantonly carry a new one through another part of the field, *L. 9. De serv.* Hence it follows, that the owner of the dominant tenement can do no act by which the burden may become heavier on the servient: He cannot, *ex. gr.* in a servitude of support, lay a greater weight on the servient tenement than is expressly stipulated in the right. He must likewise confine himself to the ordinary uses of his dominant tenement, and not stretch the right to extraordinary purposes which were not in the eye of parties at constituting it. Thus in a servitude of peats or fuel, the dominant tenement ought not to exhaust the servient moss, by using it in carrying on an iron work, or any other manufacture which may require an extraordinary supply of fuel, and which was not erected till after acquiring the servitude †²¹³. On the other hand, the owner of the servient tenement may make every use of his property consistent with the purposes of the servitude: He may, notwithstanding the servitude of fuel, or of feal and divot, to which his common is subjected, open the ground for minerals, limestone, coal, &c.; for the servitude affects only the surface. Nor can he be deprived of this right, on pretence that by breaking the ground, he makes part of the servient surface unfit for the servitude. Nay, though the right of the dominant tenement extends, strictly speaking, over the whole servient heath or moss, according to the rule *Unaquæque gleba servit*, the proprietor of the servient tenement may till part of it, if he leave

as

* Found, that a kirk-road might be altered from the line in which it had been formerly fixed for one more commodious; *Kilk. SERVITUDE, No. 2. Bruce, June 25. 1748, Dict. p. 14525*²¹².

† So the Court found in such a case, *Fac. Coll. Nov. 27. 1793, Leslie, Dict. p. 14542*²¹³.

²¹¹ *Vid. E. Aboyne, 22d June 1813, Fac. Coll. noticed supr. t. 6. § 6. not. 83. (p. 349.)*

²¹² *Vid. supr. § 12. ad fin., and the cases there referred to not. 191,*—as to the right of the owner of the servient tenement to inclose the ground through which the road passes, and to place styles or swing gates at proper intervals along the road itself.

²¹³ *Vid. supr. § 17. not. * and 199; and see the cases of Murray, &c. supr. § 5. not. 186, h. t.; also E. of Kinnoul, t. 6. § 15. not. 85.*

as much in grass as is fully sufficient for the servitude, *Stair, June 21. 1667, Watson, (Dict. p. 14529.)*. And even in a right of pasturage on a tenement, part of which had been under tillage before the servitude was imposed, the owner of the servient grounds was allowed to till further parts of it; yet so as that the grounds tilled, when they should be again laid down in grass, might remain subject to the servitude, *Stair, Jan. 20. 1680, E. Southesk, (Dict. p. 14531. and p. 7899.)*.

35. Negative servitudes, *ex. gr. altius non tollendi*, or *non efficiendi luminibus*, as they consist merely in the restraint laid on the proprietor in the use of his property, cannot possibly be accompanied with any exercise of the right by the dominant tenement. It may, however, be justly concluded, both from their being ranked by writers among the conventional servitudes, and from the frequent instances of them in practice; that they are, by the law of Scotland, accounted effectual against the singular successors of the granter, without use, by the bare agreement of parties²¹⁴. It flows also from the nature of negative servitudes, that they cannot be acquired by mere prescription, or without the express consent of the proprietor of the servient tenement: Though one should, for a century of years together, have, in the exercise of his property, applied himself to one particular use of it; though, for instance, he should, during that whole period, have kept his lands in grass, or contented himself with an house thirty feet high; he cannot be thereby precluded from building on those lands, or raising any house already built, to what height he pleases, however prejudicial it may prove to the light or prospect of the neighbouring tenement. His having before confined himself to one use, is to be ascribed, not to obligation or servitude, which is never to be presumed, but to choice. Indeed the question, Whether any servitude be constituted by prescription? depends much on the nature of the use which was first had by the owner of the tenement, said to be subjected to the servitude. Where that use began in consequence of an act done by him in the natural exercise of his property, such use, be it ever so long and uninterrupted, cannot establish a servitude against him. Put the case, that one had collected a body of water within his own property, for a particular purpose; and that the water, after serving that purpose, hath been suffered, for forty years together, to fall down upon an inferior tenement belonging to a different proprietor;

Negative servitudes.

²¹⁴ A negative servitude (*ne luminibus officiat*), constituted by written contract, was found effectual against a singular successor, "without registration, or any previous visible exercise of the right;" *Fac. Coll. Jan. 31. 1792, Gray, Dict. p. 14513*,—and even where constituted by an improbative letter, neither holograph nor tested, *Mairie, 26th June 1810, Fac. Coll.*; there being, however, in this instance, a real presumption in its favour from the relation of the properties. In a recent case it was decided, that such a servitude may be inferred within burgh, from a building plan, (which was held out to all persons purchasing ground for building, as the general plan of the town,) "without any mention either of the servitude or the plan in the titles of the property;" *Fac. Coll. Young & Co., 17th Nov. 1814*. The successful party, however, appears to have had no great confidence in this judgment, having "prevented an appeal by paying the costs," 6. *Dow, 100*; and from the unfavourable commentary which has since been delivered by the Lord Chancellor, in deciding, on appeal, another case turning very much on the same principle, it may be questioned how far so broad a position would again be maintained. *Vid. Gordon, 16th Feb. 1818, 6. Dow, 87*. It would seem indeed, that the mere exhibition of a plan, which is nowise referred to in the solemn contract of parties, ought not to be recognised as a legal mode of constituting a burden or obligation under that contract. See this principle further illustrated in *Heriot's Hospital, 26th May 1814, 2. Dow, 301*.

tor; the owner of the inferior grounds, though he may have received an accidental benefit by the water falling upon his property, cannot bar the proprietor of the water, who was all the while making that use of his property which he judged most beneficial to himself, from making another use of it afterwards, either by altering the course of the water within his own grounds, or by draining the source of it ²¹⁵.

*Res sua nemini
servit.*

36. It is a rule common to all servitudes, That *res sua nemini servit*, L. 26. *De serv. pr. urb.* This is obviously founded in the reason of the thing. The having the property of a subject, imports a right to use that subject in every way of which it is capable: The proprietor, therefore, can have no need of a servitude. It may be objected against this rule, That one of the methods formerly mentioned of establishing thirlage, seems to contradict it, *viz.* that a proprietor may thirl his own tenants to his own mill; in which case, the owner of the mill, which is the dominant tenement, and of the lands astricted, which is the servient, is the same person. And to speak freely, the constitution of a thirlage upon one's own lands, has the appearance of a deviation from this rule: The answer, however, may be, That in this species of thirlage, it is not the lands themselves which are astricted, but their fruits or produce; and these belong, not to the proprietor of the mill, but to his tenants*.

Various modes
by which servi-
tudes are extin-
guished.

37. Servitudes may be extinguished, *first, confusione*, when the same person becomes owner both of the dominant and servient tenements; for the use which the proprietor afterwards makes of the servient is not *jure servitutis*, but an act of property. And a servitude thus extinguished, revives not, though the right of the two tenements should be again divided, unless the servitude be constituted *dē novo*, L. 30. *pr. De serv. pr. urb.* *2dly*, A servitude falls with the right of him by whom it is granted, where his right is only temporary: *Resoluto enim jure dantis, resolvitur jus accipientis*. Thus a superior may subject his vassal's lands to a servitude, while he holds them by nonentry; but as soon as the vassal returns to them, they become free. *3dly*, Servitudes are extinguished by the discharge or renunciation of the owner of the dominant tenement; which renunciation is effectual against his singular successors. *4thly*, By the extinction either of the dominant or servient tenement; for upon that supposition, nothing remains to be the subject of a servitude. But if the dominant tenement, in place of being utterly destroyed, shall be rendered unfit for the purposes of the servitude for a time only, the servitude is suspended during that period. By our older practice, when a mill became so insufficient that it could not serve the thirl, the obligation upon the servient tenement was not even suspended; for the suckeners, though they were under a necessity of carrying their corns elsewhere, were liable in multure to that mill which

* Where the proprietor of a mill under lease afterwards took part of the astricted lands into his own possession, he was still found liable to thirlage during the miller's tack; *Fac. Coll. Jan. 23. 1785, Ayton, Dict. p. 16069; Ibid. June 14. 1789, Smith, Dict. p. 16072* ²¹⁶.

²¹⁵ But compare this doctrine with *Fac. Coll. Kincaid, 11th June 1752, Elchies, v. SERVITUDE, No. 6, and Wallace, 16th June 1761, Dict. p. 14511*, from which it would appear, that the inferior heritor may acquire a prescriptive right under such circumstances.

²¹⁶ This case went to a different point. It was there found, that a thirlage, originally constituted when the lands and mill belonged to different proprietors, and kept up in the tacks of the thirl after the subjects became vested in one common proprietor, was still a subsisting thirlage, and that the lands, on being again sold, "without any mention of the thirlage," remained astricted.

which was incapable of grinding it, and were only exempted from the burden of the smaller perquisites due to the servants, *Fount. Feb. 28. 1684, Macdougall*, (Dict. p. 8897.). As this was contrary to the obligation implied in thirlage, by which the owner of the mill is, in consideration of the stipulated multure, bound to uphold it in sufficient repair, the suckeners are, by the present usage, free from all multure while the dominant mill cannot serve them; but they must not, during such temporary insufficiency, carry a greater quantity of their corns to other mills than what they have immediate necessary occasion for, *Jan. 1736, E. Wigton*, (not reported ²¹⁶)*. Lastly, Servitudes are lost *non utendo*, or by the negative prescription; that is, if the owner of the dominant tenement neglect to use his right for forty years together, or if the owner of the servitude do acts repugnant to the servitude, without interruption made by him who claims it. Where the owner of the servient tenement is bound either to do, or to suffer something to be done, on his property, as in the servitude of thirlage, roads, &c. it is sufficient if he shall have forborne those acts which the servitude had bound him to, or if the owner of the dominant tenement shall have neglected to use his right, for a full course of prescription; but where the owner of the servient is barely restrained in certain respects from the use of his property, as in the servitude *altius non tollendi*, he cannot prescribe an immunity from the servitude, otherwise than by doing that very act from which the servitude restrained him, *L. 6. De serv. pr. urb.* Hence the prescription of immunity from those negative servitudes begins to run, not from the constitution of the servitude, but from the time that the person subjected did the first act repugnant to it, *Harc. 780.*, (*Wilkie against Scott, June 28. 1688*, Dict. p. 11189.). A servitude is not lost or even impaired *non utendo*, though he to whom it is due forbear at certain seasons the full exercise of his right, provided that such forbearance can admit of an interpretation consistent with an *animus* of preserving the right entire. Thus, a right of pasturage constituted upon an adjacent common, suffers not the least diminution, though the owner of the servitude should regularly, for the summer months, have carried his cattle from the servient tenement to a field of his own; because such act is *mera facultatis*, and presumed to be done, not with any view of relinquishing his right, but of feeding his cattle upon grounds which he thinks the most proper for them, that they may give a higher price in the market, *Fac. Coll. ii. 208*, (*Monro, Jan. 4. 1760*, Dict. p. 14533.) †. Not only may servitudes which are established by prescription, be lost by a contrary prescription, agreeably to the rule, *L. 35. De reg. jur., Nihil tam naturale est, quam eo genere quidquam dissolvere quo colligatur*; but though they should be constituted by grant, they may be extinguished in the same manner, by the

* Where the insufficiency continues for forty-eight hours, the thirl may carry to another mill as much grain as is necessary for their families; *Kilk. No. 12. voce THIRLAGE, Landal, Feb. 22. 1745*, Dict. p. 16023.

† See a decision to the same purpose in regard to a servitude of thirlage; *Fac. Coll. Jan. 25. 1774, Skene*, Dict. p. 10746 ²¹⁷.

²¹⁶ Reported by *Elchies, v. MULTURES, No. 3.*; and see another case to the same effect, *Lockhart, 27th July 1736, Ibid. No. 2.* In both of these cases, as in that of *Landal, not. *, h. p.*, the period which the suckeners must wait was fixed at 48 hours.

²¹⁷ Prescription was here repelled, not so much on the plea of partial possession, as on the ground that the thirlage, which was originally constituted by writ, had been "renewed in all the successive titles" of the servient property; the latest investiture, which proceeded on a precept of *clare constat* from the dominant proprietor, being much within the years of prescription, and so operating "a new constitution, although the ancient thirlage had been totally cut off by prescription."

the servient tenement enjoying an immunity from the servitude for forty years, as in thirlage * ; or by the claimant's forbearing to use it, as in the servitude of a road. In either case, the servitude is supposed to be abandoned or relinquished ; because all grants whatever lose their effect by disuse for forty years. If thirlage may be totally lost by prescription, *a fortiori* the *modus* and extent of it may be limited by possession ; and consequently if the possessor of the servient tenement has, during the years of prescription, enjoyed an exemption from the thirlage as to any particular species of grain, such long usage will be sufficient to restrict the extent of the servitude in all time coming, without regard to the possession had by the dominant tenement preceding that period †. This at least is the rule where the thirlage is constituted in general terms, without describing either the special *modus* of the astriction, or the rate of multure, *supr.* § 30.

Thirlage extinguished by a clause *cum multuris* in the charter of the vassal.

38. The special servitude of thirlage may be also extinguished by a clause in the charter of the lands astricted, granted by one who is both proprietor of the lands and of the mill, *cum molendinis et multuris*. This clause does not therefore barely create a presumption, that the lands disposed were not subject to thirlage at the date of the charter, but even when they appear to have been formerly burdened with that servitude, it implies a discharge or immunity from it, *Fount. Jan. 26. 1705, Sir J. Graham, (Dict. p. 15992.)*. It is sufficient for this purpose, if such clause be inserted in the *Tenendas* of the charter ; though all subjects designed to be conveyed to the grantee ought to be inserted in the dispositive clause ; because exemption from servitude is not a subject distinct from the lands disposed, but barely a quality annexed to them, *Dir. l. (Veatch, Dec. 7. 1665, Dict. p. 15975.) ; Falc. ii. 113, (Harrowers, Jan. 4. 1750, Dict. p. 16026.)*. For this reason, the words *cum molendinis et multuris* are seldom thrown into the dispositive clause, unless where a mill, which may be sometimes accounted a separate tenement, is intended to be conveyed. In rights granted by the crown, the clause of multures, where it is only in the *Tenendas*, is altogether ineffectual ; because when signatures are presented in Exchequer, a great part of the *Tenendas* is left blank, which is afterwards filled up at the discretion of the chancery-clerk, or the framer of the signature ; and therefore, whatever appears in that clause to the hurt of the crown, is presumed to have crept in *per incuriam*, *Stair, Jan. 8. 1662, Stuarts, (Dict. p. 10854.) ; Fount. and Forbes, Nov. 24. 1708, Halkerston, (Dict. p. 15997.) ‡*. Where the vassal has, after his charter *cum multuris*, continued to pay the insucken multures of his lands to the mill to which they had been formerly astricted, the thirlage is understood still to subsist, *St. B. 2. T. 7. § 24*. And indeed, though a clause of multures in the *Tenendas* does, in general, import a discharge of the servitude ; yet it ought to be disregarded, where either the possession subsequent to the charter, or the other circumstances of the case, cannot admit of a construction consistent with the freedom of the lands, *Fac. Coll. ii, 126. & 198. ibid. iv. 83, (Macnab, July 19. 1758, Dict. p. 16041. ; Yeaman, Nov. 17. 1759, Dict. p. 16044. ; Collart, Dec.*

* So found even in the case of a barony-mill ; *Fac. Coll. Dec. 2. 1789, Macdonald, Dict. p. 16068.*

† Accordingly, where the suckeners had discontinued the servitude for forty years, except by paying a dry multure for bear, the thirlage was found *quoad ultra* to be extinguished ; *Kilk. No. 7. voce THIRLAGE, Bruce-Stewart, Nov. 17. 1741, Dict. p. 16030.*

‡ This doctrine is laid down as entirely free from doubt ; *Kilk. No. 6. voce THIRLAGE, Wedderburn, Nov. 8. 1741, Dict. p. 16020 ;* and his Lordship says, some of the Judges considered it as equally applicable to a charter from a churchman.

Dec. 13. 1767, Dict. p. 16058.) *. A charter, containing a feueduty in the *Reddendo, pro omni alio onere*, or in full of all burdens upon the vassal, has not, like a charter *cum multuris*, the effect of exempting him from a thirlage to which he was before subject, unless there be some special circumstance favouring that interpretation. The clause of *Reddendo* is only meant to ascertain the duty, either in money, corns, or services, which must be paid or performed by the vassal, in consideration of the property of the lands: Though therefore the words *pro omni alio onere* may import a release from all burdens on the property, other than what is expressed in the *Reddendo*, they cannot be explained into a discharge of a servitude to which the lands had before been subject †. Hitherto of predial servitudes.

39. Personal

* By the decision, *Collart*, (which was affirmed in the House of Lords, Jan. 28. 1774,) it seems to have been held that the clause "*cum molendinis et multuris*," inserted in the *Tenendas* of a charter from a subject, does *per se* import a discharge of the servitude²¹⁸. The same decision has since been given; *Fac. Coll. July 21. 1785, D. of Roxburgh*, Dict. p. 16070. In this last case, the decision, *Macnab*, was disregarded.

† By statute 39. Geo. III. c. 55. (passed 13th June 1799), certain provisions are made for encouraging the improvement of lands subject to the servitude of thirlage. It is by § 1. made lawful for proprietors of lands thirled, or of mills to which lands are thirled, to apply to the Sheriff or Stewart depute or substitute of the bounds, to have the thirlage commuted into an annual payment,—by petition, specifying the lands, the mills, and the nature, extent, and application, of the thirlage; which petition shall be served on the parties interested in the thirlage, and the tenants of the mills, as well as edictally, on all having or pretending interest; and on advising it, with or without answers, or objections, (either to any further procedure, or to the matter of the petition), and claims of deduction, the Sheriff or Stewart shall, within thirty days, find and declare the precise matters in the petition and answers, which are relevant to pass to the knowledge of a jury. Twenty days thereafter, or, in case of advocacy, suspension, or other stay, ten days after the same shall be removed, the Sheriff or Stewart shall summon a jury of at least twenty-one impartial and disinterested men, heritors or tenants of land in the county, each paying L. 30 Sterling of yearly rent, or occupying his own land to the amount of L. 30 Scots valued rent; and this assize, after being, on the day appointed, reduced to nine, by each party striking off alternately, shall be sworn and constituted a jury, for determining the annual value of the thirlage, and prestations annexed to it. The evidence laid before the judge and jury must be taken in writing, and remain four years at least upon record; after which the jury shall, by their verdict, fix the amount of the annual payment in grain; and an abbeviat of the verdict is to be recorded, within sixty days from its date, in the general or particular register of seisin: But the act does not infringe the mill-owner's right of taking materials for supporting and repairing the mill-dam and the mill-lead.

§ 2. The Sheriff may determine all questions in law respecting the rights of parties stated in the petition and answers, though not within his ordinary jurisdiction.

§ 3. But where the thirlage, *quoad* any of the lands, is denied, the Sheriff shall dismiss the petition to that extent, unless the servitude is instructed by a decree of declarator, or other sufficient evidence.

§ 4. After being three years on record, the verdict shall not be set aside or altered; and if any party bring a reduction of it in the Court of Session, and not succeed, he shall pay his adversary's costs.

§ 5. Upon such verdict, the servitude shall cease; and in lieu thereof, the compensation in corn, or, in the payer's option, its value in money, at the rate of the county-fairs, shall be paid annually at the mill, or at some other convenient place, to be fixed by the jury.

§ 6. Verdict shall not be delayed by the absence of any persons interested; but the day for taking it may be adjourned by the Sheriff to any time within thirty days of the diet first appointed, cause being shewn, and expences paid, by the party praying the adjournment.

§ 7.

²¹⁸ And this in spite of a very strong case of possession subsequent to the charter. The same view having been taken in the subsequent case of *Roxburgh, supr. not.* *, the doctrine in the text, supported as it is by the cases of *Macnab* and *Yeaman*, and also by *Robertson, 28th July 1742, Elchies, v. MULTURES, No. 10.*, may now, perhaps, be regarded as overturned.

Book II.

Personal servitudes. Usufruct.

39. Personal servitudes are burdens on feudal subjects, constituted chiefly in favour, not of a tenement, but of a person. Of these the Romans reckoned three; usufruct, use and habitation. All of these might, without impropriety, be called liferent-rights; for they all fell on the death of him who had the right of them. The servitude of *usus* was limited to such part of the fruits of the subject burdened, as might be made use of by the *usuarius* or his family; but he could dispose of none of the fruits by sale. Habitation was a servitude on a dwelling-house; and was indeed a species of the other: He who had the right, might either possess the house by himself during life, or transfer his right to another; but neither he nor his assignee could use it for any other purpose than a dwelling-house. The only one of these servitudes which has been received into our law, is usufruct; which is defined by the Romans, a right that one has to use and enjoy a subject during life, without destroying or wasting its substance; which definition is well enough adapted to the nature of our liferents. He whose property is thus burdened, is in our law-language called the *fiar*, and the naked property the *fee*.

Of Liferent. Its nature.

40. The last words of the definition, *without wasting its substance*, point out a quality essentially necessary in the subject burdened: It must be such as by its nature is capable to be used *salva substantia*, as a field, a fishing, &c. An usufruct, therefore, cannot be constituted on corns, wine, or other fungibles, which perish in the use, *quorum usus consistit in abusu*: But it may be constituted on subjects, which, though they wear out by time, yet waste by so slow degrees, that they may continue fit for use for the full course of an ordinary life, *ex. gr.* household stuff. The Romans admitted a *quasi* usufruct, or improper liferent, even in fungibles. The liferenter was allowed to consume them; but he gave security, that upon his death the heir

§ 7. The commutation to be paid annually at Candlemas, commencing at the Candlemas immediately ensuing the verdict; and the amount of the first payment to be determined by the jury according to circumstances.

§ 8. If the mill be let, the commutation shall be payable, during the lease, to the tenant, who shall accept it as full compensation for his thirlage; and if the lands under thirlage are let, the landlord paying the commutation shall recover it from his tenants proportionally, (according to their rents), in the same manner as he recovers his rent.

§ 9. If this rule of allocation be objected to by tenants paying rents to the amount of one-fourth or more of the rent of the lands thirled, the jury shall divide according to the value of the multures, services, and prestations, legally exigible from each farm; and this they may do, either at giving out their verdict, or on being again convened by the Sheriff within two months thereafter.

§ 10. The commutation shall not affect the proprietor's obligation to pay land-tax, nor his right of freehold.

§ 11. Inhabitants of towns, &c. subject to the thirlage of *invecta et illata*, may apply to the Sheriff of the county, who shall proceed as in section 1. And on the jury's verdict, fixing the value in perpetuity of the servitude, in money, the Sheriff shall give decret against the petitioners, who, on payment of the sum, shall thenceforth be forever freed and relieved from the thirlage²¹⁹.

§ 12. Such purchase is competent though the mill be held under an entail, provided the price be entailed of new, pursuant to the directions of statute 20. Geo. II. chap. 50.

§ 13. If the mill and the lands lie in different counties, that jurisdiction is to be preferred in which the mill is situated; and the other parties concerned to be called by supplement.

§ 14. The statute has no operation where dry multure is fixed, unless there are mill-services, or other prestations, or restrictions, besides the dry multure.

²¹⁹ This clause held to apply, even where the community of the burgh was itself proprietor of the mill, the proceeding having in view the purchase of a total exemption from the servitude, on the part of the whole inhabitants. But the Court "doubted if partial exemptions could be claimed by individual inhabitants, the burgh in general remaining under the astringency to its own mill;" *Fac. Coll. Bakers of Dundee, 23d May 1804, Dict. p. 16076.*

heir should deliver to the fiar as much of the same kind, and of as good quality, *L. 7. De usuf. ear. rer.* But the word *liferent* is, by the usage of Scotland, applied only to heritable subjects, or to money. As to the last, one might conclude, that it could not be the subject of a proper liferent, since it cannot be used without transferring its property to another, which is inconsistent with preserving it for the fiar: And indeed the Romans considered the matter in this light, *L. 5. § 1. eod. tit.* Nevertheless money may be as properly liferented as lands; for as the liferenter's use of lands consists in enjoying the natural fruits of them during his life, his use of money consists in enjoying the civil fruits, or interest due upon it, without any right to demand or dispose of the principal sum, which is reserved entire for the fiar.

41. Liferents are divided into conventional and legal. Conventional liferents are either simple or by reservation. A simple liferent is formed by a new or separate right, for which reason it is also called *a liferent by a new constitution*; and is that right by which a proprietor of land or money makes over the bare liferent to the grantee during his life, so that the right of fee still remains in the granter. A simple liferent where the subject is heritable, requires a seisin duly registered to make the right effectual against the granter's singular successors; and becomes not real, as predial servitudes do, by the natural use or exercise of the right. For a liferent of lands, though it be doubtless a burden upon the subject liferented, is truly a feudal right, much resembling property, which constitutes the liferenter *interim dominus*, or proprietor for life. This right cannot properly speaking be transmitted to another; *ossibus usufructuarii inhaeret*, as the lawyers express it; so that though the liferenter should make over the rents and profits arising from it, the proper right of liferent remains in himself. The assignee is not by the conveyance entitled to the profits during all the days of his own life, but only during the life of his cedent or author. Hence the assignee's right being merely personal, cannot be transmitted by charter and seisin, which is a method of conveyance proper to real rights, but must be executed by a simple assignation.

42. A liferent by reservation is that right of liferent which a proprietor reserves to himself, in the same deed by which he conveys the fee or property of the subject to another. This sort of liferenter needs no seisin to perfect his right; for he stood originally infest in the property, and the right by which he divests himself of the fee, reserves his liferent; as to which therefore his former seisin, which virtually includes the liferent, still subsists. It flows from the favour with which the law regards a liferenter who had once the fee of the lands in himself, that his right is interpreted more amply than a liferent constituted to one who had no prior right in them. It is considered as a limited fee or property, rather than a liferent. Hence a liferenter by reservation has been indulged with the power of entering the heirs of vassals, either on precepts of *Clare constat*, or on retours, as if the fee still remained in him. Craig extends this right to the entering of the singular successors of vassals on resignation, *Lib. 2. Dieg. 22. § 5.* But our practice, after his death, confined it to the entry of heirs, *Had. Jan. 11. 1611, La. Crawfordjohn*, (Dict. p. 8252.). The reason of the distinction was, that the fiar himself might have been compelled to enter heirs, and so could suffer nothing by the liferenter entering them;

Conventional
liferent.
Simple liferent.

Liferent by re-
servation..

them ; but no fiar was under a necessity, as the law then stood, to receive a singular successor. The liferenter's assuming a power, therefore, to enter a singular successor, was in effect the claiming a right to obtrude a vassal upon the fiar, who could not by any law be compelled to receive him. It can hardly be doubted, that now, since the act 20. *Geo. II. c. 50. § 12.* (explained formerly, *T. 7. § 7.*) a liferenter by reservation can enter both ; and, in consequence of this right, he must also be entitled to all the casualties of superiority arising during his life ; for the receiving of a vassal into the lands, being the first act of superiority, ought to include all the consequential rights. One who has a bare personal right of lands and makes it over to another, with the reservation of his own liferent, cannot enter vassals ; because, as he had no real right in his own person, he cannot transmit it to another, and of course is entitled to none of the other rights proper to superiors, *Mack. § 38. h. t.* Though in conjunct fees granted to husband and wife, the wife's right is, in the general case, considered merely as a liferent, which dies with herself ; yet as she is by the form of the right entitled to the fee equally with the husband, her liferent is as amply extended as a liferent by reservation. But of conjunct rights more, *infr. B. 3. T. 8. § 34. et seqq.*

Life annuities.

43. Life-annuities secured on land are truly conventional liferents. These are rights of a yearly sum of money, or quantity of grain, made payable by a proprietor out of his lands, and constituted by seisin, which subsist during the life of the annuitants. They are generally granted to widows, either in place of, or as an addition to, their legal provisions ; and sometimes they are purchased by the annuitant for a price presently paid. They are *debita fundi* ; and differ from rights of annualrent chiefly in this, that they have no relation to a capital sum or stock. Where lands are in a marriage-contract or other deed provided by the father to himself in liferent, and to the heirs of his body, or the heirs of the marriage, in fee, the father's right has improperly got the name of liferent, for no other reason, than that the lands cannot descend to his issue during his life ; but he has in the judgment of law the full right of the fee ; *vid. infr. B. 3. T. 8. § 39. et seqq.*

Legal liferents.
Terce.

44. Legal liferents are those which are established by the mere disposition of the law. Of this kind two are received by our usage ; the terce, and the courtesy ; both of which are proper feudal rights affecting heritage, and constituted without either covenant or seisin. The terce, *tertia*, is a liferent, competent by law to widows who have not accepted of a special provision²²⁰, of the third of the heritable subjects in which their husbands died infest. It is styled *the terce*, and the widow *the tercer* ; because this legal provision has been always fixed to a third part of the husband's heritable estate. It obtained by our most ancient customs, *Reg. Maj. L. 2. c. 16.* ; and owed its origin to the natural right a wife has to a reasonable settlement out of the husband's estate in case of her survivorship, as she ought not to be left destitute, though the husband neglect to provide for her.

It is superseded
by a conven-
tional provision.
How it is esti-
mated.

45. Formerly the legal provisions of widows were regarded in so favourable a light, that though the husband had amply provided his wife in case of his predecease, she was entitled to her terce, over and above the conventional provision, unless it had been expressed in the settlement, that it was granted in satisfaction, or in full

²²⁰ *Vid. Countess of Findlater, 6th February 1814, Fac. Coll.*

full of the terce. As this appeared inconsistent with the husband's intentions, and to the rule of law, by which special provisions are interpreted to cancel legal ones, it was enacted by 1681, C. 10., that where a husband grants a special provision to his wife, either before or after marriage, she shall be excluded from the terce, unless such provision shall contain a clause, that she is to have right to both*. Originally the wife had a liferent only of a third of the heritable subjects in which the husband stood infest at the marriage; and the husband could not have given her more even by a conventional provision, *Reg. Maj. L. 2. C. 16. § 5, 6, 7.* In those days, marriage was considered as a liferent charter and seisin of that third in favour of the widow; and though this was no bar to the husband's power of alienating his whole land estate, *ibid. § 14.*, yet the widow's provision was not, by this rule, justly proportioned to her husband's estate; for she could not claim the terce of any lands which he might perhaps acquire by her industry and good economy during the subsistence of the marriage. The later practice has, therefore, with greater justice and equality, fixed the terce to a third of the lands in the property of which the husband stood seised at his death, whether acquired before, or standing the marriage.

46. The husband's seisin is both the measure and the security of the widow's terce; wherefore every right which excludes the husband's seisin, is also preferable to the terce, and, in so far as it extends, must diminish it; and, on the other part, whatever is excluded by the husband's seisin cannot affect the terce. By this rule, such debts alone as constitute a real burden on the tercelands, will prevail over the terce. Thus, neither an heritable bond, nor a disposition of lands granted by the husband, if death has prevented him from giving seisin to the creditor or disponee, can hurt the terce, since they are rights merely personal †²²²; nor an adjudication

The husband's seisin is both its measure and security. Out of what subjects terce is due.

VOL. I.

5 z

adjudication

* This enactment creates merely a presumption against the wife's taking the legal as well as the conventional provision, and therefore its operation is excluded wherever it appears to have been intended that she should have right to both; *Fac. Coll. Nov. 29. 1791, Jankouska*; *DICT. p. 6457 and 15868*; *Ibid. Jan. 20. 1797, Ross, &c.* as reversed in the House of Lords, *Dec. 15. 1797, DICT. p. 4631, and App. I. voce FOREIGN, No. 5.*

† This was found where, upon a disposition, the granter had entered to possession of the lands, but had not taken infestment; *Fac. Coll. July 10. 1788, Macculloch, DICT. p. 15866.* It has even been found, that a limitation or condition contained in the husband's seisin, inconsistent with the right of terce, is insufficient to exclude it; *Fac. Coll. Nov. 24. 1795, Gibson, DICT. p. 15869*²²¹. See case, *Feb. 10. 1756, Cumming, DICT. p. 4268 and 15854.* See also *Fac. Coll. June 29. 1773, Montier, DICT. p. 15859.*

²²¹ The decision in this case was quite the reverse. The husband was infest under an entail, which contained a clause excluding the terce; and although, from being defective in the irritant and resolute clauses, the entail was ineffectual against ordinary creditors, yet its exclusion of the terce being inserted in the husband's seisin, was held sufficient to defeat the terce. Judgment to the same effect was again pronounced, *Fac. Coll. Macgill, 13th June 1798, DICT. p. 15451*; and see also *Cunningham Fairlie, 15th June 1819, Fac. Coll.*

²²² In the same way, "the exercise of a faculty to burden will not exclude the terce, " if infestment have not followed," so as to render the party in whose favour the faculty has been exercised, a real creditor; 1. *Bell's Comm. 45*; *Ib. 35, in not.*; *Montier supr. not. †.*

But the husband's right, in order to entitle the widow to terce, " must be a real and " substantial fee, not nominal, or in trust;" 1. *Bell's Comm. 45.* Thus, where infestment was taken to a father in liferent, and his son in fee, but reserving to the father " power and " faculty at any time of his life, *et etiam in articulo mortis*, to contract debts upon the said " lands, and to sell or dispose thereof in whole or in part, without advice of" his son, this was held truly to vest the fee in the father, and the son's widow, therefore, on his decease

adjudication which has not been completed by seisin before the husband's death, though a charge had been given on it to the superior, *Kames*, 56. (*Carlyle*, Feb. 9. 1725, DICT. p. 147. and 15851.); since an adjudication is no better than a legal disposition, till seisin proceed on it. From this doctrine, it follows, that no terce is due out of lands in which the husband was not seised at his death, *Fount. and Forbes*, Jan. 29. 1706, *Carruthers*, (DICT. p. 15846), except in the case of fraud or wilful omission*. Fraud is, in the opinion, both of *Craig*, *Lib. 2. Dieg. 22. § 27.*, and of *Stair*, *B. 2. T. 6. § 16.*, presumed, *first*, where the husband, not having provided his wife by marriage-contract, divests himself in favour of his eldest son or other heir; see *Fount. Dec. 1. 1711, M. Annandale*, (DICT. p. 15848.); *2dly*, where a father is, by his son's marriage-contract, obliged to infeft him in certain lands, and has not fulfilled his obligation: But the widow cannot, in either of these cases, be served to her terce; because the inquest cannot declare, as the brief requires, that the husband died infeft in the lands: The only remedy competent to her is, a personal action against her father-in-law, or her husband's representatives; and, therefore, the onerous creditors of the father-in-law, or husband, will, in a competition with the widow, be preferred to her in the lands out of which the terce is claimed.

Lesser terce.

47. Our practice has distinguished between a greater and a lesser terce. A lesser terce is that which is due out of lands that are charged with a prior terce still subsisting, due to the widow of some of the husband's ancestors or authors in the lands. If, *ex. gr.* a fiar, whose lands are already charged with a terce, should die, leaving a widow who is also entitled to a terce, the last widow cannot claim her terce out of all the lands in which her husband died infeft; for a full third of them is, by an antecedent right, set apart for the first tercer. The last is entitled to the liferent only of a third of the two-thirds which remain unaffected by the first terce. But, on the death of the first widow, the lesser terce becomes enlarged, as if the first had never existed; because, after that period, the husband's seisin, upon which the measure of the widow's right depends, is no longer burdened with any prior terce, *Reg. Maj. L. 2. C. 16. § 64.*; *St. B. 2. T. 6. § 16.*

48. The

* Even where the husband's seisin had been reduced as inept, the widow was found entitled to her terce; *Fac. Coll. Jan. 26. 1790, Rose*, DICT. v. TERCE, App. No. I.²²³.

decease during his father's life, was refused a terce; *Cumming, supr. not. †*. On the other hand, the terce will be sustained to the extent of the husband's real interest in the estate, where he stands only nominally divested. Thus terce was found due out of lands, in which the husband's disponee had been infeft on a disposition *ex facie* absolute, but truly granted as a security, and so qualified by a back bond, the disposition being taken only as a real burden to the extent of the debt; *Bartlett, 21st February 1811, Fac. Coll.*; 1. *Bell's Comm. 45*. Where, however, additional sums have been borrowed from the same creditor, on bonds declared to affect the husband's right of reversion, these, as in a manner eiks to the reversion, will *pro tanto* diminish the extent of the terce; *same parties, 27th November 1812, Fac. Coll.*; *Bell, ibid.*

Where the husband's heir obtains himself infeft, and sells the lands to a singular successor, the widow's terce still attaches, and the purchaser is entitled to retain a part of the price until it be satisfied; *Fac. Coll. Boyd, 7th March 1805, DICT. p. 15874.*

²²³ It must be observed, however, that the reduction did not here proceed on any denial of the husband's radical right to the subjects. Had such been the case, a different decision would have been pronounced. The husband had merely committed an error as to the *mode* of completing his titles; and "the Court were of opinion, that, as the husband himself could not, in any event, have founded an objection to his wife's legal claim upon the erroneousness of his titles, his representative, the purchaser, was equally precluded from urging that plea."

TITLE IX.

The tercer's right is as ample to her third as the heir's is to the remainder.

48. The right of the widow to the terce-lands is as ample as that of the heir to the remaining two-thirds; and, therefore, if those lands have a right of pasturage, or other servitude, on a neighbouring tenement, the widow is entitled to a third of it, as a pertinent of the lands in which the husband died infest; *Durie, Jan. 18. 1628*, ——— *contra Mackenzie*, (DICT. p. 15838.), and her right is not confined to the lands themselves, but reaches to the houses built on them; to the tithes of land when constituted by seisin; *Durie, Feb. 13. 1628, C. of Dunfermline*, (DICT. p. 15839.), though tithes are, in other respects, considered as a separate subject from the stock*; to infestments of annualrent forth of lands; to rights in security; and to wadsets, whether proper or improper. In improper wadsets, the terce is the liferent of a third of the sum contained in the wadset. In proper wadsets, the tercer enjoys in liferent a third of the wadset lands, while the right subsists; and, after redemption from the husband's heir, a third of the redemption-money, *Cr. Lib. 2. Dieg. 22. § 26*. If the husband had two manor-places or country seats, the widow is entitled to the second or worst of the two²²⁴. If he had but one, it was by the law of the Majesty, *L. 2. C. 16. § 62, 63.*, excluded from the terce, as a subject incapable of partition. Craig gives it as his opinion, that a third of it ought to go to the widow, *Lib. 2. Dieg. 22. § 29*. By the practice, since his death, the heir has been entitled to the sole possession of it; but if he choose to reside elsewhere, the widow may claim it, preferably to any other tenant, upon payment to him of a reasonable rent for his two-thirds; *Stair, Jan. 26. 1665, Logan*, (DICT. p. 15842.) †.

49. Custom hath, in respect of other subjects, limited the terce; for rights of reversion²²⁵, superiority²²⁶, and patronage²²⁷ are excluded from it; because none of those have fixed yearly profits, and so are not proper funds for the widow's maintenance: Neither is a terce due out of leases; because a lease is not a feudal right: And, though feu-duties yield a constant rent, it has not been thought congruous to extend the terce to them, because it does not extend to the right of superiority, from which the feu-duties cannot be separated ‡. It is a position laid down by all our writers, That no burgage tenements, whether of lands or houses, fall under the terce, *Cr. Lib. 2. Dieg. 22. § 34.*; *St. B. 2. T. 6. § 16. &c. ||*. The reason is not

What subjects do not fall under it.

* Teinds vested in the husband by seisin, have since been found to fall under the terce; *Fac. Coll. June 30. 1779, Belschier*, DICT. p. 15863; (1. *Bell's Comm.* 43.)

† A widow was found entitled to a terce of the mansion-house and garden; *Fac. Coll. June 29. 1773, Montier*, DICT. p. 15859. See however, *Ibid. Feb. 24. 1796, Mead*, DICT. p. 15873.; (1. *Bell's Comm.* 44.)

‡ See *Durie, Feb. 13. 1628, La. Dunfermlin*, DICT. p. 14707; (1. *Bell's Comm.* 44.)

|| The authorities here referred to are expressed in terms not free of ambiguity. Craig says, "Apud nos nullus triens ex feudo burgensi debetur, nisi aliter convenerit." Stair's words are, "It is not extended to tenements or lands within burgh, or holden "burgage."

²²⁴ But see this doubted, *Mead, not. †. h. p.*; 1. *Bell's Comm.* 44.

²²⁵ *Macdougall, 3d July 1801, Fac. Coll. DICT. v. TERCE, App. No. 2.*; 1. *Bell's Comm.* 44.

²²⁶ *Vid. 1. Bell's Comm.* 44., where a doubt is thrown out, how far the terce may not extend even to superiorities, "in the cases of whole cities feued out, as Greenock or "Paisley."

²²⁷ A right of patronage is a fit subject of voluntary provision to a widow, by way of locality; *D. of Roxburghe, 25th June 1818, Fac. Coll.* See also *La. Forbes, 2d Aug. 1758*, as reversed on appeal, *18th Feb. 1760*, noticed in *Fac. Coll. La. Forbes, Feb. 1762*, DICT. p. 9931.

BOOK II.

Brief of terce.
Kenning to the
terce.

not so obvious: That which some have assigned is, That they seem to be reserved for the heir's residence, and are subjects that do not so easily admit of a division.

50. The widow hath no title of possession, and so cannot receive her third of the rents in virtue of the terce, till she be served to it. In order to this, she must obtain a brief from the Chancery, directed to the sheriff of the shire where the lands lie²²⁸; who thereupon calls a jury of fifteen sworn men, to inquire into the truth of the two facts or heads contained in the brief; and on their being proved, to cognosce or enter the widow to her terce. The first head of the brief is, whether the widow was lawful wife to the deceased? as to which, positive statute has, from favour to the widow, directed the service to proceed, if it shall appear that she was held and reputed to be his lawful wife, though the heir should offer to prove that she was not lawfully married, 1503, C. 77. The heir's objection against the marriage, if he is to insist on it, must be afterwards discussed before the commissaries of Edinburgh. The other head, which is, that the husband died seised in the lands specified in the brief, is sufficiently proved by his seism. The sentence, or service of the jury, by which the widow is thus served to her terce, need not be returned to the Chancery whence the brief issues; for the brief of terce is not retourable. This service entitles the widow to sue the tenants for her just third of the rents of every farm; *Durie, March 15. 1632, Relict of Veitch, (Dict. p. 16087.)*, and to possess the lands jointly with the proprietor *pro indiviso*; but she cannot remove tenants, *supr. T. 6. § 53.*, or possess any lands exclusive of the heir, till the sheriff ken her to her terce, by dividing the lands between the heir and her. In this division, after determining by kavel or lot, whether to begin by the sun or the shade, *i. e.* by the east or the west, the sheriff sets off the first two acres for the heir, and the third for the widow; and on the division of the whole in this manner, the widow, by herself or her procurator, takes instruments in the hands of a notary-public. But another method of division may be substituted in the place of this, where parties agree to it, by the valuing of entire farms, and setting one apart for the widow, and one or more double in rent to the first for the heir. Which last method may be executed more to the advantage of both parties, than if their interest were to lie promiscuously over the whole estate, by alternate acres. *Stair, B. 2. T. 6. § 13.* affirms, that the brief of terce may be directed, not only to sheriffs, but to bailies, and that bailies may also ken widows to their

"burgage." In another place, (*B. 1. Tit. 4. § 23.*), his Lordship mentions generally "tenements within burgh," as excluded from the terce. Lord Bankton limits the exclusion to "houses within burgh, holden burgage;" *B. 2. Tit. 6. § 11. Mack. § 43. h. t.* mentions "burgage-lands." It has been made a question, Whether the widow's claim shall be determined by the nature of the subject, as being a rural or an urban tenement, or by the manner of holding. This question was agitated in a case, where an extensive land-estate was held burgage, but situated at a considerable distance from the burgh. The Court (*June 10. 1801*), found in general terms, "that the terce does not extend to land holding burgage;" *Lothian contra Lothian's Representatives, Dict. App. voce ANNUALRENT, No. 2.*; affirmed on appeal, *April 7. 1803.* It had previously been decided, that when a tenement is situated within a royal burgh, but not holding burgage, it is still subject to the terce; *Fac. Coll. Jan. 26. 1790, Rose, Dict. p. 15867*, and that the exclusion does not obtain in a burgh of barony; *Ibid. Nov. 15. 1769, Park, Dict. p. 15855.*; (*1. Bell's Comm. 44, 45.*)

²²⁸ Where the lands lay in three several sheriffdoms, the Court granted commission to an advocate, as sheriff in that part, to be executed in the Parliament House; *Lawson, 30th July 1742, Elchies, v. TERCE, No. 1.*

their terce; but this is said inadvertently, if his Lordship meant to include bailies of boroughs; for he himself admits, *ibid.* § 16., that no terce is due out of burgage-lands. Though the widow cannot force payment of the rents till she be served, the service is not to be regarded as the constitution of her right; for that was constituted before by the husband's seisin, and fixed by his death: The service only declares it, and so has a retrospective quality to the term immediately ensuing the husband's death, by which she is entitled to the full payment of her third from that term downwards, preferably to any real rights or burdens that may have affected the lands in the intermediate period between his death and her own service; *Durie, Nov. 25. 1624, Semple, (Dict. p. 15827.)** 229. The terce carries right merely to the fruits, but cannot affect the fee. The widow has doubtless a right, as *interim domina*, after her service, either to possess the terce-lands in her own name, or to let them to tenants; but though she should not have received the full rents, she cannot, under colour of that deficiency, affect the property of the lands to the heir's prejudice, as she might do for the shortcoming of a conventional jointure, granted to her by way of annuity out of her husband's estate: Her only remedy is an action against the possessors of the lands, or the intromitters with the rent.

51. The terce is excluded, *first*, by a decree declaring the marriage null; which necessarily voids all consequential rights. *2dly*, By the dissolution of the marriage, before the elapsing of year and day, without issue, if there is no special clause in the marriage-contract providing the contrary, *supr. B. 1. T. 6. § 38 †*. *3dly*, By the delict of the tercer. Thus, a decree of divorce, grounded on the wife's adultery, or wilful desertion, excludes the terce: And in Craig's opinion, *Lib. 2. Dieg. 22. § 35.*, the wife's abandoning her husband's house and cohabiting with the adulterer has the same effect, though there should be no decree or sentence of conviction, *Q. Attach. C. 85. ; St. 2. Rob. I. C. 13.* *Lastly*, It has been already observed, that the terce is excluded by every deed by which the husband is divested of the fee: But the superior cannot plead, that it is excluded by the nonentry of the heir of the deceased husband; because the terce, being a legal provision, has the same effect as if the superior had expressly consented to it.

How the terce is excluded.

52. The right of courtesy, or curiality, has been also received by our most ancient customs, and is accurately described, *Reg. Maj. L. 2. C. 58. et seqq. ; Leg. Burg. C. 44.* It may be defined a life-rent given by the law to the surviving husband, of all the wife's heritage in which she died infest, if there was a child of the marriage born alive. Craig is of opinion, *Lib. 2. Dieg. 22. § 40.*, that it was introduced to prevent the husband's falling into poverty or contempt on his wife's death; but this reason is not adequate, as the right reaches to the wife's whole heritage, and so exceeds the measure of an alimentary provision. The husband may, on the wife's

Courtesy.

VOL. I.

6 A

death,

* See *Fac. Coll. Jan. 17. 1770, Hamilton, Dict. p. 15858.*

† After a cohabitation for many years, and in consequence of which there were several children, a man and woman declared a marriage, and the man died within a year and day thereafter; the widow obtained a terce, on this ground, that she was the mother of lawful children at the time of her husband's death; *Fac. Coll. Jan. 20. 1802, Crawford's Trustees, Dict. p. 12698.*

229 The terce accordingly is a preferable burden on the lands, even where the heir has sold them, and the infestment of the singular successor is prior in date to the widow's service; *Fac. Coll. Boyd, 7th March 1805, Dict. p. 15874.*

Book II.

death, enter instantly into the possession of her lands, without any such solemnity of service or kenning as is required in the terce; for his right of courtesy is after that period completed *ipso jure*. As he had, in consequence of his *jus mariti*, a right to the rents of his wife's lands, standing the marriage, that very right is continued with him after her death by an act of the law itself, though under another name.

It is bestowed on the husband as the father of an heir.

53. The right of courtesy does not, like the terce, depend in any degree upon the duration of the marriage, but entirely on the existence of issue. Put the case, that no child has been born alive of a marriage which has subsisted for twenty years, there is no courtesy, *Reg. Maj. L. 2. C. 58. § 1.*, though the widow would in that case have been entitled to her terce. On the other hand, if a living child has been procreated of the marriage, the courtesy is due, though the marriage should not have subsisted for a year, and though the child should have expired immediately on its birth, whether before or after the mother's death²²⁹. The child born of the mother must be the mother's heir in order to entitle the husband to the courtesy; for if there be a child existing of a former marriage who is to succeed to her estate, the second husband has no right to the courtesy while that child is alive, though there should be also children procreated of the second marriage. Hence it appears, that the law confers this right on the surviving husband, as the father of an heir, rather than as the widower of an heiress, *Fount. Dec. 1. 1702, Darleith; (Dict. p. 3113.)*. This indeed is contrary to Craig's opinion, *Lib. 2. Diog. 22. § 43.*; but it is most agreeable to the Roman law, *L. 1. C. De bon. mat.*, which gave to the father the liferent of all that the child succeeded to by the mother.

To what subjects it extends.

54. Heritage is not, in the definition of courtesy, set in opposition to moveables, as if the liferent of the wife's whole estate which is not moveable fell to the husband. It is to be understood of those heritable rights to which she had succeeded as heir of line, tailzie, or provision, to her ancestor, whether before or during the standing of the marriage, in contradistinction to conquest, &c. to the heritage she had acquired by purchase, donation or other singular title, *Home, 138, (Hodge, Jan. 11. 1740, Dict. p. 3119.)** It would seem, that in this particular the modern usage has varied from the old law of the Majesty, *L. 2. C. 58. § 1.*; which, in general terms, admits the right of courtesy in lands received by the husband with his wife, *in maritagio*, without distinguishing whether she had them by succession or by singular titles. And the only reason that has been given for this alteration is, that where lands come to the wife by descent, the dignity of her family must be supported by her husband. It has in all periods been the law of Scotland, that the courtesy extends to heritage, by whatever title it may be holden, even to burgage lands, *Leg. Burg. C. 44.*; *Skene, voce CURIALITAS; Cr. Lib. 2. Diog. 22. § 43.*; *St. B. 2. T. 6. § 19.* I cannot therefore help suspecting, that the decision, *Br. 101, (Gordon, June 16. 1715, Dict. p. 3116.)*, excluding burgage tenements from the courtesy, has been inaccurately observed; more especially be-
cause

* There is a later decision to the same purpose; *Fac. Coll. Feb. 1. 1781; Paterson, Dict. p. 3121.* See likewise *Forbes, June 22. 1709, Lawson, Dict. p. 3114*²³⁰.

²²⁹ *Stewart, 20th July 1632, Dict. p. 3112.*

²³⁰ See to the same effect, 1. *Ball's Comm. 47.*

cause the judgment, in that case, as stated in the decision itself, might have been better supported on another medium, viz. That the lands in question had been acquired by the wife *titulo singulari*. By our ancient usage, the husband enjoyed also, in the right of the courtesy, all honours and dignities belonging to the wife, or which would have belonged to her had she been a male, even a seat in parliament as a peer. To this day, the husband, if a commoner, is entitled, not only in the right of courtesy after his wife's death, but, standing the marriage, to the capacity of electing, or being elected, member of parliament upon her freehold, 1681, C. 21 * 231; but whether any argument may be drawn from that statute for extending the courtesy (as a more favourable or ample species of life-tenement, like that by reservation) to any of the rights of superiority, has not been decided.

55. As, in the terce, the husband's seisin is the foundation of the widow's right; so, in the courtesy, the wife's seisin is the ground and measure of that of the husband: And hence every real burden and diligence which is preferable to her seisin, must also be preferable to the courtesy. But in the following respect, the two rights differ: The terce is in no degree affected by the personal debts of the husband; whereas the husband, who has right by the courtesy, as he enjoys the life-tenement of his wife's whole heritage under a lucrative title, is considered as her temporary representative, and so is liable in payment not only of all the yearly real burdens charged on the subject, but of the current interest, even of personal debts, while his right subsists, to the extent of the benefit he enjoys by the courtesy, *Kames*, 2. (*Monteith*, Jan. 3. 1717, Dict. p. 3117.)²³¹; for he ought to leave the estate in as good condition as he found it. And were it not for this obligation, the wife's estate might be run out before it devolved on her heir, by the growing interest during the life of the husband. A right of recourse, however, was justly reserved, by the last-cited decision, to the husband who had paid up all the interest fallen due in his time, against the wife's executors, or others, who succeeded to any part of her estate which did not fall under the courtesy. Another difference may be observed between the terce and the courtesy: A tercer, if she has once declared her right by service, transmits it on her death to her executors, who may sue the possessors of the terce-lands, in an action for recovering her third of the rents; whereas, if a husband, whose right of courtesy is perfected without a declarator, shall never have exercised his right, by receiving the rents of his wife's heritage, his executors will have no action for recovering them; because that right is of the nature of a privilege personal to the husband; who, therefore, by suffering his wife's heir to gather in the rents during his life, is understood to have renounced his claim in the heir's favour, *Durie*, Jan. 19. 1636, *Macaulay*, (Dict. p. 3112). In all particulars not before mentioned, the two rights of terce and courtesy have the same nature and properties.

With what burdens it is affected.

56.

* See also, 12. Ann. ch. 6. § ult.²³¹.

²³¹ See as to the construction of these statutes in election questions, *Fac. Coll. Fraser*, 19th June 1804; *Parquharson*, 11th March 1807; Dict. v. MEMBER OF PARLIAMENT, App. No. 8. and 12.; *Fac. Coll. Mackenzie*, 23d Feb. 1811; *Wight*, p. 298; *Bell (on Elections)*, p. 136. &c.

²³² See to same effect, 1. *Bell's Comm.* 47.

Book II.

Liferenters entitled to all the fruits of the subject.

Rights of liferent how limited.

56. Liferenters, whether by law or paction, are entitled to all the fruits of the subject liferented, both natural and civil*. They may possess, not only by themselves, but by their servants and tenants; they may assign or sell the profits of it arising during their lives to others, *L. 9. pr. L. 12. § 1. & 2. De usufr.*; and they are entitled to the full use of whatever is part of that subject, though it has been intended merely for ornament; nor can they be deprived of that use by any act of the fiar †. Thus, a fiar cannot cut down trees in an avenue or park, by which the liferenter must lose the pleasure resulting from their beauty or prospect.

57. But, on the other hand, liferenters must use their right *suba rerum substantia*, so as to leave the subject liferented in as good condition as they found it, without encroaching upon or diminishing any part of the fee. Hence, *first*, no liferenter, even by reservation, can grant a lease of the liferented lands, to subsist longer than his own life, though the tack-duty should exceed the former rent; for such limitation upon the proprietor would in so far impair his right of fee ‡. *2dly*, Whatever is *pars soli*, part of the fee itself, cannot fall under the right of liferent. Coal, freestone, limestone, minerals of all kinds, &c. are indubitably *partes soli*, (though quarries are said by the Roman lawyer to grow again, after they are wrought, in certain parts of Asia and Gaul, *L. 7. § 13. Sol. matr.*); no liferenter, therefore, has a right to those, insomuch that though a colliery has been opened by the proprietor previously to the commencement of the liferent, the liferenter cannot continue it without an express right; *Stair, July 13. 1677, La. Preston, (Dict. p. 8242.)*; *June 1727, Heirs of Roschurn, (not reported)*²³³. Nay, though the privilege of coal should be expressed, the liferenter cannot exceed the measure formerly accustomed by the proprietor, either as to the number of colliers, or quantity of coal to be brought up from the pit or shaft. Yet *tercers*, whose right, constituted by the law itself, does not admit of being limited or extended by writing, are allowed to bring up such a quantity of coal as is necessary for their family,

* See as to the application of this rule, *Fac. Coll. Dec. 1. 1801, Rollo, Dict. p. 8282, and App. I. voce LIFERENTER, No. I.*²³³

† By special statute, 1681, c. 21, liferenters have right to vote for a member of Parliament, provided the subject of their liferent is of such extent and tenure as to give that privilege in other cases. The fiar may be enrolled as freeholder along with the liferenter, but can only exercise the franchise where the liferenter is absent, or declines, or is for the time incapacitated to vote; *Wight, (edit. 1784), p. 238, (Bell on Elections, p. 91.)*

‡ So found, *Fac. Coll. Feb. 26. 1794, Fraser, Dict. p. 7849, (1. Bell's Comm. 47.)*

²³³ In this case the Court of Session found a liferenter of Bank stock entitled even to an extraordinary *bonus* declared by the Bank from its accumulated profits; but this was reversed on appeal, *27th July 1803*, and the liferenter found entitled, only "to the interest thereof for her life." See a counterpart of this case, *infra. § 81. not*²³².

²³⁴ The same found as to stone and lime quarries; *Swinton, 1st Feb. 1814; Fac. Coll.*, unless in so far as may be required for the use of the liferented lands; *D. of Roxburgh, 19th Jan. 1816, Ibid.* Nay, the fiar is entitled to enter the liferented lands and work such quarries; only "reserving always what may be necessary for the supply of the said lands;" *Ibid.*

"But though this be the general rule, yet wherever the minerals are let on lease, and it is plainly the intention of the granter of a liferent that it should include the rents, this intention will be effectual;" *1. Bell's Comm. 481; Waddell, 21st Jan. 1812, Fac. Coll.*; and even where the liferenter's right may ultimately be repelled, the Court, under favourable circumstances, will sustain the *bona fide* possession and appropriation of the rents prior to challenge; *D. of Roxburgh, 17th Feb. 1815, Fac. Coll.*

TITLE IX.

Whether growing timber falls under liferent.

family, if the colliery has been opened before the death of the husband, *Durie, Feb. 14. 1628, La. Lamington*, (DICT. p. 8240) *.

58. Growing timber, when it is of that kind that does not shoot up from the root after cutting, *ex. gr.* firs, is justly accounted part of the lands, and not a fruit; and so cannot fall under liferent. And even a copse wood, when it is not divided into hags, but has been wont to be cut at once, at the distance perhaps of twenty or twenty-five years, cannot be cut by the liferenter, though it should arrive at the proper maturity during the liferent; because such wood does not appear to have been intended for yearly profit; and it is only what yields constant yearly profits that can be the subject of a liferent †: But where it has been divided into different hags, one of which has been annually cut by the proprietor, the liferenter may continue the course of the former yearly cuttings; because these are understood to be the constant annual fruits which the proprietor intended the subject should yield to him. A liferenter has also right to the windfalls, and to the underwood; and he was, by our older decisions, entitled to cut as much of the growing timber as was necessary to uphold the liferented houses, *Fount. July 16. 1680, Stamfield*, (DICT. p. 8244); cited in (*Folio*) *Dict.* 1. p. 548. Not long after, that privilege was denied to a liferenter, where the right did not expressly bear *cum sylvis*, *Fount. July 3. 1696, La. Borthwick*, (DICT. p. 8245.). But by the present practice, a liferenter infest *cum sylvis*, though he cannot dispose of any of the timber for sale, may use it for keeping in tenantable condition the houses standing on the liferented lands, *Jan. 25. 1722, D. Hamilton* ²³⁶; *Fac. Coll.* 1. 49, (*Lang, Dec. 21. 1752, DICT.* p. 8246). Liferenters by reservation seem to have no stronger right than simple liferenters, as to woods, minerals and quarries; since all liferenters must, by the common nature of the right, use the subject liferented *salvâ substantiâ*. Yet by a decision, *Clerk Home, 73. (Ferguson, July 26. 1737, DICT.* p. 8254) ²³⁷, carried by the narrowest majority, a liferenter by reservation was allowed to cut woods, though not divided into hags, that had come to a proper maturity since the commencement of the liferent, according to the common usage of that part of the country where the woods were.

59. To secure the fiar's right against waste or encroachment, liferenters were, by the Roman law, obliged to give security, *cautio usufructuaria*, to preserve the subject in the same condition in which it stood at the time of their entry, *L. 13. pr. De usufr.* By the law of Scotland also, sheriffs, and other judges, are ordained, at the suit of the persons interested, to take security from liferenters and conjunct fiars, for preserving the buildings, woods, parks, and other subjects liferented by them, without destruction or waste, 1491, *C. 25.*; and if they shall refuse, the judge is, by 1535, *C. 15.* directed to charge them to it, under the penalty of being excluded from the yearly profits of the subject liferented till security be given.

Cautio usufructuaria.

* In the case referred to, the tencer had claimed the third of the profits of a colliery upon the lands; but the claim was rejected by the Court, except to the limited effect mentioned in the text. A similar claim has been repelled since; *Fac. Coll. June 30. 1779, Belschier*, DICT. p. 15863.

† This found, *Fac. Coll. Feb. 24. 1789, Gray*, DICT. p. 8250 ²³⁵.

²³⁵ See to the same effect, *Lang, 21st Dec. 1752, DICT.* p. 8246, and *Elchies, v. LIFERENTER*, No. 6.; 1. *Bell's Comm.* 48.

²³⁶ See the particulars of this case; *Robertson's Appeal Reports*, p. 443.

²³⁷ Reported also by *Elchies, v. LIFERENTER*, No. 1.

given. Yet where waste is already committed, no action is competent to him who stands presently in the fee for recovering damages; for the damage is due to that person alone to whom the fee shall open after the liferenter's death; and it is possible, that if the presumptive heir, prosecuting such action, should die before the liferenter, his executor, to whom the sum recovered upon that action in name of damage would fall, might not be fiar of the liferented subject at the expiration of the liferent.

Liferent of houses.

60. As for the liferent of houses, the liferenter, after having entered to the possession, is without doubt obliged, like a liferenter of lands, to preserve the subject in as good condition as he got it, and to disburse the expence necessary for refitting it. But if, in the course of the liferent, the house become quite unfit for habitation by the waste of time, he cannot be compelled to make any disbursements towards its reparation, *L. 7. § 2. De usufr.* Yet if he choose to repair it by the warrant of the proper judge, the fiar must, at the issue of the liferent, pay to the liferenter's executors the expence of reparation, if it do not exceed the value of the subject; see *Fac. Coll. 1. 148.* (*Scot against Forbes, March 5. 1755, Dict. p. 8278.*) Neither can the fiar of a decayed house be compelled by the liferenter to put it in tenantable repair; because a liferent being a servitude, binds the person burdened no farther than to *nuda patientia*. If the house should be actually repaired by the fiar, the liferenter might by the Roman law resume the possession, *d. L. 7. § 2.*; but equity suggests, that in such case the liferenter ought, while his right subsists, to pay to the fiar the interest of the sum expended in repairing it³²⁸. It is provided by special statute, 1594, *C. 226.*, that where a house within a borough, subject to a liferent, falls into decay, the fiar may, at any time while the right subsists, apply to the magistrates for taking cognition of the state of the house by an inquest, and for requiring the liferenter to repair it: and if he refuse, the fiar is authorised to enter into the possession, upon giving security to pay to the liferenter, during his right, the rent which might reasonably have been expected for a lease of the subject as it stood at the time of the cognition.

Liferenters liable to all the burdens attending the subject.

61. Liferenters, as they are entitled to the profits, must also bear the burdens attending the subject liferented; as taxations, duties payable to the superior, ministers' stipends, and the other yearly payments chargeable on the lands, which may fall due during the liferent³²⁹. A widow, therefore, who is in feft for her liferent-use in the lands specified in the grant, ought to be burdened with that proportion of the land-tax which is imposed on the lands liferented. Where she is in feft in a liferent annuity of a sum of money out of lands, it would seem that she ought not to be subjected, for the same reason that the creditor in a right of annualrent is not charged with any proportion of the public taxations; for there is nothing, either in the presumed intention of the parties, or in the style of the two rights, that can make a difference; yet by an uniform tract of decisions, *Harc. 378.* (*Stamford, Feb. 1. 1686, Dict. p. 13070*); *Fount. Dec. 13. 1704, La. Valleyfield, (Dict. p. 13072).* and the more ancient ones there quoted, such annuitants are found chargeable

³²⁸ *Vid. Fac. Coll. Laird, 10th February 1807, Dict. v. LIFERENTER, App. No. 3.*

³²⁹ *Fac. Coll. Nixon, 18th Feb. 1806, Dict. v. LIFERENTER, App. No. 2.*; which is also in some sort a counterpart to the case of *Rollo, sup. § 56. not **—the liferenter of a subject burdened with an annuity having been found liable only “for the growing interest” on the arrears of that annuity, (which had been allowed to run up under peculiar circumstances.)—“the capital being a burden on the fiar.”

chargeable with the land-tax, unless where they are by express stipulation exempted from it. The court seems to have been determined in those judgments by the equity of the act, *Dec. 10. 1646, C. 3*, (notwithstanding it had lost its authority upon passing the rescissory act of Charles II.), and by the act of Convention 1667, and subsequent acts of supply, which subjected all those annuitants to the payment of the land tax: Though a clause inserted in subsidy-acts, *ubi id non agebatur*, to declare or illustrate the nature of real rights, appears to be but an improper method of altering their established legal effects.

62. A liferenter is also burdened with the maintenance of the heir when he has no other fund of subsistence, *Stair, Feb. 13. 1662, Birnie*, (Dict. p. 392). This burden took its rise from an extension of the act 1491, *C. 25*, by which the ward superior was obliged to maintain the heir when he could not maintain himself. The former part of the statute had enacted, that both wardatars and liferenters should give security to uphold, in good condition, the subject of the ward or liferent; which gave occasion to interpret the last part of the act, which concerns the alimony of the heir by the wardatar, as if it had also included the maintenance of fiars by liferenters. This interpretation is censured by Mackenzie, *Observ. on said act 1491, p. 101, &c.* as contrary to the rule, That no statute ought to be extended by implication against onerous or rational rights; and more especially against liferenters, whose rights are commonly founded on solemn marriage contracts. It has probably been received from compassion to necessitous heirs, who might starve before the fee opened to them, if the liferenter were not laid under that obligation; and from the presumed intention of the granter of the liferent, that the heir should not be left altogether destitute, while he was excluded by the liferenter. An inclination to support ancient families may have also contributed to it; and upon this ground the liferenters of money are exempted from this burden, *Kames, Rem. Dec. 3. (Merrie, July 1731, Dict. p. 397)**. Heirs, though of perfect age, are by the present practice entitled to this claim, if they have no other way of earning their bread; and the bare name of an employment, which brings the heir little or nothing, is no good defence against it, *Forbes, July 25. 1705, Ayton*, (Dict. p. 390.). Though part of the liferented lands should be either evicted from the liferentrix, or voluntarily given up by her; yet if what remains be more than necessary for her own subsistence, she must contribute to the heir's alimony, in proportion to that share which she still retains, *Br. 115, (Cunningham, July 12. 1715, Dict. p. 405.)*. But if her liferent should be reduced so low that it affords her bare sustenance, no part of that necessary pittance ought to be transferred from her whose right is onerous, to one whose only title to any part of it arises from favour. The bare right of apparenry founds this action against the liferenter, *Durie, Feb. 12. 1685, Hepburn*, (Dict. p. 381.); but the heir is not entitled to alimony, either after he has renounced the succession, *Forbes, Jan. 16. 1712, Lyon*, (Dict. p. 383.), or after he has sold the estate, *Fount. Jan. 27. 1700, Sandilands*, (Dict. p. 385.); because by the renunciation or alienation he loses the character of heir, under which character alone he can claim it.

Liabie to maintain the heir.

63.

* The same was found, *Fac. Coll. June 24. 1780, Stewart*, Dict. p. 393.

BOOK II.

This burden is personal to the liferenter.

63. This burden of maintaining the heir is personal to the liferenter, and cannot be thrown upon his creditors who come in his place by adjudging the right of liferent, 1737, *Cr. of Blair*, (not reported); for as the heir would have had no claim of alimony from his own creditors, if the estate had been carried off by them after the liferenter's death, he ought to be still less entitled to it from the creditors of the liferenter. Where the heir's grandfather has a reserved liferent of the whole estate, out of which the heir's immediate mother, who was married to the grandfather's son, enjoys a partial annuity, the mother is subject to the alimony of the heir in the first place, *Jan. 1729, Hay*, (Dict. p. 393.), as quoted in (Folio) *Dict. i. p. 30.*; but if no part of the mother's provision arises out of the estate liferented by the grandfather, the burden falls primarily on him, *Stair, June 27. 1662, Ruthven*, (Dict. p. 393.). One who enjoys an estate under a strict entail, is bound, as a liferenter, to maintain the next heir: And he cannot get free from that obligation, by offering to receive the heir into his own family, as parents may do, when they are only bound *ex jure naturæ*; for all persons entitled to alimony, either by statute or paction, have a right, at least if they be of perfect age, to maintain themselves where they judge most convenient, *Jan. 27. 1736, Moncrief*, (Dict. p. 454.), stated in (Folio) *Dict. i. p. 34.*

Extinction of liferents. Rules for determining the interests of the heir and executors of the liferenter.

64. Liferents are extinguished by the death of the liferenter or liferentrix. Doubts have been frequently moved, what part of the rents not received by the liferenter himself belongs to his executors, and what part to the fiar. The following rule, on which these questions depend, serves also to fix the different interests of the heir and executor, in relation to the rents of that year, or crop, in which the proprietor dies. That part of the rents to which the liferenter had a proper right before his death, falls to his executors; the residue, as never having been *in bonis* of the deceased, must be still accounted part of the lands, and so devolves on the fiar. Custom has fixed on two terms in the year, as the periods from which the rents of that year are to be accounted *in bonis* of the liferenter; the one half at Whitsunday, when the corns are presumed to be fully sown, and the other half at Martinmas, when they are reaped*. If the liferenter survive Whitsunday, he has by this rule a right constituted to himself, and therefore descendible to his executors, in the half of the rent payable for that year, because that half was due before his death; the other half, the term of which was only current at his death, and which for that reason had not become his property, falls to the fiar. If he survive the term of Martinmas, his executors have, on the same footing, a right to the whole of that year's rent. Those legal terms of the payment of rent are the rule for determining such cases, though the conventional terms should be made later than the legal. The liferenter, therefore, who survives Martinmas, transmits to his executors the whole rent of that year, though part of it could not have been demanded from the tenant till after the liferenter's death; for still the whole of it was due, in the consideration of law, while he was yet alive; and the delay of payment, which is granted merely out of favour to the tenant, cannot hurt or impair the right of the executors, *Gosf. July 24. 1668, Carnegie*, (Dict. p. 15887). And this holds in grass as well as in corn farms, *Feb. 1727, Sir W. Johnston*, (Dict.

P.

* See the whole of this doctrine of the division of rents between the fiar and liferenter traced to its principles; *Kames' Elucidations*, Art. 9.

p. 15913, & App. II. *voce* TERM LEGAL AND CONVENTIONAL), stated in (Folio) Dict. ii. p. 453.; *Home*, 165, (*Pringle*, June 4. 1741, Dict. p. 5419 and 15907.) *²⁴⁰. By the former practice, a liferenter must have outlived the noon of the term-day, in order to transmit the rent of that term to his executors; but by our present custom, they are entitled to it if he lives till the morning of that day, *Fount. Dec.* 8. 1704, *Paterson*, (Dict. p. 15902.) †²⁴².

65. This rule concerns only the case of lands let to tenants; for if the liferenter was in the natural possession, and had before his death tilled and sowed the ground, his executors are entitled to the whole crop, free from the payment of any rent to the fiar; because the right of the crop belongs to him who bestows the seed and industry, *Messis sementem sequitur*, *Durie*, Dec. 14. 1621, *Macmath*, (Dict. p. 15877), which obtains whether the liferenter died before or after Whitsunday, *Stair*, July 25. 1671, *Guthrie*, (Dict. p. 15891), *Falc.* ii. 9. (and *Kilk. Cockburn*, Nov. 9. 1748, Dict. p. 15911) ‡²⁴³. But the liferenter's executors have no right to the natural grass after his death; for that is a fruit which requires no yearly seed or industry, *supr.* T. 2. § 4 ||.

Where the liferenter was in the natural possession of the subject.

66.

* *Kilkerran* states another case, in which the application of these principles to grass-farms is fully discussed, p. 566, No. 5. *Campbell*, June 11. 1745, Dict. p. 15908. The doctrine contained in the text appears to be fixed by later decisions; July 2. 1760, *Turnbull*, Dict. p. 5430, *Fac. Coll.* Nov. 28. 1792, *Elliott*, Dict. p. 15917²⁴⁰. But if the conventional term of payment be made earlier than the legal, the interest of the liferenter must suffer an alteration²⁴¹.

† See (as to the older practice,) *Durie*, Feb. 16. 1642, *La. Brunton*, Dict. p. 15885; *Mack. h. t.* § ult.

‡ See *Fac. Coll.* March 8. 1791, *Duke of Gordon*, Dict. p. 5444.

|| See Dec. 7. 1744, *Sinclair*, Dict. p. 5421. On this point see decision, *Fac. Coll.* v. i. No. 49., and *Kames*, *Sel. Decis.* No. 29, *Lang*, &c. against *Duke of Douglas*, Dict. p. 8246.

²⁴⁰ The rule extends even to grass farms, annually let from April to December;—the liferenter who survives Whitsunday, there transmitting to his executor, a right to half the rents for the season; *Swinton*, 20th June 1809, *Fac. Coll.*; 2. *Bell's Comm.* 6.; *Bell on Leases*, 378.

Houses rents have lately been held to fall under the same rule, the executor of a person surviving Whitsunday being found entitled to the current half year's rent, though not falling due till the subsequent Martinmas; *Binny*, 28th Jan. 1820, *Fac. Coll.* The soundness of this decision has however been doubted; and the question has again been stirred in a process now depending. In a case reported both by *Stair* and *Gosford*, it seems to have been assumed that the analogy of corn and grass crops did not hold as to houses and manufactories, and that the liferenters of the latter "could have no right to the tack-duties but so long as they lived, and not to any terms due after their decease;" *Guthrie*, 20th and 25th July 1671, Dict. p. 15890 and 15892.

²⁴¹ It has accordingly been so decided, *Kilk. Murray Kinninmond*, 6th Nov. 1799, Dict. p. 15906, where the reason of the difference is explained by Lord Kilkerran thus: "The meaning of the common maxim, *that the legal, and not the conventional terms, are the rule between heir and executor*, is no other than this, that the postponing the legal term by the convention of parties, which generally is the case of tenants' rents, does not deprive the executor of the benefit of the legal term. But if, by the convention of parties, annual rents, for example, be made payable before the legal term, the executors will have the benefit of that convention: and the case would be the same in a fore-hand payment of rents of lands, for there is no instance of what is both due and exigible not going to executors." See to the same effect, *M. of Queensberry*, 18th Feb. 1814, *Fac. Coll.*, and 2. *Bell's Comm.* 6. Nor is the case of *Swinton*, 20th June 1809, *Ibid.*, a conflicting authority; for the anticipation, which was there found not to alter the rights of parties, was an anticipation of payment before the arrival of the term when the rent should properly have fallen due.

²⁴² This was again found, *Lo. Tolquhoun's Executors*, *Elchies*, v. LIFERENTER, No. 21.; *Kilk.* and Dict. p. 15907.

²⁴³ See another report of this case, which is also an authority for the concluding branch of the section, *Elchies*, v. LIFERENTER, No. 5.

Book II.

Where the subjects liferented are fishings, collieries, mills, bonds, personal and heritable.

66. It is the general opinion, that the duration of the liferent of fishings, collieries, salt-works, and such other subjects, the profits whereof arise from continual daily labour, is not governed by any legal terms, but must be computed *de die in diem*. And as the whole profits of a mill arise from the daily use of it, Sir James Steuart affirms, *voce* MILL & *voce* LIFERENTER, that on the death of the liferenter of a mill, his executors are entitled to the rent down to the very day of his death: Yet it was adjudged, *Stair, Dec. 8. 1671, Guthrie*²⁴⁴, that the same terms govern the duration of the liferent of mills and of lands, at least where the mill has either mill-lands or as-tricted multures belonging to it. In the liferent of a sum of money due on a personal bond, the liferenter's executors are entitled to the arrears of interest due on the capital, down to the day of the liferenter's death; and the whole interest arising from the bond after that day falls to the fiar, without regard to any terms, because the interest of money is due *de die in diem*, and by the usual style of bonds is made payable, not only yearly and termly, but continually. But in the case of an heritable bond, or of a liferent annuity of money secured upon land, the same rules are observed as in a proper liferent of lands, where the different interests of the heir and executor, and of the liferenter and fiar, are fixed according to the legal terms of land-rent, Whitsunday and Martinmas, *Home, 81. (Carruthers, Jan. 11. 1738, Dict. p. 5413.)*, though the conventional terms should be Lammas and Candlemas. The same is the case as to an annuity of grain, though payable between Christmas and Candlemas, *Jan. 12. 1681, Trotter, (Dict. p. 15899 and 2375.)*; and that though the annuity be constituted by a moveable bond, having no relation to land, in regard that the subject of the annuity is the product of land, *Fount. Feb. 14. 1684, Baillie, (Dict. p. 15900.)**

Period of commencement of liferents.

67. The commencement of a liferent, or jointure, is governed by the same rule as its duration. If therefore the husband whose lands are to be liferented by his widow, shall die after Whitsunday, and before Martinmas, his executors are entitled to the half-year's rent due at Whitsunday; and the liferentrix, who is in this view considered as the husband's heir for life in the liferented lands, gets the other half, the rent of which was current at the husband's death, *Jan. 21. 1629, Ayton, (Dict. p. 15879.)*. It is proper here to observe, that the liferent provided to widows being alimentary, is paid *per advance* before it is due; for they have a sum allowed them by law for alimony from the day of their husband's death to the first term at which the liferent becomes payable, *supr. B. 1. T. 6. § 41.*; and consequently, the first term's payment is made in consideration of the annuity or jointure due from that to the next ensuing term, and so forward while the liferent subsists.

Liferents extinguishable by renunciation.

68. Liferents are also extinguished by renunciations or discharges granted by the liferenter, though they should not be recorded in the register of reversions; for as the infestment of liferent cannot be transferred by any conveyance, the liferenter's simple renunciation must exclude posterior assignees whose right is barely personal.

TIT.

* Even where an annuity (not of grain, but of money) was constituted by personal bond, payable at Whitsunday and Martinmas, for the half year preceding each term, the annuitant dying on 2d November, his executors were found to have no right to the termly annuity due at the Martinmas of that year; *Fac. Coll. June 19. 1789, Earl of Dalhousie, Dict. p. 15915.*

²⁴⁴ Stair's report of this date is omitted in *Mor. Dict.* But see one of a previous date, as also *Gosford's* report of the same case; *Dict. p. 15890, 15891, and 15892.*

TIT. X.

Of Teinds or Tithes.

THE doctrine of tithes falls naturally to be explained after that of servitudes, tithes being truly a servitude or burden affecting lands. But as nothing has been hitherto said of church-lands, in so far as they differ from temporal, the general doctrine of church-benefices may be taken under consideration in this title; and to throw the greater light on the subject, a short account may be premised of the funds by which the clergy were supported in the first ages of the Christian church.

Teinds.

Origin of the Church's right to fruits of land.

2. Christians are commonly thought to have had originally all things in common; but it may be justly doubted, whether the text upon which that opinion is grounded, *Acts* iv. 34, 35, is to be taken in the full extent of the words; for if it had been an universal Christian duty, it is not likely that the Evangelist would have made special mention of the single instance of Barnabas disposing of his estate for the common benefit, vers. 36, 37. Neither is that notion favoured by the Apostle Peter's severe reprehension of Ananias, *Acts* v. 3., who it appears was at full liberty to hold his estate as his own property. His crime consisted in lying to the Holy Ghost, and imposing on his brethren; as if, after the sale, he had given up the whole price to be divided by the Apostles, when in fact he retained a part for private use. Thus much may be certainly affirmed, that if they had any proper communion of goods, it was of exceeding short duration; for we find weekly oblations, made as early as the apostolical age, for the saints, by every man according to his abilities, *Acts* xi. 29.; *1 Cor.* xvi. 1, 2, 3, which presupposed a right of property. These donations, while Christians were persecuted by the state, consisted chiefly of money, which could be more easily concealed than land: for by the Roman law, no bequest could be made to any community or corporate body without the Emperor's licence, *L. 8. C. De hæc. inst.*; and several of the persecutions raised against the Christians were owing to the view of profit that the Emperors proposed to receive by the confiscation of the lands that had been bequeathed to the church. But immediately after Christianity became the established religion of the Empire, the church were allowed to hold whatever should be left to them by testament, *L. 1. C. De sacros. eccl.*; and they were soon enriched by the large donatives of land estates granted to them, proceeding either from the devotion or from the vanity of the donors. All those lands were put under the management of the bishop of the diocese; and the yearly rents distributed by the deacons, according to his direction, for the support of the clergy and the poor. To prevent the abuses which even then were beginning to be committed in the application of the church-revenues, it was ordained by Pope Simplicius, *anno* 475, that they should be divided into four parts; one to the bishop himself, one to the inferior clergy, one for preserving the fabric of the several churches within the diocese, and the remaining fourth to the poor, *Caus.* 12. *Q. 2. C. 28.*; the proportions of each division to be fixed by the bishop,

bishop, *ibid.* C. 23. But the corruption of the clergy still growing from evil to worse, most of the bishops, sensible how necessary an instrument money was to church-preferments, appropriated the whole to themselves; and so left the inferior clergy destitute of all support or provision, but what depended on the voluntary contributions of those who were under their charge.

When their right to a tenth was ascertained.

3. Great murmurings having been occasioned by this additional burden on the laity, churchmen bethought themselves seriously of an expedient, which had been formerly recommended by St Austin, a father of the fourth century, of laying in a claim to the tenth of the fruits of every real estate, after the example of the Levites in the Jewish law. We find accordingly in some of the church-councils held in France, in the sixth century, the payment of tithes pressed by the warmest exhortations; and some donations of tithes were, according to Mezeray, freely made by persons of great estates in that century, and about the beginning of the seventh, chiefly to monasteries, and but a few to the secular clergy, who, if the church's claim had been well grounded, would have had the most equitable right to them. But all this was voluntary: For the right of tithes is not once mentioned among the many constitutions enacted by Justinian and the Christian Emperors, his predecessors, for fixing and preserving the rights and privileges of the church; nor is such right declared by any law of the Visigoths, Lombards, or other nations, which emerged out of the ruins of the Western Empire, till Charles the Great established it in general terms, towards the end of the eighth or beginning of the ninth century, *Leg. Lang. L. 8. T. 3. C. 1. & 2.* And, in fact, tithes were not before that period exacted, either in France, Africa, or the Eastern Empire; see *Paol's treatise of Benefices*, and *L'Esprit des Loix*, L. 91. C. 12. At what time this right was acknowledged in Scotland, is uncertain; for the affirmation of Hector Boetius, *Lib. 9.*, that K. Convallus enjoined their payment by an act about the year 570, long before it was received by any nation in Europe, is neither probable in itself nor supported by authority. David I. made two grants of lands with the tithes to particular churches; copies of which are preserved in *Anderson's Diplom. Scotiae*; and there is an express statute of David II. C. 42. § 3., inflicting the pains of excommunication upon those who should refuse to pay their tithes.

Temporality and spirituality of benefices.

4. Thus, after the right of tithes came to be universally allowed to the church by Christian princes, the church's patrimony consisted of two branches; *first*, Of the property itself of such lands as had been gifted or devised to them from time to time; which was called the *temporality of benefices*; but lands given to, or acquired by a bishop *tanquam quilibet*, are no part of the church's patrimony; for they descend to the bishop's heirs, and not to his successors in office. *2dly*, The tithes of all lands; which get the name of the *spirituality of benefices*, because they were accounted, in a more proper sense, their patrimony; though it is certain that tithes, in their infancy, were given, not to the clergy alone, but to lay monks, who took on themselves the name of *pauperes*, and to other indigent persons. The word *benefice*, which was originally used to signify a grant of temporal lands to a vassal for military service, was afterwards transferred by canonists to church livings; because these were also gratuitous rights in favour of churchmen, in consideration of their spiritual warfare.

TITLE X.
 Consent of the chapter necessary to all deeds of the bishop.

5. The several divisions of benefices, stated by writers, into secular and regular, cathedral and parochial, &c. have been sufficiently explained, *supr.* B. 1. T. 5. It is common to all benefices, that they are not the property of the beneficiaries, whose right is only temporary, and who ought therefore to use it without destruction or waste, that their livings may be preserved entire to their successors. Hence it was by the Canon law declared unlawful for bishops to do any acts relating to their churches, without the consent of the chapter, *Decretal. L. 3. T. 10. C. 4.*; or to exchange or dispose of any part of their benefices, even with the concurrence of the chapter, unless the deed appeared evidently profitable to the church, *Caus. 12. Q. 2. C. 52.* Nor could the heads of religious houses, as monasteries or priories, alienate without consent of the conventual brethren. As to the law of Scotland, it appears by the preamble of 1606, C. 3., that the consent of the chapter was, from the earliest times, required in all alienations or leases granted by the bishop of any part of his benefice; and that, on the same ground of law, the consent of the bishop, and of the majority of the chapter, was essential to all deeds granted by the dean, or any single member of the chapter, as to his particular benefice, *Spottisw. voce KIRKMEN*, p. 186, *College of Aberdeen*, (Dict. p. 7948.). But this incapacity did not strike against their power of receiving the heirs of vassals; for though the entry of heirs be a *renovatio*, it is not an *alienatio feudi*. Craig acquaints us, *Lib. 1. Dieg. 13. § 14.*, that before the Reformation, it behoved the chapter to give their consent to the bishop's deed in a meeting assembled for that very purpose; or, according to the phrase of those times, in a meeting *chapterly* convened; but by the said act 1606, the subscription of the majority, however procured, and though adhibited at different times, and in different places, was declared sufficient. Yet it was still necessary that the majority should sign their consent during the bishop's life, and while he continued in that church, without having revoked the deed; for either the death, translation, or revocation of the bishop, was a mid impediment or bar hindering the chapter's consent from being connected with the deed consented to. Hence a posterior deed granted by the bishop, to which the chapter's consent was presently obtained, excluded a prior, though the prior should have got the full number of subscriptions to it after the posterior deed was consented to by the chapter, *Cr. ibid.*

6. When a vacancy happened in the episcopal see, by the death, deprivation, or translation of the bishop, the chapter supplied the place of the bishop, or represented him, both in spiritual matters, except in conferring benefices, the collation of which belonged to the bishop, *Decretal. L. 3. T. 9. C. 2.*; and even in temporal, *6to, Decretal, L. 1. T. 8. C. 3.* But Craig's opinion, *Lib. 1. Dieg. 13. § 16. sub fin.*, is probable, and appears agreeable to our practice, that this right in the chapter extended not to deeds of alienation, but was confined to ordinary acts of administration, as letting leases for a moderate endurance, removing tenants, &c. *Spottiswood, voce KIRKMEN*, p. 187, *Erskine*, (Dict. p. 7962.).

7. By our ancient usage, parsons, and other of the inferior clergy whose benefices did not depend on the bishop, might feu out the lands belonging to them, *Cr. Lib. 1. Dieg. 13. § 17.*; notwithstanding the text in the *Cons. Feud, L. 1. T. 1. pr.* But no feudal grant of church-lands, whether by them, or by the dignitaries of the church, was valid, either by the Canon law or our usage; unless, *first*, the

The chapter supplied the place of the bishop upon a vacancy.

Churchmen anciently might infeudate their benefices under certain limitations.

condition of the benefice was thereby made better, *i. e.* unless the yearly feu-duty exceeded the rent of the lands feued, *Cr. L. 1. Dieg. 13. § 18.*; 2dly, unless the patron gave his consent, *Caus. 16. Q. 7. C. 34.*; for every one might reclaim a donation made by himself or his ancestor to the church, if the beneficiary, whose right was only temporary, should, by alienating it without his concurrence, attempt to invert it to a purpose different from what the donor had expressed in his grant, *St. 2. Rob. 1. C. 1. § 4, 5.* And hence the King's confirmation was necessary in the alienation of church-lands belonging to bishops or abbots, *Reg. Mag. L. 2. C. 23. § 1*, because the law presumed the King to be the donor, and of course the patron of those benefices, *ibid. § 2.* After the Papal power was grown to its greatest height, the Pope, in 1468, wrested this right from the patrons, whether the King or subjects, and declared all alienations of church-lands or goods void which were granted *inconsulto Romano pontifice*, *Extr. Com. L. 3. T. 4.*; see *Craig, Lib. 1. Dieg. 15. § 29.* When churchmen, on the first appearance of a reformation in this kingdom, began to suspect that they might soon be deprived of their church revenues, they frequently feued their lands at a yearly duty considerably below their true value, for which they received large sums from the feuars in name of fine or entry; and the Pope, from the same apprehensions, readily strengthened those grants by his confirmation. To remove the hurtful consequences of this kind of dilapidation, and prevent it for the future, it was enacted by 1564, *C. 88.* and 1584, *C. 7.*, That all feus of church-lands should be confirmed by the Sovereign; and that all such feus already granted, which had not been confirmed by the King or Pope, or which should not be confirmed by the King within a determinate day, should be null. And thus the Sovereign's power in that matter, as coming in place of the Pope, was not only revived, but enlarged above what it had been formerly; for by the two last-quoted acts, his right of confirming reached over all church-lands, whether he was patron of the churches or not; whereas his original right was confined to the special lands of which the Crown was either the real or the presumed patron. As several feus had been granted by bishops in the reign of James V., to which that King had consented by his superscription and privy seal, but which were not formally confirmed either by the King or Pope, these are declared by 1593, *C. 186.* to have full force, and to be preferable to posterior grants of the same lands confirmed by the King in consequence of the act 1584.

Their powers in this respect, how altered since the Reformation.

8. Churchmen were, by acts passed early after the reformation, restrained, not only from granting feus of church-lands, but from charging them with burdens to the prejudice of the benefice. Thus, by 1585, *C. 11.*, it behoved all who were to be provided to bishoprics, abbacies, or other benefices in the King's gift, to give security that they should leave them in as good condition as they found them at their entry; and all leases, pensions, or other deeds hurtful to the benefices, were declared null. More particularly, bishops, by 1606, *C. 3.*, were prohibited to grant pensions out of their benefices, to endure longer than their own right; by 1594, *C. 203*, no beneficiary under a prelate was allowed to grant leases of a longer duration than three years, without consent of the patron; and by 1617, *C. 4.*, no prelate was to let any part of his patrimony for a longer term than nineteen years, nor any churchman, under a prelate, for a longer term than their own lives, and five years after, under the pains

pains of deprivation and infamy. As several churchmen under prelates took occasion, from this last act, to grant leases for the term thereby indulged to them, without consent of the patron, it was declared, by 1621, C. 15., that the act 1617 was not intended to derogate from the former law, which required the consent of the chapter or patron to the leases of church-lands in which they had a legal interest, but merely to restrain the unbounded liberty that churchmen assumed in granting leases to last for many lives, and many nineteen years; and that therefore all leases that had been granted by any inferior clergyman, to continue longer than three years, should be void where the patron had not interposed his consent. Leases granted by churchmen, though they should have exceeded the legal terms of endurance, were sustained for the term allowed by law, and set aside as to the remainder, *Stair, July 18. 1668, Johnston*, (Dict. p. 6848.). How churchmen might acquire a right to church-lands by possession, see *infr. B. 3. T. 7. § 33, 34.*

9. The teind, or tithe, which is called *the spirituality of benefices*, may be defined, that proportion of our rents or goods which is due to the Christian clergy, for performing divine service, or exercising the other functions proper to their several offices. We are taught by natural as well as revealed religion, that a part of our substance is due for the support and maintenance of the worship of God, and that those who serve at the altar ought to live by the altar. But whether the special proportion of a tenth of our yearly revenues is due to the Christian clergy by a divine and unalterable right, is a point which has been agitated with great heat. It is affirmed by all the canonists, by most of the Popish clergy, and by no inconsiderable number of the Protestant, among whom our first reformers from Popery may be reckoned; and it is denied by most of the Protestant princes and states of Europe. The topics urged in proof of the affirmative are chiefly drawn from that article of the law of Moses, by which God himself ordained the tenth of the fruits of the ground to be given to the Priests and Levites, *Numb. xviii. 21. et seqq.* But, *first*, This argument is improper in a question, What the divine law is in the Christian church? for the Mosaical law, in so far as related to the policy of the Jewish church, was not given forth as a rule to other nations; and, being but temporary in respect even of the Jews, lost its force at the coming of our Saviour, when the order itself of the Priests and Levites was abolished. *2dly*, The Popish clergy, who offer this plea, do themselves disclaim the obligatory force of the Jewish law, where it interferes with their views of power or interest; for they have, in spite of an ordinance of Moses, which prohibits the Levites to possess lands in their own right, *Numb. xviii. 23, 24.*, drawn to the church, besides the tithes, a considerable property in land, in all the countries that acknowledge the see of Rome. There can be no doubt of the sentiments of the Scottish legislature on this point since the Reformation; for our Sovereigns, in place of transferring the tithes from the Popish to the Protestant clergy, have assumed the power of bestowing grants of the greatest part of them to laymen, with the burden of reasonable stipends to the clergy; which grants have been, either expressly, or by consequence, ratified in parliament.

10. The canon law divides tithes into predial and personal, *Decretal. L. 3. T. 30. C. 20.* Predial tithes arise from the product of lands, whether merely natural, or in part industrial; the whole of which is tithable, without any deduction or abatement given to the possessor,

Whether the tithe is of divine institution.

Teinds, predial and personal.

Book II.

possessor, *propter culturam et curam*. That law does not state mixed tithes as a branch of this division as Stair has done, *B. 2. T. 8. § 5, 6.*, and Mackenzie, § 4. *h. t.*; for the tithe of animals, which answers to the description of mixed tithes given by these authors, is truly predial, as it is payable without the deduction of any charges laid out in rearing it; and as it belongs to the church of the parish where the pasture lands lie, and not of that in which the proprietor resides, which is the distinguishing character of predial tithes; *Gloss. in Lancel. Inst. jur. Can. L. 2. C. 26. § Decimarum*. Personal tithes include all profits which arise not from lands, but are made by industry alone, whether by handicraft trades, commerce, hunting, war, &c.; but they have never been acknowledged in Scotland. A decision observed by Stair, *Nov. 29. 1678, Birnie*, (*DICT. p. 2489.*), by which certain personal tithes were adjudged to be part of a benefice, when supported by immemorial possession, is no evidence of the right of our clergy to personal tithes; and is founded merely upon a presumption, that no man would subject himself to any servitude or payment, for time past memory, had he not been obliged to it by an anterior positive constitution.

Decimæ debentur parochio.
This rule, in many particulars infringed, was amended by church canons.

11. That proportion of the fruits of the ground which is due for the service of God, ought naturally to belong to him who discharges the office of pastor in the parish where the lands lie. Hence a rule is laid down, *Decretal. L. 3. T. 30. C. 29.*, that tithes are due to parochial churches *de jure communi*; and the equity of this rule seems to be acknowledged by our statute-law, both in the times of Popery, by 1489, *C. 7.*, which makes the receiving of tithes, without a lease from the parson or vicar, criminal; and after the Reformation by repeated acts, 1593, *C. 167. & 169.*, by which, ministers who were lawfully provided to benefices, are secured in the enjoyment of the tithes belonging to them, against all grants, made, or to be made, to their prejudice, even in parliament, *parte inaudita*; see *June 27. 1665, Ferguson*, (*DICT. p. 7949.*); *Stair, Jan. 14. 1674, Johnston*, (*DICT. p. 15639.*). Yet it must be admitted, that this rule, *Decimæ debentur parochio*, never obtained universally at any period of time. At first, the payment of tithes was voluntary; and those that were willing gave them, not always to the incumbent of the parish where the tithe was drawn; but perhaps to some church at a considerable distance from it; sometimes to poor laymen; and most frequently to monks, to whom devout Christians were for many ages more liberal in their donations than to the secular clergy, on account of the high opinion conceived of their sanctity, from their profession of poverty, and austere rules of penance. And even after the right of tithes was fully established in the church, that right was most unjustly wrested from the parochial clergy, *first*, by the consecration or appropriation of the tithes to other churches or churchmen; *2dly*, by Papal exemptions; and *3dly*, by the infeudation of tithes to laymen.—As to the *first*, Patrons, who considered themselves, upon the emerging of every vacancy, as the absolute proprietors of the benefice, *supr. B. 1. T. 5. § 10.*, assumed frequently a power of appropriating or annexing the whole endowments of it to a cathedral church or monastery, both that part which was given by themselves, and even the tithes. By this annexation, the patron conveyed from himself to the donees, not only the right of presenting an incumbent, but all the fruits of the benefice; so that the donees became in effect the perpetual beneficiaries of the church annexed,
and

and of consequence the titulars of all the tithes belonging to it. In appropriations to a cathedral church, the patron made the grant sometimes to the bishop himself; and when that happened, the church annexed became part of the bishop's own benefice, and was called *mensal*; either from *mensa*, which in the middle ages signified whatever was in one's patrimony or property, *Du Cange, voce MENSA*, or because it enabled the bishop to support his table with hospitality. Sometimes the church was given not to the bishop, but to the chapter; and then it was called *common*, because all the members of the chapter had a common interest in it. See however a different account of the origin of mensal churches, *Cr. Lib. 1. Dieg. 15. § 7.*; *Forbes on Tithes, p. 35.* Many instances of such annexations, by which the parochial ministers were in effect robbed of their livings, occur with us as early as our most ancient records or chartularies carry us; and the abuse became at last, by its frequency, so flagrant over all Christendom, that it was prohibited in the ninth century, not only by church councils, *Caus. 16. Q. 1. C. 56.*, but by an ordinance of Louis le Debonnaire, *Cap. Lud. Addit. 3tia, C. 72.*; and in the fifteenth century, by a Scottish statute, 1471, *C. 43.*; by which all such appropriations were forbidden under the severe pains of treason. Nevertheless the practice still prevailed, till the Reformation from Popery put an effectual stop to it, in all the states which in the sixteenth century shook off the Papal authority.

12. As the prelate, or monastery, to whom a parochial church was thus made over by annexation, could not by themselves serve the cure in the annexed church, they did it by a deputy, who got the name of a vicar, because he held the benefice, not in his own right, but in the vice and place of the prelate or monastery; for such vicar had no right to the tithes, or to any settled maintenance out of the benefice; he depended wholly on his employers; who gave him such share of the tithes as they thought fit to assign to him for his living, and who could remove him at pleasure. Sometimes the patron in his grant annexed only the greater tithes, of corn, to the cathedral church, and reserved the lesser for a vicar who should be presented by himself to serve the cure in the parochial church. Sometimes he reserved for that purpose, not the lesser tithes only, but certain lands belonging to the benefice, called for that reason *vicar's lands*, of which mention is made, 1593, *C. 165.*; and sometimes he retained, for the vicar's behoof, part even of the greater tithes, under the name of *the vicar's pension*. These last vicars, who were named to the parish church by the patron in virtue of his reservation, held the benefice during life; and as they had a right to the lesser tithes, or to the vicar's lands, or to some other stated share of the benefice, *jure proprio*, they were proper beneficiaries. Hence arose the division of benefices into parsonages and vicarages; and the division of tithes into parsonage and vicarage tithes. And hence it may be perceived, that the same church might have been both a parsonage and a vicarage; a parsonage, in regard of the cathedral or monastery, which had got a right by the annexation to the parsonage tithes; and a vicarage, in respect of the vicar who served the cure, and was entitled either to the vicarage tithes, or to that part of the benefice which the patron had in his grant expressly reserved for the vicar's subsistence.

13. Parsonage tithes, which belong to the parson, comprehend by the usage of Scotland only the tithe of corns, as of wheat, barley,

Vicar. Parsonage and vicarage benefices.

Parsonage and vicarage teinds.

ley, oats, pease, &c. They are called in our Latin charters, *decimæ rectoriæ*, from *rector*, a parson; and sometimes *decimæ garbales*, (though Craig gives another meaning to that epithet, *Lib. 1. Dieg. 15. § 10.*), from *garba*, or *gerba*, a vocable of the middle age, signifying a sheaf or handful of corn, *Da Cange, v. GARBA*; and hence the French to this day express the drawing of the tithe, or the carrying it off from the field, by *enlevement du gerbe*, *Dict. de l'Academie Franc.* The lesser tithes, which get the name of vicarage, are appropriated to the vicar, and comprise all the predial tithes, except the *decimæ garbales*, whether they be the immediate fruits or product of the ground, as grass, flax, hemp, or whether they be other profits, which the land brings up by the possessor's industry, as calves, fish, eggs, milk, &c. The chief difference between parsonage and vicarage tithes, in their effects, is, that parsonage tithes are every where the same, the law having made them, in the general case, a burden upon all lands; whereas the payment of vicarage tithes is governed by custom, and cannot be exacted where there has been no use of payment. Thus the tithe of eggs, if it has been accustomed to be paid to the vicar of one parish, is due to him; but the vicar of another parish, if he has not had that use cannot demand it. Nay, in the same parish, one landholder may be liable in a certain kind of vicarage tithe, if he has been wont to pay it, and another who never paid it will be free, *Stair, July 7. 1677, Par. of Prestonhall*, (*Dict. p. 10761.*). By our older practice, the right of all vicarage-tithes indiscriminately was local, and depended upon custom, *Stair, Feb. 11. 1665, Scot.*, (*Dict. p. 15722.*). But some later decisions seem to make a distinction. The tithe of animals, and of things produced from animals, as lambs, wool, milk, cheese, &c. has been adjudged to be due, though not accustomed to be paid, *Fount. July 24. 1678, L. Grant*, (*Dict. p. 10763.*), stated in (*Folio Dict. ii. p. 438.*; *St. B. 2. T. 8. § 6.* But flax, plants, roots, with the other product of gardens, are not subject to tithe, unless use of payment be proved, *Stair, June 9. 1676, Burnet*, (*Dict. p. 15640.*)*. For the prescription of tithes, see *infra. B. 2. T. 7. § 13. & 14.*

The parochial clergy's right to tithes infringed by Papal exemptions.

14. The right of tithes was inverted from the parochial clergy; *2dly*, by papal exemptions. Bishops and religious houses, to whom donations of land had been made, were originally subjected to the payment of the tithe of those lands to that church where they lay, in the same manner that the donor himself was previously to the donation. To get free from this burden, application was frequently made to the Pope; who, from the plenitude of his power, took upon him to grant exemption from the payment of tithes, in favour of any churchman or religious society. This he did with so liberal a hand, that there was hardly a religious order in the church which was not, about the beginning of the 12th century, exempted from the payment of the tithe of their own property-lands. To relieve in some measure the parochial clergy from such oppressive acts of power, first, Pope Adrian IV. *anno 1156*, and, after his example, Alexander III. *anno 1170*, confined those exemptions to the

* Custom was found to regulate payment of tithe on flax; *Fac. Coll. Nov. 15. 1787, Williamson*, *Dict. p. 15727*; and on hay; *Ibid. June 15. 1796, Brown*, *Dict. p. 15730*²⁴⁷. Indeed, it seems now to be held, that custom is equally the rule of judging in all cases of vicarage-tithes, and that the distinction stated in the text is not well founded; *Ibid. March 9. 1796, Hunter*, *Dict. p. 15728.*

²⁴⁷ And on fishings, *Fac. Coll. Mitchell, 26th June 1799, Dict. p. 15706.* See 2. *Connell, Tithes, 484.*

the lands in the natural possession of the three orders of Cisterians, Templars, and Hospitallers: And decreed that all other religious houses should pay the tithe of their own property, except of the *novalia*; that is, lands that were newly brought under tillage at their own expence, *Decretal. L. 3. T. 30. C. 10.* This privilege of exemption indulged to the Cisterians was, by our Supreme Court, communicated to the Lords of Ereccion, who succeeded in their place, *Gilm. 110., July 1. and Stair, July 15. 1664, Crawford, (Dict. p. 15716 & p. 15633.)* But, *first*, that exemption was a personal privilege, granted to the monks, as *pauperes*, which ought not to have descended to their successors, *Mack. Obs. on 1587, C. 29.* *2dly*, The exemption granted by that canon to the Cisterians, was limited to such of their lands as they had acquired before the date of the canon, without any privilege as to *adquirenda*, *Decretal. L. 3. T. 30. C. 24.*; and it does not appear that the Cisterian order had any property in Scotland so early as the pontificate of Adrian IV. No lands, therefore, which formerly belonged to any of these privileged orders, are now exempted from the payment of tithes, *June 15. 1737, Minister of Barry, (Dict. p. 15721)*²⁴⁸.

15. *Lastly*, The clergy lost many tithes by their infeudation, or grants of them made to laymen, by which they were secularised, and became in a proper sense temporal rights. Lay patrons, not contented with disposing of the revenues of the parochial churches which they had founded, in favour of cathedrals or monasteries, sometimes made grants of the tithes to a poor lay friend; which grants were frequent in the eleventh century. Churchmen too, when the persons liable in tithes were backward in their payments, or hard to be come at, chose rather to feu them out to the owner of the land at a neat yearly duty, than undergo the trouble of collecting them, or run the hazard of not making them effectual; and sometimes they made an absolute grant of part of them to their prince or sovereign, the more readily to engage his interest or assistance for recovering the rest. As the church felt its power and interest considerably lessened by these and such other infeudations to laics, the disposing of tithes to laymen, under whatever pretence, was prohibited by several Lateran councils, and particularly one held by Alexander III. in 1180, and another by Innocent III. in 1215, under the heavy penalty of the want of Christian burial, and the yet heavier one of eternal damnation; and laymen were even forbidden to hold tithes, without distinguishing whether they claimed them under a grant prior or posterior to the date of these councils. Because it appeared inconsistent with equity, that prior rights should be cut off by any subsequent church-canon, several Popish states, and particularly France, have secured the possessors of tithes which had been feued by churchmen to them before the Lateran councils, *D'Acosta in Decretal. L. 1. T. 86. § ult.*

16. Many lands in Scotland are enjoyed *cum decimis inclusis et nunquam antea separatis*. All our writers agree that such lands are free from the payment of tithes; but they differ about the true meaning of those words. Lord Stair, *B. 2. T. 8. § 10.*, and Sir George

And by infeudations of them to laymen.

Lands enjoyed *cum decimis inclusis*.

²⁴⁸ See another report of this case, *Elchies, v. Teinds*, No. 6., where it is stated, that the decision proceeded on a specialty, and that "the general point is still undetermined." There have since been two other decisions unfavourable to the claim of exemption; *Fac. Coll. Leslie, 14th Jan. 1800, Dict. App. v. Striven, No. 2.; College of Glasgow, 16th June 1813, Fac. Coll.* But still the general point is treated as not "fully settled;" 2. *Connell, Tithes, 396-406.*

George Mackenzie, § 6. *h. t.*, are of opinion, that the *decimæ inclusæ* are those which were never known to have been separated from the stock, and which therefore were presumed to have been feued out along with the lands before the Lateran councils above mentioned, when as yet there was no church-canon prohibiting their infeudation. Craig, on the other hand, who holds it for certain, *Lib. 1. Dieg. 15. § 9.*, that no tithes were feued in Scotland so early, understands by *decimis inclusis*, those which at any period, even after those councils, were feued by churchmen who had right both to stock and tithe; and who, as they gathered the whole fruits indiscriminately, tithe as well as stock, when the lands were in their own possession; so when they came to make over the property to others, they included the stock and tithe in one charter. And indeed a feu of that sort is not properly a feu of tithes, but a feu of lands which had never been subject to tithes; so that though the Lateran councils had been obligatory in Scotland, such feu fell not under the prohibition. This opinion seems not only agreeable to the general plan of our law, by which prelates and other churchmen were, as early as the year 1457, allowed to feu their lands by the 71st act of that year; but is also favoured by the act of annexation, 1587, C. 29., which supposes that feus of lands *cum decimis inclusis* are valid, without distinguishing the period in which they might have been granted. Lands, therefore, feued *cum decimis inclusis*²⁴⁹, are exempted from the payment of tithe, though the grant had been posterior to the Lateran councils, if it was prior to the act of annexation*, *Dirl. 229, (Jan. 28. 1675, Tulliallan, Dict. p. 15717); Dec. 7. 1737, Arrot*²⁵⁰. A case may be figured, where the right of lands *cum decimis inclusis*, carries no privilege as to the vicarage-tithes; for where the cure happened to be served by a vicar, the parson, though he might feu the lands *cum decimis inclusis*, in so far as concerned the tithes of corn, which were his own, and which he had never separated from the stock, had no power over the lesser tithes, which belonged to the vicar.

Provisions made for the clergy upon the Reformation.

17. From the above history, it appears, that though the Popish clergy had, by various devices, engrossed to themselves a considerable part of the property of Christendom, their riches were most unequally divided. While the dignitaries of the church, and the regular clergy lived in the greatest affluence, the scanty pittance which remained for the inferior secular clergy hardly afforded them bread. Upon the suppression of Popery, the reformed clergy, who were entirely made up of parochial ministers, and a few superintendants, flattered themselves, that the nobility and gentry, who appeared

* But in every case, it must appear from the title-deeds, that the lands and teinds have not at any time been held as separate and distinct subjects; *Fount. July 12. 1678, Forbes, Dict. p. 15718; Fac. Coll. July 17. 1782, Heritors of Collessie, Dict. p. 15694; Ibid. Nov. 21. 1798, Colville, &c. Dict. p. 15707.* See the canons of the provincial councils held at Perth in 1242 and 1269, published by Lord Hailes. These canons were understood to be obligatory.

²⁴⁹ It is now settled law, that the words *cum decimis inclusis* merely, are not sufficient to support the exemption, unless followed by the expression, *et nunquam antea separatis*, or some other of similar import; *Fac. Coll. Colville, 21st Nov. 1798, Dict. p. 15707; Ibid, Badenoch, (with the two other cases of Wemyss and Melville, noticed in the same report) 15th Jan. 1800, Dict. v. TEINDS, App. No. 7.; Fac. Coll. Hay, 7th Feb. 1810; Ibid. Auchterlony, 23d May 1810; Ibid. College of Glasgow, 16th June 1813; 2. Connell, Tithes, 390. In Fac. Coll. Beatson, 5th Feb. 1812, a clause, "Quæquidem terræ, cum decimis garbalibus earund. inclusis, omnibus temporibus retroactis ultra hominum memoriam, absque divisione semper simul assedebantur," was found "equivalent to a right of teinds *nunquam antea separata.*"*

²⁵⁰ Reported by *Elchies, v. TEINDS, No. 8.*

ed so zealous for the Reformation, would have been also forward to redress the grievances of the clergy, by restoring the appropriated tithes and benefices to the parish-churches ; but that method of provision suited not with the views of such of our men of interest as wanted to share in the spoils of the Popish church. The first step taken towards establishing a legal maintenance for them, was an act of privy council, dated *Feb. 15. 1562*, declaring, that the third of all the Popish benefices should be set apart for the service of the government, and the support of preachers and readers ; and that the old beneficiaries who had exhibited rent-rolls of their benefices in compliance with a former act of council, should enjoy the remaining two-thirds during their lives, *Keith, Hist. App. p. 178*. But this ordinance contributed little to the benefit of the clergy, both because most of the Popish churchmen had given up their rent-rolls far below their true values, and because *Q. Mary*, soon after her return from France on the death of her husband Francis II., had granted to many of them a release of their thirds, or given leases of them to others ; for which see *1592, C. 123*. This gave rise to an act, *1567, C. 10.*, directing the whole thirds, without exception, to be paid to the collectors of the ministers' stipends ; and for the more sure payment of them, particular localities were assigned in every benefice to the extent of a third, which were called *the assumption of thirds* ; but no third was to be assigned out of any benefice or cure, which had never been appropriated to other uses, and had been provided to the ministers serving the cure at the churches to which these benefices belonged, *1592, C. 161*. That the above fund might be more justly distributed among the clergy, a commission passed the great seal, styled *the commission of plat*, authorising commissioners to modify stipends out of it. But this fund proved as ineffectual as the former, having been rendered quite precarious by *1606, C. 2.*, restoring bishops to the whole of their benefices ; and though the bishops were, by that act, laid under an obligation to maintain the ministers within their several dioceses out of the thirds, they made shift to elude that obligation.

18. As for the benefices of abbacies, priories, &c. proper to the regular clergy, James VI. accounted himself in a particular manner absolute proprietor of them, not only in consequence of the resignations which he had obtained from the greatest part of the beneficiaries, but because the purpose for which they had been granted, *viz.* the maintenance of the regular clergy, having been, upon the Reformation, declared superstitious, the benefices themselves fell, as *bona vacantia*, to the crown. The Reformed clergy had indeed put in a claim to the whole of the benefices of the Popish church, not only to the tithes, but to the church lands, either as their proper patrimony, or as subject to their sole administration, for the support of the poor, and for other pious uses, *First Book of Discipline, Head 6*. But his Majesty, unwilling to part with so valuable an acquisition, first exercised a power, upon the resignation or death of any abbot or prior, to appoint a lay commendator for life to the vacant benefice, who was as little liable to account for the fruits as those whom the Pope frequently named before the Reformation, *supr. B. 1. T. 5. § 4*. And most of these commendators, not satisfied with a grant which died with themselves, prevailed at last with his Majesty to change their life-tenure into a perpetual or heritable right ; which he did, by secularising, or, in our law-style, erecting most of the monasteries and priories into temporal lordships ; the grantees of which were sometimes called *lords of erection*, and some-

Church lands
fell to the crown
upon the Refor-
mation.

Benefices erect-
ed into tempo-
ral lordships.

Plat

Book II.

times *titulars of the tithes*; because they had, by their grants, the same title to the erected benefices, both lands and tithes, that the monasteries had formerly. As the abbots and priors had before been wont to name their vicars to serve the cure in those annexed churches, the lords of erection, as coming in their place, assumed the right of presenting ministers to them, upon the emerging of a vacancy, even where their charters did not expressly bear the right of patronage. A few of those grants of erection were charged with precise stipends, particularly specified, to be paid to the churches that stood within the grantee's erection; but commonly the obligation to pay the thirds was discharged in favour of the grantees, and only a general clause inserted, burdening them with the provision of those churches in competent stipends; which, in many cases, was shamefully disregarded by the grantees. A small relief was given to the reformed ministers soon after the Reformation, by a grant of Q. Mary in their favour, to take place on the death or resignation of the Popish incumbents, of all the benefices below 300 merks Scots, which was confirmed by parliament 1572, C. 52; but that could go but a short way towards the maintenance of the clergy of a whole nation.

Annexation of church lands to the crown, unless temporal lordships, mortifications, benefices of laic patronage.

19. To put a stop to the erections above mentioned, by which both the revenue and the dignity of the crown suffered considerably, all church-lands, whether belonging to bishops, abbots, or other beneficiaries, were annexed to the crown, by 1587, C. 29., to remain for ever with it unalienably. The following subjects, however, were, by the statute, excepted from this annexation: *First*, All lands which had been before the statute erected by the crown into temporal lordships; because, before passing that act, the King was absolute proprietor of all those benefices, and had full power over them. *2dly*, Such lands made over to hospitals, otherwise called *maisondieus*, or to schools and universities, as had not been inverted to other uses than they were originally appropriated to; because the purposes for which those grants had been made, in place of being superstitious, were lawful, and even laudable. But, in truth, lands granted to colleges or hospitals could not, with any propriety, be called church-lands; and so fell not within the act, though they had not been excepted. *3dly*, Benefices of laic patronage, *i. e.* the patronage of which was vested in laymen before the Reformation. These were excepted upon this ground, That one who made a grant of lands to a church, or who purchased a patronage from the proprietor, was understood to secure to himself the rights of presenting incumbents, superintending the management of the fund, &c.; which rights were therefore reserved entire to the patron, as the legislature had no intention to cut off, or encroach upon, any private rights acquired by laymen before the Reformation.

Other exceptions to the statutory annexation.

20. The manses and glebes which belonged to the Popish churchmen were also excepted from the annexation; because every minister was accounted to have, if not a divine, at least a natural right to a manse and glebe; which were therefore to be considered as part of the spirituality of benefices, and so not to be annexed to the crown more than the tithes themselves. The act therefore declared, that all these should remain with the present possessors, or with the churchmen who should be afterwards provided to the benefices. *Lastly*, Grants of pensions out of benefices were, in certain cases, excepted from the statute. Pensions of a determinate yearly
sum

sum were frequently granted out of inferior benefices, either by the Pope, or by the bishop, with consent of the incumbent, to indigent clergymen, or even to laics, to last for the life of the grantee: At other times, such grants were made upon a vacancy, to endure till the vacancy should be supplied; and after the Reformation, the King exercised this right, as coming in the Pope's place. All such pensions, whether granted by the King, or by churchmen, are excepted from the annexation, where they were either authorised by the Lords of Council, or followed by possession. Bishops are, by a posterior act, 1606, C. 3., prohibited to grant pensions to endure beyond the time of their own incumbency.

21. Feus and leases that had been granted by churchmen are, by this act *, secured to the feuars or tacksmen, for payment of the several duties formerly paid by them. The superiority of the lands thus feued, which was before in the church, is now declared to belong to the King; and the heirs of the feuars are directed to make up their titles to the property, by brieves issuing from the King's chancery. Where churchmen had feued out stock and tithe together, *i. e.* had feued their lands *cum decimis inclusis*, the crown's superiority is declared to extend over the whole tenantry, both stock and tithe; but nine-tenths only of the feu-duties payable for stock and tithe are made payable to the crown, the remaining tenth being reserved for the churchmen in place of their tithe. After the death of the beneficiaries who were alive at passing this act, the full right of the lands feued *cum decimis inclusis* devolved upon the King, and was by him afterwards transferred, in the posterior erections of those lands, in favour of the grantees, without any exception of the tenth of the feu-duties that had been, by the act 1587, reserved to the beneficiaries.

Feus and leases by churchmen are secured by the act of annexation.

22. It is extremely doubtful, whether the lands only which belonged to the church, were intended to be annexed by this statute, or also the tithes. On the one part, the act is entitled, "Annexation of the temporality of benefices;" the annexing clause also enumerates most anxiously, baronies, fishings, and all the other appurtenances of land that can be well figured, but without the least mention of tithes; and a subsequent clause of the act is introduced, with a recital, that neither the teind-sheaves, *i. e.* the parsonage-teinds, nor the smaller tithes of any lands within the kingdom, are included in the annexation. On the other hand, the very first article excepted from the statute, is the teind-sheaves, and other tithes of all lands pertaining to parsonages or vicarages; all which are to remain with the present possessors, or with those who shall be afterwards provided to the benefices; which exception imports in common sense, that the tithes of the lands not belonging to those benefices fall under the annexation. And it seems to be affirmed in a posterior statute, 1593, C. 190., that the tithes of all the prelacies of the kingdom are annexed to the crown by the general act of annexation in 1587 ²⁵.

Whether the lands only which belonged to the church, or the lands and tithes are annexed.

23.

* Act 1587, C. 29.

²⁵ The doubts expressed in the text do not appear to be entertained by the other authorities. *Stair, B. 2. t. 8. § 9.* says, that "teinds are not annexed to the crown as the temporality of benefices are, *Parl. 1587, cap. 29.*" See to the same effect, *Mackenzie's Observations* on the statute, § 7.; where also the expression in 1593, *cap. 190.* is treated as a "mistake;" *Forbes*, p. 256. 1. *Connell, Tithes*, 168.

BOOK II.

New erections
declared null by
act 1592.

23. Notwithstanding this statute of annexation, the King continued to make farther erections of church-benefices; which produced another statute, 1592, C. 121., declaring all erections made after the act 1587 void, excepting such as had been granted to persons who had received, since that act, the honour of Lords of Parliament. On the restitution of bishops, the annexation was rescinded, in so far as concerned the benefices of bishoprics, by 1606, C. 2; and the benefices belonging to the bishop's chapters were, in like manner, restored to them by 1617, C. 2. After the re-establishment of presbytery in 1690, the benefices belonging to prelates returned of course to the crown; and all lands which were formerly holden of them are declared by 1690, C. 29. to be holden for the future of the crown. But as those benefices were not annexed *de novo* to the crown, the sovereign may dispose of them at pleasure; and has actually made considerable donations out of their tithes to universities, and for other public uses; and he sometimes grants pensions out of that fund to private men of decayed fortunes, to last during their lives.

Methods of
making the
teind effectual.
Drawn teind.

24. For the better understanding the alterations made in the condition of tithes in the reign of Charles I., a brief account may be premised, of the methods by which church-beneficiaries, and other titulars, made their right to the tithes effectual, from the time they were first possessed by the clergy. The most usual and natural way was, by the titular's separating the tithe or tenth from the stock, or remaining nine-tenths of the crop, after the corns were reaped, and his carrying it off from the field to his own granaries. This got the name of *drawn teind*, and was frequently attended with grievous hardships on the owner of the ground, or his tenant; for every possessor of land who presumed, after reaping his corns, to carry off any part of them from the field, till the titular had drawn his tithe, was, from the first establishment of the church's right, subjected to severe penalties; and the titular, sometimes from indolence, but most frequently with a view of compelling the proprietor to purchase the leading of his tithes at an high price, delayed the drawing of his tithe till great part of the crop was rotten. For redressing or at least alleviating this grievance, the tithing of corns was, after the Reformation, regulated by sundry statutes, 1606, C. 8.; 1612, C. 5.; 1617, C. 9. By the last of which, the owner of the crop is directed to require the titular, or tithe master, eight days after cutting the several kinds of corn therein specified, to draw his tithe in four days after; upon the elapsing of which he may complete his harvest. But he is not at liberty, by that last act, as he was by the two former, to neglect the tithe, after having set it apart for the titular: He must also preserve it from being eaten by cattle, for eight days after the expiring of the time contained in the requisition; which, if he do, he is by the act declared free from spuilzie, or wrongous intromission. The remedy provided by these acts, however, was far from being adequate to the evil it was intended to cure.

Tacks of teinds.
Rental bolls.

25. Sometimes the titular, in place of drawing his tithes, was prevailed on to grant a lease of them to the proprietor for a neat yearly tack-duty; and sometimes he accepted of a stated quantity of corns yearly, commonly called *rental-bolls*, either in virtue of a written rent-roll or barely by the use of payment; which rent-roll, or rental, was presumed to be the full value of the tithes. In this last case, the proprietor was obliged to continue the payment to the titular

titular of the accustomed number of bolls, though exceeding the true value of the tithe, till he offered the tithe in kind, and made intimation that he would no longer submit to the payment of the rental-bolls, *Durie, March 22. 1626, Lennox, (Dict. p. 15328); Ibid. Feb. 20. 1633, College of Glasgow, (Dict. p. 15631, & p. 15331)*. And, on the other hand, though the rental-bolls should have fallen short of the true tithe, the titular was bound to accept of them, in full satisfaction of the tithe, till he used an inhibition of tithes, in the manner soon to be explained; after which, the titular might draw the tithes *ipsa corpora, Ibid. March 18. 1628, Lo. Blantyre, (Dict. p. 6434)*.

26. Charles I. sensible of the great loss which his revenue suffered by the before-mentioned erections, and being also desirous to provide the parochial clergy in reasonable stipends out of the tithes, executed, soon after his advancement to the throne, a revocation of all grants of church-lands, or of tithes, made by his father to the crown's prejudice; and, the year after, brought an action of reduction, both of the erections granted before and after the act of annexation. The ground of setting aside the erections prior to the annexation was, That they proceeded on the resignations of the beneficiaries; and that these resignations could only be made use of for presenting new incumbents, but by no means to sink the benefices. Against the erections made posterior to the annexation, the objection was, That property, once annexed, could not be alienated by the crown without a previous dissolution in parliament. In January 1627, his Majesty appointed commissioners to confer with those who had any interest in church lands, or tithes, towards bringing matters to a reasonable settlement; and authorised them to value the tithes, and to name subcommissioners under them for that purpose.

27. As persons of the highest rank and distinction were defenders in this action of reduction, it created great heats and animosities. Concessions, however, were soon made on both sides, in the way of communing: On the part of the King, that he might not raise to a greater height the general ferment of the nation; and, on the part of the lords of erection, that they might not lose all by being cast in the suit. The King demanded, in behalf of the crown, that the titulars, in whose favour the erections had been made, should surrender to him the superiorities of the church-lands, of which they had obtained the grants, as was prescribed by the act 1587; and that the crown should have a fixed yearly annuity payable out of all tithes. But the article the King chiefly insisted on, was calculated, not to serve his own interest, but to correct the abuses which continued to be committed in the drawing of tithes, notwithstanding the aforesaid statutes; and which his Majesty proposed to effect, by obliging the titular to sell to the proprietor the tithes of his lands at such a yearly value, and such a number of years' purchase, as should be agreed upon: And where the tithes were destined as a perpetual fund for the maintenance of the clergy, or for the support of universities, schools, or hospitals, it was proposed that they might be valued at the suit of the proprietor; who, upon paying the valued yearly duty to the titular, was to have the absolute management of the whole crop, stock and tithe.

28. After some progress made in this communing, all parties having interest in the tithes entered into submissions, or bonds of arbitration, for referring their several claims to the King's own determination,

Reduction of
the erections by
K. Ch. I.

Differences between the crown
and titulars on
that subject.

The differences
were submitted
to the King as
arbitrator. His
decree.

mination, all dated *anno* 1628. The first and fourth submissions were signed, on the one part, by the lords of erection, and the tacksmen claiming under the erections; and, on the other, by the landholders, who wanted either to purchase their own tithes, or to have them valued; and these submissions contained procuratories of resignation by the titulars, for surrendering their right of superiority to the King *ad remanentiam*, (on which account they were called also *the surrenders of teinds*); referring to his Majesty what consideration should be given to them for the feu-duties, or other constant rent of these superiorities, and also what sums should be settled as the yearly rate and value of the tithes. The second submission was signed by the bishops and clergy, in relation to all the tithes payable to them, of which they were not then in the possession; and the third, by the commissioners of several royal boroughs, for all the right they could claim to the tithes which had been granted for the sustentation of ministers, colleges, schools, or hospitals, within their respective boroughs. Upon each of these the King pronounced a separate award, or decree-arbitral; all of them dated September 2. 1629, and subjoined in our statute-book to the acts of Charles I. The first and fourth decrees run in the same strain: They declare the crown's right to the superiorities of erection, which had been resigned to the King by the submissions. The sum of 1000 merks Scots was thereby to be given by the King himself to the lords of erection, in satisfaction or full payment of each chalder of feu-farm, and for each 100 merks of feu-duty, or other constant rent of these superiorities; and the feu-duties were to be retained by them till such payment should be made. This part of the above decrees is confirmed by 1663, C. 14.; in which there is a proviso, that it shall not extend to the superiorities of the lands belonging to bishops or their chapters, who had been restored in 1606. But by a posterior act, 1690, C. 29., which passed after the last suppression of Episcopacy, it is declared, that all these superiorities shall for the future belong to the crown; and that it shall not be lawful to interpose any superior between the King and the vassals who formerly held of the bishops or their chapters*. The right reserved to the King by the two decrees-arbitral before mentioned, to redeem the feu-duties from the lords of erection, was renounced by 1707, C. 11. Though the vassals of erection were, by those decrees, to hold their lands immediately of the crown; yet if any vassal once consents to hold them of the lord of erection, it shall not afterwards be in his power to recur to the crown as his immediate superior; see 1661, C. 53 †.

29. The most important article in these two decrees-arbitral is that which directs the valuation of the tithe at a certain yearly rate; after which the landlord is entitled to the whole crop, upon payment to the titular of that yearly duty. The rules which the commissioners appointed for that purpose are directed to observe in the valuation, are different, according to the different conditions of the tithes. The words of the decree are, that *the rate of all tithes, where they are valued jointly with the stock, shall be a fifth part of the constant yearly*

* See *Fac. Coll.* Feb. 4. 1758, *Spottiswoode*, Dict. p. 8000; *Ibid.* Dec. 19. 1767, *Spottiswoode*, Dict. p. 8003; (*Ibid.* June 13. and July 25. 1771, *Spottiswoode*, Dict. p. 8004.)

† See *Dalr.* June 9. 1714, *Heriot's Hospital*, Dict. p. 7986; Jan. 24. 1730, *Earl of Dundonald*, 1. *Folio Dict.* 531. Dict. p. 7997; *Fac. Coll.* March 4. 1773, *Duke of Gordon*, Dict. p. 15096.

Heritors may now pursue for a valuation of their teinds. Rules of that valuation. King's case.

yearly rent that is paid for the lands, stock and tithe ; and that where they are valued apart, or severally, the rate shall be such as it has been already, or shall be valued by the commissioners or sub-commissioners, deducting from the tithes severally valued a fifth part for the ease of the proprietor. It must be acknowledged, that those rules might have been delivered with greater perspicuity and precision ; but the meaning appears to be this, that where tithes are let to the landholder for a determinate duty, either in money or in kind, they are possessed by the same person who possesses the stock, without the separation of one from the other ; and because it is impossible, while the stock and tithe are thus jumbled together, to fix the value of the tithe by itself, that sort appears to be the tithe which is said to be valued with the stock ; and therefore its value is the fifth of the rent payable for both stock and tithe ; which is accounted a reasonable *surrogatum*, in place of a tenth of the increase. On the other hand, where the tithe is drawn, or separated from the stock, every harvest, by the titular, its value is capable of a several or separate proof, to be fixed according to the quantity of the corns which are drawn as the tithe ; and upon this account, that kind is said to be valued severally, and its rate to be fixed as it has been already, or shall be valued by the commissioners ; that is, the commissioners, after taking proof of what was drawn as tithe, were to consider its value *communibus annis*, and determine accordingly. But in this last case, the proprietor was to be allowed a deduction of a fifth part of that yearly value ; so that four-fifths of the yearly value of the drawn tithe is the proportion of corns which is by that rule to be delivered to the titular as the valued tithe. This deduction is commonly called the *King's ease* ; because it is given by the King in his several awards as an ease to the proprietors. Agreeably to this interpretation of the rule, it has been adjudged, that where the tithe has been possessed by the proprietor jointly with the stock, for payment of a stated yearly duty to the titular, the rate of it is fixed at a constant yearly rent, *Fac. Coll.* ii. 18, (*March 2. 1757, Hay against Roxburgh*, Dict. p. 15750.) ; and that the value of drawn tithe must be fixed to what it shall be proved by the testimony of witnesses to have been worth, one year with another, *Jan. 28. 1708, Dougl*, *Feb. 7. 1711, Hume* ; both which judgments are entered into the register-book of the tithe-office *.

30. Lord Stair explains this clause differently, *R. 2. T. 8. § 14.* ; and the opinion of that great lawyer must have carried double authority with it in the construction of a statute which had passed so near his own time, if it did not infer a manifest absurdity. He affirms, that tithes let in lease, or in rental, are those which are said by the act to be valued severally ; because their values are severally known by their tack-duties, or by the number of rental-bolls ; and that therefore the tack-duty, or rental-bolls in use to be paid, must be the legal valued tithe. But it is obvious, that the value of the tithes cannot be justly ascertained, either by the tack-duty

Lord Stair's
opinion on that
subject.

* Where the teinds have been drawn *ipsa corpora* by the titular, but mixed with other teinds so as to prevent a discrimination of the amount of each, the valuation is fixed at one-fourth part of the rent paid to the heritor for the stock ; *Feb. 22. 1744, Gordon*, Dict. p. 15741, (*Elchies, v. TEINDS*, No. 20.) See *Fac. Coll. Aug. 4. 1773, Campbell*, Dict. p. 15762 ²⁵².

²⁵² This case relates to the apportionment of a *cumulo* valuation, where the lands have become split among different heritors ; as to which, see also 1. *Connell, Tithes*, 344.

Book II.

of leases, or by rental-bolls; for leases last no longer than for the term of years expressed in them; and the payment of rental-bolls may be discontinued at the pleasure, either of the titular or proprietor, in the manner explained *supr.* § 25.; and therefore is never considered as the rule for valuing tithes, except where none of the parties oppose it; see *Fac. Coll.* i. 69, (*Feb. 28. 1753, Morton against Officers of State, Dict.* p. 10672.)²⁵³. Besides, if tithes let in lease or rental are those which in the sense of the decrees-arbitral are valued severally, nothing remains to fall under the denomination of tithes valued jointly with the stock, but drawn tithe; and if drawn tithes are to be valued jointly with the stock, they must, according to the express direction of the decrees-arbitral, be valued at a fifth part of that rent that is paid both for stock and tithe; which is absurd; for no rent is, or can possibly be, paid to the proprietor, jointly for stock and tithe, where the tithe is drawn by the titular.

Heritors, in consequence of the King's decree, may likewise pursue a sale of their teinds.

31. The proprietor was, by the aforesaid decrees-arbitral, entitled, not only to an action of valuation, but of sale, of his tithes, against the titular or his tacksman. The price was to be nine years purchase of the valued tithe-duty, if the seller had an heritable right to the tithes; if, for instance, he himself was the titular. Where the seller was but tacksman, and so had a bare temporary right, the purchaser was to get an abatement of the price, in proportion to the endurance of the tack; and where the purchaser had already got a lease of his own tithes, which was yet current at the time of the sale, an abatement of the price was also to be allowed to him, in proportion to the number of years in the tack yet to run; the amount of all which deductions was to be settled by the commissioners; but, in practice, the commissioners, in place of abating any part of the price, where the seller's right is merely temporary by a lease from the titular, direct the interest of the price to be paid to the seller while his lease subsists, and the capital sum to be paid to the titular himself, upon the expiration of it; and by the same rule, where the proprietor who sues for a sale, has a lease of his own tithes not yet expired, he ought to be allowed retention of the interest of the price while the lease is current. This part of the awards concerning the valuation and sale of tithes, was ratified in parliament, by 1633, C. 17*.

What particulars are to be held part of the yearly rent in the valuation of teinds.

32. Several rules have been established by decisions, for fixing the particulars which are or are not to be accounted part of the constant yearly rent of land in the valuation of tithes. *First*, Every article is to be considered as rent which is truly paid by the tenant out of the growth of the lands (except a reasonable part of what gets the name of *kains* or *flying customs*), though the landlord should, with a view to disappoint the titular, disguise it in the tenant's lease, as paid upon another consideration than that of rent. Nay, the converted prices of fowls, butter, tallow, wedders, lambs, &c.

* This statute, and c. 19. of the same year, limit the right of pursuing a sale to those cases where it is exercised within two years from the date of the valuation; but the limitation having been omitted in subsequent statutes, was found not to be in force; *Fac. Coll.* May 14. 1794, *Irvine*, Dict. p. 15698. In this case it was also found, that when an heritor brings a sale of teinds already valued in victual, the grain must be converted, for the purpose of the sale, at the medium of the *fiar*-prices of the county for seven years preceding.

²⁵³ Reported also by *Elchies, v. TEINDS*, No. 35., who cites to the same effect, *College of Glasgow*, 20th June 1744; *Ibid.* No. 19. See also 1. *Connell, Tithes*, 260, et seq., where the view taken in the text is supported at considerable length.

&c., where the landlord has reserved an option, either to demand these articles in kind, or the valued prices of them, are considered, not as kain, but as rent: and for that reason accounted part of the rent of the lands, and chargeable with tithe, *Tinw. July 15. 1752, Minister of Cushney* *²⁵⁴. It is not, however, a rule without exception, That all rent paid to the landlord for the fruits of the ground is subject to tithe, and so to be accounted rent in the valuation of tithes; for as orchards produce no fruits that are the subjects either of parsonage or vicarage tithes, the rent due by the tenant for an orchard is not to be computed in the valuing of the tithe, *Fac. Coll. ii. 18, (March 2. 1757, Hay against Roxburgh, Dict. p. 15750)*. 2dly, Where the proprietor draws annual profits from the sale of subjects which are more properly part of the land than of the fruits, such profits are not considered as rent in the valuation of the tithe, because tithes are a proportion of the fruits only. Thus, neither lead ore brought up from a shaft, nor stones dug out of a quarry, nor clay out of a pit for making brick or earthen ware, are tithable, because they cannot with any propriety be called fruits. A moss is deemed to be *pars fundi*, and of course is not a tithable subject, *Dec. 11. 1734, Heritors of Calder, (Dict. p. 15739* ²⁵⁵). 3dly, The expence of culture, though heavier than ordinary, if it be annual, ought not to be deducted from the rent. No deduction is therefore to be allowed on the account of dung, though the tenant should purchase it at a high price from the inhabitants of a neighbouring village, *Feb. 6. 1745, D. of Buccleugh, (Dict. p. 15745* ²⁵⁶); and far less on account of sea-ware, which generally costs the tenant no more than its carriage from the shore, *Fac.*

* This case is reported by *Kilk. No. 16. voce TEINDS, Dict. p. 15749* ²⁵⁴. See, however, *Fac. Coll. July 22. 1772, Fullerton, Dict. p. 15762*.

²⁵⁴ The Court did not in this case proceed upon the principle stated in the text. On the contrary, they appear, from Kilkerran's report, to have held, that "where poultry were *bona fide* put into tacks," they were not to be included in valuing the rent, even should the landlord have reserved an option to take a converted price. It was only in so far as it might appear "that an *unusual* number of poultry were thrown "into a tack, which might shew an intention *fraudem facere*," that they were to be included; but "what might appear to be a reasonable number in common usage," was still to be allowed the landlord as kain. See to the same effect a report of the case by *Elchies, v. TEINDS, No. 34.*; also 1. *Connell, (Tithes,) 312*. It was accordingly found, that "poultry are never computed, even though the master have the option to take poultry, or so much money as the value;" *Kilk. Sinclair, 22d June 1738, Dict. p. 15656*; and again, *Maxwell, 15th July 1747, Elchies, v. TEINDS, No. 24., Dict. p. 15748*.

In the same way, personal services prestable by the tenants, if such "as are usually "and *bona fide* paid, ought to be teind free, though converted;" *Minister of Cushney, supr. Elchies, v. TEINDS, No. 34.*; *Sinclair, supr. Elch. Ib. No. 9.*; *Douglas, 23d July 1740, Elch. Ib. No. 14.*; *Fullerton, not. * h. p.*; 1. *Connell, (Tithes,) 312*.

²⁵⁵ Reported also by *Elchies, v. TEINDS, No. 1*. And see to same effect *Shene, 16th Feb. 1737, Ib. No. 5., Dict. p. 15739*. But it would seem, that unless tenants have "the right of digging peats for sale, the benefit derived from them is too indefinite to be a legal ground of deduction;" *Fac. Coll. Peterkin, 20th May 1801, Dict. App. v. TEINDS, No. 11.*; *Ibid. Munro, 14th Dec. 1796, Dict. p. 15771*; 1. *Connell, (Tithes,) 308*.

²⁵⁶ Reported also by *Elchies, v. TEINDS, No. 18*. But where the landlord annually furnishes the tenant with lime below the market price, deduction is allowed; *Fac. Coll. Scott, 5th Feb. 1806, Dict. v. TEINDS, App. No. 14*. Deduction was even allowed, in this case, for "the interest of the price of lime" furnished to the tenant "at the commencement of the lease," and of another sum advanced "to put the farm in "good condition." But as to this compare *Fac. Coll. E. of Selkirk, 8th Dec. 1802, Dict. p. 15778*. And see 1. *Connell, (Tithes,) 310, 311*.

Fac. Coll. ii. 18, (*sup. cit.*); for no rent can be produced without the expence of servants, cattle, manure, utensils, farmhouses, &c. *. And as the tack-duty payable by tenants is upon the account of this expence made less than it would otherwise be, (which was without doubt in the eye of the legislature, when they fixed the rate of tithe to a fifth part of the rent), the deducting of that expence also in the valuation of the tithe would be in effect to deduct it twice, to the disadvantage of the titular. *4thly*, Where the proprietor has improved or raised his rent, the improved or new rent, if it had not been imposed more than seven years before bringing the action of valuation, was not reckoned in the computation of rent by the older practice; probably from the uncertainty, whether the lands would continue able to bear that addition; but by the later decisions, such part of it is accounted rent as the commissioners of tithes, from the circumstances of the case, judge equitable, *Feb. 1. 1738, D. Douglas*, (DICT. p. 15739). Where the improvement of rent was made at an uncommon expence, on lands which would otherwise have produced little or no rent, *ex. gr.* by draining a lake, the proprietor was allowed a reasonable abatement on that account, *July 18. 1739, Heritors of Calder*, (DICT. p. 15740), though the drained grounds should appear to be truly worth the rent that the proprietor had put on them in his lease to the tenant ²⁵⁸; but by a later decision, in 1759, *Fac. Coll.* ii. 175, (*Heritors of Inverness against The Magistrates*, DICT. p. 15685), grounds gained from the sea by expensive walls or fences are not subject to the least proportion of tithe. *5thly*, If the proprietor should undertake any burden which the law had imposed on the tenant, and thereby get an higher rent for his farm; if he should, *ex. gr.* by a special article in the lease, discharge the obligation which lies on the tenant, of upholding the farm-houses in good repair, such advanced rent payable to the proprietor is not subject to tithe, as it is not paid in consideration of the fruits, but of the landlord's special bargain with the tenant, *Dec. 11. 1734, Heritors of Calder*, (DICT. p. 15739) ²⁵⁹. *6thly*, As tithes are due only out of the fruits of the earth, and not from the rent of houses, which are not tithable subjects, the rent paid for the supernumerary houses,

* Where the landlord had become bound to furnish marl to his tenants without price, he was found entitled to deduction; *Fac. Coll. Feb. 23. 1785, Gordon*, DICT. p. 15765. But a contrary judgment was given, where the tenants were merely allowed to dig peats out of a moss belonging to the heritor; *Ibid. Dec. 14. 1796, Munro*, DICT. p. 15771 ²⁵⁷.

²⁵⁷ This case seems more properly to fall under Rule 2. as to mosses. *Vid. supr. not* ²⁵⁵.

²⁵⁸ It appears from the reports of this case, that instead of "a reasonable abatement," merely, being allowed, the lands recovered from the loch were "found not liable to teind;—and that not only while the subject remained with the original drainer, by personal exception, till he should be repaid his expence, but that the exception was competent to the singular successor for ever;" *Kilk. v. TEINDS*, No. 2., DICT. p. 15657; 2. *Fol. Dict.* 441., DICT. p. 15740; 1. *Connell, (Tithes)* 309.

In improvements of a less extraordinary kind, draining and inclosing are, agreeably to the text, sustained only as grounds for "reasonable abatement;" *Trotter, 7th July 1736, Elchies, v. TEINDS*, No. 3.; *Kilk. Maxwell, 6th Feb. 1745, DICT.* p. 15744, *Elch. ut supr.* No. 21.; *Fac. Coll. E. of Selkirk, 8th Dec. 1802, DICT.* p. 15778; *Ibid. Scott, 5th Feb. 1806, DICT. v. TEINDS, App.* No. 14.; 1. *Connell, (Tithes)*, 309. The rate of deduction seems to be fixed, by a late decision, at 7½ per cent., on the sums expended on improvements, "for seven years prior to the process of valuation, but no longer;" *Fac. Coll., Smyth, 17th Dec. 1817.*

²⁵⁹ Reported also by *Elchies, v. TEINDS*, No. 1. And see to the same effect, *Skene, 16th Feb. 1737, Ibid.* No. 5; 1. *Connell, (Tithes)*, 311.

houses, over and above what is necessary for the farm, is to be deducted from the rent-roll in the valuation, *ibid* ²⁶⁰. 7thly, Mill rent must also be deducted from the rental, both because the profits arising from mills are merely industrial, and so not tithable; and because corns manufactured at mills suffer a valuation, in fixing the rent payable by the tenant whose corns they are, and therefore ought not to be valued against the titular a second time in the valuation of the tithe, as mill-rent. This rule is without doubt equitable, where no greater hire is payable to the milturer than is adequate to his labour in grinding the corns; but a proprietor may, under that colour, cut off the titular from the greatest part of the tithes due out of his lands, by subjecting the tenants to heavy rates of milture; for the rent paid by the tenants to the landlord must by that device be made considerably less than what the lands are truly able to bear; and the whole difference of rent which is thus thrown on the mill, is by this rule lost to the titular; see *Falc. Feb. 6. 1745, Sir J. Maxwell*, (DICT. p. 15744 and 16022) *²⁶¹. Lastly, Neither is the tenant's obligation to relieve his landlord of the land-tax to be considered in the valuation of the tithe, as an increasing of the rental, because the rate imposed by parliament on that score is liable to constant variations, and the endurance of the tax itself is not absolutely certain, *Dec. 2. 1730, Baillie*, (DICT. p. 15738), stated in (Folio) *Dict. ii. p. 440* †. The general rule, in which all the others relative to this head must centre, is, That where the lands are in the manurance of the proprietor, the tithe is a fifth part of that rent which they are truly worth, and might have paid had they been rented to a tenant; and when they are actually let, it is a fifth of the rent which they now pay, and may pay in all time coming, in consideration of the fruits † ²⁶³.

33.

* By this decision, the deduction was allowed; but it has been rejected in later cases; *Jan. 14. 1784, Sinclair*, mentioned in *Fac. Coll. Feb. 8. 1786, Earl of Kintore*, DICT. p. 15766 ²⁶¹.

† The same found, *July 14. 1747, Clark*, DICT. p. 15747.

‡ Accordingly, where an estate is let to a general lessee at an undervalue, the rent paid by the tenants to him, and not that which he pays to the landlord, must be the rule in valuing the teinds; *Fac. Coll. Feb. 25. 1795, Leslie*, DICT. p. 15770 ²⁶².

²⁶⁰ But see *contra, Fac. Coll. E. of Selkirk, 8th Dec. 1802, DICT. p. 15778*; 1. *Connell, (Tithes), 304*.

²⁶¹ That mill rents form a proper ground of deduction was decided, *Fac. Coll. Kincaid, 26th June 1771, DICT. p. 15756*; *Ibid. Fullerton, 22d July 1772, DICT. p. 15762*; 1. *Connell, (Tithes), 305*; and "as miltures are not teindable, so if without fraud they are paid as a dry milture to the heritor, and therefore no milture paid at the mill, but only knaveship, &c. for the miller's service, it ought also to be free: But if, to elude the teind, the heritor takes what truly are farms, payable in name of dry milture, that ought not to be deducted;" *Minister of Cushney, 22d July 1752, Elchies, v. TEINDS, No. 34*.—Deduction was allowed for a dry milture; *Heritors of Calder, 5th Feb. 1735, Elch. Ib. No. 1*. And again in the case of *Maxwell*, referred to in the text, and reported also by *Elchies, supr. No. 21*. See, however, *E. Kintore, not. **, where it was decided that a landlord taking an additional rent from his tenants, "in consideration of his relieving them from a milture," is not entitled to deduction.

²⁶² It would rather seem from the body of the report, that the Court did not adopt "the rent paid by the tenants," but reserved generally "to lead a new proof of the value." Compare the above case with *Fac. Coll. E. of Cassillis, 16th Dec. 1795, DICT. p. 14826*, where, in the case of lands let *bona fide*, and for an adequate rent at the time, on a lease of three nineteen years, the rent paid by the principal lessee, and not that received by him from the subtenant, though more than thrice the amount, was held the proper rule. See also 1. *Connell, (Tithes), 300*.

²⁶³ It is the rent payable by the subsisting lease at the date of valuation, and not what was paid at the commencement or in the course of the process, which the Court regards;

BOOK II.

Parsonage and vicarage teinds, when separately valued.

Court of session their powers as a commission for the valuation and sale of teinds.

33. Where the vicarage of a church is a distinct benefice from the parsonage, each belonging to a different titular, the parsonage and vicarage tithes are to be valued severally, 1633, C. 19. In this case, the yearly sum to which the vicarage is to be estimated on a proof, is to be held as the valued vicarage tithe-duty; and upon a deduction of this sum from the fifth of the rent of the lands, which is the legal value of the whole tithe, parsonage and vicarage, the remaining sum is the valued parsonage tithe duty, *Fount. Jan. 29. 1706, E. Galloway*, (Dict. p. 15736.). The rule fixing the rate of tithes which are valued jointly with the stock to a fifth part of the constant rent, is limited to questions brought before the commission-court between the proprietor and titular. Where the titular is not a party, the court of session, who are not fettered by any rules prescribed by the aforesaid decrees-arbitral, have justly raised the price of the tithe to what they judge to be the true value of it, *viz.* to a fourth part of the rent payable for stock and tithe, *Dalr. 29, (Hope against Heirs of Balcomie, Dec. 10. 1701, Dict. p. 15736).*

34. For carrying the decrees-arbitral in all their branches into full execution under the authority of a proper court, a commission was appointed by 1633, C. 19.; with power to the commissioners to value and sell tithes, and to name subcommissioners for valuing them over all the parishes and presbyteries of the kingdom; to receive reports from the subcommissioners that had been first named by the King in 1627, of the valuations taken before them, and to allow or disallow the same; and to rectify all valuations led or to be led, which should appear hurtful, either to the titular, to the maintenance of the ministers, or to the King's annuity. Valuations of the greatest part of the lands over Scotland had been completed under the authority of the commissions of 1627 and 1628, by their subcommissioners; but unfortunately many of them were lost, *first*, by the carrying off of the whole records of the kingdom to England, during Cromwell's usurpation, of which the greatest part perished in the vessel that was bringing them back to Scotland after the Restoration; and *2dly*, by the great fire in the Parliament Close in 1700, which consumed the records of the tithe-office. Of the subvaluations that have been preserved from those calamities, few appear to have been approved of by the principal commissioners. This afforded a pretence for titulars to object, that as the powers of the subcommissioners were barely ministerial, to take trial of the values, and to report, their reports could have no effect till they had received the approbation of the principal commissioners. But the court of session, as commissioners of tithes, considering that the subcommissioners had express powers given them to value, and that the approbation of the principal commission passed of course, where no objection was immediately offered against the report of the subcommissioners, have supplied that defect in form; and by reiterated decisions,

Falc.

regards; *Fac. Coll. Dalrymple, 3d July 1771, Dict. p. 15759; Minister of Inceh. 4th July 1810, observed, 1. Connell, (Tithes,) 301*; nor does it alter the rule, that the lands were formerly in the natural possession of the proprietor, and only let to a tenant *pendente lite*; *Fac. Coll. Campbell, 21st June 1815.* Where the lands are possessed by tacit relocation, it matters not though it be ascertained that they "would let at a great increase of rent, upon a lease of the ordinary duration," the valuation is still regulated by the rent actually paid at the time; *Ibid. Carrick, 19th Dec. 1804, Dict. p. 15732.* Where lands are let on a lease terminating at Martinmas as to the arable part, and at Whitsunday as to the grass, and where a new lease has been let after Martinmas, but before the Whitsunday, it is the rent in the new lease that is the rule of valuation; *1827 Glassford, 12th Jan. 1814.*

Falc. i. 139, &c. (July 30. 1746, *Murray against Blantyre*, Dict. p. 15746), have, in the character of principal commissioners, approved those valuations, agreeable to the powers granted to the commission in 1633, and now vested in the session by 1707, C. 9. The last of these judgments was affirmed upon appeal, in the case of the Duke of Montrose, *March 15. 1758*, (Dict. p. 10675). But when a proprietor appears to have deserted or innovated such valuation, by accepting a lease of his tithes from the titular, for a higher or even for a different tack-duty from that in the valuation by the subcommissioners, he cannot afterwards take the benefit of it, or set it up as a defence against the titular insisting for the full tithe, *Jan. 24. 1753, Presb. of Kirkaldy*, (not reported); *Fac. Coll.* i. 69, (*Morton against Officers of State, Feb. 28. 1753*, Dict. p. 10672) *²⁶⁴.

35. In actions of valuation brought before the session as the commission-court, the titular or his tacksman, and the minister of the parish, must be made parties to the suit; for both have an interest in it; the titular, that the tithe be not valued too low, because all the tithes belong to him after payment of the minister's stipend; and the minister, because the more tithes there are in a parish he is the better secured in his stipend, and in a fund for future augmentation †. Where an action of valuation is brought during

Who must be made parties in the action of valuation.

* The Court gave judgment to the same purpose, *Fac. Coll.* iii. 191, *Feb. 1. 1764, Maxwell against University of Glasgow*, Dict. p. 10692. It is a settled point, that a subvaluation may be cut off, or, as it is commonly expressed, *derelinquished*, by an overpayment to the minister, as well as to the titular, being equally incompatible with its validity as a legal valuation of the teinds; *Fac. Coll. Feb. 8. 1797, Heritors of Blairgowrie*, Dict. p. 15771, and the authorities there quoted. A similar decision was given at the same time, in a question between *Lord Dundas* and the *Minister of Balin-gry*. See note, *Ibid.* Where the subvaluation had been made in virtual, dereliction will not be inferred from payment of money to the minister, of equal value; *Fac. Coll. Feb. 4. 1795, Fergusson*; affirmed on appeal, *Feb. 15. 1797*, Dict. p. 15768²⁶⁴.

† The Court do not require the same regularity to appear in the reports from sub-commissioners. The rule is, *Omnia præsumuntur rite et solemniter acta*, unless the contrary appear. In one case, the Court refused to approve of a report, where, without taking any proof, the subcommissioners had proceeded on the consent of the heritors and patron, without that of the minister; *Fac. Coll. Feb. 4. 1795, Fergusson*; affirmed on appeal, *Feb. 15. 1797*, Dict. p. 15768. But there the minister, as parson, was titular of the teinds; and from the proceedings it appeared that he was no party. See *Fac. Coll. March 7. 1798, Sir William Erskine, &c.* Dict. p. 15772; and *June 3. 1801, Macneil*, Dict. App. I. voce TEINDS, No. 12²⁶⁵.

The action of valuation, though generally pursued by the heritor, may yet be competently brought at the instance of the minister of the parish. Indeed, it appears from 1633, c.19., that a valuation of the teinds of the parish was an indispensable preliminary

²⁶⁴ Dereliction of a subvaluation is not always inferred, even from a long course of overpayments. Thus, where repeated protests had been taken, "that payment should infer no homologation," "the Court held, that, as in every case which depends on the principle of presumption, attention must here be paid to the nature, the effect, and constancy, of the approbatory acts, which are to mark the opinion entertained by the party of the extent and validity of his right; and upon the whole circumstances, they were clear that dereliction had not taken place;" *Fac. Coll. Edmonston, &c. 18th Feb. 1807, Dict. v. TEINDS, App. No. 15; 1. Connell, (Tithes,) 378.*

A decree of the High Commission cannot be derelinquished; *Ibid. Maxwell, 3d July 1816*; but where the minister had already acquired right to the overpayments by positive prescription, before the subvaluation was approved by the High Commission, this subsequent approbation will "be limited and qualified by said prescriptive right;" *Ibid. Locality of Maderty, 9th July 1817.*

²⁶⁵ In the case of *Sir Wm. Erskine, &c.* "the Court, chiefly upon the ground that the citation of the minister was to be presumed," 1. *Connell, (Tithes,) 429*, approved of the subcommissioners' report, and repelled an objection that it did not bear the minister to have been a party. In that of *Macneil*, it was positively decided not to be a good objection, that the minister, if a *stipendiary*, had not been cited.

during a vacancy in a church, the proprietor must cite the moderator of the presbytery as a defender. So soon as a proprietor commenced his suit against a titular who was in use to draw his tithes, he obtained of course a warrant for the leading of his own tithes. This enactment was made to encourage actions of valuation, that all landholders might get their tithes valued; but it gave rise to a device frequently practised, by which that benefit of leading each his own tithes, was frequently procured by such as the law did not intend to favour with it; for many of them commenced the action of valuation against their titular, with the sole view of obtaining an order for leading their own tithes; and after they had got that end accomplished, they let fall their process. To put a stop to this, it was provided, by 1693, C. 23, That where a proprietor who had brought an action of valuation, suffered protestation to be extracted by the titular against him for not insisting, the warrant he had got for leading his tithes should be of no force after such protestation. In this action the titular, or his tacksman, had the sole prerogative of bringing a proof of the value where he was in use to draw the tithe, partly from the favour given to possession, and partly because the titulars were by that action considered as losing a point of right which they were before entitled to, viz. the drawing of the tithe: But where the pursuer had a lease of his own tithes for the payment of a determinate duty, he was allowed a conjunct proof with the titular; because the possession or management which he had of the whole crop, tithe included, before commencing his suit, threw more favour on his side. It is now become unnecessary to enter into a discussion of the questions that may be moved on this head, since, by 1690, C. 30, the

nary to every modification of stipend; *Dec. 12. 1744, Duke of Roxburghe, Dict. p. 15741*²⁶⁶. See *Fac. Coll. June 23. 1773, Knox, Dict. p. 14809.*

²⁶⁶ It was not decided in this case, nor does it seem to be true as a general rule, that an action of valuation may be brought at the minister's instance. By the act 1633, no stipend could be modified till the teinds were first valued; and, as is observed in *Lord Kilberran's* report, "while matters stood upon the footing of that act, there is no instance of a modification without a valuation, sometimes obtained in a different process, sometimes *unico contextu*, as in this case." It was therefore held, that while the above act was in force, "the minister had power to pursue such valuation;" and the valuation in the case referred to answering this description, it was accordingly sustained. A similar decision, as to a valuation obtained in 1635, is said to have been pronounced; *Minister of Kingoldrum, 18th Dec. 1805, noticed 1. Connell, (Tithes,) 419.* But now that, under the more recent acts, there is no necessity for a previous valuation in the modifying of stipends, an action of valuation at the minister's instance is thought not to be competent. *Lord Ekshies* indeed, in reporting this very case of *Roxburghe, v. TEINDS, No. 22*, expressly says, that "that would not hold now."

Where the process, however, has been raised at the heritor's instance, and the proof actually concluded, the heritor is not entitled to relinquish or let it lie over; or, if he do, the minister may take it up, and carry the valuation to a conclusion; *Fac. Coll. Hay, 19th Feb. 1817.* It has also been observed, that "since the date of the act 50. *Geo. III. c. 84.*, commonly called the Small Stipend Act, the Court has indulged ministers" (whose stipends were below the statutory *minimum*) "with the privilege of bringing valuations, for the purpose of exhausting the free teind in their parishes, and thereby entitling them to the legislative bounty;" *1. Connell, (Tithes), 419.*

The titular of two conjoined parishes, being patron of both, is entitled as patron to state objections to the valuation of teinds, in the parish where he is not titular; *Fac. Coll. Scott, 5th Feb. 1806, Dict. v. TEINDS, App. No. 14.* But one heritor in a parish is not entitled to object against a decree of valuation obtained by another, or to insist in a reduction of such decree, even though an additional burden of stipend has thereby been thrown on his lands; *Ibid. Abercromby, Dict. Ibid. No. 8.; 1. Connell, (Tithes), 378.* A valuation, however, being once reduced at the instance of the minister or other competent party, it cannot remain effectual against any party whatever; *Ibid. Colquhoun, 15th June 1802, Dict. p. 15775.*

As to the ratification of extrajudicial contracts of valuation, *vid. 1. Connell, (Tithes,) 325, et seq.*

the proprietor is in every case allowed a joint proof with a titular in the valuation. Though every landholder has had it in his power, since the year 1633, to get the leading of his own tithes, by suing for a valuation; yet if he neglect that method of relief, he must submit to all the inconveniences of the former law, and suffer the titular to draw the tithe, unless he has procured a lease of them in the manner explained § 25.

36. Besides the two submissions by the titulars and their tacksmen, one was signed by the bishops and remanent clergy, for settling the value of the tithes, belonging either to the bishops themselves or to the ministers serving the cure at their churches. In this there was a proviso, That the submitters should enjoy the rents of their several benefices, as they were then possessed by them, whether by drawing the tithe, or receiving payment in rental-bolls, without any diminution either in quantity or quality. The only tithes therefore belonging to churchmen, which fell under the submission, and which the King had a power of valuing, were those which, as Stair explains it, *B. 2. T. 8. § 35. vers. K. Ch. I.*, were in tack, or other use of payment, and of which the beneficed persons were not then in possession by rental-bolls or drawn tithe. Accordingly his Majesty confined the award proceeding on the submission by the clergy, to the special tithes falling within the compass of it, the rate of which he declared to be the same as of those belonging to titulars; and he ordained the submitters to grant rights of them to the proprietors of the lands subjected to the payment of them, upon their giving security for that yearly valued duty. As several tithes possessed by churchmen at the date of the submission, were valued during the Usurpation, from the year 1641, downwards to the Restoration, such valuations were declared void by 1662, *C. 9.* There was a separate award, on a submission signed by the magistrates of several royal boroughs, relative to the tithes under their administration, in which the clauses fixing the rate of these tithes, and obliging the boroughs to grant rights of them to the proprietors, are the same as in the former.

37. Neither of the two last-mentioned decrees contains any provision for the sale of the tithes; for the tithes belonging to churchmen, and those granted to certain boroughs, for public and pious uses, were destined to continue as a perpetual fund for the maintenance of the clergy, or of the societies for whose use they were appropriated, which is inconsistent with their being sold. They only direct how these tithes shall be valued, and secure the proprietors of the land in the full enjoyment of their tithes, on payment of the yearly valued duty. That no doubt may remain on this article, it is declared, by 1690, *C. 30.*, That tithes belonging to ministers may be valued but cannot be sold: And the commission of tithes, which was renewed by 1693, *C. 23.*, is restrained from selling, *i. e.* authorising the sale either of tithes which belonged formerly to the bishops, and now to the King, so long as they remain in the crown, or of those granted in favour of colleges or hospitals, or for other public uses; reserving a right to the proprietor liable in payment of such tithes, to sue for a valuation of them. It is provided by another clause of the last-quoted act, That where one having acquired a right to the tithes of his own lands, shall afterwards sell or feu out the lands, either without disposing the tithes, or with an express reservation of them to himself, the purchaser or feuär may sue for a valuation, but not for a sale of such tithes; because

Submissions by the bishops and clergy, for valuing the tithes belonging to themselves; and another by the magistrates of royal boroughs.

These tithes may be valued but cannot be sold.

Book II.

because the seller who had an equal title to both, and who has in the sale of the lands reserved the tithes to himself, or has not expressly disposed them, ought not to be compelled to sell them, more than a superior can be, to sell his feu-duties, or any other interest in the lands, excepted from, or not included in the feu-grant*.

Where teinds are sold, the titular must infest the purchaser, and give him absolute warrandice.

38. A proprietor, who has got his tithes valued by a decree of the commission-court, is bound, if the titular require it, to infest him in the lands, in security of the yearly valued duty, *Mack. § 16. h. t. †*. Where tithes are sold, either judicially, in consequence of an action of sale, or voluntarily by the titular, the purchaser's right is perfected by a conveyance of them granted by the titular, containing precept of seisin. The purchaser is by this grant burdened with all future augmentations of stipend, and with all impositions laid, or to be laid, on the subject made over; and the seller is, by the decree-arbitral, laid under no obligation to warrant his right, except from the facts of himself and his ancestors. But as equity suggests, that a seller should, in every case where he receives value for his right, grant absolute warrandice, in so far as extends to the price paid to him by the purchaser; therefore the settling of the securities, both in regard of the purchaser, that he may have a valid right, and of the titular, that he may be secured in the payment of the price, is, by 1633, C. 19., left to the discretion of the commissioners appointed by that statute. In practice, absolute warrandice is always granted by the titular, to the extent of the price paid by the purchaser²⁶⁷.

Annuity of teinds settled by the commissioners upon the crown.

39. In compliance with the demand of Charles I., that the crown should be entitled to an annuity out of all erected tithes, a commission appointed by him in 1627, declared, that particular yearly sums specified by them, should be paid to the crown out of every boll of teind-grain, and out of every hundred merks Scots of silver-duty, by way of annuity. An act of convention of estates, July 1630, authorised letters of horning for the more effectual levying of it; and the crown's right to it was ratified by 1633, C. 15. All tithes paid to ministers on account of stipend, and to colleges, schools, or hospitals, are, by that statute, exempted from the annuity. But if the whole of the tithes granted to boroughs for the sustentation of colleges, &c. shall exceed the sums expended by them for the purposes of the grants, the surplus of excrement is, by the decree-arbitral relative to the boroughs, subject to that burden. Though some lawyers seem to be of opinion, that this right of annuity is due only out of valued tithes, *St. B. 2. T. 8. § 13.*; *Bankt. B. 2. T. 8. § 156.*; the above-quoted act, 1633, expressly declares, That it is payable out of all tithes, unvalued as well as valued. Mackenzie affirms, § 20. *h. t.*, that the annuity is *debitum fundi*; because the statute declares, that the King shall have right to all the annuities of tithes, past and future; from which he concludes, that it is a real burden imposed on tithes by statute: **Yet, since**

* See on this point, *July 2. 1746, Muir*; reported by *Falc. I. 126*, and by *Kames, Rem. Decis. No. 77, Dict. p. 10820*.

† It seems now to be held, that the doctrine here laid down, on the authority of *Sir George Mackenzie*, is not well founded. The Court refused to direct infestment in favour of the titular; *Fac. Coll. Feb. 27. 1793, Scott, &c. Dict. p. 15696*.

²⁶⁷ As to the interpretation and effect of clauses of warrandice, in conveyances of teinds, *vid. supr. t. 3. § 29. not. 40*; *infr. h. t. § 52.*; *2. Connell, (Tithes,) 469, et seq.*

since the tithe itself is admitted by all to be *debitum fructuum, infr.* § 42., it is not so obvious how a law declaring the crown's right to the annuity, which is a certain proportion of the tithe, should have the effect to alter the nature of that proportion. As the annuity was declared by the aforesaid act not to be annexed to the crown, the King might dispose of it at pleasure; and he actually made a grant of that right, to one Livingston, in security of a debt of L. 10,000 Sterling. Livingston transferred it to the Earl of Loudon; who obtained a commission from the crown, after the Restoration, to transact for the arrears then due, and dispose of them with consent of two Lords of Exchequer; and several annuities were purchased in consequence of it. But a stop was put to the farther progress of that commission, by a warrant of Charles II. in 1674, *St. B. 2. Tit. 8. § 13.*; and the annuity has not been demanded, either by our Kings or their donatories, since that time.

40. A due attention to the history of tithes, a summary of which has been here attempted, must contribute much towards a distinct knowledge of their nature: It still remains to add some observations on the same subject, which could not have been made before, without too much interrupting the thread of that history. Tithes were, by their original constitution, a subject quite distinct from lands; for they did not belong to the owner of the lands, but to the church. The rights of the two were also constituted differently. The lands themselves passed by seisin, but churchmen enjoyed their tithes *ex lege*, both before and since the Reformation: Their right was a necessary consequence of their being invested with their several church-offices; and so no form of law was required to the perfecting of it. When indeed entire church-benefices, belonging to religious houses, were, after the Reformation, erected into temporal lordships in favour of laics, the grantees completed their titles, not only to the temporality, but to the tithes or spirituality of the erected benefices, by seisin; because the tithes became by those erections, proper feudal subjects, and the charters of erection feudal grants. For this reason, the conveyance of these tithes by the titulars to others must also be by disposition, containing precept of seisin: But a right to tithes at this day, even to laymen, when it is conferred, not by special grant or erection, but by statute, is perfected, *ex lege*, or without seisin. Thus, the tithes granted to patrons by 1690, *C. 23.*, which is soon to be explained, are fully vested in them without seisin; but when these tithes are transmitted by the patron to others, they must, like erected tithes, pass by seisin. Though landholders may now, in the general case, compel titulars to sell them the tithes of their own lands; yet lands and tithes are to this day accounted separate tenements, and pass by different titles; insomuch, that a right to lands, though granted by one who has also right to the tithes, will not carry the tithes, unless it shall be presumed, from special circumstances, that a sale of both was intended by the parties, *Stair, Feb. 27. 1672, Scot.* (Dict. p. 15638); *Fount. June 29. 1698, Callander.* (Dict. p. 15649)²⁶⁸.

41. The thirlage of lands could not, in the times of Popery, infer the thirlage of the tithes; for the landholder, though he might astrict the lands which belonged to himself, had no power over the tithes

When the right to tithes is vested *ex lege*, and when seisin is necessary to vest it.

In what cases thirlage of the lands imports an astriction of the tithes.

²⁶⁸ See another case, where this presumption was sustained; *Kilk. Dunning, 5th July 1748, Dict. p. 15659; Elchies, v. TEINDS, No. 26.*

tithes which belonged to the beneficiary. But where the same churchman had right both to stock and tithe, without having separated the one from the other, the tithe was truly included in the stock; and for that reason, the thirlage of the lands extended to the tithe of these lands. And this must also be the necessary effect of the thirlage of lands *cum decimis inclusis*, by our present law. No servitude can be enlarged, or made more burdensome, than it was in its first constitution, by any supervening law or accident, which does not infer the consent of the owner of the servient tenement to bear such additional burden, *supr. Tit. 9. § 33, 34*. The astringion, therefore, by a proprietor of his lands to a neighbouring mill, while he had as yet no right to the tithes, cannot be made heavier by his afterwards purchasing his tithes, so as to include both stock and tithe under the servitude; for such acquisition by the proprietor of the servient tenement, posterior to the constitution of the servitude, is not to be presumed to have been made for the benefit of the dominant, or to subject the acquirer himself to a burden directly contrary both to his own intention in the purchase, and to the nature of his right. Hence a thirlage constituted on the lands alone, before the year 1633, was construed not to extend to the tithes, after passing the act of that year, which granted to landholders a right of purchasing their own tithes, nor even after the landholder had actually purchased the tithes from the titular in virtue of that statute, *Durie, July 7. 1635, L. Innerweik*, (Dict. p. 15972). But if one who has already purchased his tithes, and who of course carries his whole corns to the same mill, without distinguishing between stock and tithe, shall afterwards astring his lands, it may be justly presumed the intention of parties that the astringion should reach to both. Nay, where a superior had by his charter astringed the *grana crescentia* of his vassal to the mill of the barony, the vassal's use of carrying the whole corns of his lands for forty years together to that mill, without demanding any abatement on account of the tithe, was adjudged sufficient to infer the astringion of the whole of his corns, though the tithe had never belonged to the superior who constituted the thirlage, *July 5. 1727, Macleod*, (Dict. p. 10874), observed in (Folio) Dict. ii. p. 107.

Teinds are *debita fructuum* not *fundi*.

42. The tithe is a proportion only of the fruits, and is therefore *debitum fructuum* not *fundi*. Hence the arrears of tithe create no real burden or charge on the lands, and so have no operation to the prejudice of singular successors. Nor could churchmen suffer by this doctrine; for they had the same right to draw the tenth sheaf, which was their proportion of the fruits, from the several crops of which they were the product, that the owner of the lands had to the property of the residue, or of the stock; and so might make their right effectual without the aid of any real security. And tithes even after valuation continue to be *debita fructuum*; for the valuation does no more than ascertain the value of the tithe, without altering its nature, *Stair, Feb. 20. 1662, E. Callander*, (Dict. p. 15632); unless where the valued tithe-duty is secured to the titular, by his taking seisin of the lands²⁶⁸. The action, therefore, competent to the titular, for recovering the arrears of tithe-duties, is only personal against those who have intermeddled with them, whether it be the owner of the lands himself, or tenants under him. Where the tenant who intermeddles is bound by his lease to pay a separate duty for the tithe, he is without all doubt liable; for he ought to have

²⁶⁸ *Vid. supra, § 38. not. †.*

have paid that duty to the titular who alone had right to it ; but where he pays a duty for stock and tithe, without distinguishing the rent of each, he may plead that he has already paid the whole tack-duty to his landlord *bona fide* ; because he could not possibly distinguish between the rent due for the tithe, and that which was due for the stock. This plea has been overruled in a question with church titulars or ministers, whom the law specially favours, *Durie, Feb. 19. 1629, Kirk, (Dict. p. 14786)*; but sustained when the pursuer was a lay titular, *Ibid. March 21. 1628, Murray, (Dict. p. 1780)*. The landlord who receives a joint duty from his tenant for stock and tithe is in every case liable to the titular as intromitter : And even when he lets his land to a tenant for a determinate duty, without mentioning either stock or tithe, he ought to be liable, if it appear that the tack-duty payable by the tenant is adequate to the rent which might reasonably be expected for both ; because, in such case, he is truly intromitter with the tithe in and through his tenant. But if the proprietor, conscious that the tithe belongs to another, lets his land merely for the rent which the stock will bear, his defence is stronger, that he only let to the tenant the interest that he himself had in the lands ; and that if the tenant has inter-meddled with the tithe, he did it without any authority or warrant from him ; see *Kames, 86, (Campbell against Murray, June 1726, Dict. p. 14792)*.

43. If tithes are a debt arising out of the fruits, it follows, that no tithe can be due where there are no fruits. Hence a landholder who turns his lands into grass, without any fraudulent intention to hurt the titular, is not liable to him in any sum, as a *surrogatum* in place of the parsonage-tithes. The titular's right to the tithes cannot impair the landholder's right of property ; in virtue of which he may, as has been already observed, *T. 9. § 24*, use his lands in the manner most profitable or convenient for himself. It only lays him under an obligation to pay the legal proportion of corns to the titular, when his lands produce corn, *Dirk. 355 ; (Burnet against Gib, June 9. 1676, Dict. p. 15640) ; Fount. Jan. 21. 1696, Bruce, (Dict. p. 15648)*⁴⁶⁹.

44. The churchman, or titular hath a right of hypothec upon the fruits, in security of his tithes ; which, when applied to parsonage-tithes, is of the same general nature as the hypothec on the corns for the landlord's rent. But the titular has no hypothec on the horses, oxen, ploughs, and implements of husbandry brought on the ground, or on the other *investa et illata* ; because he is not proprietor of the ground. The doctrine which is maintained by some writers in too general and indefinite terms, that this hypothec extends to all tithable subjects, ought to be understood with some limitations. Where indeed a merchant buys the crop on the ground, either before it is reaped, or while it lies yet in the fields, though at a public sale, he is liable for the tithes ; because every man ought to know, that a tithe is due out of the product of all lands ; and must presume, that it is not drawn by the titular, so long as the crop is not carried off ; see *Stair, June 24. 1662, Vernor, (Dict. p. 14788)*. And for a like reason, a buyer of tithable fish newly caught was condemned to pay the tithe, *Ibid. Dec. 13. 1664, Bish. of Isles, (Dict. p. 15683)*. But where corns are bought

Hence no tithe is due where there are no fruits.

Titular's hypothec for his tithes.

⁴⁶⁹ Vid. 1. *Connell, (Tithes,) 307 ; 2. Ibid. 444.*

bought in a public market, the buyer's plea is good, that he had no reason to suppose that the tithe had not been already drawn, *Ibid.* Dec. 20. 1664, *Reid*, (DICT. p. 15634). There can be no hypothec for tithes after valuation; for landholders whose tithes are valued, have the entire management of the whole crop, which is inconsistent with a right of hypothec; and hence it follows, that that right is competent to such churchmen or titulars only as have the drawing of the tithes.

Tacit relocation of tithes, and inhibition of tithes.

45. Where tithes are let to the landholder for a fixed number of years, the tacksman may, on the expiration of the lease, continue to possess for the former tack-duty by tacit relocation, if the titular shall not then declare his intention of removing him. As in a lease of lands, the landlord signifies his resolution to remove the tacksman by a warning, which interrupts tacit relocation, the titular expresses the same intention by an inhibition of tithes; which is a writ, issuing either from the signet, or from the commissary court, at the suit of the titular*; by which not only tacksmen and possessors, but all persons whosoever, are interpellated from meddling with the tithes. This writ therefore does not mention any particular defenders, as summonses do, and so is executed only edictally against all and sundry. An inhibition of tithes, as it interrupts tacit relocation, entitles the titular to an action either for declaring his right to a fifth part of the rent of all subsequent years, in place of the former tack-duty, or for a warrant to draw the tithes *ipsa corpora*. And if the tacksman, or any other, continue to possess the tithe, after the inhibition is executed, he is liable in a spuilzie †. This kind of inhibition therefore differs much

* Inhibition of teinds can be used only by a proprietor, or one who has a proper title to enter to the possession²⁷⁰; *Fac. Coll. Nov. 26. 1760; United Colleges of St Andrew's, DICT. p. 15344.*

† It has been found, that citation, in an action at the instance of the titular against the landholder possessing the tithe by tacit relocation, concluding for payment of a yearly sum as the supposed amount of the free tithe, did not subject the landholder to a higher payment than the former tack-duty, though the Court at the same time subjected the landholder to payment of the full tithe from the date of their interlocutor; *Nov. 14. 1765, E. March contra Leishmans, DICT. p. 15324.* Lord Kames reports a case, *Earl of Selkirk, Dec. 7. 1763, DICT. p. 15324*, where the Court is said to have found citation in an action for bygone sufficient to interrupt tacit relocation: But this is not a correct account of the decision; for the Court, upon a reclaiming petition, found the titular's right to commence from their first interlocutor by which that right was ascertained. The Court have since, upon a most mature deliberation, assoilzied from bygone teind-duties up to the date of the final judgment of the Inner-House; *Fac. Coll. Feb. 25. 1795, Sir John Scott, DICT. p. 15700*²⁷¹.

In an action for bygone teind-duties, it is only the actual proven teind of each year that can be demanded. The *surrogatum* of one-fifth part of the real rent cannot be admitted in such a case, as in a regular action of valuation; and even when the tithes are valued, the decree can operate only from its own date; *Fac. Coll. Feb. 20. 1799, Lady Christian Graham, DICT. p. 11063.*

²⁷⁰ That is to say, it is inept at the instance of a party merely asserting a right, and who has brought no process for ascertaining that right.

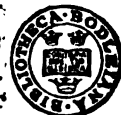
²⁷¹ The principle of decision in this, and the subsequent case of *Lady C. Graham*, has nothing to do with tacit relocation; though, like it, it rests a good deal on the *bona fides* of the party liable in teind. Had tacit relocation applied, or had the defender's title of possession depended in any measure on a lease of his teinds, there could have been no difficulty in ascertaining the value of the bygone teind-duties, as that would have appeared from the rent stipulated by the lease; while the question of payment, again, would most probably have been decided on the same principles as in other actions for rents. But in the two cases referred to, the defender had neither a lease of his teinds, nor any other proper right to them; and, the question arising as to the extent of the titular's claim, it was observed on the bench, "that claims for arrears of teinds are extremely unfavourable. If the demand had been made in proper time, the hori-

"tors

much from an inhibition of lands; which, as shall be explained next title, is a diligence that lays a real embargo on the subject, and so must be registered before it can interpel singular successors from purchasing; whereas inhibition of tithes serves merely as an intimation by the titular, to stop any farther intermeddling with them; and so needs only to be published in the parish where the lands lie. A bare inhibition of tithes gives no right to the titular to turn any person out of possession: For as warning used against a tenant is not a sufficient ground for the landlord to remove him summarily, without a previous decree of removing; neither can a titular, even after inhibition, debar his tacksman, or any other who had been formerly in the lawful possession, from retaining it, till he be authorised to turn him out by the sentence of a judge, without incurring a spuilzie, *Stair, Jan. 27. 1665, L. Bearford, (DICT. p. 1817).*

46. This title may be concluded with an account of the provisions of stipend made by law for the maintenance of the Reformed clergy, and of the other legal rights and privileges to which parochial ministers, or their executors, have been entitled, after all the former expedients enacted for their support had proved ineffectual, in the manner related, *supr. § 17, 18.*—Besides the other powers granted to the commission of tithes, by 1633, *C. 19.*, they were authorised to modify reasonable stipends to the parochial clergy out of the tithes, *supr. B. 1. T. 5. § 21.* By a former commission, which had been appointed by parliament for the same purpose; 1617, *C. 3.*, the lowest rate of stipend that was to be modified to any minister was 500 merks Scots, or five chalders of victual, unless where the whole fruits of the benefice fell short of that quantity; and the highest was 1000 merks, or ten chalders of victual*. By the act 1633, *C. 8.*, the *minimum* was raised to eight chalders of victual, where victual-rent was paid, or proportionally in money; which proportion is, by a posterior clause in the statute, declared to be 800 merks, unless where there shall be a reasonable cause for giving less⁷². But neither that, nor any subsequent commissions of tithes, were limited, as to their powers of altering the old *maximum* fixed by the act 1617. And therefore, now that the expense of living is so much heightened, the commission-court exercise

Modification of teinds for ministers' stipend.—*Quantum* of stipend.



* Victual is the name given in our law to any sort of grain or corn; and a chalder of oat-meal is sixteen bolls, at eight stone weight to each boll.

“tors would in all probability have purchased their teinds. Any title of possession, therefore, sufficient to put them *in bona fide* to suppose that they were not liable to a claim of this nature, is always sustained as a valid defence against it.”—“Even when the heritors have no such defence, it is always very difficult for the titular, in an action for arrears, to ascertain the extent of his right. It is incumbent on him to establish what was the actual amount of the teinds in each year; for he is not entitled to substitute in its place those calculations and conversions which have been introduced in favour of heritors in processes of valuation.” It was on this last principle, and in respect “that the pursuers did not now offer to prove the annual value of the teinds previous to the decree of valuation,” that judgment was pronounced in *Lady C. Graham*. It was on the principle of a colourable title of possession, that judgment was pronounced in *Sir John Scott*. Where there is no colourable title of possession on the part of the heritor, and where the titular can prove the actual amount of the teinds “for each year,” during which he claims arrear, it is thought the issue might be more in his favour.

See on the subject of tacit relocation, 2. *Connell, (Tithes,)* 439; and on that of arrears of teinds, *Ibid.* 445.

⁷² By 50. *Geo. III. c. 84.* the minimum stipend is now fixed at “a yearly amount or value of L.150 Sterling.” Where there are not teinds to pay this amount, the deficiency is made up from a sum yearly “set apart and appropriated in the hands of his Majesty’s Receiver-General and Paymaster in Scotland, out of the public revenues.”

exercise a discretionary power of augmenting stipends considerably above that *maximum*, where there is enough of free tithes in the parish. The reasons which chiefly move the court to grant augmentations are, that the parish is a place of more than ordinary resort, or that the cure is burdensome, or that the necessaries of life give an high price in that part of the country, or that the scanty allowance of stipend in that parish bears too small a proportion to the weight of the charge ²⁷³ *.

74.

* The Court of Commissioners of Teinds, for a long time subsequent to the commission 1707, refused to grant a second augmentation of any stipend which had been once augmented since the date of that commission. This judgment, in particular, was pronounced, *Aug. 4. 1779, Milligan contra Heritors of Kirkden*, Dict. p. 14816. And notwithstanding a reversal in the House of Lords, *July 8. 1784, Dict. p. 7479*, the Court again decided as they had done in the case of *Kirkden, Fac. Coll. Dec. 29. 1786, Mitchell contra Heritors of Tingwall*, Dict. p. 14817; but this judgment was in like manner reversed, and the cause remitted back to the court of commissioners for consideration, *May 22. 1789*. Since that period, the point is no longer considered as matter of doubt, the Court having, in cases without number, granted re-augmentations suitable to the circumstances of each parish. See *Minister of Prestonkirk, Feb. 3. 1808, Dict. App. voce STIPEND, No. 6* ²⁷⁴.

The steps for obtaining a modification or augmentation of stipend, like other proceedings

²⁷³ How far should the possession of a glebe of extraordinary extent, or of lands which have been mortified and attached to the benefice, affect the minister's claim to an augmentation? In general, the principle laid down by the Court in *Buitle, 22d Nov. 1809*, observed in a note to *Minister of Old Deer, 23d Nov. 1808, Fac. Coll.*, would appear to be correct; viz. "That if the glebe had as usual been designated from the heritors, it ought to be taken into consideration; but if what was called glebe had been given *abunde* by way of mortification, it ought not to be considered, because that would be frustrating the intention of the granter, who meant it as an *addition* to the legal provision of the minister." In the particular case, the Court did not think the excess of the value of the glebe sufficiently considerable to affect materially the augmentation, so that there was no proper decision on the point. But the principle was afterwards given effect to, *Kennedy, 9th Dec. 1818, Fac. Coll.*; where, there being no trace of the glebe's having been designated out of the lands of the heritors, the Court deemed it an irrelevant consideration, that "the glebe happened merely to be larger than usual." The case of *Allan, 23d Jan. 1811, Ibid.*, is not a conflicting authority, having been decided on specialties, which at once reconcile it to the general rule. The mortification was not there granted to "the minister of an existing parish." On the contrary, the object of the parties was to have an additional church; "towards the stipends" whereof they accordingly mortified certain lands. In consequence of this, a new parish was erected, and the mortification was found so very considerable, as of itself to be "sufficient for the endowment of the minister." In these circumstances, which took the case altogether out of the common situation, the Court held, "that the teinds were liable only *subsidiarie*, in so far as the mortified fund was not sufficient." And it afterwards turning out that the minister was "already sufficiently provided," the augmentation was refused.

²⁷⁴ This matter is now regulated by statute as follows:—"1st, It is not competent to augment or modify any stipend which shall have been augmented or modified prior to the passing of this act (30th June 1808,) until the expiration of 15 years from and after the date of the last final decret of modification of such stipend;" *Stat. 48. Geo. III. c. 138. § 1.* 2d, "No stipend which shall be augmented or modified by a decree, after the passing of this act, shall be again augmented or modified until the expiration of 20 years from and after the date of such decree of modification thereof: Nor shall any such stipend be augmented or modified, at any future period, until the expiration of 20 years from and after the date of the last decree of modification thereof respectively;" *Ibid. § 2.* 3d, In processes called in Court prior to 12th March 1808, and still continuing in dependence at or after the passing of the act, "it shall be competent to the pursuer either to suspend the same until 15 years have elapsed from the date of the last preceding decree of modification, or to prosecute the same to a conclusion forthwith;" but "if the stipend in any such depending case shall be augmented, or modified, by a decret after the passing of this act, the same shall not be again augmented or modified," excepting from 20 years to 20 years, as in case second, *Ibid. § 3.*

In interpreting the words of this statute, it has been decided, 1st, That the "last final decret of modification," implies not the interlocutor originally granting the modification, but the interlocutor ultimately adhering to that one, and closing the litigation: And, 2d, That the words, "it shall not be competent to the Lords of Session to augment," imply, that it shall not be competent to commence the action, by citation of the party; *Daun, 6th June 1810, Fac. Coll.; Minister of Strathmiglo, 18th Dec. 1811, observed 2. Connell, (Tithes,) 133.*

TITLE X.

Decree of modification and locality.

47. Where a determinate quantity of stipend, either in money or corns, is modified to a minister out of the tithes of the parish, without proportioning the stipend among the several landholders, the decree is called *of modification*: But where that *quantum* is also localled or proportioned among the different landholders liable in the stipend, it is styled a decree *of modification and locality*. The whole tithes of the parish, out of which the stipend is modified, are understood to be a security to the minister, till, by a decree of locality, the proportions payable by each landholder be ascertained. Where therefore a stipend is only modified, the minister may single out any proprietor he shall think fit, who will be liable in the first instance, in so far as his tithes extend; though that should exceed the quota of stipend which might justly fall to his share, in proportion with the other landholders in the parish, *Stair, Dec. 3. 1664, Hutcheson, (Dict. p. 14788)* ²⁷⁶. After a decree of locality, no landholder

ceedings before the commission-court, are carried on in the form of a regular action, originating in a summons, generally at the instance of the minister, as being more immediately interested, though it has been found competent for a patron to bring the action; *Kilk. D. of Queensberry, 19th July 1749, Dict. p. 15662; Ibid. & Falc. Dunbar, 17th Jan. 1750, Dict. p. 15663* ²⁷⁵.

²⁷⁵ “In order to guard against collusion,” it has been “enacted, that every minister insisting in the process of augmentation, shall, after the passing of this act, besides calling the heritors, also cite the moderator and clerk of the Presbytery of the bounds, and furnish them with a statement of the amount of his present stipend, and the addition to the stipend which he means to crave, in order that the Presbytery, if they shall judge it proper, may appear as parties to the process; and in the event of the Presbytery entering no appearance, the minister shall forthwith transmit to the moderator or clerk of the Presbytery a certified copy of the interlocutor pronounced by the Court; and it shall be competent to the Presbytery, within five months after such interlocutor is pronounced, to enter an appearance, and to shew, if they shall see cause, that the decree of modification pronounced, is collusive and prejudicial to the benefice;” *Stat. 48th Geo. III. c. 138. § 17; Minister of Old Meldrum, 18th Dec. 1811; observed 2. Connell, (Tithes,) 169.*

An *assistant clergyman*,—even where his appointment does not arise, as in the usual case, from a temporary necessity occasioned by the age or infirmity of the incumbent, but where it arises from the peculiar nature of the charge, and is in some sort provided under authority of the Court of Teinds,—is not entitled to have a separate stipend localled in his favour, and so cannot pursue an augmentation. “This was considered as an important general question of law; and it was unanimously held by the Court, that the minister, being the only incumbent, was the only person entitled to sue for an augmentation, and must have the whole stipend modified and localled to him in the first instance; though his right should be burdened in favour of the assistant, who was subordinate to him, and over whom it was expedient he should have this control, as being one for whose behaviour and character he was in some measure answerable;” *Fac. Coll. Macruer, 18th May 1803, Dict. p. 15711.* The same found, in the case of an *Assistant and Successor; Ibid. Shaw, 29th January 1806, Dict. v. STIPEND, App. NO. 5.* An augmentation cannot be pursued, even by a *second minister*, where established, not “by the authority of the Commission for plantation of kirks and valuation of teinds, but by private agreement with the heritors, or magistrates of burghs;” *Kilk. Marshall, 7th July 1738, Dict. p. 14795; sed contra*, where the Commission, in a previous proceeding as to the stipend of this second charge, had already “so far interposed, as to convert so much of the money into victual, and to determine by whom the same should be paid as the constant stipend in all time coming;” *Ibid. Fairnie, 14th June 1749, Dict. p. 14796.*

An obligation granted by the minister to the heritors on their withdrawing opposition to a former augmentation, that he would not bring another during his incumbency, does not prevent him from again applying for one; the Court uniformly discouraging all such private contracts respecting augmentations; *Fac. Coll. Earl of Kellie, 9th March 1803, Dict. p. 15710; 2. Connell (Tithes,) 168.*

For “the form of proceeding in processes of augmentation, modification and locality,” see *A. S. 5th July 1809.*

²⁷⁶ Since the *A. S. 5th July 1809*, this course of proceeding against individual heritors has given place to interim decrees of locality against the whole. It is a good ground of suspension, that the stipend allocated against any heritor, by such interim decree, exceeds his valued teind; *Fac. Coll., Macartney, 4th March 1817*; but it is not competent, by any accounting in a process of locality, to adjust overpayments by heritors upon interim schemes; *Ibid. Heritors of Abernethy, 8th December 1819.*

An

landholder is liable in more than the proportion that he is charged with by that decree*. An action of recourse, however, is competent to the landholder, who, in a modified stipend, is thus made liable in the first place, against the rest, *Ibid.* Modified stipends, though part of them be generally decreed to be paid in money, are in effect payable out of the tithes, and come in place of them; for the commission court has no power to modify stipends beyond the extent of the tithes in the parish †. They are therefore, like the tithes

* The question, Whether after a stipend is allocated, each heritor is personally liable for the share laid on him? was debated, but not finally decided, *Campbell against Murray, June 1726, Dict. p. 14792.* In a later case, the heritor was found personally liable, *Minister of Eskdalemaur, July 30. 1742, Dict. p. 14795.* The same rule would probably be adopted in the case of an *interim* decree of locality.

† Where the whole teinds of a parish, or nearly the whole, had been valued in money, the Court refused to modify from them a stipend in victual; *Fac. Coll. Feb. 27. 1793, Gordon, Minister of Strathdon, Dict. p. 14821; June 19. 1793, Duke of Gordon contra Minister of Dumbleat, not reported.* But in a later case, the Court, after a legal argument upon the general question, found, "that victual-stipend may be allocated " on heritors, whose teinds are valued in money, the value of the money being computed at a medium of the *fiar*-prices for the county, which have been struck for the last " seven years preceding the interlocutor of augmentation, agreeably to the rule followed in the case of the process of sale, (*vide supra*, Note subjoined to § 31.); with " this explanation, that as the stock cannot be encroached upon, it shall be optional " to any heritor, instead of delivering and paying the quantity of victual and money " stipend thus laid upon him, at any time to give up and pay, in all time thereafter " to the minister, the whole of his valued teind, according as the same shall have been " ascertained by his decree of valuation;" *Fac. Coll. Jan. 24. 1798, Mitchell, Minister of Lamington, Dict. p. 14827.* The Court, *Jan. 31. 1798*, gave the same judgment in similar cases from the parishes of *Skene, Cummertrees, and Roxburgh.* See note under the case of *Lamington.* It was observed, that where one heritor's teinds happened to be valued in grain, and another heritor's in money, there was a necessity of apportioning both the victual-stipend and the money-stipend upon each, in order to preserve equality between them ²⁷⁷.

An heritor, whose teinds have been valued, is entitled at any time to surrender his teinds at the valuation; and this, however long he may have been in the custom of paying beyond his valued teind, and even though these payments have been made under the sanction of prior decrees of locality; *Mitchell, cit. in not. h. p.; Fac. Coll., Dalgleish, 16th Nov. 1803, Dict. p. 15714; Ibid. Locality of Eddleston, 4th Dec. 1805; Dict. v. TEINDS, App. No. 13.; Minister of Nenthorn, 21st Feb. 1810, Ibid., in not. to Eddleston; Locality of Fearn, 21st Nov. 1810, Fac. Coll.; Ogilvie 5th June, 1811, Ibid.; Maxwell, 2d June 1813, Ibid.; Maxwell, 3d July 1816, Ibid.; Macartney, *supr.*; 48. *Geo. III. c. 138, § 14.; 2. Connell, (Tithes), 295, et seq.* But where the minister has acquired a right to the overpayments by positive prescription, in the face of a subvaluation which had never been acted upon, and before that subvaluation had been approved by the High Commission, the subsequent approbation will "be limited and " qualified by said prescriptive right;" and a posterior surrender will not disturb the previous use of payment to the minister; *Fac. Coll. Locality of Madderty, 9th July 1817.* An heritor surrendering has no interest in any subsequent localities, nor can he be subjected in any part of their expense; *Locality of Eddleston, supr.* An heritor having two distinct parcels of land in a parish, with distinct valuations effecting to each parcel, is entitled to surrender the valued teind of one, and retain the other; *Ogilvie, supr.**

The minister's right to his full stipend as localled, cannot be impaired or altered by such surrenders. Where an heritor, therefore, in place of paying the proportion of stipend allocated on him, finds it more for his interest to surrender his valued teind, any compensation to the minister which this may render necessary will be provided for, if the circumstance occurs in the course of a process of locality, by a rectified scheme, localing the deficiency on the other heritors; *Dalgleish, supr.*; where it occurs afterwards, indemnification has been given in the shape of additional augmentations; *Locality of Gairloch, 10th Feb. and 16th June 1813; Minister of Nairne, 30th June, observed 2. Connell, 304. et seq.*

²⁷⁷ This matter is now put to rest by statute. The 48th *Geo. III. c. 138, § 8.* enacts, "That every stipend which shall be augmented after the passing of this act, " shall be wholly modified in grain or victual, even although part or the whole thereof " shall have been previously modified in money, or although part or the whole of the " teinds shall be money teind; unless where it shall appear necessary, on account of the " state

tithes themselves, *debita fructuum*; so that singular successors cannot be sued for the arrears of stipend due previously to their right; nor fiars, for the arrears thereof which had become due during the subsistence of a liferent that excluded them.

48. As the submission by the clergy to Charles I., gave him no power to determine concerning the tithes that were then possessed by the bishops, the commission-court erected in 1633 was not authorised to modify a stipend to the incumbents in the bishops' patrimonial churches, which therefore continued to depend solely upon them. By 1641, C. 30., bishops' churches were put on the same footing with others: But it would seem, that upon the restitution of Episcopacy in 1662, the ministers serving the cure in the patrimonial churches were brought back to their former dependence on the bishops, and that the dependence is now transferrèd from the bishops to the King, who, by the abolition of Episcopacy in 1690, has come in their right. In processes for a legal stipend, insisted on by these ministers since that period, the commission court for some time did not adventure to modify a stipend to them out of the tithes. They barely recommended to the Lords of Treasury, and, since the Union, to the Barons of Exchequer, to procure for the pursuers a royal gift of such part of them as might be sufficient for their maintenance; see

Forbes

TITLE X.

Stipend modified by the Commission out of bishops' tithes.

“ state of the teinds, or on account of the interest of the benefice, or on account of the nature of the articles other than grain or victual, which have been in use to be delivered in kind, as stipend, that a part of the said stipend should be modified, not in grain or victual, but in money, or should be modified in such other articles as have been in use to be delivered in kind as stipend.” The Court are accordingly required, “ in the case of every decree of modification, which shall be pronounced after the passing of this act,” “ to convert the said money stipend, or money teind, into grain or victual,” according to an average of the fiar prices “ for seven years preceding the date of the decree of modification, and exclusive of that year in which such decreet of modification shall bear date;” *Ibid.* § 9. 10. and 13.

Another clause (§ 11.) enacts, “ That it shall not be competent for the Lords of Council and Session, as commissioners aforesaid, where a stipend shall, after the passing of this act, be modified in grain or victual, in whole, or in part, to authorise the minister to receive the same, or any part thereof *in kind*; but that it shall only be competent for them to decree the value thereof to be paid, or for him to receive the same *in money*, according to the *fiar prices* of the kind or description of grain or victual, into which the same shall have been modified, appearing from the annual fiars of the county or stewartry,” where the parish “ shall not be altogether situated in one and the same county or stewartry; or where no annual fiars applicable to the kind or description of grain, or victual modified, shall be struck in the county or stewartry wherein such parish is situated,” the Court are empowered “ to fix upon and specify two or more of the adjoining counties, or such stewartry, county, or counties, as they shall deem most suitable in the circumstances of the case, according to the annual fiar prices of which stewartry, county or counties, they shall decree the value thereof to be paid in money;” *Ibid.* § 12. Where there “ shall be different rates of annual fiar prices for any county or stewartry, district or place, struck in virtue of authority from the Sheriff or Stewart,” the conversion “ shall be made according to the highest annual fiar prices;” *Ibid.* § 13. The stipend when thus converted is payable by the Linlithgow measure, without any regard to the measure of the particular county where the parish lies; *Fac. Coll., Minister of Rothesay, 24th May 1820.*

A question has been raised, whether the above provisions of the statute, rendering it incompetent to draw the stipend “ in kind,” apply to the case, where a surrender of teinds has been made,—or where the whole teinds of a parish have been exhausted, and modified as stipend by decree of Court. In both of these situations, the statute has been held preemptory, *Fac. Coll., Maxwell, 2d June 1813; Ibid. Smith, 22d June 1814.* From what passed on the bench, however, at pronouncing this last decision, a doubt seems again to be thrown over the effect of the statute, in the case of a *surrender*. It has accordingly been observed, that “ this point may be considered as remaining unsettled;” 2. *Connell, (Tithes,)* 152.

Book II.

Teind redeemed by the patron from proper beneficiaries, must be sold to the heritor at six years' purchase.

Forbes on Tithes, p. 386. But the commission-court are now in use to modify stipends to the ministers of mensal churches out of bishops' tithes; because the general scope of the law is, that the minister of each parish should have a competent stipend modified out of the tithes of his parish*.

49. Notwithstanding the several particulars before mentioned, by which parochial tithes were misapplied, both during Popery, and since the Reformation, some few benefices remained entire in the hands of the parsons, where the tithes had been neither erected into temporal lordships, nor otherwise charged with any burdens. The ministers planted in those churches after the Reformation had the same proper right to them that the beneficiaries had in the times of Popery; and they might grant leases of them under the statutory limitations above stated, § 8. But when, by 1649, C. 39., the right of presentation was taken from patrons, that act, to compensate for their loss, declared the right of all tithes not formerly disposed of to be in the patrons, with the burden of reasonable stipends to the ministers; by which all ministers were in effect made stipendiary. And though that act was rescinded upon the Restoration, a power was again granted to patrons, by 1690, C. 23., and 1693, C. 25., to redeem from the proper beneficiaries who still remained, their whole tithes, upon providing them with competent stipends; reserving a right to them to continue in the full possession of their benefices till legal stipends should be modified to them †. The landholders liable in the tithes may, by the aforesaid act 1690, compel the patrons to sell to them the tithes thus redeemed from the beneficiary, at six years' purchase; whereas other titulars lie under no obligation to sell theirs under nine ‡.

50.

* Where part of the tithes of a parish belong to the bishop, and part to the landholders, by virtue of heritable rights from lay titulars, the tithes belonging to the landholders must be exhausted before any part of the stipend can be localled upon the bishop's tithes, because bishops are considered as a superior order of ministers; *July 18. 1715, Minister of Arngask contra The Heritors*, mentioned in *Fac. Coll. March 7. 1770, Officers of State contra Campbell of Lochnell*, *DICT. p. 14796*; *Ibid. June 3. 1795, Skene, &c. Heritors of Daviot*, *DICT. p. 14822*. See *Ibid. Dec. 9. 1795, Heritors of Portmoak*, *DICT. p. 14823*. See *Williamson, Nov. 27. 1772, DICT. p. 14808* ²⁷⁸.

† Teinds formerly held by the members of the bishop's chapter fall under the two statutes cited in the text, and have not the privileges of bishops' teinds; *Fac. Coll. July 16. 1788, Christie*, *DICT. p. 14818* ²⁷⁹; *Ibid. May 23. 1797, Solicitor of Tithes*, *DICT. p. 15704*.

‡ In every case of sale, therefore, it is of importance to inquire, whether the person from whom the teinds are to be purchased has right to them as titular, or as patron merely. It was in one case found, that these words in the defender's title-deeds, "una cum jure patronatus ecclesie parochialis et parochie de *Kirkpatrick Fleming*, et decima tam rectoris quam vicarii eorundem," carried right only as patron; *Dec. 4. 1748, Marquis of Armandale*, *DICT. p. 15661 and 15662*. In later cases, this decision seems to

²⁷⁸ These bishops' teinds are alone entitled to this privilege, which belonged to that rank of clergy at the Reformation; *Fac. Coll. Christie, 16th July 1788, DICT. p. 14818*; *2. Connell, (Tithes,) 269*. But even where privileged, bishops' teinds are liable to allocation before college teinds; *Fac. Coll. New College St Andrew's, 7th December 1808*; *2. Connell, (Tithes,) 270*. Teinds acquired by a college from an ordinary titular, "in whose hands they had been liable for stipend," are entitled to no privilege, but are localled upon as if still belonging to the titular; *Ibid. College of Glasgow, 25th May 1814*.

For the rule in regard to these privileged teinds, in the case of united parishes, &c. *vid. infr. § 64. in not.* As to teinds formerly held by the bishop's chapter, *vid. not. † & p.*

²⁷⁹ This case goes to another point; *vid. supr. not.* ²⁷⁸. The doctrine which it is here quoted as supporting, was, however, again given effect to; *Fac. Coll. Sol. of Tithes, 3d December 1800, DICT. v. TEINDS, App. No. 10*; *2. Connell, (Tithes,) 268*.

50. Though tithes seem to be appropriated by law to the subsistence of the clergy, and on that account ought not to be applied for providing communion-elements, more than for purchasing communion-cups, or repairing the wall of a church-yard, the commission-court are in use, when they pronounce decrees of locality, to modify a fixed sum to the minister out of the tithes, in name of communion-elements. It is true, that that burden is expressly laid on the parsons, by 1572, C. 54. ; but that statute ought properly to be understood of the few ministers who were proper parsons or beneficiaries ; for the stipends of stipendiary ministers were soon after declared free from all burdens, by 1593, C. 162. And all our ministers are now become stipendiary, since the acts quoted under the preceding section *. The sum thus awarded for communion-elements, as it is specially destined for defraying the expense necessary in administering that holy sacrament, is no proper part of the stipend, though it be contained in the minister's decree of locality ; and therefore is not due to him for the years in which he has not administered the sacrament, but ought to go to the poor, July 21. 1713, *Parish of Abdie*, (DICT. p. 2490) †.

51. Though ministers have not now a right to the tithes themselves, yet all tithes may be at this day affected with the burden of a stipend, or of an augmentation of stipend to the minister, to such extent as the commission-court shall think reasonable ; some more directly and others only *subsidiariè*, according to the different titles under which they are enjoyed. In this matter, the following rules are established by practice. Tithes are either such as were never erected, *i. e.* never granted by the crown to any layman ; or, *2dly*, They have been erected and are yet in the hands of the lay-titular ; or, *3dly*, They are let in lease by the titular ; or, *4thly*, They have been heritably disposed by him. Where the tithes of a parish have not been affected with any grant in favour of a layman, these ought, in the *first* place, to be applied to the maintenance of the minister, to which all tithes were originally destined. In default of these, the tithes which are yet in the hands of the lay-titular, fall, in the *second* place, to be allocated ; for as the titular of a benefice, who himself cannot serve the cure, is bound to employ a person who can, the burden of the stipend ought to fall on such titular, as long as he has a sufficient fund in his own hands, rather than upon those to whom he has granted leases or heritable rights of the tithes. And if the titular does not draw the tithe in kind, but

TITLE X.
Sum for providing communion-elements.

In what order the teinds are to be allocated for stipend.
1st, Those never erected :
2dly, Those erected, yet possessed by a lay-titular.

to have been departed from ; and clauses, conceived in nearly the same terms, have been held as vesting not only the patronage, but a proper titularity, and consequently giving right to demand nine years' purchase on a sale. In particular, such an effect has been repeatedly given to these words : " Unà cum advocacione, donatione, et jure patronatus ecclesiæ parochialis et parochiæ de _____, cum decimis rectoriis et vicariis ejusdem ;" July 20. 1753, *Spalding*, DICT. p. 15670 ; *Fac. Coll. June 6. 1792, Elliot Ogilvie*, DICT. p. 15695 ; *Ibid. Feb. 15. 1797, Stewarts*, DICT. p. 15703. In the case of *Spalding*, it is said that these words, " Necnon advocacionem, donationem, et jus patronatus ecclesiæ parochialis de _____, rectoriæ, et vicariis ejusdem," convey the patronage only of the parsonage and vicarage teinds.

* Accordingly it has been found, that the commission-court cannot modify a sum for communion-elements out of the stock ; *Fac. Coll. Feb. 19. 1793, Willie*, DICT. p. 2493. See *Ibid. June 17. 1772, Heritors of Logie*, DICT. p. 15691.

† An opinion to the same purpose was expressed by the Court, *Fac. Coll. July 14. 1780, Hay*, DICT. p. 2492, &c. though in that case the Court rejected a claim of repetition made upon the minister for those years in which he had not administered the sacrament.

Book II.

3dly, Those let in lease by the titular:
And, 4thly, Those heritably disposed by him.

but receives a tack-duty from the landholder, such tack-duty is burdened, since that is the benefit arising to the titular from his right. These two kinds are usually called *free tithes* *.

52. If there is a shortcoming in these, the tithes let in lease by the titular to the landholder are allocated in the *third* place; and where this happens, it is the tack that is charged with the burden, and not the tack-duty; for where the tack-duty payable to the titular, which is his interest in the tithe, falls short of the stipend or augmentation, the tacksman's interest in it, or, in other words, the surplus tithe over and above the tack-duty, is subject to the allocation. But where the tacksman is thus loaded, in consequence of an augmentation, the commissioners are directed, by 1690, C. 30, as a compensation to the tacksman for this supervening burden, to prorogate his lease for such a term of years as they shall find just; which prorogations are as valid as if they had been made by the titular himself, provided he be cited as a party by the tacksman in his suit for the prorogation; and prorogations have, in virtue of this power, been granted to tacksmen for such a number of years as made their leases nearly equivalent to perpetual heritable rights. But upon an appeal to the House of Lords from one of those sentences, which was pronounced *July 5. 1732, E. Galloway, (2. Fol. Dict. 434.,)* the tacksman was adjudged not entitled to a prorogation, in consequence of voluntary augmentations fixed by private agreement between the minister and himself: there must be a judicial sentence of the commission-court, augmenting the stipend. *4thly*, The tithes that are heritably disposed by the titular to the landholder, must be appropriated to the stipend, if all the funds formerly mentioned should prove deficient; for a competent stipend to a minister is a burden that tithes carry always about with them, even against onerous purchasers; a disposition of tithes by a titular not being understood to exempt the grantee from the burden of future augmentations. And it is upon this, among other considerations, that the law has obliged titulars to sell tithes at nine years' purchase; which is a rate greatly below their true worth, were they not subjected to that burden. In this case, however, the tithes of the titular's own lands are allocated proportionably with the tithes of the other landholders, *Dec. 21. 1757, Edmonstone of Duntreath contra Duke of Montrose, (not reported).* But if the titular hath specially warranted his grant against future augmentations, or if he has got a price for them equal to what he might have expected though they had not been subject to augmentations, equity suggests, that the tithes of the titular's own lands ought in such cases to be allocated, to the entire exemption of the tithes sold by him to the dispoonee, *Feb. 1. 1738, D. Douglas, (Dict. p. 15656)* ²⁸⁰. As lands *cum decimis inclusis* are, by the law of Scotland, free from tithe, they must of course be exempted from the burden of any augmentation

* The author has laid it down, (§ 37. *h. t. in fine*), that where an heritor having right to the teinds of his own estate shall convey the lands without the teinds, such reserved tithes are not subject to sale; and they have been found to be exempted from allocation of stipend, until all the free teinds in the parish are exhausted; *July 2. 1746, Muir, Dict. p. 10820*. It has however been found, that where lands are feued out for a joint-duty both for stock and teind, a proportion of the duty paid for the latter is held to be free teind; *Fac. Coll. Feb. 13. 1793, Dundas, Dict. p. 14820*; and *Nov. 17. 1802, Dict. p. 15709*.

²⁸⁰ On the subject of warrandice against augmentations, *vid. supr. § 38, and t. 3. § 29. not. 40*. See also *Carmichael, 22d May 1821, (S. and B.)*; *E. Aberdeen's Trustees, 22d Nov. 1821, (Ibid.)*

augmentation of stipend, *Dirl. 229, (Tulliallan, Jan. 28. 1675, Dict. p. 15717).*

53. Where there is sufficiency of free tithes in a parish, the titular, since he has right to the whole, has a power of appropriating or allocating any part of them that he shall think proper for the payment of the stipend, unless there has been a previous decree of locality. And this holds, though the stipend should have been past memory paid out of the tithes of certain particular lands; for such use of payment is as much a voluntary act in regard to the titular, as it would be in an owner of land liable in stipend, to throw the proportion of it payable by himself, sometimes on one tenant and sometimes on another, *Feb. 1731, E. Galloway, (Dict. p. 15655.)* The abuse of this power frustrated in a great measure the privilege competent to landholders, of purchasing their own tithes; for as soon as a landholder brought his action of sale against the titular, he frequently allocated the pursuer's whole tithes towards payment of the stipend *pro tanto*, after which they could not be sold. For this reason few ventured to prosecute that action, from the apprehension that the titular might load them with the burden of the stipend to the full extent of their tithes. But the fear of this was altogether removed, by 1693, *C. 23.*, renewing the commission of tithes, which declares, that it shall be unlawful to a titular or his tacksman, after citation given to him by a landholder in an action of sale, to make an allocation of the pursuer's tithes solely, but only in proportion with the other tithes in the parish*.

54. By our ancient custom, the beneficiary seems to have had no interest in the fruits of the benefice, till he could, by laying hold of them, appropriate them to himself. And hence, if he died before the corns were reaped, he could transmit no part of that year's crop to his executors; see *Balf. p. 220, C. 5.; Durie, March 21. 1628, Murray, (Dict. p. 1780).* But by our later practice, which was at last approved of by statute 1672, *C. 13.*, Whitsunday and Michaelmas have become the legal terms at which stipends fall due to the incumbents. At Whitsunday, the corns are presumed to be fully sown; and at Michaelmas, to be fully reaped. If therefore the incumbent was admitted to his church before Whitsunday, he is entitled to that whole year's stipend, because his entry was prior to the sowing of the corns; and by parity of reason, if his interest in the church hath ceased before that term, by death or otherwise, he hath right to no part of the fruits of that year. If he was admitted after Whitsunday, and before Michaelmas, he is entitled to the half of that year's stipend; because, though his entry did not commence till after completing the sowing, yet it began before the

If there is no locality, the titular may allocate any teinds he pleases, but not after citation in a sale of teinds.

Legal terms of the payment of the stipend, by which is regulated its transmission to executors.

* It has been a subject of frequent discussion, Whether it be competent for an heritor, by purchasing his teinds during the dependence of a process of locality, to obtain an allocation *pari passu* with heritors previously holding heritable rights? In one case, *Fac. Coll. June 7. 1797, Lamont, Dict. p. 15706*, the Court gave such an effect to an heritable right obtained *pendente processu*. But there, the titular had no interest as an heritor of any lands in the parish; and it was thought that the other heritors had not a sufficient title to object. See *March 5. 1800, Abercromby contra Erskine of Mar, Dict. App. I. voce TEINDS, No. 8.* But in the case of the *Duke of Queensberry and others contra The Earl of Mansfield, May 21. 1800, Dict. App. I. voce TEINDS, No. 9*, where the titular was patrimonially interested as an heritor, the Court found, that one of the heritors who had brought a process of valuation and sale of his teinds, had obtained decree of valuation, and was *in cursu* of obtaining decree of sale, came too late, and was not entitled to plead that he should be considered as having an heritable right, and as entitled to be localled upon only *pari passu* with the titular and patron. The Court, therefore, refused to stop proceedings till he should obtain his decree of sale.

Book II.

the term at which the corns are presumed to be reaped, *Stair, July 24. 1662, Wemyss*, (Dict. p. 15885); and, by the same rule, if he was removed from the benefice after Whitsunday, and before Michaelmas, he hath also right to the half of that year; and, if he was not removed till after that term, he is entitled to the whole of it. The reason why one of the legal terms in benefices is Michaelmas, and not Martinmas, as in liferents, arises from the different natures of the two rights. All church benefices did originally, and are still, in the consideration of law, accounted to consist of tithes that were drawn by the churchman, at the separation of the corns from the ground, which was, according to the legal presumption, completed at Michaelmas; and the modified stipends, that are now come in place of the tithes, retain the same quality as to that particular with the tithes themselves, in the place whereof they were substituted. But, in liferents, the term is Martinmas, because the rents of lands are not due by the tenant to the landlord till Martinmas at soonest, before which term the corns are not presumed to be fully brought to the tenant's granaries. That part of the stipend which has fallen due to the incumbent, according to those legal terms, descends, in as far as it is unpaid at his death, to his executors, though the whole of it should consist in money, or though the incumbent should, by agreement with those who are liable in the stipend, postpone the term of payment from Michaelmas to Martinmas; see *Falc. i. 182, (Wood, June 5. 1747, Dict. p. 467)*, for, though such agreement must regulate the time at which the demand is to be made from those debtors, it cannot affect the question, At what term each year's stipend becomes legally due, and consequently descendible to executors?

Ministers' manse.

55. As no churchman could live comfortably without a dwelling-house, and a reasonable portion of ground in his own manurance, for the use of himself and his family, Charles the Great directed, that he should be furnished with these, out of the tithes which he had immediately before declared to belong to the church, *Leg. Lang. L. 3. T. 3. C. 2.; Capit. Kar. L. 1. C. 91.* But that provision of tithes, in so far as concerned parochial benefices, was frequently evacuated, by their impropriations to cathedrals or monasteries, in the manner already explained. By the law of Scotland also, since the Reformation, ministers, besides the stipend modified to them by the commission-court, are entitled, in consequence of special statutes, to a house and glebe*. The house which is set apart

* A minister in a royal borough is not entitled to a manse by designation of the presbytery on the act 1683, *June 30. 1750, Thomson, Dict. p. 8504*; (reported also by *Elchies, v. MANSE, NO. 4.*) As to the case of a parish, partly landward and partly consisting of a royal borough, see *Feb. 28. 1769, Elgin, Dict. p. 8508*, where the minister was found not entitled to a manse; which however proceeded on the special circumstances of that case; and *June 16. 1784, Muster, Dict. p. 8513*, where a manse was refused, but reserving to the minister to insist for a competent house-rent. In the case of *Mr Dobie, minister of Linkithgow, against Earl of Rosebery, &c. March 6. and May 21. 1802*, the minister was found entitled to a manse; and the opinion of the Court in general was favourable to the claim of the minister, both as to manse and glebe, in the case of such parishes²⁸¹.

²⁸¹ This case will be found shortly reported in a note to *Fac. Coll., Minister of Dunfermline, 19th Nov. 1805, Dict. v. MANSE, App. No. 1.*; which was decided in a similar way, and the judgment afterwards affirmed on appeal. The question was again raised in a case from the burgh of Ayr, when an opposite judgment was pronounced; *Ibid. Auld, 12th Nov. 1819*; but as a legal authority, this case stands in very peculiar and anomalous circumstances; for while the above result was only carried by a majority of three Judges to two, even in the Division where the question depended, the view taken

apart for the churchman's habitation, is in our law language called a *manse*. It appears from a variety of authorities cited by *Du Cange*, *voce* MANSUS, that that term was made use of, in the middle ages, to denote a determinate quantity of ground, the extent of which is not now known, fit either for pasture or tillage. In the before-quoted capitulary of Charlemagne, it signifies the particular portion of land which was to be assigned to every churchman; and it has been by degrees transferred from the churchman's land to his dwelling-house.

56. Few of the Reformed ministers were at first provided with dwelling-houses; most of the Popish clergy having, upon the first dawn of the Reformation, let their manses in feu, or in long leases: Ministers therefore got a right, by 1563, C. 72., notwithstanding those feus or leases, to as much of the manses as would serve them; otherwise the Popish churchman, or other person possessing them, was to build a competent dwelling-house for the incumbent. Where the possessors were unwilling, and refused to remove, the bishop or superintendent was authorised, by 1572, C. 48., to design or mark out the said manse for the minister's use during his incumbency; upon which designation, letters of horn-ing passed against those who still continued obstinate in holding the possession. In the case of abbey and cathedral churches, the minister might, by 1592, C. 116., insist for a manse within the precincts of the abbey or cathedral, unless the proprietor of such precinct should provide him in a commodious manse elsewhere. Where a parish-church, notwithstanding these acts, continued still unprovided of a manse, the landholders or heritors of the parish were, by 1649, C. 45., revived by 1663, C. 21., directed to build one at their own charge, at the sight of the bishop, with some of the most discreet men of the parish; the expence not exceeding L. 1000 Scots⁸², nor below 500 merks; and in pursuance of this statute, presbyteries, who are now come in the bishop's right, are in use
to

Obligation on the heritors to build a manse where it is wanted.

taken by this very narrow majority was decidedly opposed to an unanimous opinion of almost the whole other Judges of the Court:—

“ Present the Lord President, Lords Balmuto, Hermand, Succoth, Balgray, Gillies, Pitmilly, and Cringletie.

“ The above Judges are unanimously of opinion, that, independently of all specialties, the charger is by law entitled to have a manse designed to him, as minister of the united parishes of Ayr and Alloway.

“ In point of principle, the Judges cannot see any distinction between a royal burgh having a landward parish, and burghs of regality or barony having the same; secondly, They consider the point to have been fixed by the judgment of the House of Lords, in the case of Dunfermline, which they have always understood proceeded on the general principle. Indeed, it appears to the Judges, that the specialities founded on, bore all the other way.”

This opinion was disregarded, and judgment pronounced against all its principles. With great deference, it is impossible to regard such a decision in any other light than as an authority against itself. The opinions of ten out of thirteen judges were in favour of the minister's right to a manse; and in all likelihood, therefore, when the question next occurs, this will be the judgment of the Court.

But be the law as it may, in the case of a single cure, or where the claimant is first minister, it is undoubted that the *second* minister of a royal burgh, with a parish partly landward, is not entitled to have a manse and glebe designed to him, even though his stipend be paid from the teinds of the parish; *Fac. Coll., Adamson, 14th Feb. 1816; Connell, (Parishes,) 274.*

On the question, “ What ministers are entitled to manses ?” See *Connell, (Parishes,) 255, et. seq.*

⁸² The expense is not now limited to this sum; indeed such a limitation would render altogether nugatory the substantial provision of the statute, whereby heritors are

are

Book II.

This obligation
extended to stable,
barn, byre, &c.
Who meant by
heritors.

to proportion among the heritors the sums falling to be paid by each; not according to their real rent, because that is more uncertain; but according to their several valuations; and letters of horning issue of course against them, for the payment of those proportions.

57. This obligation upon landholders to build a manse is so extended by an equitable interpretation, as to include stable, barn, and byre, with a garden²⁸³; for all which it is usual to allow half an acre of ground. But where ground has been already designed or marked out for a manse, and the other appurtenances of it before mentioned, the minister has no right to demand a new designation, on pretence that the ground formerly marked out for it did not amount to half an acre. The burden both of building and repairing ministers' manses, is by 1663, C. 21., imposed upon heritors; and the just rules of interpretation require, that the word in the statute, *heritors*, be taken in the same sense throughout; and that therefore, if liferenters were not to be considered as heritors in the obligations relative to the building of a manse, neither could they be liable in any proportion of the expence of repairing it. It would appear from a decision, Nov. 14. 1679, *Minister of Moreham*, (Dict. p. 8499), that the court of session did not understand the term *heritors* to include liferenters in the sense of that act; who of course were entirely exempted from any share of the expence of building a manse, both in respect of the term used in the statute, which in its most obvious meaning excludes those who have bare liferents; and because the building of a manse, being a work intended to last for some generations, no part of the burden ought to be laid on those whose only interest in the lands is a right of liferent. But as this act is, from the generality of the expression, of doubtful interpretation, it is possible that in the reparation of the manse, which has less of the nature of perpetuity than building it, and is frequently reiterated during the subsistence of the same liferent, our judges might be moved, by considerations of equity, to burden a liferenter, who has a real right in the lands though it be but temporary, with the interest corresponding to the sum imposed upon the *fiar* for these repairs, while the liferent subsists^{* 284}.

Before

* It has been made a question, Whether, by the term "heritors," in the statute 1663, c. 21., are to be understood actual holders of land only, to the exclusion of superiors? The Court decided this question in the affirmative, after having directed an inquiry

are ordained to build "competent" manses. In a late instance, accordingly, where the question was brought formally before the Court, their Lordships "were unanimously of opinion, that the point was fixed by long and invariable practice." The Presbytery had in this case awarded "about L. 1200 Sterling;" *Fac. Coll. Dingwall*, 27th Nov. 1816, since affirmed on appeal; *Connell*, (*Parishes*,) 277. *et seq.*

²⁸³ "These accommodations have been uniformly given by the Court for a number of years back, with the addition of some smaller offices, such as a hen-house, scullery, &c."—"With regard to the number and size of the rooms of a manse, and the dimensions of the offices, no general rule has been, or can possibly be, laid down by the Court. An improvement having taken place in the houses of most other classes of men, the Court has shown a disposition to sanction an enlargement of the habitations of the clergy, beyond the dimensions adopted in former times. Regard is also had to the kind of manses which neighbouring clergymen have obtained;" *Connell*, (*Parishes*,) 291.

²⁸⁴ The upholding of the manse being a burden on the "heritors of the parish," persons who hold no property in the parish, but are merely owners "or holders of seats in the parish-church," are not liable; *Fac. Coll. Farie*, 2d Feb. 1813, *Connell*, (*Parishes*,) 329.

58. Before the Reformation, the whole expence of upholding the manses of churchmen was paid out of the public funds of the church, and no part thereof by the beneficiaries or incumbents. But not long after the establishment of the Protestant doctrine, it was enacted, 1612, C. 8., That all ministers who had received sufficient manses should be bound to keep them in tenantable repair; in default of which, they or their executors were declared liable in damages to their successors in office. The form of declaring a manse sufficient, or free, is this: The incumbent, who at his entry is entitled to a commodious manse in sufficient repair, applies to the presbytery; who appoint a visitation of it by proper craftsmen, as masons, slaters, house-wrights, &c. These are directed by the presbytery to make up and report to them, estimates of the sums necessary for the reparation; which sums, if the presbytery approve of the estimates, they proportion among the several heritors by the rule before set forth; and letters of horning will pass on a bill to the court of session, for carrying the sentence of the presbytery into execution. Where the manse is completely repaired, the heritors may apply to the presbytery for a second visitation; and if the report of the visitors that the manse is now sufficiently repaired, be approved of by the presbytery, they declare it a free manse, which, by the aforesaid statute, lays the burden of upholding it on the incumbent or his executors²⁸⁷ *. The act, however, which imposes this burden on ministers, does not appear to reach to an
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TITLE X.

When the manse is put in sufficient repair, the minister must keep it so.

quiry into the general practice throughout Scotland. It may therefore be held as a point perfectly settled, that no part of the expence of building a minister's manse can be laid upon the superior; *Fac. Coll. July 2. 1778, Sir Laur. Dundas, Dict. p. 8511*²⁸⁶. In an earlier case it had been adjudged, that even where a superior had by his charters become bound to relieve the vassals of "all public burdens whatsoever," this gave them no claim of relief for any part of the expences laid out by them, in either rebuilding or repairing the church, manse, and office-houses belonging to the parish; *Ibid. Jan. 23. 1773, Bruce, Carstairs, Dict. p. 2333, (affirmed in the House of Lords 24th Nov. 1775.)*

* The heritors may demand this second visitation, to the effect of laying the burden of future repairs upon the incumbent, although the manse had been originally built by themselves without concurrence of the presbytery, as come in place of the bishop, agreeably to statutes 1649, c. 45, and 1663, c. 21, (*supra*, § 56). So the Court decided, *Fac. Coll. Feb. 21. 1786, Parish of Carney, Dict. p. 8514*. And if the minister has already been provided with a suitable manse, the presbytery cannot afterwards direct an addition to be made on account of the present state of the incumbent's family; *Ibid. July 28. 1788, Minister of Dalmeny, Dict. p. 8515*.

²⁸⁶ See also *Fac. Coll. Murray, 20th Feb. 1794, Dict. p. 15092; Connell, (Parishes,) 330*.

²⁸⁷ In the case of *Botriphnie, 3d July 1805*, observed in *Connell, (Parishes,) 309, et seq.*, it was found "incumbent on heritors who mean to impose so heavy a burden, as is contended, is here imposed by the statute 1663, on a stipendiary minister, to have their purpose expressed and accomplished in the most authentic and regular manner." In a still later case, it was laid down, that they must obtain from the presbytery, "not merely a declaration that the manse was for the time sufficient, but a declaration that it was free, in this sense, that they were liable for no future repairs during the incumbency;" *Per Lord Chancellor, in D. Hamilton, &c., affirmed on appeal, 13th July 1813, 1. Dow, 393*. It would almost seem, in short, that nothing but a finding in express terms, and as it were *per verba solennia*, that the manse is "free in terms of law," and this upon an application formally made by the heritors to the presbytery for that purpose, will peremptorily fix the future burden on the minister. How very strictly the proceedings are interpreted against the heritors, and how favourably for the minister, will however best be understood, by perusing the two cases just referred to. See *Connell, (Parishes,) 309, et seq.*

house gifted to the church, which is intended by the donor, not for an habitation to the minister, but as an addition to his stipend; and therefore any obligation which lies on the minister in that case, is grounded merely upon an implied condition in the donation, that the incumbent who enjoys the profits, ought to bestow part of them in upholding the subject in good repair. But it would seem, that if such house was in a ruinous condition when the incumbent entered into the possession of it, he is not bound to expend the smallest sum towards its reparation; for the expence of refitting those houses, frequently amounts nearly to that of rebuilding, and sometimes even exceeds it. When the manse becomes uninhabitable from the necessary decay of the building, through the waste of time, the incumbent, though the manse has been already declared free since his entry into the church, may demand to have it rebuilt, or sufficiently repaired a second time, at the charge of the heritors²⁸⁹.

Minister's glebe.

59. The glebe, which is that portion of land that is assigned to the minister by statute over and above his proper stipend, must contain four acres of arable ground; and is to be designed in the same manner, and the decree of the presbytery carried into execution against the former possessors in the same way, by charging them upon letters of horning, as is provided in the designation of manses, 1572, C. 48. Though all ministers, whether in town or country, seem by our statutes entitled to a manse, or to a sum of money in consideration of it²⁹⁰; yet all cannot claim a glebe; for there are many parishes, particularly among the royal boroughs, which have no lands in them proper for a glebe; see 1663, C. 21. But the ministers even of royal boroughs, where any part of the parish lies in the country, have right to a glebe*. Some statutes after the Reformation, restricted the subject of glebes to churchlands, 1593, C. 165., also 1592, C. 118.; and by a posterior act, 1606, C. 7., which in its preamble refers to the former, the subject of them is farther limited to arable lands lying near the church, partly for the incumbent's conveniency, and partly to prevent partiality in burdening one heritor more than another; after which it is enacted by a separate clause, that where there are no arable lands in the parish near the church, the incumbent shall, in place of the glebe,

* So the Court have repeatedly decided, *Stair, Dec. 17. 1664, Minister of Dysart*, DICT. p. 5121²⁹¹; *Fount. March 26. 1685, Minister of Kirkcaldy*, DICT. p. 5121; *Fac. Coll. Dec. 17. 1779, Fullerton*, DICT. p. 5123²⁹². In the report of a prior case, (as to a manse,) *Ib. Feb. 28. 1769, Heritors of Elgin*, DICT. p. 8508, it is said the Court had given an opposite judgment upon the general point of law; but it now appears, that there the Court had proceeded on the particular circumstances of the case. See the above case of *Fullerton*.

Where, by an illegal transaction with his heritors, a minister had given up his manse and glebe, his successor was found entitled to demand both in due course of law, although the right of challenging the transaction was objected to as cut off by prescription; *Fac. Coll. Feb. 8. 1793, Minister of Falkland*, DICT. p. 5155.

²⁸⁹ So found in the case of *Botriphnie, 3d July 1805*, observed by *Connell, (Parishes,)* 326.

²⁹⁰ *Vid. supr. § 55. not. **, and ²⁸¹.

²⁹¹ *Stair's* report of this case is omitted in *Mor. DICT.* The report here referred to is by *Newbyth*.

²⁹² See also *Connell, (Parishes,)* 349, *et seq.*

glebe, be entitled to sixteen souns * of grass ; which are to be in like manner designed, not out of temporal lands, but out of the best pasture church-lands lying next adjacent to the church. As the benefit intended by these statutes to the minister, was altogether evacuated when there were no church-lands in the parish, it was provided by 1644, C. 31., That in default of church-lands, the glebe was to be designed out of any other arable lands lying ewest, or most convenient for the church. This act, though falling under the act rescissory of Charles II., appears to have been regarded as still in force, by the aforesaid act 1663, C. 21., in which it is plainly taken for granted, that every minister hath right to a glebe, except those in some royal boroughs ; and designations of glebes are by that act directed to proceed in general terms, with the single exception of incorporated acres in boroughs ; but without distinguishing between church lands and temporal ; see *St. B. 2. T. 3. § 40., vers. If there be †.*

60. A right of relief or recourse is competent to the heritors whose lands are set off for the manse or glebe, against the other heritors in the parish. The act 1594, C. 199., which provides this relief, grants it only to the heritors of church-lands ; and limits it to the special case where all or the greatest part of the lands in the parish consist of church-lands ; so that the landholder whose grounds have been marked out for the manse or glebe, is, by the words of that statute, loaded with the whole burden of such designation, without recourse, if the half of the lands of the parish be not church-lands ; contrary to the spirit of the act, which was designed to preserve an equality among all the heritors. The act already quoted, 1644, which authorised the designation of glebes out of temporal lands, equitably extended this right of recourse, in favour of the heritors whose temporal lands were designed, against the other heritors of the parish ; and if the first part of that act, allowing such designations, has been received as our law since the Restoration, the last part of it, which extends the recourse, ought also to be received, being a just and indeed a necessary consequence of the other. If this reasoning be conclusive, recourse is by our present law competent to every heritor whose lands are designed,

Right of relief to heritors out of whose lands the glebe is set off.

* A soun is a quantity of ground sufficient for pasturing ten sheep, or one cow.

† It has been supposed, that no designation of temporal lands could take place, where there were church lands in the parish, however inconveniently these last might be situated for the minister ; and so the Court found in the case of the *Minister of Kingsbarns* ; *Fac. Coll. June 10. 1794, Dict. p. 5140.* But the same case having afterwards been brought before the Court, and considerable doubt having been entertained both on the general point, and on the special circumstances which there occurred, the Court altered the former judgment, and, waving the general question, found, that in the particular circumstances of the parish of Kingsbarns, the minister was entitled to a designation of his glebe out of temporal lands nearest to the church and manse, and that the relief lay against the whole heritors ; *June 11. 1799, Balfour Hay contra Erskine, Dict. voce GLEBE, App. NO. 2²⁹³.*

²⁹³ “ Although this interlocutor bears to have been pronounced on the special circumstances of the case, yet the Court now expressed so strong an opinion against the distinction between temporal and church lands in the designation of arable glebes, that it was considered as a judgment upon the general question against that distinction ; and ever since that period the distinction has been wholly disregarded in the designation of arable glebes ;” *Connell, (Parishes,) 370.* It is otherwise in regard to grass glebes, *infra, § 62.*

Glebes pay no
tithe, and are
unalienable by
the incumbent.

signed, though the whole of the parish should consist of temporal lands. This right of recourse is not real, against the lands themselves; it is barely personal, against those who were heritors at the time of the designation, and their heirs; *Stair, June 24. 1675, Snow, (Dict. p. 10167).*

61. Where two parishes are united into one, the minister of the united church is entitled to both the glebes that belonged to the two churches before the union or annexation; but if the united glebes, when joined together, make at least one legal glebe, the minister cannot plead, that the glebe belonging to the manse in which he actually resides, should, in so far as it is deficient, be brought up to the legal standard, on pretence that all ministers are by statute entitled to a full glebe next adjacent to their manses, *Fac. Coll. i. 165, (Forbes against Miller,) Nov. 26. 1755, (Dict. p. 5127).* Glebes pay no tithe. This was at first a necessary consequence of the rule, That tithes are due only to the parochial pastor; for whatever tithe was due out of the glebe possessed by him, could belong to no other but himself. But when, after the Reformation, laic titulars were made capable of enjoying tithes, a titular who had obtained a grant of the whole tithes of a parish, might have laid his claim against the minister of that parish for the tithe of his glebe; to prevent which, the glebes of ministers, 1578, C. 62., and also their souns of grass where they have no arable glebe, 1621, C. 10., are declared free from the payment of tithe. Manses and glebes are declared to be, after their designation, unalienable by the incumbent; who therefore can neither sell nor let them in feu, or in lease, to the prejudice of his successors, 1572, C. 48*. This statute was necessary for putting a stop to a fraud practised by churchmen at the Reformation, who feued out their lands at an undervalue, upon receiving considerable sums from the feuars at their entry, in name of fine or purchase-money, which they pocketed up for their own use. That it was not intended to strike against such alienations as were profitable to the benefice, appears not only from the reason of the thing, but the words of the act, which expressly limit the enactment to *alienations detrimental to the successor*: Yet the act has been explained into an absolute prohibition to feu, though the yearly feu-duty secured by the grant to the benefice should be quadruple of what could reasonably be expected in the way of tillage †. This, however, is certain, that upon the transportation of the church to another part of the parish, the old manse or glebe may be sold or exchanged for a more commodious one; and such sales or excambions have been authorised by the Court ‡.

* The same thing had been enacted by a prior statute, 1563, c. 72.

† So the Court decided, after a most deliberate consideration; *Fac. Coll. May 14. 1791, Minister of Little Dunkeld, &c. Dict. p. 5153.* The same doctrine was held in a later case; *Fac. Coll. Feb. 8. 1793, Minister of Falkland, Dict. p. 5155.*

‡ Whether the incumbent at the time may, by contract of excambion, exchange his glebe, must depend a good deal upon circumstances. In the case of *Robertson against Fraser, Feb. 16. 1791*, not reported, an excambion of this kind was sustained, having been acquiesced in for a considerable time, and no sufficient evidence of lesion appearing. The concurrence of the presbytery had likewise been obtained. It has been disputed whether trees growing upon the glebe belong to the heritors or to the minister. In the case of *Hepburn of Humbie against the Heritors of Keith and Humbie, Feb. 16. 1791,*

62. Beside the glebe, the minister had right to grass for a horse and two cows, by 1649, C. 45. This act was revived by the above-cited statute 1663, C. 21., which seems to make the minister's right to his grass and to his glebe equally broad; for it enacts, that every minister, except those of such royal boroughs as have no right to a glebe, should have grass²⁹⁵: And yet it mentions church-lands as the only subject out of which his grass is to be designed²⁹⁶; so that whether a minister, whose parish consists only of temporal lands, hath a legal claim for grass, may admit of doubt²⁹⁷. Thus far the act is clear, that where there are church-lands in the parish, if they either lie at some distance from the church, or consist of arable ground which has seldom been pastured upon, the landholders are subjected to pay to the minister L. 20 Scots, as an equivalent for his grass²⁹⁸; and in that case, all the heritors were declared to be burdened equally with the payment, *Jan. 3. 1745, Ferguson*, (Dict. p. 5157.); reported by *Falc.* and by *Kames, Rem. Decis. 63*²⁹⁹. But as this method put the minister to the necessity of receiving the L. 20 in as many small sums as there were landholders in the parish, which in parishes where the property was divided among fifty or sixty brought great inconveniences on the incumbent, it was adjudged, *Fac. Coll. i. 171, (Durie, &c. against Min. of Dunfermline, Dec. 12. 1755, Dict. p. 5161)*, that the burden of the whole ought to be laid, in the first place, on the proprietor of the nearest

1791, not reported, the Court were in general of the latter opinion, though it was not necessary in the circumstances of the case to decide that precise point. In the case *Logan against Reid, May 16. 1799, Dict. v. GLEBE, App. No. 1.* it was decided that the minister might cut and appropriate the trees²⁹⁴.

²⁹⁴ A minister may work a *marl* pit in his glebe, provided it can be done without injury, and "that the produce shall be applied for the service of the benefice," *Minister of Maderty, 14th Nov. 1794, Dict. p. 5153.* He may also "work the coal" below his glebe, at the sight, and under the direction of the heritors and the presbytery;—"the value and proceeds of the coal" being "also to be under their control and management, for behoof of the minister and his successors;" *Fac. Coll. Minister of Newton, 3d June 1807, Dict. v. GLEBE, App. No. 6.* As to the powers of the minister, see *Connell, (Parishes,) 424. et seq.*

²⁹⁵ It has been contended, that the designation of the grass glebe "should be made from the lands of the legal description that were in point of proximity nearest to the kirk;" but this argument as to the necessity of absolute proximity, (sacrificing the convenience of the minister, and every other circumstance, to the most trifling difference of distance,) has no foundation, either in the words or spirit of the statute; *Fac. Coll. Anderson, 22d May 1810; affirmed on appeal, 6th July 1814, 2. Dow, 433; Connell, (Parishes,) 398.*

²⁹⁶ Where it is denied by the heritors that the lands designed are church lands, the *onus probandi* is laid on the minister; and it is not incumbent on the heritor, even where the only proprietor of the parish, and though it be evident that there are church lands in the parish, to show where these church lands lie; *Fac. Coll. Minister of Panbride, 24th Jan. 1815.*

²⁹⁷ A minister, whose parish consists only of temporal lands, has clearly *no* legal claim "for grass" in kind. The doubt here raised is as to his claim for the *pecuniary allowance*; and this point seems still not altogether determined. *Vid. Connell, (Parishes,) 406. & 421.* The judgment in the case of *Durie, &c.*, noticed a little lower down in the text, is, however, adverse to the minister's claim; the liability for the statutory allowance, in a parish where there were both church lands and temporal lands, being there exclusively limited to the former. See also *Elchies' Notes, (vol. ii. p. 172.) on Minister of Kilwinning, 3d Jan. 1745, v. GLEBE, No. 3.*

²⁹⁸ The sum of L. 20 Scots being now altogether inadequate as an equivalent for "grass for one horse and two kine," an attempt was lately made to obtain from the Court such an allowance as would afford a real compensation. The minister founded on the liberal course pursued in regard to manes; *vid. supra, § 56. note 282*: But the Court held the statute imperative, and found the minister "not entitled to more than L. 20 Scots;" *Fac. Coll. Carfrae, 13th May 1814; Connell, (Parishes,) 400 et seq.*

²⁹⁹ Reported also by *Elchies, v. GLEBE, No. 3.*

nearest church-lands: And this rule appears to be founded in the statute itself, which gives recourse to the landholder who pays it, against the other heritors of church-lands in the parish. Where the minister has no fixed legal manse from the heritors, and the question is, What heritor is liable to make payment to the incumbent, as possessed of the nearest church-lands? those are considered as the nearest which lie at the smallest distance from the glebe, without any regard had to their distance from the minister's dwelling-house; which being in this case frequently rented from year to year, is liable to frequent changes; and, of consequence, the proprietor of the church-lands lying nearest to the glebe is the person immediately liable in payment of the whole L. 20 to the minister for his grass, saving to him his action of recourse in manner before mentioned, *Tinw., March 2. 1756, Min. of Dunfermline*³⁰⁰. Lands of a poor soil, which by nature seem more fitted for pasture than the plough, may be designed for the minister's grass, though they may have sometimes been brought under tillage, *Fac. Coll. i. 192* *³⁰¹. Though the lands which have been designed by the presbytery properly for a glebe, should be of such an extent as to be sufficient also for the minister's grass; yet if he has possessed it as his

* *Hodges against Bryce, Feb. 27. 1756, Dict. p. 5162.* But in general it seems to be held, that no designation can be made of lands constantly kept in a state of cultivation, though occasionally bearing a crop of grass; *Kilk. i. voce GLEBE, Steel against Dalrymple, July 27. 1748, Dict. p. 5161; Fac. Coll. June 26. 1778, Grierson, Dict. p. 5162.*

³⁰⁰ The minister's right to insist for a grass glebe in kind is not taken away, though his predecessors, under an agreement with the heritors, not formally sanctioned by the presbytery or other competent authority, have been in use, for time immemorial, to accept of the statutory allowance of L. 20 Scots in lieu of it; *Fac. Coll. Lawrie, 10th Feb. 1804, Dict. v. GLEBE, App. No. 4.; Ibid. Minister of Panbride, 18th May 1809; Anderson, 6th March 1810; affirmed on appeal, 6th July 1814, 2. Dow, 433; Connell, (Parishes,) 400.* This rests on the general principle, recognised in innumerable cases, that "any incumbent may insist for the rights competent to the benefice, and no private arrangement by one can bind his successor;" *Minister of Linlithgow, 24th Nov. 1801, observed in a note to Fac. Coll. Minister of Dunfermline, 19th Nov. 1805, Dict. v. MANSE, App. No. 1.; Minister of Falkland, supr. § 61. not. † &c. &c.* But where the statutory equivalent has been accepted by the incumbent for the time, with the regular sanction and concurrence of the presbytery, this will effectually regulate the future rights of the benefice, and exclude all claim by subsequent incumbents; *Fac. Coll. Minister of Dollar, 9th July 1807, Dict. v. GLEBE, App. No. 7.; Connell, ut supra.*

³⁰¹ No designation can be made of "land that is *bona fide* in a course of cultivation," however much it may be matter of opinion that it is more fitted for pasture; *Fac. Coll. Minister of Panbride, 18th May 1809:* On the other hand, "heritors must not, in *amulationem*, till up what was in use to be lee; else they might leave nothing to be designed for the ministers, but moss, maix, hills, or rocky ground, to the minister's prejudice, and defrauding the good design of the law; for such an interpretation were to lie at the catch, *et verba legum captare*;" *Fount. Steel, 31st Jan. 1712, Dict. p. 5131.* In short, the principle of decision seems to be well laid down, "that, by arable lands, the act of Parliament did not mean either lands that by industry could be laboured, for all lands are arable in that sense; nor yet lands that were constantly in tillage, for in that sense some of the best grounds would not be accounted arable; but such grounds as of their own nature were arable, and now are, or have been in use to be tilled, in their course, with the other grounds of the farm;—and lands not arable, such as were not proper for tillage, and have not been usually employed in tillage;" *Minister of Dunfermline, 20th June 1751, Elchies, v. GLEBE, No. 5.* On the above subject, see *Connell, (Parishes,) 388. et seq.*

"The question, whether lands fall within the exception of arable in the statute, is to be determined by their condition at the time when the designation is applied for, however recently such lands may have been improved;" *Grierson, supr. not. * i. p.* When an heritor, after designation by the presbytery, and in the course of an unsuccessful litigation against it, improves the ground, so as to render it more productive, the extent of glebe will not be regulated by its state "when the matter comes to be finally adjusted" in the court of review, but by its condition "at the date of the decree of the presbytery;" *Fac. Coll. Wilson, 10th June 1818.*

his glebe in virtue of that designation, without any action brought by the heritors for voiding it, the minister appears not to be barred from insisting also for his grass, in pursuance of the act 1663, C. 21.; because that act gives the minister a right to grass over and above his glebe³⁰². Yet the minister of an united parish, who was possessed of glebes to that extent, but without any evidence of an actual designation of grass by the presbytery, was found to have no separate claim upon that statute; because it was presumed, that the ground was marked out both for glebe and grass, no record being kept of designations of grass; and ministers might, if such presumption were not admitted, get second and third designations of grass in the same parish, at some distance of time from each other, *Fac. Coll.* i. 165, (*Forbes, Nov. 26. 1755, Dict. p. 5127.*)³⁰³. Besides all this, ministers have by 1593, C. 165., *freedom of foggage, pasturage, fuel, feal, divot, loaning and free ish and entry according to use and wont of old*; which act is ratified by the posterior act in 1663, C. 21*. What these privileges are, must be determined by the local custom in the several parishes †.

63. Besides the above-mentioned burdens of stipend, communion-elements, manse, glebe, and grass, imposed on the landholders of a parish, certain burdens were, by statutes enacted soon after the Reformation, laid on the whole inhabitants or parishioners ‡. The upholding of churches and church-yards was, by 1563, C. 76., remitted to the privy council; who accordingly settled the manner of

Certain statutory burdens laid on all parishioners, are now transferred to landholders.

* The minister has also right to take the grass in the church-yard, by cutting it, but cannot pasture his cattle there; *Fac. Coll. Dec. 2. 1778, Hay, Dict. p. 5148*³⁰⁴.

† It has been decided, That a presbytery cannot design fuel to a minister out of a moss over which he or his predecessors had not formerly exercised that servitude; *Feb. 28. 1769, Duff, Dict. p. 5147*. Indeed, the extent of a minister's privileges under these statutes must always depend on the state of possession; *Ibid. Feb. 25. 1779, Dymock, Dict. p. 5149*.

‡ In regard to the extent of the church, it has been adjudged, and laid down as a rule to be observed in all after-cases, that the church must be capable of containing two-thirds

³⁰² So found, *Fac. Coll. Dundas, &c. 6th Dec. 1805, Dict. v. GLEBE, App. No. 5*. See also *Parishioners of Banachie, 18th Feb. 1675, (Dir. 124.)*, *Dict. Ibid. Bankton, too, B. 2. t. 8. § 124.*, and *Elchies, v. GLEBE, No. 1.*, both lay down the doctrine as quite settled. As to the latter authority, however, it will be observed, that an essential error has crept into the printed edition. It runs thus: "Though a minister have no more than four acres of glebe," he may notwithstanding insist also for his grass under the act 1663. The word "no" has here been inserted by a typographical blunder: it does not occur in the MS. in the Advocates' Library, *Connell, (Parishes,) 408 and 412*.

If, indeed, it could be shown, either by direct evidence, or irrefragable presumption, that there had actually been a *previous* designation of grass, in addition to the proper glebe, there would of course be no room for any farther claim. See *Bethune, 2d Feb. 1811, observed by Connell, (Parishes,) 409*; also *infr. not.*³⁰³.

³⁰³ If this decision was truly rested on the presumption suggested in the text,—that the ground already possessed by the minister was designed not merely as proper glebe, but "was marked out both for glebe and grass,"—it is quite in consistency with the doctrine previously laid down, as applicable to the case of a single parish; at the same time, judging from the report, there would appear not to have been room for any such presumption. There ought, however, to be no distinction, and there can be none in sound legal principle, between the case of a single and that of an united parish. And, therefore, as it seems fixed, in reference to the former, that the minister is entitled to his grass, over and above his proper glebe, unless *de facto* there has been a *previous* designation specially of grass, *supr. not.*³⁰², it is likely that a similar decision would now also be pronounced in reference to the latter. This would, in fact, only be returning to a judgment of little earlier date than the one in the text. "A minister of two united kirks having, betwixt the two, twelve acres of glebe, was found entitled to grass by the said act" 1663, c. 21.; *Beaton, 8th Feb. 1734, Elchies, v. GLEBE, No. 1*. See on this subject, *Connell, (Parishes,) 412, et seq.*

³⁰⁴ So decided again, *Spence, 1st Dec. 1808, Fac. Coll.* So also in an older case, it was "found, that the kirkyard ought not to be used for pasturage, nor computed as part of the minister's grass;" *Beaton, 8th Feb. 1734, Elchies, v. GLEBE, No. 1*.

of repairing churches, by an act September 13. that year, which is ratified by 1572, C. 54. The ratifying statute does not recite the tenor of the act of council; but it appears by a copy of it preserved in *Statute law abridged, Append. No. 2.*, that two-thirds of the expence were charged on the parishioners, and the remaining third on the parson; and the parishioners were to be taxed for their shares, by stentmasters chosen by themselves. Parishioners are, by 1597, C. 232, ordained to repair the church-yard walls of their own parishes; and by 1617, C. 6., they must provide communion-cups, lavers, and other utensils necessary for administering the sacraments. But now, by long custom, those burdens, at least that of repairing churches and church-yard walls, are transferred from the parishioners and parson to the landholders, who must bear the expence of repairing, and even rebuilding the parish-church, according to the valuations of their several lands ³⁰⁵ *.

64. It

two-thirds of the examinable persons in the parish, not under twelve years of age; *Fac. Coll. June 22. 1787, Heritors of Tingwall, Dict. p. 7928* ³⁰⁵.

* The superior is not liable in any part of the expence of building or repairing the church; *Fac. Coll. Jan. 23. 1773, Bruce Carstairs, Dict. p. 2933*; *Ibid. Feb. 20. 1794, Murray, Dict. p. 15092*. The titular of the teinds is liable only in proportion to his valuation, though it has been pleaded that he ought to pay a full third of the expence; *Clerk Home, No. 84, Parish of Selkirk, Feb. 9. 1738, Dict. p. 7915* ³⁰⁷. But it happens in many cases, that the allocation cannot justly take place according to the valued rent. Thus, when the parish is composed partly of a town, and partly of a landward district, it has been held, that the expence of building as much of the church as is necessary for accommodating the latter, must be defrayed by the heritors in proportion to their valued rents, and divided among them in the same proportion; and the expence of the remainder

³⁰⁵ This rule was laid down as applicable to the case "where it becomes necessary to build a new church." It was afterwards found, that where an existing church is substantial, or capable of being repaired, the heritors cannot be forced to pull it down, and build a new one, on the ground that it is not sufficient to accommodate two-thirds of the examinable persons in the parish; *Cunninghame, &c. 12th Dec. 1811, Fac. Coll.* But more recently, even in this situation, it has been held, that where the increase of population arises from permanent causes, a church, which required at any rate a certain degree of repair, "must be made sufficiently large to contain two-thirds of the examinable persons in the parish, either by building a new church, or by an enlargement of the present one;" *Heritors of Lerwick, 27th Jan. 1820, observed by Connell, (Supplement,) 44*. At the same time, the Court are said to have "intimated, that this should not be considered as a judgment on the general point, that wherever there was an increase of population, heritors were bound to make an addition to the parish-church proportioned to that increase;—and that in future every case must be judged of by its own circumstances;" *Connell, (ibid.) 53*. This branch of the question, therefore, may at present be regarded as not altogether settled.

See on the above subject, *Connell, (Supplement,) 30. et seq.*

³⁰⁶ The radical jurisdiction as to all questions concerning the building and repairing of churches, is vested in the presbytery; *Spot. Kirk-session of Lauder, 24th Nov. 1630, Dict. p. 7919*; *Fac. Coll. Minister of Dunning, 10th June 1807, Dict. v. KIRK, App. No. 4.*; *Maxwell, in Dom. Proc. 19th June 1816, 4. Dow, 279*; *Connell, (Supplement,) 54. et seq.* It is part of this radical jurisdiction, that the presbytery shall order and receive plans and estimates, and appoint them to be carried into execution; the heritors being entitled only to state objections, not to insist on choosing a plan for themselves; *Fac. Coll. Campbell, &c. 19th May 1815*; *Maxwell, supr.*; *Connell, (Supplement,) 67*. The heritors, however, have the right of superintending the operation of building; or they may execute the work by tradesmen of their own, if they adhere to the plan and estimates approved of by the presbytery, and proceed without undue delay: even when the presbytery act, they are held to act entirely for the heritors, so that should there be any thing amiss in the execution of the work, the presbytery cannot discharge the contractor, but the heritors may appear in their own persons, and vindicate their civil rights; *Fac. Coll. Dunbar, &c. 29th June 1804, Dict. v. JURISDICTION, App. No. 11.*; *Parishes of Falkirk, 18th May 1810, and Muirkirk, 15th May 1812, observed by Connell, (Supplement,) 63. et seq.*

³⁰⁷ The proprietor of a coal mine is not liable for any part of the expence of building or repairing the church; in respect "the profit derived from a coal mine being of the nature of casual rent, should not be made to bear a share of a permanent burden;" *Fac. Coll. Bell, 16th Feb. 1805, Dict. v. KIRK, App. No. 3.*; *Connell, (Supplement,) 28*.

TITLE X.
Annexation of
lands *quoad sa-
cra*.

64. It sometimes happens, that lands, where they lie at too great a distance from the church to which they originally belonged, are, by the commission-court, annexed *quoad sacra* to another parish, the church whereof lies at a lesser distance from these lands. By annexing *quoad sacra*, is understood, that the inhabitants of the annexed lands are, for their greater conveniency in attending divine service, brought under the pastoral care of the minister of the church to which they are annexed. But such annexation affects only the inhabitants; the lands continue in all civil respects part of the old parish³⁰⁹; and therefore they remain burdened with the payment of the stipend to that church from which the inhabitants were disjoined *³¹⁰; and it was adjudged, that the owners of those lands do not, by the annexation, become liable in any part of the expence necessary for upholding the manse, or even the church, of the parish to which they are annexed, and which the inhabitants constantly resort to for divine service, but that they continue, even in that respect, to be accounted part of the old parish, *Falc. i. 274*, (*Park against Maxwell, July 13. 1748, Dict. p. 8503*) †.

65. After

remainder paid by the feuars and proprietors of houses, in proportion to their real rents, and divided amongst them in the same proportion; *Fac. Coll. Nov. 20. 1781, Town of Crieff, Dict. p. 7924*. The same decision was pronounced in a case from the *Parish of Peterhead, Jan. 15. and Feb. 10. 1802*, not reported. On appeal to the House of Lords, this last decision was (*June 24. 1802.*) reversed; and it is declared in the judgment that the charge of building the church "is a parochial duty, and that it ought to be defrayed by all the owners of lands and houses, in proportion to their real rents³⁰⁸."

* So the Court decided, *Fac. Coll. July 22. 1772, Knox, Dict. p. 14802*.

† The decision here quoted by the author, respected only the expence of building a manse in the new parish. It has since been expressly adjudged, that lands annexed *quoad sacra*, are liable in upholding the church, not of the old parish, but of the new, and that as to all other parochial burdens, no change whatever takes place; *Fac. Coll. Feb. 2. 1773. Drummond, Dict. p. 7920*.

It is also a point settled beyond all controversy, that even when two whole parishes are

³⁰⁸ The Lord Chancellor "thought there was no express law, nor train of decisions, establishing in a parish of the present description, the rule of the real rent in regard to one part of the parish, and of the valued rent in another part; and that the best and fairest rule was to take the actual or real rent of the whole property in the parish, and upon that to apportion the expence;" *Connell, (Supplement,) 26*. It would hence appear, that the above decision does not import any change in the law with respect to parishes, merely landward; as to which the assessments will most probably be regulated as before, by the rule of the valued rent; *Ibid. 27*. The decision in the *Peterhead* case was again referred to by the Lord Chancellor, as fixing the principle; *Maxwell, &c. in Dom. Proc. 19th June 1816, 4. Dow, 279*.

³⁰⁹ Accordingly, an annexation of parishes *quoad sacra tantum* does not affect or transfer the previous civil rights and obligations of the respective parishes with regard to the maintenance of the poor; *Thomson, 17th Nov. 1808, Fac. Coll.*

³¹⁰ It is different where the annexation has been made *quoad omnia*. In a late case, though the annexation had occurred so far back as 1630, and notwithstanding stipend had uniformly continued to be paid ever after to the minister of the old parish, the Court found the minister of the parish to which the annexed lands had been united, entitled, after exhausting the free teind in his own original parish, to all or as much of the teinds of the annexed lands "as may be necessary for completing his modified stipend;" *Fac. Coll. Johnston, 3d March 1802, Dict. p. 14834*. Should the disjunction from the original parish, however, be made under such circumstances, as to infer a *condition*, that the minister of the parent parish was in all time coming to draw a certain part of his stipend out of the teinds of the disjoined lands, this part of the teinds can never afterwards be appropriated to the minister of the new parish, even though it should require the whole teinds of the parish to answer the stipend modified to him; *Locality of Abbotshall, 22d Nov. 1815, Fac. Coll.* This was a case where the disjoined lands had been erected into a distinct parish of themselves; but the principle equally applies to the case of an annexation.

BOOK II.

Right of annat,
what was an-
ciently meant
by it.

65. After the death of a parochial minister, his executors have right to the annat or ann. Writers differ much about the meaning of this word. *Polydor. Virgil. L. 8. C. 2, De rer. inv.*; *Greg. Tholosan. Partit. L. 1, T. 25, C. 1*, and others, give that name to the right reserved to the Popes out of the fruits of vacant benefices, under the colour of supplying the general necessities of the church, of which mention is made, *Ext. Comm. L. 3, T. 2, C. 11*; and which right Walsingham affirms to have been received in England, in 1305, *Ypod. Neustr. ad hunc annum*. Du Cange, *v. Annata*, defines it to be a year's rent of every bishopric or abbacy, granted to the Pope by the bishop or abbot, on his entry to the benefice. The annat, when taken in this last sense, was only exacted from those churchmen who had received consecration from the Apostolical see; and seems to have taken rise from an ancient custom, of an honorary paid by those who entered into holy orders, to the bishop who ordained them, *Nov. 123, C. 3. & 16*. The first Scottish statute which mentions the annat, is 1547, *C. 4.*, by which the fruits of the benefice then on the ground, and the annat afterwards, were, upon an invasion threatened by England, declared, notwithstanding this pontifical right, to belong to the executors of such churchmen as should fall in the defence of their country. And the same encouragement was renewed on a like occasion, by 1571, *C. 41*.

What the right
of annat is in
Scotland at this
day.

66. The right of ann, as that term is now understood in Scotland, was borrowed from Germany. In several Protestant churches there, as of Pomerania, Frankfort, &c., a year's rent of each parochial benefice was, soon after the Reformation by Luther, given on the incumbent's death, as a gratuity to his wife and children, beside what was due to himself for his incumbency; to which they gave the name of *annus gratiæ*. In Saxony, Brunswick, Magdeburg,

are united having different titularities, or different patronages, the stipend must be divided between the parishes agreeably to their rentals, and each titular or patron has only right to allocate his proportion thereof within his own right. This was first decided in 1718, in a case *Maxwell of Tingwall contra The Officers of State, &c.* not reported; and the Court have in several late instances literally followed that as a precedent; *Fac. Coll. July 13. 1774, Fotheringham Ogilvie*, *DICT. p. 14815*, in which the case of Maxwell of Tingwall is referred to; *Fac. Coll. Dec. 5. 1798, Sir William Maxwell*, *DICT. p. 14832*; *May 14. and June 18. 1800, Locality of Craig*, not reported. The rule is, that the order of allocation shall take place in each parish in the same way as it would have done had they continued separate, without regard to any right of preference which may appear to exist between the titulars themselves. Thus, it has been applied where a college was titular of the one parish, and the Crown, as coming in place of a bishop, titular of the other; *Fac. Coll. Dec. 5. 1798, Parish of Logie*, *DICT. v. COLLEGE*, *App. No. 2.*³¹¹ Where one parish has been divided into two, and the titularity of the new parish transferred, they will in like manner be held as separate parishes in any new locality; *Fac. Coll. Jan. 23. 1799, Duke of Hamilton, &c. DICT. p. 14833*³¹².

³¹¹ So also, it was found, that an augmentation of stipend must be allocated on each of two united parishes, in proportion to the amount of its own rental, though in one of the parishes the teinds belonged to a college, and that a theological college, and in the other to a common titular; *Minister of Whitelkirk and Tynningham, 22d Feb. 1809, Fac. Coll.* See 2. *Connell, (Tithes,) 275. et seq.*

³¹² The import of this decision may be more correctly stated thus:—Where there are two or more distinct titularities in a parish, the burden of stipend is divided in proportion to their respective proven rentals, and separate allocations take place, applicable to each titularity. This was again decided, *Fac. Coll. Deans of Chapel Royal, 11th Dec. 1799, DICT. v. TEINDS*, *App. No. 6.*; the order in which the teinds would have been localised on, in consequence of the privileged character of the Chapel, had there been but one titularity, being here, as in the cases referred to, *supr. not.*³¹¹ and †, entirely disregarded. See 2. *Connell, (Tithes,) 276.*

burg, &c. only six months' stipend was allowed, *Boehmer. Jus. Eccles. L. 3, T. 5, § 298, et seqq.* James VI. after this example, recommended to the bishops to make an ordinance, that the half of the year's benefice next ensuing the incumbent's death should belong to his widow and children; which appears to have been complied with from a decision, *Durie, July 19. 1626, E. Marishal*³¹³. The extent of this right was not however precisely fixed till 1672, C. 13., which declares it to be a half year's stipend given by the law, on the death of all churchmen, whether bishops or parochial ministers, to their executors, beside what may have been due to the deceased himself for his actual service: So that, if the incumbent die after Michaelmas, his executors are entitled to the whole of that year's stipend for his incumbency, and to the half of the next in name of ann; and if he die after Whitsunday, they have the first half of that year for his incumbency, and the other half as ann. The ann is due, though the incumbent had been before his death suspended by a sentence of the church from the exercise of his office; for still he died incumbent in the benefice, the right of which cannot be affected by any church-sentence, other than that of deprivation, 1592, C. 115.; *Stair, Jan. 26. 1670, Relict of Shiels*, (DICT. p. 10437.). As the law has given this right to the executors of all ministers indiscriminately, it is due not only in parishes where the stipend is made up of the tithes, but though it should be paid out of the revenues of a borough, or consist of a fund raised by voluntary subscriptions, *Falc. i. 182, (Hutchison, June 9. 1747, DICT. p. 467.)*³¹⁴.

67. Writers differ about the proportions by which the ann is to be divided between the incumbent's widow and children. Some affirm, that the widow ought to draw no more than an equal share with any one of the children; and some, that the one half of the ann goes to the widow by herself, and the other to the children, among whom it is proportioned *in capita*; which last opinion is supported by a decision, *July 1747, Children of Macdermit*, (DICT. p. 464.)³¹⁵. But, if we set aside that authority, a third opinion may perhaps be more agreeable to the act 1672, which gives the right to executors, without the least mention either of widow or children; for if it be given to executors, it ought to be governed by the rules of succession in executry, by which one-third of the ann would, like other moveable subjects, go to the widow, where there are both widow and children, and the remaining two-thirds be divided among the children *per capita*³¹⁶. All are agreed, that where there is a widow without children, the widow gets the one half, and the next of kin to the deceased the other. If there be children,
and

The proportion by which it is divided between the widow and children.

³¹³ Omitted in *Morison's DICT.*

³¹⁴ Reported also by *Kilk. and Elchies, v. ANN, No. 1.*

³¹⁵ *Elchies* also observes the case, on the authority of *Kilkerran's Notes, v. ANN, No. 2.*

³¹⁶ This opinion is contrary to all the authorities, excepting perhaps *Stair, B. 2. t. 8. § 34.*, where the mode of expression is not free from ambiguity: "The annat divides betwixt the relict and nearest of kin, if there be no bairns." *Mackenzie, B. 1. t. 5. § 16.*, and again in his *Observations on the Statutes, p. 150*; *Forbes, (Institute,) Part 1. B. 2. c. 1. t. 2. § 6.*; *Bankton, B. 2. t. 8. § 14.*; *Connell, 2. Tithes, 457*, agree in laying down the rule according to the decision in *Children of Macdermit*, referred to in the text. *Erskine* himself, in his *Principles*, seems to hold this as the law, reconciling it with his view of the statute, by remarking, that the Court had been "probably led by the general practice;" *B. 1. t. 5. § 22.*

BOOK II.

It requires no confirmation to vest it, and is unalienable by the incumbent.

and no widow, the children get the whole, to the entire exclusion of the other kinsmen of the deceased; and where he has left neither widow nor child, the whole ann goes to his next of kin, *Stair, July 6. 1665, Colvil, (Dict. p. 464.)*.

68. Since the ann never belonged to the deceased churchman, but is a legal gratuity, chiefly intended for the behoof of his widow and children, who, for the most part, are but poorly provided by the deceased himself, it requires no confirmation; for confirmation is the method the law has appointed for perfecting titles to the moveable estate belonging to the deceased, in the person of his next of kin. This however was doubted, see *Stair, July 19. 1664, Scrimgeour, (Dict. p. 463.)*, till the aforesaid act 1672, by which the incumbent's executors are declared to have right to the ann without confirmation. It also follows, from the ann's never having been *in bonis* of the incumbent himself, that it is not affectable by his debts, nor assignable by him to any stranger, to the prejudice of those for whose benefit the law intended it; *Fount. March 18. 1686; Alexander, (Dict. p. 470.); Fount. Feb. 20. 1694, Donaldson, (Dict. p. 471.)* *.

TIT. XI.

Of Inhibitions.

What is meant by diligence.

AFTER having treated of the constitution and transmission of feudal rights, with their several limitations, and the burdens with which they are chargeable, it remains to be considered, how those rights may be affected at the suit of creditors by legal diligence. Diligences are certain forms of law, by which a creditor endeavours to make good his payment, either by laying hold of and imprisoning the person of the debtor, or by securing his estate from alienation or embezzlement, or by carrying the property of it directly to himself. Diligence is either real or personal. Real is that which is proper for attaching heritable or real rights. Personal is that by which the debtor's person may be secured, or his personal estate affected. Of the first kind the law of Scotland has received two: *First*, Inhibition, to be explained under this title; and *2dly*, Adjudication, which the law has substituted in the place of apprising, and which is to be considered under the next.

Inhibition, its nature.

2. Inhibition is a personal prohibition, which passes by letters issuing from the signet, prohibiting the party inhibited to contract any debt, or grant any deed, by which any part of his lands may be alienated, or carried off, to the prejudice of the creditor inhibiting.

* By special statutes, 17. Geo. II. c. 11, § 16, and 19. Geo. III. c. 20, § 14, (establishing a fund for provision to the widows and children of the Scottish clergy), the ann is burdened with a sum equal to one-half of the annual rate at which the incumbent had been in the use of contributing to the fund. It has been decided, that the annuities due to the widows of ministers under these statutes cannot be assigned before the term of payment; *Fac. Coll. May 19. 1791, Mackenzie, Dict. p. 10413* ³¹⁷.

³¹⁷ Neither are they subject to arrestment; 19th Geo. III. c. 20. § 78.; 1. *Bell's Comm.* 73.

ing*. This diligence was introduced to secure creditors who are in danger of losing their debts, through the profuse disposition of the debtor: The prohibition therefore contained in it is barely personal against the debtor himself, whose character and turn of mind give the creditor ground to suspect him of an intention to alienate. Hence the debtor's heir, who has, after the ancestor's decease, perfected titles to the estate, lies under no restraint, if the inhibition be not renewed against him. This method of securing creditors against the debtor's deeds of alienation is more effectual than that by the *actio Pauliana* of the Roman law: For there, evidence was required of an actual intention in the debtor to disappoint his creditors, in order to annul the alienation; whereas a *præsumptio juris et de jure* arises from the diligence of inhibition, that every deed done by the debtor counteracting the prohibition contained in that diligence is fraudulent, *Cr. Lib. 1, Dieg. 12, § 31.*

3. Inhibition may proceed, according to Mackenzie, § 2, *h. t.* either upon a decree, or on a registered bond, which is, in the construction of law, a decree. This carries a strong insinuation, as if inhibition could not be grounded upon any unregistered deed; but it is nevertheless daily admitted, upon the title of bonds, or other liquid obligations to which the creditor hath right, whether registered or not †. An inhibition may also be served by a creditor upon his debtor, where his only title is an action which he has commenced for making good a claim not yet sustained or ascertained by the judge, which is called *inhibition upon a dependence*, or *on a depending action*. In this last kind, it had been the general practice for the creditor who was to inhibit, to raise a summons against his debtor for constituting the dependence, and, so soon as that summons had passed the signet, to raise letters of inhibition against him, as upon a depending action; and it was thought sufficient if the summons was executed against the defender before serving him with the letters of inhibition. But beside that no action can be properly said to depend against one till he be cited in it as a defender, the style of all inhibitions supposes or assumes that the summons, by which the dependence is constituted, has been already executed against the defender at issuing the letters of inhibition. Notwithstanding this universal *communis error*, therefore, an inhibition was declared void, because it was raised, and had passed under the signet, before executing the summons on which it was grounded, *Br. 9, (Creditors of Rosehill, Nov. 22.*

Its grounds are either a liquid debt, or a depending action.

* See *Fac. Coll. Feb. 29. 1780, Gordon, Dict. p. 7008* ³¹⁸.

† It has likewise been found, after an inquiry into the state of practice, that inhibition may proceed upon a horning, without production of the bond or other ground of debt on which the horning proceeded; *Falc. ii. 216, Scott, July 3. 1751, Dict. p. 6993* ³¹⁹.

³¹⁸ It was here found, that inhibition does not bar the granting of a lease of ordinary endurance; this being a beneficial, and in some sort a necessary act of administration. But where the lease is "not a proper administrative lease," but, by allowing the tenant to retain the rents, is rather "an attempt to obtain, in the form of "a lease, a security for debt, which the creditor could not have obtained directly by "the voluntary act of the debtor, nor by legal diligence," inhibition is an effectual bar; *Wedgwood, &c. 13th Nov. 1817, Fac. Coll.* On the same principle, inhibition annuls a long lease; or a lease at a small rent with a grassum; 2. *Bell's Com. 156*, and *MacLachlan, 10th Feb. 1802*, there noted. *Vid. supr. t. 6. § 21. not. 94.*

³¹⁹ *Kilkerran, v. INHIBITION, No. 14.*, reports this case as if left undetermined, *Dict. p. 6989*. But *Falconer's* report is fully confirmed by *Elchies, v. INHIBITION, No. 16.*; where it appears, that the Court, having at first superseded the case, to permit an inquiry into the practice, in the end "unanimously repelled the objection." The law is accordingly laid down on this footing; 2. *Bell's Com. 152.*

22. 1714, DICT. p. 6968)^{320*}. An inhibition upon a depending action can have no effect towards annulling deeds granted by the debtor after that diligence, till the dependence be closed by a decree in favour of the pursuer, sustaining the debt and declaring its extent; because, until such decree be recovered, it is uncertain whether the inhibitor be truly creditor to the party inhibited, or to what amount †. If the claim depending should be transacted by the voluntary agreement of parties, in consideration of a determinate compounded sum to be paid by the debtor, without a judicial sentence, the inhibition, which could no longer be said to be grounded on a depending action, would probably fall, and the creditor be put to the necessity of renewing his diligence upon the debtor's obligation for the compounded sum ‡. Inhibition may proceed, not only on debts already payable, but on those, the term of payment of which is not yet come, *Hope*, (INHIBIT.) *March* 19. 1622, *Napier*³²⁴, see *Fac. Coll.* ii. 52, (*Stirling* against *Nisbet*, *Aug.* 11. 1757,

* The same fate attended arrestments raised as on depending actions, where the summons was not executed; *Forbes*, *July* 19. 1706, *Creditors of Strichen*, DICT. p. 8144; *Fac. Coll. Orme*, *Feb.* 13. 1759, DICT. p. 3690³²¹. After a dependence has been thus constituted, it subsists till final decree is pronounced by the Court: and though an appeal be entered against an interlocutory order, an inhibition, as on a depending action, may still be competently passed; *Fac. Coll. July* 2. 1774, *Heron*, DICT. p. 7007, (2. *Bell's Com.* 151, 152.)

† The Court repelled the objection to an inhibition on a dependence, that it was not special as to the sum, or the ground of debt on which the action was raised; *Kames*, No. 36, *Creditors of Tofts*, *Nov.* 1722, DICT. p. 6970³²².

‡ The Court would not give effect to an inhibition on a depending action which had never been terminated by decree, the matter having been submitted to arbitration; *Falc.* ii. 215, *Reids, &c.* against *Napier*, *July* 3. 1751, DICT. p. 6993³²³.

³²⁰ In a case where the summons had been lost, but where the parties had notwithstanding gone on with the litigation, without any objection to the want of it, its tenor being at the same time apparent from quotations and other proceedings in process, the Court (no opposition being made) granted inhibition; *A. v. B.*, *17th June* 1815, *Fac. Coll.*

The defender in an action cannot inhibit on the dependence. But it is competent for him to apply, by special bill, for inhibition in security of expenses of process found due to him, though not actually modified and decerned for; *Wilkie*, *25th Feb.* 1815, *Fac. Coll.*

³²¹ This rule, in regard to *arrestments*, is now altered, the bankrupt statute declaring, "that, in time coming, letters or precepts of arrestment upon any depending action may be granted summarily, upon production of the libelled summons;" *54th Geo. III. c.* 137. § 2.; *Infr. B.* 3. t. 6. § 3. *in not.* But no alteration has been made in regard to *inhibitions*; 2. *Bell's Com.* 151.

³²² *Mr Bell* observes, that in this note, "the result of the decision is stated too broadly, as if applicable to every case without exception;" and he states the rule as being more accurate in this shape: "Where the action is for a precise sum, that sum must be specified in the inhibition: but frequently the action is of such a nature that it is impossible to specify any certain sum, as in counts and reckoning; and in such cases, it is sufficient to refer particularly to the relative action; 2. *Com.* 151. In point of fact, the gaining plea in the case of *Tofts* was quite in consonance with this,—“Since the law allows inhibition upon every depending action, the inhibition must receive its form and shape from the action whereon it is founded, which, in the present case, was a *count and reckoning* against a tutor.”

³²³ Reported also by *Elchies, v. INHIBITION*, No. 17. The same principle decides the case put in the text. "But there seems to be no doubt, that a special agreement to reserve the effect of the inhibition may be effectual, if the creditor stipulate to be allowed to proceed with the action, so as to have a judicial decree for the sum awarded;" 2. *Bell's Com.* 152. So held, accordingly, *Fac. Coll. Stewart*, *16th Feb.* 1770, DICT. p. 7004; and again, *Anderson*, *25th May* 1821, (*S. and B.*)

³²⁴ *Hope's* report of this case is omitted in *Mor.* DICT.; but another by *Haddington* is given, p. 8156. Both are to the same effect, and are so referred to; 1. *Fol. Dict.* 540.



1757, Dict. p. 6994); and even on conditional debts, though these are not proper obligations till the existence of the condition under which they are granted, *Stair, Dec. 11. 1667, Hog, (Dict. p. 7039)*; also reported by *Dirl. 116, (Dict. ibidem)* ³²⁴. But if an inhibitor upon a conditional debt shall bring an action of reduction *ex capite inhibitionis*, before that period, the decree of reduction can have no present effect: It is barely declaratory; and its operation is suspended till the obligation be purified by the existence of the condition.

4. The legal forms required in carrying on the diligence of inhibition, regard either, *first*, The personal execution of it against the debtor; or, *2dly*, Its publication; which, in several of our statutes, gets also the name of *execution*; or, *3dly*, Its registration. The solemnities relative to the personal execution of the letters, which serves as an intimation to the debtor, are the same which are prescribed in the execution of summonses, and letters of horning, by 1540, C. 75; which have been already explained, T. 5, § 55.—The explaining the manner of publishing and registering interdictions has been hitherto postponed, because the essential forms are precisely the same in interdictions and inhibitions; and therefore, what shall be here said of the one is to be understood also of the other.—And first, as to publication: By our ancient customs, observed by *Balfour, p. 186, C. 2*, it behoved inhibitors to publish their diligence at the market-cross of the head borough of the shire where the debtor resided, by a messenger reading the letters at the cross, after three oyesses made for convocating the lieges, in the same manner as in the publication of hornings; and by his afterwards affixing a copy of the letters, and of his own execution to the cross*. The only statute which mentions the publishing of inhibitions in express terms, 1597, C. 268, has plainly had an eye to that custom; and directs, that where the party inhibited resides within a stewartry, or other separate jurisdiction, the diligence shall be published at the head borough of that jurisdiction, in place of the head borough of the shire. But this branch of the act is now rendered useless, by the abolition of separate jurisdictions. An inhibition executed against the debtor personally, in an house where he has resided only occasionally for forty days, may be published at the head borough of the jurisdiction, either of that dwelling-house, or of the debtor's proper and fixed domicile, *Tinw. Dec. 2. 1748, Creditors of Kinminity* † ³²⁶. An inhibition used by an interdictor against the interdicted, and duly registered, has been adjudged to supply the want

The legal forms required in inhibition.

* An inhibition was found null, because the execution did not bear the three oyesses, nor the open proclaiming or reading of the letters; *Fac. Coll. Jan. 24. 1782, Creditors of Jarvieston, Dict. p. 3797* ³²⁵.

† Reported by *Kilk. No. 10, voce INHIBITION, Dict. p. 6982*. If the debtor is out of Scotland, the inhibition must be published at the market-cross of Edinburgh, and pier

³²⁴ “ Inhibition, on future or contingent debts, is subject to the control of equity;” 2. *Bell's Com. 151; vid. infr. h. t. § 8.*

³²⁵ An inhibition was sustained, where the execution bore three oyesses, open and public reading, though it wanted the words open proclamation, in respect that three oyesses and public reading import open proclamation; *E. Leven, Feb. 14. 1706, Dict. p. 3769.*

³²⁶ From *Kilkerran's* report of this case, *v. INHIBITION, No. 10., Dict. p. 6982*, the alternative course suggested in the text does not appear to have received the sanction of the Court. On the contrary, the Court seem to have thought, that the law “ is rather more effectually complied with by publication at the market-cross of the head burgh

Book II.

All inhibitions and interdictions must be registered within forty days of their publication.

want of publication of the interdiction, *Stair, Nov. 10. 1676, Stuart*, (DICT. p. 3092); which is an evidence, that the formal publication of the interdiction by a messenger is not accounted an essential solemnity, (for solemnities cannot be supplied by equipollencies), but is enjoined barely as a rational and proper method of notifying it to the lieges.

5. As experience soon taught, that the executions and publications of this diligence might be easily concealed from purchasers and creditors, or forged to their prejudice, all interdictions and inhibitions, with their executions, were, by 1581, C. 119, NO. 1, ordained, for the security of singular successors, to be registered in the books, both of the shire where the debtor resides, and, if he has lands in another shire, in the books also of that shire where the lands lie, within forty days after publication, under the sanction of being declared null. This act was in part repealed by that clause of the

posterior pier and shore of Leith; *Stair, B. 4, T. 50, § 13; Bankton, B. 1, T. 7, § 136; Fac. Coll. Feb. 1. 1793, Pierse, &c. DICT. p. 3721. See, however, Feb. 2. 1750, Creditors of Murray, DICT. p. 3718*³²⁷.

“ burgh where the party has his ordinary domicil, than when made at the market-cross of the head burgh where he happens to have an occasional residence; in so much, that it was not thought clear that such publication would not have been liable to objection.” See also to the same effect *Kilkerran's* remarks, *Ibid.* No. 12., in *E. March, 2d Feb. 1750, DICT. p. 3719*. It is singular enough, that the very publication which is here thought to be objectionable, had been but a few years before repeatedly given effect to, as the only competent course; the Court being then of opinion, that an inhibition executed against the party himself at the place of his occasional domicil must be published at the head burgh of the same jurisdiction; “ and that, in no case, is it regular to execute an inhibition personally at a debtor's dwelling-house within one jurisdiction, and against the lieges at the market-cross of another jurisdiction;” *Fol. Dict. Baird, 8th Nov. 1739, DICT. p. 3738; Kames, Rem. Dec. Dunbar, 27th July 1745, DICT. p. 3705*. Between these conflicting authorities, there is perhaps sufficient to support the alternative view of the text. At the same time, the safest practical course is that suggested by a very eminent practitioner: “ How is a practitioner to conduct himself upon a matter of this kind, between the absolute and occasional residence of his party? If his information be not very explicit, his only method is to publish at both market-crosses;” 1. *Ross's Lectures, 493*.

The above difficulty, however, can occur, only where the party has actually acquired a second domicil. Where he has not resided long enough for this, publication at the head burgh of his occasional residence is undoubtedly incompetent; it must be made at the head burgh of his regular domicil, in ordinary form; *Low, 10th March 1815, Fac. Coll.*

The jurisdiction within which the lands are situate, in no case enters into the question as to the proper place of publication; *Infr. h. t. § 6; Stair, B. 4. t. 50. § 10; Bankt. B. 1. t. 7. § 136; Creditors of Kinminity, supr.; Fac. Coll. Pierse, &c. 1st Feb. 1793, DICT. p. 3721*.

³²⁷ In this case it was found to be good publication, though made only at the head burgh of the domicil at which the debtor usually resided when in Scotland; and *Kilkerran* supports this, as the only proper mode of publication. *Elchies* also reports the case, v. INHIBITION, No. 13.; and gives another to the same effect, *Hamilton's Creditors, 5th June 1752, Ibid.* No. 18. In the case of *Pierse*, publication was made both at the head burgh of the domicil, and at the market-cross of Edinburgh, pier and shore of Leith; though it no doubt seems there to have been considered that publication in the latter way alone would have been sufficient. The passage in *Stair* referred to applies to the execution against the debtor, and not to the publication to the lieges; while that in *Bankton*, though favourable to the view taken in the case of *Pierse*, is not very precise. In these circumstances, it may not seem altogether free from danger, to rest entirely on a publication at the market-cross, pier and shore: though, from the almost universal practice in favour of that course, little apprehension, perhaps, needs now be entertained. At the same time, if absolute safety be desired, the safest course undoubtedly is, as in the above case of *Pierse*, to publish the diligence both at the market-cross, pier and shore, and at the head burgh of the domicil. See on this subject, 1. *Ross's Lectures, 494. et seq.*

Where the debtor resides in Scotland, inhibition published in the usual way, at the head burgh of that residence, is effectual against foreigners; and there is no necessity for publication, at market-cross, pier and shore; *Fac. Coll. Topham, &c. 36th Jan. 1808, DICT. v. INHIBITION, App. No. 2*.

posterior one in 1597 formerly recited, which enacts, That where the party dwells within a separate jurisdiction, the diligence is to be registered in that separate jurisdiction. But the clause of the act 1581, which required registration in the books of the shire where the lands lay, continued in force notwithstanding the posterior act 1597, till the abolition of separate jurisdictions by the act 20. Geo. II.

6. By 1597, C. 265., letters of interdiction, inhibition, and some others therein mentioned, were to be registered, in the books of the proper jurisdiction, in presence of a notary and witnesses; and if the sheriff, bailie, or steward, refused, he who presented them for registration might get them recorded in the books of session. But by 1600, C. 13., the presence of a notary and witnesses is dispensed with, and an option given to register those writs in the general register of the session, though the registration should not be refused by the judge of the inferior jurisdiction. From the injunction given by act 1581, to register inhibitions both in the books of the jurisdiction where the inhibited resides, and where his lands lie, messengers took occasion to publish them also in both jurisdictions, which became a custom almost universal: But the omission of this form, which was superadded by messengers only for their own advantage, makes no nullity in the registration, *St. B. 4. T. 50. § 10. vers. The next reason; Forbes, Feb. 14. 1710, Lo. Gray, (Dict. p. 3733)*. It is because registration is a surer way to certify the lieges, than publication at the market-cross, that registration is required, both where the party resides, and where his lands lie; whereas publication is sufficient if it be used at the jurisdiction of the party's residence. Registration in the general register secures all the lands of the inhibited from alienation, in whatever part of the kingdom they may lie; but where the inhibition is recorded in the register of a particular shire, it covers no lands but what are situated in that shire*; and for this reason it may be prudent for a creditor who is not fully apprised of the extent and situation of the whole estate of his debtor, to record his diligence in the general register³²⁸. Though an inhibition should be registered in the books of a shire where part of the lands belonging to the debtor lies, within forty days after it has been, in compliance with the aforesaid custom, published in that shire; yet if it be not registered also, within forty days from the publication, in the shire of the debtor's domicil, it can have no effect as to those particular lands, *Tinw. Dec. 2. 1748, Creditors of Kinminity †*; because publication, in the shire of the domicil, being that which is directed by the law, the omission to register the letters of inhibition in it within forty days from that publication must be fatal to the diligence.

7. To prevent inhibitors, to whom the principal executions are returned after they are registered, from altering them, in case they should be found informal, the clerk of the record is, by 1581, C. 119., NO. 1, required to mark them with his subscription before returning them to the inhibitor who presents them for registration. An execution, therefore, which was not so marked, was declared void, as wanting the proper legal check prescribed by the law against false executions, *Br. 90. (Preston, Feb. 22. 1715, Dict. p. 3769.)* But by a later decision in a similar case, *June 16. 1727,*

In what register they must be recorded.

They must be marked with the subscription of the clerk.

VOL. I.

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Duch.

* See *July 27. 1745, Dunbar, Dict. p. 3699 and 3705, (2. Bell's Com. 148.)*

† Reported by *Kilk. No. 10, voce INHIBITION, Dict. p. 6982.*

³²⁸ As the operation of the diligence extends to subsequent acquisitions, (*infr. § 10.*) the situation of which cannot at the time be known, the general register is in all cases to be preferred.

BOOK II.

Duch. Argyle, observed in (folio) *Dict. ii. p. 329.*, the objection, That the execution was not marked by the clerk, was repelled, because the injunction of the act stood on the footing of a bare ordinance, not enforced with any sanction. It is a general rule in all diligences which require several acts to perfect them, That they are not complete till the last step: An inhibition therefore must run through all the forms of publication and registration before it become a complete diligence. Nevertheless the estate of the debtor is, after publishing the inhibition, rendered litigious, as lawyers express it; which has this effect, that the creditor who had begun the diligence is secured against all voluntary deeds granted by his debtor after the publication, though proceeding upon a cause truly onerous, provided he shall, within the time prescribed by statute, perfect his diligence by registration; *Dirk. 254.*, (*Cruickshank against Watt, Feb. 12. 1675, Dict. p. 8393.*) Nay, if the debtor shall, at any time after being cited upon an inhibition used by one of his creditors, though previously to its publication, grant a voluntary right to another creditor, such right is voidable at the suit of the inhibitor upon the act 1621, afterwards to be explained, *Harc. 639.*, (*Gartshore, March 16. 1686, Dict. p. 1051.*)³²⁹; *vid. infr. T. 12. § 16.*

8. At first inhibitions, because they restrained the inhibited from the full exercise of his property, were accounted unfavourable, as carrying with them a certain degree of reproach, and therefore were never granted, except *causa cognita*, *Balf. p. 476, C. 1.*, (*Maxwell, July 11. 1543, Dict. p. 7013.*) They are upon this ground not allowed, even by the present practice, when they proceed on conditional debts, unless it appear that the debtor is *vergens ad inopiam*, or that the inhibitor has some other just and sufficient cause for using that diligence, *Forbes, July 17. 1713, Weir, (Dict. p. 7016)*.* Hence inhibitions grounded upon obligations of warrandice, which are truly conditional debts, ought not to pass, unless the creditor who is demanding the diligence satisfy the court that it is not without ground that he apprehends some danger of having the subject warranted carried off from him by an action of eviction, *St. B. 4. T. 20. § 29.* Though inhibitions now pass generally of course without opposition from the debtor; yet if he appear, and offer a good reason why the diligence ought not to pass the signet, the court is in use to stay it, *Fount. Feb. 15. 1699, Murray, (Dict. p. 7014).* This happens most frequently where the depending action, upon which the inhibition is grounded, appears calumnious. But even where the debt is confessedly just, the court of session have sometimes stopped this rigorous diligence as emulous, where the solvency of the debtor was notorious, *July 11. 1728, Royal Bank, (Dict. p. 875) †.* It is not however likely that this judgment, which

* See, to the same purpose; *Kilk. No. 7, voce INHIBITION, Macreadie, Jan. 27. 1747, Dict. p. 6980.*

† See *Kames, Rem. Dec. No. 106, Sir John Meres, &c. Feb. 27. 1728, Dict. p. 800.*

³²⁹ Mr Bell suggests, as the only remedy, "that a person purchasing, or lending money, shall retain the price or loan unpaid, till the expiration of the term, at which the inhibition, in order to be effectual, must be recorded;" 2. *Com. 159.* But is not this liable to objection, 1. As giving the real transaction a date different from what appears on the face of the deed; and 2. Because, though registration must take place within forty days from the publication, yet, no peremptory period being assigned within which publication shall be made, there will necessarily be some degree of uncertainty in calculating the expiration of the forty days? Perhaps a search of the Signet books affords the best practical security. But might not all objection be removed, by placing inhibitions on the same footing with seisions, and giving them no effect against third parties until recorded? It is a good general suggestion of Mr Bell's, that there should be a record for the commencement of all such procedure, as is guarded by litigiousity; 2. *Comm. 158.*

Inhibition is not allowed to pass on conditional debts, nor where the debtor is notoriously solvent.

which must be confessed to encroach on the legal right of creditors, will be drawn into example³³⁰, unless where there is the strongest evidence that the creditor intends something else by his demand of diligence than the security or recovery of his debt*. Inhibition may be refused *ex officio judicis*, though the debtor make no opposition, if any exception to the diligence shall occur to the court from the creditor's own showing. Thus, inhibition demanded by a wife on her marriage-contract against her husband, was not allowed to proceed till inquiry was made into the husband's circumstances and profuse disposition, *Fount. Feb. 9. 1706, Wishart*, (Dict. p. 7015.).

9. As to the extent and effect of inhibition, it appears by the oldest style of this diligence, which continues down to this day, that it secured originally the moveable as well as the heritable estate of the debtor from alienation. But as this embargo upon moveables proved a great interruption to the free course of trade, the effect of inhibition has been long limited by the usage of Scotland to heritage: So that debts, though contracted after inhibition, are held to be a sufficient foundation of diligence, both against the person and the whole moveable goods of the debtor, not only in a question with his other creditors, but with inhibitors themselves; *Durie, March 22. 1623, L. Braco*, (Dict. p. 7016). And hence the arrears of interest due to a person inhibited, upon a right of annualrent, or other *debitum fundi*, though they are heritably secured, yet being moveable subjects, fall not under inhibition, which is a diligence proper to heritable rights, *Falc. ii, 138, (Scot, June 15. 1750, Dict. p. 6988)*³³¹. Since inhibitions anciently secured moveables

Inhibition formerly secured the moveable estate, but is now limited to the heritable.

* It is impossible to stop or to recall an inhibition for a liquid debt; *Kilk. No. 9, voce INHIBITION; Blackwood against Marshall, Feb. 22. 1749, Dict. p. 6982.*

³³⁰ This judgment was in fact reversed on appeal, with costs, *9th May 1729, Journals of the House of Lords*. And in the subsequent case of *Blackwood*, "the Lords refused to recall the inhibition," being of opinion, "that let a man's circumstances be what they will, an inhibition against him could not be stopped when used for a liquid debt. The more solvent the debtor is, the less excusable is the deferring payment;" *Kilk. not. h. p.* The case is also reported by *Elchies, v. INHIBITION. No. 10.*

It is only in the case of future, or contingent debts, that the Court will interfere. Where there is no just cause of alarm from the circumstances of the debtor; or no present appearance of the existence of the condition on which payment or performance is to depend; where the diligence in any other particular connected with the nature or result of the case appears unnecessary, vexatious, or oppressive, &c., the inhibition will here called; *Fac. Coll. Stirling, 11th Aug. 1757, Dict. p. 6994; Kilk. and Falc, Macreadie, 27th Jan. 1747, Dict. p. 6980; Brebner, &c. 15th Nov. 1821, (S. & B.); Sir H. D. Hamilton, 4th March 1823, (S. & D.); 2. Bell's Com. 151.* On the same principle, the amount for which inhibition is laid on, if unreasonable or excessive, will be restricted within proper bounds. Inhibition on the dependence of an action of damages for L. 6000 was, on this ground, restricted to L. 100; *Duncan, 22d Jan. 1822, (S. & B.)* The Court will also recall the inhibition, on satisfactory security being found for the debt, or on evidence that the creditor already possesses ample security; *Brebner, supr.; E. Stair, 21st Dec. 1822, (S. & D.); 2. Bell's Com. 151;* but if any previous security has, from the altered circumstances of the parties, become insufficient, the inhibition will not be recalled "except on new caution;" *Matheson, 4th July 1822, (S. & B.);* and see also *Spence, 11th July 1821, Ibid.*

³³¹ In a late case, where the transmission of an heritable bond had been reduced *ex capite inhibitionis*, it was contended, as to certain annualrents *in medio*, that these not falling under the inhibition, the assignee's right thereto still remained entire, notwithstanding the reduction. The inhibiting creditor had, however, attached the annualrents by arrestment; but to this, assuming the inhibition to be of no effect, it was answered, that the assignee's right was prior in date, and therefore preferable. The Court held, that the right to the bond being reduced, the assignation to the rents, as purely accessorial, could not be separated from it; and every impediment, being thus taken out of the way by the operation of the inhibition, the annualrents were validly carried by the arrestment, which was therefore preferred; *Low, 23d May 1815, Fac. Coll.*

ables from alienation, our present law, by which it has lost that effect, ought to be explained so as to make the least deviation possible from our ancient usage; and consequently all subjects ought to be secured at this day by inhibition, which are not moveable in a proper sense*. It is agreed by all, that proper rights of land, such as charters or dispositions, may be secured by inhibition against the deeds of the inhibited, though they continue *in nudis terminis* of personal deeds, without actual seisin: But Stair, *B. 4. T. 50. § 2.* maintains, that inhibitions do not reach to bonds or obligations, though they bear a clause of seisin, if seisin has not actually followed; and conformably to this position, it was found, that the conveyance of an heritable bond, upon which no infestment had proceeded, was not voidable *ex capite inhibitionis*, *Dalr. 45.* (*Oliphant against Irving, Dec. 31. 1703, Dict. p. 5562*). This distinction, however, hath not been since supported by practice. Neither indeed hath it any solid foundation in nature. The reason offered by Bankton in support of the judgment, that such rights cannot be said to lie in any county, *B. 1. T. 7. § 137.* is by no means satisfactory; for the lands described in the heritable bond or disposition may be said, with the greatest propriety, to lie in the county specially mentioned in the deed, whether seisin be taken on it or not³³².

It reaches *acquiritenda*.

10. Inhibition secures to the inhibitor, not only those heritable rights which were vested in the debtor at the date of the diligence, but such as he may afterwards acquire; because it is the true design of inhibitions, to prevent the least degree of commerce with the debtor for the future, in relation to his heritage, that may tend to the inhibitor's detriment, *Stair, Dec. 15. 1665, Elies, (Dict. p. 5987.)*; yet as all inhibitions must be registered in the jurisdiction where the debtor's heritage lies, no inhibition can extend to after purchases made by the debtor, which lie in a jurisdiction where the diligence was not registered; for to such purchases the inhibitions could not have been extended, though they had been made of a date prior to it.

It strikes only against voluntary debts and deeds.

11. This diligence strikes against the voluntary debts or deeds of the inhibited, *i. e.* against all rights granted by him, to which he was not obliged, anterior to the inhibition³³³. Therefore a sale of lands,

* It has been made a question, Whether inhibition is effectual to attach subjects in themselves moveable, but rendered heritable *destinatione*; *ex. gr.* a bond devised to a certain order of heirs. The Court expressed an opinion in the affirmative, but had no opportunity of giving an express judgment; *Fac. Coll. Feb. 15. 1783, Mackay, Dict. p. 3137*³³². See *Fac. Coll. Dec. 14. 1796, Henderson, Dict. p. 5534*.

³³² *Mr Bell* says, "It is a settled rule, that inhibition does not affect debts due to the person inhibited, though heritable in succession; as bonds excluding executors; or even heritable bonds, where no infestment has been taken;" *2. Com. 150.*; and this opinion is supported not only by the authorities referred to in the text, but by *Kilkerran, v. INHIBITION, No. 14.*, in his remarks on *Scott, 15th June 1750, Dict. p. 6988*; and *1. Ross's Lectures, 495*. Yet there can be no doubt, that the diligence of adjudication applies to such cases; *infr. t. 12. § 6.*; *1. Bell's Comm. 626.*; *Mackay, supr. not.* *; and *Mr Bell* states the rule to be, that in discriminating between heritable and moveable estates as to the competency of inhibition, "the distinction to be followed is that which regulates the application of the diligence of adjudication or arrestments,"—"adjudication and inhibition being co-operative diligences; the latter acting as a prohibition for guarding those subjects over which a real right may be constituted by adjudication;" *2. Bell's Com. 149*. The opinion of *Erskine*, too, derives considerable support from the view taken by the Court in the case of *Mackay, supr.* Be this, however, as it may, if an heritable bond has *once* been clothed with infestment, so as to rear up a proper feudal estate in the original creditor, it ever after loses the character of *nomen debiti*, and becomes affectable by inhibition, in the hands of all subsequent assignees, whether they have perfected their own rights by sasine or not; *Low, 6th Dec. 1814, Fac. Coll.*; *Bell, supr.*

³³³ It does not affect acts of ordinary administration; *supr. § 2. not.*³¹⁸.

lands, however onerous, made by the debtor after publishing the inhibition, or a voluntary security upon land granted by him to a creditor even after citation upon the diligence, though antecedently to its publication, may be annulled by the inhibitor, suppose that creditor's debt should have been contracted previously to the inhibition. But this restraint goes no farther. If, *ex. gr.* the debtor was, antecedently to the diligence, bound either to grant to his creditor a special debt or subject, or even, in general terms, to make over his lands to him for his farther security, the granting of such right becomes necessary: He was compellable to it before the creditor, who excepts to the deed, had acquired any right by inhibition; and therefore the right so granted cannot be hurt by that diligence, *Stair, July 22. 1675, Gordon, (Dict. p. 7034.)*. On this ground inhibition does not strike against judicial rights, *ex. gr.* against an adjudication of the debtor's estate, recovered after inhibition, upon a debt contracted before it; because adjudication is not truly the deed, either voluntary or necessary, of the debtor who lies under the inhibition, but of the law. But an adjudication led upon a bond posterior in date to the inhibition, is subject to reduction, because its only foundation is a bond granted voluntarily by the debtor after that diligence.

12. By this rule, if a wadsetter or annualrenter shall, after he has been inhibited, be required to renounce his right of wadset or annualrent, or consignment of the sums therein contained, the renunciation following upon it, being a necessary deed, cannot be affected by the prior inhibition; for every debtor has a right, on payment, or consignment of his debt, to demand a renunciation or release from his creditor, *Stair, Jan. 7. 1680, Maclellan, (Dict. p. 571.)*. This bore hard on creditors who had wadsetters or annualrenters for their debtors, and who had no effectual way by any diligence, even that of inhibition, to hinder them from renouncing their right on payment, and from squandering away the redemption money. To secure inhibitors against the effect of such renunciations, it is declared by act of sederunt, *Feb. 19. 1680*, That after the inhibitor has intimated to the reverser his diligence by a notorial instrument, and produced in presence of the notary and party, the inhibition duly registered, it shall not be lawful to the reverser to make payment to his creditor, otherwise than by way of action, to which the inhibitor must be made a party; and in this action it is competent to the inhibitor to demand that the redemption-money may be paid not to the wadsetter or annualrenter, but to himself, in virtue of his ground of debt and diligence³³⁴.

If a wadsetter is inhibited, the reverser, who wants to redeem, must call the inhibitor in the declarator of redemption.

13. Inhibition is only a negative or prohibitory diligence: It gives the creditor a right to reduce all posterior voluntary deeds granted by the debtor; but it has no positive effect towards transferring either the property or possession of the debtor's estate to himself. His debt, if it was personal before, continues such after the diligence. Nay, though the inhibitor should recover a decree voiding posterior deeds, or contractions, *ex capite inhibitionis*, such reduction of deeds granted to others cannot alter the nature of the debt due to himself, or give him access to the possession of his debtor's estate, which he cannot attain till he make his debt real by adjudication. Hence an inhibitor can claim no proper preference

Inhibition is only a negative diligence, and has no effect in transferring the property.

³³⁴ The act of sederunt does not apply where inhibition is not used until the wadset has been declared dissolved. Subsequent to this, the redemption money in the hands of the consignee is attachable by arrestment, and not by inhibition; *Stormonth, 24th May 1814, Fac. Coll.; 2. Bell. Com. 10. & 156; supr. t. 2. § 16; and t. 8. § 23.*

rence on account of his diligence, and can only be ranked, after he has led his adjudication according to the rules laid down with regard to the competition of adjudgers; insomuch, that if debts be contracted by the party inhibited on heritable security though after the inhibition, (and which are consequently struck at by that diligence), the inhibitor's debt, which still continues personal, has no title to any degree of preference in a question with those real creditors, in an action of ranking; for personal debts cannot be ranked in a competition with real ³³⁵. Yet as the inhibitor's diligence cannot be hurt by those posterior debts, he has a right to draw back from the creditors ranked, whose debts fell under the inhibition, the sums contained in that diligence ³³⁶.

Deeds by an inhibited person are not null, but reducible by the inhibitor, and stand good as to all others.

14. Deeds, even when they are granted by a person inhibited, contrary to the restraint he is laid under by the inhibition, are not *ipso jure* null; for though that diligence prohibits him to grant deeds hurtful to the creditor, yet, as such prohibition is imposed merely for the inhibitor's behoof, he may use the benefit of the law, or not at his pleasure; and if he makes no use of it, the deed continues valid; so that the inhibitor acquires only a right to reduce it, in so far as it tends to his detriment. And, even where a deed is actually voided *ex capite inhibitionis*, the reduction has no effect, but in favour of the inhibitor himself. The deed continues in full force with regard to every other creditor of the inhibited, since the only ground of reduction is, that the deed was granted to the inhibitor's prejudice; according to the rule, *Res inter alios acta, aliis neque nocet neque prodest*. The inhibition is not therefore pleadable by any of the inhibitor's co-creditors, who are third parties; nor can it alter the natural preference of their several debts. And, on the other hand, as the inhibitor cannot be hurt by debts contracted after his diligence, neither can he avail himself of them, so as to enlarge his own preference beyond what his grounds of debt naturally entitle him to: He draws from his debtor's funds, as much as he would draw if those posterior debts or deeds were not in the field, and no more.

Where several rights of annualrent have been granted after inhibition, the deficiency of the fund, after paying the inhibitor, falls entirely on the least preferable.

15. From the doctrine of the preceding section, it follows, that where several infestments of annualrent, of different dates, have been granted by the debtor after inhibition, for the satisfying of all which, after payment of the sums due to the inhibitor, the debtor's estate is not sufficient; the deficiency of the fund of payment does not affect all those posterior annualrents *pro rata*, (though this had been the former practice), but must fall entirely on the least preferable, *Jan. 13. 1747, Lithgow*, (Dict. p. 6974), reported by *Falc.*

³³⁵ By the bankrupt statute, it is declared that the adjudication or conveyance to the trustee shall not be "struck at by any prior inhibition; saving always the effect which such inhibition may have in the ranking against contractions of debt by the bankrupt posterior to the inhibition;" 54. *Geo. III. c. 137. § 30*. In reference to this enactment, which also existed in the prior statute, 35. *Geo. III.*, the Court have decided that the purchaser of a subject is in safety to pay, and must pay, to the trustee under the sequestration, without any discharge of the inhibition; *Ferrier, 8th July 1812, Fac. Coll.*; 2. *Bell's Com. 447*.

³³⁶ Where the debtor, after inhibition, sells his property, and before any steps are taken by competing creditors the purchaser is infest, in this case the preference secured by the inhibition is complete in itself; "The inhibitor has not indeed, without adjudication or other diligence, any active title on which he can demand payment; but no other creditor can adjudge after the sale," (or more correctly after the recorded infestment of the purchaser,) "while the inhibitor may at any time reduce the sale and adjudge; and the power of doing so exclusively is held to entitle him to the preference, without going through these proceedings." 2. *Bell's Com. 153*, compared with *Ibid. 607*; *Monro, 19th July 1777*, there noted; *Fac. Coll. M'Laure, 19th Nov. 1807, Dict. v. COMPETITION, App. No. 3*.

i. 160, and by *Kames, Rem. Dec. 78*: For, though the inhibitor cannot be hurt by any of those posterior debts and securities, and consequently has a right to draw back his whole debt from the annualrenters; yet no part of it ought to be drawn back from those whose debts were first contracted after the inhibition, while the fund of payment was sufficient both for the inhibitor and them: It is only the deeds granted after exhausting the creditor's fund of payment, which can be said to be granted to the inhibitor's hurt, and which are therefore subject to reduction. The same judgment, founded on the same grounds, was pronounced in a case entirely similar, *Fac. Coll. ii. 209, (Langton's Creditors, Jan. 8. 1760, Dict. p. 6995)**.

16. Hence also debts, though contracted after the inhibition, cannot be voided *ex capite inhibitionis*, if the inhibitor could have drawn nothing from the debtor's estate, even supposing those posterior debts had not been contracted; because the inhibitor suffers nothing by such debts, since, though they had never existed, the fund of the inhibitor's payment would have been exhausted by debts preferable to his, *Feb. 15. 1698, Mill, (Dict. p. 2876)*, observed in *(Folio) Dict. i. p. 184*. Let the case, therefore, be put, that adjudications have been deduced against the debtor's estate, on debts contracted before the inhibition; that these adjudications exhaust the whole fund; and that other creditors have, upon debts contracted after the inhibition, adjudged the said estate within year and day from the first adjudication; the inhibitor, whom we suppose not to have adjudged, would have drawn nothing though the posterior debts had not been contracted, being cut off by adjudications on debts contracted previously to his diligence: The posterior creditors, therefore, will draw *pari passu* with the prior in consequence of the rule of preference to be explained next title, while at the same time the inhibitor will be excluded from the smallest part of the debtor's heritable estate.

17. As for the ways of extinguishing inhibitions, that diligence may be not only stayed by the court of session upon sufficient grounds before its passing the signet³³⁷, but it may be reduced on good reasons, after it is completed by publication and registration. The usual reasons for the reduction of inhibitions arise from nullities, either in the ground of debt on which the diligence has proceeded, or in the form of carrying it on; of which last, Stair furnishes us with many instances, *B. 4. Tit. 50. § 13. et seq*³³⁸. Where the sum contained in the inhibitor's ground of debt is either paid to the inhibitor by the debtor, or offered to be paid to him under form of instrument, the law compels the inhibitor to discharge the debt and diligence; which special manner of extinction is called *a purging of the inhibition*. But any co-creditor of the inhibited, whose debt is struck at by the inhibition, or a purchaser from him, has a right, on payment to the inhibitor of the debt due to him, to demand, in his own favour, a conveyance thereof, and of the diligence following on it, that he may the more effectually secure his purchase, or recover the debt due to himself by the common debtor. Yet if the inhibitor

Debts contracted after inhibition are not struck at, if the inhibitor at any rate could have drawn nothing.

Grounds for reducing inhibitions.

* See also *Falc. ii. 127, Creditors of Hope of Kerse, Feb. 2. 1750, Dict. p. 6984*.

³³⁷ Inhibition being by the present practice issued at once, the usual remedy is by summary application to the Court, on cause shown, praying for a recall. In what cases recall is given, *vid. supr. § 8*.

³³⁸ See *2. Bell's Com. 157.; Low, 10th March 1815, Fac. Coll.; Johnstone, 15th Feb. 1823, (S. & D.)*

inhibiter shall have led an adjudication against his debtor's estate, upon a just and legal ground of debt, an offer to purge by one who has bought lands from the debtor, made after expiring of the legal term of redeeming the adjudication, may be rejected by the inhibitor; because the irredeemable property of the debtor's estate, which he hath acquired by the expired adjudication, cannot be wrested from him on the title of a voluntary disposition, granted by the debtor, after inhibition, to his prejudice, *Falc. ii. 122.* (*Setler, Jan. 16. 1750, Dict. p. 6983.*)

TIT. XII.

Of Apprisings, Adjudications, and the Judicial Sales of Bankrupt Estates.

In what manner heritable rights may be carried from the debtor to the creditor.
Apprising.

AFTER having treated of inhibitions, which is a diligence merely prohibitory, we are naturally led to explain in what manner the property of heritable rights may be carried directly from the debtor to the creditor. Two or three distinct kinds of diligences have been instituted for this purpose by our law: *First*, Apprisings; in place of which, adjudications have been substituted for near a century: *2dly*, Certain adjudications, which were received at first by our most ancient usages, and which are used to this day; but as they were originally meant for very different purposes from apprisings, so they still differ, both in their nature and properties, from the adjudications introduced in place of these: *And, 3dly*, Judicial sales of bankrupt estates, made and declared by the court of session. By apprising, or comprising, (for these are synonymous terms), we understand the sentence of a sheriff, or of a messenger specially appointed sheriff for that purpose, by which the heritable rights belonging to the debtor were sold for payment of the debt due to the appriser, redeemable by the debtor within the term indulged by the law. Though adjudications have been long substituted in place of apprisings, yet this diligence must be particularly considered and explained; not only because several of our most considerable estates are at this day enjoyed under the title of expired apprisings, but because there is so near a resemblance in the nature and effects of the two diligences, that the first cannot be thoroughly understood without a distinct knowledge of the last.

Nature of apprising. It was originally a proper sale.

2. Where a debtor, who is unable or unwilling to pay his creditors, refuses to dispose of his estate for their payment, he may be compelled by law to do that justice to them, which he cannot be brought to voluntarily. The diligence of apprising, when taken in this general view, is *juris gentium*; for methods have been laid down by the laws of all civilized nations, for taking the debtor's estate, whether real or personal, into execution for the payment of his debts. By the Roman law, *L. 15. § 2. De re judic.*, the debtor's moveable estate was first to be sold; and, if that was not sufficient, his immoveable. In the same manner, a creditor was not permitted, by the ancient law of Scotland, to attach any of his debtor's lands or heritages, so long as he had moveable goods sufficient for satisfying his debts, *St. 2. Rob. I. C. 9.*; and, at first, not only the goods belonging to the debtor himself, but those of his tenants, were subjected to diligence upon a brief of distress, *St. Alex. II. C. 24, § 1.* In default of moveables, the sheriff was directed to give

give notice to the debtor, that it behoved him to dispose of as much of his heritage within fifteen days after, as might satisfy his creditor; and if the debtor neglected, or refused, the sheriff was authorised to do it for him, *ibid.* § 2, 3. Apprisings, therefore, were, by their original constitution, proper sales of the debtor's land to any purchaser who offered. At that period, the superior might, without any gratification, have been compelled to receive the purchaser as vassal, § 7, unless he chose to purchase the lands himself, § 5: And the debtor appears to have been entitled to a legal right of redemption within a year, at least in burgal tenements, *Leg. Burg. C. 95.* We learn from a decree of apprising, pronounced in 1450, a copy of which is annexed to *Hist. Law-Tracts, Append. NO. 6,* that lands continued to be apprised in the form thus prescribed by Alex. II. for many centuries after.

3. This statute of Alex. II. received considerable alterations, and indeed improvements, by 1469, C. 36. The goods belonging to the debtor's tenants could not be distrained for any higher sum than they owed to their landlord; the superior was entitled to a year's rent of the lands for receiving the purchaser as his vassal, on the payment of which it behoved the superior to enter him; and the term within which the debtor might redeem his lands from the purchaser, upon repayment of the purchase-money, together with the expence of infestment, and the composition to the superior, was lengthened out to seven years. If the debtor had not lands sufficient for the creditor's payment, within the territory of the sheriff before whom decree was first recovered against him, the crown issued letters to the sheriff of the shire where his other lands lay, to expose these also to sale, in so far as there was a shortcoming. If no purchaser could be found, the sheriff was required to apprise or tax the value of the lands by an inquest, and to make over to the creditor such a proportion of them as corresponded in value to the amount of the debt: And hence those judicial sales got the name of *apprisings*; see Mackenzie's observations on this act, 1469, C. 36. The ingenious author of *Historical Law-Tracts*, observes, *tit. Securities upon land*, that, prior to this statute 1469, creditors who were secured upon lands had the privilege of distraining their debtor's rents at short hand, without the decree of a judge obtained in consequence of a brief of distress. This he proves by a bond dated in 1418, (*Appendix, NO. 2.*), subjecting certain lands of the granter's property to the diligence of his creditor, in the same manner that the creditor or he might distrain their proper lands for their rents, without the authority of any judge: And from thence he concludes, *first*, That the pointing authorised by the act 1469, which is said to proceed on a brief of distress, relates only to executions upon personal debts, and not to those which proceed on real securities. *2dly*, That that branch of the statute which indulges debtors in a right of redeeming the apprised lands within seven years, is confined to apprisings on personal debts, leaving the law, in so far as concerned those which proceed upon *debita fundi*, upon its former footing.

4. To prevent the expence of double diligences, where the debtor's lands lay in different shires, apprisings, in place of being executed by sheriffs, whose jurisdiction was limited each to his own county, came in the course of time to be intrusted to messengers, who were, by letters issuing from the signet, constituted judges or sheriffs in that part, and whose powers extended over the whole kingdom.

Ancient form of deducing apprisings.

This diligence formerly executed only by the sheriff, came afterwards to be intrusted to messengers.

kingdom. And this practice, after it was once introduced, maintained its ground, notwithstanding an express statute prohibiting it, upon a complaint exhibited by the sheriffs of an encroachment thereby made on their jurisdiction, 1540, C. 82. A blank was left in the letters of apprising, for inserting the name of any messenger whom the creditor should choose to employ; and the messenger was thereby commanded to pass to the ground of the debtor's lands, and search for moveables; and in default of them, to denounce the lands to be appraised, *i. e.* to make publication, both on the ground of the lands, and at the market-crosses of the head boroughs in the several jurisdictions in which they lay, that the lands themselves were to be appraised; and copies thereof were to be left by him, both on the lands and on the said market crosses. Of these letters of apprising, search for moveables, denunciation, and day and place of apprising, the messenger was, by a copy, to give notice to the debtor, either personally, or at his dwelling-house: And, by act of sederunt, *June 27. 1623*, preserved by Spottiswoode, *Pract. p. 44*, fifteen free days must have intervened between the denunciation and the actual sale or apprising of the lands, excluding both the day of denunciation and of the sale. If the messenger's execution did not specially mention, that, before denouncing the lands, he made a previous search for moveables, but had found none sufficient for clearing off the debt, the decree of apprising was subject to reduction. Upon the day prefixed for the apprising, the creditor exhibited a claim of his debt to the messenger, who remitted the examination of it to a jury or inquest. After the claim was sustained by them, an offer of the lands to be appraised was made to the debtor upon payment; and, on his failure to appear, or to make payment, the messenger interposed his authority to the verdict of the inquest, by his decree adjudging such a proportion of the debtor's lands to belong to the appriser, as was taxed by the jury to amount to the principal sum, penalty, composition to the superior, and sheriff-fee: But no part of the debtor's lands was set off to the appriser in name of interest before the Reformation, because the exacting of interest was prohibited by the Canon law.

5. The messenger at first held his court in the tolbooth or courthouse of the head borough of the shire where the lands lay; but by a dispensing clause, which was afterwards inserted of course in all letters of apprising, he was left at liberty to hold his court at Edinburgh, as the *communis patria*; and upon special emergencies, at other places, *Stair, July 12. 1671, Heirs of Lundy, (Dict. p. 71.)*. This custom was probably introduced for the conveniency of the clerks to the signet, who alone could be clerks to the process of apprising, and most of them had their fixed residence at Edinburgh. As long as the rule prescribed by the act 1469 was observed, of apprising the lands by an inquest of men of the same county, who knew their value, the effect of the diligence was confined to such a proportion of the lands as was enough for clearing off the debt; but after apprisings were by dispensation allowed to be deduced at Edinburgh, where persons came frequently to be set on the inquest who were utter strangers to the value of the subject, the debtor's whole lands fell under the decree of apprising at large, without comparing their value with the extent of the debt; and by this means great estates were sometimes carried off from debtors for the most inconsiderable sums. Mackenzie, § 3. *h. t.* assigns a different

The inquest, formerly held in the county, came to be held at Edinburgh; and the whole lands, instead of a part, fell under the decree.

different reason for this rigorous practice, viz. That the debtor, as a compensation for the apprising of his whole estate, was indulged with a right to redeem it at any time within seven years from the date of the apprising. But this reasoning proceeds from a mistake in fact; for the same statute 1469, which grants that right of redemption to the debtor, expressly confines decrees of apprising to such a proportion of his lands as shall correspond in value to the debt.

6. No moveable right, or subject, could either be appraised by our ancient law, or can now be adjudged; for though letters of apprising contained a power to poind moveables, yet that which was properly called *apprisings* was a sale of the debtor's heritable subjects, most commonly lands; and whatever was intimately connected with, or united to land, as fishings, annualrents, reversions, life-rents, &c. Every right, therefore, which was of its own nature heritable, might have been appraised, though it should not have been perfected by seisin, as a charter, disposition, heritable bond³³⁹; or though it should not have required seisin to its completion, as a right of courtesy, of reversion, &c.; and even a lease, though assignees should not have been mentioned in it, if they were not expressly secluded³⁴⁰. Nay, mere faculties or powers relative to heritage, were appraisable by creditors. If, for instance, a person had on his deathbed disposed of, or burdened, his estate to the prejudice of his heir, the privilege or faculty competent to the heir to reduce the deathbed deed *ex capite lecti* might have been appraised, or may now be adjudged, from him by his creditor, if he himself wilfully stands off from reducing it, and thereby enlarging the fund of his creditor's payment; for every pecuniary or patrimonial interest belonging to debtors ought to be subjected to the diligence of creditors; *vid. Steu. Ans. voce ADJUDICATION* *.

7. This rule, That all heritable rights may be appraised or adjudged, extends not however to offices of trust conferred during pleasure, or even during life, upon personal regards; for though such offices bear that character of heritable, that they have a tract of future time, they imply a *delectus personæ*, for which there is no room in appraisings or adjudications, since personal qualities are not communicable to creditors by legal diligences †.—How our ancient law stood with respect to grants of titles of honour, may admit of a distinction. When titles of honour were granted by patent to a patentee, and a certain order of heirs, without any grant

All rights relating to heritage might be appraised.

Whether offices of trust, titles of honour, &c. might be appraised.

* See *Fac. Coll. Jan. 29. 1789, Trustees of Wedderburn*, Dict. p. 10426³⁴⁰.

† The office of keeper of the register of seisins for a county, granted to a person during life, or *quamdiu se bene gesserit*, with power to name a deputy, cannot be adjudged; *Fac. Coll. and Kames, Sel. Decis. Wilson, Dec. 7. 1759*, Dict. p. 165.

³³⁹ *Vid. supra, t. 11. § 9. not. 339.*

³⁴⁰ A husband's interest *jure mariti* in the rents of his wife's lands is adjudgeable; *Fac. Coll. Menzies, 8th Dec. 1761*, Dict. p. 5974; *Calder, 19th Nov. 1818, Fac. Coll.*; *Steu. Ans. v. Jus Mariti*, p. 174; *Bank. B. 3. t. 2. § 38.*; *Kames, Sel. Decis.* in his remarks on the case of *Wilson, cit. in not. † h. p.*; 1. *Bell Com. 47.*, corrected in *Addenda*, No. 2. But where the lands are adjudged as being the husband's property, with a general clause of all right, title and interest which he may have therein, the husband's interest under the *jus mariti* has been held not to fall under this general clause, and the adjudication therefore found to be altogether null; *Calder, and Bell Com. ut supr.*

It is not competent to adjudge a *spes successionis*; *Beaton, &c. 7th June 1821, (S. & B.)*

Neither is it competent to adjudge the right of a substitute heir of entail, to pursue a declarator of irritancy against the heir in possession; it being optional to the substitute whether he will take advantage of the irritancy, or not; *Wedderburn's Trustees, cit. in not. * h. p.*

grant of lands, such titles have been ever understood to be conferred *ex defectu familiae*; so as not to be transmissible from that family to a stranger, by any conveyance either voluntary or legal; but where large tracts of land were given of old by charter, with the dignity of Earl, or Lord, or Baron, or the right of a seat in parliament annexed to the lands, it can hardly be doubted, that such grants lay open to the diligence of creditors; since it is certain that they were frequently carried from the grantees, or their heirs, even by voluntary transmission; in which cases, the conveyance could receive no support from the favour due to creditors, as legal conveyances did. Thus, the grants of the earldoms of Ross, Wigton, and several others, made by Robert I., and his successors, appear to have been transmitted by the grantees to strangers, who, under the title of the assignments made in their favour, enjoyed them as fully, both lands and honours, as the original grantees had done, without opposition either from the crown or the grantee's heirs, *MS. Essay on Territorial Honours, by the late ingenious Mr George Chalmers* *.—The question, Whether offices of dignity and trust may be adjudged? was brought before the session in 1743. An adjudication of the office of King's Usher was deduced against the apparent heir-male of the family of Langton, to one of whose ancestors an heritable grant of that office had been made. In that case a variety of instances having been laid before the court, taken from our public records, by which it appeared, that offices of considerable dignity, as sheriffships, and even some of the highest, as the high constabulary of Scotland, had been transmitted from hand to hand by voluntary conveyance; the judges rightly found, *a fortiori*, that the office in question was subject to the legal diligence of creditors, *Falc. i. 208, (Cockburn, July 23. 1747, Dict. p. 150)*; *Kames, Rem. Decis. 82, (Same case, Cockburn, Dict. ibidem)*; see also *Kames, Rem. Decis. 104, (Earl of Caithness, Feb. 17. 1749, Dict. p. 163)* †. It cannot therefore admit of the least doubt, that a patent or grant of an office is affectable by adjudication, where the patent itself authorises a voluntary transmission, *ex. gr.* an office expressly granted to the patentee and his assigns; for there is no subject which the owner has a power of assigning voluntarily, which may not be also carried off by the diligence of creditors.

8. If apprising be proper to heritable subjects, a decree of apprising of a right of annualrent, or any other *debitum fundi*, can carry no arrears due upon the right appraised for terms prior to the decree; because, though such arrears be heritably secured, yet having been separated from the subject affected by the apprising before leading it, they are no longer part of it, but are moveable, and as such are affectable only by diligence proper to moveables, *ex. gr.* by arrestment or poinding, *Durie, March 13. 1627, Macghe, (Dict. p. 136)*. For the same reason, apprising does not carry such of the rents of the lands appraised as have fallen due at any time prior to the decree of apprising, *Ibid. Feb. 16. 1633, Harper, (Dict. p. 139)*. All the subjects appraised must be specially mentioned

Apprising of any heritable subject carries no arrears due prior to the decree.

* See the cases of *Stair, Cassilis, and Sutherland*, particularly the last of them (which may be seen in the Library of the Faculty of Advocates), in which the question concerning territorial dignities was very fully treated.

† This last case is also reported by *Kirk. No. 5. voce PERSONAL AND TRANSMISSIBLE, Dict. p. 10416*.

tioned in the decree: An apprising therefore of such of the debtor's lands as are described by no other character than that of being situated in a certain parish or county, is ineffectual; but where a barony is appraised, all the subjects that are reputed to be parts of the barony are carried under that appellation. If the lands are specially described in an apprising, every right competent to the debtor in them, though not a right of property, will be carried by the general clause of *all right and interest belonging to the debtor in the said lands*. Such apprising, therefore, is preferable to all posterior apprisings, though these should express the special right competent to the debtor; *Stair, Nov. 21. 1673, Fairholm*, (DICT. p. 182); *Fount. Nov. 20. 1711, Brown*, (DICT. p. 187). But tithes are not carried by a general clause of all right, petitory or possessory, competent to the debtor; because such clause is only meant to include all right in the lands, and so cannot extend to the tithe, *Fount. Feb. 17. 1702, Home*, (DICT. p. 184).

9. It was not upon every kind of debt that apprising could proceed. *First*, In an heritable bond granted according to the old form, the lands contained in the bond were the proper debtor, and not the granter, who lay under no personal obligation to pay, except in the special case of requisition: No apprising, therefore, could be deduced upon such bond against the granter as debtor, till he truly became such by requisition*. *2dly*, The debt on which the creditor led his diligence must have been liquid, *i. e.* either ascertained by the obligation itself to a precise sum, or estimated to a certain value in money by a judicial sentence, before leading the apprising. Thus, a creditor in a quantity of corns, could not deduce an apprising upon his obligation, till, by the previous sentence of a judge, the corns had been converted to a fixed price, and the debtor decreed to pay that price to the creditor; for no more than a just proportion of the lands, corresponding to the value of the debt, was suffered to be appraised by the act 1469; and messengers, who were judges in apprisings, though they might judge the value of the lands appraised, had no power to convert or liquidate a debt of an uncertain value to a money debt. And though the court of session are now the only judges in the adjudications which have come in the place of apprisings, still the debt on which the creditor adjudges must be liquid, that the precise sum may be known, on the payment of which the debtor can redeem his lands³⁴⁰. *3dly*, Neither could apprising proceed on a debt whereof the term of payment was not yet come; because it behoved the messenger, before apprising the lands, to make a search for moveables, that these might be distrained in the first place: and it would be highly unjust, to suffer a creditor to carry off his debtor's moveable goods by pouding, before the obligation to pay took place. This rule holds to this day in adjudications; and it is grounded on the same maxim; for no creditor can, by any diligence whatever, transfer to himself the property of his debtor's estate till the term of payment; see *Stair, Feb. 11. 1680, Gordon*, (DICT. p. 170). Such adjudications are indeed sometimes passed by the session; but as they cannot be carried into execution till the term of payment of the debt due to the adjudger, they have been considered as an extraordinary reme-

On what kind of debts apprising could not proceed.

VOL. I.

6 x

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* *Durie, July 20. 1622, Cranston*, DICT. p. 64. The same rule applies to adjudications; *Fac. Coll. Feb. 25. 1762, M'Guffock*, DICT. p. 131.

³⁴⁰ A bill of exchange is *per se* sufficient to found adjudication; it is not necessary that it be protested or registered; *Fergusson, 20th Feb. 1816, Fac. Coll.*; 1. *Bell's Comm.* 636.

The legal of appraisings did not run against minors.

dy, founded solely in equity, and not in any positive principle of our law. Hence they are admitted only in cases where the debtor is *vergens ad inopiam*, or where the creditor, if his hands were tied up from diligence, would run the hazard of losing his debt, by the other creditors adjudging year and day before him, *Fac. Coll.* ii. 173, (*Nisbet against Stirling*, Feb. 16. 1759, *DICT.* p. 59).

10. Though the debtor's right to redeem, called *the legal reversion*, or *the legal*, was, by the act 1469, restricted to seven years from the date of the apprising, it is made lawful by 1621, *C. 6*, to minors, from whom lands may be appraised, to redeem them at any time before their age of twenty-five years, whether the common legal reversion of seven years be expired or not; and minors succeeding to such minors are entitled to this privilege, in the same manner as if the lands had been appraised from themselves. Practice has extended this act, so as to include under it the case of a minor heir succeeding during the legal even to a major, from whom lands had been appraised, *St. B. 3. T. 2. § 14. vers. Thus it*; so that the legal of an apprising can in no case expire, in the person of a minor, whether he be the original debtor from whom the lands were appraised, or whether he succeed as heir to the debtor. By the same act, where a debtor from whom lands are appraised, dies before his age of twenty-five, but after expiring of the common legal of seven years, his heir, though he be major, is allowed a year after the debtor's death for redeeming the lands; because, otherwise, he could not avail himself of the privilege, competent to his ancestor, of keeping open the right of reversion. But if the common legal be not expired before the minor's death, the major succeeding has no more time indulged to him, than happened to be unexpired of the legal when the minor died; which he would have been entitled to, in the common right of an heir, though the lands had been appraised from a major. This, however, is to be so understood, that the major heir shall in all events have a full year for the redemption, though so much should not have remained current of the ordinary legal at the minor's death; for it would be absurd to indulge him in a longer time, when the common legal was expired at the death of the ancestor, than when the legal was yet current at that period.

Apprising against the heir of the debtor, upon a charge to enter.

11. Lands may be appraised, not only by the original creditor, but by any person who shall, either as assignee, or as heir to him, have the right to the debt established in himself*. And, on the other hand, whoever stands in the right of a debt, may lead an apprising of his debtor's lands, not only in the debtor's lifetime, but after his decease.—The methods which are by our usage pursued in this last case, deserve a more particular discussion. By our ancient law, creditors might have attached the lands belonging to their deceased debtor, without any previous charge against his heir to enter, *Leg. Burg. C. 94*. And in fact such decrees of apprising were, about the year 1500, recovered by creditors, after their debtor's death, upon a bare edictal citation against the heir, *Hist. Law-Tracts, Append. NO. 8*. But as it was probably thought too great a stretch, to attach lands for payment of debt which lay *in hæreditate jacente*, and truly belonged to no man till the heir had made up

* See the application of this doctrine to adjudications, in the case of an assignee; *Fac. Coll. Feb. 4. 1784, Porteous*, *DICT.* p. 121,—and of an executor, *Ibid. June 19. 1782, Watson*, *DICT.* p. 7009; *Ibid. Nov. 26. 1784, Lenox, &c.* *DICT.* p. 14381; *Ibid. June 28. 1785, Creditors of Park*, *DICT.* p. 14382; *Ibid. Nov. 27. 1789, Arbuthnot*, *DICT.* p. 14383.

up titles to them, it was made lawful to creditors, by 1540, C. 106, to charge the heir to enter, and on his failing to comply, to apprise the lands as if he had entered. The author of Historical Law-Tracts has urged several ingenious arguments to prove, that the remedy provided by this act was intended for the creditor of the heir, not of the ancestor, *vol. ii. p. 120, &c.* But though it should be admitted, that the words of the act are capable of this construction, and though the history of our ancient law should favour it; yet the legislative power, whose opinion, though it were erroneous, must in such questions be decisive, hath declared by a posterior act, 1621, C. 27., that the first statute is to be understood of the ancestor's creditor, and for that very reason hath amplified it, so that its benefit may extend to the creditor of the heir.— For the better understanding this head of our law, the doctrine of succession must be anticipated, so far as to explain the general properties of a service or entry as heir, and of charges given to the heir to enter.

12. Services are intended to give to the heir an active title, or a proper right to the heritable estate belonging to his ancestor. A general service establishes in him who enters heir, the right of such part of the heritage of the deceased, as either requires no seisin, or in which the deceased was not actually seised; and a special service carries the right of those heritable subjects in which the ancestor died vest and seised. Though the two before-mentioned statutes, authorising the apprising of lands after the debtor's death, upon a charge used against the heir to enter, do not distinguish between a general and a special charge to enter, our uniform practice has been careful, not to confound the one with the other. A special charge fully supplies the want of a service; it states the heir, *fictione juris*, in the right of the subjects to which he is charged to enter, and consequently makes those subjects liable to the same execution at the suit of the creditor, as if the heir had entered to them, and been infeft upon his service. A general charge is, on the other hand, intended barely for fixing the representation of the heir, or subjecting him to that debt which was formerly due by his ancestor; but it does not establish in him the right of such heritable subjects as are carried by a general service, so as they may be affected by the creditor's diligence, *July 10. 1737, Monro, (Dict. p. 2173)*, stated in *(Folio) Dict. i. p. 131.*; see *Spottisw. p. 43, Macmartin, (Dict. p. 2700)*. This difference appears from the different styles of the two charges. In a special charge, the certification or penalty threatened against the heir, in default of his entry, is, that the creditor shall have the same action, both against the heir and against the lands, as if he had been served and entered to them; but the certification in a general charge is barely, that the creditor shall have the same action against the heir as if he had entered, without the least mention of the lands.

13. When therefore the debt is due by the ancestor, it imports the creditor to know, in the first place, whether the heir is to represent his ancestor, and so subject himself to the debt; for which purpose he must give him a general charge to enter to his ancestor the debtor. If the heir fail to give obedience to the charge within the time specified in the letters, the creditor may bring an action of constitution against him; in which, if the heir do not renounce the succession, decree passes of course, subjecting him to the debt, as lawfully charged to enter heir to his ancestor, which constitutes

Charge, general
and special.

The first fixes
the representa-
tion of the heir,
and the last
states him in the
right of the sub-
jects.

constitutes the debt against him *passive*. It still remains that the heritable rights belonging to his ancestor be vested in him, so as they may be subjected to the creditor's diligence. For this purpose, if they are rights in which the ancestor died *infeft*, the heir must be charged to enter in special to them; and if the deceased's right was personal, not perfected by *seisin*, and therefore to be carried by a general service, then what our lawyers distinguish by the name of a *general-special* charge must be given to the heir. This kind of charge has the name of *special*, not only because it is directed against subjects specially contained in the letters of charge, but because it hath the vesting effect of a proper special charge; and it is called *general*, because it relates to such subjects alone as a general service can carry. As this charge, whether special or general-special, is made equivalent to the heir's actual entry, by the statute 1540, an apprising led by the creditor, after the days of the charge are expired, effectually carries to him the subjects to which the heir was charged to enter.

Where the heir is the debtor, a special charge only is necessary.

14. Where the apparent heir, and not the ancestor, is the debtor, there is no occasion for giving him a charge to enter in general. It imports nothing to the creditor, whether the debtor shall, or shall not, subject himself to the debts of the ancestor. His only concern is, that titles be completed by the debtor to the heritable subjects which belonged to his ancestor. In order to this, letters must be raised and executed at his suit, against the heir, either of special or of general-special charge, according to the different natures of the subjects to be affected by the creditor in the manner now explained. After the elapsing of the days of this charge, the subjects contained in it are as effectually carried to the creditor by his decree of apprising, in consequence of the statute 1621, as if the heir had actually entered to them.

Time within which the lands of the heir can be appraised.

15. The act of 1540 ordains, That letters shall issue under the authority of the session, at the suit of any creditor, to charge the heir, if he be of perfect age, year and day being passed after the ancestor's death, (which is allowed to the heir as a *tempus deliberandi* *), to enter to the lands, within forty days next after the charge; and that, in default of compliance with the charge, letters shall issue for apprising. These words have been so explained by subsequent custom, that the creditor may charge the heir immediately after the death of the ancestor, provided that letters of apprising be not raised, till after the expiring both of the year of deliberating, and of the forty days next ensuing that year within which the heir is charged to enter. Soon after adjudications came in the room of apprisings, a custom was beginning to be introduced by some writers to the signet, of raising summonses of adjudication against the heir before elapsing of the forty days mentioned in the special charge; to stop the progress of which, writers to the signet are, by act of sederunt, Feb. 18. 1721, prohibited to write or form any such summonses till the forty days be fully expired; and an adjudication begun to be led before the expiration of these days, contrary to

* No addition to the *tempus deliberandi* can be made on account of the heir's being at a distance, and so for a time uninformed of the ancestor's death; *Fac. Coll. Nov. 14. 1783, Henderson, Dict. p. 5292.* By *Stat. 33. Geo. III. c. 74, § 9,* (and by *54. Geo. III. c. 137, § 8.*) it is enacted, "That the *induciae* of a charge to enter heir shall in no case exceed forty days, whether the person charged be within the kingdom or out of it; and that after one such charge, whether general or special, has been given at the instance of any creditor, every subsequent charge, at the instance of the same or of any other creditor, may be upon the *induciae* of twenty days only."

to the injunctions of that act, was postponed to an adjudication regularly led, *Fac. Coll.* i. 27., (*Cowper's Representatives*, July 9. 1752, *DICT.* p. 267.). It appears, however, that the statute 1540 relates only to those charges against the heir on which the ancestor's lands are to be appraised. In charges which are to be merely the foundation of a common summons, or process upon the passive titles, the action will be sustained, if the summons on which it proceeds was not executed till a year after the ancestor's death, though the forty days were not also elapsed at the date of the execution, *Durie*, June 19. 1628, *Macculloch*, (*DICT.* p. 2168.). To this case the act of sederunt is to be applied, mentioned both by Aikman, *MS. Compend. of books of sederunt*, and by Mackenzie, *Observ. on said act 1540*³⁴¹, declaring, that apparent heirs may be charged within the year after their ancestor's death; but that the year must be elapsed before any action which is founded on that charge can be pursued against him. Though this statute authorises no charges against heirs who have not attained their perfect age, yet immemorial custom has extended it also against minors.

16. The diligence of apprising hath stronger or weaker effects, according to the different lengths to which it has been brought. As soon as the lands, or other subjects to be appraised, are denounced, they become litigious; so that no voluntary deed granted afterwards by the debtor, though previously to the decree of apprising, can hurt that begun diligence; *vid. supr. T.* 11, § 7³⁴². This doctrine is received by all our writers, and supported by an uniform tract of decisions, in the case not only of deeds granted for the security of creditors, but in leases, dispositions, or other voluntary rights granted to strangers, for a price presently paid, or other valuable consideration, *Pr. Falc.* 19.; (*Creditors of Murray*, Jan. 1682, *DICT.* p. 8376.); see *Stair*, Feb. 8. 1681, *Neilson, &c.* (*DICT.* p. 1045.). It was without doubt introduced, that the debtor might not have it in his power to defeat or evacuate his creditor's diligence, by taking the hint on the denunciation, and disposing of the lands in favour of his own kinsmen and trustees, to the exclusion of the creditor apprising. But the giving so strong effects to any imperfect diligence whatever, affecting heritage, is destructive of the security intended by the records to purchasers, who cannot discover by the most accurate search into them, whether the lands they are to purchase have been denounced; and who therefore must lose both the lands they have purchased, and the price they have paid for them, if they were denounced so much as one day before the purchase, by any creditor of the seller. This censure is equally applicable against the doctrine of litigiosity, in inhibitions³⁴². The rule, however, That lands are, after denunciation, rendered litigious, admits of exceptions: *First*, If the debtor should, after the denunciation of his lands, enter into marriage, which doubtless is a voluntary deed, a right of terce is thereby constituted to the wife, in the third part of the lands in which the husband stood infest at the marriage, not only though they had been denounced to be appraised, but though decree of apprising had been recovered, unless infestment had also followed on that decree before the

Denunciation in the apprising, renders the subject litigious.

Exceptions from this rule.

³⁴¹ This seems to be *A. S.* 18th Jan. 1613; contained in the late publication "under authority of the Commissioners for inquiring into the Administration of Justice in Scotland," &c.

³⁴² As to the doctrine of litigiosity in adjudications, *vid. infr.* § 41. On litigiosity, as a ground of preference in general, see 2. *Bell Comm.* 158. *et seq.*

marriage; *vid. supr. Tit. 9. § 46.* This exception arises from the very favourable case of widows, whose destitute situation calls for the special protection of the law. *2dly*, If the user of the diligence be *in mora*, *i. e.* if he hath taken no step for a considerable time to perfect his diligence, he is construed to have relinquished or abandoned it; and consequently the debtor may afterwards grant voluntary deeds, which will be effectual to the grantee, *Stair, July 23. 1674, Johnston, (Dict. p. 2738.)*

Yet seisin is necessary to perfect the appriser's right.

17. It may be thought, that a decree of apprising recovered by the creditor, does not extinguish the quality of litigious, which the subjects appraised had received by the denunciation; yet if the appriser shall, even after decree, neglect for any considerable time to perfect his right by seisin, or at least by a charge against the superior to enter him, voluntary deeds may afterwards be granted by the debtor, which the law will prefer to the appriser, *Spottisw. p. 43, in fin. Hamilton, (Dict. p. 1689.)*; *St. B. 3, Tit. 2. § 21.* A neglect of four years after the date of the decree has been adjudged sufficient to constitute the debtor *in mora*, *Durie, March 29. 1636, E. Galloway, (Dict. p. 8384.)* *³⁴³. A decree of apprising being a judicial or legal disposition, includes, according to the common nature of dispositions even before it be perfected by seisin, a right to such

* An annual renter was preferred to a creditor whose debt was secured by adjudication near three years prior to the infestment of annual rent, and within year and day of an adjudication made effectual by seisin, the adjudger during that period having neither been infest, nor taken any steps to obtain infestment; *Fac. Coll. and Selec. Decis. July 26. 1764, Duchess of Douglas, Dict. p. 2893.* Lord Kames, however, doubts whether *mora* can be imputed to an adjudger during the legal, though he neither charge the superior, nor enter to the possession; *Dict. p. 8390.* See *Elucidations, Art. 19* ³⁴³.

³⁴³ On this subject, the following remarks may be cited from the work of Mr Bell :—“ An adjudication does not, like a common action, lose the quality of litigious, by decree: it still continues to run its course as a diligence, till recorded and completed into a real right. If not recorded within sixty days, it loses all effect. If so recorded, the public have a fair intimation of the *nexus* formed upon the property. But still there are two questions here of some nicety.—1. In a competition between an adjudger whose right is completed merely by a charge against the superior, and an infestment on a voluntary conveyance, granted before the adjudger's proceedings have been commenced, the infestment prevails. But where adjudication has been commenced before a voluntary conveyance is granted, Is a charge to the superior sufficient to preserve the litigious prohibition in force during the legal? Or must the adjudger proceed to obtain infestment? It would appear that the charge is sufficient to preserve to the adjudger the benefit of litigiosity till the expiration of the legal, the adjudger not being bound to obtain infestment during the legal, nor blameable for neglect if he rest contented with the charge against the superior;” (*Hamilton, 21st July 1627, Dict. p. 1689; Wallace, Dec. 1756, Dict. p. 8383.*)—“ 2. But suppose that the adjudger has not himself charged the superior, and has no other completion of his diligence than, in virtue of the statute, a communication of the benefit of another adjudger's charge, as being within year and day: Will this produce the same effect? It would rather appear that it should not: as the statute was meant to have effect among the adjudgers merely, but not to extend to other creditors;” (*Duchess of Douglas, supr. not. h. p.*)
“ From the expiration of the legal, it is necessary for the adjudger to proceed directly to make his right real by infestment. But as an infestment is necessary only in case the right of the creditor-adjudger is to continue real, and his debt not to be paid off, the creditor cannot be held bound to take infestment until he shall know, with certainty, whether it be necessary for him to do so. The quality of litigious, I should therefore apprehend, would continue during a reasonable time after the expiration of the legal, that the creditor may obtain a declarator of expiry and infestment. No case upon this point seems hitherto to have occurred; but it would seem natural to judge of the question by the analogy of the doctrine of litigiosity in other circumstances;” 2. *Bell Comm.* 159. & 160.
See also *infra. § 23. 31., &c.*

such of the rents of the lands appraised as fall due after its date ; for which the appriser may sue the tenants and other possessors, 1621, C. 6. And because all legal conveyances are complete *ex sua natura*, without intimation, therefore, an appriser is equally preferable on the rents, in competition with posterior arrestments, or other personal rights, as an assignee whose right was perfected by intimation would be, *infr. B. 3. Tit. 5. § 5.* Neither can it be objected in such case against the appriser, that he has deserted his diligence by failing to obtain infestment ; because his right to the rents, in competition with arresters, was fully perfected by the decree itself ; and a right already complete as to certain effects, cannot be made more complete, as to those effects, by any farther step of diligence, *Stair, Feb. 23. 1671, Lo. Justice-Clerk, (Dict. p. 2766.)* But though an appriser was thus entitled, by his decree, to enter into the immediate possession of the rents ; yet *de praxi* he was not indulged with the right of removing tenants ; which, however, is a practice that has been already observed to be hardly reconcilable to the other legal rights included in the common notion of dispositions, *supr. Tit. 6. § 52.*

18. Apprisers must, as the old law stood, have suffered considerably, if they did not exercise this their right of possessing the lands, and gathering the rents ; for as the exaction of interest was not lawful before the Reformation, their right was redeemable, by 1469, C. 36., whether they possessed or not, on payment of the bare principal sum, with the expence of diligence ; and when an appriser allowed another to possess, the only remedy competent to him was an action against the possessor, which might have proved fruitless through the possessor's bankruptcy. But, by 1621, C. 6., the debtor's right of reversion is burdened with the payment both of the principal sum and interest ; which obtains, though the not-payment of the interest should have proceeded from the choice made by the appriser not to possess when it was in his power ; for the law gives him the option of either alternative.

19. As creditors were, after the Reformation, entitled not only to their principal sum, but to the past interest due upon it, where the ground of debt bore a clause of interest ; the principal sum and interest were, in the case of apprising, accumulated by the decree into one sum, which carried interest during the not redemption of the lands. Apprisers, therefore, being truly purchasers under reversion, *supr. § 2.*, enjoyed the rents of the appraised lands, in satisfaction or *in solutum* of the interest, in case they chose to possess during the legal, without any obligation to account to the debtor for the rents, in so far as they exceeded the interest, towards payment of the capital. And this was most equitable, as long as such a proportion only of the debtor's lands was appraised as corresponded to the debt. But after apprisings had the effect of carrying off the whole of the debtor's lands, this doctrine became the source of gross oppression ; for the debtor was, after the elapsing of seven years, deprived thereby of his property for ever, though the appriser had received more of the rents during the currency of the legal than amounted to his whole claim, principal and interest : It was therefore enacted by the aforesaid statute 1621, that apprisers should have right, during the legal, to no more of the rents than corresponded to the interest of the debt ; that the surplus rents should be applied towards the extinction of the principal sum ; and that, in case the whole rents received by the appriser during the

Apprisings formerly redeemable on payment of the principal, but since 1621, the reversion is burdened both with principal and interest.

Other regulations introduced by act 1621, and by act 1668.

the legal amounted to the principal sum contained in the apprising, with the interest, composition to the superior, and expence of diligence, the lands should return to the debtor. The same statute provides, that if the lands be appraised from a minor, the appriser shall have right to the full rents, after the expiring of the common legal of seven years, till the debtor's age of twenty-five, without any account, though these yearly rents shall exceed the yearly interest of the debt; but this part of the act was repealed by a posterior statute, 1663, C. 10. By the conception of this last act one may be apt to take it for a declaratory law; for the words are, *Ratifies the act 1621, and declares its meaning to be, &c.* But it truly abrogates it; for it enacts, That minors shall be obliged only for the interest of the sums contained in the apprisings led against them, and that they shall not lose the right to the surplus rents of the lands during their minority of twenty-one years. From this expression in the act 1663, limiting the debtor's minority to twenty-one years, a doubt may arise, whether the debtor is entitled, by the present law, to the surplus rents between his age of twenty-one and twenty-five, to which last term the legal reversion had been prorogated in favour of minors by the act 1621; which question has not yet, that I know of, received the determination of our supreme court. Because it behoved the appriser, by the act 1621, where the rents exceeded the interest of the debt, to apply the excess towards payment of the capital, it is equitably provided, that if, on the contrary, the rents shall not amount to the interest, the debtor must pay the whole debt, principal and interest, before redemption; so that all the interest unpaid is a charge on the right of reversion. If the smallest part of the claim shall remain due at the expiration of the legal, the whole subjects appraised are, in strict law, carried irredeemably from the debtor: Yet the court of session, where it appears that the debt is paid off to a trifle, may possibly, from their pretorian power, soften that rigour, and declare the apprising extinguished.

The appriser must account as a steward for the rents of the debtor's estate after extinction of his debt.

20. If an appriser shall, in virtue of his prior diligence, debar another creditor from possessing while the legal is yet current, he is accountable, while he continues his possession, for those rents from which he has excluded the competing creditor by the force of his own title, not only for what he hath actually received, but for what he might have received, *Durie, Feb. 11. 1636, Colquhoun, (Dict. p. 3472).* Nay, he must account in the same manner to the debtor, where he has begun to possess on his apprising, without any decree preferring him to another creditor; for his bare possession excludes the debtor from receiving the rents, *Stair, Jan. 4. 1662, Seton, (Dict. p. 297)*; and the creditor's title of possession, which in its nature excludes all other creditors, is equivalent to a decree of the judge, preferring him to the full and total possession. The appriser, therefore, during this exclusive possession, must be charged as a steward, for the rents of his debtor's estate, according to a full and complete rent-roll, and get credit only for such of them as he shall not be able to make effectual after using the proper diligence. As the debtor, when he makes a payment to his creditor in cash, has a right to demand credit for the full sum paid to him; so payment, when it is made to the creditor, (no matter whether he be an appriser or not,) out of the rents of the debtor's estate, must be estimated by its real value at the time of delivery: and for that reason, he must charge himself with the rent received by him; not merely at the rate of the sheriff-fiars, or according

ording to the prices at which he may have thought fit to dispose of it to another; but at the full value of it at the time the delivery was made; the extent of which cannot, by any subsequent act, be affected to the prejudice of the debtor, on whose account it was delivered. If the appriser, or other creditor, after having entered into the sole and total possession of his debtor's estate, be afterwards disturbed in it, either by the methods of law or force, or by the promiscuous intromissions of the debtor, or any co-creditor, he is accountable, not by a full rental, as in the former case, but barely for what he hath received, till he again recover the peaceable and total possession, *Stair, Jan. 20. 1681, Burnet, (Dict. p. 3478)*. If an appriser should, instead of applying the surplus rents towards the extinction of his capital sum, pay them to the debtor, the debtor who received them must give the appriser credit for them, in the account of his intromissions; but in a question with a posterior appriser, who hath an interest that the debt due to the first should be paid off *quamprimum*, these surplus rents, which the first appriser paid to the debtor, must be applied to the payment of his own principal debt.

21. The court of session is authorised, by 1661, C. 62, to restrict the appriser's possession, at the suit of the debtor, to such part of the lands appraised as answers the interest of the debt due to him, if the debtor be willing to ratify the appriser's possession, and deliver to him the title-deeds of the lands to which the possession is restricted. Though the first clause of this statute, relative to debtors in personal debts, was without doubt temporary, the clause by which the appriser's possession is thus restricted was found to be perpetual, *Pr. Falc. 84, (Wilson, Feb. 16. 1684, Dict. p. 83)*. This restriction was, by the practice immediately subsequent to the statute, adjudged to be a privilege personal to the debtor, which could not be pleaded by posterior creditors, *Stair, July 28. 1671, Murray, (Dict. p. 3477)*; yet by a later decision, *Nov. 1728, La. Kirkhouse, (Dict. p. 232)*, the possession of an appriser was restricted at the suit of a widow who could not otherwise have access to the debtor's funds for the payment of a personal claim of alimony, which was excluded by the appriser's preference.

Restriction of the appriser's possession at the suit of the debtor.

22. The right to the lands after elapsing of the legal reversion, is carried irredeemably to the appriser, who therefore possesses from that period without account, not as creditor in a debt, but as proprietor of the subject appraised; see 1690, C. 10*. Though

After expiry of the legal, the right is carried irredeemably to the appriser.

VOL. I.

6 Z

therefore

* It is now held that the legal of a general adjudication³⁴⁴ does not expire, *ipso jure*, (to the effect of cutting off the right of reversion), on mere lapse of the period allowed for redemption. There must be a regular decree of declarator; *Fac. Coll. Match 7. 1794, Campbell, Dict. p. 321; Ibid. Feb. 5. 1799, Young, &c. Dict. p. 7012*. See also *Ibid. Nov. 25. 1794, Landale, Dict. p. 305.*³⁴⁵

³⁴⁴ There seems to be no difference in this respect between a general and a special adjudication.

³⁴⁵ See on this subject, 2. *Bell Comm.* 601. *et seq.*

In a late case, it was laid down as "settled law, that to convert an adjudication into an irredeemable right, and extinguish the right of the reverser, it is necessary that the adjudger either obtain decree in a declarator of expiry of the legal, or regularly invest himself with charter and seisin upon the adjudication, and possess thereon for forty years;" *Ormiston, 7th Feb. 1809, Fac. Coll.* Adjudication, with charter and seisin, and possession thereon for forty years, was sustained, as a perfectly good title, without any declarator of expiry; *Falc. Johnston, 7th June 1745, Dict. p. 10789*, reported also by *Elchies, voce PRESCRIPTION, No. 26.*; *Spence, 21st Jan. 1807, noticed 2. Bell Comm. 606*; *Robertson, affirmed on appeal, 10th May 1815, 3. Dow, 106.* See also *Dalyell, 17th Jan. 1810, Fac. Coll.*

"Where the decree of declarator has been pronounced in absence, it has been
"thought

Book II.

In the competition of appraisings, the first perfected by seisin, or which the creditor has done all in his power to perfect, is preferable.

therefore the legal right of reversion should be kept open through some defect or informality in the diligence, yet the appriser, possessing after the expiration of the legal term, is not bound to restore the intermediate rents which he has *bona fide* received as proprietor, between the expiration of that legal term, and his being interpellated by a citation at the suit of the debtor, or some competing creditor, though his debt should be overpaid by such intromissions: But he is obliged to impute them towards the payment or extinction of his debt, *Kames*, 18, (*Walker*, Jan. 1720, Dict. p. 302).

23. Though an apprising, without seisin, where it is not relinquished by the creditor, is preferable to the voluntary deeds of the debtor granted after the denunciation of the lands, it cannot come in competition with real rights or diligences, which are founded on deeds granted, or debts contracted by him, previously to the denunciation, if they be completed before infestment taken by the appriser; because such rights are truly necessary, the debtor having been laid under a necessity of completing them by an antecedent obligation³⁴⁵. Thus a right of annualrent, proceeding on a bond granted before denunciation, if perfected by a seisin prior to that which is taken upon the apprising, is preferable to the apprising, *St. B. 3. T. 2. § 21*. To give full effect, therefore, to an apprising, as a proper feudal right, in competition with such real rights, or with appraisings proceeding on debts contracted before the denunciation, the appriser must obtain charter and seisin from the superior of the lands appraised; and in such competitions, the right first completed by seisin is, in the common case, preferable. Yet if the appriser has done all in his power to obtain seisin, *ex. gr.* if he has charged the superior to receive him, he will be preferred to an appriser whose charge is posterior to his, though he who gave the last charge shall have obtained the first seisin: For the law has not put it in the power of the superior, partially to prefer whom he pleases, by postponing the infestment of one creditor, and receiving another; but has justly granted the preference to those who appear to have been first in diligence, *Durie*, Jan. 31. 1632, *Ferguson*, (Dict. p. 2429). Neither is it in the debtor's power, more than in the superior's, to disappoint or frustrate the preference of a creditor who is insisting in his diligence of apprising, by any indirect device, from partial favour to another creditor; *Ibid.* Nov. 28. 1628, *Borthwick*, (Dict. p. 2427). In appraisings of lands holden of the crown, the appriser sometimes takes a notorial instrument, upon offering his signature in exchequer, to prevent the officers of that court from staving off the passing of his charter: And where, after such protestation by one creditor, a charter shall nevertheless be granted to another, it cannot hurt the right of the protester, unless he shall afterwards abandon his diligence*.

24. The

* By statute 33. Geo. III. c. 74, § 11, (and 54. Geo. III. c. 137. § 11.) "in order to fix more clearly in time coming, what diligence is necessary to make an adjudication"

"thought doubtful whether it can be opened up again like a decree for an ordinary debt. At first sight the cases are a little perplexing. But the following distinctions seem to explain and reconcile them:—1. An irregularity in the original diligence of adjudication will entitle the debtor to open up the decree of declarator, which is considered only as an accessory, partaking of the nature of its principal: 2. Irregularity in the proceedings, or decree of declarator, will entitle the debtor to relief: Or, 3. If the debt was paid off or extinguished within the legal, the debtor will be relieved against the decree of declarator;" 2. *Bell Comm.* 601. And see the cases of *Landale* and *Young*, *cit. in not.**; also *Fac. Coll. Maclellan*, 21st Jan. 1806, Dict. voce ADJUDICATION, App. No. 15.

³⁴⁵ *Vid. supr.* § 17. *not.* ³⁴³,

TITLE XII.

Composition paid to the superior for entering the appriser.

24. The year's rent payable by the appriser to the superior who enters him in pursuance of the act 1469, is called the *composition to the superior*; and it is in strict law due without regard to the extent of the debt on which the diligence is led. But as this fell heavy upon apprisers whose debts were small in proportion to the value of the lands, it is frequently modified, *ex æquitate*, far below its true worth, according to circumstances, *Durie, March 30. 1637, Paterson*, (DICT. p. 15055). In computing it, all the real burdens affecting the lands, whether constituted by the law or confirmed by the superior, ought to be deducted. Where an appriser is excluded from the rents by a liferenter, he is not bound to pay the composition while the liferent subsists; because during that period he can get nothing by his diligence, *Durie, July 18. 1633, Baird*, (DICT. p. 15054). If the right apprised from the debtor be a bare superiority, it has been decided, that the debtor's superior is entitled only to a year's feu-duty for entering the appriser; because, in these, the feu-duty is the only rent reserved to the appriser's debtor, and consequently the only rent to which the appriser is entitled in virtue of his diligence, *Durie, Feb. 15. 1634, L. Monkton*, (DICT. p. 15020)³⁴⁶. Though many apprisers should charge the superior to infest them, the superior has right to no more than one year's rent for all of them put together; for all of them constitute only one right to the lands apprised; since, if any one of them shall carry the full right, that one must exclude all the rest. If the appriser who has paid the year's rent for his entry, shall afterwards have his apprising cast upon a nullity, the second appriser, since he has, in that case, the sole benefit of the diligence and infestment, ought to repay to the first the whole composition paid by him to the superior, *Durie, July 22. 1628, Lo. Borthwick*, (DICT. p. 15030). Superiors, by our more ancient practice, did not consider themselves as bound to enter such apprisers as could not instruct the right of their author, from whom they had apprised: But this is not admitted as a sufficient defence by the later decisions; because an appriser is not presumed to be master of his debtor's title-deeds. Nay, a superior must enter the appriser on a charge, though the superior himself should be in possession of the lands, or should claim the property of them under a separate title, *Durie, July 17. 1632, Black*, (DICT. p. 201). But this act of the superior not being voluntary, but an act of obedience to the law, does not weaken or encroach upon any right formerly competent to himself in the subject; for he enters the apprisers with this quality, which, though it should not be expressed, is always implied, *Reserving his own right, and that of every other person*. In lands holden of the crown, the composition is regulated, not according to the rent of the lands, but in proportion to the principal sum apprised or adjudged for. Where that sum does not exceed 10,000 merks Scots, one *per cent.* is only demanded,

“ tion effectual, it is enacted, that the presenting a signature in Exchequer, when the
 “ holding is of the crown, or the executing a general charge of horning against supe-
 “ riors at the market-cross of Edinburgh, and pier and shore of Leith, when the hold-
 “ ing is of a subject, and recording an abstract of the said signature or the said charge
 “ in the register of abbreviates of adjudications, (*infra*, § 49.), shall be held in all time
 “ coming as the proper diligence for the purpose aforesaid.”

³⁴⁶ See the case of *Cockburn Ross, supr. t. 7. § 7. not. 161*, “ The report of this
 “ case deserves to be studied;” 1. *Bell Comm.* 26.

Where the superior refuses to enter the appriser.

demanded, though that composition should be less than the sixth part of the valued rent, which the crown exacts from singular successors by voluntary purchase, *supr. T. 7. § 6.*; and where the capital exceeds that sum, the composition falls still lower, to an half *per cent.*

25. Where a superior refused to enter the appriser, the apprising was, by the old practice, presented to the court of session to be approved by them, *Hope, Min. Pr. § 274.*, upon which approbatory decree, or as it was called, *allowance*, three consecutive precepts were ordained to be directed to the superior, commanding him, in different styles, to receive the appriser, *Cr. Lib. 3. Dieg. 2. § 20.*; the last, under this certification or commination, that if he did not give obedience, the appriser, passing him by, might pursue the same method against the next higher superior; whom it behoved, in that case, *supplere vices*, to fill up the place of the immediate one, and receive the subvassal. But such entry by the mediate superior, being barely an act of obedience to the law, like the one stated in the preceding section, cannot be considered as voluntary, more than that other; nor deprive him of the casualties which may afterwards happen to fall by the death or delinquency of his immediate vassal; or abridge him of any other right that might have been competent to him if the subvassal had been entered by his own immediate superior. That those precepts described by Craig were no other than letters of four forms, appears from 1647, *C. 43.*, which, upon a recital, that apprisers were put to unnecessary expence, by using letters and charges of four forms against their superiors, substitutes in their room simple charges against them, upon letters of horning on twenty-one days: and though this statute fell under the rescissory act of Charles II., and was not revived by any law after his restoration, the usage thereby introduced has been in observance ever since. If the next higher superior also refused, it behoved the appriser to apply to the next after him in order, and so from one superior upward to another, till he came to the Sovereign; who never refuses to receive any vassal, upon payment of the composition established in Exchequer.

Registration of allowances of apprisings.

26. As it is of the highest importance to creditors and purchasers to know what apprisings are led against those to whom they are to lend their money, or from whom they intend to purchase lands, the Privy Council, by an act, February 1636, directed the full tenor of apprisings to be recorded. This having been attended with great expence, it was prohibited, by 1641, *C. 54.*; and in its place the clerks to the bills were ordained, for the information of the lieges, to enter into a record, within sixty days after their dates, a note, or as Stair explains it, *B. 3. T. 2. § 25.*, the allowance of every apprising, containing the sum for which it was led, the lands appraised, the names of the appriser, debtor, superior, and messenger, and the dates of the executions. That act was revived, by 1661, *C. 31.*, with this certification annexed to it, That posterior apprisings, if allowed and recorded within the statutory time before prior ones, should be preferable, according to the dates of the allowance and registration. And thus, allowances, which were first calculated for the single purpose of compelling refractory superiors to their duty, came at last to be considered as a proper method of making all apprisings public, and as a ground of preference in a competition with co-apprisers. The last words of this act 1661 contain a saving clause, in the following words: *Without prejudice to any farther diligence by*

by infestments, or charges against the superiors, according to the priority or posteriority thereof, prout de jure; and indeed by the nature of the right, the registration of a seisin that follows upon an apprising, must fully make up for the want of the registration of an allowance.

27. The court of session have by repeated decisions explained the above statute, 1469, obliging superiors to receive apprisees as their vassals in the lands appraised, in the utmost extent the words could bear; and have found, that that obligation lost nothing of its force, even in the case of corporations who had adjudged their debtor's lands, and in that character demanded an entry from the superior, *Dalr.* 96. (*Aberdeen, Dec. 11. 1712, Dict.* p. 15034); *Forbes, July 24. 1713, Univer. of Glasgow, (Dict.* p. 9296)³⁴⁷. By these judgments, superiors might, by the fact of another not consented to by themselves, suffer the loss of all their casualties; for a corporation never dies, nor marries, nor is minor. But as the last of these decisions was reversed upon appeal, it would seem that superiors are not obliged, even at this day, to enter corporations who have adjudged, notwithstanding the statute, 20° *Geo. II. C. 50. § 12.*, obliging them to receive all disponees; which, as hath been already observed, was enacted merely for the more expeditious making up the titles of singular successors³⁴⁸. Lord Stair's proposal, *B. 2. Tit. 3. § 41.*, of compelling the adjudging corporation to make over their right to a trustee, by whose death or delinquency the superior may be entitled to his casualties, is particularly censured in the pleadings upon the decision last quoted in 1713³⁴⁹. A superior may get free from the obligation he lies under of receiving an appriser, by making payment to him of the debt on which the apprising proceeds; and if the debt exceed the value of the lands appraised, by paying him a sum equal in value to the lands, and taking a conveyance of the apprising in his own favour, 1469, *C. 37.* For where the superior, who is the *dominus directus* of the lands, offers to the creditor the just value of the subject affected by his diligence, the obligation ought to cease. But this privilege, called *retractus feudalis*, is not competent to the superior after the legal of the apprising is expired; for the appriser's right becomes from that period irredeemable; and as the vassal, who is the debtor, cannot afterwards redeem the lands, neither can the superior, who comes in his place.

Where a corporation is the appriser.

28. Certain kinds of apprising are complete without seisin. *First*, A bare decree of apprising carries the full right of those heritable subjects belonging to the debtor, which were not perfected by seisin, though capable of it, but continued personal in him; for there can

Certain apprisings require no seisin.

³⁴⁷ See 2. *Fount.* 367. for a partial report of this case, which has been omitted in *Morison's Dict.*

³⁴⁸ The reversal in the case of *University of Glasgow* took place 9th May 1715, *Robertson's Reports*, p. 172; so that it could decide nothing as to the effect of the statute which passed in 1747. That the statute, however, does not compel a superior to receive a corporation as his vassal, was decided in the case of *Hill*, 17th Jan. 1815, *Fac. Coll.* This decision applies to the case of a disponee, but its principle extends also to that of an adjudger. *Vid. supr. t. 4. § 11. in fin.*; and *t. 7. § 7.*

³⁴⁹ In the case of *Hill, supr.*, it was observed by the *Lord President*,—"As to compelling the vassal to enter by a trustee, we cannot compel the vassal to bring forward a trustee; but if the hospital offer a trustee, I am clear the superior must receive him." The Court accordingly declined to recognise either this mode of arrangement, or another way of compensating the superior which was suggested, viz. by entering the corporation, "on their agreeing to pay a duplication of the feu-duty every twenty-five years."

can be no warrant for granting seisin on such apprisings*. *2dly*, In like manner, when the subject appraised from the debtor requires no seisin to perfect it, *ex. gr.* a lease, or a right of reversion, it must be carried by a simple apprising: For where seisin is not necessary to the first constitution of a right, it cannot be necessary to its conveyance; and apprising is nothing but a judicial conveyance of the right appraised. On this ground, second apprisings, *i. e.* apprisings of subjects which have been already appraised by another creditor, require no seisin, even where seisin would have been necessary to vest the right appraised in the first appriser. For understanding this, it must be observed, that by the old law the first apprising, when perfected by seisin, divested the debtor of the property, and consequently excluded all posterior apprisings: But because it was competent to the debtor to redeem the first appriser's right by payment, second apprisers, who appraised all the right competent to their debtor in the lands, carried to themselves by their diligence the right of reversion, or faculty to redeem; and as rights of reversion, being merely personal, required no seisin, therefore posterior apprisers were, without the necessity of taking infeftment, preferable according to their dates, *Gosf. July 22. 1675, Boyd, (DICT. p. 250.)*³⁵⁰. Yet it might have been prudent even for second apprisers to take infeftment. The first apprising might have been null, or it might have been paid by intromissions within the legal; and where the first apprising was either declared void, or extinguished by payment, the second apprising came in place of the first; upon which second, if seisin was not taken, the creditor in an apprising posterior to that second, might get himself first infeft, and so be preferred: And though there should be no hazard from any subsequent apprising, it has been already observed, that no purchaser of lands, whether voluntary or judicial, can, by the practice of our courts, remove tenants before he be infeft.

Whether an apprising led by a superior requires seisin.

29. Stair is of opinion, that an apprising led by a superior requires no seisin; because the superior's seisin of the lands, which still subsists notwithstanding the right of property granted by him to the vassal, recovers its full force when that right is again brought back to himself by the judicial sentence of apprising; which therefore has the effect of consolidating the property with the superiority: And hence his Lordship infers, that an apprising or adjudication by the superior is, without farther diligence, preferable to all apprisings of a posterior date, though perfected by seisin, *B. 3. T. 2. § 23.* But, *first*, Consolidation, when applied to this case, appears inconsistent with feudal rules: For apprising is no better than a legal conveyance; and as no voluntary conveyance of the property to the superior hath the effect *per se* of consolidation, without a resignation of the property *ad remanentiam* by the vassal in his favour, duly registered; neither can it be affected by the superior's apprising, which admits not of resignation till he be first infeft upon his own precept. *2dly*, The act 1661, to be explained next section, requires either infeftment, or a charge against the superior to make an apprising effectual, without distinguishing between apprisings led by the debtor's superior and by his other creditors: So that, from

* In like manner, the adjudger of an unexecuted procuratory of resignation, or precept of seisin, acquires the full right of such clause, which he may therefore execute in his own person, just as if it had been conveyed to him by voluntary assignation from the original grantee; *Fount. Dec. 6. 1695, Dewar, DICT. p. 241; Fac. Coll. March 1. 1782, Marshall, DICT. p. 6927, &c.; Ibid. June 22. 1791, Pierce, DICT. p. 244.*

³⁵⁰ *Vid. infr. § 33. in fin.*

from the passing of that act, the superior who apprises has no colour for pleading any peculiar privilege or ground of preference over other apprisers.

30. Though second apprisers had a right to redeem their debtor's lands from the first, few had money sufficient for that purpose; and hence it frequently happened, that the first appriser either carried the debtor's whole estate to himself, or he conveyed his right, perhaps for a trifling consideration, in favour of the debtor's apparent heir, or of a trustee for his behoof, to the utter exclusion of all the other creditors, though equally onerous. To cure these two evils, resulting from the unequal preference of creditors, and from the devices of apparent heirs, the act 1661, C. 62. was enacted; by one branch of which, all apprisings led, either before the first effectual apprising, or within year and day after it, are made preferable *pari passu*; and such apprising as is preferable to others in respect of the first infestment, or of the first exact diligence for obtaining it, is declared to be the first effectual apprising. The year and day runs from the date of the decree of apprising, and not from the date of the seisin, or of the diligence to obtain seisin, *Stair, July 4. 1671, L. Balfour, (Dict. p. 238.)**; which interpretation is favoured, not only by the words of the act, but by the intention of the legislature, to allow a reasonable time from the date of the first effectual apprising, to creditors living at a distance, for carrying on their diligence against the common debtor. The description given in the statute of the first effectual apprising has been explained by some lawyers so as to exclude all apprisings of rights which require no infestment, or on which no seisin has followed, from being included under this *pari passu* preference; because no seisin can proceed on such apprisings, by which they may be made effectual. But as the reason inductive of this enactment is equally applicable to all apprisings, the character there given of an effectual apprising is not to be accounted adequate, but rather as an instance or example taken from the most common case. Our decisions have therefore extended this *pari passu* preference to the apprisings or adjudications even of personal rights; and as, in these, the first in date is, by the nature of the right, the first effectual adjudication, all adjudications within year and day of that first are preferred with it *pari passu, Dec. 1725, Sir Th. Moncreiffe, (Dict. p. 242); Nov. 19. 1734, Jackson, (Dict. p. 281).*

31. The exact diligence to obtain infestment, by which an apprising may be rendered effectual, is different, according to the different superiors of whom the lands are holden. If they are held of the crown, the presenting of a signature in exchequer is sufficient: if of a subject, a charge given to that subject to enter the appriser, makes the diligence effectual³⁵¹. The strong effect given by this act to the presenting of a signature, or to a charge used against a subject-superior, is intended merely to regulate the preference of apprisers among themselves, but by no means to alter the nature or condition of feudal rights. Hence, though a charge given to the superior is by the statute made equivalent to a seisin, in a question between

Act 1661 introduced a *pari passu* preference among all apprisings within year and day of the first made effectual by seisin;

Or of the first exact diligence used for obtaining seisin.

* The same decision was pronounced, *July 27. 1678, Rickarton, Dict. p. 240.* As to the method of calculating the year, see *Stair, Jan. 26. 1681, La. Bangour, Dict. p. 248,* where the Court found, That the year was to be counted, not by the number of days; but by the return of the day of the same denomination of the next year, (leap years making no difference in this respect), and that, therefore, where, of two adjudications, the one was dated *July 30. 1679,* and the other *July 31. 1680,* they must be ranked *pari passu* under the statute; (1. *Bell Comm. 618.*)

³⁵¹ *Vid. supr. § 17. & § 23. in not.*

between co-apprisers, it has no such effect in a competition with an infestment of annualrent, or any other voluntary right perfected by seisin, *Pr. Falc.* 58. (*Justice, Dec.* 1682, *DICT.* p. 2823.); *Kames*, 48, (*Stirling, Feb.* 26. 1724, *DICT.* p. 2831.). Hence, also, a widow's terce is preferable to an adjudication upon which the superior has been charged, *Kames*, 56. (*Carlyle, Feb.* 9. 1725, *DICT.* p. 15851). And on the same ground, such adjudication, being but a personal right, must be carried by a general service notwithstanding the statute. Nay, though an apprising of adjudication should be perfected by seisin within year and day after the date of an infestment of annualrent, the annualrent-right is by the same rule preferable, to the utter exclusion of the apprising.

The act 1661 regulates only the preference of apprisings, but does not affect any other feudal rights.

32. On this head, a case occurred, not a little perplexing, observed by Lord Stair. An apprising was led against a debtor's lands, on which seisin followed immediately; a right of annualrent was soon after granted by the debtor on the same lands; and after seisin was taken on that right, a second apprising was deduced against them within year and day from the date of the first. By a known feudal rule, the first apprising which was perfected by seisin, prior to the right of annualrent, is preferable to it; and the right of annualrent, though totally excluded by the first apprising, is, by the same rule, preferable to the second; nevertheless, the statute 1661 expressly prefers the first and second apprisings *pari passu*. The court, in a question that appeared so involved in contradictions, preferred all the three *pari passu*, *Feb.* 6. 1673, *L. Coalston*, (*DICT.* p. 2821.). It must appear, however, on a due consideration of the statute, that the right of annualrent ought not to have been brought under the *pari passu* preference established among apprisers. It should have been ranked after the first apprising, and before the second, as if no such enactment had been made. The first appriser, on the other hand, ought to have been decreed to communicate to the second, only such part of the sum for which he was ranked, as he would have been cut out of, if no right of annualrent had been in the field; since the second appriser had himself to blame for suffering that right to intervene between the first appriser and him, which he might have prevented by a more early diligence. The later decisions have reduced this matter to its true principles, *Forbes, Jan.* 20. 1709, *Cred. of Langton*, (*DICT.* p. 2877.); *Feb.* 1730, *Campbell*, (*DICT.* p. 2891.), observed in (*Folio*) *Dict.* i. p. 184.; see *Essay upon Vinco vincentem* *.

Theseisin which made the first apprising effectual, is communicated to all the rest within the year. Consequences of this.

33. The act 1661 declares, that all apprisers within year and day of the first effectual one shall be preferred *pari passu*, as if one apprising had been led for the whole sums contained in all of them: The seisin, therefore, or charge, which makes the first apprising effectual, is by the law itself communicated to the rest; and so becomes a common right, and is considered, *fictione juris*, as if it had proceeded upon every one of them. As a consequence of this, the first appriser cannot at pleasure pass from his diligence, to the prejudice of the other apprisers, to whom the law gives an equal interest in it with himself, *Stair, Jan.* 28. 1676, *Machurg*, (*DICT.* p. 256.); and though the debt due to him shall be paid off, his apprising is not extinguished as to all effects, but subsists as to the other apprisings within year and day of it, *Stair, Nov.* 7. 1679, *Straiton*, (*DICT.* p. 255.) †. All the apprisers within year and day of the first

* See *Kames, Elucidations, Art.* 81.

† See to the same purpose, *Stair, Dec.* 19. 1672, *Street, DICT.* p. 248.

first effectual one, have the benefit of the diligence used on it, as well after as before the expiring of the legal; for neither our statutes nor decisions distinguish between these two periods, *Kames*, 19. (*Barclay of Towie*, June 23. 1720, Dict. p. 260.). Hence an apprising, after the legal is expired, must be a quite different kind of right, in regard of the debtor, and with respect to co-apprisers. In a question with the debtor, it is an irredeemable right of property; but in a competition with co-apprisers, it resolves into a simple security, as if the legal were not expired; for all the apprisers joined together are but so many creditors, equally entitled to the possession of their debtor's estate. Nevertheless, if one of the apprisers shall actually enter into the possession, he has the sole benefit of his own intrusions, without any obligation to account to his co-apprisers; for although all of them have an equal title to possess, yet whoever does not insist for possession upon his title, has himself to blame, *Stair*, July 17. 1675, *Boyd*, (Dict. p. 10651.); *Fount.* Jan. 4. 1695, *Wallace*, (Dict. p. 10653.). The whole expence disbursed by the first effectual appriser, in leading his apprising and carrying on the diligence for making it effectual, including the composition to the superior, must by the statute be replaced to him, by the posterior apprisers within year and day who claim the benefit of that first apprising; and not barely such a proportion of it as corresponds to the amount of their several debts; for that is all the recompence the first gets for bringing in those others *pari passu* with himself, *Stair*, Feb. 5. 1663, *Grahame*, (Dict. p. 245.); and though only one of many posterior apprisers should claim the benefit of the first diligence, that one must pay the whole expence, reserving his recourse against the rest, in case any of them should afterwards claim it. The statute regards such apprisings only as are within year and day of the first: the preference of those that are not led till after the year, is governed by the former law, (stated *supr.* § 28.), relative to the preference of second and posterior apprisers; so that the first of them in date excludes the second, the second excludes the third, &c. *Gorf.* July 22. 1675, *Boyd*, (Dict. p. 250.). And this doctrine hath been confirmed in a late case, where, after the first effectual adjudger was infest, three or four adjudications were deduced of different dates, without year and day of the first, upon none of which diligence was used for obtaining seisin; and, lastly, an adjudication was recovered, upon which charter and seisin followed. The court preferred the adjudgers not infest according to their dates, before the adjudger infest, in regard his adjudication was the last in date, *Fac. Coll.* i. 180, also reported by *Tinn.* Jan. 27. 1756, *Creek of Bayne of Tulloch*, (Dict. p. 250.):*

34.

* By Stat. 29. Geo. III. c. 7. § 10; (and 54. Geo. III. c. 137. § 9.); "in order to lessen the number of adjudications for debt, and consequently the expence to all parties, and to facilitate the *pari passu* preference of creditors in similar circumstances," it is enacted, "That the Lord Ordinary officiating in the Court of Session, before whom the first process of adjudication against any estate for payment or security of debt is called, shall ordain intimation thereof to be made in the minute-book and on the wall³⁵; in order that any other creditors of the common debtor, who

³⁵ When a first adjudication is brought for payment of a sum; over the whole of which the debtor instantly instructs a right of retention, such adjudication cannot proceed, even to the effect of intimation being appointed under the statute; *De of Quakerberry's Executors*, 11th July 1817, *Fac. Coll.* Much more, of course, "where the claim of debt can be instantly answered and rejected;" 1. *Bel's Comm.* 620. But where investigation and discussion are necessary, intimation must proceed, *Ibid.*

BOOK II.

All expired appraisings affecting the debtor's estate, and purchased by his apparent heir, are redeemable by posterior appraisers within ten years.

34. By another clause in the same statute, all expired appraisings affecting the debtor's estate, and purchased by his apparent heir, are declared redeemable within ten years after the purchase by posterior appraisers, for the sums truly paid for them by the heir. This part of the act being designed to discourage and obviate the fraudulent devices of apparent heirs, has been, by a liberal interpretation, extended to cases not expressed in the letter of it. Thus, the enactment has been declared to strike against purchases made by an apparent heir during the life of his ancestor, though no heir is in a legal sense apparent till the death of his ancestor, *Stair, June 19. 1668, Burnet*, (Dict. p. 5302.); and against appraisings purchased within the legal, though the enacting words are limited to expired appraisings, *Fount. Feb. 26. 1685, Campbell*, (Dict. p. 5325.). Thus also the right of redemption hath been extended to personal creditors, *Stair, July 11. 1671, Maxwell*, (Dict. p. 5306.); and the ten years allowed to the appraisers for redeeming, have been construed to commence, not from the date of the purchase, but from the publication of it by seisin, or some other open deed, by which the purchase might be known, *Pr. Fac. 67, (Molle against Craw, Nov. 13. 1683, Dict. p. 5322.)*. But all the doubts which might have been moved on this branch of the act, are now obviated by 1695, C. 24., by which an apparent heir's possession of his ancestor's estate, or his voluntary purchase of rights affecting it, is declared to infer a passive title. A further guard is also set against collusive devices between debtors and their near kinsmen, by a separate clause of the last-cited act 1695, by which adjudications, or other rights affecting the debtor's estate, acquired by any such near relation of the debtor, to whom the debtor's apparent heir may succeed as heir, are declared to have no effect beyond the extent of the sums truly paid for them, though they should not be redeemed to the world's end. To conclude this account of the act 1661, the legal reversion of all appraisings was thereby prorogated from seven to ten years. As to the clause in that statute, saving the preference of appraisings led upon rights of annualrent, or other *debita fundi*, *vid. supr. Tit. 8. § 37.*

Grounds for reducing, restricting and extinguishing appraisings.

35. The several grounds of setting aside, restricting, and extinguishing appraisings, may be now explained. The effect of them is altogether lost by a decree of reduction; which commonly proceeds, either where the appriser's debt is not justly due, or where nullities or essential defects appear in the form of the diligence.

But

“ at the next calling of the cause, can shew, that although they have not executed
 “ their summonses of adjudication, they are in other respects, by the nature of their
 “ grounds of debt, and steps taken by them, in condition to proceed in adjudging
 “ their debtor's estate, may produce the instructions of their debts, with summonses of
 “ adjudication libelled and signeted, for the purpose of their being conjoined in the de-
 “ cree of adjudication, twenty sederunt days being allowed for such intimation before the
 “ cause can be called a second time; and if any of these forms shall happen to be omit-
 “ ted, the said adjudication shall be null and void, (“ without prejudice to its being
 “ brought forward again in more due form, or still conjoined with any after adjudica-
 “ tion; and”) without prejudice to the validity and order of ranking of posterior ad-
 “ judications according to the rules of law.” This conjunction of adjudications is com-
 “ petent only in the first process of adjudication against the debtor's estate; *Fac. Coll.*
Nov. 24. 1801, Campbell, &c. Dict. App. voce BANKRUPT, No. 13. See another
 question on the interpretation of this clause, in the sequel of the same case; *Fac. Coll.*
March 5. 1802, Clark, &c. Dict. App. v. BANKRUPT, No. 15. (See also *Fac. Coll. Al-*
lisons, 19th Dec. 1805, Dict. v. ADJUDICATION, No. 14.) A provision nearly similar
 to this had been contained in 28. *Geo. III. c. 18, § 5.*³⁵¹

³⁵¹ See on the subject of this note, 1. *Bell Comm.* 618. *et seq.*

But though by the strict rules of law, diligence, where it is not regularly carried on in every step, is good for nothing; yet because it would be too rigorous to overthrow the diligence of a lawful creditor *funditus*, for every slight omission in point of form, therefore where the objection is of lesser moment, *ex. gr.* where the interest due upon the principal sum is accumulated, and so made to carry interest from a short day or term prior to the decree, the apprising, though it is not allowed to have full force, is sustained *ex æquitate*, as a security for the sums truly due; or, as it is usually expressed, the apprising is restricted to a security*. Generally the creditor is in this case cut off from his claim of accumulations, the expence of leading the diligence, and the composition to the superior, if he has paid it: Yet sometimes the apprising or adjudication is sustained, not only for the principal sum and interest, but for the accumulations; especially where the question is not with a co-creditor, but with the debtor himself, as in the case of an assignee who leads an adjudication *bona fide* for the whole debt assigned, though a partial payment has been made to the cedent, which could not be known to the adjudger, *Nov. 3. 1738, Balfour*, (DICT. p. 107.). Apprisings and adjudications led by Papists, are declared by 1700, C. 3, incapable of expiring, so that they only subsist for the principal sum and interest; but when they come to be vested in a Protestant, they are governed by the common rules †. In these restricted apprisings, the right of redemption is not closed by the elapsing of the ten years, but continues open, and never expires against the debtor, who may therefore redeem the appraised lands at any time.

36. How far apprisings or adjudications may be restricted or affected by the personal declarations of the creditor, may be doubted. It is certain, that the public records were calculated chiefly for fixing the absolute and irredeemable property of land to purchasers, which is, of all others, the most valuable subject of commerce; for the purchase of apprisings, or of other temporary and redeemable rights, in security of debt, is neither of such importance to the community, nor in its nature capable of receiving so much benefit from registers. An appriser, for instance, when he uses diligence, consults no records, but affects the subject appraised *tantum et tale* as it was vested in his debtor³⁵². And in the same manner, a purchaser from him cannot be said to act on the faith of the records, since the apprising might previously to his purchase have been extinguished by the appriser's discharge, or by his intromissions with the rents of his debtor's estate, which can enter into no record; *vid. infr.* next section. It might, therefore, seem, that he who purchases

Whether apprisings and adjudications may be affected by personal declarations of the creditor.

* Even when an adjudication is restricted to a security, it may acquire the legal quality of first effectual, if the steps necessary for that purpose have been regularly taken; *Fac. Coll. Dec. 8. 1781, Sinclair, &c.* DICT. p. 268.

† This statutory disability is in a great measure taken off by 33. *Geo. III. c. 44. Vid. supra, t. 3. § 16. not. †.*

³⁵² The doctrine of *tantum et tale*, so far as regards the original appriser or adjudger, is now exploded; the right of the debtor, as it appears on the face of the records, devolving on them, equally unaffected by any personal and extrinsic conditions or declarations, as on an ordinary purchaser. *Vid. 1. Bell Comm. 23. 31. & 220.; supr. t. 3. § 13. not. 37; Fac. Coll. Wylie, 8th Dec. 1803, DICT. p. 10269.* The doctrine of the text, however, seems still to be acknowledged in so far as respects the restriction or other personal qualification of the creditor's apprising or adjudication; though it is difficult to perceive on what sound principle a distinction can be rested.

chases an apprising, *utitur jure auctoris*, and consequently lies open to all the objections which may be pleaded against the cedent. In practice, backbonds or other personal declarations, restricting an apprising, if granted by the appriser, before he be infeft, are effectual during the currency of the legal, even against his singular successor infeft upon his conveyance, though such backbonds should continue latent deeds, *Stair, B. 3. T. 2. § 39.*; *July 12. 1670, Kennedy*, reported by *Stair, v. i. p. 692.* (Dict. p. 10205.); because an apprising without seisin is a personal right, which therefore may be restricted or charged with personal declarations. But such declarations by an appriser after he is infeft, can have no effect against his singular successors, even within the legal, *Stair, July 6. 1661, Tailfer*, (Dict. p. 5633.); *Hare 810.* (*Sinclair, Jan. 1685, Dict. p. 5324.*)

How apprisings are extinguished.

37. An apprising, when it is redeemed from a prior, by a posterior appriser, is not extinguished; the right of it is only transmitted from one creditor to another. In order to its extinction, payment must be made by the debtor, or by others on his account, either to the original appriser, or to his assignee³³³. Apprisings are thus extinguished *ipso facto*, without the necessity of any decree of declarator, *first*. By the creditor's intromission, during the currency of the legal, with the rents of the lands appraised, to the full extent of his claim, 1621, C. 6. *2dly*. By bonds to the amount of the debt due originally to the debtor, of which the appriser hath received payment, by himself or others within the legal, *Falk. June 7. 1745, La. Crowdieknows*, (Dict. p. 10013). *3dly*. By the creditor's discharge or acquittance, granted in consequence of payment made in cash by the debtor himself. And in this manner apprisings may be extinguished without the necessity of recording the acquittance in the register of reversions, *Stair, July 23. 1662, La. Fraser*, (Dict. p. 938.); for though apprisings bear some resemblance to wadsets, the renunciations or discharges of which must be registered by 1617, C. 16.; yet no right that is extinguishable by bare intromission, (which is not capable of entering into any record), can be considered as a wadset, so as to fall under the enactment of that statute.

Order of redemption of apprisings, and action of count and reckoning at the instance of the debtor.

38. What has been already observed, serves to shew the different sources from which the insecurity of a singular successor, in the purchase of an apprising or adjudication, may flow, though his right should be perfected by seisin. It may be extinguished by the appriser's written renunciation or discharge, which need not be registered; or by his intromission with the debtor's effects, which cannot be registered; or, lastly, the seisin, which has proceeded on the adjudication purchased, may possibly be a common right to support other adjudications led within year and day, to the greatest extent, in an equal degree of preference with that adjudication itself. To prevent the legal of an apprising from expiring, and thereby preserve the right of reversion, either to the debtor or posterior appriser, it behoves them, while the legal is yet current, to make premonition or intimation to the first appriser, that he may receive his debt, and to consign the sums due under form of instrument:

³³³ The presumptive heirs of the debtor are not, *in titulo*, during his lifetime, to reduce or suspend the effect of an adjudication, on the ground of their having offered to pay the debt, before adjudication was deduced; *Gowans, 22d. June. 1640. Res. Coll.*

instrument. The order of redemption, and the action of count and reckoning consequent upon it, are, in their general nature, the same that are used in wadsets. But as in apprisings there is no determinate time mentioned for premonition, nor any place expressed where the sums contained in them are to be consigned, questions upon those points must be arbitrary, *St. B. 2, T. 10, § 15*. An action of count and reckoning, and declarator of extinction, brought within the legal, by the debtor against the appriser, has the effect of prorogating the legal reversion or keeping it open, *Stair, June 26, 1677, Kincaid, (Ditt. p. 289)*. In this action the debtor must charge himself, not only with the principal sum itself, and interest which is due by him, but with the whole expence of diligence incurred by his creditor in recovering that debt, viz. the sheriff-fee, the expence of infestment, and the composition due to the superior, together with a salary to a factor or steward, if one has been employed for collecting the rents. Nay, the appriser is entitled to the composition due to the superior, and to the sheriff-fee, from the debtor, though the superior and messenger should, from a personal regard to the appriser, have passed from their several claims in his favour; since the benefit of such gratuities or presents ought not to be transferred from the person favoured, to another for whose use they were never intended, *Davis, July 2, 1625, Kincaid, (Ditt. p. 314)*. The debtor need not, after redemption, be again infest in the lands; for an apprising is the sale of lands to a creditor, redeemable by the debtor upon payment. And as all redemptions operate *retro*, so as to avoid the sale, as if it had never existed, the debtor's seisin must revive, and recover all the force that it had originally before the apprising was led.

39. The legislature, considering, that the greatest estates were, as the law stood formerly, carried off by creditors apprising for inconsiderable debts; that messengers who were the only judges in apprisings, ought not to be intrusted with matters of such importance; that by the length of the legal reversion of ten years, the cultivating of the ground lay too long neglected, both by the debtor and creditor; and that the diligence of apprising was most expensive by loading the debtor with penalties and sheriff-fees, did, by 1672, C. 19, in the room of the old form of apprising by messengers, substitute adjudications, which, by that statute, are ordained to be carried on, as ordinary actions, before the Court of Session. By this statute, not the whole of the debtor's estate is to be adjudged, but such part of it only as shall be estimated to the principal sum, and interest then due; from which this new diligence has got the name of a *special* adjudication. And because the creditor is, by the statute, laid under the necessity of accepting land in the place of money, a fifth part is added to the capital on that account*, over and above the composition due to the superior, and the expence of infestment; but without penalties or sheriff-fees. Upon this decree, the creditor may immediately enter to the possession of the special lands adjudged and receive the rents. And because the law considers these rents as precisely commensurated to the yearly interest of the debt, they therefore extinguish the current interest, without subjecting the adjudger to account

Adjudications substituted in place of apprisings. Special adjudications.

* The allowance of one-fifth has been granted even when the subject adjudged was a right of annualrent; *Fr. Falc. 40, Kerr against Dalrymple, Jan. 10, 1688, Ditt. p. 72.*

Book II.

for any surplus rents. The legal reversion, which in appraisings was ten years, is in the case of these special adjudications restricted to five. The debtor is obliged, by the statute, to exhibit a valid title to the lands adjudged, and to deliver it, or transumpt of it, to the adjudger, to renounce the possession of these lands, and to ratify the decree of adjudication, that so the creditor may have a clear right, and a quiet possession*. The *pari passu* preference of appraisings established by the act 1661 does not obtain in the special adjudications founded on the act 1672. Where no more is adjudged than that precise proportion of the debtor's lands, which is sufficient for satisfying his debt, the adjudger ought to retain all that proportion to himself, in case the debtor shall not redeem. A special adjudication therefore carries the sole and entire property of the subject adjudged to the adjudger, with this only restriction, that the debtor may redeem it at any time within five years.

General adjudications.

40. It was in part foreseen, what hath since most commonly happened, that the debtor either could not, or through wilfulness would not, produce a valid right, or ratify the adjudication. It was therefore enacted, by the same statute, That the creditor might, in that case, adjudge all or any right belonging to his debtor, in the same manner, and under the same reversion of ten years, as he might by the former law have apprised it. This last kind is called a *general* adjudication; and ought to be deduced only for the principal sum, interest and penalty †; for the fifth part is not to be added to the capital, except in special adjudications. By mistake, however, general adjudications were frequently extracted for a fifth part, over and above the debt and penalty; and such were for a while sustained as a security for the sums truly due, in regard of the *communis error*: But by act of sederunt, Feb. 26. 1684, all general adjudications which shall be so extracted for the future, are declared altogether null. No general adjudication can be insisted in, without libelling, in the summons, the other alternative of a special adjudication; for special adjudications are introduced by the act 1672, in the room of appraisings; and it is only where the debtor refuses to comply with the terms required of him in a special adjudication, that the act authorises the leading of a general one ‡. But this libelling of both alternatives is now become a point almost of mere form; for debtors seldom produce a progress in consequence of the first alternative; so that it only gives occasion to the debtor to get the pronouncing of the decree put off for a few days or weeks, by taking a day to produce a progress, according to the directions

* See *Fac. Coll. Aug. 9. 1782, Norval*, DICT. p. 94.

† The author here alludes to what is called the liquidate penalty, stipulated as accessory to the principal sum. The *termly* penalties, or, as generally expressed, "termly failzies," cannot be comprehended in the general adjudication; *Stair, July 20. 1678, Morice*, DICT. p. 7426; *Fac. Coll. Nov. 15. 1771, Park*, DICT. App. voce ADJUDICATION, No. 6.; *Ibid. July 27. 1775, Hart*, DICT. p. 119.; even where the liquidate penalty is lower than a fifth part of the principal sum; *Ibid. Nov. 28. 1783, Porteous*, DICT. p. 120. (See 1. *Bell Comm. 642.*)

‡ See a case where the creditor was found not obliged to accept a special adjudication; *Fac. Coll. Farquhar, Jan. 14. 1769*, DICT. p. 92³⁵⁴.

³⁵⁴ This was, because the debtor, in consequence of a judicial sequestration of his whole estate, was not in condition to exhibit a *valid title*, as required by the statute; *supr.* § 39.

directions of the act. General adjudications pass of course, without inquiring into the grounds of debt, unless the debtor shall appear and except to them: And after one creditor has obtained and extracted decree of general adjudication, sentence is passed summarily upon all posterior adjudications, unless sufficient objections, instantly verified, are offered against them; that so none of the adjudgers may, by the expiring of year and day, lose the benefit of the *pari passu* preference established by the act 1661. The *induciæ legales* are even shortened in favour of creditors who are in danger of being deprived of that benefit: But where the *induciæ* are thus shortened, all defences competent to the debtor, though they be repelled *hoc loco*, are reserved entire, and must be discussed, before the decree can be carried into execution; see *Fac. Coll.* iii. 48, (*Hamilton against Blackwood, July 17. 1761, Dict.* p. 6864.)*

41. Adjudications led on the act 1672 differ little from the old apprisings, except in form. The essential properties and legal effects of the two diligences are the same, as to their power of transferring the property of the subject affected to the creditor, the right of redemption in the debtor, the right in the minor of keeping the legal reversion open, the obligation the superior lies under to receive the creditor as his vassal, the title he has to a year's rent in name of entry, the effect of a charge against him, the *pari passu* preference of apprisings established by the act 1661, when applied to general adjudications, &c. Hence also a citation in a summons of adjudication, renders the subject to be adjudged litigious, as denunciations did in apprisings, *Harc.* 278, (*Cardross against Colvill, March 1682, Dict.* p. 77.); *vid. supr.* § 16. For though, by the words of the act 1672, superiors and adjudgers are declared to be in the same case after citation in an adjudication, as if an apprising had been led against the lands, and a charge given upon it, the legislature meant no more, than to make citation upon a summons of adjudication equal to denunciation upon letters of apprising; for the supposition, that the legislature intended to give the same force to a citation on a summons of adjudication as was formerly given to a decree of apprising followed by a charge, would not be barely adversary to the nature of the two diligences, but involve that part of the enactment in the grossest absurdities and contradictions, *Mack. Observ. on 1672, C.* 19³⁵⁵.

Adjudications are little different from the old apprisings unless in form.

42. Though apprisings, because they were judicial sales, could not be led on debts whereof the terms of payment were not yet come; yet 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*, *Forbes, July 12.*

Adjudications in security.

* In the case referred to in the text, the Court had, upon a petition, dispensed with the second diet of the summons of adjudication; and the same has been frequently done since. It is also common, in actions of constitution, to make a similar dispensation where the pursuer craves only decree *cognitionis causa*; *Fac. Coll. Nov.* 26. 1794, *Cannan, Dict.* p. 12005.; and in such cases, the Court have also dispensed with other usual formalities of process, (such as, "reading in the minute-book," &c.) See *Ibid.* Feb. 24. 1795, *Ranking of Polquhairn, Dict.* p. 12190.; *Form of Process*, (edit. 1799), p. 183; (*1. Bell Comm.* 622.; *1. Form of Process*, (1815,) p. 286.)

³⁵⁵ On the subject of litigiosity, *vid.* 2. *Bell Comm.* 159.; *supr.* § 16. & 17.; *infr.* § 65.

12. 1711, *Blaw*, (DICT. p. 12908.) *. But such adjudication, as they are grounded solely upon equity, subsist only as securities, and cannot, by any length of time, become irredeemable rights. They seem, however, to be entitled equally with other adjudications to the *pari passu* preference established by the act 1661, as to the principal sum and interest.³⁵⁶

Abbreviate of adjudications.

48. In place of the former allowances already explained, a short abbreviate of every adjudication was directed to be made by *Reg. 1695, art. 24.*, which, after being signed by the Lord Ordinary, who pronounced the adjudication, was to be recorded by the clerk to the bills within sixty days after the date of the decree. In pursuance of this regulation, adjudgers were in use to take up the principal abbreviate after recording it; by which others having interest might happen to suffer, either if the abbreviate were lost, or if partial rights of the same adjudication were conveyed to different disponees; all of whom could not have the same abbreviate in their keeping †. It is therefore ordained by act of sederunt, *Jan. 18. 1715*, That one principal abbreviate, signed by the judge, shall be retained by the clerk as a warrant for any posterior extract; and for the adjudgers' farther security, the judge is to sign two or more abbreviates of the same adjudication, as the creditor shall desire, that he may have one or more duplicates in his own keeping ‡.

Whether adjudications preclude the creditor from using personal diligence.

44. By the more ancient practice, an appriser in possession of the whole lands appraised, could not use personal diligence against his debtor, unless he first renounced the apprising, *Durie, Jan. 22. 1681, L. Cloverhill*, (DICT. p. 218.); because the possession of that subject was accounted sufficient security for the debt: But after passing of the act 1661, by which apprisers, though in possession, might be compelled to quit with part of their preference to posterior apprisers within year and day, neither apprisings, nor general adjudications, which have been introduced in their room, could be considered otherwise than as partial and imperfect securities, which ought not to preclude the creditor from using other diligence³⁵⁷. But the act 1672 justly provides, in the case of special adjudications, where no more than a stated proportion of the debtor's lands is adjudged to the creditor, no part of which is communicable to others, that

* See *Fac. Coll. Nov. 14. 1781, Creditors of Wallace-Dunlop*, DICT. p. 62.

† Where the Lord Ordinary had died before signing the abbreviate, the court, on application of the adjudger, remitted to another Judge for that purpose; *Fac. Coll. Jan. 21. 1764, Sibbold*, DICT. p. 208.; and where, from that or any other accident, the abbreviate has not been recorded within the sixty days, the court will, on a similar application, grant warrant of registration; *Ibid. : Fac. Coll. Nov. 22. 1774, Snellome*, DICT. p. 206. (1. *Bell Com.* 643.)

‡ The abbreviate of the adjudication of the estate of a merchant sequestrated under 39. *Ord. III. c. 74.* is directed by act of sederunt, *Nov. 26. 1793*, to be signed by one of the Principal Clerks of Session, and recorded in common form.

³⁵⁶ As to the adjudication in security, see 1. *Bell Com.* 611. & 612. In a late case, it was observed from the Bench, that "the style of such an adjudication in security is quite different from that of an adjudication for payment. The summons of an adjudication for payment merely sets forth the debt; and concludes that the court shall adjudge the subjects to the pursuer for payment of the debt. But the summons of adjudication in security, besides setting forth the debt, sets forth the circumstances rendering it necessary to adjudge in security, and concludes that the court shall adjudge in security." *D. Queensberry's Executors*, 11th July 1817, *Fac. Coll.* See also *Fac. Coll. McNeil's Creditors*, 7th March 1794, DICT. p. 122.

³⁵⁷ So decided as to general adjudications; *Kilk. 25th July 1740, Mabens*, DICT. p. 219, *Elchies, v. ADJUDICATION*, No. 27.

that the adjudger in possession shall use no farther diligence against his debtor, unless the lands so adjudged shall be evicted from him; for possession upon a special adjudication implies an acceptance by the adjudger of the special subject adjudged, in full satisfaction of his claim, if the debtor shall not redeem it in the terms of the statute.

45. Since apprisings and adjudications of the debtor's estate are truly sales under reversion, towards payment of the creditor's debt, the creditor's whole claim, both principal and interest, must be extinguished, in so far as the subject adjudged goes, by the judicial conveyance of it in his favour. The debtor, therefore, whose lands are sold, cannot be said to continue debtor, either in the capital sum or the arrears of interest due upon the accumulate sum in the adjudication; though indeed his right of reversion is burdened with the payment both of the one and the other: And if he whose lands are adjudged be not debtor in these sums, neither can the adjudger be creditor; nor consequently his executors. Hence the adjudger's executors have no right to these arrears of interest; the right of adjudication descends *cum omni causa*, after his death, to his heir, as a *jus individuum*, the past interest being truly part of the right of property, constituted to the judicial purchaser by his adjudication, *Feb. 3. 1738, Ramsay**³⁵⁸; and his executors are entitled to no more than the rents of the subject adjudged, fallen due before his death, in so far as they were not recovered by himself, in case he was in the possession; which the executors of every proprietor would have a right to, by the known rules of succession in moveables.

Effect of the decree of adjudication upon the nature of the debt.

46.

* This appears to be the case reported by *Kilk. No. 3, voce ADJUDICATION AND APPRISING, Dict. p. 5598.* (Reported also by *Elchies, v. ADJUDICATION, No. 8. & 20.*) It has been confirmed by later decisions; for which, *vide supra, B. 2. t. 2. § 7. not. †*³⁵⁸.

³⁵⁸ See also 2. *Bell Comm. 7.*, where a very valuable opinion, delivered by *Lord Pitfour* on this point, in 1761, is given in these words:—"I am humbly of opinion, that where an adjudication is preferred for the accumulate sum adjudged for, and interest thereon, the sums drawn for the interest as well as the principal must belong to the adjudger's heir, because the annualrents of the accumulate sum are not considered as a debt due by the debtors to the adjudger, which could transmit to his executors, but rather as an eik to the reversion competent to the debtor. The adjudication is, in effect, a sale under reversion; and the original accumulate sum, and the annualrents which are considered as an eik to it, must both descend to the adjudger's heir, who only can have right to the lands to be redeemed. This is a point which was solemnly decided by the Court of Session in the case of the *Creditors of Wylicleugh*, (*Ramsay, supr.*) in the year 1738: and though it was generally otherwise understood before that time, yet, as the decision went upon solid principles, so the practice has since gone on agreeably to it; and the whole sums drawn upon adjudications, whether for accumulate sums or annualrents, have been drawn by the heirs of the adjudger.

"But if the adjudication has been opened, and restricted to a security for principal sum and annualrents, I apprehend the rule would be different; for such adjudication cannot be considered as a sale of the lands for payment of an instant price. The adjudication is found not to have been legally ordered, and therefore ought, in strict law, to be found absolutely void and null; and it is only *ex equitate* and *nobili officio* that it is at all sustained to any effect whatever. When it is sustained as a security, the debt subsists, principal and interest, due by the debtor; and the adjudication is only a *pignus pretorium*, like an heritable bond, of which the principal sum ought to fall to the debtor's heir, and the annualrent to his executors. I take this to be analogous to the principles upon which the Lords proceeded to the above decision 1738; and I remember that it was generally so understood by the Judges at that time."

The same distinction between a proper adjudication and an adjudication in security is taken in *Elchies'* report of the case of *Wylicleugh, supr.*

Book II.

The adjudger, though in possession of the lands, is not vassal during the legal.

46. But though an adjudication be considered, in questions of succession, as a right of property, it does not constitute the adjudger vassal in the lands during the legal³⁵⁹, though he should be infest: For an adjudger, though he be a purchaser, is not a voluntary one; he is brought under the necessity of insisting for that decree which makes him a purchaser, that he may recover his debt; so that with regard to him, the adjudication is to be accounted a step of diligence which he may abandon, if he shall judge any other method more effectual for his payment; *St. B. 3. T. 2. § 30; Durie, March 15. 1628, Lo. Blantyre, (Dict. p. 217.)*. Nay, this obtains, though the adjudger should be both infest and in possession; for as the adjudication is led for the special purpose of the payment of debt, redemption by payment made within the legal, takes off all the effects of the diligence *retro*, as if it had never been used: The reverser therefore continues vassal in the judgment of law, as long as the right of reversion is competent to him; because so long it is in his power to extinguish the adjudication by payment. *Sir James Steuart, voce COMPRISING*, observes, in support of this position, that it was anciently the practice of exchequer, in the case of an appriser of lands holden of the crown, to take him bound at his entry that he should renew his seisin upon the expiration of the legal, as judging that it was only from that period that he became the King's vassal. And agreeably to this doctrine, the casualties of superiority were found to fall during the legal, by the death, not of the appriser, though he should be both infest and in possession, but of the reverser, *July 24, 1739, Cred. of Bonhard, (Dict. p. 16453.)*³⁶⁰. Upon the same medium, sums secured by adjudication were found to be carried by a general clause in a disposition, of all debts real and personal due to the granter, notwithstanding the defence pleaded by the disponent's heir, that an adjudication is a legal sale of the debtor's lands, redeemable upon payment of his debts, which must be extinguished by the judicial conveyance of the lands to the creditor, and so could not be comprehended under a general description of debts. The court considered, that adjudication ought not to have the effect of extinguishing the debtor's obligation to the prejudice of the creditor, who frequently judges that step of diligence necessary for his security, but may nevertheless, if he find it ineffectual, betake himself to any other lawful method of recovering his debt*; and where legal diligence can be used by the adjudger upon the debt, for the payment or security of which adjudication is led, it is impossible to maintain that that debt is extinguished, *Fac. Coll. ii. 257, (Wades, December 11. 1760, Dict. p. 221.)*.

47. The general and special adjudications hitherto explained, were substituted, by the act 1672, in the place of apprisings; but there are two other kinds of adjudication which were received in our old law at the same time with apprisings, *viz.* adjudications on a decree *cognitionis causa*, otherwise called *contra hæreditatem jacentem*, and adjudications in implement. As to the first, the method prescribed

* See *Kilk. Mabens, July 25. 1740, Dict. p. 219, (supr. § 44.)*

³⁵⁹ It would seem not to have this effect until decree of declarator of expiry of the legal; or until the adjudger's right has become indefeasible by possession on charter and sasine for the years of prescription. *Vid. supr. § 22. in not.*

³⁶⁰ *Vid. supr. t. 5. § 7.*

Adjudication
contra hæreditatem jacentem.

prescribed by 1540, C. 106., to creditors, for attaching the heritage of their deceased debtors, by charging the apparent heir to enter to his ancestor, first in general, and then in special, and upon his failure to apprise the lands, has been explained above, § 11. *et seq.* But where the debtor's apparent heir, after being charged in general, renounces all benefit which might accrue to him by the succession, he cannot with propriety be charged to enter heir in special to an estate which he has already renounced; nor did the act 1540 make any provision how the right of the lands belonging to the deceased debtor might in that case be carried to the creditor. This defect was supplied by the following expedient, which, being introduced by necessity, was approved of by our judges without a statute. Though the heir renouncing could not be subjected to the payment of his ancestor's debts, the creditor was allowed to summon him for form's sake, in a suit for proving the debt due by the deceased, in consequence of which a decree was recovered, not against the defender, who was absolved from the suit in respect of his renunciation, but against the *hæreditas jacens* of the deceased, which was thereby subjected to the creditor's diligence. This decree got the name of *cognitionis causa*, because it was intended for the single purpose of declaring or cognoscing the extent of the debt due by the deceased, that adjudication might proceed upon it against the lands. By the old practice, the creditor, where the debt was liquid, protested for adjudication in the process of cognition; and a decree of adjudication was granted summarily in consequence of the protestation, *St. B. 3. T. 2. § 46.*; but now adjudication cannot pass without a previous summons for that purpose. The creditor however sometimes inserts a conclusion of adjudication in his summons of constitution following upon the general charge, in case the heir shall in that process renounce the succession; and a decree of adjudication proceeding on that alternative in the summons is effectual to the creditor. This diligence, grounded on the renunciation of the heir, was styled, not an apprising, which was an appellation proper to the decrees pronounced by messengers on the appretiation of an inquest, but an *adjudication*, because it was a sentence of the court of session or other judge-ordinary, adjudging the *hæreditas jacens* of the debtor deceased, to the creditor pursuer.

48. Though no adjudication can, in the common case, carry any rents due out of the subject adjudged previously to the date of the decree, for the reason assigned *supr.* § 8.; yet in the special case of adjudications *contra hæreditatem jacentem*, such rents may be adjudged. Put the case, that a debtor dies to whom some past rents were due by the tenants, and that after his death the tenants have run into a farther arrear of rent; it must be admitted, that the rents which were fallen due before the debtor's death cannot be carried by adjudication, because they were separated from his heritable estate before his death, and so descended to his executors as a moveable subject which was *in bonis defuncti*; but the rents incurred after his death cannot be said to have belonged to him, since they did not even exist at his death, and are truly a rent grown out of his heritable estate since his death, which for that reason would have accrued to his heir if he had entered. As, therefore, by the heir's renunciation of the debtor's succession, the adjudger comes in the heir's place, these rents must, *necessitate juris*, be carried

What is carried by adjudication *contra hæreditatem jacentem*.

ried by the creditor's adjudication against the *hæreditas jacens*, though fallen due previously to the date of it, there being no other method known in law by which they may be affected by diligence, *Cr. Lib. 3. Dieg. 2. § 23*. This rule does not, in the opinion of some lawyers, extend to an adjudication led upon a special charge against the heir; because that kind of adjudication proceeds on a *fictio juris*, holding the heir as entered, and therefore ought to carry none of the rents fallen due before the decree, more than it could have done if it had proceeded on the heir's actual entry, *Bankt. B. 3. T. 2. § 43*. Yet the contrary was decided, *Feb. 13. 1740, L. Kilbucko*³⁶¹, which seems to have proceeded on this ground, That there was no other way for the creditor to come at these rents, if the apparent heir abstained from the possession, which has been thought reason enough for establishing this rule in adjudications *contra hæreditatem jacentem**. On the same ground of law, heritable sums which have become moveable since the debtor's death, perhaps by an order of redemption, are carried by an adjudication against the *hæreditas jacens*, because these subjects can be reached by no other form of law, *St. B. 3. T. 2. § 48*.

Redemption of
adjudications
contra hæredita-
tem jacentem.

49. Adjudications *contra hæreditatem jacentem* are, by 1621, C. 7, declared redeemable by any posterior co-adjudging creditor, either of the deceased debtor, or of the heir renouncing, on payment of the debt due to the first adjudger, within the term of seven years from the date of the adjudication, which was then the legal also of apprisings. This right of redemption was granted to co-adjudgers, from a consideration of the loss sustained by creditors, who, by the first adjudger's diligence against the *hæreditas jacens*, were excluded from the whole of the estate belonging to their deceased debtor, though they were creditors equally onerous with him. And it was from the same equitable consideration, that the act 1661, which establishes the *pari passu* preference of apprisings within year and day, did expressly extend that preference to adjudications for debt; by which nothing can be meant but adjudications *contra hæreditatem jacentem*; for at that time no other adjudications were known in our law, except adjudications in implement; and these are led, not for the payment of debt, but for the performance of a fact.

* The court likewise found, *July 29. 1760, Anderson and others, claimants on Strowan*, (not reported), that an adjudication on a special charge carried the interest of an heritable bond from the death of the predecessor last infest. At the same time it will be observed, that these decisions were prior to the judgment of the House of Peers, in the case of *Hamilton of Rosehall, April 8. 1767, Dict. p. 5257*, finding unapplied rents to belong to the apparent heir³⁶². *Vide infra, B. iii. t. 8. § 58*.

³⁶¹ Reported by *Kilk. v. ADJUDICATION AND APPRISING, No. 7.*, (inserted in the supplemental vol. to *Morison's Dict.*) and by *Elchies, v. ADJUDICATION, No. 24*.

³⁶² This case does not touch the doctrine laid down in the text. It was a competition between the heir and executor of one, who, instead of renouncing the ancestor's succession, (the only case wherein adjudication on a decree *cognitionis causa* can occur), had actually entered into possession, but had died in apparençy. The Court of Session held, that in such circumstances, the arrears of rent belonged to the heir; but the House of Lords, on a sounder view, reversed this judgment and preferred the executor. This result is nowise incompatible with the position, that where the apparent heir does not enter to possession, but on the contrary repudiates and "renounces all benefit which might accrue to him by the succession," adjudication will carry to the ancestor's creditor all arrears due at or since the death of his debtor. The only situation where the case of *Hamilton* can interfere, is where a competition may happen to arise between the creditors of the ancestor adjudging the *hæreditas jacens* and the creditors of a deceased apparent heir, who has been in possession, attaching the arrears as part of their debtor's moveable estate; and it would here seem that the creditors of the heir would be preferable. *Vid. 2. Bell Comm. 5. & 15.; Ibid. 1. 64.*

fact. It was made a doubt before the act 1621, whether the heir himself who had renounced, might not, in special cases, be restored against his renunciation, and consequently redeem adjudications deduced against the estate of the ancestor. Craig inclines to think, *Lib. 3. Dieg. 2. § 24.*, that even a major, though he had renounced, might have redeemed within the legal, if no person was hurt by his being restored; but this question was soon after resolved in the negative, by the aforesaid act 1621, in which it is taken for granted that minors may be restored; but no such right is either expressed or implied in the act as competent to majors; and subsequent practice hath so explained it, *Stair, Jan. 27. 1680, Macaulay, (Dict. p. 45. 363.)* Yet custom hath established an indirect method, by which majors also may redeem after renunciation, viz. by granting a trust-bond for a sum amounting to the full value of the ancestor's estate, upon which the trustee charges the heir who grants it to enter in special, and afterwards adjudges in common form. The conveyance of this adjudication in favour of the heir, entitles him not only to redeem prior adjudications, but also to set them aside upon nullities, or to prove that they have been satisfied by intrusions. But the using such conveyance subjects the heir to a passive title; *vid. supr. § 34.*

50. Adjudications in implement are deduced against those who have granted dispositions, without procuratory of resignation or precept of seisin, and refuse to divest themselves; to the end that the subjects disposed may by that diligence be effectually vested in the grantees: and they are called *in implement*, because their purpose is, to implement or give full force to the granter's imperfect deeds. The disponee could not, by our more ancient practice, adjudge in implement, till he had used diligence against the granter by decree, and registered horning; because such adjudication, being an extraordinary remedy, introduced by necessity without the authority of a statute, was not admitted till all other means had proved ineffectual, *Newbyth, Feb. 8. 1666, Cruickshanks, (Dict. p. 52.)*; but by our later customs it may be led without any such previous steps. This kind of adjudication may be directed either against the granter himself or his heir. Where it was pointed against the heir, there was formerly no necessity to charge him to enter, *St. B. 3. T. 2. § 53.*; because the disponee does not, in such case, insist against the heir, to make him personally liable in any sum, but barely to make effectual a special deed granted by the ancestor; yet by the present practice, the granter's heir must be previously charged to enter. If the heir shall, in the action brought against him upon that charge, renounce his claim to the debtor's succession, the pursuer is to prosecute the same method which is prescribed in an adjudication for debt.

Adjudication in implement.

51. In an adjudication in implement, there is no place for a legal reversion, or a right to redeem within a certain time; for it is led, not for the payment of a debt, but to give full effect to an imperfect grant made voluntarily in favour of the adjudger. It therefore carries from the granter the subject disposed absolutely and irredeemably, in the same manner as if the disposition had been voluntarily perfected by the granter himself; and so leaves no room for any reversion, unless a reversion had been stipulated in the deed,

It admits of no redemption nor *pari passu* preference.

³⁶³ 1. *Bell Comm.* 609. Although the heir who renounces is himself precluded from redeeming, the next heir after him may take up the succession, and redeem it any time before decree of declarator of expiry of the legal; *Stewart, 7th Dec. 1809, Fac. Coll.; Bankton, B. §. t. 2. § 81.* See also *Stair and Newbyth, 17th Jan. 1666, Crawford, Dict. p. 6871.*

for the fulfilling of which the adjudication is led ; in which case the conventional reversion must subsist, as being an original condition of the right. On the same principle, the *retractus feudalis*, or option competent to the superior to redeem, upon payment of the debt, to the value of the lands, can have no place in these adjudications. This is also peculiar to them, that no adjudication of any other kind can be preferred *pari passu* with them, nor they with others, *St. ibid.* ; for though the act 1661, relative to the *pari passu* preference of apprisings, is, by a special clause, extended to adjudications for debt, or, as has been already explained, to adjudications upon decrees *cognitionis causa* ; yet adjudications in implement cannot fall under that appellation ; and indeed this last sort, being led for one special purpose, and affecting one special subject, appears not to have come within the view of the legislature. It has, however, been found, that in a competition between two adjudgers in implement, where both the parties were *in pari casu*, the last in date was preferred, because he had given the first charge to the superior, *Dabr. 49, (Sinclair against Sinclair, June 21. 1704, Dict. p. 56.)*

52. This account of the two adjudications after the old form, may be concluded with some observations common to both. The act 1469, C. 37., which obliged superiors to enter apprisers, could not, by the just rules of interpretation, be applied against adjudgers after the old form ; because the statute itself confines the enactment to apprisings, and so ought not to include adjudications, which are a distinct sort of diligence : and, besides, it may be doubted, whether adjudications in implement were known in our law so early as the year 1469. There appears indeed the same reason in the nature of things, why superiors should be entitled to a year's rent for the entry of adjudgers against the *hæreditas jacens*, as of apprisers, because both these are diligences for the payment or security of debt. Nothing, however, is said of the year's rent due to the superior by an adjudger *contra hæreditatem jacentem*, in the act 1621, C. 7., which particularly relates to that subject, though the statute immediately preceding, which concerns apprisings, plainly supposes him entitled to it upon the entry of an appriser : As therefore there was reason to think the legislature had purposely avoided to mention adjudgers, the court would not assume a power of extending the superior's right against them, *St. B. 3. T. 2. § 49.* But now, by 1669, C. 18., it is declared, without insinuating the smallest distinction between adjudgers in implement, and *contra hæreditatem jacentem*, That all adjudications shall for the future be in a like condition with apprisings, as to the superior ; and consequently, superiors seem, since that act, to be under an obligation to enter both, and to be entitled to the composition of a year's rent from both upon their entry ³⁶³. It may be doubted, however, whether the superior would, at this day, be compelled to enter an adjudger in implement, who could not instruct his author's right, though he would, in such case, be obliged to enter an adjudger for debt. The ground of the superior's obligation in the last case, is by no means applicable to the first. An adjudger in implement is presumed to have received from the granter of the deed, who is a voluntary disposer, the title-deeds of the subject disposed along with the grant ; whereas an adjudger for a liquid sum, as he leads his diligence without

Some particulars common to these two last species of adjudications.

³⁶³ Where the adjudication *contra hæreditatem jacentem* is led before the Sheriff, without an abbreviate, it would seem that an entry cannot be forced from the superior ; *Kilkerran, King, 14th Dec. 1742, Dict. p. 5744.* Reported also by Clerk *Home, Dict. p. 5743, Kames, Rem. Decis. Dict. p. 8135,* and *Elchies, v. ADJUDICATION, No. 85.* See also 1. *Bell Comm. 627. ; A. S. 2d Dec. 1742 ; infr. § 54.*

without being possessed of his debtor's writings, may lose his debt, in a competition with any adjudger whom the superior shall think fit to enter before him, if his entry were to be put off till he should be able to recover those title-deeds.

53. Though now by the act 1672, substituting adjudications in the room of apprisings, the session is declared the only court competent to adjudications, exclusive of all inferior judges; yet since no adjudications are there meant, but that kind which came in the place of apprisings, which were pronounced by messengers, so sheriffs, as they had by the former law, have at this day the cognisance of adjudications *contra hæreditatem jacentem*, *Forbes, Jan. 4. 1709, Ker, (Dict. p. 46.)*. Whether the cognisance of adjudications in implement is, by the present law, proper to the court of session, seems to depend upon the practice prior to the act 1672. If before that statute such adjudications might be pursued before inferior courts, they may be so still, since they are not comprehended under the act. It is probable they might, as they import no higher or more eminent jurisdiction, than adjudications *contra hæreditatem jacentem*, which have been subject to the cognisance of sheriffs; but this is a fact which hath not been fixed either by our writers or decisions.

In what courts it is competent to pursue them.

54. The abbreviates of adjudications, which, by *Regul. 1695, art. 24.*, are enjoined to be signed by the Lord Ordinary, are there said to be substituted in the place of the former allowances. Of consequence, that regulation was limited to such adjudications as had formerly been in use to be allowed, to the exclusion of adjudications against the *hæreditas jacens*, upon which allowances had in no period of time proceeded. But that injunction is now, by *Addit. regul. 1696, art. 3.*, expressly extended to adjudications *contra hæreditatem jacentem*. Since that time it has been the general practice, where such adjudications are pronounced by the sheriff, to get the abbreviates of them signed by him; and, where they have no abbreviates, the court of session refuse to grant letters of horning upon them against superiors, *Act of Sederunt, Dec. 2. 1742*; see *Kames, Rem. Dec. 34, (King petitioner, Dec. 14. 1742, Dict. p. 8135)*³⁶⁴. Adjudications in implement do not however fall under this article of regulations, which makes not the least mention of them; nor does it appear that that kind of adjudication was ever in use to be allowed*.

Adjudications *contra hæreditatem jacentem*, must have abbreviates.

55. After having discussed the subject of apprisings and adjudications, which are judicial sales redeemable by the debtor, it falls to be explained, how lands which have been affected by the diligence of creditors, may be brought to an absolute and irredeemable sale for their payment.——But it may be proper to premise a short account of the sequestration of land-estates, both because it is a diligence competent to real creditors, and as it commonly prepares the way for the actions of ranking and sale. Sequestration of lands (under which may be comprehended every heritable subject) is a judicial act of the court of session³⁶⁵, whereby the management

Sequestration of land estates.

* But it is necessary in this case, also, that there be an abbreviate duly recorded; *Kilk. No. 10. voce ADJUDICATION AND APPRISING, Guthrie, Feb. 20. 1741, Dict. p. 204.*

³⁶⁴ *Vid. supr. § 52. not. 363.*

³⁶⁵ In a late case, "it seemed to be the opinion of a majority of their Lordships, that a Lord Ordinary, in time of session, had not powers to sequester heritable property," but that this sequestration could competently be awarded, under such circumstances, only on petition to the Inner-House; *Fac. Coll. Macalpine, 10th July 1807, Dict. v. SEQUESTRATION, App. No. 1.*

Book II.

Sequestration not granted summarily, and is competent only when the estate is before the court upon the diligence of creditors.

Factors on sequestrated estates.

agement of the subject sequestrated is taken from the former possessor, and intrusted to the care of a factor or steward named by the court; who gives security for his administration, and is, by his commission, accountable for the rents to all having interest. This diligence is competent, either where it is doubtful in whom the property of the lands is vested, if sequestration be demanded before either of the competitors has attained possession³⁶⁵, or where the estate is charged with debts equal, or nearly equal, to its value.

56. Sequestration of lands, as it is a rigorous diligence, is not to be granted summarily, without descending into an inquiry concerning the foundation and extent of the claims affecting the subject. If the measure appear not to be either necessary, or evidently profitable to the creditors, it ought to be refused: And upon this ground, sequestration appears not to have been admitted by the Roman law, where the debtor offered reasonable security to the creditors for their payment, *L. 7. § ult. Qui satisd. cog. ; L. ult. C. De ord. cogn.* Neither ought sequestration to be granted of subjects that are not brought before the court by the diligence of creditors; for it is the dependence in court of the competition among the several creditors who have affected the same disputed subject by their diligences, which alone founds a jurisdiction in the judges to take that subject into their possession, till the right of the competitors be determined*. Hence, neither the debtor's consent to sequester, nor even a voluntary grant executed by him in trust for his creditors, can support a sequestration, so as to stay the diligence of such creditors as are unwilling to accede to the trust-deed. Nay, arrestment of the whole rents from year to year hath no further effect than to procure a sequestration of the special rents attached by that diligence. It is only when, by a total diligence, the right which is in the debtor to the rent of the lands in all time coming, or at least during his life, if his right be a bare liferent, is brought before the court, that the estate itself can be sequestrated, *Feb. 13. 1745, Creditors of Ochertyre*, (Dict. p. 14345.): And as a consequence of this, no creditor whose debt is not made real upon the estate, has a title to demand sequestration.

57. The court of session, who decree the sequestration, have the naming of the factor; in which they are commonly directed by the recommendation of the preferable creditors, as of the persons who have

* See *Fac. Coll. Dec. 1769, Earl of Hyndford, &c.* Dict. p. 14347; *Ibid. July 24. 1781, Blackwood*, Dict. p. 14349. See, however, *Ibid. June 15. 1782, Campbell*, Dict. p. 14350³⁶⁶.

³⁶⁵ Sequestration was awarded where one of the competitors had attained possession, the Court not considering that possession "as peaceable;" *Fac. Coll. Competition Innes, &c. 23d June 1807, Dict. v. TAILZIE*, App. No. 13. In the sequel of the same case, however, the Court held, "that the sequestration was awarded, and the judicial factor appointed, only to take charge of the estate *pendente lite*, and to possess so far, "as none of the parties had legally obtained possession previously to its date; and "that therefore the judicial factor was not entitled to recover, for behoof of the *heir*, "such rents of the estate, whereof the succession was *sub judice*, as had been levied by "the *executor* before the date of the sequestration, or received by anticipation by the "heir in possession before his death;" *Swinton, 20th June 1809, Fac. Coll.*

³⁶⁶ The cases of *Blackwood* and *Campbell* were cases where process of ranking and sale had been brought at the instance of an apparent heir; and in the first, sequestration was refused on the pursuer's application, while in the other it was granted. *Mr Bell* holds the latter the correct decision, and observes, that though "it does not follow necessarily that sequestration may be applied for on the dependence of a sale by "an apparent heir, which often proceeds without any bankruptcy;" yet "where "there is insolvency, it is now held that sequestration is competent in this case, as "well as in a sale by creditors;" 2. *Comm.* 307.

have the first and highest interest in the subject, though the posterior creditors may appear to have in many cases a more equitable interest in the choice of a factor than the preferable, since these seldom run any danger of losing their debt, let the factor's management be what it will; whereas the preserving of the fund entire for the payment of the posterior creditors depends in a great measure on his probity and diligence. Writers were, by act of sederunt, Nov. 23. 1710, declared incapable of the office; and though a nomination is seldom excepted to on that score, the objection when it is offered is sustained by the court, 1757, *Creditors of Maclauchlan*, (not reported)³⁶⁷. The apparent heir of the debtor may also be considered as an improper factor, both on account of his necessitous circumstances, and of the reason there is to suspect design or contrivance to defraud the creditors: But where no opposition is made, there is nothing to hinder him from being named. A factor appointed by the session, though the proprietor had not been infeft in the lands, has the power of removing tenants, *Fac. Coll.* ii. 41, (*Thomson against Elderson*, July 9. 1757, Dict. p. 4070), contrary to the generally received opinion, stated *supr.* T. 6. § 51.

58. The rules by which a judicial factor on a sequestrated estate ought to conduct himself, are contained in several acts of sederunt³⁶⁸. By act of sederunt, Nov. 22. 1711, § 6, 7, 8., factors must, within six months after extracting their factory, make up a rent-roll, or rental, of the estate, and a list of the arrears due by tenants, to be put into the hands of the clerk of the process, as a charge against themselves, and a note of such alterations in the rental as may be made afterwards; and must also deliver to the clerk, annually, a scheme of their accounts, charge and discharge, under heavy penalties. They are, by the nature of their office, bound to the same degree of diligence that a prudent man employs in his own affairs; the obligation to which the Roman law expressed by *præstatio culpæ levis*; and by act of sederunt, July 31. 1690, they are accountable for the interest of the rents which they either have, or by proper diligence might have recovered, from a year after their falling due³⁶⁹. As it is much in the power of judicial factors to take advantage of the necessities of creditors, by purchasing the debts at an undervalue, all such purchases, made either by the factor himself, or for his behoof, are declared equivalent to an extinction or discharge of the debt, by act of sederunt, Dec. 25. 1708³⁷⁰. No factor can warrantably make payment to any creditor without an order of the court of session; for he is, by the tenor of his commission,

Rules by which these factors must conduct themselves.

³⁶⁷ This disqualification is not in observance, 2. *Bell Comm.* 307.; "and no objection to the appointment of a writer would now be sustained;" note by Mr More, in his edition of *Erskine's Principles*, h. t. § 23.

³⁶⁸ See this subject fully treated, 2. *Bell Comm.* 306. et seq.

³⁶⁹ They will be liable for full interest, or bank interest, according to circumstances. Mr Bell observes, that "the factor ought to have the money in bank, as the money of the principal, or to pay interest for it at the full rate;" 1. *Comm.* 560. See the cases of *Lord Elphinston*, 15th May 1790, *Fac. Coll.* Dict. p. 4067; *Mackenzie*, 19th Dec. 1818, *Fac. Coll.*; where bank interest only was allowed.

³⁷⁰ On the same principle, the factor cannot purchase any part of the estate under sequestration, where it is brought to sale; 2. *Bell Comm.* 309. And see *Ibid.* 312.; *Fac. Coll.* *York-Buildings Company*, 8th March 1793, Dict. p. 13367, as reversed on appeal, 4. *Dow*, 380.; *Mackellar*, 8th March 1817, *Fac. Coll.*; *supr.* t. 3. § 16. in not.; *Brown*, 191. et seq.

commission, directed to pay the rents to those who shall be found to have the best right to them. And of that, the court, who are his constituents, are the only proper judges. Judicial factors are entitled to a salary; which is generally stated at the rate of five *per cent.* of their intromissions; but is seldom ascertained till their office expire, or their accounts be settled, that the court may modify a greater salary, or a smaller, or none, in proportion to the factor's integrity and diligence, *Forbes, June 22. 1711, Heriot, (Dict. p. 4061.)*; see also *Act of sederunt, Nov. 23. 1711.* Many instances occur, where the court of session, without sequestration, name a factor to preserve the rents from perishing; *ex. gr.* where an heir is deliberating whether to enter, where a minor is without tutors, where a succession opens to one who resides abroad, &c. *St. B. 4. Tit. 50. § 28.*; in all which cases, the person named to the office, who is sometimes called factor *loco tutoris* or *curator bonis*, is subjected to the rules prescribed by act of sederunt, *Feb. 13. 1730*³⁷¹.

Sale of bankrupt estates on acts 1681 and 1690.

59. Though adjudications were judicial sales of the debtor's estate, carried on *invito debitore*; yet in a competition of adjudgers, either among themselves, or with other real creditors, no method was known in our law by which the estate might be so brought to sale, that the price might be divided according to the interests of the several competing creditors, before the act 1681, *C. 17.* That statute authorises the court of session, upon an action of sale brought by any real creditor upon an estate, the proprietor whereof is bankrupt, to cognosce and try its true value, and to appoint commissioners for selling it to the highest bidder. *Bankrupt* is a word of French original, denoting a banker who stops payment: And, in our law-language, that term is sometimes applied to a debtor whose funds are not sufficient for his debts; and sometimes not to the debtor, but to his estate. The debtor's previous consent to the sale was required by this statute, where the right of reversion competent to the bankrupt was yet current: But that consent was seldom obtained; and the commissioners appointed by the court were seldom found willing to undertake an office, troublesome in itself, and ungrateful to the debtor. To remove these obstructions, decrees of sale of bankrupt estates are, by 1690, *C. 20.* directed to be pronounced by the court of session itself, who are empowered to proceed in all cases where the debtor appears to be bankrupt, whether the legal of the creditors' adjudications be expired or not.

Requisites by these statutes.

60. No action of the sale of lands can be carried on, but either by a creditor of the proprietor, or by his apparent heir. As to the first, the pursuer of the sale must be a real creditor upon the debtor's estate, 1681, *C. 17*³⁷². The summons of sale must include the whole

³⁷¹ *Vid. supr. B. 1. t. 7. § 10, 11. 13., &c.*

³⁷² "If the pursuer of a process of sale and ranking, shall, during the dependence, die, or forbear to insist, or if his title and interest shall happen to be satisfied and extinguished, the factor, if any be, or otherways any other reall creditor may, upon speciall warrand from the Lords, take up the process where it left, and carry it on to its finall issue, for the common behoof of the whole creditors;" *A. S. 23d Nov. 1711, § 4.* This privilege, instead of being confined to "any other reall creditor," is now "competent to any creditor who is in a situation to adjudge;" *54. Geo. III. c. 137. § 10.* The same course has been recognised, where a nullity in the original purchaser's title has been discovered; *Stewart's Creditors, 29th Feb. 1812, Fac. Coll. ; 2. Bell Comm. 303.* See also *Blackwood, 1st July 1748, Elchies, v. RANKING AND SALE, No. 14. ; Sale of Arkland, 6th Jan. 1750, Ibid. No. 17. ; Kilk. and Falk. Dict. p. 2240 & 19323.*

whole lands belonging to the debtor; and if any part of his estate be omitted, even though he possesses it only as apparent heir, the sale cannot proceed, *Falc.* ii. 29, (*Monro, Jan. 6. 1749, Dict.* p. 13362.)*. By our former practice, it was necessary to enumerate specially the whole lands belonging to the bankrupt; but as this was attended with many inconveniencies, it is declared sufficient, by act of sederunt, *Jan. 17. 1756, § 12.*, after enumerating all the lands which have come to the knowledge of the pursuer, to add a clause, mentioning in general all other lands and heritable estate belonging to the bankrupt, or to which he may succeed as heir of any of his predecessors †. The reason of including the debtor's whole lands in the summons, is because the debtor's bankruptcy and notorious insolvency is expressly required in all judicial sales, by 1681, *C. 17.*; 1690, *C. 20.*; *Act of Sederunt, Feb. 24. 1692.*; and unless the whole of the debtor's heritage be brought before the court, the debtor's bankruptcy cannot be proved. Lord Stair affirms, *B. 4. Tit. 51. § 6.*, that by the words *notorious insolvency* in the statute, it is not understood that the debts due by the proprietor must exceed the value of his estate, but merely that it must be so heavily charged with debt, that prudent persons will not purchase from him: And it is believed, that notwithstanding the strong expression in the statute, the court, for the sake of expediency, would allow a sale to proceed, where the interest of the debts exceeds the rents of the estate, though the debts might perhaps fall short of the total value ‡.

61. Apparent heirs may, by 1695, *C. 24.*, bring the estate of their ancestor to a sale, whether it be bankrupt or not: For though creditors cannot bring their debtor's estate to a sale without the debtor's consent, unless it be bankrupt; yet where the debtor's apparent heir is himself the pursuer of the sale, no other can have the colour of any interest to except to it. This privilege is however to be understood only of a judicial sale; for the statute was not meant to authorise heirs, before they had made up valid titles to their ancestor's estate, to dispose of it, as if they were proprietors, by a voluntary sale, without the authority of the proper judge, perhaps with a fraudulent intention to disappoint creditors. This privilege in the statute, of a judicial sale, is competent, even to such apparent heirs as have incurred the passive title of behaviour as heir, *Feb. 28. 1733, Blair, (Dict. p. 5247.)*³⁷³. Actions of this kind

Sale at the instance of apparent heirs upon act 1695.

* See *Fac. Coll. Dec. 25. 1784, Macpherson, Dict.* p. 13363.

† A sale may proceed against the estates of two different debtors on one summons, if bound by one and the same deed; *Kilk. Arbuthnot, Jan. 10. 1747, Dict.* p. 13322; *Fac. Coll. Watson, March 5. 1761, Dict.* p. 11997.

‡ By *Stat. 93. Geo. III. c. 74. § 8.* (and *54. Geo. III. c. 137. § 7.*) a judicial sale, at the instance of creditors, may in all cases proceed where the interest of the debts and the other annual burdens exceed the yearly income of the subjects under sale, or when a sequestration has taken place under that or any former statute, without other proof of bankruptcy or insolvency.

³⁷³ A deed of entail not made real by infesment, has been held not to bar an heir-apparent of line, who is also heir of entail, from bringing a judicial sale for the debts of the entailor; *Mitchell, &c. 4th Feb. 1809, Fac. Coll.*; *2. Bell Comm. 303.*; *Sandford, 78. & 261.*

In a sale at the instance of a creditor, any other creditor, on the death, &c. of the original pursuer, may obtain leave to proceed, *supr. not.*³⁷³. "In a sale by an apparent heir, the Court refused to authorise creditors to interfere;" (*Kilk. Hamilton's Creditors, 29th June 1749, Dict.* p. 13323.) "But where the pursuer, under the act 1695, died after the sale of the lands, the Court held that the next apparent heir and the purchaser (who also was a creditor) were entitled to carry it on;" (*Elchies, voce*

Book II.

kind ought to be pursued at the heir's own expence, where a surplus price arises to him from the sale, after the payment of all the creditors; for in such case he is considered as acting for his own behoof, that he may make such surplus price effectual to himself. But if the estate shall appear to be bankrupt, the expence ought to be paid out of the price, which is the fund of the creditors' payment; since, in that event, the creditors alone can be gainers by the sale; see *Fac. Coll.* iii. 31. & 46. (*Macphail, March 6. 1761, Dict. p. 4029.*; *Macphail, June 30. 1761, Dict. p. 5298.*)*. Though the reasons are as strong for a previous ranking, in sales brought by apparent heirs, as in those that are carried on at the suit of creditors upon a bankrupt estate; yet seeing the 26th article of the regulations 1695, requiring an antecedent ranking in the last case, for which see next section, makes no mention of the first, it would seem that the purchaser in a sale, pursued by an apparent heir, where there has been no ranking of creditors prior to the sale, must retain the price in his hands, till a decree of ranking be extracted. And if there be an excrescence after payment of the debts, warrant would, it is thought, be granted to pay it to the apparent heir, even though he should decline to enter; for his entry might expose him to a passive title, to which there is no ground to suppose that the statute intended to subject him³⁷⁴.

Nature and form of the action of sale on 1690.

Ranking of creditors and their preference settled previous to the sale.

62. In actions of sale of bankrupt estates, brought at the suit of a creditor upon the act 1690, the debtor, or, if he be dead, his apparent heir, and all the other real creditors in possession, must be made proper parties to the suit; but it is sufficient if the personal creditors be called by an edictal citation, *Act of Sederunt, Nov. 23. 1711, § 1* †. The summons of sale contains also a conclusion of ranking of the bankrupt's creditors; and the same term or day which is assigned to the pursuer in this sale, for proving the debtor's bankruptcy, with the yearly rent and value of the lands, is also assigned to the creditors, for exhibiting or producing in court their grounds of debt and diligences, in order to a ranking. To force the creditors to this the more effectually, a separate action of reduction-

* See also *Clerk Home, Drummond, Nov. 13. 1741, Dict. p. 13365.* (Reported also by *Kilk. Dict. p. 4029.*)

† The edictal citations here alluded to, were accompanied by many formalities, equally troublesome and useless, and were directed to be inserted in a separate record at Edinburgh. But by act of sederunt, *Nov. 13. 1793*, (passed in conformity to powers expressly delegated to the Court by *33. Geo. III. c. 74. § 7.*), it is declared sufficient to execute such citations at the market-cross of Edinburgh, and pier and shore of Leith, without also executing the same at the church-door of any parish, or recording the executions in any register.

RANKING AND SALE, No. 22.); 2. *Bell Comm.* 303. "The Court all agreed, that one or other of them had right to carry it on, but were not agreed which of them; and therefore found only, in general, that the petitioners had right to carry it on;" *Elchies, ut supr.*

³⁷⁴ Judgment was pronounced on this principle, *Fac. Coll. Middlemore, 2d Feb. 1803, Dict. v. HEIR-APPARENT, App. No. 2.*; the Court "being of opinion, that the decree of sale was to be held as an adjudication for the general behoof, and a sufficient title for the heir to take up the reversion." See to the same effect, *Falc. Hamilton, 14th Dec. 1750, Dict. p. 5297.*; *Elchies, v. RANKING AND SALE, No. 20.*; 2. *Bell Comm.* 325. It is different, where the process of sale, instead of being brought under the act 1695, at the instance of the apparent heir, is brought under stat. 1681 and 1690, at the instance of a real creditor. In the latter case, should a reversion accrue, "the heir must make up his title as if to the real right of the lands;" *Bell, ut supr.*; *Clerk Home, Stirling, 21st July 1742, Dict. p. 14436, Elchies, v. RANKING AND SALE, No. 7. & 8.*

reduction-improbation was usually carried on by the pursuer against them, alongst with the process of ranking and sale, calling for the production of their several rights, under certification that they should be declared false, if not produced, at or before the term assigned: But the necessity of this separate action is now superseded by a late act of sederunt, *Jan. 17. 1756*, declaring, That the first and second terms assigned in the action of ranking and sale to the creditors, shall have the same force as if they had been assigned in an action of reduction-improbation; and that if they be duly published in the *Edinburgh Evening Courant* *, a decree of certification, proceeding upon that publication, against the writings called for and not produced, after the terms are elapsed, shall have the same effect in favour of the whole creditors, as if each of them had pursued a reduction-improbation, and had obtained decree of certification in that action†. After finishing the ranking, with the proof of the yearly rent of the lands, and of the other facts for which a proof was granted, the court fix the price at which the lands are to be set up at the sale, either entire or in different parcels or lots, as the creditor shall desire; they appoint the day of sale; and grant warrant for issuing letters of intimation under the signet, specially describing the lands to be sold, and expressing the price they are to be put up at, and the time and place of sale. These letters must be published, according to the directions of the said act 1681, at the market-cross of the head burgh of the jurisdiction where the lands lie, and at the parish-church, and at six other adjacent parish-churches, after dismissing the congregation: And the real creditors who are in possession are to be thereupon specially cited, upon twenty-one days; and all others having interest, at the market-cross of the head borough of the jurisdiction, and at the market-cross of Edinburgh, and pier and shore of Leith, on sixty days; at all which places, copies of the letters of intimation are to be affixed.

* By a subsequent act of sederunt, *Aug. 9. 1783*, this notice was directed to be likewise given in the *Caledonian Mercury*; and it is now, by act of sederunt, *July 11. 1794*, § 1., appointed to be made exclusively in the *Edinburgh Gazette*, a publication established by the above-cited statute 33. *Geo. III. c. 74. § 14.*; and by act of sederunt, *June 29. 1793*.

† The decree of certification does not prevent a creditor from afterwards leading an adjudication against the bankrupt estate, (on grounds of debt produced before the decree,) as it strikes only against grounds of debt and diligences existing at its date, and not produced in the ranking; *Fac. Coll. Nov. 22. 1785, Grierson, Dict. p. 274.*; *Ibid. May 19. 1796, Dun, Dict. p. 273*, in which last case a prior decision, *Ibid. Jan. 25. 1783, Craig, Dict. p. 272*, was held to be erroneous. See *Ibid. Jan. 29. 1796, Cheap, &c. Dict. p. 5301* ³⁷⁵.

³⁷⁵ The law of judicial sales, whether at the instance of creditors or of the apparent heir, is now placed on a different, and much improved footing; these separate adjudications during the dependence of the action being wholly prohibited. By stat. 54. *Geo. III. c. 137. § 10.*, it is "enacted, that when the estate of a debtor is brought in-
" to the Court of Session by process of judicial sale and ranking, the decree of sale
" to be pronounced by the Court shall be held as a general decree of adjudication in
" favour of every creditor, who shall afterwards be included in the decree of division;
" and the effect of such general decree shall be the same in all competitions, or ques-
" tions of ranking and preference, as if it had been pronounced and extracted of the
" date of the first calling of the process of sale before the Lord Ordinary in the Outer-
" House: and no separate adjudication shall be allowed to proceed during the depen-
" dence of a judicial sale; it being hereby declared to be competent to the Court of Ses-
" sion to settle by an act, or acts of sederunt, in what manner, and at what period or
" periods, the principal sums and bygone interests of the debts shall be accumulated, so
" as to do equal justice to all concerned." See also 2. *Bell Comm. 296, 305, &c.*
Before the above enactment, a remedy against the abuse of separate adjudications had to a certain extent been attempted; but in a much less perfect form. *Vid. infr. not.* *
§ 68.

ed*. At the day appointed, the Lord Ordinary puts up the lands to sale³⁷⁶; and, upon his report, the court, by their decree, adjudge the irredeemable property of them to the highest bidder³⁷⁷; on which decree, infestment may be obtained in the same manner as upon other adjudications, 1690, C. 20. Though the court, where there is no offerer, are authorised, by that statute, to parcel out the estate among the creditors according to their several interests; yet, as that method is attended with considerable inconveniences, they have seldom or never attempted it; but are ready, at the suit of the creditors, to bring lower the price formerly set on the lands; after which, a second day is appointed for the sale. As purchasers had it in their power, by obstructing the ranking of the creditors upon affected reasons, to enjoy the estate for years together, without paying any part of the price; pretending that, till the ranking was closed, it could not be known which of the creditors were entitled to the price, and in what proportions; it is declared by *Regul.* 1695, *art.* 26., that the preference of the creditors shall be concluded by an extracted decree, at least to the extent of the price set on the lands by the court, before they be actually put up to sale. Hence, though the conclusions of sale and of ranking are contained in the same summons; yet as the ranking must be finished by a decree previous to the sale, the two decrees of ranking and of sale must be extracted separately †.

Judicial purchasers, how secured, and the lands disburdened of all debts of the bankrupt.

63. The creditors preferred upon the price are, for the security of the judicial purchaser, required by act of sederunt, *March* 31. 1685, to make over their debts and diligences to him, upon payment, in corroboration of the purchase, with absolute warrandice to the extent of the sums received by them out of the price; by which obligation the creditors become liable, if the lands should be evicted from the purchaser, to restore these sums to him, with interest from the date of the sentence of eviction ‡. Every purchaser of a bankrupt estate, who shall pay the price to the creditors ranked, or, in case of their refusal to receive payment, shall, after a year from the sale, consign it in the hands of the magistrates of Edinburgh, is, by 1695, C. 6. ||, declared to be discharged of his obligation,

* By the act of sederunt, *Nov.* 13. 1793, already referred to, it is made necessary only to execute the letters of publication at the market-cross of Edinburgh, and pier and shore of Leith, and to intimate the interlocutor of the Court, granting warrant for such letters, by one advertisement in the Edinburgh Gazette.

† By *Stat.* 33. *Geo.* III. c. 74. § 7., *in fine*, (and 54. *Geo.* III. c. 197. § 6.), it is enacted, That “in all cases of judicial sales, the lands or other heritable subjects may be brought to actual sale so soon as the necessary previous steps are taken, whether the ranking be concluded or not, unless the court, upon application of any party concerned, shall find sufficient cause to delay the sale.”

‡ But such conveyances are limited to that effect alone, as in every other respect they operate as extinctions of the debts; *Fac. Coll.* *July* 10. 1788, *Creditors of Seton*, *DICT.* p. 18371.

|| By the *Stat.* 33. *Geo.* III, c. 74. § 7., (and 54. *Geo.* III. c. 197. § 6.), already so often quoted, this act is in part repealed; and it is enacted, “That in every case of a sale under the authority of the court of session, it shall be lawful to the purchaser, at any term of Whitsunday or Martinmas subsequent to the term of payment of the price,

³⁷⁶ The common agent cannot become an offerer at the sale; *York-Buildings Company*, 8th *March* 1793, *DICT.* p. 13367, as reversed on appeal, 4. *Dow*, 380. See the principle of the decision followed out in *Mackellar*, 8th *March* 1817, *Fac. Coll.* See also *supr.* t. 3. § 16. *in not.*; § 58. *h. t. not.* ³⁷⁷.

³⁷⁷ As to the recourse, on failure of the highest, upon the second and other lower bidders, under a clause to that effect, uniformly inserted in the articles of sale, *vid.* 2. *Bell Comm.* 318.; also in addition to the authorities there referred to, *Davidson*, 19th *Jan.* 1815, *Fac. Coll.* See also *Brown*, 589. *et seq.*

tion, and the lands are declared disburdened of all the debts and deeds of the bankrupt, or his ancestors or authors: and the only remedy provided by that act to such of the bankrupt's creditors as judge themselves prejudiced by the sale and division of the price, is an action for recovering their share from the creditors who have received it; but no action lies at their suit, though they should be minors, against the purchaser himself³⁷⁸. Yet this cannot be understood, as if such payment or consignment conferred any stronger right to the lands upon the purchaser, than was competent to the bankrupt; which was nevertheless explicitly adjudged, *Dabr.* 182, (*Couper* alias *Chalmers* against *Mireton*, June 21. 1720, Dict. p. 14171.), plainly contrary to the common rules of law, and indeed to common equity; for though the purchaser acquires all right vested in, or descendible to the bankrupt from his ancestors or authors, it cannot hurt third parties, who may have had a right preferable to that of the bankrupt, and who, not being called as defenders, had no access to know of the sale, and upon that account, no opportunity of appearing for their interest, *Fac. Coll.* i. 84., (*Urquhart* against *Officers of State*, July 28. 1753, Dict. p. 9919)³⁷⁹ *.

On whom does the expence of the sale fall.

64. The court of session, upon the application of the pursuer in a judicial sale, grant warrant of course to the factor to advance to him a sum sufficient for defraying the expence of that action, out of the rents received by him: And the sum so advanced by the factor, was, by our older practice, allowed to his credit in his factory-accounts, without proportioning it among the several creditors according to the shares they were to draw of the price; by which means the fund of the creditors' payment was diminished to the extent

“ price, to lodge the price, with the interest due upon it, in the Royal Bank, or Bank of Scotland, (or the Bank of the British Linen Company, 54. *Geo. III. c.* 137. § 6.), at such interest as can be procured for it; by doing which, and by giving notice thereof to the agent who carried on the sale, he shall be discharged of the said price; and the Court, upon the application of any of the creditors, shall be empowered to make an order on the purchaser to lodge the price and interest at any of the said terms, subsequent to the term of payment, in one or other of the said banks; sufficient intimation being always previously given both to the purchaser and to the common agent for the creditors that such application is made, in order that all parties may have an opportunity to object.” A similar enactment had passed ten years before, 23. *Geo. III. c.* 18. § 5.

* In ranking the creditors upon the price, the whole sums due to them, interest as well as principal, are held to be a capital as at the term from which interest is payable on the price; *Fac. Coll.* Jan. 17. 1792, *Brown*, &c. Dict. p. 13339, (1. *Bell Comm.* 563.) See on the same principle, *Ibid.* July 31. 1767, *Blackwood*, &c. Dict. p. 13359.; *Ibid.* Feb. 4. 1795, *Trustee of Dickson*, Dict. p. 13345. ³⁸⁰.

³⁷⁸ At the date of this act, the sale at the instance of an apparent heir was not known; but the enactment, contained in it to the effect noticed in the text, has been held in fair construction to apply also to this latter species of sale; *Middlemore*, *infr. not.* ³⁷⁹.

³⁷⁹ Erskine's view is implicitly adopted by *Bell*, 2. *Comm.* 321. :—“ It is no longer to be questioned,” says that learned author, “ that a judicial sale gives no protection against the claims of third parties whose right is not derived from the bankrupt, and who were not parties to the action of sale. And there seems to be as little doubt, that upon the emerging of any claim which undermines the right that was in the bankrupt, the purchaser would be entitled to suspend the payment of the price, until he were relieved from it.”

On the other hand, “ against the bankrupt, and all deriving right to the lands from him, the purchaser's right is protected, by its judicial nature, as a decree; by the peculiarity of the proceedings in the action upon which the decree proceeds; and by the declarations of the statutes establishing it;” 2. *Bell Comm.* 322. Accordingly it was held, that in a sale by an apparent heir, the right of the purchaser could not be affected by the appearance of a nearer heir, but that recourse could only be had by such heir upon the receivers of the price, precisely as in the case of a sale at the instance of creditors; *Middlemore*, 5th March 1811, *Fac. Coll.*

³⁸⁰ See also *Falconer*, &c. 30th Nov. 1814, *Fac. Coll.*

extent of that whole expence; and consequently the burden fell entirely on the posterior creditors. This method of accounting was altered by act of sederunt, Nov. 23. 1714, § 9.; and the burden of the expence of the sale ordained to be proportioned among all the creditors, prior as well as posterior, according to the several shares falling to them of the price; in regard that processes of ranking and sale were intended for, and did actually redound to, the common benefit of all of them. But as, by this last regulation, real creditors who, by the preferable nature of their diligences, had their debtor's lands charged with the payment, not only of their principal sum and interest, but of the expence of diligence, were cut off from that claim by debts confessedly posterior to their own, the court, upon occasion of a question moved by the creditors of Invergordon, concerning the import of that act of sederunt, Whether judicial sales, pursued by apparent heirs on the statute 1695, fell under it? brought matters back to the first usage, by act of sederunt Aug. 10. 1754, which directs, that the expence of judicial sales, in so far as it shall have been advanced by the factor, shall be allowed to him in his accounts; that in so far as he shall not have advanced it, it shall be paid out of the first of the price; and that the residue of the price shall be divided among the creditors, in terms of the decree of ranking * 381. And this act of sederunt is expressly extended to the case of sales brought at the suit of apparent heirs.

65. This title may be concluded with a general observation or two, concerning the effect of diligences used against bankrupt estates. After rights are rendered litigious by an action of ranking and sale, which is calculated for the common interest of all the creditors, the rule is, *Pendente lite nihil innovandum*; no diligence carried on or perfected while the sale is pendent, in order to create a new preference to the user of it, in competition with other creditors, ought to have any legal effect 382 †. Hence, in a question between a creditor who had adjudged pending an action of sale, and another, who, that he might not be excluded by the first adjudger, had led a second adjudication within year and day of the first, but after the lands were *de facto* sold, the two diligences were preferred *pari passu*; though the last, having been led after the right of the lands had been transferred from the debtor, was an improper diligence, *Falc. i. 233.* (*Irvine against Maxwell, Jan. 29.*

All diligence,
pendente lite,
is ineffectual.

* If, after the sale, and the establishment of a scheme of division, but before actual division of the fund, it shall by any circumstance be diminished, the loss falls entirely on the postponed creditors, as if no sale had taken place; *Fac. Coll. Nov. 27. 1793, Creditors of Rae, Dict. p. 13348.; (2. Bell Comm. 264. & 320.)*

† This doctrine has not been supported in practice; *Fac. Coll. July 12. 1785, Massey, Dict. p. 3377.; Ibid. Nov. 15. 1791, Haldane, Dict. p. 5299.; Nov. 22. 1785, Grierson, Dict. p. 274.; Jan. 29. 1796, Cheap, Dict. p. 5301.; May 19. 1796, Dun, Dict. p. 273.; June 22. 1791, Limond against Pierce, Dict. p. 244 383.*

381 The same rule is followed in the case of sales under the bankrupt statute; *Crawford, 8th March 1817, Fac. Coll.; 2. Bell Comm. 451.*

382 On this passage it has been remarked, that "Mr Erskine incorrectly seems to apply the doctrine of litigiosity as a bar to legal diligence. It is an impediment only to voluntary acts of conveyance or obligation hostile to the pursuer. The doctrine which he states as referable to the maxim, "*pendente lite nihil innovandum,*" is truly to be referred to the principle, that wherever the process can be regarded as a general measure for behoof of all the creditors, it ought to supersede the diligence of individuals. This doctrine is now established by express enactment in the recent sequestration statutes;" *2. Bell Comm. 161.; and see supr. not. 375.*

383 These authorities are now destroyed, and a wholesome reform introduced, by the bankrupt statute. *Vid. supr. not. 375.*

29. 1748, Dict. p. 5264.) *, and as such would have had no effect in a competition with the fair and lawful diligence of any co-creditor. It may be observed, however, that this inhabile diligence, of adjudging a debtor's lands after they have been judicially sold, hath full effect, where, without hurting the preference of any co-creditor, it is used merely to supply a defect in form, and to enable the adjudger to draw the payment of a just debt out of the bankrupt's funds. Thus, adjudications led after the sale of the bankrupt's estate are uniformly sustained in favour of personal creditors, who are ranked *ultimo loco*, and who cannot draw from the purchaser what remains of the price, without adjudging the lands sold ³⁸⁵.

66. It is a rule in all real diligences, That where a creditor is preferable to others on several different subjects belonging to his debtor, he cannot use his preference arbitrarily, by favouring one of his co-creditors more than another, where his own interest is not concerned, but must allocate his universal or catholic debt proportionally against all the subjects or parties whom it affects. If it be material to such creditor to draw his whole payment out of any one of those subjects, *ex. gr.* if the estate of one of the obligants in his debt shall be brought to a sale before the rest, he may apply his whole debt against the subject sold, without being obliged to trust to his security upon the other subjects. That inequality, however, will be rectified, as to the posterior creditors, who had also, by their rights and diligences, affected the subject out of which he drew his payment, by obliging him to assign over to them his right on the separate subjects, which he made no use of in the ranking, by which they may recur against those separate subjects

How a creditor who has a catholic right must apply that in a competition.

* Also reported by *Kilk.* No. 14., *voce* RANKING AND SALE, Dict. p. 15349., (and by *Elchies*, *voce* RANKING AND SALE, No. 13.) In this case, which was that of a sale pursued by an apparent heir, the Court found the decree of sale to have the effect of an adjudication for behoof of the whole creditors. And by act of sederunt, July 11. 1794, § 15., framed under authority of the aforesaid stat. 33. *Geo. III. c. 74. § 10.*, the Court appointed and ordained, That "it shall be in like manner a rule in time coming, that in processes of sale and ranking at the instance of creditors, the decree of sale shall have the same effect, and shall operate as a common decree of adjudication in favour of all the creditors who shall be included in the decree of ranking and division; and it shall not be necessary in time coming for any of the creditors ranking as aforesaid to lead separate adjudications against the estate, in order to entitle them to receive payment; neither shall such adjudications be necessary for the security of the purchaser; the decrees of sale, ranking, and division, being in effect an adjudication of the estate for all the debts therein contained." Where a creditor had nevertheless proceeded to adjudge in such circumstances, the Court refused to allow him the expence thereby incurred; *Fac. Coll. June 20. 1797, Edie and Laird*, Dict. App. I. *voce* ADJUDICATION, No. 9. ³⁸⁴.

³⁸⁴ All separate adjudications during the dependence of actions of sale, whether at the instance of the apparent heir or of creditors, are now expressly prohibited. *Vid. supr. not.* ³⁸³.

³⁸⁵ But see this now reformed, *supr. not.* In closing this section it may not be out of place to notice, that "there is litigiousity in all real actions for recovering the property or possession of lands. In the case of *Morison*, (8th March 1787, *Fac. Coll. Dict. p. 8895.*), the action was of the nature of a declarator of property. In another case, decided some years before, (*Fac. Coll. Menzies*, 9th Jan. 1760, Dict. p. 14165.), litigiousity was found to result from the dependence of a reduction of a sale; and the successful pursuer of that reduction was found entitled to recover the lands against creditors who had lent money to the defender on heritable bonds; "may even against a person who had purchased the lands from his creditors;" 2. *Bell Comm.* 159. In a late case, adjudication by a personal creditor, during dependence of an action declaratory of a right preferable to the right of the adjudger's debtor, was found barred by litigiousity; *Wauchope*, 1st July 1817, *Fac. Coll.*

subjects for the shares which the debt preferred might have drawn out of them. As this obligation to assign, is founded merely in equity, the catholic creditor cannot be compelled to it, if his assigning shall weaken the preference of any separate debt vested in himself, affecting the special subject sought to be assigned³⁸⁶. But, if a creditor upon a special subject, shall acquire from another a catholic right, or a catholic creditor shall purchase a debt affecting a special subject, with a view of creating to the special debt any higher degree of preference than was naturally due to it, by an arbitrary application of the catholic debt, equity cannot protect him from granting assignation to the creditor who is excluded by such application³⁸⁷; especially if, previously to the purchase, the subject had become litigious by a process of ranking; for transmissions ought not to hurt creditors who are no parties to them, nor to give the purchaser any farther right than was formerly in himself, or his cedent; see Essay on the *beneficium cedendarum actionum* *³⁸⁸.

A creditor recovering payment of part upon a collateral security, does not thereby diminish the extent of his principal security.

67. It shall be lastly observed on the head of adjudications, or other diligence used by creditors for securing their debts in case of the debtor's bankruptcy, that though a creditor adjudging upon his debt, should have thereafter recovered payment of part of it, not under the title of his adjudication, but out of a separate fund belonging to his debtor, over which his adjudication had not reached; yet the security of such creditor acquired by his adjudication remains entire and undiminished, so as to entitle him to a preference on the whole sums contained in it, in security of the balance still due to him after the separate payment, as if no such payment had been made. The security is as broad for the last shilling, as for the whole sum; because it is the nature of the security which entitles him to the preference, and not the amount of the sum which is secured. This doctrine was expressly established in the case between *the Earl of Loudon and Lord Ross*, Feb. 16. 1734, (DICT. p. 14114), stated by *Lord Kames*, in his *Remarkable Decisions*³⁸⁹; and it has been since observed in questions of preference, *Fac. Coll.* ii. 127, (*Creditors of Auchinbreck*, July 21. 1758, DICT. P.

* By the late *Lord Kames*. The substance of this Essay will be found in the *Principles of Equity*, by the same Author.

³⁸⁶ Where two parties, though *ex facie* joint obligants in a debt, are in reality, the one principal, and the other only cautioner, the catholic creditor may draw his whole debt from the estate of the principal, and the secondary creditor is not entitled to an assignation, so as to come against the estate of the cautioner; *Stewart*, 11th Jan. 1814, *Fac. Coll.*

³⁸⁷ But see *contra*, where the transaction is gone into *bona fide*; *Fount. Scotland*, 3d Jan. 1696, DICT. p. 3367.; *Dalr. and Bruce, Preston*, 22d Feb. 1715, DICT. p. 3376. Mr Bell, however, entertains doubts of the soundness of these judgments; 2. *Comm.* 285.

³⁸⁸ See this subject discussed, 2. *Bell Comm.* 283. *et seq.*

³⁸⁹ This report, which is omitted in *Morison's DICT.*, will be found inserted in the supplemental volume. The case is also reported by *Elchies*, *voce* RANKING AND SALE, No. 3. The authority of the cases referred to in the text has been called in question. Mr Bell observes, that "it would rather appear that on the view of the diligence which is now adopted, the determination given in the case of the *Earls of Loudon and Glasgow*, and in that of *Auchinbreck's Creditors*, would not be held as conclusive to entitle an adjudger, who had recovered a partial payment on account of his debt, to rank for the undiminished amount of his original claim;" 2. *Comm.* 289.

p. 14129) *. And it holds, not only in securities affecting heritable rights, as adjudications ; but in those which are proper to moveables, as arrestments ; whence it appears, that a creditor may proceed in either case to take other collateral securities, without diminishing or encroaching upon the first.

TITLE XII.


* It is here supposed, that the subjects included in the securities are different. See the Note subjoined to *B. ii. tit. 8. § 37.* ; which relates to double securities on the same subject. See also *Dict. voce RIGHT IN SECURITY.*



END OF VOLUME FIRST.