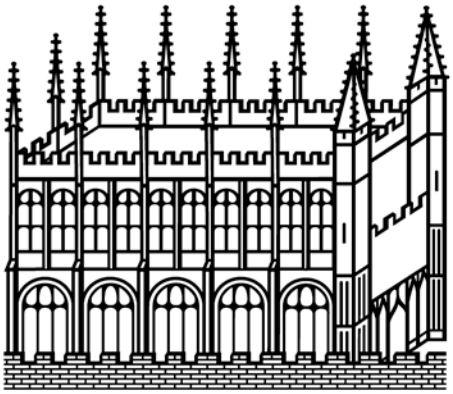


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Gough
Scotland.
1914.

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# PRACTICAL OBSERVATIONS

Upon divers TITLES of the

# Law of SCOTLAND,

Commonly called

# *Hope's Minor Practicks.*

Written by Sir THOMAS HOPE of *Craighall*, ſometime Advocate to King *Charles* I.

With NOTES upon divers Parts of the Book, ſhewing what Alterations have happened in the Law ſince the firſt writing of this Treatiſe, and other uſeful *Obſervations* diſperſed through the whole Work.

*To which is ſubjoined, An Account of all the Religious Houſes that were in* Scotland *at the Time of the Reformation.*

By the late JOHN SPOTISWOOD of that Ilk, Advocate.

*EDINBURGH,*
Printed: And Sold by A. DAVIDSON in the *Parliament-houſe*, and other Book-ſellers in Town. MDCCXXXIV.




THe Publiſher Proprietor of this Book, in order to obtain and preſerve the Privilege granted 19th Statute of the 8th of Queen *Anne*, intituled, *An Act for the Encouragement of Learning*, &c. has duly entred this Book in the Regiſter of Stationers Hall, *London*.

# THE PREFACE.

*THE following ſmall Treatiſe, writ by one of the moſt learned Lawyers of our Nation, the famous Sir* THOMAS HOPE *of* Craighall, *ſometime Advocate to King* Charles I. *being for its great Uſefulneſs much eſteemed by all of that Profeſſion amongſt us; my Father thought he could not do a Piece of better Service to the Publick, than by giving, not only a correct Edition of it, purged from the manifold Errors that commonly creep into Manuſcript Copies, (in which it had hitherto appeared) through the Negligence or Ignorance of Tranſcribers; but alſo to ſubjoin ſome* Notes *and* Obſervations *of his own, for illuſtrating ſuch Places as might create Difficulties to ordinary Readers, and more particularly for*

*ſhewing what Alterations have been made in our Law, by Acts of Parliament or otherwiſe, ſince the Author's Time. Accordingly my Father, ſome Years ago, ſet about the Work; But dying when little more than the half of it was printed off, I thought my ſelf obliged to do Juſtice to thoſe Gentlemen who were Subſcribers, by continuing the Work from the Manuſcript Copy which he had left behind him. I am very ſenſible, that it is no ſmall Diſadvantage to it, that my Father did not live to give it the finiſhing Stroke: But as the Motive I have mentioned is a ſufficient Apology for the Share I have in it; ſo I am hopeful it will atone for ſuch Faults as have eſcaped through that Diſadvantage.*

*There are two Things to be noticed, with reſpect to the* Notes, *which 'tis proper the Reader ſhould be advertiſed of. The firſt is concerning a* Scots *Law Lexicon, to which frequent References are made in them. This Treatiſe my Father had compoſed much about the ſame time with the other, and no doubt deſigned to have put it to the Preſs ſhortly after: But as I am not under any Obligation with*

*with reſpect to this laſt, (which I believe will make an ordinary Volume by itſelf) all I ſhall ſay on this Head is, that the Reception which this ſhall meet with will determine me as to the Publication of it.*

*The other Thing to be taken notice of is, the Account of the Monaſteries and other Religious Houſes in* Scotland *at the Time of the Reformation. This being likewiſe drawn up by my Father, and intended by him to be ſubjoined as an* Appendix *to this Work, to which in ſeveral Things it has a very near Relation, I thought it would not be ſo congruous to omit it; and have therefore given it the Place he deſigned. Though it is not to be expected, but that a Work of that Variety and Extent, and of Matters ſo conſiderably remote from our Time, muſt labour under not a few Imperfections, and be liable to ſeveral Miſtakes; yet as it is the moſt complete, and I hope the moſt accurate Account of our old Religious Houſes hitherto publiſhed, 'tis humbly thought it will in the general be acceptable to the Publick.*

J. S.

CON-

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# PRACTICAL OBSERVATIONS ON THE LAWS of *Scotland.*

## TITLE I.

### *The Form of Proceſs, before the Lords of Seſſion.*

SUMMONS before the Lords of Seſſion, ordinarily ſhould be execute upon 21 Days Warning, (in which Count of Days, either the Day of the Execution of the Summons, or the Day of Compearance, ſhould be free) except the Summons be privileged, either in their own

Nature, as Regiſtrations, Removings, *&c.* or elſe privileged by a ſpecial Privilege, contained in the Summons; both which come in upon ſix Days Warning.

§ 2. There are many Cauſes of ſpecial Privilege; I inſtance one for all, Becauſe the Purſuer is content to refer to the Defender's Oath of Verity his Summons; the Words are, *To be called ſummarily on ſix Days Warning, but Diet, Table, or Continuation of other Summons; becauſe he is content to refer the whole Premiſſes to the Defender's*

By Act of Sederunt, *June* 21. 1672. concerning privileged Summons, the Lords ordain, That no Summons be privileged, by their Deliverance or otherwiſe, except theſe following,

| | |
|---|---|
| Alimentary Cauſes, | Removings, |
| Declarators ſpecial, | Spuilzies recent, |
| Ejections recent, | Suſpenſions, |
| Exhibitions, | Transferrings, |
| Forthcomings, | Tranſumpts, |
| Intruſions, | Wakenings, |
| Poindings of the Ground, | Coming in the Vice. |
| Prevento's, | |

The Privilege of which Summons lies in this, That they can be executed upon ſix Days, except Ejections, Intruſions, Recent Spuilzies, and ſucceeding in the Vice, that muſt be executed upon 15 Days.

Summons, in which a Purſuer refers the Verity of his Libel to a Defender's Oath, not being noticed in the above Act, is not to be reckoned a privileged Summons, and muſt therefore have two Diets. See Note on § 4.

If a Defender be out of *Scotland*, theſe Summons muſt be executed upon 15 Days.

Theſe

*Defender's Oath of Verity* ſimpliciter, *ſo far as ſhall not be proven by Writing.*

Theſe Words of Stile in a Summons to be called ſummarily, &c. as in § 2. are not now uſed.

The Word *but*, (of a *Saxon* Extract, frequent in our Language) ſignifies *without*.

§ 3. The principal Summons ſometime will receive Proceſs immediately, after the Day of Compearance is paſt; and ſometimes after the Day of Compearance therein is paſt, the ſaid principal Summons ſhould



The Form of Proceſs in all Nations requires, That in Matters of Importance more than one Citation be given to a Defender; purſuant to which univerſal Cuſtom, our Law required the Citations in this §: But becauſe the Form of continuing Proceſs and Summons in the Seſſion, as here ſet down, occaſioned Delay of Juſtice, and great Trouble and Charges to the Lieges; for, when a Defender lived at a great Diſtance from the Seat of Juſtice, the Purſuer, after he had executed his Summons, was forced to return it to the Seſſion-houſe to be continued; and upon an Act of Continuation, which he was to extract, to raiſe other Summons to be executed in the ſame remote Places of the Kingdom, for the moſt Part by Meſſengers, ſent there on Purpoſe; which ſecond Summons, and Execution thereof, were to be returned before there could be any Procedure in the Cauſe; and ſometimes, when (thro' the Vacation Time interveening) the firſt Summons could not be continued, the Proceſs was not in readineſs againſt the enſuing Seſſion: So that Purſuers were, to their great Prejudice, poſtponed divers Months. For preventing theſe Inconveniencies, the Parliament, by their Act the 10. *July*, 1672. did ſtatute, That in all Proceſſes to be intented before the Lords of Seſſion, the Purſuer ſhall not be obliged to continue his Summons, and

to

be continued, and the Party again warned, before Proceſs be granted thereupon. And for Warrant of the ſecond Summons, there is

to take out Acts of Continuation, and to execute ſecond Summons as formerly. And becauſe, by Law and Cuſtom obſerved in Caſes of great Importance, a Decreet cannot be obtain'd upon one ſingle Citation, therefore, by that Act it is ordain'd, That all Summons before the Lords of Seſſion, which before were in Uſe, and ought to have been continued, ſhall contain two ſeveral Warrants, for citing the Defenders at two ſeveral Times, and to two diſtinct Diets and Days of Compearance; and that the ſaid Summons be directed to Sheriffs in that Part, and Meſſengers *reſpective*; and That, by the firſt Warrant, to be inſert in the ſaid Summons, ſuch Perſons as might, and were in uſe to have executed the firſt Summons, be warranted to give the firſt Citation upon the ſame Time, and with the ſame Certifications, as formerly were, and ought to have been in Citations upon the firſt Summons. And by the ſecond Warrant, Meſſengers at Arms, or ſuch other Perſons as formerly were, and ought to have been employ'd to execute Letters, or ſecond Summons, where they were apart, and upon Acts of Continuation, ſhall be warranted and commanded to give the ſecond Citation, after the paſſing and elapſing of all the Time contain'd in the Warrant for the firſt Citation: And the ſaid ſecond Citation is ordain'd to be upon the ſame Time, and with the ſame Certifications, that were uſual in ſecond Summons, and in the Acts whereupon the ſame proceeded, according to the ſeveral Stiles, Conception and Nature thereof, *reſpective*.

But this Way of ſending firſt a Sheriff in that Part, and thereafter a Meſſenger, which is two ſeveral Times, of purpoſe to execute one and the ſame Summons, having manifeſtly the Inconveniencies that attended the Act of Continuation, and ſecond Summons; Therefore, the Parliament, by their 12. Act, in the Year 1693. did reſcind that Clauſe in the foreſaid Act of Parliament 1672. which required the ſecond Citation to be given after the elapſing of the firſt Diet of

is an Act of Proceſs, ſubſcrib'd by the Clerk of Regiſter, or one of the Clerks his Deputes; which Act is called, *An Act of Continuation.*

of Compearance; and declared, That it ſhould be lawful to give Citation for the firſt and ſecond Diets of Compearance, at one and the ſame Time, providing the ſame be done by a Meſſenger at Arms, as was the Uſe of Summons for the ſecond Diet.

§ 4. Theſe Summons require Continuation, when the Libel requires Probation, and the ſame is not uſed inſtantly at the Bar; but where the Libel is inſtantly verified and proven by Writing, the ſaid Libel and Summons need no Continuation.

§ 5. The ſecond Summons of Continuation has not a ſet Number of Days of Warning, and is commonly done upon ſix Days,



For illuſtrating this, ſee §§ 111, 112, 113, 114, 115. of this Title.

Summons muſt have two Diets, except they be privileged.

By the Act of *Sederunt*, *June* 21. 1672. the ſecond Citationis ordained to be on ſix Days, except in Summons executed againſt Perſons Inhabitants of the Burgh of *Edinburgh*, or the contiguous Suburbs thereof, who may be ſummoned by the ſecond Citation upon 24 Hours Warning.

See the Notes on § 3. and Act of Parliament 1672. The Inhabitants in *Edinburgh* can, in the firſt Summons, be cited upon 24 Hours, as to Cauſes, that before the above cited Act of *Sederunt*, in *June* 1672. were accuſtomed to be ſo executed. *Stairs* Deciſ. Vol. 2. P. 247.

Strangers,

or other Space longer or ſhorter, conform to the Diſtance of the Place where the Defender dwells; and if the Defender dwell in *Edinburgh*, he may be ſummoned perſonally, to compear the Morn after the Charge.

Strangers, not Indwellers in *Edinburgh*, tho' at *Edinburgh* for the Time, muſt have the ordinary *Inducíæ legales*; becauſe they are not preſum'd to have with them their Writings, or other Probation. *Stairs* Deciſ. Vol. 2. P. 289.

But the Parliament 1685. conſidering the great Diſtance of the Iſlands of *Orkney* and *Zetland*, from the Town of *Edinburgh*, and the Uncertainty of Paſſage by Sea, and the many freſh Waters and other Ferries in the Way by Land, did, by the Act 43. ordain, That every Summons to be intented againſt the Inhabitants of theſe Iſles, before the Lords of Privy Council, the Lords of Seſſion, and before the Commiſſioners of Juſticiary, and Letters of Horning and Lawborrows upon their Decreets, or by their Warrant, ſhall be executed upon 40 Days, without Prejudice to Letters upon Writings, regiſtrated, by the Clauſe of Regiſtration, the Parties Conſent, that Execution ſhall paſs on a ſhorter Time.

§ 6. The ſaid Summons may be execute, by a Boy Sheriff in that Part, and need not a Meſſenger of Arms, except in ſome Caſes; ſuch as, when the Matter being referred to the Defender's Oath, by the Act

The Sheriff of a Shire was of old the chief Officer, who put to Execution the Commands and Orders of the King; but when a great Number of Summons was iſſued out from under the King's Signet, the Sheriff could not attend the Execution

Act and ſecond Summons, the ſaid Defender is ſummoned to give his Oath, with Certification, he ſhall be holden as confeſt, if he compear not the ſaid Day; in which



Execution of all, nor was it abſolutely neceſſary, when the Matter was of ſmall Importance, and did not immediately concern the King or Country: Wherefore, there was a Blank in the Summons, to put in it the Name of any Perſon, and to him the Execution of the Summons was directed. And becauſe that was anciently the Office of the Sheriff of the Shire, therefore the Executor of the Summons is called, *a Sheriff in that Part*, *i. e.* no other Part of the Office of Sheriff is committed to him, than to execute that ſpecial Summons.

All Summons having only one Diet, (as well as the ſecond Citation given by a Summons having two Diets) behoved to be given and executed by a Meſſenger at Arms; and by the 10. *Act*, *Parl.* 1669. All Interruptions, as to Rights of Lands, by Citation, are ordained to be execute by Meſſengers at Arms; and ſeeing the firſt and ſecond Diets are ingroſſed in one Execution, no Summons can be now executed by a Sheriff in that Part.

By Act of *Sederunt*, *February* 16. 1723. it is ordain'd, That Summons ſhall be fully libelled before they be executed. ii. That a full Copy of the Libel ſhall be given at the Citation, when each Defender (if there be many) ſhall receive a full Copy of that Part of the Libel which concern themſelves.

From this general Rule are excepted,

Summons for
- Adjudications,
- Choofing Curators,
- Exhibition *ad deliberandum*,
- Mails and Duties,
- Multiple-poinding,

Summons of
- Poinding the Ground, the Heritor getting always a full Copy,
- Ranking and Sale,
- Tranſumpt,
- Wakening.

Without

Caſe, the ſaid Defender ſhould be ſummoned by a Meſſenger of Arms, and perſonally apprehended, otherwiſe he will not be holden as confeſt.

Without Prejudice of repeating Summons *incidenter*, by way of Defence, as formerly; with Certification, the Defender is not bound to anſwer to what is not contain'd in the Copy delivered to him. iii. That with the Proceſs ſhall be returned; the Defences, both dilatory and peremptory, in Writing, ſign'd by the Party, or his Proctor, proporting an Acknowledgement or Denyal of the Facts libelled, otherwiſe they ſhall be regarded as confeſs'd. And (2.) New Defences, after they come to Knowledge, ſhall, in Writing, be put in the Hands of the Clerk, 48 Hours at leaſt, before they be propounded. (3.) Further, That all the Writings which a Defender founds upon, and hath in his Cuſtody, ſhall be put in the Clerk's Hands, 48 Hours before calling of the Cauſe, with Certification, a Purſuer ſhall not be obliged to make Anſwer to a Defence, which has not been ſo preſented in Writing. (4.) Without Prejudice of ſuch Emendations of the Libel, or of the Defences at the Bar, before Litiſconteſtation, as accords, and of adding new Reaſons of Reduction, as formerly. iv. That where there are moe Defenders than one, the Proceſs ſhall, within the Time limited by Act of Regulation in 1672, be (by the Advocate, principally appointed to ſee the ſame) returned into the Clerk's Hands, to remain for ſix Days, in which the Advocates for the other Defenders, may borrow, and return the ſame, with Defences in writing, and Vouchers thereof, in Manner, and under Certification, and Pains preſcribed by the forecited Regulations, and this Act, which is declared to be of Force till *November* 25. 1725.

§ 7. No Summons before the Lords, may be either continued, or called, the ſaid Day of Compearance, except allenarly

in

in receiving of Witneſſes, which may be called on the Day of Compearance: Alſo the like Order is kept in calling of Acts, which cannot be called till the Day of Compearance be paſt, except for Witneſſes, as ſaid is.

§ 8. All Actions before the Lords, have their Diets of Compearance, with Continuation of Days, and are not peremptor,

ACTION] Is defined a Right which every one hath to purſue, and ſeek *in Judgement*, (*i. e.* by Interpoſition of the Authority of a Judge) any Thing that belongeth, or is due to us, which may be called a Claim or Demand expreſſed in a Writing, formed in the Stile of the Court, which again is named a Libel; and becauſe it contains a Warrant to cite or warn the Defender to compear and anſwer, it is called a Summons, from the Latin Word *Monere*, to warn.

All Summons before the Lords, are with Continuation of Days, and are not peremptor, *i. e.* the Defender is not bound preciſely to anſwer on the Day, to which he is cited; neither need he compear in Perſon, as behoved to be done before the Lords of Privy Council, and muſt be done before the Lords of Juſticiary; but the Diet is continued againſt him, and he is allowed a Hearing by his Advocate, at any Time before Sentence be extracted.

The calling of the Summons, by an under Clerk, in the utter Houſe, keeps the Inſtance from preſcriving, and makes the Summons to endure for Year and Day longer; but if the Cauſe be not proſecuted in that Time, the Action muſt of new be wakened againſt the Defender: However, to ſtop this Preſcription, the Purſuer was in Uſe to call the Summons over again, within the Year and Day, and continued ſo doing, from Year to Year, which has been done for ſeveral Years; and theſe after Callings, with the Clerk's marking thereof, on the Margine of the Summons, were

tor, as they are before inferior Judges. But after the Day of Compearance is paſt, may be called at any Time, within Year and Day, as the Party pleaſes, becauſe, during that Time, *Currit inſtantia et non perit*; but after Year and Day, if the Summons be not called *medio tempore, perit inſtan-*

were called a *Partibus*, from the Words that were made Uſe of in the Marking, as 16. *June*, 1711. *Partibus ut ſupra*, to ſee. But by an Act of *Sederunt*, *February* 26. 1718. the Lords of Seſſion conſidering that Practice, and judging it to be hurtful to Defenders, they ordained, That after the firſt Calling, which is to be marked by the under Clerk, on the Summons, within Year and Day of the laſt Compearance, it ſhall not be leiſom to the Clerks to mark any other *Partibus* on the ſaid Summons, until the ſame be given out, ſeen and returned, and come in by Courſe of the Roll, to be judicially called before an Ordinary; and that thereafter, all Callings, or *Partibus* to be marked on the ſaid Proceſs, ſhall be ſigned by the Ordinary, and all *Partibus* marked hereafter, otherways than the Act preſcrives, are declared null: But, in Regard of the former Cuſtom, the Lords declared, That all Summons, in which ſuch *Partibus* are marked, before the ſame were ſeen and returned, and come in of Courſe to be called, preceeding the Date of the Act, ſhall not be wakened.

By Act of *Sederunt*, *June* 11. 1661. the Lords ordain all Wakenings of Proceſſes to be executed upon 24 Hours, againſt Perſons who are, for the Time, within *Edinburgh* or *Leith*; and upon ſix Days againſt others within this Kingdom, and upon Fifteen Days againſt all out of the Kingdom.

The Summons muſt be executed within Year and Day of its Date, and if it bear Warrant to cite the Defender to compear the Day of next to come, the Day of Compearance muſt be within Year and Day of the Summons, for a Citation otherways given, will be null. *Stair*'s Dec. Vol. 1.

*inſtantia*, and the Summons cannot be called, except the ſame be wakened, and the Party of new ſummon'd, which may be done on ſix Days warning, or fewer, notwithſtanding the principal Summons, of its own Nature, abode Twenty One Days Warning.

§ 9.

Vol. 1. P. 301. Yea, if the Summons be not continued within the Year, after the Days of Compearance, the Inſtance periſheth, and ſo cannot be wakened.

But in a Summons, having two Diets, not mentioning *Next to come*, which relates to the Date of the Summons, the Day of Compearance needs not be within Year and Day of the Date of the Execution, but it may be extended to a Space of twenty Months, and upwards, and is formal and valid, provided the firſt Diet be within Year and Day of the Execution, and the ſecond Diet within Year and Day of the firſt Day of Compearance, *July* 15. 1709. *Bailie* againſt *Menzies*.

By *Act* 9, and 10. *Parliament* 1669. and *Act* 14, 15. *Parliament* 1685. concerning Preſcriptions and Interruptions, it is ordained, That all Actions proceeding upon Warnings, Spuilzies, Ejections, Arreſtments for Miniſters Stipends, and other Actions mentioned in the ſaid *Act* 9. ſhall preſcrive within 10 Years, except the ſaid Actions be wakened every five Years; and that all Citations made Uſe of for Interruptions, whether in real or perſonal Right, be renewed every ſeven Years, otherways they preſcrive; but this Act is not to be extended againſt Minors, during Minority; and by *Act* 19. *Parliament* 1696. Summons uſed for interrupting Preſcription of real Rights, are to contain the Grounds whereon they proceed, muſt paſs on a Bill, and be under the Signet, and, with their Executions, are to be in a particular Regiſter, and Books apart, recorded within Sixty Days after the Execution; and Summons already raiſed, were ordained to be regiſtrate before the 9. of *October* 1697. Theſe raiſed by Minors, are excepted by *Act* 5. *Parl.* 1698.

§ 9. Theſe Words of the Summons (*In the Hour of Cauſe*) denote the Time of the Court and Judgment, while Juſtice is adminiſtred.

By *Act* 49. *Parliament* 1537. the Lords are ordained to enter into the Seſſion-houſe at Eight Hours in the Morning, and to ſit till Eleven; but now all the Members enter at Nine, being advertiſed by the ringing of a Bell, and ſit till Twelve. *Vide* the preſent State of the College of Juſtice, Pages 6 and 7.

§ 10. The Summons ſhou'd be execute againſt the Defender, either perſonally, or at his dwelling Place; and if the Defender be

DEFENDER.] And upon the Ground of the Lands debateable, as in Perambulations, Compriſings, ſhewing of Holdings, Recognitions, and ſuch other real Actions, concerning the Property of Lands, or heritable Service owing therefore. See *Spotſ.* Practicks, Tit. *Summons.*

In Declarators of Property and Moleſtation, againſt neighbouring Heritors, it is ſufficient to call the heritable Poſſeſſor, to whom Diſpoſition is made, tho' he be not infeft, and there is no Neceſſity to cite the Author who ſtood laſt infeft. *Vide Gil.* Deciſ. No. 58.

And if the Lands ly within one Juriſdiction, and the Defender dwell within another, he may be called before the Judge of that Juriſdiction where the Lands ly, by ſummoning him at the Ground of theſe Lands, and by raiſing Letters of Supplement, for citing him perſonally, or at his dwelling Place. *Spotſ.* Sum. § 21. 37. *Durie's* Deciſ. Mr. *David Williamſon* againſt *Hagie*, *November* 28. 1635. The Order of ſummoning Defenders in civil Actions, is ſet down in *Act* 74. *Parl.* 1540. which ſee, with *M'Kenzie's* Obſer. thereon. And if one be ſummoned at the Place where his Wife and Family remain, it is ſufficient, tho' he himſelf, at the

be Minor, his Tutors and Curators, if any he has, for their Intereſt, ſhould be ſummon'd at the Market-croſs of the head Burgh

the Time of the Execution, and long before, dwelt in another Place. *Spotſ.* Sum. § 22. 35. The like found in the Caſe of *Irvine* of *Kincauſſie* againſt *Deuchar*, *March* 13. 1687. But in the Caſe of *Baillie* of *Lamingtoun* againſt *Menzies*, *July* 13. 1709. the Citation of one (not perſonally apprehended) by leaving a Copy at another's Dwelling-houſe, which the Execution bore to be his Reſidence at that Time, was ſuſtained, the Purſuer proving Reſidence there 40 Days before the Date of the Execution.

When a Defender is cited at his dwelling Place, the Execution muſt expreſs the Town or Burgh in which that Dwelling lies, except it be imply'd in the Defender's Deſignation, as when he is called, Indweller in a Burgh or Place. *Durie's* Deciſ. *Montgomery* againſt *Fergushill*, *November* 9. 1632. An Execution being quarrell'd, for want of this Deſignation of Dwelling-houſe, the Purſuer was allowed to produce another formal Execution, under the ſame Meſſenger's Hand, deſigning the Dwelling-houſe, he abiding by the ſame, *February* 26. 1709. *Junkieſon* againſt Lady *Arvolick*.

MINOR.] In ſummoning a Pupil, having a Tutor, it is ſufficient to deliver a Copy thereof to the Tutor only. *Spotſ.* Sum. § 20. And a Minor being at School, may be ſued at the Place where he remains at the Schools, tho' at the Time of the Execution, and ſome ſhort Time before, he was in another Place, provided he was there only to recreate himſelf, or to viſit Friends, and purpos'd thereafter to return to School, and accordingly did return. *Spotſ.* Tit. *Sum.* § 23.

It is ſufficient to ſummon the Tutors and Curators generally; and it is not neceſſary to cite them by Name, or at the head Burgh of the Sheriffdom in which they dwell, or at the Market-croſs of their Territory, Regality or Stewartry, in which the Lands, belonging to the Minor, ly, even tho' it be a real, or ground Action, as a poinding of Ground for Annualrents. *Durie's* Deciſ. L. *Rankieler* againſt L. *Aiton*,

*July*

Burgh of the Shire where the Minor dwells, and Copies affix'd, and left thereon; and if the Defender be forth of the Country,

*July* 26. 1625. And if it ſhould be alledged, That the Tutors and Curators were ſummon'd at the Croſs of the head Burgh of a Sheriffdom, other than of that within which the Minor dwelt; this Exception of *alibi* will be repelled *eo loco*, and reſerved to the Defender, to reduce thereon, as accords. *Durie*'s Deciſ. Biſhop of *Dumblane* againſt his Vaſſals, *March* 8. 1626.

*Forth of the Country.*] A Perſon out of *Scotland* cannot be ſummoned *Principaliter*, *i. e.* as the chief Defender, to compear before any inferior Judge, but before the Lords of Seſſion only, and that upon 60 Days. *Spotſ.* Sum. § 14. And in executing a Warrant to remove, the Tenant being warn'd at the Market-croſs on 60 Days, needs not be warn'd at the Pariſh-kirk, upon moe Days than 40. *Durie*'s Deciſ. L. *Faldownſide* againſt *Bennerſide*, *January* 11. 1622.

When a Defender who reſides in *Scotland*, is not perſonally apprehended, the Law appoints a Copy of the Summons to be left at his Dwelling-houſe, the only, and moſt probable Way, whereby the ſame can come to his Knowledge: But when he is out of this Country, that Order of citing cannot ſerve; wherefore a publick and ſolemn Place was neceſſary to be pointed at, where it may be preſum'd Abſents out of *Scotland* may have their Actournies, or Correſpondents; and according to our ancient Cuſtom, the head Burgh of the Sheriffdom, within which the abſent Perſon had laſt his Reſidence, is preſum'd to be ſuch a Place, as may be collected from the following Acts of Parliament, *Act* 32, 33. *Parl.* 1555. *Act* 119. *Parl.* 1581. *Act* 65, 85. *Parl.* 1587. *Act* 267. *Parl.* 1597.

But, becauſe theſe Statutes give no Directions, concerning Citation of Defenders in civil Actions; a permiſſive conſuetude Immemorial, has ordered, That Defenders out of *Scotland*, be cited at the Market-croſs of *Edinburgh*, as the Metropolitan of the Kingdom, and reckoned the *Communis patria* of all *Scots* Men; and, becauſe all poſſible Endea-

Country, he ſhould be ſummoned upon Sixty Days Warning at leaſt, at the Market-croſs

Endeavours are fit to be uſed, to certiorate thus abſent Parties, of the Actions againſt them; as it is preſum'd they have at *Edinburgh* their Agents, ſo likewiſe it is preſumed, That when the Ships go into foreign Countries, they may carry Advice to the Defender; wherefore it has been thought neceſſary, by our Lawyers, to cite the Party, alſo at a principal Sea-port, within the Sheriffdom where the abſent Defender laſt reſided, or if there be none there, at a Port within the Sheriffdom next adjacent; but, becauſe the Port of *Leith*, through its Neighbourhood to *Edinburgh*, is of greateſt Reſort, therefore, the ſame Cuſtom did introduce Citations of Parties out of *Scotland*, to be uſed at, and affixed upon the Peir and Shore of *Leith*: And unleſs this Order be obſerved, the Summons are null, and it was ſo decided, tho' there was no poſitive Statute, directing that Manner of Citation; nor was there a Prohibition of citing otherwiſe, which might ſeem to have been warranted by the foreſaid Acts, as is obſerved by *Durie*, *Chriſtie* againſt *Jack*, *June* 4. 1631. And this Order, and Place for citing, upon 60 Days, a Defender forth of the Country, is to be obſerved, tho' he leave a Wife behind him, and, notwithſtanding of the Preſumption in Law, That where the Wife is, there the Family is underſtood to be. *Spotſ.* Sum. § 25. And it is a general Rule, That the Market-croſs of *Edinburgh*, with the Peir and Shore of *Leith*, are Places regarded in Law, equal to a Defender's Dwelling-houſe; ſo that all Intimations, Arreſtments, *&c.* againſt Perſons forth of this Country, muſt be uſed at *Edinburgh* and *Leith*.

This Order of citing Perſons out of the Country, is more effectual in Law, than a Citation of a Defender in the Country, by leaving a Copy of the Summons at his Dwelling-houſe; for a Defender out of the Country, thus cited, will be now holden *pro confeſſo*, tho' *Dirletoun* obſerves it was otherways decided, P. 117. but that Deciſion was altered, P. 181. which is the Warrant of the preſent Practice: Whereas, Perſons living in the Country, cannot be holden

*pro*

croſs of *Edinburgh*, and Peir and Shore of *Leith*, by Copies affix'd, and left thereon.

*pro confeſſo*, otherwiſe than by a Citation of them perſonally apprehended, and to be expreſſed in the Meſſenger's Execution.

And this Order of citing Perſons out of the Country, muſt alſo be obſerv'd, in uſing Orders of Redemption of Compriſings, Wadſets, &c. tho' the Lands ly in another Sheriffdom than that of *Edinburgh*, *Durie*'s Deciſ. *Murray* againſt Lord *Teſter*, *February* 22. 1631.

The Execution againſt Perſons forth of the Country, and generally the Execution of edictal Citations, ſhould bear, That a Copy of the Summons was left, and affix'd on the Market-croſs, and on the Peir and Shore of *Leith*, otherways the Execution is void; yet an Execution bearing, That a Copy was left, has been admitted, becauſe it is preſum'd, That the Meſſenger left it affix'd.

§ 11. And if the Nature of the Cauſe require the Defender to be ſummoned over again, by a ſecond Summons, the ſame may be done upon fifteen Days Warning, at leaſt, and needs not ſixty Days thereto.

§ 12. If the Defender be ſummoned before his Departure out of the Country, and thereafter depart forth of the ſame, if Need requires that he be ſummoned again by a ſecond Summons, he needs not be ſummoned upon ſixty Days, but upon ſo many Days

In caſe a Defender had been ſummoned eight Days before his going out of the Kingdom, and thereafter depart forth thereof, the *Act* 32. *Parl.* 1555. orders the ſecond Citation to be

Days as if he had remained, and were within the Kingdom.

be upon 15 Days Warning, (and not upon ſix, as if he had remain'd in the Country) and that, at his Dwelling-place; and if he has none, the Citation is at the Market-croſs of the head Burgh of the Shire, where he had moſt Reſort before his Departing. See *Mackenzie*'s Obſerv. on that Act. But there is no Occaſion for this now, ſince the Citation to the firſt and ſecond Diets were put into one Copy. *Vide* Notes on § 3. in the End.

§ 13. If the Defender compear not, but be abſent when the Purſuer calls his Cauſe againſt him, then either the Libel is proven *inſtanter*, or it needs no Probation, as in Cauſes of Reduction or Exhibition, which bears Certification, and in other

 Cauſes,

REDUCTION.] For tho' ſome of the Reaſons need Probation, yet others are made probable by the Writ, crav'd to be produced, as that it is vitiated in its ſubſtantial Parts, *&c.* which would be verified by Production thereof; but till that be done, the Reaſons libelled are not cognoſc'd; ſo that the Decreet is pronounced, not on account of theſe Reaſons, and is rather a Decreet of Certification, (than of Reduction) for not Production of the Writings, call'd to be reduced; which the Ordinary in the Outer-houſe is impower'd to give. *Vide* the Notes on § 14.

EXHIBITION.] The Purſuer muſt libel on a Concern or Intereſt, and Right in the Papers, or Parchments craved to be exhibited, which he inſtructs, either by the Title of his Summons, or pretends to do it by Clauſes in the Writings call'd for.

Defenders in Decreets in Abſence, either of Reduction or Exhibition, will, upon Production of the Writs, be eaſily repon'd; but this is done by an Action of Reduction, or by a Suſpen-

Cauſes, ſuch as Removings, Letters conform, *&c.* And in theſe Caſes, the Purſuer will obtain Sentence and Decreet therein; but if the Matter need Probation, and be not proven *inſtanter*, then the Purſuer

Suſpenſion at their Inſtance, againſt the Obtainer of theſe Decreets, and in theſe Caſes, they muſt pay Expences and Damages, the firſt Purſuer has, on Account of the Reducer's Abſence, been put to, which the Judge will modify diſcreetly.

REMOVINGS.] The Libel is proven by the Inſtrument of Seaſin, Precept for warning the Tenant to remove, with the Execution thereof; but *ineſt officio judicis*, to try that the Titles be formal, and the Proceſs orderly deduced, when the Defender is not preſent to propone obvious Exceptions.

When the Defender, perſonally apprehended, receiv'd the Copy of the Summons, and the Purſuer, at calling the Summons, refers the Libel to his Oath, if he compears not, he will be holden *pro confeſſo*, and Decreet will be given, for *this* is reckoned a *proving Inſtanter*.

*Summon Witneſſes*,] or Havers of Writings, proper for proving the Libel.

*Warn the Defender.*] By the preſent Practick, the Defender is not warn'd, to hear and ſee Probation led, by Writ or Witneſſes; for, by putting the two Diets into one Summons, he is expreſly warned to that Effect, and when Act for proving is produc'd, he's preſum'd to be hereto warned, *apud acta*.

But when the Purſuer is to prove his Libel, by Oath of the Defender, who was not perſonally apprehended, he muſt, by a Diligence, cite him perſonally, to give Oath, under Certification, if he compear not to depone, that he ſhall be holden as confeſt.

LITISCONTESTATION.] A Term of Law among the *Romans*, ſignifying a Narration of the Thing in Controverſy, made before a Judge by both Parties, in Preſence

ſuer deſires Letters to ſummon Witneſſes, and craves a Term to be aſſigned to him, for the Probation of his Libel, and to warn the Defender to that Day, to hear the Probation led and deduced, (which Aſſig-



ſence of Witneſſes, for thus, in the Time of the ancient *Romans*, Matters were brought into Judgment, as in the Laws of the xii. *Tab.* which *Vinnius* expreſſes in his Comment upon the *Inſt. Tit. de Office. jud.* thus, *ſi is, qui in jus vocatus eſt, neget, quod intenditur, et cum actore paratus ſit contendere, negatio ejus,* Rem debiam, *contentio utriuſque,* Litem, *facit, et a veteri ritu teſtationis in lite inſtituenda, litis conteſtatio dicitur. De quo ritu Vide* Pet. Fab. 2. Semeſtr. 24. Rævard. pro tribun. 11. Cujac. 9. Obſ. 21. *Per litis conteſtationem, poteſtas ſit judici de re cognoſcendi et judicandi: ante nihil cognoſci aut definiri poteſt.* Nov. 53. Cap. 4. tot. Tit. K. ut lit. non cont. non proc. *Eaque ſit recte nunc definietur (nam vetus conteſtatio ſublata eſt, licet nomen manſerit) negotii hinc inde apud judicem facta narratio, continens petitionem actoris, et ad eam rei conventi reſponſionem per contradictionem.* L. Un. C. de lit. Cont. L. *Rem non novam,* 14. § 1. C. de judic. L. 2. C. de jurejur, propt. Calumn.

Now-a-days the Import of the Word is, That both Parties mutually teſtify, that they ſubject themſelves to Judgment, which is done by one's claiming, and the other's refuſing the Claim; and upon that the Judge directs what is to be done, towards putting an End of the (*Lis*) Controverſy or Plea.

*Apud acta.*] In the Language of the *Romans*, *Acta* or *Geſta*, ſignifies Things done in general; thereafter, by a Tranſpoſition, the Word ſignifies Things done by Men in Power and Authority, and which were put into a Writing-publick, or Record; and alſo ſignify'd, whatever was, by a Judge, done, in Relation to publick or private Pleas; and which, by his Order, were put into Writing, and, among Lawyers, was an uſual Way of Speech, as, § *Ult. de Adopt. Servum, Actis intervenientibus filium ſuum nominare.* And

§ 1.

nation of a Term, and the Act extracted thereupon, is called Litiſconteſtation, *parte non comparente*) but if the Defender be compearand, he is cited *apud Acta*, and needs no other Citation.

§ 1. *de Donat. Donationem actis intervenientibus inſinuare.* Now *actis intervenientibus* is much the ſame with *apud acta*, in our Law, when that particular Fact is done in publick Court, and ſet down, or noted in the Court Books.

§ 14. But there are ſome Cauſes, wherein, albeit the Party compear not, yet the Judge in the Outer-houſe, will neither aſſign a Term to prove, nor give Sentence, until he adviſe the Relevancy of the Summons, the Deſire and Reaſons thereof, with the Lords; as for Example, if the Summons be for *proving the Tenor* of an Evident, or if the Purſuer, in a Reduction, ſatisfy

By the Regulations of the Seſſion, in *Act* 16. *Parl.* 1672. there is a Diſtinction of Actions, made with Reſpect to the Competency of the Judge, for ſome can be cognoſc'd in the Outer-houſe, others again cannot be ſo, but muſt be carried from that to the Inner-houſe; and the Cauſes ſaid, in that Act, to be proper for the Inner-houſe, are, *The diſcuſſing of Reaſons of Reduction of heritable Rights, of Lands or Annualrents, Declaratories, or Rights thereof, Probations of Tenors of Writs, deſtroyed or loſt,* Ceſſiones bonorum: All which are to be diſcuſs'd in the Inner-houſe, in Manner ſet down in the ſaid § 5. *viz. Reductions*, after the Production is clos'd, and *Declarators*, and *Ceſſiones bonorum*, after the Dilators are diſcuſs'd in the outer-houſe, and *great Aviſandum* made by the Ordinray there, who is to proceed

no

ſatisfy the Production himſelf; and therefore crave Decreet, becauſe he *verifies* his Reaſon *inſtanter*, or becauſe the Reaſon is negative, and which proves it ſelf; and in thir Caſes, or the like, the Judge ſhould not aſſign a Term, or give Sentence, until he adviſe with the Lords, albeit the Defender be abſent. The like in *Improbations* and *Ceſſionibus bonorum* is obſerved.

no further therein; yet notwithſtanding of this, the Reaſons in Reductions of ſmall Moment, or *triti juris*, are, upon Requeſt of the Purſuer, made to the Lords in the Inner-houſe, remitted to be diſcuſs'd by the Ordinary in the Outer-houſe.

*Ceſſionibus bonorum.* ] *Ceſſio*, in the *Roman* Law, ſignifies an Alienation, or giving away of Goods; but here the Word *Omnium* is to be underſtood, and it is, in our Law, a Diſpoſition, by an inſolvent Debitor, in Favour of his Creditors, of his whole Eſtate moveable, and immoveable, real, and perſonal. This was, by the *Julian* Law, firſt introduc'd among the *Romans*, out of Pity and Commiſeration towards Debitors, who, through Misfortune, became inſolvent, that, by granting this univerſal Right, they might be taken out of Priſon. The 3d. Title of the xlii. Book of Pandicts, is, *De ceſſione bonorum*. In *Scotland*, this Law obtains, and for putting it to rightful Execution, there are ſeveral Acts of *Sederunt*.

§ 15. If the Purſuer compear not, the Day of Compearance being bygone, the Defender, or his Procurator may compear in Judgment, and produce the Copy of the Summons delivered to him, and declare,

That he was ſummoned to a certain Day bygone, in ſuch a Cauſe; and becauſe the Purſuer inſiſts not therein, and that he is ready to anſwer, he may *Proteſt*, that no Proceſs be given againſt him in that Action, until he be of new warned again by the Purſuer, and have his Expences refounded to him.

PROTEST.] *Proteſtation* is a judicial Act, given to the Defender, when the Purſuer does not inſiſt, whereby the Judge aſſoilzies the Defender from that *Inſtance*, and declares he is not obliged to anſwer, until he be ſummoned of new, and the Proteſtation Money paid; and this is introduced, that the Defender may not be forced to an uncertain Attendance, at the Purſuer's Pleaſure. Now this Proteſtation againſt Purſuers in ordinary Actions, is of two Sorts, namely, It may be ſought immediately after the Days of Compearance are paſt, and that by Production of a Copy of the Summons. And next, It is granted, if the Purſuer, when the Cauſe is called by Courſe of the Roll, doth not inſiſt in the ſame Way, as in the Caſe of Advocations. And this laſt, which is call'd a judicial Proteſtation, may be ſought in every Step of the Proceſs, when the Purſuer withdraws from the Plea.

The abſolutely ſecure Way to get free from a Proceſs, in which the Purſuer declines to inſiſt, is this, After the Proteſtation for not inſiſting, is extracted, to raiſe a Summons againſt the Purſuer, warning him to inſiſt, with Certification he ſhou'd never be heard thereafter, as was done by the Lord *Torthorwold* againſt the Earl of *Queensberry*, *July* 1636. Obſerved by *Spotiſwood* Tit. *Summons*, § laſt.

§ 16. Which Proteſtation the Lords admit, and this Proteſtation is granted to the Defender, upon the Copy of the principal Sum-

Summons delivered to him; and if the ſaid principal Summons ſhould be tabulate, the Copy thereof ſhould be tabulate alſo, that he may obtain Proteſtation thereon.

§ 17. And if the ſaid principal Summons requires Continuation, and be continued, Proteſtation is granted to the Defender, upon Production of the Copy of the principal Summons, together with the Act of Continuation; and in this Caſe the Copy needs not be tabulate, becauſe the principal Summons are preſum'd to be tabulate, after Continuation.

Theſe two § § are obſolete, but for the Table, ſee § 103, 104, 105, 106. of this Title, and the Notes there.

§ 18. All principal Summons before the Lords, which ſhould be continued, come in upon 21 Days Warning.

*Vide* the Notes on § 4.

§ 19. When both Purſuer and Defender are compearand, the Purſuer, after the Day of Compearance is paſt, cauſes call his Summons, and if it be continued, cauſes



*Call the Summons.* ] See the Notes on § 7.

After the Seſſion-bell, which rings about 9 in the Morning, the Under-clerks come to their own Table, in the Outer-

call the Act of Continuation, and the Compearance of the Procurators is marked for to ſee the Pieces.

§ 20. Which Pieces, Summons, Execution thereof, with the Purſuer's Title, he ſhould ſend to the Defender's Procurator;

Outer-houſe, and each of them, by Turns, read and call, conform to the fore-mentioned Note, the Names of the Parties; which, with a more audible Voice, is repeated by a Macer, to the End, the Advocates, and their Servants, who ought there to be preſent, may hear the Defender's Name, and the Advocate, whoſe Client he is, or to whom the Copy of the Summons is ſent, may anſwer; and if no Advocate compear for the Defender, the Clerk, under the above-written Note, writes 22. *June*, 1725, (which is the Date of the Calling) *Actor* S. *Alter*, abſent to the next Week's Roll, after which, conform to the Article in the Regulations 1695. the Purſuer cauſes inroll the Summons in the next Week's Roll, in the ſame Way, as if it had been duly return'd, in Manner hereafter declared, to the Effect he may get Act or Decreet; and if, at calling of the Cauſe by Courſe of the Roll, none compear for the Defender, the Judge ordinary pronounces an Act, or decerns in Abſence, and ſigns the Sentence, which, in due Time, may be extracted, and this Decreet will be effectual, if the Defender be perſonally apprehended, and the Libel referred to his Oath; for, by Non compearance, he will be holden as confeſſing. The Decreet will be valid alſo, tho' the Defender be not perſonally apprehended, if the Libel be inſtantly verified by Writs libelled on: But if the Purſuer does not think fit to make Uſe of, or wants theſe Means of Probation, he may offer to prove his Libel by Witneſſes, or by Writs in the Hands of other Perſons, and get Warrant for a Diligence in the ſame Way, as if the Defender were compearing, and diſputing.

But,

tor; and if there be more Defenders than one, or where more Procurators compear, the Proceſs will be ordained to be ſeen in the

But, if, either at Calling by the Clerk, after the Seſſion-bell, or before the Ordinary, by the Roll, an Advocate compears, and craves to be marked for the Defender, and to ſee the Proceſs: The Clerk in the firſt Caſe, and Judge in the Second, will allow him to ſee it, and the Clerk marks on the Margin, under the foreſaid Note, or Roll for the Calling, 10. *June*, 1725. *Actor* S. *Alter* T. to ſee; and this Marking by the Clerks, as well when the Party is abſent, as when he is preſent, is ſaid to be a Calling and Marking thereof; and if there be many Advocates for the Defender, or many Defenders, who have different Advocates, their Names are marked, and the Proceſs ordained to be ſeen, in the Hand of the eldeſt Advocate, or of him who compears for the greateſt Number of Defenders, to whom it is recommended, that he acquaint the Reſt, which is likewiſe marked with the Calling.

It is to be obſerved, That at the firſt Calling by the Clerk, it is not uſual to have an Ordinary preſent; and that, if an Advocate's Servant compear, he may crave to have his Maſter marked as the Defender's Advocate, and to ſee the Summons, and the Clerk will mark that Advocate's Name.

The Defender's being denounced, and regiſtrate to the Horn, or his Abſence out of the Kingdom, tho' his Advocate want a Proxy, will not debar him to ſee the Proceſs.

This Calling hinders the Summons from preſcriving, as has been told in the Notes on § 8. which ſee.

After the Calling by the Clerk, the Purſuer's Procurator writes an Out-giving upon the back Part of the Summons, thus, 14. June, 1725. *Given out to* T. *to ſee this Summons, and one Execution by me* S. and ſo ſigns it. And if the Purſuer's Title be a Bond, or Diſpoſition, or any other Writs, one or moe, the ſame ought to be given out, and mentioned in the Out-giving, and this is called the *Proceſs*; and the different Pieces thereof, which, without any Receipt, are delivered to the Defender's Advocate, or to his chief Servant, who

the Houſe of any one of their Advocates, whom the Judge ſhall appoint for that Effect; and they may keep and ſee the ſame for

who is allow'd to keep the ſame ſix Days, after which he reſtores the Proceſs with a Return, thus, 21. June, 1725. *Seen and returned by me* T.

Where Proceſſes are kept up unreturn'd by the Defender's Advocate longer than the Time allow'd, it is ſtatuted by the Regulations 1672. That, upon Complaint to the Lords, the Ordinary on the Bills ſhall call the Advocate, and fine him in 3 Lib. *Scots*, for each Day he has kept the Proceſs, from the Time it was requir'd perſonally, or at his Chamber, by way of Notar's Inſtrument, until the Day of the Complaint, and 6 Lib. for every Day the Proceſs is detain'd after preſenting the Complaint; and one of the Macers are ordain'd to exact the Fine, under Deprivation, and warranted to exclude the Advocate out of the Houſe, till he make Payment to the Ordinary on the Bills, whereof the one Part goes to the Poor's Box, and the other to the Purſuer, if he deſire, otherwiſe the whole is put into the Box. And when many Defenders are call'd, and for them ſeveral Advocates compear, the Advocate, who, for the Party principally concern'd, taketh up the Proceſs to ſee, (and in whoſe Hands it is appointed to be ſeen by the other Advocates) ſhall be allowed, for ſeeing thereof, only four Days; in which Time, if he does not return the Proceſs, he incurs the Penalties above-mentioned: And the Proceſs, when return'd, ſhall, in the Clerk's Hands, remain ſix Days before it be call'd; in which Time, any compearing for the other Defenders may ſee the Proceſs, and upon it write and ſubſcribe for whom he compears, and, upon an Amand, may, for 24 Hours, borrow the Proceſs from the Clerk; and in caſe he do not, in the Time foreſaid, reproduce the Proceſs, the like Execution is to be uſed therefore, as in the former Caſe. Likewiſe, if any Advocate in the ſaid Space of ſix Days, be deſirous to ſee the Proceſs, or a Party having Intereſt, but not call'd, upon Production of the Party's Intereſt in the Clerk's Hands,

for the Space of 48 Hours, and thereafter muſt give them back again to the Purſuer's Procurator, who, when he has receiv'd them

Hands, he will be allowed to ſee in Manner foreſaid; and if the Advocate neglect to ſee in Manner above-written, he ſhall not be heard when the Cauſe is call'd, whether he compear for a Party call'd, or for his Intereſt; but for getting Proceſſes return'd in due Time, the preſent Practice is, That upon a Complaint preſented to the Ordinary on the Bills by the Purſuer's Advocate, the Advocate's Servant to whom the Proceſs was given, may be ordered by the ſame Ordinary to be impriſoned, which is put in Execution by a Macer, and this Party complain'd upon is apprehended and impriſoned, till the Proceſs be returned of its due Date, and the Macer get an Half-crown from the Party againſt whom the Caption is put in Execution, and may detain him till he be paid thereof.

Theſe Out-givings and Returns are ſign'd by the Advocates themſelves; for the Lords have declared, That if the Servant of any Advocate ſhall preſume to adhibite in Writ his Maſter's Subſcription to a Petition, or to the Out-giving or Return of a Proceſs, they ſhall be proceeded againſt, and puniſhed as Falſifiers and Forgers of Writs. *July* laſt, 1678.

Tho' the Out-giving bear, That the Proceſs is given to an Advocate, yet the Caption for not Returning is againſt his Servant, becauſe generally Proceſſes are delivered to the Advocate's chief Servants; and it has been practiſed, That upon Complaint by the Advocate, whoſe Servant was under this kind of Caption for not returning a Proceſs, the Ordinary granted Warrant for apprehending the Agent, to whom the Advocate's Servant gave the Proceſs, and till it was produc'd both were kept in Cuſtody.

The Summons being returned, the Purſuer's Advocate, or his Servant, on a *Saturday* thereafter, carries it to the Keeper of the Book of Inrollment for the Outer-houſe, who places it in the Roll of ordinary Actions, among the Cauſes inrolled that Day, according to the Date of the Return, in

Manner

them back again, may cauſe call the ſame again for the Reaſoning of the Cauſe.

§ 21.

Manner preſcrib'd in the *Act of Regulations*, 1672. the Keeper of the Rolls being for this End obliged to attend in the Seſſion-houſe every *Saturday* Afternoon, from Two to Four a Clock.

When the Cauſe is call'd before the Ordinary, according to the Courſe of the Roll, the Purſuer's Procurator repeats his Libel, and if none compear, he may get a Decreet, which, nevertheleſs, is in Abſence, tho' the Proceſs was return'd by an Advocate.

It happens ſometimes that the Defender's Advocate compears, and the Purſuer is abſent; in which Caſe, the Defender's Procurator may crave, that the Summons be deleted and ſcor'd out of the Roll, which makes the Inrollment void: But this is not ſecure, for the Purſuer may of new inroll the Cauſe, and ſometimes he lets this Inrollment fall, of Deſign to bring it in before another Ordinary, and in order thereto, he cauſes make two or more Inrollments in the ſame Cauſe; but this fraudulent Practice will have no Effect, if the Defender's Advocate found his Exception upon the Act of *Sederunt*, 8. *November*, 1695. whereby the Keepers of the Rolls, both of the Inner and Outer-houſe, are prohibited to inroll any Cauſe in a Week's Roll but once, and are appointed to mark the firſt Inrollment upon the Back of the Proceſs, for his greater Security. And the Lords have declared, That the ſcoring of any Cauſe out of a Roll, ſhall have the ſame Effect, as if they were ſcor'd out of all other Week's Rolls, inhibiting ſtrictly the Keepers of the Rolls of both Inner and Outer-houſe, to inroll *de novo* the Cauſes ſo ſcored, except in Courſe as they ſhall be given up, and that after all the Cauſes that were inrolled before the ſame; and it is competent to the Defender, and any other of the Lieges, to object againſt Proceſſes otherwiſe inrolled: But in caſe the Purſuer do not inſiſt upon the firſt Inrollment, it were better for the Defender to crave a Proteſtation againſt him for not inſiſting, which will be granted without any other Solemnity, than the demanding thereof at calling the Cauſe. See § 15. and the Notes.

§ 21. In the Reaſoning of the Cauſe, the Defender defends by proponing of the *Exception*, which is an Anſwer to elide the Libel. The Anſwer that the Purſuer makes

EXCEPTION.] This Word is from the Law of the *Romans*, and in their Language, *Extipere* ſignifies to *Defend*, and ſo an *Exception* is called a *Defence*; or it may be ſaid to be taken from the Stile or *Formula* of the Summons, which was in Uſe to be given with a *Niſi*, unleſs, *ſi non*, if the other Party do not, *extra quamſi*, *without the Defender do this or that*, &c. And the Emperor *Juſtinian*, in the Title of his *Inſtitutes*, which treats of *Exceptions*, at the Beginning ſays, *That Exceptions are devis'd to defend, and are introduc'd for the ſake of thoſe againſt whom the Action is raiſed, becauſe* (continues he) *it often happens, that tho' the Purſuit be according to Law, yet it is unjuſt againſt him who is called to it.*

A Defender, who comes prepared for his Defence, either denies that the Purſuer has Right and Title in Law to purſue, or, tho' he finds the Action competent, yet propounds ſomething that either removes it wholly, or diminiſhes the Claim; and *this*, in a proper Senſe, and *not the Inficiation*, or total Denial, is an *Exception*: But, generally ſpeaking, every Thing which one alledges for defending himſelf, and for eliding the Action, is call'd an *Exception*.

In our Practice there is great Diſpute, If or not an Alledgance is to be propon'd by way of Exception, or remitted to be proſecuted by way of Action? The Reaſon of Difference proceeds from the Form of Procedure; for ſome Nullities are received ſummarly, and may be proponed by way of Exception, others again need Proceſs of Reduction and Declarator, which ariſes from the Circumſtances of the Proceſs; as when, in defending the Right quarrelled *incidenter*, other Perſons, not call'd to the principal Action, are concerned, or the Proceſs will, if that Alledgance be inſtantly receiv'd, expatiate into another Form, or Kind of Action, of higher and more weighty Conſequence than the principal

makes to the *Exception*, is called a *Reply*, *Replicatio*, and ſo forward, the Purſuer and Defender mutually Anſwers *Replies*, *Duplies*, *Triplies*, *Quadruplies*, &c.

principal Proceſs, or that this will be retarded, the Queſtion being only a *Prejudicium*, or Preparatory, and which, tho' ſuſtain'd, will not determine the principal Cauſe, as in the forecited Deciſion in § 8. the Biſhop of *Dumblain* againſt Vaſſals, *March* 8. 1626. with many others of this Kind; all which is referr'd to the Diſcretion of the Judges, if the Matter be not already regulated by a poſitive Law, or ſettled Practick.

*REPLICATIO.*] It ſometimes falls out, That the Exception which at firſt View ſeem'd juſt, yet is wrong and hurtful; ſo that to help the Purſuer, another Alledgance is wanting, which is called a *Reply*, becauſe by it the Exception is, *as it were*, folded back, and opened up or reſolved; *Inſt. de Replicationibus*, where you'll find a pat Example.

Again, it may happen, that the Reply, which at firſt Sight appear'd to be according to Law, is hurtful to the Defender, for whoſe Aid another Defence muſt be proponed, and this is called a *Duply*, or Duplicatiou. *Ibid.* § 1.

Further, if that *Duply* have the like Appearance with theſe above, the Purſuer is, for eliding thereof, allow'd another Alledgance, which is called a *Triply*, and ſo forth, the Proceſs extends to *Quadruply*, *Quintuply*, *Sextuply*, &c. according to the various Circumſtances of the Plea, and of the Parties. But, for reſtraining the Number of unneceſſary Exceptions, and that there may be an End of Diſpute, the Judge, according to the ſettled Form of Procedure in the Court, declares when the Parties are to ſtop.

§. 22. In the Order of proponing Exceptions, the *Dilators* ſhould be proponed before the *Peremptors*.

§ 23.

§ 23. In Dilator Exceptions, the *Declinator* againſt the Judge ſhould be firſt proponed; for, if the Defender ſhall propone any other Dilator, and crave the Judge's Anſwer thereupon, he will not be heard

A *Defence* is either *dilatory* or *Peremptory*; a *Dilatory* delays and defers the Action, but does not take the ſame away; a *peremptory Exception* extinguiſhes the Action, and operates a perpetual Abſolvitor in favour of the Defender. Dilatory Defences are divided into *Declinators* and *Dilators, ſpecially ſo called.*

In proponing Defences, the Order ſet forth in this ought to be obſerved; but if the Cauſe be called by Anticipation out of its due Place in the Roll, as was ſaid in Notes on § 20. the Purſuer's Advocate may refuſe to inſiſt, or the Defender's Advocate to Anſwer, and the Clerks are prohibited to write upon any ſuch Proceſs, or to extract any Act or Decreet thereupon.

The common Declinator is Incompetency, the Grounds whereof are ſet down in the Title of Spotiſwood's *Form of Proceſs*, which treats of *Advocations*; only it is to be obſerved, That the Lords of Seſſion being the ſupreme Judges in all civil Matters, their Juriſdiction, as to the Territory, is univerſal over the whole Kingdom, and yet there are ſeveral Cauſes whereof they are not Judges competent; in the firſt Inſtance, as Cauſes Conſiſtorial, which muſt be purſu'd before the Commiſſaries, Judges in the Eccleſiaſtick Court; and Cauſes Maritim, cognoſcible only by the Judge of the Admirality; and Criminal Proceſs, which belong to the Juriſdiction of the Lords of Juſticiary. As alſo, by the Act of Parliament 1672. concerning the Regulations of Judicatories, by *Act* 9. *Parl.* 1663. and *Act* 15. *Parl.* 1672. concerning *Regulations*, § 10. The Lords are diſcharged to grant Advocations from Judges competent for Sums within 200 Merks, or for any Cauſe whereunto the inferior Judges are expreſly appointed; and no Summons for ſuch Cauſes muſt be raiſed before the Lords, except in ſingular Caſes mentioned in the Act:

heard thereafter to uſe a Declinator of the Judge, *Quia primus actus Judicii eſt Judicis approbatorius.* The common Exception Declinator againſt the Judge is, *Exceptio incompetentiæ Judicis*, That the Judge

Act: Nevertheleſs, the Lords do paſs Bills of Advocation from the Commiſſars, upon pregnant Reaſons of Iniquity, when inſtructed; and tho' they do not Advocate the Cauſe to themſelves, yet they will remit it, with Inſtructions and Directions to the Judge how to proceed. And likewiſe, albeit the Cauſe be within 200 Merks, yet if the Defenders live in ſeveral Juriſdictions, the Lords will ſuſtain the Proceſs: And Cauſes belonging to the Members of the College of Juſtice are excepted; as alſo, Actions for Sums, tho' under 200 Merks, due to Merchants, Cooks, Vintners, and others within Burgh, for Furniture taken off from them, by Perſons living without their Shire.

The Lords of Seſſion are not Judges competent to the ſerving of Brieves taken forth of the Chancellary, tho' they cognoſce upon Advocations of theſe Brieves; and when the Reaſons of Advocation are ſuſtain'd, they Advocate the Cauſe to their own Macers, who are the ſupreme Judges to all Brieves: And if the Cauſe be intricate, they will either ordain the Brieves to be ſerv'd in their own Preſence, that they may be at Hand to direct the Macers, or otherwiſe they will join ſome of their own Number as Aſſeſſors to ſit with the Macers. And tho' the Lords of Seſſion are not Judges competent in Riots and Crimes, yet they will cognoſce on Wrongs done to their own Members, or by them, in Matters relating to their Employment, and likewiſe in Contempts done to their own Authority, and puniſh the Delinquents by Fine, Impriſonment, or other arbitrary Puniſhment: And tho' in the Caſes above-mentioned, the Lords of Seſſion be not Judges competent in the firſt Inſtance, yet they may judge them in the ſecond, by cognoſcing upon the Decreets pronounced by theſe Judges, in Suſpenſions and Reductions thereof, to which the Lords alone are Judges compe-

Judge is not competent to the Matter controverted, and belongs not to his Juriſdiction; as for Example, The Judge is Eccleſiaſtical, and the Matter Civil, and purſued before him; or the Defender dwells in the



competent. But they do not ſuſpend or reduce Decreets of the Juſticiary, tho' they did both with reſpect to Decreets of the Privy Council, pronounced in Matters of Civil Rights, as Aliments, or the like; concerning which, Competitions fall out before the Seſſion.

If the Declinator be perſonal againſt the Judge, and ſuſtain'd, the next Ordinary in Courſe, who is Ordinary on the Bills, is call'd out to judge that particular Cauſe, and when it is over, he returns to the Inner-houſe; but where there is Ground for ſuch Exceptions, the Ordinary generally does decline himſelf, which takes off all Occaſion of Diſpute on that Head.

The Declinatories being diſcuſſed, (or where there is no Occaſion for them) the other Dilatories are to be propon'd in this Order; *Firſt*, Againſt the Form of Proceſs, as that there are more Defenders than Six, contrary to the 21. Article of the *Regulations*, 1695. or that the Summons has not been legally called or inrolled, or that it is not tabulated, or that the Defender has not been legally ſummoned, the not tabulating the Summons, delays till next Calling, before which the Summons may be duly tabulated. As to all which it is to be noticed, that the Purſuer muſt procure his Cauſe to be call'd within that Week, for unleſs Decreet or Act be put up in the Minute-book, or *Aviſandum* made, or ſome Interlocutor pronounc'd by that Ordinary, the Cauſe will not be fixed before him; and the Purſuer, by this Negligence, will loſe the Benefit of that Inrollment, and be forced to inroll of new again, except the Ordinary mark a Continuation of the Cauſe, and grant Warrant for inrolling thereof in the next Week's Roll, which is only done in Competition, and ſome other Cauſes mentioned in the *Regulations* 1672.

Sheriffdom of *Fife*, and therefore the Sheriff of *Lothian* is not Judge competent to him.

§ 24.

As to the *Inrollment*, there is another Dilator; when there are many Defenders in one Summons, a Roll of their Names muſt be put upon the Outer-houſe Wall, that their Procurators may be certiorate when their Clients are called, and to be ready: This ſhould be put up with the Roll of that Week in which the Cauſe is to be called, and muſt be two Days on the Wall before the Defenders be obliged to anſwer. Nevertheleſs, this is not needful (in all Cauſes, where many Defenders are called, as) in Summons of Mails and Duties, in Poindings of the Ground againſt Tenants, or where the Cauſe is againſt many Perſons join'd in one Relation, as are Members of Societies, Incorporations, and other collective Bodies, or Creditors of one Debitor, who may be generally deſign'd, as Tenants of particular Lands, Baronies, Lordſhips, Earldoms, or Tenants to ſuch a Maſter, in ſuch a Pariſh, or Sheriffdom, or the like.

If this Dilator take Effect, ſo as the Cauſe cannot be call'd that Week, the Purſuer's Procurators ought to crave, that it may be continued in the next Week's Roll, and to inroll the ſame accordingly.

There are ſome Cauſes, which, after they are ſeen and returned, need not bide the Courſe of the Roll, as the King's Cauſes, which may be call'd upon either of the two next *Sederunt* Days, after the Proceſs is returned; failzieing of which, there muſt be Fifteen Days Advertiſement given to the Defender's Advocate, that they may acquaint their Clients to be preſent; but Cauſes purſued at the Inſtance of the King's Donator have not this Privilege, Actions of *Bonorum*, Transferrings and Sales are call'd by way of Act, the firſt Act Day after they are ſeen and returned; and Actions of Aliment, or concerning Fines and Forfeitures, reſcinded by Act of Parliament ſince the Revolution, and for Miniſters Stipends, School-maſters Fees, College Rents, and all Sales (when the Purſuer inſiſts to force the Creditors to produce their

§. 24. This laſt Exception of Incompetency for the Place or Sheriffdom, is not



their Intereſts, and to depone upon the Verity of their Debts, in order to be ranked) may be inrolled in the Roll of the Week, immediately following their being ſeen and returned, which is called the *Regulation Roll*.

If the Exception be againſt the Summons, as againſt the Form and Stile of the Libelling, and the like, which are not *in ſubſtantialibus*, the Purſuer is at the Bar allow'd to mend the ſame; and when ſuch Amendments are made, the Defender is not bound inſtantly to anſwer the Summons, but, upon craving a Sight of the Proceſs of new, will be allow'd to ſee the ſame in the Clerk's Hands, and ordain'd to be ready at next Calling.

The next Dilator is againſt the *Purſuer's Perſon, quod non habet perſonam ſtandi in judicio*, becauſe he is a *Minor indefenſus*, and the Proceſs rais'd without Concourſe of a Tutor or Curator; in which Caſe, the Ordinary will name the Procurator at the Bar, or any other Perſon condeſcended on, to be *Curator. ad hanc litem*, and upon Acceptance, authoriſe them to concur in the Proceſs; upon which, the Defender will be compelled to anſwer the Libel.

Another dilator Defence, ariſing from the Purſuer's Perſon, is, That he ſtands *denounced* at the head Burgh of the Sheriffdom, Stewartry, or Regality wherein he lives, and *regiſtrated at the Horn*, and therefore *is debarred ab agendo*: This Defence muſt be inſtantly verified, by producing the Letters of Horning and Execution regiſtrated, which the Purſuer will be allow'd to ſee, and to object againſt the Validity thereof; and if he be legally denounced and regiſtrated, as ſaid is, the Purſuer muſt relax himſelf in common Form, and Letters of Relaxation are expede, either by themſelves, to the Effect only that the Party may have *perſonam ſtandi in judicio*, or the Clauſe of Relaxation is adjected to Letters of Suſpenſion, and expede therewith. Denunciations to the Horn, as above, and regiſtrated, will debar the Defender from proponing his Defences, as well as it does hinder the Purſuer to inſiſt in the Proceſs, which is

obviated

againſt the Lords of Seſſion, for they are univerſal Judges to the whole Kingdom.

obviated by this Purſuer's aſſigning the Proceſs, and inſiſting in the Aſſigney's Name; but Denunciation at the Market Croſs of *Edinburgh*, when the Purſuer or Defender does not reſide within the Shire, ſtops none *ab agendo aut defendendo.*

The next Exception Dilator is againſt the Purſuer's Title, and is *contra litis ingreſſum*, whereby the Defender alledges, That there is not a ſufficient Title produced, or that the Titles libelled upon have not been ſeen, and many others, according to the Nature of the Summons and Action.

§ 25. *Exceptio ſuſpicionis* may be propon'd againſt the Lords of Seſſion, and all other Judges whatſomever; in which Caſe, the

*Suſpicion* is an Act of the Mind, by which we are drawn into a Doubting, and become fearful of Things or Perſons, that my bring Hurt to us. Example, *Suſpicion of a Debitor's flying*, to defraud Creditors, or to avoid Priſon; *of a Tutor*, who unfaithfully manages, and misbehaves in his Office; *of a Judge*, that he'll wilfully determine unjuſtly; *for a Magiſtrate*, who, becoming unmindful of his Oath and Duty, does Hurt, by judging iniquiouſly; may warrantably be declin'd. *L.* 14. *& ult. C. de Jud. Novel.* 82. *&* 53. Suſpicion of one's being guilty of a publick Crime, which, when againſt the State, makes Way for Torture.

*Suſpicion with reſpect to a Judge*, is ſuch a Quality or Circumſtance, from which a good Man may gather, that the Judge will do againſt Law and Equity. There are many Cauſes of this Suſpicion; I ſhall recount a few. One cannot, without Suſpicion of Partiality, be Judge in a Cauſe wherein he was employ'd as Advocate, *L.* 17. *ff. de Juriſd. L. fin. C. de Aſſeſſor. Ne* (ſays the Emperor) *adfectionis ſuæ Advocationis memor, incorrupti Judicis nomen præferre non poſſit.*

But

the Judge ſhould purge himſelf of partial Counſel.

But in *Scotland* this is not a relevant Cauſe of Declinator. If the Judge be Vaſſal, or Beneficiary to one of the Parties; if he is an open and declared Enemy; if he has expreſt a partial Favour and Kindneſs; and generally the Cauſes ſuſtained to reject a Witneſs, are relevant againſt a Judge, and even tho' they be of leſſer Degree; for it is eaſier to find another Judge, than ſometimes another Witneſs. *Gail. Lib.* 1. *Obſ.* 33. *N.* 10. If the Judge *fovet conſimilem cauſam, i. e.* hath the like Proceſs depending in another Judicatory; for it is not expected that the Judge will determine the Plea before himſelf, otherwiſe than he wiſhes his own to be decided. This Exception of Suſpicion muſt be proponed, with the other Declinators of the Judge, except it be newly emerg'd, or has lately come to Knowledge.

## § 26. No Lords of Seſſion ſhould judge in any Cauſe pertaining to their Father,



Son,

Tho' no inferior Judges can decide in Cauſes of their Couſin-germans, and conſequently of Relations in a nearer Degree of either Affinity or Conſanguinity; yet the Lords of Seſſion, in whom greater Truſt is repoſed, are declin'd only in Cauſes belonging to their Blood-Friends above-named, and were admitted to judge the Cauſes of all Perſons join'd to them in Alliance, till it was ſtatuted by the 13. *Act, Parl.* 1681. *That no Senator of the College of Juſtice, Ordinary or Extraordinary, ſhall ſit and vote in Cauſes, where the Purſuer or Defender is either Father, Brother, or Son-in-law to him, or to ſit and vote in any Cauſe where he is Uncle or Nephew to the Purſuer or Defender.* And that Act extends the Law to the Lords of Privy Council, Exchequer, to the Commiſſioners of Juſticiary, and to all other Judges in *Scotland.*

And this Act, by a reaſonable Interpretation, ought to be extended to Cauſes proſecuted in the Names of Confidents

and

Son, or Brother, but may be declin'd therein. *King* James VI. *Parl.* 14. *Cap.* 212.

and Truſtees, to the Behoof of thoſe mentioned in the Act. See *Mackenzie*'s Obſervations on the ſaid Act.

§ 27. Next the Declinator of the Judge, the Defender ſhould propone this Exception againſt the Purſuer's Perſon, *Quod non habeat perſonam ſtandi in judicio*, becauſe he is a Rebel, and at the King's Horn, or excommunicated.

See the Notes on § § 22, 23, 24.

EXCOMMUNICATED.] The Acts for denouncing Perſons excommunicated, and generally all Acts enjoining Civil Pains upon Sentence of Excommunication, are reſcinded by *Act* 28. *Parl.* in *July* 1690.

§ 28. Then he ſhould propone his Exception againſt the Title of the Purſuer, *contra litis ingreſſum*, alledging the Purſuer's Title to be null of the Law, for ſuch and ſuch Reaſons.

§ 29. Then his Exceptions againſt the Libel, *viz.* againſt the Relevancy thereof.

§ 30. If the Defender propone a Dilator Exception, and get the Lords Anſwer or Interlocutor thereon, repelling the ſame, at the next calling of the Cauſe, if the Defender propone moe Dilators, the Purſuer may urge him to propone all the Dilators he has

has in the ſaid Cauſe, now at the ſecond Calling; becauſe he has gotten already the Lords Anſwer and Interlocutor, in a Dilator proponed before.

By Act of *Sederunt*, *November* 20. 1711. § 16. The Lords, for preventing unneceſſary Delays, appoint all dilatory Defences to be proponed at one Time; and theſe being diſcuſſed, the peremptory Defences, or other Alledgances, are to be all proponed at once, at leaſt before any Report or Application to the Lords in Preſence, with Certification, That an Alledgance not ſo proponed ſhall not be heard thereafter, unleſs the Proponer pay a Mulct to the other Party for his Expences; to be modified as there ſhall be Cauſe, except the Alledgance be recently come to Knowledge, which ſhall be received, provided that Circumſtance be inſtructed by Oath, and no otherwiſe.

§ 31. Exceptions Dilator, as they are proponed, ſhould be inſtantly verified, and no Term aſſign'd for proving thereof.

Such dilatory Exceptions as cannot be immediately proven, are repelled *in eo ſtatu Proceſſus*, but will be reſerved to be inſiſted in as a Reaſon of Reduction, as was decided in the Caſe; The Biſhop of *Dumblane* againſt his Vaſſals, *March* 8. 1626. and in many others, which is the preſent Practice, except they be propon'd as *peremptoriæ Cauſæ*, *i. e.* the Defender ventures the Verity of the Cauſe upon the Event thereof; and both Parties conſent, that they may have the Effect of Peremptories.

§ 32. All Dilators ſhould be propon'd before Peremptors; and if the Defender propone a Peremptor, he will not be heard thereafter to propone a Dilator.



The Reaſon is given in § 23.

§ 33. An Exception is called *Dilator, Dilatoria, a Differendo*, becauſe it delays and defers the Action, and does not take the ſame away, *differt non aufert. Exception peremptor*, is called *Peremptoria, a Perimendo, quia Cauſam perimit, & Prorſus extinguit.*

A peremptory Exception relevant and proven, extinguiſhes the Action, and operates a perpetual Abſolvitory in Favour of the Defender.

§ 34. To an Exception peremptor relevant, the Purſuer may make a relevant Reply, and take away the ſaid Action, and the Defender may meet the Reply with a relevant Duply, for to elide the ſame; and ſo a Term will be aſſign'd to the Parties for Probation, either to the Purſuer for proving his Libel, if the Exception be repelled ſimply in reſpect of the Libel, or of the Libel and Reply, if the Exceptions be not repelled ſimply; but in reſpect of the Reply, or otherwiſe, aſſigns a Term to the Defender for proving of his Exception, if the ſame be admitted; or otherwiſe aſſigns a Term both to the Purſuer and Defender, *viz.* to the Purſuer to prove his Libel and Reply, in reſpect whereof, an Exception proponed by the Defender was repelled; and

and to the Defender, to prove his Exception, which was not repelled, but admitted: Which Aſſignation of a Term to either of the Parties, for Probation, makes Litiſconteſtation in the Cauſe, *Parte comparente.*

§ 35. After Litiſconteſtation, the Defender will not be heard to propone any new Exception, except that which is *de novo emergens, & nuper perveniens ad notitiam*; which the Defender muſt verify *inſtanter*, by Writ, or by Oath of Party.

See the Act of *Sederunt*, *November* 20. 1711. § 16. in the End, as in the Note on § 30. of this Title.

The Cauſe is not properly ſaid to be with us *Litiſconteſted*, till an Act upon the Diſpute be extracted.

In the Caſe *Watſon* againſt *Brown*, *January* 6. 1711. A Purſuer of an Action upon the paſſive Titles, was, after an Act extracted for proving one of the Titles libelled, allow'd to return to the firſt Ordinary, and to propone and ſeek Probation of the other paſſive Titles libelled, but formerly not inſiſted in.

§ 36. There are three Kinds of Probation, *to wit*, by Oath of Party, or by his judicial Confeſſion, by Writ, and by Witneſſes.

§ 37. The Parties Oath is his Oath of Verity, which, when it is uſed againſt him, he ſhould be ſummoned thereto, *to wit*, to give his Oath, with Certification he ſhall

ſhall be holden as confeſt therein. And at the Day of Compearance, the Matter is called by the Act of Proceſs; and if the ſaid Party be ſummoned, perſonally apprehended by a Meſſenger of Arms, he will be holden as confeſt, except his Procurator take a Day to produce him, to give his Oath; which Day being come, and the Act thereof extracted, the Party will be holden as confeſt, if he compear not then; and if he compear, the ſaid Party is receiv'd, and ſworn judicially to tell the Verity, and comes Afternoon to depone: Which

*Perſonally apprehended.* ] A Defender will not be holden as confeſt, upon an Execution, bearing, That the Meſſenger came to the Defender's Houſe, and that the Meſſenger knew that he was within, and that he was forcibly kept out by the Defender's Wife, and that thereupon the Meſſenger proteſted, that the Defender might be holden as perſonally apprehended. At adviſing this Caſe, *July* 5. 1670. ſome of the Lords were of Opinion, that the Defender ſhould be holden as confeſt, the Meſſenger proving that he was within. Others thought, That the Execution would have been ſuſtain'd, if it had proported, that the Meſſenger and Witneſſes had given a particular Evidence of their Knowledge of the Defender's being within. A third Opinion was, That the Defender ſhould be holden as confeſt, unleſs he could *inſtruct* he was *alibi*, in Regard of his Contumacy. But in the End it was reſolved, That Holding as confeſt, being a ſolemn and important Certification, peculiar to *Scotland*, that the Aſſertion of the Meſſenger, and this Execution ſhould not be ſufficient, nor put the Defender to *alledge alibi*, but that there ſhould be a Warrant to cite him at the Market-croſs of the head Burgh of the Shire where

Which Depoſition the Party ſubſcribes himſelf, if he can write, and otherwiſe the Lord Examinator ſubſcribes the ſaid Depoſition.

where the Defender dwelt, with Certification he ſhould be holden as confeſt.

*Subſcribes.* ] The Judge ſigns with the Party, who, if he cannot write, the Depoſition mentions *that.*

§ 38. There is an Oath of Verity, which is called a *qualified Oath*, which Qualification of Oath, the Party who uſes the ſame, ſhould give in, and ſhew to the contrar Party, to the Effect the contrar Party may adviſe, if he will receive the ſaid

*Qualified Oath.* ] The ſhewing to the other Party, the Quality which a Party, who is to depone, has a Mind to adject, was ordered by an Act of Sederunt, *December* 7. 1613. and is not now in Uſe.

When the Advocate takes a Day to produce his Client to depone, he ſhould proteſt for a qualified Oath, and the other Advocate ſhould proteſt to the Contrary; both which Proteſtations are admitted by the Judge, and marked by the Clerk.

A qualified Oath is that which contains Circumſtances, or Conditions and Qualities adjected to the Matter of Fact referred to Oath; as when a Defender ſwears, That the Ground of Debt was the Price of Goods, which were either, 1. Not at all, or not fully delivered. And 2. That the Price was duly paid; or when, to the Confeſſion of Debt, he adjects, That it was paid to the Purſuer's Order, or that the Purſuer is owing to the Deponent an equivalent Sum, or the like.

The

ſaid qualified Oath of his Party; which, if the contrar Party be pleaſed with the ſaid Party's qualified Oath, is received; or otherwiſe, if the contrar Party be not pleaſed therewith, he may reſile from the Party's

The Qualities of an Oath, are either intrinſick or extrinſick. The Firſt are thoſe which are naturally and neceſſarily inherent in the Thing, or flowing from it, as in the firſt Example. The Extrinſick are theſe Qualities which have not a natural Connection with, or Dependance upon the Matter of the Oath, but is extraneous to it, as in the other two, and laſt Examples; and therefore they reſolve into a Defence, and muſt be proven otherwiſe than by that Party's Oath.

The Lord Examinator cognoſces upon the Quality, by admitting or rejecting, as he ſees Reaſon for it. Act of *Sederunt*, *January* 4. 1678. But does not determine, if the Quality be intrinſick or extrinſick, tho' he orders the ingroſſing into the Oath, every Quality that has any Affinity to the Subject-matter.

When in the Cauſe, an Act of Litiſconteſtation is extracted, the Manner of Probation is ſo far determined, that if the Purſuer has referr'd to the Defender's Oath the Proof of his Claim, he cannot reſile, and take himſelf to prove it by Witneſſes; for he has made his Election, and is thereby circumſcribed. On the other Hand, tho' the Matter was undertaken to be proven by Witneſſes, and no Diligence uſed or executed, or tho' the Witneſſes be ready at the Bar to make Faith, the Point to be proven by them can be referred to the Oath of Verity of the other Party himſelf, and the Witneſſes will be diſmiſs'd. *See* Spotſ. *Tit.* Probation, § 22. And if the one Party offer to prove by Oath or Writing of the other, he muſt, at the Term aſſign'd, chooſe one of theſe Alternatives, and he cannot be compelled to make his Election ſooner, but if he once make his Election, *v. g.* of Writ, he will not be allowed the Oath of

ty's Oath, and prove otherwiſe, as he will be ſerv'd.

§ 39. The Party that intends to uſe his qualified Oath, commonly proteſts for the ſame, the Time of Litiſconteſtation.

of the other Party. Spotſ. *Tit.* Probation, § 25. Dury, *P.* 871. *Lady* Weſtmuirland *againſt Lady* Home.

The ſame Form holds with Reſpect to the Purſuer, when the Defender, for Proof of his Exception, takes himſelf to the Purſuer's Oath.

The Party deferring to the Oath of the other, muſt, if required, firſt give his own Oath, *de Calumnia*, *L.* 34. § 4. *de Jurejurando*, *L.* 32. *Cod. de fidei com.* & *paſſim Dd.*

My Lord *Dury* obſerves, *June* 16. 1629. That, at diſcuſſing a Suſpenſion of a Decreet againſt a Defender, who, after a Term was taken to produce him to depone, was holden as confeſſed, the Suſpender having deferred to the Charger's own Oath, the Verity of the Purſuit and Charge; the Lords found the Charger could not be compelled to give Oath therein, yea, not *cum onere Expenſarum*, which was offered. The *Ratio decidendi* was, That the Lords would not looſe a Decreet, in which a Party once compearing by a Proctor, was holden as confeſt: And the Lawyers are unanimous in the Opinion, That this Delation is favourable; yet they give Counſel to offer it before Litiſconteſtation. *Ant. Fab. Concil. Lib.* 9. *Tit.* 22. *Art.* 8. *Jure* Saxonico, *poſt præſtitam Guarandam*, & *Litiſconteſtationem*, *juramenti delatio Locum non habet.* Carpz. *Part* 1. *Conſtit.* 12. *Def.* 1. *In negotio tamen noviter emergente*, *etiam jure* Saxonico, *poſt litem conteſtatam*, *admittitur.* Brunnem. *De proceſſu*, C. 23. N. 7.

§ 40. When the Purſuer refers his Libel to the Defender's Oath, the Defender muſt either ſwear, or elſe defer the ſamen back

back again to the Oath of the Purſuer, at the Defender's Option.

§ 41. There is another Kind of Oath for Probation, which is called *Juramentum in Litem*, and has only Place in certain

This Oath, *In litem*, is an aſſertory, judicial and neceſſary Oath, ſworn by a Purſuer, for eſtimating and valuing a Thing which he has proven, *pro ut de jure*, was fraudulently taken away, and wrongouſly detain'd by a Defender; or when, thro' one's Dole and Fraud, or ſupine Neglect and Omiſſion, the Purſuer wants the Thing acclaimed; and alſo for valuing Damage ſuſtained by Want of what is ſo abſtracted.

Before there can be Place for this Oath, the Perſon muſt prove the ſubſtantial and antecedent Part of his Libel, *to wit*, That Goods in general were taken away fraudfully and wrongouſly, or detained. *Dury*, *P.* 821. And when many Particulars, of divers Natures, are libelled, as Pleniſhing, Cattle, Horſe, Sheep, Corns, *&c.* if it be proven that any one of the Particulars were taken away, the Purſuer's Oath, will, in Supplement, be taken for proving the Abſtraction of the other Particulars. Dury's *Deciſ.* March 8. 1628. Brown.

None but the Judge can defer this Oath, which is neceſſarily adhibited in Actions for Reſtitution of Goods, and Things wrongouſly taken away; the Quantity and Value whereof not being notorious to others, cannot be known, otherwiſe than by Oath of the Purſuer, tho' the Extent and Value is relevantly alſo proven by Witneſſes; but ſtill the Purſuer, if ordered by the Judge, muſt depone, *ex credulitate*, *i. e.* That he believes, and is inform'd, That the Quantity, in the Depoſition of the Witneſs, is true; and that the Intromiſſion by the Defenders, extends to no leſs than is proven. *Dury P.* 68. *P.* 115. *P.* 156.

There's Place for it in all Actions for Reſtitution of Goods, either ſtollen, or wrongouſly taken away, and which are not, or cannot be reſtored; or when re-delivered, it is neceſſary

tain Cauſes, as in Cauſes of *Spuilzie of moveable Goods*; in the which, he who is ſpuilzied, may prove by Witneſſes, that the Committer of the Spuilzie intromet-ted with a certain Part of the Goods libelled;

ceſſary for eſtimating the Loſs and Damage a Party has ſuffered, either by having his Goods deteriorated, or by being deprived of the Uſe of them, as in *Spuilzies*, *Ejections*, *Intruſions*, *in Actions upon the Edict*, *Nautæ caupones*, &c. and generally in all Actions, where our Law allows *violent Profits*.

This Oath is ſworn by the Owner of the Goods, or by him from whom they were taken away. A Pupil's Oath is not taken, but a Minor, a Tutor or Curator, are allowed to depone *in litem*.

This Oath is only admitted in Proceſs, againſt the Spoliator, or other Delinquent himſelf, but not againſt the Heir, unleſs the Plea was litiſconteſted with the Defunct.

When a Purſuer is thus left at Will, and may value the Thing as he Pleaſes, Equity requires, and the Law allows the Judge to weigh Matters more impartially, and *ſecundum Arbitrium boni Viri*, and to moderate the Prices; yea, it is left to the Judge's Diſcretion to defer this Oath or not, and according to his own Knowledge, by himſelf, to tax the Value of the Thing, and Damage, tho' the Defender do not require it, or tho' he be abſent.

In this Oath the Purſuer is not tied to ſwear upon the true Value, but is even allowed to eſtimate the Thing by his own Affection or Fancy of it; and ſo it is called *Juramentum Affectionis*, as well as an Oath *in litem*; in which, as is ſaid, Reſpect is had, not how much the Thing was truly worth, as how much the Purſuer eſteem'd it. As *Ulpian* in another Caſe expreſſes, *L. 5. ff. Ne quis eum qui in jus vocabitur, vi eximat. § 1. In eum autem, qui vi exemit in factum, judicium datur; quo non id continetur, quod in veritate eſt, ſed quanti ea Res eſt ab actore eſtimata, de qua*

*contro-*

belled; which being proven, the Quantity and Value of all the Goods libelled, is referred to the Purſuer's Oath, *in odium ſpoliantis*, but which the Lords modify, notwithſtanding.

*controverſia eſt*, &c. Which is admitted in the Law, to puniſh the malicious and unjuſt Meddling with other Mens Goods.

If the Action, in which this Oath is admitted, be not purſued within three Years after the Date of the Fact libelled, there's no Place for this Oath, and the Purſuer muſt prove his Libel, as he'll be ſerved; ſo that he will not get the *Pretium Affectionis*, nor can even the true Value be proven by his own Oath, except that Minors have three Years after their Majority. *See Act* 81. *Parl.* 1579. *and* Mackenzie's *Obſerv. thereon.*

§ 42. There is another Kind of Oath, which is uſed in Proceſs, which is called Oath of Calumny, *Juramentum de calumnia*, and is uſed to ſtop the malicious Pleaing and Vexation of the Party; which, when it is craved of the Purſuer, he ſwears, That

*Juramentum de calum.*] This, according to *Juſtinian*, in *L.* 2. § 4. *Cod. de jurejurando propter calum.* is ſo neceſſary, that it cannot be remitted by either Party to the other, which is to be underſtood a previous Agreement and Paction; But in the Practice of *Scotland*, it is tacitely remitted, if not ſought.

This Oath, when deferred to an Incorporation, or Society of Men, and to a City, is not to be given by the Secretary or Clerk, but by the Seniors, or Aldermen of the Town-council, or of the Incorporation, who are preſum'd to have beſt Know-

That he believes he has juſt Cauſe to purſue his Libel, as it is libelled; and if of the Defender, he ſwears, He has juſt Cauſe to propone his Exception.

Knowledge of the Buſineſs. *Arg. L.* 2. § 5. *Cod. de jurejur. propter calumniam dando.*

A Tutor or Curator can be compell'd to give this Oath for their Minor; yea, a Pupil himſelf, who is *doli capax*, which in Law is preſum'd to be toward the End of his Pupillarity, can be forced to ſwear, *De Calumnia. Arg. d. L.* 2. *& paſſim Dd.*

§ 43. This *Juramentum Calumniæ* is not *Veritatis & ſcientiæ, ſed credulitatis tantum.*

§ 44. And if the Purſuer or Defender be preſent at the Bar, either of them may be commanded, at the Deſire of others, to give his Oath *de Calumnia inſtanter*; and if he be not preſent at the Bar, the contrar Party will get Warrant to charge him to compear with Certification, and which ſhould be execute againſt the Party, perſonally apprehended by a Meſſenger of Arms.

*With Certification.* ] If he compear not to depone, he ſhall be holden as confeſt. *Vide* the Notes on § 37.

§ 45. The Proctors of either Party being required by the contrar Party, or by

his Proctor, will be compelled to ſwear, *de Calumnia in Animam conſtituentis*, to wit, *That he has juſt Cauſe to purſue the Libel, or to propone the Exception, as he is informed; and that he thinks the Information*

*The Proctors.* ] That holds not in Matter of Law, but only in Matter of Fact, if the Client be abſent; but if preſent, an Advocate is not obliged to ſwear *in facto.*

*In any Part of the Proceſs.* ] Tho' generally it is ſought in *initio Litis.* This Oath is by Lawyers divided into General and Special, the Firſt is given upon the whole Libel, of which in *Novel.* 49. *C.* 3. The Special is upon a ſpecial Article of the Libel, or occaſionally upon a certain Anſwer, Defence, or Reply, *&c.* or any Part of it.

In Proceſs of Reduction and Improbation, the Defender craving the Purſuer's Oath, if he had juſt Cauſe to purſue Improbation of the Writs called for; the Lords found, The Purſuer could not be compelled to give his Oath, particularly upon that Part of the Summons, ſeeing the Improbation and Reduction being both in one Summons, he ought only to give his Oath *de Calumnia* upon the whole Summons, as it ſtands, *Dury, P.* 475. Earl of *Galloway.*

By *Act* 125. *Parl.* 1429. it is ſtatuted, That the Parties, if preſent, ſhall, in the Beginning, before they be heard in the Cauſe, ſwear they believe their Cauſe to be good and true; and in Abſence of the Party, the Advocate ſhall ſwear upon the Soul of his Client; the Tenor of the Oath is ſet down in that Act thus,

*Illud juretur, quod Lis ſibi juſta videtur,*
*Et ſi quæretur, verum non inficietur.*
*Nil promittetur, nec falſa probatio detur,*
*Ut Lis tardetur, Dilatio nulla petetur.*

Theſe Verſes are no Part of the Statute, but inſert by the Tranſcriber of the Acts of Parliament, and taken out of *Hoſtienſis de Juram. Calum. & Gloſſ. in* § 1. *Inſtit. de pœna. tem. litig.*

The

*tion given to him by his Client is true.* This Oath may be craved of the Party or his Proctor, in any Part of the Proceſs, before the giving of the Decreet.

The Lords of Seſſion, in an Act of *Sederunt*, *January* 13. 1672. conſidering that Oaths of Calumny, as the ſame are ſometime emitted by Parties in theſe Terms, *If the Party has Reaſon to alledge or deny the Points whereupon he is required to depone*, areambiguous; and ſeeing all Oaths ſhould be in Terms diſtinct and clear, therefore they ordained ſuch Oaths to be in theſe Terms, *If or not he does not know the Alledgance, or other Matter referred to Oath, to be true, ſo that he ſhould put the Proponer to the Neceſſity of proving the ſame.* And if the Party, againſt whom any Point or Alledgance is to be proven, require the Oath of Calumny of the Party proponing the ſame, the Terms ſhall be, *That he may enquire whether he knows the Thing that he propones is not true, ſo that it were calumnious for him to inſiſt therein.* And it is declared, *That a Party is not holden to give an Oath of Calumny*, in Facto proprio & recenti, *ſeeing, upon the Matter, the ſame reſolves into an Oath of Verity.*

The giving this Oath of Calumny or Credulity will not exeem the Giver thereof, if he ſuccumb, and be found litigious, from Payment of Expences of Plea to the other Party.

§ 46. Where the Libel or Exception is intended to be proven by the Party's Oath, he who has the Probation ſhould declare, the Time of Litiſconteſtation, That inſtead of all Probation, he refers the ſame to the Party's Oath, and a Day will be aſſigned unto him for ſummoning of his Party for that Effect.

§ 47. Anent Probation by Witneſſes. The Witneſſes ſhould be ſummoned to compear at a certain Day, to bear leal and ſoothfaſt Witneſſing, in ſwa far as they know, or ſhall be ſpeired at them, in the ſaid Matter.

§ 48. Who, if they compear *in termino probatorio* at the Term aſſigned, they are receiv'd, and admitted in Judgment, being firſt lawfully ſworn and admitted in Preſence of the Party againſt whom they are uſed, or his Proctor, or in Abſence of the Party being lawfully ſummoned to hear them received; for, if the Defender compear not, he ſhould be ſummoned to hear the Witneſſes receiv'd; but if he be compearand, it is not neceſſary to ſummon him to that Effect foreſaid, *Quia in hoc Caſu intelligitur citatus apud acta.*

When a Defender, by a firſt Citation, is perſonally apprehended, he needs not be cited over again, in Order to hear Witneſſes examin'd, or even to be holden as confeſt, upon a Point referred to his Oath; for his Procurator will be oblig'd to produce him to depone, with Certification, &c. See the Notes upon § 35.

§ 49. The Witneſſes compearing, being mean Men, will obtain their Expences againſt the Uſer of them, upon the Lords

Lords Modification, and Anſwer to the Bill given in by the ſaid Witneſſes for that Effect, if the Party pay them not willingly.

§ 50. *This is true*, if the Witneſſes compear at the firſt Term; which if they omit to do, they will not fall their Ex-

 pences

The Writ by which Witneſſes are cited, is iſſued out of the Clerk's Office, and is call'd Letter of *Diligence*; when the Witneſſes compear, at, or after the Day to which they are cited, if the Party Uſer of the Diligence delay to diſpatch them, they preſent themſelves to the Party, or his Advocate, and require that the Act be called, otherwiſe they proteſt, That they may be free from the Effect of both the Dilligences, and take Inſtruments in the Hands of a Notar, before Witneſſes. In like Manner, they compear before the Ordinary on the Oaths and Witneſſes, and after calling the Party and his Procurators, and the Clerk of the Proceſs, they reſume the former Inſtruments, declare their Willingneſs to depone, and proteſt as above. Whereupon the Ordinary diſmiſſes them.

Perſons called by Diligence, compearing upon the firſt Citation, and being mean Men, are not bound to depone, till they get Aſſurance of Payment of their Expences; which, if ſought, the Ordinary to Oaths and Witneſſes, will, after deponing, modify and ordain Payment to be made accordingly; and if the Party or his Agent pay not willingly, the ſaid Lord Ordinary will give a written Order for Payment of the Dues, as follows, *Viz.* Eight Shilling to a Footman, and Sixteen Shilling to an Horſeman, for each Day of Attendance, and the Days of Journey to and from their Dwelling-houſe, to be paid in 24 Hours thereafter: And in Caſe Payment be not made, he orders as much more as is needful, to extract an Act, and raiſe Horning and Caption thereon, which he liquidates by the ſame Interlocutory; but if the Witneſſes bide the ſecond Diligence, they get no Expence; which

pences *off* the Party, albeit they compear in any After-term of Proceſs.

which is a Puniſhment for the unneceſſary Trouble and Coſt they put the Party to.

§. 51. For Probation of the Libel or Exception, *&c.* there ſhould not be received above the Number of 24.

The Lords are in Uſe, not to ſuffer any moe Witneſſes than 24 to be led in any Cauſe, yet there are many divers Heads contained in one Libel, which perhaps hardly can be proven by ſo few a Number, as to prove the Duties of ſundry Lands lying far from other, *&c.* the Party will be heard to uſe 24 Witneſſes, or as many as he pleaſeth, for proving every one of theſe different Heads. As was done between Sir *Mungo Murray*, and the Commiſſar of *Dunkeld.* 2. *July*, 1630. Spotiſ. *Probation by Witneſſes*, § 8.

§ 52. For proving of the Libel, there are three Terms granted to the Purſuer, at which, and each of them, he may ſummon new Witneſſes; and in the After-terms againſt Witneſſes, ſhould not be heard to ſummon any new Witneſſes, *but* theſe who were ſummoned of before, in any of the ſaid three Terms.

§ 53. For the Probation of an Exception or Reply, all the Witneſſes that the Party is to uſe in the Cauſe, ſhould be ſummoned to the firſt Term; and none may be ſummoned in the After-terms, *but* theſe that

that were ſummoned at the *firſt Term*, as ſaid is, *otherwiſe than for proving of the Libel*: For, anent the Probation of it, *Witneſſes* may be ſummoned to a ſecond or third Term, which were not ſummoned of before; and the Witneſſes which were ſummoned before, may be ſummoned upon greater Pains to a ſecond Term.

§ 54. The *Firſt* Citation of Witneſſes is, *Indifferently under all higheſt Pain and Charge.* The *Second* is, *Under Pain of Horning*, with Certification Letters ſhall be direct to put them thereto. The *Third* is Horning, and *to denounce them to the Horn*, for not Compearance. The *Fourth* is *Caption* againſt them, for to put them in Ward. After which Diligence againſt the Witneſſes, of all the Terms, when they are all paſſed, then a Term is aſſigned to the Party, who has the Probation of his



By the *Act* 16. *Parl. Anno* 1672. Concerning the Regulations of Judicatories, in § 25. which reſpects the Seſſion, it is ordered, That there ſhall be only two Diligences againſt Witneſſes, one by Horning, another by Caption, and they are called firſt and ſecond Diligences.

Sir *George M'Kenzie*, in his Obſervation on this §, ſays, the four Diligences againſt Havers of Writs, were, 1. Letters, with Certification, That if the Havers produced not, other Letters would be direct againſt them, charging them thereto

own Conſent, to produce the ſaid Witneſſes.

thereto *ſimpliciter*. 2. That Letters of Horning would be direct. 3. Horning. 4. Caption.

§ 55. *Nota*, That Horning againſt Witneſſes needs no Regiſtration, neither is the ſame effectual and valid, to take the Gift of their Eſcheat thereupon, or to debar them from Judgment, neither needs the ſame a ſolemn Relaxation; but the ſaid Horning is only effectual for Caption, and putting them in Ward while [*until*] they come and depone.

Sir *George M'Kenzie*, in the above Obſerv. on § ſays, The Rebel will, on Account of this Denunciation, be debarr'd *ab agendo*, beſides other Inconveniencies; and in his *Inſtitutions*, *B.* iv. *Tit.* 2. § *penult.* he ſays, Eſcheat will not fall: Both which (according to our Authors Opinion) obtains in the preſent Practique.

§ 56. The Depoſition of the Witneſſes is ſubſcribed by the Lord Examinator of them, and by themſelves, if they can write.

If they cannot ſign their Name, the Depoſition bears, *That they cannot write*, and the Examinator ſubſcribes.

§ 57. At the Time of the receiving of the Witneſſes, the Party Producer of them ſhould

ſhould take a new Term of further Diligence inſtantly at the Bar, before the ſaids Witneſſes be examined, which is in the Afternoon.

This is obſolete: The preſent Practice is, when the Witneſs appears not on the firſt Diligence, the Act being called, the ſecond Diligence, or Caption, is ſought, and a Term is given, betwixt and which it is to be put to Execution; and till the Term elapſe, Proceſs ſiſts.

§ 58. *Unus Teſtis non probat (hoc eſt plene, ſed tantum eſt ſemiplena probatio:)* But there muſt be two Witneſſes, at leaſt, agreeing together for proving.

§ 59. If the Party, in Time of *Litiſconteſtation*, alledges, That the Witneſſes whom he muſt uſe, are forth of the Country, and make Faith, that they are neceſſary Witneſſes; in that Caſe, there will be granted a long Term to him, to the Effect he may ſummon his Witneſſes upon ſixty Days Warning for the Firſt, and all the reſt of the Terms likewiſe.

§ 60.

Sixty Days were only allow'd for the firſt Term, and not for the Second, Third or Fourth; for which, an ordinary Term at Diſcretion was allowed. Spotiſ. *Tit. Prob. by Witneſſes*, § 11.

The preſent Practice in this Caſe allows ſixty Days for the firſt Term, and for the Second, the Time is at the Diſcretion of the Judge.

§ 60. The common Objection againſt Witneſſes is, He cannot be Witneſs, becauſe he is *Man*, *Tenant*, or *Servant* to the Producer, or that he is within Degree *Defendent* to the Producer, *i. e.* within the fourth Degree.

MAN,] in this Place ſignifies, a Dependant on another above him, to whom the Man is as a Servant to his Maſter; and tho' the Name of *Man* is of more Eſteem than that of *Servant*, yet in common Language they are uſed promiſcuouſly. The *Romans* in the ſame Senſe made uſe of the Word *Homo*, from which comes the Feudal Term *Hominium*, *quæ eſt veneratio quam Vaſſallus Patrono, propter beneficium acceptum tribuit, cum ſe eo nomine Hominem*, i. e. *Clientem ipſius fore profitetur, quæ veneratio plane ſervilis eſt.* In which Senſe, *Craig*, in his Treatiſe, *De Hominio*, uſes the Word; and in our Law, the Word *Man-rent*, ſignifies perſonal Service or Attendance.

DEFENDENT,] *i. e.* Forbidden, from the *French* Word *Defendre*, to forbid or prohibit.

*Fourth Degree*,] *i. e.* Couſin-germans, as well of Affinity, as of Conſanguinity. In computing the Degrees of Propinquity of Blood, we follow the *Roman* Law, and not the Canon Law.

And this holds, tho' the Husband or Wife, from whom the Affinity ariſes, be dead, yet when there is a Penury of Witneſſes, the Lords will allow Brothers-in-law, and Couſin-germans, to be received *cum Nota*, as was done in the Caſe, *Brown* againſt the Town of *Kirkcudbright*, *January* 15. 1679.

In judging the Hability of a Witneſs, this may be a Rule, Whoever could not be Judge to a Party, cannot bear Witneſs in his Cauſe.

§ 61. Altho' Witneſſes be within Degree *Defendent* to the Producer, by Deſcent from

from a Baſtard; notwithſtanding thereof, he may be received a Witneſs.

§ 62. He that is *Tenant* to the Producer in a Dwelling-houſe in Burgh, he may be Witneſs for him.

§ 63. *Item*, A *Tenant not removeable*, he may be a Witneſs in his Maſter's Cauſe, as if he have a Liferent, or a Nineteen Year Tack; but a ſimple Tack of Lands, for certain Years, altho' Tackſman, will hinder him to be a Witneſs in his Maſter's Cauſe, becauſe he is not a Tenant irremovable, but may be removed after expiring of the Tack.

In the preſent Practice, a Tenant of a Country-farm, by written Tack for three or five Years to run, is admitted; as are alſo the Sons or Cottars of moveable Tenants.

The Reaſon of the Difference between a Tenant in *Burgh*, and him in the *Landwart*, is, That the Firſt can be more eaſily accommodated, and provided with Habitation in a Town, which is made up of many Houſes, than a Farmer can be ſerved with a Tenandry in the Country; and the Law preſumes, that Favour or Fear towards his Landlord, for his own Intereſt, may provoke him to Partiality: Which Circumſtance renders his Teſtimony ſuſpected.

§ 64. *Item*, A *Beggar*, or *poor Body*, that is not worth the *King's Unlaw*, that is to ſay, *Ten Pounds*, may not be Witneſs; but if the ſaid *poor Body* have a *Calling*, he

he may be Witneſs, notwithſtanding of his Poverty.

UNLAW,] This Word comes from *un* or *on*, a private Particle, as in the *Latin* Language, is the Particle *in*, and *Law*, Right: So that *Unlaw* ſignifies with us the ſame Thing as *ſine Lege*, *contra Legem*, *vel non jure factum*, *i. e.* a Doing or Fact againſt Law, for which a Fine or Mulct is due, and payable to the King's Officer; and by Tranſition, Unlaw ſignifies the Fine impoſed for the Delict: So that here a Perſon, who, if he committed Wrong, is not able to pay the King's Fine, cannot be received a Witneſs.

This *Quota* for the Unlaw ſeems to be taken from the Fine before the Juſtice in the South-ſide of *Forth*, in the Reign of King *James* I. which was 10 *Lib.* as was the Unlaw of thoſe, who, being warned, compeared not in Parliament. *Skene*, *de verb. ſig.* But albeit theſe Fines are now much enlarged, yet this Unlaw of 10 *Lib.* and no more, is ſtill made uſe of in the Caſe of this §.

§ 65. If a Witneſs be caſten, in an Exception or Reply, the Party Uſer of him, will have granted to him another Witneſs in his Place, but not for the Libel.

This hath fallen into Deſuetude.

§ 66. A Matter of Ten Pounds, or above the ſame, is not probable by Witneſſes; but in Furniſhing, Intromiſſion, and Delivery

*A Matter of Ten Pounds.*] I ſhall here ſet down Caſes, wherein Money-Matters of Value above Ten Pounds *Scots* have been allow'd to be proven by Witneſſes.

A Paction to Graze Four Mares for Four Merks Yearly, and to make their Off-ſpring forthcoming, was found proveable

Delivery of Victual, Witneſſes will prove it, altho' it be One Hundred Pounds, or above.

able by Witneſſes, *Spotiſ.* Tit. *Probation*, § 26. And *Dury* adds, Albeit the Action for Implement was not purſu'd for 3 or 4 Years after the Time of the Agreement. *Page* 401.

The Promiſe of a Wife, made after the Husband's Deceaſe, to pay 120 Lib. contain'd in a Bond granted by Husband and Wife *ſtante matrimonio*, was found proveable *prout de jure*. Spotſ. *Tit.* Probation, § *laſt.*

A Promiſe to pay 100 Lib. or any Sum leſs, is proven by Witneſſes, *Dury*, P. 798. A. ( tho' the contrary is obſerved by him in P. 441. B. and *Gilmuir*, D. lxxxv. P. 66. )

A Promiſe to pay a Liferent Duty, tho' of never ſo ſmall a Quantity, is not proveable by Witneſſes, but by Writ or Oath of Party. *Dury*, 801.

Intromiſſion with the Farms and Profits of Lands, wherethrough an Infeftment will be extinguiſhed, is proven by Witneſſes, *Dury*, P. 247. A.

The Payment of the Price of a Butt of Sack, and of the Price of a Tun of Beer, which, by a ſign'd Ticket, was acknowledged to have been receiv'd and due, can be proven by Witneſſes, even tho' that Ticket did bear, That a Sum of Money beſides was reſting, the Payment whereof cannot be proven otherwiſe than by Writ or Oath. *Dury*, 248. A.

In all Caſes where Witneſſes are allow'd to prove, there muſt be two Witneſſes concurring together in their Teſtimonies: For the Teſtimony of one Witneſs led by a Purſuer, cannot be ſupply'd by the Purſuer's Oath in Supplement. Stair's *Deciſ. Vol.* 1. *P.* 531.

*Delivery of Victual,*] is always ſuſtain'd to be proven by Witneſſes, altho' the Party be by Bond obliged thereto. Spotſ. *Tit.* Probation, § 3.

§ 67. Anent Probation by Writ. The ſaid Writ ſhould be produc'd *in termino probatorio*, if there be no other Probation,

as

as of Witneſſes, *&c.* which, if it be, then the Party may produce all Writs, which he will uſe, *in Modum Probationis*, at any Time before the Concluſion of the Cauſe.

By Act of *Sederunt*, *November* 20. 1711. § 17. Parties who are Maſters of Writs to be made Uſe of for proving an Alledgance, muſt inſtantly produce theſe, otherwiſe, if a Term be ſought, and a Diligence taken out, for recovering ſuch Writs that were in their Cuſtody, they'll be decern'd to pay to the other Party a Mulct, not under 2 *L. Sterl.* as ſhall be modified by the Ordinary, to whom, in the Courſe of the Proceſs, this is made manifeſt.

§ 68. And if the Evident or Writ be not his own, or if it be his own, but in another Man's Poſſeſſion, *ex probabili Cauſa*, then incident Diligence will be granted unto him, againſt all Havers of the ſaid Writ, who *has*, *had*, or *fraudulently put the ſame away*, to compear at the Day of Probation aſſign'd in the principal Cauſe, and to produce the ſame for Proving. Vide *Queen* Mary, *Parl.* 7. *Cap.* 63.

§ 69. At which Day of Compearance, the Summons, or incident Diligence, are ſeen by the Defender, upon whoſe Denial of the having of the Writs, the Proceſs goes on in the ſaid Summons of Incident, and Terms are aſſign'd to the Purſuer thereof, *in communi forma*, for proving of his Libel; and

and in the mean Time of Dependance of the Incident, the principal Cauſe ſhould ſleep and ceaſe, until the Incident be firſt ended.

§ 70. Incident Diligence ſhould be proteſted for, the Time of Litiſconteſtation, by the Party who intends to uſe the ſame; and ſhould be raiſed at his Inſtance againſt the Havers of the ſaids Writs, and againſt the Defender or Purſuer in the principal Cauſe: Otherwiſe the ſamen Incident will be caſten.

Except there be in the Act of Litiſconteſtation a Warrant to iſſue out Letters of Diligence againſt Witneſſes and Havers of Writs, the Clerks will not deliver any Diligence.

§ 71. Incident uſed by the Defender in an Improbation againſt him, ſhould be againſt the Havers of the Writs. The principal Party Purſuer, and the King's Advocate, and generally the *Party of the principal Action*, ſhould be ſummoned in the Incident.

See the Title XII. of the Reductions and Improbations, and the Notes there.

§ 72. Incident uſed for Writs, made to the Defender's Father or Goodſir, to whom he is Heir, will not be ſuſtained, (except the

the Defender be Minor) becauſe theſe Writs are his own, and preſumed to be in his Poſſeſſion.

Yea, if a Major give good Reaſon, ſhowing how his Writs went out of his Cuſtody, as, That he has not as yet got them from his Curators, or from his Factor; or, That they were given to a Writer who is deceaſt, and his Papers are ſeal'd, or the like; the Lords will allow a Diligence.

§ 73. Incident uſed againſt the Purſuer only, will not be ſuſtain'd; becauſe the Defender may, in that Caſe, propone his Exception, and ſay, No Certification for the Writs called for, becauſe they are in the Purſuer's own Hands, and therefore will not be heard, to delay the Purſuer by an Incident.

A Purſuer is in *mala fide* to ſeek Certification for not Production of Writs in his own Cuſtody; and a Decreet extracted will be eaſily reduc'd, if that Circumſtance be made to appear.

§ 74. Incident, in Action of Improbation, ſhould be raiſed and uſed before the Day of Compearance of the ſecond Summons; otherwiſe it will not be ſuſtain'd.

§ 75.

The Order of Proceſs of Improbation is, by Act of Parliament 1672. *Concerning the Regulations of the Seſſion*, greatly altered, and is now much different from what it was in our Author's Time.

§ 75. Alſo, generally the Incident ſhould be raiſed and uſed, before the Term of Probation aſſign'd in the principal Cauſe, otherwiſe it is not Diligence, and ſo will not be ſuſtain'd.

All Letters of Diligence in every Action, muſt be executed before the Term Day, otherwiſe they will not be received.

For this, and how the Witneſſes or Havers of Writs are brought to depone, *Vide Spotſ. Form of Proceſs, Tit.* 2. § 87, 88, *&c.*

§ 76. According to the Evidents of the Incident, ſo is the principal Cauſe proven, or not proven; and the Writs that are produced by Virtue of the Incident, are for ſatisfying of the Incident, and for proving of the principal Cauſe, Libel, or Exception, *&c.*

§ 77. After Litiſconteſtation is made, either *Parte comparente, vel non comparente*, there is no calling of the Cauſe, neither upon the Purſuer, nor upon the Defender's Part, but upon the laſt Act of the Proceſs.

§ 78. When the Party calls upon the Act made after Litiſconteſtation, if he be Purſuer to whom the Summons is admitted to Probation, or againſt whom an Exception, ane or mae, is admitted in Favours of

the Defender, he *ſatisfies*, firſt, *his own Term*, by Production of Diligence, and thereafter, (if the Defender produce no Diligence for Probation) he may crave the Term of Probation to be *circumduced* againſt the Defender, in reſpect of his Negligence; and if that Term be ſatisfied by Production of *Diligence*, *hinc inde*, then there is a new Term aſſign'd for Probation, *& ſic deinceps*, according to the ordinary Terms of Probation, received by the Practique and Cuſtom of the Houſe.

§ 79. *Item*, If the Defender call upon that Act, it is either to produce his own Diligence for proving of his Exception, or to crave the Term to be circumduced againſt the Purſuer, anent the Probation of the Libel or Reply, if aneor mae be admitted to his Probation; So that the Party that has the Probation, and failzies therein, tynes his Cauſe, and no further Term of Probation is granted to him, but the *Term is circumduced*, *Actore non probante, reus abſolvitur: Reo non probante, ipſe condemnatur: Actore probante, reus condemnator: Reo probante, reus abſolvitur.*

§ 79.

The Cauſe is called upon an extracted Act of *Litiſconteſtation*, the Warrant of which, *i. e.* the Summons, Executions, and Minutes, remain with the Extracter. *Vide* Spotſ. *Form of Proceſs*, § § 78, 79. and 87, 88, &c.

§ 80. Where the Purſuer or Defender produce their Diligence for ſatisfying of the Act, in this Caſe either of them may proteſt, *quoad vel contra alias probationes, quoad Exceptionem vel Replicam reſpective.*

§ 81. When the Party, who has the Probation, has uſed all the Diligence which he may uſe in the Cauſe, in all the Terms of Probation, and judicially renounces all further Probation, whereupon an Act of Renounciation of further Probation is extracted, under the Clerk of Regiſter's Hands, or his Deputes; then the Cauſe is concluded, and reſts only to be adviſed by the Lords: Which Concluſion of the Cauſe is, *Concluſio non ſolum Exceptionum, ſed etiam Probationum.*

It is not uſual now to extract an Act of Renunciation, &c. and the Cauſe is concluded, when *great Aviſandum* is made with the Proceſs and Probation, and a Warrant given by the Clerk for inrolling it in the Inner-houſe Roll of Cauſes to be prepar'd.

§ 82. If the Party, who has the Probation, holds his Peace, and the other Party, in Judgment, proteſt, That the Cauſe be holden as concluded, the Proteſtation is admitted againſt further Probation, and the Cauſe is concluded likewiſe: So that

nothing reſts to be done, but the adviſing of the Cauſe, whether proven or not proven. Both which Caſes foreſaid make Concluſion of the Cauſe.

§ 83. No Proceſs, when it is concluded, ſhould be adviſed, nor the Decreet therein pronounced, until the Act of Renunciation of further Probation be produced, with the Act of Proteſtation againſt further Probation, by the other Party: Both which Acts ſhould be ſubſcribed by the Clerk-Regiſter, or his Deputes.

The Order now obſerved is much different, and is ſet forth in the Act of Parliament, *Anno* 1672. Concerning the Regulation of the Seſſion. *See* Spotſwood's *Form of Proceſs*, *Tit.* 11. §

§ 84. After Renunciation, or Concluſion of the Cauſe, and an Act extracted thereupon, none of the Parties may produce other Writs, for Probation, than thoſe which are expreſſed in the Act, which commonly bears thir Words, (*That the Purſuer repeats the Depoſition of his Witneſſes, and Writs produced* in initio litis, *and renounces.*) And upon the Part of the Defender, bears, *That he repeats the Depoſitions of his Witneſſes, and produces ſuch Writs,*

*Writs*, and holds his Peace: Whereupon the Lords ordain the Cauſe to be concluded.

The Lords now at Adviſing, receive Writs, which were not, till then, in the Power or Poſſeſſion of the Producer.

§ 85. The Time foreſaid of the Concluſion of the Cauſe, the Party may, and ſhould proteſt, for all his lawful Objections *contra producta*, that is, againſt all the Writs that are *produced*, *in modum probationis*; *Vide Queen* Mary, *Parl.* 7. *Cap.* 63. And the Reaſon of this is good, becauſe the Lords will oftentimes admit, or repel an *Exception*, *reſerving Objections*, *contra producenda*.

The Lords now never adviſe any Probation, without calling the Cauſe by a Roll, and hearing the Procurators plead for, and againſt the Probation.

§ 86. When the Cauſe is concluded, if the Probation be all in Witneſſes, the Lords adviſe the Cauſe, proven or not proven, without calling of the Parties; but if either the Whole, or a Part of the Probation conſiſt in Writ, the contrar Party, *poſt concluſionem in Cauſa*, muſt ſee the haill Writs, and then the Cauſe is adviſed by the Lords, that they may decern therein: At which Time of adviſing of the

Cauſe, if there be any Doubt in the Probation, the Parties Purſuer and Defender are heard to ſay, the one, wherefore the Cauſe is proven; the other, wherefore it is not proven. According to the which Alledgances made by the Parties, the Lords adviſe the Probation, and decern accordingly.

§ 87. The Writs for Probation being produced, and ſeen, as ſaid is, the contrar Party may make his lawful Objections againſt the ſame, *ut ſupra*, of which the laſt is, *Objectio falſi*, when the Party alledges, the Writs produced cannot prove, becauſe they are falſe and feigned; in which Caſe, the Lords admit the ſaid Exception of Falſhood to be diſcuſt in that ſame State of Proceſs; and in the mean Time ſtay the Pronunciation of the Decreet in the principal Cauſe, except the Writ, againſt which the Falſhood is opponed, was produced *in initio litis*: For in this Caſe, ſeeing he had the Exception of Falſhood *competent* to him, *ante litem conteſtatam*, he will not be heard now, becauſe it will be taken for a Delay; but the Falſhood will be reſerv'd to be purſu'd in the ordinary Way of Action.

§ 87.

§ 88. When an Exception of Falſhood is *propon'd*, either *ante vel poſt litem conteſtatam*, the Proponer muſt conſign ſuch a Sum of Money as the Lords appoint.

By *Act* 62. *Parl.* 7. *Queen* Mary, 1557. The Sum is not defined, but is left at the Diſcretion of the Judge, the one Half to be paid to the Queen, and the other to the Party: But Cuſtom has altered this, for the Lords of Seſſion ordain a Sum of Money to be conſigned, which ordinarily is 40 Lib. *Scots*; and a Day is appointed by the Judge, for the Proponer of the Falſhood to conſign, and for the Producer of the Writ to *hide* by the ſame.

§ 89. *Item*, The Exception or Objection of Falſhood, *poſt litem conteſtatam*, in Reſpect the Falſhood and Trial thereof conſiſts *in facto*, is, in Effect, a new Litiſconteſtation, which requires all the Terms of Probation, and thereafter Concluſion of the Cauſe.

§ 90. The Manner of *Improbation* is Twofold, *viz.* the *Direct* and the *Indirect* Manner of Improbation.

§ 91. The *Direct Manner of Improbation*, is by the Witneſſes inſert in the Writ, which is taken to be improven, and by the Writer thereof; for all Charters, Contracts, Bonds, Obligations, Reſignations, Reverſions, and other Writs, ſhould mention in the End thereof the Name of the Writer; otherwiſe the ſame makes no Faith, *King*

James VI. *Parl.* 13. *Cap.* 175. except they condeſcend on the Name of the Writer, to the Effect the contrar Party may improve the ſame.

The Writer of all private Papers or Parchments ſign'd ſince the *Act* 5. *Parl.* 1681. cannot be condeſcended on; ſo that the want of Name and Deſignation of the Writer now annuls the Writing.

§ 92. If Two of the ſubſcribing Witneſſes inſert, affirm the Writ to be good and true, albeit the reſt and greater Number depone the contrar, the Writ ſtands good and true, and proves ſufficiently.

§ 93. The *Indirect Manner of Improbation*, is, by Conjectures, Preſumptions, Probabilities, ſuch as by Compariſon of Handwrits, and by Compariſon of Seals, and by *alibi*; as when the Party proves himſelf, or the Witneſs inſert, or the Writer, to have been in another Place the Time of the making or ſubſcribing of the Writ, or by other Ways or Circumſtances, as the Judge ſhall think relevant.

§ 94. The *Indirect Manner of Improbation* has Place, when the *Direct* ceaſes, and none

The Lords of Seſſion have, in both theſe Manners of Improbation, a privative Juriſdiction: The Sheriffs and Commiſſars may judge in the Verity or Falſhood of the Execution of

none are Judges thereto, but the Lords of Seſſion only, and no inferior Judge.

of their own Officers; and upon the Objection of Falſe or Feigned, examine the Witneſſes inſert.

Tho' the *Act* 62. *Parl.* 8. *Queen* Mary, *Anno* 1557. mentions Sheriffs, Stewarts, Bailies of Regalities, Provoſts, Bailies of Burghs, or any other Judges Spiritual or Temporal, as competent to have Falſhood propon'd before them; yet that obtains not at this Day.

§ 95. Beſides the foreſaid Improbation, which is by Exception or Objection of Falſhood, there is an *Improbation by Way of Action*, in the which two Terms ſhould be aſſigned only to the Party, for Production of the Writs alledged falſe, with Certification, if they produce not, the ſamen Writs ſhall be decerned falſe, and to make no Faith.

§ 96. After which two Terms, uſually Certification is granted, if not ſimply, at leaſt upon Condition, that what the Party ſhall produce betwixt and ſuch a Day, ſhall be received, wherein, if he failzie, then the Certifi-

By Regulations 1695. § 20. It is appointed, That there *be no Decreet of Certification* upon Summons of Reduction or Improbation, or of ſimple Improbation *in Abſence*, and when a Defender in theſe Actions, compears not, the Summons is called in the ordinary Way, before the Lord in the Outer-houſe, who appoints it to be inrolled, conform to the Date of its Calling; and if, when the Summons is again called

Certification ſtands, and the contrary Party may extract Decreet, and Sentence thereon, after the ſaid Term is paſt, which is never reducible *inter Majores*, but by improving of the Executions of the Summons.

called by Courſe of the Roll, Decreet be given in Abſence, the ſaid Decreet ſhall not be extracted for four Weeks thereafter.

By Act of *Sederunt*, *January* 1. 1709. the Lords ordain all Acts for the ſecond Term to be called judicially among other Acts, to the Effect the Purſuer's Proctors may intimate to the Defender's Procurators, to ſatisfy the Production, betwixt and a certain Day to be appointed by the Ordinary, not exceeding ten Days, which Intimation is written on the Margin of the Act, and ſign'd by the Lord Ordinary.

It is further enacted, That when a ſecond Production is made, and therewith the Dues for a ſecond Calling paid, great *Aviſandum* made, and Certification *contra non producta* granted, that all After-productions made, before extracting the Decreet of Certification, ſhall be received by the Clerks, and inſert in the Decreet, without a new Calling, *&c.*

§ 97. *Sentence* is either *Interlocutor* or *Definitive*: Interlocutor is, while the Judge pronounces, during the Time of the Dependance of the Cauſe, anent the Libel, Exception, Reply, Alledgance or Anſwer, and is ſo called, becauſe *Judex interim loquitur, ſcilicet, pendente Cauſa principali. Sentence definitive* puts a final End to the Cauſe, according to the Probation thereof, and is either *Condemnator*, when it is decerned

ɔerned againſt the Defender, in thir Terms, *Finds proven* and *decerns*, or *Abſolvitor*, when the Defender is aſſoilzied, in thir Terms, *Finds not proven, and aſſoilzies.*

§ 98. Before the Lords, it is not neceſſary, or in Uſe, to warn the Parties to hear Sentence pronounced, as it is before inferior Judges.

In ſome inferior Courts that is practiſed, in others it is not; which Variety occaſions great Diſorder, when Decreets of inferior Judges are ſuſpended, and a Reaſon founded on the Want of that Formality; for neither Judge nor Advocate can certainly know, if that particular Judge be in Uſe to cauſe cite a Defender to hear Sentence.

§ 99. The Lords of Seſſion may reduce, and ſuſpend their own Decreets.

*Suſpend their own Decreets,* ] with the Decreets of all inferiour Judges, which is a Part of the privative and ſuperior Juriſdiction of the Lords, however the Judges of the high Court of Admiralty, can, in certain Caſes, not only recall their own Decreets, but alſo reduce thoſe pronounced by inferior Judge Admirals. And in like Manner, the Commiſſars of *Edinburgh* reduce Decreets in Matters conſiſtorial, pronounced by inferior Commiſſars, and theſe Decreets reductive, are liable to Correction by the Lords, if there's Cauſe for it.

§ 100. If the Cauſe be in a Suſpenſion, wherein the Purſuer calls, and the Defender is abſent, then the proper Terms, either of the Purſuer's Deſire, or of the Lords Deter-

Determination, are, *To ſuſpend till they be produced*, viz. *the Decreet and Letters called for, to be produced and ſuſpended*; and the proper Terms in a Reduction, *Parte non comparente*, are, *To reduce for not Production*; and the proper Terms in Improbation, are, *Grants Certification, and decerns to make no Faith*; and the proper Terms in Exhibition of Evidents, are, *Grants Letters* ſimpliciter, *and decerns*; and in all other common Actions, as of Removings, *&c.* the Terms are only, *Decerns*.

The Perſon, who in the principal and original Action was Defender, is in the Suſpenſion Purſuer, and calls for Production of the Decreet obtain'd againſt him, with the Charge raiſed thereon, in Order to be ſuſpended for Reaſons expreſt in his Summons, or Letters of Suſpenſion.

The *Stylus Curiæ*, at this Day, is other than what it was when this Book was written by the Author.

§ 101. If the Defender be compearand, and all his Exceptions proponed and repelled, then the proper Terms are, either *to aſſign a Term to prove*, if it requires Probation, or *to decern*, in the Terms *reſpective* foreſaid, where there is no Probation neceſſar.

§ 102. If the Cauſe be in a Suſpenſion, not only bearing Reaſons, but alſo duply, triply,

triply, quadruply, as in Caſes of Multiplepoinding; in this Caſe, if one of the Defenders compear, and the Reſt be abſent, the proper Terms of the Lords Decreets, are, *ordains the* Party compearand *to be anſwered and obeyed, ſo far as concerns the double Poinding*; and if the Party compearand diſputes upon the Reaſons of the Suſpenſion, and if the Reaſons be found not relevant, or not verified *inſtanter*, then the proper and uſual Words of the Lords Sentence, are, *Finds the Letters orderly proceeded, notwithſtanding of the Reaſon, or of the haill Reaſons*, if they be mae, or if the Reaſons, or any of them, be found relevant, and proven *inſtanter*, the proper Words are, *Suſpends the Letters* ſimpliciter.

§ 103. After Litiſconteſtation in Cauſes of Removing, the firſt Thing the Purſuer craves, is, either that Caution be found, or elſe that the Decreet be pronounced; but ſometimes the finding of Caution will be continued to the next Term of the Proceſs, if the Purſuer have Terms to run, for proving of his Reply; or, if the Purſuer be warned, at the Inſtance of the Defender, to give his Oath *de Calumnia*, if he has juſt Cauſe to deny the Truth of the Exception,

and

and be not preſent to give his *Oath*, but deſires a Day for that Effect; if he take a Day, the Lords will give the ſame Day for the finding of Caution, and if the Cautioner be rejected upon the Alledgance of Inſufficiency in this Cauſe, the Lords will aſſign a new Day, for finding of a better Cautioner.

The Caution for violent Profits, if ſought, muſt be found at the firſt Pleading in the Cauſe, for till that be done, the Defender is not allowed to propound one peremptory Defence.

§ 104. At the firſt Inſtitution of the Seſſion, Summons were appointed to be called every Day of the Week, according to the Table, and every Day of the Week had its own Table, *hoc eſt*, its own proper Cauſes, which were to be called thereon; and alſo, there were ſome Cauſes, which might have been called any Day of the Week, and theſe were under the common Table.

§ 105. This Order of Table is altogether out of Uſe, except only the *common Table*, and the *Table of* Friday for the King's Cauſes.

§ 106. The Keeper of the Table, of old, was obliged to affix upon the Tolbooth Wall, the Roll of the tabled Cauſes; but this

this is out of Uſe, and now he only receives the Summons, and inſerts a Minute thereof in his Minute-book, and gives back the Summons to the Party, and writes on the Back thereof, *Tabulate*, and ſubſcribes his Name.

Of old, ſo ſoon as the Day in Summons, to which a Defender was cited, did elapſe, the Summons was brought in to the Clerk of the Regiſter, or to his Servant to be put into a Book, in which they were inſert by Way of Table, and the Summons was marked, for which 13. *ſh.* 4. *d. Scots* was paid as the Dues, and the ſo doing was called the *Tabulating of Summons*. From this Book, the Lords, at their Pleaſure, call'd Cauſes after they were ſeen by the Advocates, *without* reſpecting the Order of the Table, or preferring the Cauſes which were firſt tabulated, wherethrough the Liedges were put to great Trouble and Expence, occaſioned by their Attendance the moſt Part of the Seſſion, not knowing any certain Time when their Proceſſes would be called: But to remedy this Inconveniency, and that all might get equal Diſpatch in Buſineſs, it is, by *Act* 16. *Par.* 1672. appointed, That Books of Inrollment be made. See the ſaid Act in § 2, 3, 4, 5, 6, 7, 8, 9. See alſo the preſent State of the Colledge of Juſtice, prefix'd to *Spotiſwood*'s Form of Proceſs, which exhibites the Dues and Fees of the Keepers of the Rolls of Cauſes, as well for the Inner-houſe, as for the Outer-houſe.

Tho' by the Regulations of the Seſſion in 1672. and in 1695. Table and the tabulating Summons, is rendred unneceſſary, yet the marking Summons, and exacting of the Regiſter's Dues, has not been abrogated, but remains an unprofitable Burden on the Clients, ſo that ſtill it is convenient to know which Summons muſt be tabulated, and which not, as is declared in the following § §.

§ 107. To know what Summons ſhould be tabled, there is one General, that all Summons,

Summons, which bides 21 Days Warning, muſt be tabled; and no Summons which comes in upon ſix Days, bides Tabling, except Improbation.

§ 108. *Item*, All Summons of Reduction, and Declarators of Redemption, Non-entries, and Eſcheats, *&c.* bides 21 Days Warning; and ſicklike, Summons of Tranſferrings of Actions and Decreets.

§ 109. *Item*, All Summons *in Facto*, and which require Probation, bides 21 Days Warning, except they be verified *inſtanter*, or priviledged, either in their own Nature, or by the Lords Deliverance.

§ 110. *Item*, Summons, of their own Nature privileged, and which comes in upon ſix Days Warning, are *Summons of Removing*, *Summons of poinding the Ground for Annualrent*, *for Regiſtration of Contracts*, *for Exhibition of Evidents*, *all Summons of Suſpenſion of Decreets*, *or Nullity of Hornings*, which are craved to be ſuſpended; and alſo *Summons to make arreſted Goods forthcomand*.

§ 111. *Item*, Some Cauſes are priviledged, by the Lords Deliverance, as *Cauſes alimentary*, or becauſe the Summons is *verified inſtanter*, or is referred to the Party's Oath, or becauſe acceſſory to the Lords former

mer Decreets, as in a ſpecial Declarator after a General, and Summons upon a regiſtrate Bond.

§ 112. *Item*, Summons of recent Spullie being intented, within 15 Days after committing thereof, are priviledged from the Table, and alſo from Continuation.

In Notes on § 2. it is ſhewn, which Summons are priviledged, and need but one Diet, ſo that all, except theſe, muſt have two Diets.

§ 113. As to the Continuation of Summons, there is one *General*, that all Summons that conſiſts *in facto*, and is to be proven by Witneſſes, muſt abide Continuation, except the ſame be priviledged, either of their own Nature, or by the Lords Deliverance, as in Summons to make arreſted Goods forthcomand, recent Spuilzies, and Summons acceſſory to the Lords former Decreets.

§ 114. *Item*, There is another *General*, That all Summons whereupon the Lords grant Certification, and uſe to give Decreet againſt a Party for Not-compearance, without Probation of the Summons, muſt bide Continuation, as is Summons of Reduction, Improbation, Exhibition of Evidents, *&c.*

§ 115. *Item*, A third *General*, There are Summons, which are *verified inſtanter*; albeit, in their own Nature, they bide Table, and are execute on 21 Days Warning; yet in reſpect they are verified *inſtanter*, bides no Continuation, as in Declarator of Eſcheat, Non-entries, Redemption, and of Transferrings.

§ 116. But there is an *Exception* from this laſt Rule, of Declarators of expiring of Reverſions, which bides Continuation, albeit they be proven *inſtanter*, in reſpect of their Importance, being for the Loſs of Heritage.

For Continuation of Summons ſee the Notes on § 3 and 4.

Actions, and the Form of Procedure therein before a Judge, were deviſed, in order to prompt procuring Juſtice to be done by Perſons refractory to another, in Relation to Things, as Bonds for paying a Debt, or for fulfilling a Deed concerning Things, &c. *Perſonis jus dicitur de Rebus, per Actiones, tanquam legitima media.* Now the chief of Things are eccleſiaſtical, as Churches or Kirks, Benefices and Patronages thereof, Miniſters Stipends, Rights belonging to Biſhops, with their Chapters; and alſo the Rights pertaining to religious Houſes, as Abbacies and other Convents: Of all which in the following Tittle.

TITLE

# TITLE II.

## Of *Kirks* and *Benefices*.

ALL *Kirks* are either ſeveral Benefices, or are Parts of Benefices; ſeveral Benefices are called, *Jura patronatus*, becauſe the beneficed Perſon cannot come to the Right thereof, but by the Preſentation of the Patron: and the other Kirks which were not ſeveral, but unite to a Benefice, *ad diſtinctionem*, were called *Patrimonial*, becauſe they were Parts of Benefices, *nam Eccleſia unita non dicitur Eccleſia, vel Beneficium, ſed pars Beneficii.*

§ 2. This Diſtinction is clear in all the Biſhops of *Scotland*, who of old had, and now by their Reſtitution has ſtanding in their Perſons the Right of Kirks,



The Author puts a Difference between a Kirk and a Benefice, which takes Place when the Government of the Church was prelatical, and in a more eſpecial Manner before the Reformation; but now in Time of Presbytery there's no Place for that Diſtinction, becauſe every one Church is a ſeveral Benefice.

The

both *patrimonial*, and of *Patronage*, or *de jure præſentandi*; for the Kirks which are the Biſhops proper Kirks, are called Patrimonial; and the Kirks which are not patrimonial, and wherein he has *nudum jus præſentandi*, and whereof the Fruits and Rents

The Word *Eccleſia*, *Kirk* hath many Significations, and here it ſignifies a particular Diſtrict of Land, or Pariſh, *Parochia*, within which live a goodly Number of Chriſtians, under the Direction of a Prieſt or Miniſter, and who, on the Lord's Day, and other Occaſions, meet for Divine Worſhip in a Temple or Kirk built for that Purpoſe, and dedicate to the Honour of God.

Benefice ſignifies a Kirk doted with a certain Revenue payable to the Miniſter Ordinary for performing divine Service at it; and is ſaid not only of the Function, but alſo of the Revenue appendant to it, ſo that a Benefice is a certain Portion of the Goods of the Church aſſigned to an eccleſiaſtick Perſon, to be enjoyed by him during Life; for Retribution of the Service which he renders, or ought to give to the Church: There are many Sorts of Benefices, which, with an Account of their Origen, you will find in *Spotſ. Scots*-Law-*Lexicon.*

Benefices are divided into many Branches, ſome are, 1. Collative, depending on the Collater alone, who, without Neceſſity of a Confirmation by another, confers them to whatever Perſon he pleaſes, provided he be capable of the Benefice, as is done by Biſhops in filling vaccant Churches within their own Dioceſs, either *jure patronatus*, or *jure devoluto*, *i. e.* in the Exerciſe of their Right of Patronage, or of the Right of Devolution; and ſince the aboliſhing of Epiſcopacy, the Rights competent to Biſhops, is veſted in the Presbytery; they can now preſent in Caſe of a Devolution only, for the Patronages belonging to Biſhops, are fallen to the Crown.

Rents pertains not to the Biſhop, are called *Jura patronatus*; and the Perſon preſented by the Biſhop to theſe Kirks, has Right to the hail Fruits and Rents of the Benefice to which he is preſented;



2. Benefices in Patronage are theſe which cannot be conferred by the Ordinary, whether Biſhop or Presbytery to any other Perſon, than to him who is preſented by the Patron, provided he be in Law qualified for that Function.

3. Benefices Elective, are filled by Election of one fit for them, which muſt be confirmed by a Superior. The whole Biſhopricks in *Scotland* were Elective; for the King did not preſent, but granted to the Chapter of the vacant Dioceſs, a Liberty to choiſe a proper Perſon in Room of the Biſhop deceaſed, tranſported or incapacitated: And the Perſon ſo elected, was confirmed by the King, who gave to him a Charter of the epiſcopal Lands and Stipend, &c. By Act 23. Parl. *July* 1690. Patronages being aboliſhed, the whole Parochial Churches in *Scotland* became Elective Benefices; and the Miniſters elected were approven by the Presbytry. (Read the Act.)

In the xii Century, the Eccleſiaſtical Revenues were parted among the Clergy, and a determined Portion and certain Subſiſtence was appointed to every one, which gave Riſe to the many Canons that make up a Body of Law, adapted to every Thing that may touch Church-men, in their Perſon or Goods. Now the Portion and Subſiſtance given to each, was called a Benefice, and all of them were ſatisfied with one alone; for the Plurality of Benefices did not, till the following Century, creep in, under a Pretext of Equity: And becauſe, as they alledged, a Churchman had not a Sufficiency out of one Benefice, to ſubſiſt upon, he was indulged to poſſeſs two or three, or moe, until he had a Revenue that would anſwer his Neceſſities: But in managing this matter, as much regard being taken of the Quality of the Perſon, as of the Office; what's call'd neceſſary

was

and albeit the Biſhops plant, and admit Miniſters in their own patrimonial Kirks, yet the Miniſter has no Right to the Fruits of the Teind, becauſe the Miniſter is not Titular thereof, but allenarly has Right to ſuch

was ſo far ſtretch'd, that there was no Rule to be fix'd on, by which one could determine the Revenue fit for a Clergyman; ſo that the Cardinals, who pretend to be in dignity equal to Princes, plead for a Revenue conform to their Condition. It is recorded in Hiſtory, That Pope *Clement* VII. granted to his Nephew *Hippolite de Medicis*, a Permiſſion to poſſeſs all the Benefices of the World.

This Power of Annexation and Uniting many ſingle ſmall Benefices into one, belong'd before the Reformation, to the Pope alone; and *ſince*, it is fallen to the King and Parliament, or their Committee called the *Commiſſion for Plantation of Kirks, Sale and Valuation of Teinds*, who have exerciſed it. It is of little uſe to give here Inſtances and Examples of ſuch Annexations, ſee Mr. *Forbes*'s Treatiſe of Church Lands and Tithes, Chap. v. § 13. where he enumerates ſome of them.

Theſe ſmaller Benefices, which at the Beginning were *una & integra*, and ſeveral ſubſiſting by themſelves, endued with the eſſential Attributes neceſſary to conſtitute a true perfect Benefice, become after the Union, ſmall Parts of a large compounded Benefice, directed and governed by a Biſhop, or Rector and Parſon, to whom the Revenue of the whole Benefices belongs. Now it happening that either thro' the great Extent of the Pariſh, or through the Multitude of People, or that the leſſer Benefices, whereof it was compoſed, lay in ſeparate and diſtant Places, ſo that one Man was not able to take Care of the Souls of all the Chriſtians who lived within the Bounds of this large Benefice: The Cure of theſe Pariſh Churches annex'd, was ſupplied by Vicars, whom the Rector, or Head Prieſt who reſided and ſerved the Cure, at another Church

of

ſuch a Portion or yearly Duty out of the Kirk, as the Biſhop appoints him for his Maintenance; and he is the Biſhop's *Vicar* allenarly, for the Biſhop himſelf is *Parſon.*

of the Benefice, did name: But this Vicar had no Title to any ſhare of the Church Revenue, other than was given by the Parſon, who had Right to alter this Appointment at his Pleaſure, for the whole Revenue of the united Benefice belonged to him, as a Patrimony, during his Incumbency, from Poſſeſſion, whereof he could not be removed without a Cauſe.

Now, the Parſon comes to his Benefice, (whether it be great or ſmall, ſimple or compound) by the Preſentation of a Patron, directed to the Biſhop, who collates it, *&c.* Wherefore the Benefice is called by the Canoniſts *jus patronatus*, *eccleſia*, *beneficium*; and by our Author, *a ſeveral Benefice* or Patrimony; whereas theſe ſmall Benefices, whereof this larger one is compoſed, are termed parts of Benefices, which are ſerved by a Church man not preſented, but ſent thither by the Rector, who in ancient times might remove him at Pleaſure.

Church men (as ſuch) are capable of being Patrons, wherethro' the Right of preſenting becomes a Part of the Benefice: But this gives no Title to the Revenue of the Church, whereof they have the Patronage, which remains an entire Benefice, and muſt be ſerv'd by a Parſon of its own, and not by a Vicar.

If this Church ly within the Dioceſe of the Patron Biſhop, the Preſentation and Collation, tho' different Acts, is perfected by one Writing, whereas if the Benefice lies within the Biſhoprick of another Ordinary, one Biſhop preſents in one Writing, and the other collates by another Writing.

§ 3. *Kirks of Patronage* are either *Eccleſiaſtick* or *Laick*; Eccleſiaſtical were theſe

whereof the Patronage pertained, either to the Pope, or ſome other Eccleſiaſtical Perſon, as Biſhop, Abbot, Prior, *&c.*

Laick Patronages are theſe which belong to Lay Men, ſee Lay or Laick in *Spotſ. Scots-Law-Lex.* and ſee *in hoc Tit.* §. 5, 7, 8, 9, 10.

§ 4. Before the Reformation, the Pope was counted univerſal Patron of the hail Kirks of *Scotland*, and he was founded *qua ad hoc, in Jure communi*, and ſince the Reformation 1561, the King has come in his Place, and is preſumed, of the Law, to be *Patronus univerſalis*; ſo that, as of old, all Patronages were the Popes, except where either Eccleſiaſticks or Laicks could ſhew a particular lawful Right of the Patronages in their Perſons, ſo now all pertains to the King, except where lawful Rights can be ſhown in the Perſon of any Subject.

The Author places the Beginning of the Reformation of the Church of *Scotland*, in the Year 1561, others begin it in 1558, after Queen *Eliſabeth* ſucceeded to the Crown of *England*.

§ 5. At the Time of the Reformation, the King got Right, not only to the Patronage of great Benefices, as Biſhopricks, Abbacies, Priories, *&c.* But alſo of all other

ther inferior Benefices, as Parſonages and Vicarages, whereof the Patronage pertained either to the Pope, or to Biſhops, Abbots or Priors, *&c.* But in my Judgment the King had them by a diverſe Manner, for by Act of Parliament, the Authority of the Pope in *Scotland*, is aboliſhed; by the which, the Patronages pertaining to the Pope, were eſtabliſhed in the King's Perſon: But as to Patronages pertaining to Biſhops, Abbots and Priors, I find no Law nor Act of Parliament which deprives them of their Patronages, but only a perpetual Cuſtom ſince the Time that the King has preſented to all Benefices, whereof the Prelates were Patrons of old; which Cuſtom has taken the firſt Ground, not from any poſitive Law, whereof we have none, but from the Will and Pleaſure of the Kings, who having the Preſentation of great Benefices in their Hands,

The Act cited in the Beginning of this § is the 2d of Parl. 1567.

Here the Reader might expect a Diſcourſe concerning the Regal, and the Power which the Pope claimed and exerciſed in *Scotland*, with an account of the Supremacy belonging to our Kings: But, becauſe that wou'd exceed my Deſign, and requires a Diſſertation that cannot be ſhort, I forbear ſpeaking any Thing further than to name the Authors who have written learnedly on the Regal in general, *viz.*

*Aubery*

Hands, be aboliſhing of the Pope's Authority, preſented the Prelates to the great Benefices, when they vaiked, only *quo ad patrimonium ſed non quo ad jura patronatus,*

*Aubery de la Regale.* 4to. *Paris,* 1678.

*Antonius Charlas, Cauſa Regaliæ penitus explicata ſ. reſponſio ad diſſertationem Natalis Alexr. de jure Regaliæ. Leod.* 1685.

*Diſſertations ſur L'autorite ligitime des Roys en matiere de Regale, par M. L. V. M. D. R. Cologn.* 1682. 12*mo.*

*Edit. du Roy concernant L'uſage de la Regale,* 4to. *Paris* 1682.

*Matthieu de Larroque Nouveau traite de la Regale,* 8vo. *Rotterd.* 1685.

*Lettre des archeveques, &c. au Roy ſurle Bref. du Pape au ſujet de la Regale,* 4to. *Paris,* 1680.

*L'Eveque de Pamies, Traite de la Regale,* 4to.

*Phil. Probus, Quæſt.* 63. *de Jure Regaliæ. Paris,* 1551, in 8vo.

*Recuel des diverſes pieces concernant la Regale & la Dioceſe de Pamies. Col.* 1681. 12*mo.*

*Relation des affaires de la Regale dans, les dioceſe d' Alet & de Pamiers,* 8vo. 1681.

*Acacius Ripoli. de Regaliis Tractat. Fol. Barcin.* 1644.

*Arnulplh. Ruzæus de jure Regaliarum cum aliis Tract. Fol. Paris,* 1542. *& in Tr. Tr. acetiam cum ſupplemento. Phil. Probi.* 8vo. *Paris,* 1551.

*Sfondratus Cardinalis Cæleſtinus. Gallia vindicata, in qua Teſtimoniis exemplisque Gallicanæ Eccleſiæ, preſertim quæ pro Regalia ac* iv *præpoſitionibus a Ludovico Maimburgo aliisque producta ſunt, refutantur. Typis Monaſterii ſ. Galli, per Jacobum Muller* 1702, *in* 4to *Editio aucta. Ejusdem libri diſſertatio* ii. iii. & iv. *Exſt. In Bibliotheca Rocaberti, Tom.* 6. *P.* 729. *(Sub nomine) Eugenii Lombardi, Regale ſacerdotium Romano Pontifici aſſertum, per Cyriendrum Donatum,* 1684 *in* 4to. *ſine Loco.*

——*Et*

*tus*, and be a ſecond or reciprocal Act preſented to the ſmall Beneſices, whereof the Prelates were Patrons of old.

——— *Et in Bibliotheca Rocaberti. Tom.* xi. *P.* 307.

*Boetius Epo. de Regalibus principis in beneficiis Eccleſiaſticis.*

*Ant. Olivan Catalani Regalia Regis Arragonum & Comitis Barcionnenſis.* 4to. *Barcinone*, 1600.

*Bern. Laurentius de poteſtate ſecularium ſuper Eccleſiaſt. Tr.* 2 *Tr.* xii.

*Benign. Millelotus de poteſt. judicum ſecularium in perſonas Eccleſiaſt.* 8vo. *Franc.* 1612.

And beſides theſe, *Preſident le Maitre*, and *Guymier Chopin*, *Paſquier*, and Dr. *Gilbert Burnet* Biſhop of *Sarum*, have written on this Subject; to whom I might add theſe Authors who treat *De poteſtate Regia & ſeculari in Eccleſia, de immunitate Eccleſiaſtica*; but becauſe they are numerous I forbear to inſert them.

§ 6. But now the Biſhops, by the late Act of Parliament, *anno* 1606. are reſtored to all their Patronages which pertained to the Biſhopricks, except ſuch as were diſpoſed of before by the King, with conſent of the Titulars who ſtood preſented in the ſaid ſmall Beneſices, and confirmed in Parliament.

See Act, 2 Parl. 1606. and *M'Kenzie*'s Obſervations thereupon.

§ 7. *Item*, Before the Reformation there were ſome laick Patronages which pertained neither to the Pope nor to Prelates, but

pertained

pertained to laick Patrons; and the Right they had, behoved either to flow from the Pope, after he was made univerſal Patron within the Kingdom, or elſe the Benefices has been founded with this Quality, *Reſerving to the Founder, his Heirs and Succeſſors, the Right of Patronage.*

§ 8. But now all the laick Patronages within this Kingdom, which pertains to Subjects, has no other Warrant but Infeftments flowing from the Kings before the Reformation: And as to other Patronages which the King has diſponed ſince, they are not counted Laick but Eccleſiaſtical Patrona-

*Patronum faciunt dos, Ædificatio, fundus.* See *M'Kenzie's* Inſtit. Book 1. Tit. v. § 7, 8, 9. The Authors who have written learnedly of Patronages, are, *Sigiſmund. Finkelthaus de jure patronatus eccleſiaſtico & de jure ſepulturæ. Lips.* 1680. 4to.

*Jacob. Fontanella, de jure Patronatus, Rom.* 1666. *Fol.*

*Cæſar Lambertinus de jure Patronatus, cum Rocho de Curte, Paulo de Cittadinis, Jo. Nicolao & Cardinali Simoneta. Venet.* 1607. *Fol.*

*Jo. Baptiſta Cardinalis de Luca, de jure Patronatus, Rom.* 1674. 12mo.

*Franc. de Roye. de jure Patronatus & juribus honoriſicis in Eccleſia Andeg.* 1667. 4to.

*Julianus Vivianus Praxis juris Patronatus. Rom.* 1628. *Fol.*

To theſe might be added the Names of the many Authors who have wrote *de Beneficiis eccleſiaſticis*, and *de Decimis, de reſignationibus beneficiorum, de ſucceſſione eccleſiaſtica, de Unionibus eccleſiarum.*

Patrona-

tronages, that is to ſay, Patronages to which the King has Right, by coming in Place of the Pope or Prelates.

- Patronages
  - Laick
    1. Before the Reformation, and purely laick.
    2. Since the Reformation by the Kings either diſponing to Laymen, old eccleſiaſtick Patronage, or by annexing them to the Crown.
  - Eccleſiaſtick
    1. Before and ſtill remaining ſo, ſince the Reformation.
    2. Before the Reformation, and now become laick.

Our Hiſtorians and Law-writters do not tell the preciſe Time when the feudal Law came to be of full Force in *Scotland*; that is, when the Subjects, *Property* or *Dominium utile* was ſeparated from the King's *Superiority*, or the *Dominium directum*; for in the *Roman* State, they were indiſtinctly in the Perſon of the Citizens, ſubject to Taxes; and in the Times of the *Goths* and *Vandals*; after Diſſolution of the Empire, the Sovereign or General was ſole Proprietar of all the conquered Provinces, and feued them out to the Subalterns: Which Cuſtom, with the above Diviſion of *Dominium* introduced the feudal Law. Now Patronage is a Kind of Property, and being enumerated *inter feuda*, guided by the feudal Law, and conveyable by Charter and Saſine; it may be thought, that before the feudal Law was in Force with us, the Subjects had Right to Patronages independent of the Sovereign; but now, when all feudal Things flow from the Sovereign, as their Source, it is next to Impoſſibility, to point at any Patronage, or other Subject of the Feudal Law, the full *Dominium* whereof, was fully veſted in the Subject, and not derived from the King. See *h. t* §. 10.

§ 9. And it is expedient to know the Difference betwixt old laick Patronages, and theſe

theſe that are diſponed by the King, ſince the Reformation, becauſe, by Act of Annexation in *July* 1587. all Kirk-lands are annexed to the Crown, with Exception always, of Lands which pertained to Benefices, being laick Patronages, which Exception is to be extended only to laick Patronages, which were lawfully eſtabliſhed before the Reformation.

The Act of Annexation, which is *Act* 29. *Parl.* 1587. deſerves to be read with *M'K.* Obſerv. thereon.

*Lands which pertained to Benefices.* ] That is when Benefices ( to which laick Patrons did, before the Year 1558. preſents the Incumbent ) were endued with temporal Lands, theſe Lands are not by the above Act annexed to the Crown. Hence is manifeſt, the Uſe of knowing theſe Patronages, which are truly laick from the Beginning.

§ 10. *Item*, Before the Reformation, the King's Majeſty, and his Predeceſſors, had ſome laick Patronages which pertained to the Crown, and it has been a great Queſtion, How theſe Patronages has come in the King's Hands, whether *jure coronæ ſimpliciter*, or by Right of Forfaulture of the Subjects who were infeft therein of before: But it is certain, that the King got the moſt Part of them by Forfaultries, as the Patronage of the Provoſtry of *Lincluden* by Forfaulture of the Earl of *Douglaſs*,

*glaſs*, the Patronage of the Colledge Kirk of *Dunbar* by the Earl of *March*, the Patronage of the Provoſtry of *Kirk-heuch* by the Earl of *Fife*, which is true in Reſpect of the immediate Way and Manner how theſe Patronages has laſt come to the Crown; but that excludes not, that theſe ſame Patronages pertained of before to the King, *jure coronæ*, ſeeing the ſame Subjects who were forfaulted, had them of before from the King; and it is very lickly, that when King *Malcolm Kenmure* diſponed all his Lands to his Subjects, for their Service, and reſerved to himſelf allenarly the *Ward* and *Marriage* of their Heirs, that, at the ſame Time, he diſponed to his Subjects alſo, all ſuch Patronages as he had in the Bounds of the Lands diſponed.

§ 11. And it cannot be denied, but the Kings of *Scotland*, before *Malcolm Ken-*

It is commonly reported that *Kenneth*, Son of *Alpin* tranſlated the epiſcopal See of *Abernethy* to St. *Andrews*, after he had ruined the Kingdom of the *Picts*; yet I do not believe that there was any ſettled Place of Reſidence for a Biſhop amongſt the *Picts*, notwithſtanding we find ſome *Pictiſh* Biſhops ſubſcribing the Councils.

As for St. *Andrews*, the firſt Biſhop of that See was *Kelloch*, in the Time of King *Gregory*, *anno* 875; others will have *Fothad* to have been the firſt Prelate of that See, from the

*Kenmure*'s Time, founded and erected the whole Biſhopricks, Abbacies and Priories of *Scotland*, and ſo had Power in the Founda-

the Covering of the Goſpel kept in St. *Andrews*, whereupon was engraven the following Words, *Hanc Evangelii thecam conſtruxit Antiſtes* Fothad, *qui primus* Scotis *Epiſcopus eſt*; he was baniſhed by King *Indolfus*, and after his Expulſion, he lived 8 Years. Now *Indolph* lived in 958.

*Whitehorn*, or *Candida caſa*, founded by St. *Ninian*, *imperante Theodoſio juniore*. *Beda* calls this Place *Pictiminia*, and the firſt Biſhop of this See, *Acta*: It was ruined by the Incurſions of the *Danes*, and reſtored by St. *David Fergus*. Lord *Galloway* founded here a Monaſtry of *Præmonſtratenſes*, who are called *Candidus Ordo*. There are ten Biſhops of this See, mentioned, before it was overturned.

*Glaſgow* and *Aberdeen* had no Biſhops, before *David* the firſt, ſo there was only two Biſhopricks in *Scotland*, before *Malcolm Kenmure*, *viz*. St. *Andrews*, whoſe Prelate was ſtiled *Epiſcopus* Scotorum, and *Whitehorn* founded by the *Saxons*, and ſubject to the Arch-biſhop of *York*.

St. *Mungo* is reckoned the firſt Biſhop of *Glaſgow*, about 599. I take him to have founded the Church of St. *Aſaph* about 560. and to have reſided at *Glaſgow*, where there is a Church dedicated to his Memory; yet by the Inquiſition made by King *David*, whileſt he was Earl of *Cumberland*, of what Lands belonged of old to *Glaſgow*, it would really appear, That *Glaſgow* had been the Seat of the Biſhops of *Cumberland*; and it is certain, that *John*, firſt Biſhop of *Glaſgow*, exerciſed his Juriſdiction over that Province, till ſuch Time as *Henry* the firſt erect the Biſhoprick of *Carlyle*, to ſtop him in the Exerciſe of his Office, which occaſioned Biſhop *John* to wander a long Time Abroad.

There was never a Biſhoprick at *Murthlaick*; which was an obſcure Place; King *Robert* 2d gives the Church of that Village to *Aberdeen*, which is a Token that the Biſhops

Foundation, to reſerve the Patronages to themſelves, and alſo had the like Power in reſerving of ſmall Benefices.

Biſhops of *Aberdeen* did never reſide there; moreover, in examining nearly the Parchment *Cartulary* of *Aberdeen*, you will ſee, That the Charter by King *Malcolm*, is King *Malcolm* the 4th. and not the 2d. *Excerpt. ex Mſs. D. Rich. Hail.*

King *Malcolm Kenmure*, who reigned from 1059 to 1093. is ſaid to be the firſt who conſtituted to Biſhops a peculiar Province and Dioceſe, within which his eccleſiaſtical Authority and Jurisdiction was confin'd: He built the Churches of *Dumfermline* and *Durham*; and his Daughter, Queen *Maud*, Wife of *Henry* the 1ſt, King of *England*, founded the Church of *Carliſle*.

The Abbacies, Priories, and other religious Houſes which were in *Scotland* at the Time of the Reformation, and known at this Time, are inſert in a Table, to be found in the Appendix, which ſheweth at what Time, and by whom theſe religious Houſes were founded.

§ 12. *Item*, All the Lands, Kirks and Teinds of *Scotland*, without Queſtion pertained once to the King, *viz.* the Time of Paganiſm, for then the Pope had no Juriſdiction in *Scotland*; and after Paganiſm, whatever was given to the Pope, behoved to flow from the King, and be tied to ſuch Conditions as the Kings reſerved to themſelves; and therefore, *meo judicio*, all the laick



See the Notes on § 7 and 8. *ſ. h. t.*

It is probable, That the Clergy combin'd with the Pope, to encroach upon the Right of our Kings, who from Time to Time

laick Patronages in *Scotland*, has pertained, *jure coronæ ſimpliciter*, to the Kings, and from them has flowed to the Subjects.

Time diſputed the Matter of the Regal with the Court of *Rome*, and ſtopt the Exerciſe of the Pope's uſurped Power.

§ 13. Where Kirks are not erected in ſeveral Benefices and Titles, but united into other Benefices; in this Caſe, *the Titular of the Benefice* has no *jus præſentandi* of Titulars, to Kirks united; but the Kirks are planted with Miniſters according to the Laws of the Kingdom appointed for Plantation of Kirks, which was in the Power of the Biſhops of the Kingdom, within their own Dioceſe, by Act of Parliament 1612.

Titular, ſee *Spots. Scots-Law-Lexicon.*

The Acts of Parliament mentioned here, are Act 114. Parl. 1592. and Act 1. Parl. 1612. which read, with *M'Kenzie*'s Obſervations thereon.

Ever ſince the Reformation, at leaſt ſome Space of Time after the State of the Church was ſettled, there's with us no Diſtinction of Benefices into ſeveral and united, or Parts of Benefices; for now they all are one entire Benefice, albeit that ſome of them had been in Time of Popery, Portions of a larger Benefice, and were ſerv'd by a Vicar depending upon another Churchman; ſo that each of the inferior Benefices in *Scotland*, are, at this Time, of one Kind, and may be reckoned Parſonages, to which none can be admitted otherwiſe than by Preſentation of a Patron.

1612. and before them was in the Power of ſeveral Presbyteries.

Since the firſt Writing of this Book, which was about *Auguſt* 1632, at *Craigball* in *Fife*, I find, in ſome Copies, added to the end of this §, theſe Words; *and now ſince the aboliſhing of the Biſhops, is fallen to the Presbyteries again.*

§ 14. *Item*, When the Biſhops planted a Kirk which was of their own Patrimony, they did the ſame by admitting a Miniſter thereto, as *Dioceſan Biſhops*, for all their own Kirks were within their own Diocele, (wherever they lay) *formaliter*, albeit locally they may ly within another Biſhop's Dioceſe. But when the Biſhop planted a Kirk, whereof he is Patron, in

 that

In the Time of Epiſcopacy, ſince the Reformation, ſome Kirks, were under the Patronage of Laicks, others were in the Patrimony or Patronage of Biſhops. The Biſhops Parochial Kirks, were, in the Conſtruction of Law, reputed to be within their own Dioceſe, and in theſe the Miniſter was ſettled, rather by Admiſſion than by Preſentation and Collation. As to Kirks under the Biſhop's own Patronage, it is to be noticed, if they did ly within his own Dioceſe, the Preſentation and Collation were perfected by one ſingle and individual Act; but if they were within the Dioceſe of another, the *Patron-biſhop* preſented, and the *Dioceſean-biſhop* collated.

*Preſentation* is that Act and Deed of a Patron, whereby he names and exhibites to the *Biſhop* or *Presbytery*, a Perſon capable to be received into a vacant Benefice, and requires them to give Collation thereof to the Perſon preſented.

*Collation* is the Act of a Biſhop, or now of the Presbytery, to whom Preſentation is made, whereby they accept and approve

that Caſe he preſented not, but conferred *pleno jure*; ſo that whereas in other Patronages, there is requiſite to a lawful *Title*, a Preſentation from the Patron, a Collation, or Admiſſion from the Biſhop, and an Inſtitution: In Kirks which pertain'd to the Biſhop's own Patronage, there was requiſite only Collation and Inſtitution.

approve of the Perſon preſented; and in Teſtimony thereof, the Biſhop, by a Writing under his Hand, confers and gives to him that Benefice. And moreover, orders ſome, one or moe, of the inferior Clergy to inſtitute him Miniſter of that Pariſh, and to induce him into the Church.

*Inſtitution* is an Act of theſe Miniſters deputed and authorized by the Biſhop or Presbytery, to ſettle the Perſon preſented to the Church, and to induce him thereunto, which is done by placing him in the Pulpit, and by delivering to him the Keys of the Church; whereupon the inſtitute Miniſter takes Inſtruments, in the Hands of a Notary Publick. And this is like to a Saſine in Lands, and has the like Effect, with reſpect to the Benefice and Stipend, for it gives *jus in re*. See in a Stile Book the Form of a Preſentation, Collation, Inſtitution, with the Inſtruments taken thereon, which will illuſtrate this Matter.

§ 15. In laick Patronages, the laick Patron is obliged to preſent within ſix Months,

Not only the Laick, but alſo the Biſhop-patron is obliged to preſent within that Space.

*Jus devolutum*, or the Law of Lapſe, is defin'd to be a Right devolv'd upon or falling to the Biſhop, and now to the

Months, after which Time the Biſhop has *jus conferendi jure devoluto.*

the Presbytery, upon default of a Patron's not preſenting, within the Time preſcribed by Law, a Miniſter to the vacant Church, lying within the Bounds of the Dioceſe or Presbytery, by which Right, ſo devolved, the Biſhop, for that Turn, is intitled to confer upon a qualified Perſon, the Church vacant; and if the Biſhop neglect to collate in due Time, that Right falls to the Archbiſhop; and now in Time of Presbytery, it devolves on the Provincial Synod. See *M'Ken.* Inſtit. B. 1. T. 5. § 8. And *Forbes* of Tithes, Cap. iy. § 7. and 13. *&c.*

§ 16. All Benefices conſiſt either of *Spirituality* or *Temporality*; the Spirituality, is the Kirk, or Teinds pertaining thereto; and the Temporality, is the Kirk Lands.

The Stipend, Manſe, Gleib, and Sommes Graſs belong to the Spirituality, they are alodial and exeem'd from Payment of any Burden whatever, as Ceſs, Tithe, Blanch or Feuduty. See *Craig Feud. Lib.* 1. *Dieg.* xii. § 14. Act 62. Parl. 1578. Act 162. Parl. 1593. with *M'ken.* Obſ. on theſe Acts. Nevertheleſs a Miniſter's Liferent eſcheat (under which his Stipend falls) is at the King's Gift. Since the aboliſhing of Popery and epiſcopal Government, there's no Place for the Diſtinction of the preſent Church Patrimony, into Spirituality and Temporality, for the Clergy have not now any temporal Eſtate, as Property Lands, Superiorities, Patronages of Kirks, and Jurisdiction pertaining to their Kirks.

§ 17. In *anno* 1561. it was ordained by Act of Council, That the *Third of all Benefices* ſhould be applied to the Maintenance of the Miniſters, *in the firſt Place*, and the

Superplus of the Thirds, to the Maintenance of the Queen's-houſe; and to this Effect the whole Prelates and beneficed Perſons, were ordained to give up the Rental of their Benefices to the *Collector* and *Collector-clerk*, who were appointed for that Effect; aud conform thereto, the Prelates and beneficed Perſons gave up their Rentals, and the ſaid Rentals were regiſtred in three Rental Books.

§ 18. *Item*, For better Payment of the Thirds of Benefices, there were particular Places deſign'd for Payment of the Thirds, which was called the *Aſſumption of the Thirds*; and after this Aſſumption the Prelates and other beneficed Perſons had no Power to ſet Tacks nor give Penſions out of that which was aſſumed for Payment of the *Thirds*; otherways all ſuch Tacks and Penſions were null of the Law, which is eſtabliſhed by Act of Council in *February* (14.) 1587. and ratified in Parliament in *June* 1592. (by Act 121.)

§ 19. The *Thirds* were diſtribute among the Miniſters in this Sort; firſt, the ſeveral Kirks were planted by the Superintendents, appointed in every Province by the General Aſſembly; and at the Deſire of the Superintendents, or of the Commiſſioners from

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the General Aſſembly, the King and Queen's Majeſty paſt a Commiſſion under their Seals, to a Number of the Nobility and Miniſters, for Meeting at *Edinburgh*, and *there* for modifying of the Stipends to the Miniſters of theſe Kirks whilks were planted, which Meeting was called the *Plat*; and this Plat ſat yearly in *November*: This Form continued ever till the Biſhops were reſtored in *anno* 1606. and as yet the *Books of Aſſignation* or Modification of Miniſters Stipends, are extent, from the Year of God 1561. to the Year 1606. and are in the Keeping of the Clerk of the General Aſſembly, and his Deputes, who alſo now, at the Command of the Biſhops, every one of them within their own Dioceſe, inſerts in the ſaid *Books of Aſſignation*, the Names of ſuch Miniſters, with the Quantity of their Stipends, as they gave Warrant for: And the ſaid Clerk and his Deputes had Power to give forth Extracts out of the Regiſter, and to ſubſcribe the ſame, which makes full Faith in Preſence of the Lords of Council and Seſſion, and thereupon the Lords, *brevi manu*, without Decreet, granted Letters of Horning, Arreſting and Poinding, in Favours of the Miniſters.

§ 20. *Item*, Whatſoever of the *Thirds* were not aſſigned to the Miniſters, *that* pertained to the King, and it was called *Superplus*, whereof there was yearly a Book made, which altered, and was more or leſs, according to the Aſſignation to the Miniſters; and according to this *ſuperplus Book*, the King's Collector did charge for the

At the publick and open avowing of the Reformation of Religion in the Year 1560. the eccleſiaſtick Livings, both Spirituality and Temporality, were in the Hands, either of the Popiſh Clergy, or, in theſe ſtirring Times, were poſſeſſed by divers of the Nobility and Gentry, wherethrough that Part of the Petitions, in Favour of the Reformers, craving, That the Patrimony of the Church might be employed to the Suſtentation of the Miniſtry, was not acceptable to theſe Lords, who albeit they condemned the Authority of the Pope and his Religion, yet they had no Mind to quit the Church Patrimony; nevertheleſs in *December* 1561. Conſultation being holden by the Queen, with her Privy Council and ſome of the Nobility, concerning a Proviſion to the Miniſters, of competent Livings; and there having been on that Head, a Conference alſo with the Church-men, it was concluded and ordained, That if a fourth Part of the Fruits of the whole eccleſiaſtical Benefices were not ſufficient to ſuſtain the Miniſters, ſupport the Prince, and ſet forward the common Affairs of the Country, a third or more ſhould be yearly uptaken and employed to theſe Uſes. But the Acts had not the deſir'd Effect, ſo that the Miſmanagement of this Fund occaſioned many Grievances, crying Grudges and loud Complaints, as is related by our Hiſtorians of the Reformation. The Publiſher of that Hiſtory imputed to *John Knox*, has tranſcribed four Acts of Council made in relation to this Matter; the firſt dated *December* 20. 1561. which is referred to in this §. The 2d is dated *January*

the *Superplus* for the King's Uſe, and with it alſo for the omitted Benefices, which the Prelates, and other beneficed Perſons, omitted in the up-giving of the Rentals; and alſo for *common Kirks*, and *Frier's Lands, which* alſo, with the Thirds, were appointed for the Uſes foreſaid.

*nuary* 24. 1561-2. The 3d is upon the 12th of *February*. The 4th on the 15th of the ſame Month, and Year foreſaid; and ſeeing the Clergy, ſince that Time, are otherways, and now better provided, it is unneceſſary to proceed further in the Explication of a Subject *longa deſuetudine obumbratum*, my Purpoſe in theſe Notes, being the ſame with that of the Emperor *Juſtinian*, in his Inſtitutions, *Ut lectorum tam aures quam animi, nihil inutile, nihilque perperam poſitum, ſed quod ipſis rerum obtinet argumentis accipiant.* Inſtitut. Præem. § 3.

§ 21. *Memorandum*, Thir common Kirks pertained to the Chapters of Biſhopricks *in communi*, till the Year 1594. at which

By Act 196. Parl. 1594. common Kirks are declared to be of the ſame Nature with other Parſonages and Vicarages, and being Benefices of Cure, are ordained to be conferred by Preſentation of a Patron, and by Collation; for at this Time (when the Thirds obtained) Chapters, and other eccleſiaſtick Communities were ſuppreſſed; but by Act 2. Parl. 1617. Chapters are reſtored to their ancient Patrimonies and Rights.

*Common Kirks*, are ſuch, as in Time of Popery and Prelacy, belonged in common, to all the Dignities of the Chapter of a Biſhoprick, or to the whole Members of a Convent, or Cathedral, and each of them had a Part of the Stipend of theſe common Kirks.

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which Time, by Act of Parliament, they were erected in ſeveral Parſonages and Benefices, and ordained to be conferred to Miniſters, as other Benefices.

The Act 52. Parl. 1572. ratifies a ſecond Time, an Act of Secret-council, made concerning the Diſpoſition of all Benefices, not exceeding 300 Merks, or within, to qualified Miniſters.

By Act 100. Parl. 1581. Kirks which in Time of Popery had been annexed to Prelacies, are disjoined, and ordained to be ſupplied by ſufficient Miniſters, with competent Livings, and theſe Kirks were to be counted in the Third, that Miniſters may be provided thereto *ad Vitam*.

§ 22. *Item*, The Remanent of the Thirds for the King's Uſe, is now, for the moſt Part, extinguiſhed, by the Reſtitution of Biſhops, who has Right to their own Thirds; and partly by Erection of Abbacies and Priories, in which the Thirds are diſcharged to the Lords of Erection, they planting the Kirks.

§ 23. Likewiſe in the Parliament 1617. and 1621. There was Commiſſion granted for Plantation of Kirks, which has made the

Even before the Reſtitution of Biſhops the Thirds of Benefices did not anſwer the End, for the Preachers, after the Reformation, increaſing, what might at the Beginning ſerve a ſmall Number of them, was, in Proceſs of Time, become inſufficient for the Whole, eſpecially when the Epiſcopal Benefices were exeemed, and the Convents or Monaſtry

the old Books of *Aſſignation* of Miniſters Stipends, and yearly *Plat* thereof, to be out of Uſe; and the only Uſe thereof to be (as is ſaid before) in inſerting the Miniſters Names by Warrant of the Biſhops.

§. 24.

naſtry erected into Lordſhips, were burdened with a Proviſion to thoſe ſerving at the Churches pertaining to theſe Prelacies: Now it fell out, that either theſe Churches were not planted, or that the Miniſters of ſuch as were ſupplied, being left to the Diſcretion of the Biſhops, and of the Lords of Erection, got not a competent Allowance, whereby through the Miniſtry being kept in Poverty and Contempt, could not faithfully do their Duty; for remeding theſe Evils, the King and Parliament appointed a Commiſſion to ſome of the Clergy, Nobility, Gentry and Burgeſſes, Members of Parliament, for planting and providing Churches.

The firſt Commiſſion to this Purpoſe, is appointed by Act 3. Parl. 1617. the next was by Act 5. Parl. 1621. and both were not to continue longer than one Year. See theſe Acts, and *M'Ken.* Obſerv. thereon.

The loweſt Stipend allowed by Parl. 1617. is 500 Merks, or five Chalders of Victual.

By the Act Parl. 1621. the Commiſſioners are impower'd to provide erected Kirks, with ſuch Proportion of Stipend, as they ſhall find may be, with leaſt Prejudice, made out of the Fruits of the Parochines, and as they ſhall find expedient, either exceeding the Sum of 500 Merks, or under the ſame, as may moſt convenientiy be had, &c.

The third Commiſſion was conſtitute by Act 19. Parl. 1633. which is the moſt compleat of any, and a Model, after which all Commiſſions ſince have been copied; by that Act the loweſt Stipend is appointed to be 800 Merks, or eight Chalders of Victual.——The Decreets to this Effect, were, in our Practice, formerly called *Decreets of Plat*; but now they have the Name of *Decreets of Modification*, or, if the Stipend be divided and proportioned, as well as modified, the Decreet is called, a *Decreet of Locality*.

§ 24. Every Biſhoprick had their own *Chapter*, that is, a certain Number of *Parſons* and *Vicars*, within their own Dioceſe; by whoſe Conſen tthe Affairs concerning the Biſhoprick, were done and performed, *and that reciprocally*; for nothing by the Biſhop could be done without Conſent of the Chapter, or moſt Part thereof, nor yet the Perſons of the Chapter in their particular Benefices, without Conſent of the Biſhop, Dean and Chapter, or moſt Part thereof.

§ 25. But there is an Exception therefrom, of the *Arch-biſhoprick of St.* Andrews, which had no Chapter paſt Memory of Man; but the Conſent of the Prior of St. *Andrews*, and Convent thereof, (whoſe Conſent was teſtified by appending the Convent's Seal of the Priory) was to the Arch-biſhop inſtead of a Chapter, and the

The *Chapter* is the Biſhop's privy Council, with whoſe Conſent he ſets Tacks of his Revenue, grants or renewes Feues of his Lands, &c. *capitulum*, the little or inferior Head of the Dioceſe, which in a Vacancy rules and governs the Biſhoprick, and to them the *conge d' elire* is adreſſed, &c. See Act 3. Parl. 1606. and Act 2. Parl. 1617. whereby it is ſtatuted, That the Conſent of the Prelate is not neceſſary to the Entry or Change of Vaſſals of the Chapter, nor is the Conſent of the Chapter requiſite to the Entry of the Prelate's Vaſſals.

By

the Reaſon thereof has been apparently, becauſe the Arch-biſhop of St. *Andrews*, at the Foundation of the Priory, which was erected by himſelf, and founded out of the Fruits and Rents of his own Benefice, or out of ſuch Kirks as lay within his Diociſe, and were before of his Chapter, did, by that Foundation, extinguiſh the Chapter-kirks, and made them patrimonial to the Priory; and in Reſpect thereof,

By Act 8. Parl. 1607. Power is given to the then Arch-biſhop of St. *Andrews*, Doctor *George Gladſtones*, to nominate ſeven qualified Perſons of the Clergy, having Charge within his Dioceſe, to be the perpetual Council and Chapter of the Arch-biſhoprick of St. *Andrews*: But thereafter, by Act 2. Parl. 1617. the Parliament declares the Miniſters ſerving the Cure at the Kirks therein mentioned (being in Number 24) ſhall be eſteemed the Chapter of that Biſhoprick, and ſhall have the Adminiſtration of the Affairs belonging thereto, which was formerly performed by the Prior and his Canons. Nevertheleſs, the Arch-biſhop, in caſe of Vaccancy, is to be elected by eight Biſhops of his Dioceſe, therein named, and by five Miniſters ſerving the Cure at the Kirks ſpecified in that Act, or by the major Part of theſe Biſhops and Miniſters. Since that Time the Biſhoprick of *Edinburgh* having been erected, the Biſhop thereof is made Chancellour and Viccar to the Arch-biſhop of St. *Andrews*, and therethrough is firſt Ordinary in the Election, which Office formerly belonged to the See of *Dunkeld*.

By the ſame laſt cited Act, the Biſhop of *Glaſgow*, when the See ſhall vaik, is ordained to be elected by the three Biſhops of his Dioceſe, and by his ordinary Chapter, or the moſt Part of them.

If

of, the Prior and his Convent remained to the Biſhop, in Place of the Chapter; in whoſe Place now the Parliament hath ordained a new Chapter, by Act of Parliament 1607 (in Reſpect the Priory is erected in a temperal Lordſhip, which the Lords finds to be only for the Biſhop, and not mutual, (as it was of old) by Decreet in *Anno* 1624.

If there be no Chapter or Convent, ſome Lawyers think the appending of the conventual Seal of the Chapter, with the King's Confirmation, is ſufficient, &c. *Craig in lib.* 1. *Feud. Dieg.* 13. § 9. *P.* 91. towards the End, declares his Opinion on this Subject thus,——*Si non fuerit capitulum, ſive Conventus, an in hoc caſu Prælatus feudum per ſe conſtituere poteſt? Et profecto cum Prælatus & capitulum, inter ſe ſint relata, uno interemto, alterum per ſe ſtare non poteſt de jure, proinde, in hoc caſu, & ſine capitulo, prælatus injure, non recte concedit feudum, uſu tamen noſter, cui aliquando nihil non licet, defertum capituli aut conventus (ſi omnino nullus ſit) ſigilli communis appenſione cum principis confirmatione ſupplet.*

The Priory of St. *Andrews*, was, by King *James* vi. erected into a temporal Lordſhip, in Favour of the Duke of *Lenox*, and the Ratification of the Superiority thereof, paſt in the Parliament 1592. but King *Charles* 1. afterward annexed it to the Biſhoprick.

§ 26. As Biſhopricks had their Chapters, ſo Abbacies and Priories had alſo their *Conventual-brethren*, whoſe Conſent, or the moſt Part of them, was neceſſary to all Tacks and Feues: But now the *Conven-*

*vent-brethren* are all dead, and there is none to be put in their Place; and by Act of Parliament 1587. all *Monks Portions*, after their Deceaſe, were ordained to pertain to the King, but all thir *Monks Portions* are diſponed by the King to the *Lords of Erection*, in their ſeveral Erections, and the ſame remains only in Abbacies and Priories

A *Convent*, *Conventus*, is a Monaſtry, or Place for Lodging, &c. religious Perſons of both Sexes; the Proteſtants juſtly ſay, That Convents are ſo many Citadels, which *Rome* has built in Popiſh Countries, thereby to maintain their Authority, and to ſubject to themſelves the Conſciences of the People. It ſignifies alſo, The Body, or Community of the Religious, who dwell in theſe Houſes, and are attach'd to them, of which there are many Orders and Kinds, to be found in a Table inſert in the Appendix. *Conventual* ſignifies, The Things which pertain to theſe Places and Perſons. And *Conventual-brethren* are the religious actual Inhabitants of theſe Houſes, and matriculate Members of the Community, having a Vote in the Adminiſtration of their common Affairs, in Contradiction to thoſe Religious, who, as Gueſts or Paſſengers, are received into the Houſe to diet and lodge for a Day, or for a ſhort Time; or to difference theſe Gremials from Brethren who poſſeſs Benefices, depending upon the Houſe or Convent, but not reſiant.

*Monks Portions.* Every Monaſtry had, for upliſting their Rents, a Chamberland, who yearly accounted for his Intromiſſion, now thoſe Rents were put in Portions, as many as the Number of the Conventual-brethren, to be imployed for their Food and Raiment, either in common, or ſeverally, according to the Statutes of the religious Houſe. And at the Reformation, when Monaſtries were ſuppreſt, the Monks were ſufferred to poſſeſs their reſpective Portions during Life, and there after they fell either to the Crown, or to the

ories not erected, and in thir the common and *Convent-ſeal* is in Place of the Convent;

the Lords of Erection; and King *James* 6th, in his general Revocation, Act 31. Parl. 1587. revocks all Gifts of *Monks Portions*, &c. whereto he had Right by precedent Acts of Parliament.

§ 27. *Item*, There are ſome Benefices which has a Convent, and are neither called Abbacies nor Priories, but *Miniſtries*, whereof there are three or four in *Scotland*, *viz.* the Miniſtry of *Falfoord*, *Peebles*, *Scotland-wel*, and the Miniſtry of the *Trinity-friars* in *Aberdeen*.

§ 28.

The *Superior* in a Convent of *Matharines*, is named *Miniſter*, and his Benefice or Charge is called Miniſtry; St. *John de Matha* was the firſt Patriarch of the Order of the Holy Trinity, and Redemption of Captives, their Office being to redeem Chriſtians in *Turkiſh* Slavery. They are denominated *Mathurines* from their Founder, who aſſociated himſelf with the holy Hermite *Felix D'Vallois*, in the ſolitude of *Cerfroy*, near to *Meaux*, *apud cervum frigidum in Territorio* Meldenſi. The bare footed Religious of this inſtitute, about the Year 1261. firſt built a Monaſtry in the Valley of *Barcelone* in *Provance* in *France*, and ſince that Time there are many others ſettled in *Europe*. They are called likewiſe Trinity-friars, or Red-friars; their Houſes are named Hoſpitals; for a further Knowledge of this Order, I refer to the Appendix.

Beſides the Miniſtries mentioned in this Paragraph, there were in *Scotland* many others, *viz.* in *Dunbar*, *Houſtoun*, *Dornoch*, *Dundee*, *Berwick*, *Lochſeal*, *Brithen* and *Lufneſs*. See the Table of religious Orders.

§ 28. *Item*, Beſide all thir, there were collegiat Kirks, which conſiſted of a Provoſt and ſo many collegiat Prebendars, who were obliged to do certain divine Service in the collegiat Kirks; and thir were foun-

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A collegiat Kirk is a Church built and endued for a Society of Clergymen incorporat, (commonly in a Place where there is no Epiſcopal See) conſiſting of a Dean or Provoſt, or other Preſident; and under them, Prebends or Canons, who have in the Church, their ſeveral Degrees or Stalls, where they ſit for more orderly ſinging the cannonical Houts. They were inſtitute for performing divine Service, ſinging of Maſs, Veſpers, &c. There were of old in *Scotland* 32 Colledges or collegiat Churches, which may be divided into two Kinds; the one Sort is of Foundation Royal, whereof the King is Patron, confers the Prebends, names the Provoſt or Dean, and the Canons or Prebendaries. The other Kind are theſe founded by the Barons who had great Fortunes; both the one and the other, in their divine Service, are regulated as Cathedrals.

*Kirkheugh* has been founded by one of our Kings, ſeeing 'tis called *Prepoſitura Beatæ Mariæ de rupe*, or *Cappella Regia*, which imports it to be of a royal Foundation: It was given to the Culdees of St. *Andrews*, among whom, as it is recorded in our Hiſtory, one of our Kings, *Conſtantine* the Third, retir'd in the Year 938, and to his Death, which was five thereafter, liv'd a religious Life in that Place, which clearly proves *Kirkheugh* was founded before there were any Earls of *Fife*, the firſt whereof was *Ethelredus* Son of *Malcom* the 3d, King of *Scotland*, the Beginning of whoſe Reign was in 1057. This Earl of *Fife*, in his Donations to the Priory of *Lockleven*, is deſigned *Comes de Fife, & Abbas de* Dunkelden.

The Colledge church of *Crichton* was not founded by the Earl of *Bothwell*; for, in the Charter of Foundation of that collegiate Church, it is expreſly mentioned, That Sir *William*

*Crichton*

ded in *Scotland*, by Noblemen and great Barons, as *Kirkheugh* by the Earl of *Fife*, *Lincluden* by the Earl of *Douglaſs*, *Dumbarton* by *Lennox*, *Crightoun* by *Bothwel*, *Abernethy* by *Angus*, *Tain* by the Earl of *Roſs*, and *Dumbar* by the Earl of *March*, and

*Crichton* Chancellor of *Scotland*, with Conſent of his Son, founds, in the Pariſh Church of *Crichton* or *Locherwart*, a Colledge for a Provoſt and 8 Prebendries, and two Scholars or Clerks, for performing divine Service. This Foundation is dated at *Edinburgh* the 26th of *Decembir* 1449, and confirmed by *James* Archbiſhop of St. *Andrews*, three Days thereafter, *viz.* the 27th of the ſame Month of *December*. Theſe Charters are in the Advocats Library.

*Abernethy* was originally founded for Culdees, by *Garnard* Son of *M'Douark* King of *Picts*, about the Year 700. they embraced the Conſtitutions of the Canons regular of St. *Auguſtine*, in 1273. ſince which Time they continued regular; and it does not appear that this Priory was at any Time ſeculariſed; for, tho' the Superior of this religious Place, may be called *Præpoſitus*, it does not from thence follow, that the Canons were ſecularifed, becauſe many of the Superiors of the Monaſtries of the Canons regular (which are not Abbacies) are at this Day called *Prepoſiti*, *proveſts*.

*Tain* was not founded by the Earls of *Roſs*, but by *Thomas* Biſhop of *Roſs*, as is clearly manifeſt from the Charter in the laigh Parliament-houſe, which is dated 12th *September* 1481.

You'll find in the Appendix, an alphabetick Liſt of the collegiat Kirks in *Scotland*, containing the Names of the Founders, and the Year of the Foundation.

Some of theſe Colledge Kirks were called Provoſtries from the Head or Ruler; and as our Author obſerves, all or moſt Part of them, through the Forfaulture of the Founders,

and whereof the moſt Part are come to the King, by Forfaulture of the Founders.

ders, have fallen, and now belong to the King, and are at his Preſentation, in the ſame Manner, as theſe of royal Foundation.

§ 29. *Item*, Other Gentlemen who could not attain to the founding of colledges, erected Chapels and Chaplanries, in which they had divine Service: And by



Chapel, called by the Latins *Cappella*, perhaps from *Capſa* and *Capſula*, a little Room in a Church or religious Houſe, where anciently they keept a Coffer, one or moe, in which they put the Relicts of Saints, and other precious Things. And *Spelman* obſerves, That the Words Chapel and Chaplain, were not in Uſe at the Beginning of the 5th Century. The Nottaries or Secretaries of the Prince, and thereafter the Chancellors, were called Chaplains, where-through, the Chancellary, in which they kept a Regiſter of the Charters, and other important Writings of the Kingdom, which paſt under the King's Hand, was called the Chappel Royal, in the ſame Manner as the Place wherein they kept the religious Relicts: But in a proper Senſe, a Chappel is a ſmall Church, ſtanding diſtinct and ſeparate, and is neither a Paroch, nor a Cathedral, nor a Priory; but ſubſiſts by it ſelf, and which the Cannoniſts call *Sub Dio*. The 21 Canon of the Council of *Agde*, a City of *France*, in lower *Languedoc*, in Latin *Agatha*, which was held in 1506. permits private Perſons to have Chaplains in their Houſes, diſcharging nevertheleſs the Clergy to celebrate divine Service, in theſe private Chappels, without Permiſſion from the Biſhop. This Word is alſo ſaid of that Part of a great Church, where there is an Altar, at which they ſay Maſs, called by the Cannoniſts, *Sub Tecto*,

Act of Parliament 1567. It is declared to be lawful to all Patrons of Prebendries or Chaplanries, to beſtow the ſame upon Burſars.

*Tecto*, and is properly a Chapellany; and in *France* there are ſeveral collegiat Kirks, who get the Denomination of holy Chappels, becauſe they keep there ſeveral holy Relicts; and in *Scotland* we have followed that Example, as appears by the Paragraph following. See *Spotiſ. Scots-Law-Lexicon*, in the Words Chappel and Chaplain.

The Statute cited in this Paragraph, is Act 12. Parl. 1567. by which it is ſtatuted, That Patrons having Provoſtries or Prebandries of Colledges, Altarages, or Chaplanſies at their Gift, may preſent the ſame to Burſars, whom theypleaſe to name; and the Parliament heartily requeſts ſuch Patrons to diſpone accordingly. This Word Burſa, is explained in *Spotiſ. Scots-Law-Lexicon.*

§ 30. The Kings of *Scotland* had alſo their own collegiat Kirks erected for their own Uſe, as the Chappel Royal of *Stirling*, where-

Our Kings of *Scotland*, in all their Palaces, founded Chappels. King *David* in his Foundation of Holy-rood-houſe, *Anno* 1128. declares, That the Abbot thereof was his Chaplain, and in his Abſence (any other Religious of that Place) to whom belonged all the Offerings made there. In this Chappel were kept ſeveral Relicts, and Bones of Saints, which was produced when any publick Acts were expede; and at this Day our Retours mention, *In Cappella Domini noſtri Regis.* The Monaſtries endeued by our Kings, were conſidered as Chappels belonging to them, from whence the Abbot and Church-men of that Houſe were called *devoti Oratores, vel Capellani noſtri*; and theſe private Chappels of our Kings had this

whereof the chief and principal Adminiſtrator was called the Dean of the Chappel Royal, and the reſt were called Prebendars, and are obliged to ſerve in the King's Chapel, where the King commands by his Dean,



this Priviledge, That they could not be interdicted by the Pope.

King *James* the 3d, *Anno* 1487. annexed to his Royal Chappel at *Stirling*, the Priory of *Coldinghame*, and King *James* the 4th got that Chappel erected by Pope *Alexander* the 6th, into a collegiate Church, in *September* 1501. and the Dean is appointed to be the King and Queen's Confeſſor, with Epiſcopal Juriſdiction. The Dignity of Dean of the Chappel Royal was firſt annexed to the Provoſtry of *Kirkheugh*, near St. *Andrews*: Thereafter, by Pope *Julius* the 2d, it was joined to the Biſhoprick of *Galloway*; and upon that Biſhop's Dimiſſion, it was, by King *James* the 6th, annexed to the Biſhoprick of *Dumblain*, where it ſtill remains.

Thus much concerning Kirks and Benefices, *&c.* it remains that ſome Thing be ſaid of the Power and Juriſdiction civil competent to a Biſhop, and of the Judge Eccleſiaſtical, by him appointed, as Officials of Old, and of Commiſſaries now, who made Inquiry concerning the moveable Eſtate of Perſons deceaſt, authoriſed Executors nominated in their laſt Will; and if they had not conſtitute ſuch, the Officials appointed Executors dative, both which Teſtaments, *i. e.* Written and Dative, the Commiſſaries confirm in Favour of the reſpective Executors, who are bound to make Inventary of the Defunct's whole Executory-goods, and to find Caution, that they ſhall be accountable, *&c.* Now of this Liſt of Goods, ſome of the Bonds granted to the Deceaſed (but not every one of them) were a Part; and herein it is proper to know, which of theſe Bonds do fall under Confirmation, and belong to the Executor, and which do not, *viz.* theſe which pertain to the Heir; on Occaſion whereof, our Author treats of Bonds moveable

and

who now is the Biſhop of *Dumblain*; whereas before, it was ever annexed to the Biſhoprick of *Galloway*.

and heritable, and of the divers Sorts of Executors, and likewiſe of the Succeſſion of Heirs, as may be ſeen in the next Title.

# TITLE III.

## SECT. 1. *Of Confirmation of Teſtaments.* 2. *Of Executors.* 3. *Of Bonds Heritable and Moveable.* 4. *Of the Succeſſion of Heirs.*

THE Biſhops of old had double *Juriſdiction*, one *Spiritual*, over the Kirks of their Dioceſs; and the other *Civil*, over the hail Inhabitants of their Dioceſs; and to that Effect, appointed their *Officials*, who

In the Epiſcopal Government of the Church, there are two Degrees in the Prieſt-hood. Thoſe in the Firſt are called *Biſhops*; theſe in the Second are named *Presbyters*, or ſimply *Prieſts*. The ſeveral Biſhops have a reſpective Territory, within which they execute Juriſdiction eccleſiaſtical, which

who had Power to judge in all Matters concerning Teinds, Minors, Orphans and poor Widows. And ſicklike, had Power to confirm the Teſtaments of all that died



which they have over both the Layty and Clergy, for they are Overſeers and Inſpectors, into the Life and Manners of all Chriſtians, and Perſons living and reſeant within their Dioceſs; and the Word ἐπισκοπῶ in Greek, interpreted *Super intendens* in Latin, ſignifies as much. The inferiour Clergy or Presbyters have properly no Juriſdiction, nor Power in the Government, other than what the Biſhops give them, either by Delegation or Connivance; albeit, of themſelves, and in Quality of their Function as Prieſts, they can admoniſh and teach thoſe within their Pariſh, preach the Goſpel, viſit the Sick, comfort the Afflicted, and adminiſter the Sacraments of Baptiſm and of the Lord's Supper, with a Power to uſe Commination, abſolve penitent Offenders, and to excommunicate ſcandalous impenitent Sinners, which is term'd the Power of the Keyes, of looſing or binding: All which the Biſhops have in Common with their Presbyters; and moreover a peculiar Juriſdiction, which is either ſpiritual or temporal and civil: The Firſt conſiſts, and is exerciſed, in the Ordination of Prieſts, ſuſpending or depoſing them from their ſpiritual Office, and in ſingular Caſes and Cauſes of Excommunication, in conſecrating Churches, in viſiting the Clergy, and in ruling and directing them, &c.

Our Author, in this Title, handles only the civil Power of the Biſhop, which is delegated to another appointed to judge in his Court, by Virtue of a general Commiſſion, and this Judge is, by the Canon Law, called *Officialis principalis*. His Juriſdiction was both ſpiritual and civil, and the Commiſſion could not, in Time of Popery, be given to a Layman: But it is now otherways; for, by Act 133. Parl. 1584. All Miniſters are diſcharged to accept or uſe any Office of Judicatory, civil or criminal, and to be Clerks or Nottaries (except in making Teſtaments) under the Pain of Deprivation.

*Quota.* 1

within their Dioceſs; and for confirming thereof, had his *Quota*, which is *Viceſima pars of the Defunct's Part.*

*Quota.* ] This *Quota* is determined by the laſt Article of the Inſtructions, or Order, to be kept in Confirmation of Teſtaments, recorded among the printed Acts of *Sederunt*, conform to an Act dated *February* 20. 1666. By Act 19. Parl. 1669. the Quote is paid for the free Gear only, the Debts being always inſtructed. Likeas, by the ſame Act, Executors Creditors are declared to be free from the Quote, in ſo far as concerns the Debts they confirm as reſting to themſelves; as are alſo poor People not worth 40 *Lib. Scots*: But Debts due by Bond, bearing Obligement to infeft, will not diminiſh the Quote, when there is an heretable Eſtate to pay theſe Debts. By Act 14. Parl. 1701. all Quotes due ſince the aboliſhing Prelacy, in the Year 1689. are diſcharged to be exacted, and all Bonds given for the ſame, are declared to be void.

§ 2. *Item*, This Juriſdiction was taken from the Biſhops at the Reformation, and the Queen made *Commiſſaries* within ilk Dioceſs, with the ſame Power that the Officials had; and now the Biſhops are reſtored thereto, by Act of Parliament 1609. with this Proviſion always, that there ſhall be

The Word *Official* being Popiſh, and the Power being exerciſed by the Popiſh Clergy, gave Offence, at the Time of the Reformation; or rather, when the Power and Juriſdiction of the Popiſh Biſhops was abrogated, that of their Officials did ceaſe alſo, and Proteſtants would not apply to them for Juſtice in Matters cognoſcible in their Courts: Wherefore Queen *Mary*, by a Signature in the Year 1563. did inſtitute the

be four Commiſſars in *Edinburgh*, who ſhall be Judges in all *Scotland*, ſwa far as concerns Divorcements, and all Reduction of inferiour Commiſſar's Decreets; of which four, two to be admitted by the Arch-biſhop of St. *Andrews*, and two by the Arch-biſhop of *Glaſgow*, albeit their Reſidence be only within the Dioceſs of St. *Andrews*.

the Commiſſary Court at *Edinburgh*, appointing four Commiſſaries to ſit there, and to judge in Divorces, and to reduce the Decreets of inferiour Commiſſaries; which Commiſſion is, by Act 28. Parl. 1567. ratified. They were at firſt nominated by the Queen, and were called *Judices Regii*, and after her Dimiſſion, they were nam'd by the Lords of Seſſion; and it appears from the Books of *Sederunt*, That ſome of theſe Commiſſaries were Lords of Seſſion. But the Epiſcopal Government being reſtor'd, the Nomination of Commiſſaries, was, by Act 6. Parl. 1609. given back to the Biſhops, which was confirmed by Act 1. Parl. 1662. But ever ſince the aboliſhing Epiſcopacy in *July* 1689. the Sovereign names the Commiſſaries in all the Commiſſariots of *Scotland*.

§ 3. Defunct's Teſtaments were of old confirmed by the Officials, and now by the *Commiſſars*, whither the ſame were *Teſtaments Teſtamentar* or *Dative*, but with this Diſtinction, that the Nomination of Executors made by the Defunct, was confirmed immediatly without any Neceſſity of a preceeding Sentence: But, where there was no Nomination by the Defunct, there be-

behoved to preceed a Decreet of the Commiſſars, decerning Datives, whereof this Order was, and is keeped.

§ 4. The Procurator Fiſcal of ilk Commiſſariot, immediatly after the Defunct's deceaſe, cauſes ſerve an Edict, upon a Sunday, at the Kirk Door, on Nine Days Warning, warning the Wife and Bairns, and others having Intereſt, To compear before the Commiſſars, and to hear and ſee Executors decerned and confirmed to the Defunct; at which Time, if any compeared and produced a Nomination, and if no other compeared to object againſt the ſame, the Producer was remitted to the Procurator Fiſcal to confirm the Teſtament; and to that Effect, to give up an Inventary. But if no Nomination was produced, then if the Relict and Bairns compeared, and deſired the Office of Executry, the Judge decern'd them Executors, whereupon they give out a Decreet, whilk is called a Decreet Dative; and if none compear, the Judge decerns his own Procurator Fiſcal. But thereafter upon Supplication given to the Judge by the Relict or Bairns, or any other of Kin, or elſe not of Kin, being a Creditor, or any having ſome reaſonable Intereſt, they will be ſurrogat, in Place of the

the Procurator Fiſcal, in the Office of Executory, which is called a *Decreet of Surrogation.*

By Act 26. Parl. *July* 1690. all Commiſſars and their Fiſcals, *&c.* are forbidden to charge or require any Perſon to confirm the Teſtament, or to give up the Inventary of any Perſon deceas'd, except at the Inſtance of the Relict, Bairns, neareſt in Kin, their Tutors or Curators, or of a Creditor: And it is by that Act declared, That ſpecial Aſſignations or Diſpoſitions, made by a Defunct, tho' not intimated in his Lifetime, ſhall be good Titles to Poſſeſs, Purſue or Defend, albiet, the Sums and Goods therein contain'd be not confirmed. But notwithſtanding of this Act, Surrogations are not Null.

§ 5. The eſſential Points of Confirmation are, the (1.) giving up of the Inventar, (2.) the ſwearing thereof, and (3.) the finding of Caution to make it forthcoming to all Parties having Intereſt.

In antient Times, Purſuant to our *Scots* Canons, *July* 13. 1420. *In Synodo generali apud Perth,* Executors as well Teſtamentary as Dative, were ordained to Swear and make Faith at the Time of confirming the Teſtament, that they ſhall lielly and truly fulfil, according to their Power, the reaſonable Will of the Dead, and ſhall give juſt compt and reckoning of their Adminiſtration, to all Perſons having Intereſt, when they ſhall be lawfully required to do the ſame. See *Balf.* and *Spotſ.* on this Title in their Practicks.

§ 6. And the Inventar conſiſts of three Parts. (1.) The Goods and Gear of the

the Houſe, and Corns, being the Grouth of the *Maynes*, or in the Barns or Barn-yards, with Horſes, Oxen, *&c. Next*, the Debts reſting to the Defunct. And *laſtly*, the Debts reſting by the Defunct: And after this the total Sum of the whole is drawn up, which is either divided or undivided, according to the Condition of the Inventar and Eſtate of the Defunct when he died; for, if the Debts exceeded the Goods *nulla diviſio*, and if the Defunct has Wife and Bairns, the Diviſion is *Tripartite*, whereof one Third is to the Wife, another to the hail Bairns *by* (*i. e. beſides*) the Heir, and the third is called the Dead's Part, becauſe he has power to diſpone the ſamen

*Maynes* ] from *Manere*, the Lands adjacent to the Manſion-houſe, which were ordinarly laboured by the Proprietor's Servants, for the Uſe and Maintenance of the Family, in our Charters called, *terræ dominicales*, See it in *Spotſwood's Scots-Law-Lexicon.*

The Statute mentioned in the end of this §, is Act 14. Parl. 1617. ——— by *Stranger* is here meaned, one who is not a Child of the Teſtator, tho' he be related to him as neareſt in Kin, *&c.* And in this Caſe, even the Wife is reckoned a Stranger, for when ſhe is Executor Teſtamentary, beſides her own legal Portion, ſhe has a Title to a third of the Dead's Part.

Strangers being Executors nominated get a third of the Dead's Part, not on account of Charges, but as a Gratuity from the Teſtator; for the Act mentions, *That by Interpretation of the Will of the Defunct, Executors nominat did before*

ſamen to whom he will, but if it be not diſponed, his Third falls alſo to the Bairns *by* the Heir; and if the Defunct did name *Executors Strangers*, and did not expreſly diſpone on his Third, by Legacy or otherways, the Executors, by Act of Parliament fall the Third of the Defunct's Part for their *Charges.*

*fore that Time, carry the Defunct's whole Part of the Goods, to the prejudice of his Wife and Bairns, which was thought to be againſt Equity.* See *M'Ken.* Obſer. on the Act.

When there is an univerſal Legatary, the Executor named gets no Share of the Dead's Part. *November* 29. 1626. *Forſyth* againſt *Forſyth*, and *January* 15. 1674. *Paton* againſt *Leiſhman.* By the fore-cited Statute, it is declared, That (*what is thereby enacted*) ſhall be without prejudice to the Executors, of whatever Legacies ſhall be left to them by the Defuncts, albiet the ſame exceed the Third of the Dead's Part; and in caſe the Legacies exceed it, the Executor ſhall have Right to the whole Legacy, and to no Part of the Third; and where Legacies are left to ſuch Executors, they ſhall not have Right to both, but the Legacy ſhall be imputed in part Payment of the Third.

§ 7. If any Thing was omitted in the up-giving of the Inventar of the Teſtament, or evil Appretiat, and given up within its juſt Worth: Then at the Inſtance of any Party having Intereſt, or of the *Procurator Fiſcal*, there is an Edict raiſed for decerning *Executors ad omiſſa, aut male appretiata*, which muſt be executed againſt the Executor confirmed upon nine Days warn-

warning; and on the Day of Compearance, the Purſuer will be preferred to the Executor confirmed, *propter dolum et malam fidem* of the Executor confirmed, if he be not able to purge the Fraud by pregnant Preſumptions and Circumſtances.

By Act 26. *July* 1690. The Procurator Fiſcal has now no Right to claim Adminiſtration.

In the Caſe *Ker* againſt *Ker*, *July* 16. 1667. obſerved by *Dirleton*. It was found, That an Executor, notwithſtanding of the Oath given upon the Inventary the time of Confirmation, may be urged to declare upon Oath, if ſome Debts and Goods were omitted, which he then knew not of, and if he has not got Prices greater than theſe in the Inventary.

When one is ſeeking to be decerned *ad omiſſa*, there is a neceſſity for producing the principal confirmed Teſtament that it may be known, whether the Goods alledged to be omitted were confirmed or not before. But after one is decerned *Executor Dative ad omiſſa*, and is purſuing for the Gear omitted, he needeth not produce any more than the Dative to inſtruct his Summonds, unleſs the Defender will alledge peremptorily, that the ſame Goods were confirmed in the principal Teſtament, *March* 6. 1627. *Spotſ. Prac. Tit. Executors*, § 34.

§ 8. This Teſtament *ad omiſſa* is confirmed by the ſame Order as the principal Teſtament, except allennarly that this receives no Diviſion, in reſpect the Relict and Bairns may be excluded *ob malam fidem*, and the hail will be adjudged without any Diviſion, to pertain to the *Executor Dative ad omiſſa*; and yet, if either the Relict or Bairns

Bairns purge the Fraud, *ut ſupra*, they will be admitted to crave their own Part, as they have in the principal Teſtament.

Any principal Executor, who in theſe Caſes cannot free himſelf from Fraud, which is attended in ſome Meaſure with Perjury, forfaults both the Office and the Goods omitted; but ſtill the *Executor ad omiſſa*, &c. is liable to the Relict, Children and Creditors of the Defunct, not participant of the Fraud, in the ſame Manner as the principal Executor would be, if there had been no Omiſſion or Mal-appretiation.

§ 9. *Item*, The Executor in the principal Teſtament, for eſchewing of this Prejudice, which may ariſe by the *omiſſa*, are in uſe to proteſt at the Time of the Confirmation of the principal Teſtament, that they may be heard to eik any Thing that was omitted, when the ſame ſhall come to their Knowledge; and they may upon Supplication to the Commiſſars, when any Thing omitted comes to their Knowledge, eik the ſame to the principal Teſtament, which is done without new Confirmation, and admitted by the Commiſſars, providing it be done before the ſerving of the Edict *ad omiſſa*; and providing that which is craved to be eiked exceed not 1000. *L.* or the half of the principal Inventar: In which Caſe, the Commiſſars will

will not do it by way of Eik, but will have the ſame to be done by way of new Confirmation *ad omiſſa.*

§ 10. *Memorandum*, albiet a Father's Teſtament that has a Wife and Bairns, receives a *Tripartite* Diviſion; yet where it wants any one of them, it receives but a *Bipartite* Diviſion, and the Teſtament of a Woman cannot receive a *Bipartite* Diviſion if her Husband be dead, but is confirmed without any Diviſion, albiet ſhe have Bairns; becauſe, *Non debetur legitima liberis ex parte Matris, quia Mater non habet liberos, in poteſtate ſicut Pater:* But if her Husband be living, and Bairns gotten betweeen them, then her Teſtament receives a *Tripartite* Diviſion, *viz.* a Third to herſelf, and of the other two Thirds, one to the Husband and the other to the Barns, which is in reſpect of the *legitim* due to the Bairns after the Father's deceaſe, albiet there be no

In this Inventary of the Family, ſubjected to the Diviſion, the Wife's Jewels and Habiliments, being *præter dotalia*, and not in communion, are prætermitted, which paraphernal Goods, the Executors of the Wife will take *tanquam precipua.*

In confirming the Teſtament of a Wife pre-deceaſing, the Debts of the Husband as well active as paſſive, movable *quoad relictam*, muſt be admitted into the Inventary, and

no *Legitime* due to them by Deceaſe of the Mother; and if there be no Bairns, the Teſtament receives a *Bipartite* Diviſion, *viz.* one Half to the Defunct, and another to the Husband.

and albeit *Nisbet* in his Doubts, *Tit. Teſtament on the Wife's Part*, and *Stewart* in his Anſwers agree, That there is to be Conſideration of the *Legitime*; yet they both expreſs themſelves doubtfully, with reſpect to the Heirſhip-Goods, albeit *Stewart* inclines to take no regard of the Heirſhip, becauſe the Husband lives, yet it may ſeem that the Reaſons given for admitting the *Legitime* have the like Force for the Heirſhip. See the Doubts and Anſwers.

§ 11. *Item*, albiet the Heir be excluded from all Portion of the Father's Teſtament, yet *quoad Matrem* he comes in alike with the reſt of his Bretheren and Siſters.

If the Heir of either Father or Mother get Heretage by their Deceaſe, he muſt either collate, or renunce his Share of the Executry.

§ 12. *Item*, In Teſtaments *non eſt jus repreſentandi*, as there is in Lands and Heretage; but the neareſt in degree of Kin-



*Jus Repreſentandi, i. e.* The Right of Repreſentation, a Term in our Law, borrowed from the *Romans*, which we make Uſe of in Caſes of Succeſſion, is thus, By the civil Law, the Succeſſion to one not teſted, was either *in Capita*, or *in Stirpes*. The firſt took Place (and was ſo termed) when

dred excludes all others of a farther Degree, albiet more near *quad ſucceſſionem* to Lands and Heretages; for in Heretage there

when the Heritage was divided into as many Parts as there were Heads, or Perſons who might ſucceed. *Succeſſione in Stirpes*, when many Perſons who have Right to ſucceed throw their being deſcended of divers Parents, Kindred of the deceaſed, who was the Root of the whole Progeny, being called to the Succeſſion, the Number of them is not noticed, but only theſe Stocks from which they ſeverally or immediatly deſcended: So that by *Capita*, we underſtand the Perſons begotten and proceeding from one or many Roots of Kindred and Lineage, which nevertheleſs meet together in, and flow from the deceaſed, to whoſe Eſtate they claim Succeſſion. By *Stirpes* we mean, Theſe Perſons who are the Root and Stem of the Lineage; as the Son is the *Stirpes* of the Oyes or Grand children, and theſe are *Stirpes* of the Great-grand-children. Again this Succeſſion *in Capita* obtains, when the Succeſſors claim it by Virtue of their own proper perſonal Right: That *in Stirpes* takes Place, when the Succeſſors come and are admitted upon Account of a Right in the Perſon of one deceaſed, whom the Succeſſors *in Stirpes* repreſent, as coming in his Right and Place, and this is called *jus Repreſentationis*, or *jus Repreſentandi*. Thus according to the *Roman* Law, in a Queſtion of Succeſſion to a Grand-father, all the Sons and Daughters ſucceed *in Capita*, and each draw equal Shares, as many Perſons, as many Parts: But if a Son or Daughter be dead, leaving behind them Children, theſe are admitted to draw and inherit ſuch a Portion as would have fallen to their Father or Mother, if they were alive. For Example, *A.* dies, leaving behind him 3 Sons, and of a deceaſed Son 3 Oyes, and of a deceaſed Daughter 4 Oyes. The whole Heritage is divided into 5 Parts, whereof the 3 ſurviving Sons draw each of them 1 Share, in all 3 Shares, and becauſe the Son deceaſed would have got the 4 Share, therefore his Children the 3 Oyes can get no more: In like Manner the 4 Grand-

children

there is *jus repreſentandi*, and the Son, Oye, *&c.* has the the ſame Place or Right that their Father had; but in Teſtaments the



children by the Daughter get the 5*th.* Share, which would have been her Portion if ſhe had ſurvived; ſo that the Sons of the deceaſed ſucceed *in Capita*, and the Children of his predeceaſed Sons and Daughters, *i. e.* his Oyes, ſucceed *in Stirpes*. This Right of Repreſentation is not circumſcribed within any definite Degree of Kindred, but reaches as far as there is one to claim it. For ſuppoſing in the preſent Caſe, That one of the Nephews deceaſing had left 3 Children, their Father being intituled to no more than to ⅓ of a fifth Part of his Grand-father's Eſtate, each of his Children can get no more than a third of their Father's Portion, which is of the whole Inheritance belonging to the Great-grand-father one thirtieth Part. In our Land Eſtates, which are ordered by the Feudal Law, the eldeſt Son ſucceeds to his Father in the Feu, and excludes the whole younger Brethren; and if he die before the Father, his eldeſt Son comes in his Room *jure Repreſentationis*, and in the Succeſſion of his Grand-father will be preferred to his Uncles, tho' they be one Degree nearer to the deceaſed; and in a Feminine Feu (*feudo Feminino*) the whole Daughters ſucceed to their Father *in Capita*: But in the Caſe of many Daughters, when one or two are deceaſed, leaving each a Son, he ſucceeds to their Part; but if they leave two or more Daughters, their Mother's Share and no more is *jure Repreſentationis* divided among them, and therethrough, their Succeſſion to their Grand-father, is not *in Capita* with their Aunts, but *in Stirpes*, and as their Mother would have ſucceeded. See the Commentators on the Title, *de Heredit. quæ ab inteſtat. defer.* and on *Novel.* 118. But as to the Succeſſion in Moveables or Executry, our Law and Practick admits not this Right of Repreſentation; but he or they being in the ſame Line, and in the ſame Degree of Propinquity, *i. e.* higheſt to the deceaſed, are only admitted, and they exclude the Deſcendants of others

*Father-brother* or *Father-ſiſter*, will exclude all the Brethren and Siſter's Bairns, and will have the ſole Benefit of the Executory.

others deceaſed, who were as nigh as they, and if they had been alive, would have drawn their Portion, wherethrough our Succeſſion in Moveables is only *in Capita*, and not *in Stirpes*. Ex. gr. A Father dies, leaving behind him 3 Sons or Daughters alive, and two or three Grand-children of a Son deceaſed. The ſurviving Children are Executors to their Father, and the Grand-children are excluded from all Right to the Moveables of their Grand-father, and draw no Portion of the Share which would have fallen to their Father, if he had been in Life. But it is to be obſerved, That the Kindred in the Collateral Line, tho' nearer in Degree, are not admitted while there's in the ſtrait Line Deſcendent any one, tho' moſt remote. Thus Great-great-grand children, *&c.* of the Perſon deceaſed, will be admitted before his Brother. See *Hope* Min. Pract. Tit. iv. § 12. and the Notes on it. The Collectors or Compilers of the Laws of the xii. Tables, have gleaned this Part of the *Roman* Law, from the like Conſtitution of the *Athenians*, The Words whereof *Demoſth.* recites in his Oration ὑπὲρ ἀγρίου κλήρου as *Mynſinger* obſerves. I have been more than ordinary large on the Explication of this Matter, becauſe none of our Law-writers have illuſtrated it.

But ev'n in Executory, the *jus Repreſentationis* has Place, where the Executor being neareſt in Kin, died after the Teſtament was confirmed, tho' not executed. *Bells* againſt *Wilkie*, *Jan.* 25. 1662. obſer. by *Gilmuir*.

§ 13. The Benefit of Confirmation of Teſtaments is this, That the Executor confirmed is no farther ty'd in Law to the Payment of the Defunct's Debts, but *ſecundum vires*

*vires Inventarii*; whereas, if any Perſons, ane or mae, intromet with the Defunct's Goods before Confirmation, they may be



Every kind of Executor is bound to do Diligence, for making effectual the whole Goods and Sums in the Inventary.

Vitious Intromiſſion is not now purgeable by ſubſequent Confirmation of the Goods intrometted with. For by Act 20. Parl. 1696. It is ſtatuted, That Intrometters with the Moveables of a Defunct, who are not before Intromiſſion confirmed Executors, nor have before Intromiſſion Right from an Executor confirmed, ſhall be liable as vitious Intrometters, albeit a third Party be confirmed Executor in a particular Debt or Subject.

Since the enacting this Law, the Lords have ſuſtained, in Favour of an Intrometter, without a Title, an after Confirmation within Year and Day of the Debitor's deceaſe, *Drummond* againſt *Campbell*, *December* 13. 1709.

By our Old Law and Practick 1567. Executors ſhould confirm the Defunct's Teſtament within ſix Months, *Spotſ.* Pract. Tit. Executors, § 33. and *ibid.* § 40. The Lords ſuſtained Confirmation within Year and Day, tho' after Intromiſſion, and the intenting a Purſuit. *Adie* againſt *Gray*, *Jan.* 24. 1628. *Spotſ. eod.* § 62. The Lords found it was lawful to an Executor decerned, to Confirm at any Time before Year and Day expire, and to purge his former Intromiſſions thereby, altho' there were never ſo many Purſuits intented againſt him before Confirmation, *March* 25. 1629.

In the Caſe *Ewing* againſt *Rowan*, *June* 15. 1711. An Action at the Inſtance of the Heir, who had paid moveable Debts, againſt a vitious Intrometter, was found not to Extend *ultra Valorem* of the Goods intrometted.

And in a Caſe *Moor* againſt *Maxwell*, *June* 18. 1712. The Lords found a Confirmation before Citation, did purge the foregoing Vitioſity, notwithſtanding of the Act 20. Parl. 1696, afore-cited.

When

conveen'd, as univerſal Intrometters, for the Defunct's hail Debts, albeit, the ſame exceed the Intromiſſion never ſo much, and the only Way to purge and free themſelves, is,

When the Intromiſſion was ſmall ( 7 *L.* 10 *ſh.* ) and conſiſted of a ſingle Act, the Lords found it was not Vitious, as in the Caſe *Stark* againſt *Folly*, *Jan.* 22. 1713.

An Intrometter in the following Circumſtances was not found vitious. 1. If, before Intromiſſion, the Gift of the Defunct's Eſcheat had been declared. 2. If, before Intromiſſion, he had obtained a Gift of the Defunct's Eſcheat, tho' it be not declared. 3. If he had from his Donators of Eſcheat, a Warrant to intromet. 4. If he had that Liberty from the Executor, who had confirmed the Goods intrometted with. 5. If the Intrometter entered to a Defunct's Houſe, by Warrant of the Lords, the Poſſeſſion of Goods in the Houſe doth not infer vitious Intromiſſion, unleſs they make uſe of ſuch of them as *uſu Conſumuntur*, or diſpoſe of others that are not of that Nature, as Beds, Tables, and the like. Lady *Spencerfield* againſt *Hamilton*, *June* 10. 1674. and ſee the Caſe of *George Meinzies* againſt *Meinzies* of *Rotwell*. *December* 16. 1674. *Chalmers* againſt *Ferguſſon*, *Jan.* 22. 1675. *Spotſ.* Tit. Executory §. 16. obſerved, That a Woman being purſued as univerſal Intrometter, and excepting, that there were Executors confirmed before intenting the Cauſe, and that the Teſtament was exhauſted by lawful Sentences, and Summonds of Exoneration intented before the Purſuit, was relevant, &c. altho' Decreet of Exoneration was not obtained. And in the ſame Title, § 17. if a Mother be left Executor Teſtamentar, and confirm her Daughter, who, thereafter, upon lawful Sentences, obtains a Decreet of Exoneration; if afterwards the Executor Teſtamentar be purſued, ſhe may defend herſelf by the foreſaid Exception, notwithſtanding of her Intromiſſion, in reſpect the ſame was to the Behoof of the Executrix confirmed. See likeways *Spotſ.* in the ſame Title, § 62. and *Forbes Journ.* P. 708.

A Relict being purſued as vitious Intrometter with her Husband's Goods, defended herſelf by ſingular Titles; and tho'

is, to confirm *ante Citationem*, otherways, *tenentur in ſolidum.*

tho' the Purſuer got this declared to be inſufficient, yet ſhe was found liable *in valorem* only, but was hindred to ſupply the defect in her ſingular Right, by a Confirmation *pendente lite*, in Prejudice of the Purſuer. *Black* againſt *Lindſay*, *July* 23. 1713. obſ. by *Forb.*

§ 14. *Item*, Where the Teſtament is confirmed, the ordinary Remedy to free them from the Debts, which exceeds the Inventary, is to obtain a Decreet of Exoneration before the Commiſſars, to which they muſt ſummond the hail Creditors of the Defunct, and all others Generally.

§ 15. *Item*, The Commiſſars do never admit Exoneration by Way of Exception; but, before the Lords, it is ordinary, if the Executor conveen'd offer him to prove,



When the Teſtament is executed, and the Inventary exhauſted, *i. e.* when the Executor gets Poſſeſſion of the Moveables, and obtains Payment of the Debts owing to the Defunct, at leaſt, obtains Decreet againſt the Debitors; and on the other Hand, when the Debts due by the Teſtator, are paid, the Relict, Children, and Legators ſatisfied, wherethrough the whole Sum of the Inventary is exhauſted, the Executor raiſes Proceſs of Exoneration before the ſame Court, wherein the Confirmation was expeded; and this Decreet of Exoneration, if duly obtained, affords a peremptory Defence againſt all after Proceſs, which may be intented by any Creditor of the deceaſed, againſt this Executor; and to make this Exoneration

that the Inventar is exhauſted by true Debts proceeding upon Decreet, or proven by Writ, whereof he made Payment before the Intention of the Cauſe againſt him.

ration effectual, the Executor is not abſolutely ſafe to pay any Debt, without a Decreet for his Warrant. For,

Executors may not make voluntary Payments (which the Law orders) that it may not be in their Power, to prefer one Creditor to another; and, if even after Sentence, but before Payment, another Creditor purſue, the Executor muſt execute a Summonds of Multiple-poinding: And tho' Debts acknowledged in the Teſtament (albeit they have no other Document) may be paid without a Sentence; yet when another Creditor has raiſed Proceſs, the Executor muſt, by a Summonds of Double-poinding, call the Teſtamentary Creditors, whom he cannot but know. See *Stair*'s Inſtit. Lib. iii. Tit. 8. § 66. *Spotſ.* Pract. Tit. Executors §§ 59, 65, 70.

An Executor being purſued by the Defunct's Creditors, it is not enough to alledge, the Teſtament exhauſted by lawful Decreets obtained againſt him, except he ſay alſo, that he has made Payment conform to theſe Decreets. See *Falconer*'s Deciſ. No. xi. P. 22.

It was the Cuſtom before the Commiſſars, when Creditors of one deceaſt, get Decreet againſt the Executor, to cauſe them find Caution, that they ſhall refound to the other Creditors Teſtamentaries (when they recover Sentence againſt the Executor) a Part of what is paid, in Proportion to the whole Debts. See *Spotſ.* Tit. Executory § 70.

§ 16. In Teſtaments, all thoſe who are of a like Degree, are admitted to the Office of Executry; albeit, ſome of them be *Germani*, ſome of them *uterini tantum*, and

and ſome of them *Conſanguinei tantum*; albeit in Succeſſion of Heritages, the Brother or Siſter-german exclude all others, who are either *Conſanguinei* or *Uterini*.

Our Author hath unadvertantly fallen into a Miſtake, for *Uterini* are excluded for ever, becauſe the *Cognati*, or Kindred by the Mother, are never admitted to the Succeſſion, which the Law devolves upon the *Agnati* alone, or Kindsfolk by the Father, of whom ſome are *conſanguinei* only, *i. e.* deſcended from the ſame Father, but not from the ſame Mother; others are called *Germani*, *i. e.* begotten of the ſame Father, and born by the ſame Mother, upon Account of their full Blood, exclude the *Conſanguinei*, who never take Place, except in the Faillure of the *Germani*, and of their Deſcendants.

§ 17. *Item*, In Teſtaments the Succeſſion is granted to all who are of one Degree, which is divided among them, *quoad Capita, & non quoad Stirpes*, albeit it be otherways in Succeſſion of Heritage, which is divided *quoad Stirpes & non in Capita*.

See the Notes upon § 12. *h. t.*

§ 18. *Item*, The Teſtator cannot diſpone

A *Teſtament* is a Writing, in which one names a Perſon, one or more, to be Succeſſor to him in his whole moveable and perſonal Eſtate, (who, by the Law of *Scotland*, is called an Executor, and not an Heir) and in it he may alſo declare his Will and Pleaſure concerning the Diſpoſal of theſe Move-

pone in Teſtament upon that which is Heritage, or Heirſhip goods, but he may name Moveables (which are called Executry) after his Deceaſe. The Law and Practick gives to a Teſtator Power of nominating in his Teſtament, a Tutor, one or moe, to his Children who are within the Years of Pupillarity.

Albeit this Teſtament may be form'd and ſign'd many Years before a Teſtator's Deceaſe; yet, becauſe it is revockable, *etiam in articulo Mortis*, and if not recalled, is reckoned to be his laſt Will on Death-bed, *i. e.* that while he lived, he continued in the ſame Mind, therefore it is not of Force till after Death.

Ancient Cuſtom and Practick has given it a peculiar Stile, which is not proper to be adapted to any other Deed in Law, or Conveyance, eſpecially of Lands and Tenements, which muſt be done in a Writing and in a Form peculiar, and ſet a Part for that Purpoſe. See the Caſe of *Allan Henderſon*, *November* 14. 1667. elegantly reported by *Dirleton* in his Deciſions, *P.* 40.

Now, a Leidge or free Subject, while ſound in Mind and Body, may diſpoſe, at Pleaſure, upon his whole Means, moveable or immoveable, which is done by a Diſpoſition, the Stile whereof is known, and not by Way of Teſtament: But he, upon Death-bed, cannot, any Manner of Way, alienat his Lands and Heritage, to prejudge his Heir, who has Right, not only to the Lands, but alſo to a Portion of certain Moveables which the Law has ſet a Part for him, known by the Name of Heirſhip Goods, the Inventary whereof is in the Appendix to this Book.

The Word Executor and Executory, is *Nomen univerſale* giving a *jus Univerſum*, *i. e.* a full Right to the whole Goods which the Law allows a Teſtator to diſpone upon, tho' not one Particular of them be named; for it is an univerſal Succeſſion in its Kind; and when a Teſtator gives away any Thing in ſpecial, it is ſaid to be done by Way of *Legacy*, which may be bequeathed to a third Party, or even to the Executor himſelf, who, in that Reſpect, is called a *Legatary*. It may be thought a Legacy of a Sum due to the Teſtator,

upon

name a Tutor to his Barns, who are *infra pubertatem.*

upon heritable Security, will be effectual, according to the Reaſoning in the Caſe *Cranſton* againſt *Brown*, *November* 21. 1674. obſerved by *Nisbet*; but it will import no further than an Obligation on the Executor, to pay as much out of the Executry, if ſufficient to bear that Burden, as was found in the Caſe of *Kinloch* againſt *Lundie*, *July* 1663. obſerved by *Gilmuir*.

In Relation to Conveyances of Heritage by one in Sickneſs, ſee Act 4. Parl. 1696. And for the Nomination by a Father, of Curators to his Children, ſee Act 8. Parl. 1696.

§ 19. Albeit in Teſtaments the Executor confirmed has *beneficium Inventarii*; yet if the Creditor offer him to prove, that the Executor confirmed has intromitted with a Number of Goods, which he hath *doloſe* omitted, the Lords are in Uſe to admit this Reply, *ad hoc*, to make the Executor liable to the whole Debt for which he is purſued, albeit his further Intromiſſion be leſs than the Debt.

§ 20.

See the Notes on § 13. Superintromiſſion after Confirmation, is found to be an univerſal paſſive Title, *Spotiſ.* Tit. *Executor*, § 22. *February* 17. 1627. See the Caſe *Chalmers* againſt *Farquharſon*, obſerved by *Nisbet*, *January* 22. 1675. where he gives ſolid Reaſons in Law, why an Intromitter is liable the Moment after Intromiſſion without a Title; and in the Caſe *Drummond* againſt *Campbel*, *December* 13. 1709. Superintromiſſion after Confirmation with Goods not given up in the Inventary, was declared to be an univerſal paſſive Title. See the Notes on § 13. and § 29. *h. t.*

§ 20. An *Executor nomimate*, or *decerned dative*, may purſue before Confirmation, providing they have Licence of the Commiſſars for that Effect; But this is only granted in principal Teſtaments, either *teſtamentar* or *dative*, but not *in datives ad omiſſa*, in Reſpect the Commiſſars refuſe to grant Licence thereupon.

An Executor decerned, who has confirmed a Part of the Goods, may, without a Licence, purſue for Payment of other Debts, not confirmed in a Proceſs before either the Commiſſars themſelves, or the Lords of Seſſion, *Bothwel* againſt *Trotter*, *January* 10. 1710.

In the Caſe of *Steven* againſt *Ker*, *June* 1665. the Purſuer's Title as Executor, *ad omiſſa*, and having Licence, being quarrelled, that without a Confirmation of the Subject, there was no ſufficient Title, the Lords ſuſtained Proceſs in Reſpect the Purſuer was decerned, tho' not confirmed; and that the principal Executor, who had the ſole Intereſt to quarrel, had been called to hear the giving Decreet dative *ad omiſſa*.

§ 21. *Item*, Licences are granted commonly by the Commiſſars, *ad Diem vel uſque ad Sententiam excluſive*; and if any Licences be granted, *includendo Sententiam*; or if the Sentence happen to be pronounced before the outrunning of the Day to which the Licence was granted: In thir Caſes the Lords ordain the Sentence not to be extracted, untill the Purſuer report to the Clerk of the Proceſs, the Comfirmation of the

the Teſtament; or otherways, at the Lords Pleaſure, find Caution to confirm betwixt and ſuch a Day deſigned by the Lords.

A Decreet proceeding upon a Licence, was not annulled for not bearing the Debt to have been confirmed before Sentence, becauſe it was inſtructed that it had been duly confirmed, *Johnſton* againſt *Houſton*, *January* 20. 1713. in *Forbes*.

§ 22. The Cautioner in the confirmed Teſtament, cannot be purſued, till the Executor be diſcuſſed.

See the Reaſon of this in *M'Ken. Inſtit. B.* iii. *T.* 3. § 25.
In the Caſe of the Creditors of *Harden* againſt *Ker*, *June* 1712. in *Forbes*, the Lords found, a Cautioner in the confirmed Teſtament, could not accept from the Executor, a Diſpoſition of all the confirmed Goods, ſo as to make them his own Property, in Prejudice of Creditors of the Defunct.

§ 23. *Item*, Albeit commonly the Confirmation bear, That the Caution is found by the Executor, yet if the Executor be Pupil or Minor, and gives not up, nor makes Faith upon the Inventary, himſelf, but the Inventary is given up and ſworn, by the Mother, Tutor, or neareſt in Kin, *&c.* In this Caſe the Caution is underſtood to be found by theſe that ſwear the Inventary, and not by the Minor; and the Minor may purſue theſe that gave up the Inventary, and intrometted with the Goods and

and Gear confirmed, and obtain Sentence againſt them; and if they ſhall be found not *ſolvendo*, after the diſcuſſing of them, he may purſue the Cautioner contained in the Teſtament; and it will be no relevant Defence to the Cautioner to alledge, that he is Cautioner for the Executor, and that therefore he can have no Action againſt him, but ought to relieve him, in Reſpect the Caution is holden to be found, not by the Minor, but by the Upgiver, as ſaid is.

In Matter of Executry, the Caſe of a Minor is very favourable; for, though he be Executor nominated, yet he may renounce before he be confirmed. (as any other Executor may do) but if once confirmed, no Executor can renounce *quamvis rebus integris*, and has intromitted with nothing; whereas a Minor may, by Way of Action, be reſtored *in integrum*: But in this Caſe, a Major muſt put the Teſtament to full Execution. In *July* 1626. *Alexander Drummond* purſuing *Logan* Spouſe to *Maxwel* of *Hills*, for a Debt due by her Father, the Lords found, That in Reſpect her Father's Teſtament dative was given up by her Mother, who confirmed her Executor in her Minority, and that ſhe had never any Intromiſſion with her Father's Goods; therefore ſhe being ſtill Minor, might renounce, *rebus integris*. See *Spotiſ.* Tit. *Executry.* § 71.

§ 24. Where there are any moe Executors than one, and all die to one, *he* remains

1. When an Office which is perſonal and indiviſible, with Reſpect to the Right, is allowed to be exerced and adminiſtrated by two or moe Perſons, if one of theſe fail by Death, or otherways, the full Title and Right, which, from the

mains Executor *in ſolidum per jus accreſcendi*; but if all die, then the Teſtament, in ſo far as is not execute, muſt of new be con-

the Beginning, was in all and in every one, remains with the Surviver; and the Right which belonged to the Perſon deceaſed, not deſcending to Heirs, becauſe it was perſonal, accreſſes wholly, or *in Solidum*, and is conjoined to the other Perſon ſurviving; and this the Law calls *jus Accreſcendi*. See in *Spotiſ. Scots-Law-Lexicon* this more fully explained, with the various Kinds or Ways of Conjunction. *Solidum*, as well in the Language of Lawyers, as of Grammarians, is the ſame with *Totum & Integrum*, a Whole without Diminition or Subſtraction of any the leaſt Part of it.

2. The Office of an Executor, according to the Intendment of Law, is to fulfil the Will of the Teſtator: Now, if the Executor die before that be done, the Judge Ordinary gives the Office to another, that the Deſign of the Defunct may be brought to Effect, *& nihil magis hominibus Debetur quam ut ſuprema voluntatis, poſtquam jam aliud velle non poſſunt, Liber ſit Stylus, & licitum quod iterum non redit Arbitrium.* L. 1. Cod. de Sſ. Eccles.

3. The Goods of the Teſtator are, in his Lifetime, *homogeneous*, known by one only Name of his Property, and undergo no Diviſion into Parts; but, by Appointment of Law, at and after his Deceaſe, others appear to have an Intereſt in theſe Goods, and lay to them a Claim, which the Teſtator cannot evacuat or hinder; and they are firſt the Children in the Family of a Father, who get a Third of the Moveables, called the *Legitime*; and next, the Wife gets another, known by the Name of the *Wife's Third*; the remaining Third being left to the Teſtator's Diſpoſal, is called the *Dead's Part*; and this alone, in a proper Senſe, is the Subject of the Teſtament, and of the Executor's Adminiſtration, with Reſpect to which only the Teſtament may be ſaid to be executed or not to be executed; for the Children *in Familia*, tranſmit their *Legitime* to their own neareſt in Kin, albeit the Teſtament of the Father was not confirmed, becauſe, in their Father's Lifetime, the Law conſiders ſuch

ion:

confirmed, *quoad non executa*, and Executors decerned and confirmed to that Effect, and

*tanquí Domini rerum illius*, and as domeſtick Heirs, whoſe Right, while their Father lives, being ſopite, appears after his Deceaſe; and the Law gives to them a Third or Half of the Moveables, which is due to them, *naturali quadam Neceſſitate*, (L. 7. ff. de Bon. damnati) & *communi Parentum Voto*. (L. 7. § Ult. ff. ſi Tabb. Teſti.) But it is not ſo in their Right to a Share of the Dead's Part, which is not tranſmitted without Confirmation. 2. A Relict tranſmits her Third or Half of the Moveables of her Husband, tho' the Teſtament is not confirmed; becauſe, *ſtante Matrimonio*, there was between Husband and Wife, a Communion of the whole Moveables, whereof the Adminiſtration is in the Hands of the Husband; by whoſe Deceaſe, the Wife's Intereſt appears, and becomes to be determinable *quid quale & quantum*; ſo the Deceaſe, and Will of the Huſband, is not the Cauſe of this Right, albeit then, and not before, the certain Quantity of the Goods belonging to the Wife is made manifeſt; and becauſe her Third or Half cannot be known, till the *Quota* of the Debts be ſtated and paid, the Law ordains the Defunct's Teſtament to be confirmed *i. e.* to exhibite an Inventary of Goods, and another of Debts and Legacies, both which are to be ſatisfied by the Executor, *Secundum vires Inventarii bonorum mobilium*, and that becauſe the Debts affecting the whole Goods, muſt be paid preferably, either to the Legitime, or the Relict's Third. Now as to the Children, or any neareſt in Kin, claiming the Dead's Part; and as to Legataries, if they die before Confirmation, the Intereſt of the Kinſolks and Legacies periſh, for they deſcend not to Succeſſors, which they wou'd have done, if confirmed in the Teſtament. See the Caſe *Bells* againſt *Wilkie*, *January* 25. 1662. and of *Hamilton* againſt *Hamilton*, *December* 1662. both obſerved by *Gilmuir*. But with Reſpect to the Executor, the ſimple Act of confirming, ſufficeth not to make the Teſtament to be executed; for, if he ſhould deceaſe without doing more, there's Place for an Executor, *ad non executa*, who muſt be

decerned

and that is counted *non executum*, which was not actually intrometted with, nor uplift-



decerned, and give up Inventaries of new again. The Difference betwixt Executors confirmed, being neareſt in Kin, and Executors, Strangers to the Teſtator, lieth in this, That the Firſt hath Nature's Right, cloathed with a legal Title, for their own Behoof, and not in Truſt for another; and it would ſeem againſt Equity and Reaſon, that the unforeſeen and unavoidable Calamity of Death ſuperveening, ſhould hinder the Repreſentatives of the deceaſing Executors, from proſecuting the Right ſo eſtabliſhed by their Anceſtor, who poſſibly was by the teſtamentary Debitors, unjuſtly poſtponed and impeded from obtaining Decreet and Payment. Again, the Stop may proceed from Arreſtments by the Creditors of the Executor, in the Hands of the teſtamentary Debitors, and it may ſeem unjuſt, that theſe Creditors thus affecting the Executry (which may be done as well before as after Sentence) ſhould thereby, not only hinder their Debitor to acquire Funds for their Payment, but alſo hurt themſelves, whereas a Stranger hath no more but *nudum Officium*, or a Truſt to the Benefit of others. See *Nisbet*'s Doubts, Tit. *Executor*, § 4, 8. and *Stewart*'s Anſwer. Now, for diſtinctly explaining this Matter, it is to be noticed That the Office of Executor is in Part *active*, and in Part *paſſive*; the active conſiſts in gathering together the *Corpora* and *Species* of the Moveables, and in ſelling or diſpoſing of them; and next, in purſuing the Debitors for Payment of the Sums due to the Teſtator, which are in Law called *Nomina*. This Part of the Office is executed when the Executor confirm'd gets Poſſeſſion of the Moveables, *Fairholm* againſt *Biſſet*, *January* 18. 1662. and when he obtains Sentence and Decreet at his own Inſtance, againſt the Debitors, tho' he gets no Payment, becauſe Confirmation and Sentence is *equi parate* to retour, and Infeſtment of an Heir, and the not getting actual Payment of the Debts, is imputable to the Debitors, and not to the Executor; likeas in Law, *Id apud ſe quis habere videtur, de quo habet actionem; habetur enim, quod peti poteſt* L. 143. de V. S. See *Niſbet*'s

uplifted, before their Deceaſe, which chiefly has Reſpect *ad nomina Debitorum.*

*bet*'s Doubts, Tit. *Executor Creditor*, and *Steuart*'s Solution: But if the Executor die, *pendente lite*, the Teſtament, in as far as concerns that Subject, is *non executum*, and all his Diligence by Inhibition, Arreſtment, Litiſcontestation, &c. periſheth, for it cannot be transferred active in the Perſon of the Executor, *ad non executa*, becauſe he is not Succeſſor of the laſt Executor, but of the Teſtator. See the Deciſion in the Caſe of *Jackſon*'s Children, Executors decerned, purſuing by Licenſe, a Proceſs againſt the Creditors of *Cockburn*, *June* 30. 1705. The *paſſive* Part of the Office lies in being ſubject to Actions, for Payment of Debts and Legacies, againſt which he can defend by alledging, 1. He is not liable, *ultra vires Inventarii*, either uplifted, or for Payment whereof, he has done all Diligence. 2. He is ready to count, and to aſſign to the Purſuers, the Proceſs depending. It would ſeem that the *non executum* does not much relate to this Part of the Office; for, if the Executor ſhould die before he cleared the teſtamentary paſſive Debts and Legacies, thoſe concerned have a relevant Title to purſue his Repreſentatives to pay, or to count, or aſſign. Hence it appears, that a Teſtament may be in Part *executum* and in Part *non executum*, in Relation to the different Subjects of the Adminiſtration. If the Executor be a Stranger nominated, and die before the Teſtament is confirmed, his Executors have no Title to the Third of Dead's Part, allowed by Act 14. Parl. 1617. the ſame is loſt, if ſuch Executor, tho' confirmed, ſhould die before any Part of the Teſtament be executed; but if it be in Part *executum* & *non executum*, it may be thought he ſhould have a proportional Share, becauſe the Third is given as a *Præmium* for the Trouble he is at to recover the *bona Defuncti*. See *Niſbet*'s Doubts, Tit. *Executor*, *Q.* 7 and 8. and *Steuart*'s Anſwer.

§ 25. Where there are more Executors than one, they muſt all be conveened; and if any of them be omitted, the Commiſſars refuſe

refuſe to grant Proceſs: But I have ſeen the Lords grant Proceſs, if the Sum purſued for was within that Part of the confirmed Teſtament, which, by Diviſion of the hail, would fall to the Executor conveened.

§ 26. Where all the Executors are purſued for any Debt, the Lords commonly



In Proceſſes againſt Executors, it is to be noticed, That the Purſuer muſt prove *ſcripto*, the Defenders are Executors to the deceaſt Debitor. See *Spotiſ.* Tit. *Executor*, § 32. Next, the Libel muſt be proven otherways than by the Oath of the Executor, who will not get Exonoration upon Account of Debts confeſſed owing by his own Oath. *Ibid* § 24. And Executors can be conveened only for moveable Claims, and not to warrant Diſpoſitions or Infeftments of Lands given by the Teſtator. *Ibid* § 39.

A Minor being nominated Executor, may renounce before he be confirmed; but if he be once confirmed Executor, he cannot renounce, albeit he has not intrometted, but muſt, by Way of Action, ſeek to be reſtor'd *in integrum*. *Ibid* § 38.

In the Caſe of *Drummond* againſt *Logan* Spouſe of——— *Maxwel*, as Executrix Dative to her Father, *July* 1626. the Lords found, That in Reſpect the Inventary of the Father's Teſtament dative, was given up by the Mother, who had confirm'd her in her Minority, Executrix, and that ſhe never had any Intromiſſion with her Father's Goods; therefore ſhe being ſtill Minor, & *rebus integris*, might renounce to be Executrix. *Ibid*, § 71.

Any Co executor may be conveen'd *in ſolidum* by a Creditor or Legatary, the Reſt being dead, if his Intromiſſion has been with Goods above the Value of the Debt or Legacy ſought, albeit the Executors have made *Diviſion* among themſelves, reſerving Relief againſt his Co-executors, or their Heirs. *Ibid* § 18. *Aitken* againſt *Ewart*, *July* 23. 1620. In like Manner,

find, That they cannot be conveened *in ſolidum*, but *pro virili Parte*; but if all be deceaſt but one, he is conveenable *in ſolidum*,

In an Action purſued by *Peacock* againſt *Peacock*'s Bairns, and Executors confirmed to their Father *George*. This Exception was found relevant, That all Parties having Intereſt, were not ſummoned, *viz.* ſome Body to repreſent one deceaſed, who was joint Executor with the Defenders, which behoved to be done, ſeeing the Office of Executor is indiviſible, unleſs the Purſuer did alledge: That the Executors conveened, had intromitted with as much as would pay the Purſuer, *July* 18. 1628. *Spotiſ. Ibid*, § 19.

A Sentence obtained againſt a Defunct, muſt be tranſferred againſt his Executors, before any Execution can follow upon it. *Ibid*, § 21.

By Act of *Sederunt February* 28. 1662. the Creditors of a Defunct, confirming or uſing legal Diligence, at any Time within ſix Months after their Debitor's Deceaſe, come in *pari paſſu*, whereupon *Stairs*, in his *Inſtit. Lib.* iii. *Tit.* 8. § 67. ſays, That all the Decreets againſt Executors, ſhould proport a ſuperceeding of Execution for a competent Time, that they may do Diligence.

*Nisbet* obſerves, *December* 13. 1666. That divers Decreets being recovered againſt one *Shaw*, confirm'd Executor to his Brother, a Factor in *London*; he deſir'd Suſpenſion without Caution, upon this Reaſon, That he had done Diligence to recover the Defunct's Debts and Goods; and, that he could not ſatisfy theſe Decreets, until he ſhould recover the Defunct's Eſtate, which he was willing might be divided among the Creditors, according to their Diligence, ſeeing he was content to make Faith, that he could not get a Cautioner, the Lords paſt Suſpenſion, as to perſonal Execution only.

Every Executor indiſtinctly, either nominate or neareſt in Kin, or Creditors, are liable to do Diligence againſt Poſſeſſors of the Goods inventaried, and againſt teſtamentary Debitors, and muſt hold Compt accordingly. Act of *Sederunt March* 5. 1679. Lord *Elibank* againſt Lord *Preſtonhal*, *July* 23. 1708. becauſe the firſt Confirmation gives in Law a

Right

*dum*, reſerving him Action and Relief againſt the Heirs and Executors of his Co-executors.

Right, which excludes all ſecond Confirmations, wherethrough, during the Lifetime of the firſt Executor, the Creditors of a Defunct cannot touch directly the Defunct's moveable Eſtate, the Right whereof is veſted in the Executor confirm'd; and ſeeing the Office is a Truſt, and *Negotiorum geſtio*, it is reaſonable, that the Executor confirmed, who ſecludes all others, ſhould be liable *in Dolo*, *Culpa lata*, & *levi*. As alſo, when Executors exoner themſelves by Debts paſſive paid, they muſt communicate the Eaſes got from the Creditors of the Teſtator, and charge no more than was given out by them, becauſe they are Truſtees for the Relict, Children and Creditors of the Deceaſt. *Elphinſton* againſt *Paton*, *December* 16. 1710.

They are liable in Annualrent (after Confirmation, during not Payment) of Sums which, in the Inventary are given up, bearing Annualrent. *Robertſon* againſt *Baillie*, *June* 26. 1705.

§ 27. *Item*, Where there are moe Executors confirmed than one, they muſt all purſue, and one cannot purſue without another; at leaſt, if the Co-executors refuſe to concur to the Purſuit, they muſt be cal-

 led

If there be many Executors, one of them, by himſelf, without Concourſe of the Reſt, can neither proſecute Action, compone, tranſact nor diſcharge Debts due to the Teſtator. *Balfour*, Tit. 39. And in the Caſe *Dobie* againſt *Semple*, *March* 13. 1630. the Lords found, That there being moe Executors a Diſcharge granted by one of them to a teſtamentary Debitor, will not liberate from Payment of theſe Parts of the Debt, which fall the other Executors not dicharg-

led for, as Defenders, for their Intereſt, which is ever obſerved before the Commiſſars: But I have ſeen the Lords ſuſtain the Purſuit of one of the Executors, without Citation of the reſt, reſtricting always the Purſuit to the Executor's Part who purſues.

diſcharging. *Spotiſ.* Tit. *Executors*, § 67. For, albeit the Office be indiviſible, yet the Subject under Adminiſtration is divided into as many ſeveral Parts as there are Perſons.

In petitory Actions, at the Inſtance of Executors, for the executory Goods, Competitions may ariſe between them and the Donataries of the Teſtator's Eſcheat, and Creditors Arreſters of the Goods in the Teſtator's Lifetime; for clearing whereof it is to be known, That,

In the Caſe *Polwarth* againſt *Reoch*, *November* 6. 1685. an Executor Creditor confirming and obtaining Decreet againſt the Debitor, for Payment of a Debt due to a Defunct, was preferred to a Donatary, whoſe Gift was poſterior to her Confirmation and Sentence, *Quia prior tempore potior Jure.*

§ 28. This Exception is ordinary, where Parties are purſued as univerſal Intrometters, No Proceſs, *becauſe they are Executors confirmed before the Intention of the Cauſe.*

See the Notes on § 13, and 19. *h. t.*

§ 29. *Item*, This other Exception is admitted before the Commiſſars, but not before

before the Lords, *That there are* plures Intromiſſores *who are not called.*

Albeit a vitious intrometter be univerſally liable to the Creditors of one deceaſed, yet nevertheleſs this paſſive Title is not ſuſtain'd after the Deceaſe of the Intrometter, further than to make his Heir liable *in quantum loculpletatus*, the Purſuer, for the Defender's Security, confirming, before extracting the Sentence, a Teſtament, as Executor Creditor to his Debitor. *Wallace* againſt *Murray*, *December* 14. 1676.

§ 30. *Item*, The Defence commonly proponed to purge univerſal Intromiſſion, is, *Neceſſary Intromiſſion with ſuch particular Goods and Gear*, whereupon they muſt condeſcend, and offer to make the ſame furthcoming, and this Exception is found relevant, except the Purſuer *reply upon further Intromiſſion*, whereupon alſo he muſt condeſcend; and this is counted neceſſary Intromiſſion, when the Relict and Bairns meddles with Goods within the Houſe, or *Cuſtodiæ cauſa*; but if they ſell them,



A Relict or the Children *in Familie* at the Time of the Deceaſe, are allowed to continue Year and Day, which is indulged to them, for giving up Inventary, and confirming; and if they be *in mora* ſo to do, they're judged to be vitious Intrometters; but if their timely Endeavour to confirm, has been interrupted by Creditors of the Deceaſt competing for Preference, or otherways, they'll be freed from the paſſive Title, unleſs they've been *in mora* to expede the Confir-

them, it is not neceſſary, *niſi ſervando deterioretur.*

Confirmation, after all Impediments were removed. See the Notes on § 13. *h. t.*

§ 31. The Executor is liable to the Payment of moveable Debts, and of Old could not be purſued for heritable Bonds, but now the Lords promiſcouſly ſuſtain Action againſt the Executors and Intromitters, as well for heritable as moveable Bonds, and that without diſcuſſing of the Heir; where-

From Act 72. Parl. 1503. it appears, That in ancient Times, the Heir had a relevant Exception in Proceſs againſt him, for Payment of his Predeceſſor's whole paſſive Debts, as well heritable as moveable, *viz.* That the Father's Moveables ſhould pay their whole Debts, and that the Executor ſhou'd be firſt called; but by that Act it is ordained, That the Heir may be purſued after a Year from his Anceſtor's Deceaſe, and that he may demand from the Executor, Caution for relieving his Heritage, in as far as the Moveables do extend. Now, tho' by this Law the Heir muſt anſwer every Creditor, yet he gets from the Executor a Relief; but ſtill the Statute does not determine if the Surety ſhould be limited to moveable Debts only; nevertheleſs, Practice, and Cuſtame has rather extended, than interpreted the Act; for ſince, both the Heir and Executor repreſent the Debitor, and ſucceed the one to his Lands, the other to his Moveables, *et quem ſequuntur commoda, eundem etiam & incommoda*; and therefore, they ſhould be liable reſpective, *in ſuo Genere.* See *Spotiſ.* Tit. *Executors*, § 68. *P.* 121. *Carnouſt* againſt *Meldrum*, *July* 30. 1630. a Deciſion pronounced after the Lords had thought on the Caſe two or three Days.

whereas the Heir is not conveenable for moveable Sums, *niſi poſt Annum et Diem* after the Defunct's Deceaſe, albeit he be already entered Heir.

An Executor may be purſued immediatly after Confirmation: By the preſent Practick, an Heir entered may be purſued immediatly, for Payment of Debts due by his Anceſtor, both moveable and heretable.

§ 32. Albeit the Heir have *Annum deliberandi*, and may not be purſued within Year and Day, nor charged to enter Heir, whereupon Purſuit may be moved againſt him, within Year and Day, neither for moveable nor heritable Bonds; yet if he voluntarily enter Heir, by ſerving and retouring himſelf Heir to his Prediceſſor, either generally or ſpecially, or by accepting a Precept of *clare conſtat* from his Superior, for infefting of him in the Lands, as Heir to his Prediceſſor; in this Caſe he may be purſued for heritable Bonds, *etiam infra Annum et Diem*; and yet may not be purſued for moveable Bonds while the Year be bygone; and the Reaſon is, Becauſe, by entering Heir, he has renounced the Benefit introduced in his Favours, *quoad Annum deliberandi*, but not renounced the Benefit introduced in his Favours, by Act

of

of Parliament, whereby the Heir is made free from all Purſuits for moveable Sums, within Year and Day.

What our Author teaches concerning Proceſſes againſt Heirs, for moveable Debts, ſeems to have been taken out of *Haddington*'s Practicks, Tit. *Heirs*: But, as was ſaid in the Notes on § 31. does not now obtain. See Act 76. Parl. 6. *James* 4. and *M'Ken.* Obſer. on it, *P.* 113.

§ 33. *Item*, Albeit the Lords grant Action for heritable Bonds within Year and Day, where the Heir is entered; yet they will not grant them againſt him, as behaving himſelf as Heir, by all the Ways whereby *Geſtio pro herede* is inferred by the Law and Cuſtom of the Kingdom; and that becauſe it is not liquid nor clear by theſe Deeds, that he has renounced the Benefit of Deliberation, and the ſame requires Probation *de Facto*, as to prove Intromiſſion with heirſhip Goods, or with the Mails and Duties of Lands, Teinds or Annualrents to which the Defunct had Right, and *dubius eſt eventus Probationis*; and the Purſuer poſſibly may not prove the Intromiſſion, in the which Caſe, the Lords behoved to aſſoilzie, and conſequently to find them-

The Lords do now admit Proceſs *Periculo petentis.* See the Caſe *George Melvil* againſt Lord *Melvil*, *March* 2, 1636. and

themſelves to have done Unjuſtice, by granting Proceſs within Year and Day.

and it may be thought juſt and reaſonable, that the Purſuer ſhould pay the Expence of the Defender, if the paſſive Title of Behaviour be not proven.

§ 24. It may be asked, if the Lords will ſuſtain Proceſs againſt an univerſal Succeſſor to the Defunct's Lands and Heretage, within Year and Day after the Defunct's Deceaſe? To which it is anſwered, That this Member of the Summons, as *univerſal Succeſſor*, may have a double Senſe: for, either it may be underſtood of univerſal Succeſſion to the Lands and Heretage, after the Defunct's Deceaſe; in which Senſe it is co-incident with the other Member before ſpecified, of behaving as Heir, by Intromiſſion with the Mails and Duties, *&c. et in hoc Senſu*, repeats the former Anſwer which is made to that Member; or otherways, univerſal Succeſſor may be underſtood of the apparent Heir, who was infeft by his Prediceſſor in his own Time, *ſed poſt contractum Debitum*, whereupon he is purſued; and in this Caſe it is not certain what the Lords would find, neither has it ever been practiſed, and there may be Arguments *pro & contra*, becauſe univer-

univerſal Succeſſor is eſteemed *tanqui heres*; but I think the Lords would incline to grant no Action till Year and Day be bygone, becauſe he is purſued as apparent Heir for the Defunct's Debt; and becauſe this Member, as univerſal Succeſſor, *Titulo lucrativo poſt contractum Debitum*, is libelled as an Alternative with the reſt of the Members, which infer *Geſtionem pro hereæde*, albeit it cannot be counted of that Nature, in Reſpect it is a Right eſtabliſhed in his Perſon *ante Mortem Defuncti*, and nothing done *ante Mortem Defuncti*, can infer *Geſtionem pro hereæde*: And further, he has not *jus deliberandi* within Year and Day; for, albeit he would renounce the Lands wherein he is infeft, yet the Lords will not ſuffer him, but binds him to the Pay-

The Note on the § preceeding, is applicable to this: And *Nisbet* obſerves a Deciſion *February* 6. 1677. by which it was found, That apparent Heirs may be purſued as behaving before the Year expire, ſeeing *eo ipſo quod miſcent adeunt paſſive*: And as to the Pretence, That they would be wronged, if it ſhould have appeared by the Probation, That they did not meddle, it is of no Weight, ſeeing the Lords may modify Expence.

In the Proceſs of *Johnſton* againſt *Rome*, upon the paſſive Title of Succeſſor, *Titulo lucrativo*, &c. tho' it was alledged by the Defender, That he had made no Uſe of the Diſpoſition, and that he was content to renounce the ſame; yet

Payment of all the Debts contracted before the Fie, albeit the Burden exceed twice the worth of the Fie, which in my Judgment, is noways equitable.

yet the Lords found he could not do it, ſeeing it was delivered to him. *July* 8. 1676.

## Sect 2. *Of moveable and heretable Bonds.*

§ 35. As to the Diſtinction between heretable and moveable Bonds, it was of old thus, *viz.* That a moveable Bond was that which was made to the Creditor by ſimple Bond, for Payment of the Money at a Term, with a Penalty, and did not contain Obligement to infeft in an Annualrent, nor to pay Annualrent to the Creditor, as well not infeft as infeft. And an heritable Bond was, when the Debitor ſold Lands, or Annualrent out of his Lands, under Reverſion of the principal Sum which was lent to him by the Creditor; and alſo containing Requiſition of the Debitor for Payment of the principal Sum upon 40 Days Warning, or mae or fewer, as the Party pleaſed.

§ 36. *Item*, This heretable Bond was made moveable by uſing of Requiſition for Payment of the principal Sum, conform to the

the Condition of the Bond; and by raiſing and uſing of Letters of Horning thereupon, for Payment of the Sum; but if the Creditor, after Requiſition, received Annualrent, the Bond ceaſed to be moveable, and returned to its own Nature.

The Annualrents received muſt be due for Terms after the Requiſition or Charge of Horning, otherways the taking Payment has not that Effect.

§ 37. And this Diſtinction of heretable and moveable Bonds, as it was juſt, ſo it was neceſſary. *Juſt*, in Reſpect of the Diſtinction of an heretable Right and Infeftment, which makes an heretable Bond juſtly to be counted *heretable*, to which the Heir has only Right, and not the Executor; for, as the Heir (if Infeftment had followed) could only be ſerved to the Annualrent; ſo he has only Right to crave the Infeftment to be expede to him, which was not done to the Defunct; and is in the ſame Caſe, as if the Defunct had bought Lands, either abſolutely, or under Reverſion, and had died before he got Infeftment; and this Diſtinction is *neceſſary* alſo, becauſe it diſtinguiſheth betwixt that which is due to the Heir, and that which is due to the Executor; betwixt that which is due to the Relict,

and

and that which is due to the Bairns; and alſo diſtinguiſheth what Debts ſhould be paid by the Heir, and what by the Executors, or whereof the Heir may have Relief off the Executors.

§ 38. But now the Form of Bonds is ſo conceived, and the Lords decide ſo uncertainly, that it is exceeding hard to diſcern the Diſtinction betwixt heretable and moveable; for, firſt, the Bonds are now conceived, bearing a *Clauſe of Annualrent*, and after it a Proviſion, *That the Creditor ſhall have Power to crave his principal Sum at any Time without Requiſition*, which confounds the Nature of heretable and moveable Bonds; for, in the Beginning of the Bonds, they are conceived *heretable*, and by a poſterior Clauſe, the ſame are made *moveable* at the Pleaſure of the Creditor, without expreſſing any external Act to diſtinguiſh, whether it be heretable or moveable.

§ 39. *Item*, The Lords, in their Deciſion anent this Point, have been very uncertain; for, ſometime they have found no Bond to be heretable, except it bear a Clauſe to infeft. Otherways they fand it heretable, without a Clauſe of Inſeftment, if it bear an Obligement to pay Annualrent

rent to the Creditor, as well not infeft as infeft. And laſtly, they have found it heritable, albeit it want both theſe Clauſes, if

This Treatiſe having been written in the Year 1632. the Doctrine therein delivered, is abrogated, and greatly altered, by Act 57. of the rebellious Parliament, *Anno* 1641. and becauſe of the Equity of the Sanction, the like is ſtatuted by Act 32. Parl. 1661. for the Parliament conſidering, That the Miſery and Poverty of fatherleſs Children, was occaſioned by their Parents taking Bonds, &c. for lent Money to themſelves, their Heirs, Executors or Aſſignies, with a Clauſe for Annualrent, during the not Payment of the principal Sum; and, albeit thereby they had no other Meaning, than that their Money ſhould not remain unprofitable, and had no Deſign that this Debt, and Security for it, ſhould pertain to the Heir alone, excluſive of the other Bairns, or neareſt in Kin, beſides the Heir; yet nevertheleſs, by the Interpretation at that Time, the younger Children and others, were left in a pityful State, unprovided with any Means to live on, and were brought to great Miſery and Poverty, which forced them to become Beggars, as was oft found by pityful Experience. For Remedy to this Evil, it is ſtatuted, That all Bonds for Money, with a Clauſe for paying Annualrent, ſhall be interpreted moveable, except they contain an expreſs Obligement to infeft, or that they be conceived in Favours of Heirs or Aſſignies, ſecluding Executors. In either of which Caſes, the Bonds are declared to be heretable, and the Sums thereby due, are ordained to pertain to the Heir. Declaring nevertheleſs, That ſuch Bonds, as by theſe Acts are moveable, ſhall remain, *quoad fiſcum*, in their ancient State, not to fall under the Compaſs of ſingle Eſcheat, nor ſhall they pertain to the Relict *jure Relictæ*, nor to the Husband *jure Mariti*.

In the Caſe of *Jaffrey* againſt the Laird of *Wamfray*, *January* 12. 1677. a Sum due by a Bond bearing an Obligement to infeft, and a Clauſe of Requiſition, was found to be moveable, after Requiſition, and to fall under Eſcheat, notwithſtanding of the above Act 32. Parl. 1661. in Reſpect

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if it did bear an Obligment to pay Annualrent.

Bonds of the Nature foreſaid, became moveable by Requiſition, even before the ſaids Acts; and ſince the Fisk is not thereby put in better Caſe, he ought not to be in worſe.

A Bond bearing Annualrent, being granted before the Act 1641. and in 1642. corroborated by another, bearing Annualrent alſo, the Lords found, That the Bond of Corroboration belonged to the Heir, as Acceſſory to the principal Bond, which is heretable. *June* 15. 1664 Earl of *Mar* againſt *Hamilton*: For a moveable Bond of Corroboration, does not alter the Nature of the original heretable Bond. *January* 17. 1683. *Wiſeheart* againſt *Miln.*

A Sum due by Bond, in moveable Form, bearing the Debt to be eiked to the Reverſion of a Wodſet formerly granted for another Sum, was in the Caſe of *Rollock*, *March* 1. 1683. found to belong to the Executors, in Regard it is none of the Species of the heretable Bonds contained in the Act of Parl. 1661. *viz. ſecluding Executors*, nor bearing a *Clauſe of Infeftment.* neither was the Bond put into the Regiſter of Reverſions.

§ 40. *Item*, Commonly the Bonds which bear Obligement for Payment of Annualrent ſimply, bear, in the firſt Place, an Obligement to pay the principal Sum at a certain Term, or at the Pleaſure of the Creditor, and a Penalty in Caſe of Faillie; whereupon it oft falls out to be diſputed, Whether this Bond be moveable or heretable, *ante eventum termini*, which falls out, if the Debitor or Creditor die before the Term, or if the Creditor be denounced Rebel before the Term. And in thir Caſes, the Lords have found, That the ſame is moveable, *ante terminum*: And if the Creditor

ditor die before the Term, They have found the Sum to pertain to the Executors, and not to the Heir; or if he was denounced Rebel before the Term, they fand the Sum to fall in Eſcheat to the King; and if the Debitor die before the Term, they fand it a Debt payable by the Executors. And whereof the Heir may get Relief off the Executors, if he be compelled to pay, *poſt Annum et Diem*, in Reſpect the Creditor has Choice to purſue whom he pleaſes, *poſt Annum et Diem*; and if the Debitor die *poſt terminum*, the Bond will be counted heretable, *quoad* the Heirs of the Debitor, albeit

In the Caſe Mr. *William Gordon*, *December* 1683. the Lords found the Sums in a Bond, containing Obligation to infeft the Creditor inſtanter, was *ab initio*, and before the Term of Payment heretable, and pertained not to the Executor, altho' the Creditor deceaſed before the Term of Payment; for Bonds bearing an Obligement to infeft inſtantly, were even before the Act of Parliament 1641. heretable, *ab initio*, as was clear by a Deciſion *July* 15. 1623. *Anderſon* againſt *Anderſon*, and a Deciſion in *January* 1624. does not derogate from it, becauſe the Bond there mentioned, had an Obligement to make Payment at a certain Term, and failzieing thereof, to infeft. In the which firſt Caſe, the Sum was found moveable before the Term of Payment.

The Doctrine of this § ſeems to be eſtabliſh'd by a Practick between the Laird of *Carnouſie* and the Laird of *Meldrum*, *July* 30. 1630. when after two or three Days reaſoning, the Lords found, That if, as well the Debitor die before the Term of Payment, in a Bond, as the Creditor, the Bond is moveable. See the Caſe in *Spotiſ.* Tit. *Executors*, § 68.

albeit it may be moveable *quoad Creditorem*, and will pertain to his Executors, if he died before the Term, *et e contra*, if the Creditor died after the Term, it will be heretable, *quoad eum et ejus hæredes*, and yet may be moveable, *quoad Debitorem*, if he died before the Term.

§ 68. and another concerning the Rent of a Mill, due for Poſſeſſion, partly before, and partly after the Heritor's Deceaſe, in Competition between the Heir and Executor. *Ibid* § *Ult.*

In a Caſe obſerved by *Nisbet*, *July* laſt, 1666. *Gray* againſt *Gordon*, a Bond bearing the Term of Payment, to be diverſe Years after the Date, and Annualrent to be paid in the *Interim*, termly and yearly, was found to be heretable, *quoad Fiſcum*, tho' the Creditor deceaſed before the Term of Payment of the Principal.

§ 41. Of old the Lords would grant no Proceſs againſt an Executor, for an heretable Bond; but now they grant Proceſs, and yet there is no Law to give the Executors Relief againſt the Heir, as the Heir has againſt the Executors, for his Relief,



By Act 76. Parl. 1503. the Executor is bound to find Caution to relieve the Heir from Payment of moveable Debts; yet there's no Statute ordaining the Heir to relieve the Executor of heretable Debts: But *ex paritate rationes*, and agreeable to Equity, our Cuſtom gives to both a reſpective Relief, *March* 7. 1627. *Falconar* againſt *Blair*. And in the abovecited Practick between *Carnouſie* and *Meldrum*, the Lords found, That the Heir ſhould have Relief off the Executor of all moveable Bonds, and the Executor ſhould be relieved by the Heir of all heretable Bonds, which

ſeems

when he pays a moveable Debt: And, which is worſe, the Relict and Bairns, are, by this Confuſion, defrauded of their natural legal Portion; ſeeing the Executor will only be obliged to make Payment to them of the Inventar of the Teſtament, with Deduction of the heretable Debt, which they have been compelled to pay.

ſeems to be well judged, ſeeing it is moſt rational, That the Heir who has the Benefit of the active heretable Debts, ſhould have the Burden of the paſſive heretable Debts and the like, as to the Executor, *ſecundum naturam, eſt commoda cujuſque rei eum ſequi quem ſequuntur incommoda.* L. 10. De R. I.

The Executor is in *bona fide* to ſatisfy heretable Creditors ſeeking Payment, and which, neither the Bairns nor the Relict can ſtop or quarrel; but ſeeing, in as far as is paid, Action for Relief is competent againſt the Heir, whom the Executor, or the Bairns and Relict, may purſue, *qui habet Actionem ad Rem recuperandam ipſam Rem habere videtur.* L. 15. de R. I. And whereas the Relict has no Benefit from Bonds for Money on Annualrent, therefore the Heir or Executor, to whom ſuch active Debts do belong, muſt keep her third or half Share skaithleſs, as has been decided.

## Sect. 3. *Of Heirs, and of their ſeveral Kinds, and of the Manner how they ſucceed.*

§ 42. *Item*, Albeit the Heir may be purſued, *poſt Annum et Diem*; yet becauſe there are diverſe Sorts of Heirs, as the Heir general, Heir of Line, Heir of Taillie or Proviſion, Heir of Conqueſs, and Heir of

of the ſecond Marriage; therefore it is expedient to know, by what Order the Heirs are purſued; wherein, this Courſe has been conſtantly keeped by the Lords, That the



The Definition of an Heir given by the *Civilians*, will not ſerve in the Doctrine of our Law; for, among the *Romans*, *Hæres* (from which our Word Heir is derived) *eſt, Succeſſor in univerſum, jus quod Defunctus habuit, i. e.* All Lands, moveable Rights, Debts, &c. whereas, by the Feudal Law, which we follow, the eldeſt Son, who alone is Heir, gets the whole Land Eſtate, with the Heirſhip Moveables that pertained to the deceaſed Father. And on the other Hand, the younger Children, who are called Executors, *qua* neareſt in Kin, or *Hæredes in mobilibus*, get the Remainder of the Eſtate, *viz.* the whole moveable Goods and Gear; and becauſe the Lands fall to the Heir; therefore, with us, landed Men are denominated Heretors, from the French Word *Heritier, i. e.* Heir.

Among the *Romans*, the Proprietary named, in a Teſtament, the Perſon one or moe, whether Stranger or Child, whom he deſigned to be his Heir, which is not practiſed in *Scotland*; for, with us, no Land or other Eſtate, that by the Courſe of our Law falls to the Heir (which is therefore called Heretage) can be conveyed by Way of latter Will or Teſtament. 2. None get the Name of Heir, properly ſo called, other than a Perſon that is conſanguinean, or has Blood Relation to the Defunct, who may, *inter vivos*, diſpoſe upon his whole Fortunes, or *univerſum jus*; yet nevertheleſs, the Perſon ſo honoured, is not called an Heir, but a ſingular Succeſſor, becauſe of the Title through which he comes at the Succeſſion; Beſides one (tho' of Blood) is not titled an Heir, unleſs he be ſerved and retoured Heir, according to the Forms preſcribed and known in our Practick.

Sir *James Steuart*, in his Anſwers to *Dirleton*'s Doubts and Queſtions, Tit. *Bonds heretable*, P. 17. diſtinguiſhes between an *Heir-general*, and an *Heir-in-general*; thus, an Heir of Proviſion, ſays he, by getting Right to certain

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general Heir, or Heir of Line, ſhould be firſt purſued and diſcuſt, before the Heir of Taillie, Proviſion, Conquets, or Heir of the

Bonds, or Sums of Money, or to Rights without Infeftment, may be ſerved Heir of Proviſion in General, and ſo have Right to his Proviſion, and yet not be *Heir-general*; for (as it is in the Sentence before) there's a Difference between a *General ſervice*, which gives to the Heir ſerved, Right to the *univerſum jus* of the Heretage, and a *Service-in-general*, which only gives Right to that which would fall to the Heir, and needs no Infeftment.

An Heir general is ſo called, becauſe the *Brief* taken out of the Chancellary, and the Claim that paſſes on it, are in the *Stile* generally conceived, without any Addition to the Word *Heir*, and the Law preſumes there's no nearer Kinſman to claim the Inheritance. Again, an *Heir general* is always an *Heir of Line*, and in a Service upon a *general Brief*, there are only two Points inquired into, 1. If the Anceſtor died at Peace with the Sovereign, *i. e.* was not a Traitor-convict. 2. If the Bearer of the Brief is next Heir to the Deceaſt, without examining if he be conſanguinean, in the direct or collateral Line, tho' that will be known from his Deſignation, as Son, Grandſon, Brother's Son, Siſter's Son, *&c.* to the Defunct.

The other Heirs have a ſpecial Addition, as, 1. *Heir of Conqueſt*, which ſuppoſes there's an Heir of Line, and that there is an Eſtate to which both may ſeverally ſucceed. 2. *Heir-male*, which ſuppoſes there is a Female who is nearer, where-through the Succeſſion comes to be cut off, and is like unto a taillied one. 3. *Heir of Taillie*, when the Line of Propinquity is cut, that the Succeſſion may devolve on a remote Kinſman; yea, ſometime on a Stranger. 4. *Heir of Proviſion*, this Denomination belongs properly to Children by a ſecond Marriage; who, before they come into the World, are, by the Contract of Marriage between their Parents, provided to Patrimonies, either in Land or Money; and if the Proviſion be made to the Bairns of a Marriage, all the Children, without Diſtinction

on

the ſecond Marriage; and when the Heir of Line is diſcuſt, then the Purſuit is ſuſtained againſt the Remanent.

on of Sex or *Primogeneture*, muſt be ſerved Heirs of Proviſion to their Parents, in Order to make a Title and Right to the Lands or Sums contracted. However, there may be an Heir of Proviſion, who is not a Child of a Marriage. *M'Ken.* in his *Inſtit. B.* iii. *Tit.* 8. §§ 21, 22, 23, 24. treats of this Heir of Proviſion.

After the *General-heir*, the other Heirs are diſcuſſed in the Order above ſet down, except that the Heir of Line muſt be conveened before the Heir of Conqueſt, when a Defunct Debitor has both, and which only occurs when one dies without Heirs of his own Body. But there's no Neceſſity to diſcuſs the Heir of Line, unleſs he has an Eſtate affectable. *Gilmuir's Deciſ.* xxxv. P. 26.

By *diſcuſſing*, we underſtand the ſearching and ſifting of the foregoing Heir, and getting from him all that can be got; at leaſt, doing therefore Diligence perſonal by Horning and Caption, and real by Adjudication, if there be a Fond adjudgeable; all which muſt be inſtructed in the Proceſs againſt that Heir who is next in Order, and propones the Benefit of diſcuſſing. And thus it may fall out, that there muſt be as many diſtinct Proceſſes, as there are ſeveral Sorts of Heirs. But to prevent this Inconveniency, Obligations ſhould have a Clauſe, diſpenſing with this Order and Benefit of diſcuſſing, where through any of all the Heirs, may, at the Creditor's Option, be purſued to fulfil the Predeceſſor's Deed.

§ 43. *Item*, The Heir of Line is properly *in Succeſſionibus ex recta Linea*, and general Heir comprehends both, *in recta & collaterali*, and *in recta Linea* there may be Heirs of Line of the firſt and ſecond Marriage, and Heirs of Taillie and Proviſion

bye [ *beſides* ] them, but not of Conqueſt, which has only Place, *in Succeſſione collaterali.*

Heir of Line and Heir general, are almoſt ſynonimous Terms, albeit we uſe not commonly the Term of *Heir-of line*, but in Contradiſtinction to the other Kinds of Heirs. See *M'Ken. Inſtit. B.* iii. *T.* 8. § 13.

Albeit the eldeſt Son, and Children of a ſecond Marriage, are *in Linea recta deſcendentium*; yet are they denominated Heirs of Proviſion only, and not of Line, becauſe that Name belongs properly to the eldeſt Son of the firſt Marriage, if there is one.

There may be Heirs of Proviſion of a firſt Marriage, as in this Caſe, when Right of Lands or Bonds are conceiv'd in Favour of the Heirs or Bairns of that Marriage *Nomen heredum & liberorum*, ſignifies one Thing; ſo that all the Bairns muſt be ſerved Heirs of Proviſion to their Father. See *Gilm. P.* 44. *Deciſ.* lxii. *January* 14. 1663. *Beg* againſt *Nicolſon*, and *Steuart* againſt *Steuart*, *January* 29. 1678. both obſerved by *Stairs*.

§ 44. It may be queſtioned, whether the Heir of Taillie, or the Heir of the ſecond Marriage ſhould be firſt diſcuſt? It would appear, That the Heir of Taillie ſhould be firſt diſcuſs'd, becauſe the Heretage is parted between him and the Heir of Line; and what the Heir of the ſecond Marriage has, he gets it commonly by vertue of his Parents Contract of Marriage, and the Heir of the ſecond Marriage is not *a'ioqui ſucceſſurus*, but allenerly by Proviſion; and on the other Part, it is to be

be conſidered, That the Heirs of the firſt and ſecond Marriage, may be, either both Male, or both Female, or, the one Male and the other Female, or where both, or any one is Male, there is no Place for the Heir of Taillie; which is made for excluding of the Females, and therefore the Queſtion will fall to be decided, where the Heirs of the firſt and ſecond Marriage are both Female, in which Caſe they are both Heirs of Line, and ſo muſt be firſt diſcuſs'd before the Heir of Taillie.

In the Caſe propos'd of a Son or Daughter by a ſecond Marriage, coming to be Heir of Line, as well as Heir of Proviſion: *He* or *ſhe* is allowed to renounce to be *Heir of Line* without prejudice to their Claim, as *Heir of Proviſion*, by the Contract of Marriage of their Parents, with reſpect to which, the Law conſiders them to be *quaſi Creditors*.

§. 45. *Item*, The Heir General muſt be firſt

The Heirs of a Debitor are diſcuſs'd in this Order, The Heirs of Line, muſt be firſt purſued to fullfill the Defunct's Deeds, and to pay his Debts next to theſe the Heir of Conqueſt, (3.) the Heir Male, (4.) the Heir of Taillie, (5.) the Heirs of Proviſion, (6.) Heirs Subſtitute. All Heirs, if once entered, are liable for their Predeceſſors Debts *in ſolidum*, except Heirs Portioners, who are only liable *pro rata*, and Heirs Subſtitute in a Sum, who are only liable to Creditors in the Value of the Sum to which they are Subſtitute: (The ſame may be ſaid, with reſpect to

Bairns

firſt diſcuſs'd before the Heir of Conqueſt.

Bairns of a Marriage, when they are provided to a certain determined Sum. But for fulfilling a Deed, relating to particular Lands, the Heir who ſucceeds in *theſe*, muſt be firſt purſued without diſcuſſing. When Women ſucceed, all of one Degree come in equally, and becauſe the Eſtate is devided among them; they are called Heirs Portioners. See *M Ken.* Inſtit. B. iii. *t.* 8. § 25. and the Note on it.

By Act 24. *Parl.* 1695. Any apparent Heir, has liberty to enter Heir to his Predeceſſors *cum beneficio Inventarii*, the Service being expede, and the Inventary made up within the Time, and in the Manner preſcribed by that Act; in which Caſe, the Heir ſo entering, ſhall only be liable for his Predeceſſors Debts and Deeds *ſecundum vires Inventarii, i. e.* according to the Extent of the Subject in the Inventary. See and read the Act.

§ 46. In Succeſſion, Heretage deſcends, Conqueſt aſcends; and that is counted Heretage, not only to which the Defunct ſucceeds as Heir to his Predeceſſor, but alſo, that wherein he was Infeft by his Predeceſſor, he being then apparent Heir.

A Diſpoſition by a Father to his eldeſt Son of his Eſtate, or of any part of it, is called *præceptio hæreditatis*, and becauſe he is *alio qui ſucceſſurus*, this Preception if cloathed with Poſſeſſion, ſubjects the Son to a paſſive Title, even in the Father's Life-time.

§ 47. *Item*, If the Heir of Conqueſt be once Infeft, then the Conqueſt changes it's Nature, and will no more aſcend, but deſcend. § 48.

What is conqueſſed by a Father, is, with reſpect to his Heir of Line, reputed *hereditas paterna*, Falconer *Deciſ.* lxvi. *P.* 44. For Conqueſt only appears in a collateral Succeſſion.

§ 48. The General Heir, falls the *Heir-ſhip-goods*, and alſo has Right to Tacks of Lands, or Teinds, becauſe nothing is compted Conqueſt, but whereupon Infeftment had, or might have followed, and therefore it might be doubted, if Heretable Bonds bearing Obligment of Annualrent, but not Obligment to Infeft, ſhould pertain to the Heir of Conqueſt, or to the Heir General; and ſicklike, the Heir General will have Right to Reverſions, and Aſſignations to Reverſions, to Gifts of Ward, Non-entry, and Eſcheat, but with this Caveat of Reverſions, That if the ſame be of the Lands, to which the Heir of Conqueſt ſucceeds; in that Caſe, the Reverſion will pertain to the Heir of Conqueſt, and

The Heir of Conqueſt hath Right to all Lands, Annualrents, Heretable Bonds and others, whereupon Infeftment, did, or might follow; but he has no Right to Tacks, Penſions. moveable Heir-ſhip, and all other Rights having *tractum futuri Temporis*, and requiring no Infeftment, and ſo not competent to Executors, all which belong to the Heir of Line. *M'Ken.* Inſtit. *B.* iii. *t.* 8. § 12.

By Act 32. *Parl.* 1661. Merely perſonal Bonds for Money, with a Clauſe to pay Annualrent, belong to the Executor, but if they contain an Obligment to Infeft, the Debt is Heretable, and will fall to the Heir of Conqueſt. *July* 1675. Lord *Halkerton* againſt *Robiſon*, obſerved by *Dirleton*. Who gives againſt that Deciſion, Arguments for having the Bonds, whereon no Infeftment followed, to belong

and not to the Heir General, as was decided betwixt *Robert Pitcairn*, Abbot of *Dumfermline* his Heirs.

long to the Heir of Line. See § § 39. and 40. of this Title, with the Notes thereon.

§ 49. And ſicklike the Heir General, has Right to the Office of Tutory of the Son or Daughter of the Defunct; and in reſpect thereof, has this Advantage, that he may procure the Bairn to be Infeft as Heir to his Father, which being done, the Lands ceaſe to be Conqueſt, and become Heretage, and if the Heir Die, without Heirs of his Body, the Tutor and his Heirs will ſucceed to the Lands, and not the Heir of Conqueſt; whereas, if the Bairn had died not Infeft, the Lands would fall to the Heir of Conqueſt [*of the Father*] and not to the Heir General, [*the Tutor.*] And the Reaſon of the Difference is, becauſe in this laſt Caſe, the Heir of Conqueſt is to be ſerved to the Lands, as Heir not to the Bairn, but to his Father: And in the other Caſe, the Tutor is to be ſerved to the Lands, as Heir to the Bairn who was laſt Infeft, and not as Heir to the Father in whoſe Perſon it was Conqueſt.

§ 50.

§ 50. In Succeſſions, the Male does ay exclude the Female, except only in one Caſe, which is ſingular by the Practick of *Scotland*; which is this, That the Siſter German is preferred to the Succeſſion of the Lands and Heretages wherein her Brother-german died laſt veſt and ſeaſed, and excludes the Brother, who is in the ſame Degree with the Defunct and her, being Brother of the Defunct, but not German, but only Father-bairns. Albeit, if the Brother had died uninfeft, the ſecond Brother being of the other Marriage, would have ſucceeded to the Lands, and *ratio differentiæ eſt*, becauſe the Brother, albeit not German *quoad Patrem*, is preferred to all the Females, but not ſo *quoad Fratrem*, who is Infeft after the Father's deceaſe, for in this Caſe, the Practick of the Country, prefers the Siſter-german; ſo that in this Caſe, as in the former, anent the Conqueſt, the paſſing or not paſſing of the Infeftment, alters and changes the Courſe of Succeſſion.

§ 51. *Item*, The like Caſe is, when a number of Daughters ſucceed to the Father, who ſucceed *pro æquis portionibus ubi non eſt maſculus*, and if of the Daughters, ſome be German, and ſome only upon the Father's ſide, if one of the Germans Die Infeft, her Siſter-

Siſter-german ſucceeds to her, but not the Remanent, but if ſhe Die not Infeft, *omnes ſuccedunt ex æquo.*

See a Note on § 45. concerning Heirs Portioners.

In Succeſſion, full Blood excludes, and is preferred to half Blood, as is before ſet forth in the Notes on § 16. of this Title. In the one Caſe, the Heir ſucceeds to the Father, and in the other Caſe, he or ſhe ſucceeds to the Brother or Siſter German who was laſt ſeaſed, and to whoſe Inheritance, the others who are half Blood only, have no Claim.

§ 52. And ſicklike, where a number of Siſters does ſucceed to the Father, and one of them Die, leaving a Bairn behind her; if the Bairn Die not Infeft, the remanent Siſters German ſucceed *ex æquo*, becauſe they are to be ſerved Heir to their Siſter, who died laſt veſt and ſeaſed, or to their Father, if their Siſter was not Infeft, but if the Bairn was Infeft, either as Heir to his Mother, or to his Mother's Father. In that Caſe, becauſe the Succeſſion muſt be to the Bairn, who died laſt veſt and ſeaſed, therefore it muſt go to the neareſt of Kin on the Father's ſide, and not upon the Mother's ſide, and ſo the Brother or Siſter of the Bairn deceaſed, (if there was any of a ſecond Wife, [*i. e. Step-mother*] would be preferred to the Succeſſion, and if there was none, the Father himſelf would be

be preferred, and failizeing of him, the neareſt of Kin on the Father's ſide.

§ 53. But it is to be conſidered, That ſeeing this diverſity of Succeſſion is only in reſpect of Infeftment, that therefore in the Caſes where there is no Infeftment, either not requiſit, or not paſt, the Heir to the Defunct, is ay the neareſt upon the Father's ſide; as for Example, if one Die, leaving three Daughters, and that he had Right to ſome Reverſions and Tacks of Teinds, and if one of the Daughters Die, leaving a Bairn, which before it's deceaſe was ſerved and retoured General Heir, either to it's Mother or Good-ſire; in this Caſe, *jus eſt perfecte acquiſitum* to the Bairn, which after the Bairn's deceaſe, falls to the neareſt of Kin of the Father's ſide, and not to the Mother's ſide.

§ 54. And ſicklike, if the Father of the three Daughters, had heretable Bonds or Contracts, whereupon he got no Infeftment before his Death: In that Caſe, the Bairn of the Siſter Defunct, being retoured general Heir, as ſaid is, tranſmits the Right unto the neareſt of Kin on the Father's Side: But if either the Father of the three Siſters was infeft, upon the heretable Bonds or Contracts; or if the Daughter deceaſt, obtain'd

tain'd her ſelf infeft thereupon. In thir Caſes, or either of them, the Bairn being only ſerved general Heir, but not Infeft, would not Tranſmit the Succeſſion to the Father's ſide, but to the Mother's ſide: Becauſe either the Mother, or the Mother's Father died laſt veſt and ſeaſed, to whom the Heirs of the Bairn on the Father's ſide, cannot poſſibly ſucceed.

## TITLE

Tho' the Lands, or principal Sums due by Bonds whereon Saſine followed, ſhall paſs from the Father or other Heir of that Child not Infeft; yet the bygone Rents, or Intereſt of the Money reſting due at, and preceeding the Child's deceaſe, will fall to his neareſt in Kin.

Thus much concerning Succeſſion to Blood-relations in the Heretable Eſtate of their Kinſman deceaſed, either Infeft or not. But becauſe ſome well meaning People, lent Money to Perſons in Poſſeſſion of their Predeceſſors Eſtate, in which they believed they were Infeft, (when truly they were not) and after their deceaſe, the next in Kin refuſes to enter Heir to them: Becauſe they can get the Eſtate, by paſſing from them, and by entering Heir to a remoter Predeceſſor, who died laſt ſeaſed therein. For obviating this Damnage of Crediters, and the Fraud of this apparent Heir. "It is by "the forecited Act 25. *Parl.* 1695. ſtatuted, That any "who, ſince *January* 1. 1661. is ſerved Heir, or by A- "djudication on his own Bond hath ſucceeded, not to his "immediate Predeceſſor, but to one remoter, as to his Good "ſire, by paſſing his Father, and the like, ſhall for the Debts "and Deeds of the Perſon intrjected, who was three Years "in Poſſeſſion of the Eſtate, to which he is ſerved, be liable "in ſo far as extends to the value thereof, deducing the "Debts already paid, &c. As in the Act, which ſee.

Now this Matter of infeſting Heirs, makes way for the Title following.

# TITLE IV.

## *Of Ward,* 2. *Non-entry,* 3. *Marriage,* 4. *Relief, and* 5. *Of Retours, with the Precepts directed thereon.*

### SECT. I.

IF the Lands which pertain'd to the Defunct, *held Ward* of the Superior, the Heir being Minor, may not enter till he be of perfect Age, whilk, in the Male, is 21 Years, and in the Female 14. But if the Superior diſpence with the Minority, they may Enter; and the King's Majeſty never refuſes to grant Diſpenſation, which paſſeth by the Caſhet and



Held Ward] *Craig* in his Feus B. i. D. x. § 19. *P.* 59. Calls it a vitious Way of expreſſing, to ſay, by Service of Ward and Releif, for (continues he) Ward and Releif are not Services, but only they accompany Military Service, and are Conſequences of *Military holding*, wherefore it were better to call it, holding by Service, Ward and Releif, or by Service, (meaning Military) with Ward and Releif. However,

Ward holding, is by our Lawiers, ſo denominated from the chief

Signet only, providing the Donatar of the Right of the Ward, Crave the ſame, and Conſent thereto, otherwiſe the Licenſe and Diſ-

chief Emolument, accrewing to the Superior thereby, which is the ſame with the Military Tenor in the Feudal Law, *(tenendria per ſervitiam militare)* it is of all the other kind of Feus, the moſt Antient, the Propereſt, and the moſt Noble.

*Ward*, which comes from the barbarous German latine Word *Warda*, or the Gallick *Gaarda*, is in good Latine termed *cuſtodia*, and is Feudal, occurring, when a Vaſſal, dieing infeft and ſeaſed in a Military Feu, leaves behind him a Minor for his Heir, *the keeping* of the Feu Lands (whether they be the full Property, and in Poſſeſſion of the immediate Vaſſal, or of other Sub-Vaſſals to whom he had feued them) with the Cuſtody of the Heirs Perſon, albeit the Minor hath other Tutors or Curators Teſtamentary, *&c.*

The Reaſon of the difference of Years in a Male, from theſe in a Female, is, That albeit, a Girl is Marriageable and may Marry after 12, Years, yet being 14. compleat, ſhe is not ſo much preſumptively, as really and truly, fitted for Matrimony, and theſe two Years are ſuperaded in this Caſe, and given to the Superior, that he may have Time to look out for an Husband, not only proper for his Vaſſal, but alſo fit for his own Service, and whereas the Law has appointed the Time for marrying both Male, and Females, ſooner than Majority, yet the Woman, who is not deſtined for Military Service, can, at 14 Years, Marry an Husband fit for War. See what *Craig* moſt elegantly ſays on this Subject. B. ii. D. xx. § 4. *p.* 294.

This Diverſity of Age, with reſpect to the two Sexes in this Caſe, is pointed at in Act 5. *Parl.* 1547.

*Craig* in the *Dieg.* above-cited, § 2. ſaith, Diſpenſations were firſt introduc'd by the *Norman* or *Gallick* Law, (which agrees with *Juſtin. Cod. Tit. De. his qui ven. ætat. impetr.*) and from the French, were conveyed to us.

The Nature of a Diſpenſation will be better underſtood, by

Diſpenſation bears this Clauſe, *That it ſhall be but Prejudice to the King and his Donatar of the Right of the Ward.*

by reading the Stile of the Letters, to be found in *Dallas*'s Syſtem. *P.* 488.

Hereafter in *Tit.* viii. § § 2, and 3, 9, 10. It is told what the Signet and Caſhet are.

§ 2. *Item*, The Donatar to the Ward, may enter immediatly to the Lands without a Declarator, and may uplift the Mails and Duties, and Warn the Tenants to remove, and the common Exception, which uſes to be proponed in Removings, that the



See *Cr.* B. ii. D. xx. § 15. *P.* 288. in the End.

Why, in the Caſe of Ward, a Declaratory Action is not requiſite, as it is neceſſary for making other Caſualities of Superiority effectual, This Reaſon may be given, becauſe the Benefit the Superior gets by the Ward, is given *ipſo jure feudali*, and is *pars contractus feudalis*, ſo that the Superior *jure dominii directi*, has immediate acceſs to the Rents of his Feu, as well as the deceas'd Vaſſal had *jure dominii utilis*, and this benefit is not quite by a Superior's confirming a baſe Infeftment: Whereas Emoluments falling to the Superior, *ex delicto feudali* of the Vaſſal, ſuch as Non-entry, Eſcheat, Recognition, being unfavourable, are ſubjected to a narrow Examination or Trial, and require a Probation of Facts and Circumſtances, which muſt be diſcuſſed by prejudicial or previous Actions of Declaratory.

By Act 26. *Parl.* 1491. It is ſtatute, *That the Tenants, Labourers, and Inhabitants of Lands fallen in Ward, ſhall remain unremoved, till the next Term of* Whitſunday

Defenders are Tenents to ſuch a Perſon, who is heritably infeft, and he not warned, is not relevant againſt a Donatar to a Ward: Becauſe the Donatar during the Time of the Ward, is in Place of the Maſter; and ſo there was no neceſſity to Warn the apparent Heir of the Maſter.

day *following, they paying to the Over-lord, the Rents uſed and wont.* And in Conſequence of which Statute, The Superior or his Donatar will get no more than the Tack-duty, tho' it be never ſo far within the true avail of the Lands, before he make Warning or Interruption, by executing a Summonds for Payment of the Mails and Duties, which is Equivalent to a Warning. The Laird of *Lee.* againſt *Glen* of *Bar. March* 13. 1627. *Spotſ. Tit. Ward.* § 2.

The common Opinion is, That King *Malcom M'Kenneth* ii. who begun to Reign A. D. 1004. introduc'd into *Scotland*, Ward and Releif, and Marriage. But *Craig* is of Opinion, they owe their Origin to the Feudal Cuſtoms. See *M'Ken. Inſtit.* B. ii. *t.* 5. § 32. & *eod.* § 12. *leges Malcolmi de origine Wardæ & Relevii. cap.* 1. With the Annotations thereon. *Craig de feud.* B. ii. D. xx. § 3. and 4.

The Tacks and other Rights, during the Ward, are in the Conſtruction of Law, ſleeping: But ſo ſoon as it is at an End, they awake and reſume their former vigour, and take Place for the whole Years that were to Run at the Time the Tenants were remov'd, whom the Heir is oblig-ed to reſtore to their antient Poſſeſſion. *Cr.* B. ii. D. xx. § 15. toward the End, *P.* 289.

§ 3. *Item*, The Tacks or Infeftments made by the Defunct, will not defend the Tenants, or the Perſons to whom the ſame are

are made, frae the Donatar's Action of removing; and albeit, the Infeftment be confirmed by the King (except the ſame be given to be holden of the King) yet the ſame will not defend againſt the removing, and the Reaſon of it is, becauſe all Confirmations granted by the King, bears this Clauſe, *Saving & reſerving alwiſe to his Majeſty and his Succeſſors, the Rights, Services and Duties due to them, forth of the Lands, whereof Confirmation is granted; but where the Infeftment is given to be holden of the King*, & confirmed, that ſtays the Ward, *pro tanto*, becauſe, the King's Majeſty cannot have the Ward of Lands, whereof he has a Vaſſal living, but the Ward is ſuſpended, if the Infeftment confirmed was Temporal, and for Lifetime only; as is commonly uſed in Infeftments granted by Huſbands to their Wives; and if the Infeftment confirmed was Heritable, then the Ward

A Confirmation of baſe Infeftments will ſecure the Feu againſt the legal effect of Feudal delinquinces, from which Superiors claim Advantage, ſuch as Recognitions, Forfaultures, *&c.* But it will not defend againſt Caſualities belonging to the Superior, *ex jure vel contractu Feudali*, as Ward, Marriage, and the like; beſides, all Confirmations ſhould contain a Clauſe, *ſalvo jure noſtro, i. e.* of the Superior confirming. See *Dirleton*'s Doubts, *Tit.* Ward lands. and *Steuart*'s Anſwer in *P.* 330. *Dury July* 7. and 24. 1628

Ward could not Vak, by Deceaſe of the Diſp ner, nor by Minority of his Heir, becauſe he was fully diſſaiſed of the Right of the Lands before his Deceaſe.

1629. Lady *Cathcart* againſt ſome of her Tenants.

In that Title of *Dirleton*'s Doubts, you'll find pleaſant Caſes worthy to be read, concerning the Ward of the Heir of Appriſers and Wadſetters, and the Termination thereof, by Extinction or Redemption.

In this § there are twice mention made of *Infeftments confirm'd by the King*; The firſt is, an Inteſtment *de me*, *i. e.* baſe, the ſecond in the End of the § is an Inteſtment *a me*, which, when confirm'd, is alike with a Reſignation.

If the Gift of Ward, *&c.* be for behoof of the Maſter, or immediate Vaſſal, in a Declaratory, and Action for removing againſt Tenants or Sub-vaſſals, *that Gift* will accreſce to the Defenders, upon their paying a Proportion of the Compoſition, and Expence, as was found in the Caſe of *Pinkel* againſt the Tenants of *Carſluth*. *February* 15. 1665. agreeable to that which is delivered by *Craig*. B. ii. D. xx. § 22. *P.* 290. in the End.

## § 4. *Item*, The Relict will have Right to

This Caſuality of Ward, affects not Lands burdened with Liferents conſtituted by Law, ſuch as Terce, Courteſy, *&c.* which need not the Superior's Confirmation, *Cr.* B. ii. D. xx. § 20. *P.* 290.

In a Plea between Colonel *Erskine*, and Sir *George Hamilton February* 12. 1713. obſ. by *Forb. P.* 661. It was found, That a firſt Appriſer being, by Diſpoſition of his appriſing, regiſtrated in the Books of Reverſions, denuded within the Legal, in Favour of a ſecond Appriſer, no Caſuality of Ward, Marriage, *&c.* With reſpect to the Lands appriſed, did fall, by the Death of the firſt Appriſer. It was,

to her Teree, notwithſtanding of the Ward.

was, in the ſame Caſe, alſo found, That a ſingular Succeſſor in theſe Ward-lands, being many Years before the Gift of Ward and Marriage, infeft by Charter under the Great Seal, containing *novo damus*, and change of the holding from Ward to Blench, *that* the ſaid Charter did import a Diſcharge of theſe Caſualities, in Caſe they had fallen.

Sect. 2. *Of Non-entry.*

§ 5. *Item*, If the Heir enter not after expireing of his Minority, then the Lands are in *Non-entry*, and not in Ward, becauſe the Ward is ended, and during the Ward, it could not be called Non-entry, becauſe the Heir could not enter, and therefore the Non-entry begins after the expireing of the Ward; but a Non-entry ſubſequent to a Ward, is of the Nature of the Ward, and not of the Nature of a common Non-entry, ſpecially where the Wardatar is in Poſſeſſion of the Ward, for then he continues his Poſſeſſion, without obtaining Declarator upon the Non-entry, and he has Right to the full Mails and Duties, and may remove the Tenants as he did in the Time of the Ward; whereas in common Non-entries, there is not a Title or a Right without a Declarator, and when a Declarator is obtained, there is no more due for the Years preceeding

ceeding the Declarator, but the retour'd Duty, if any be, but where no Retour is, in that Caſe, The Donator to the ſimple Non-entry

Non-entry is a Caſuality, whereby the Superior has Right to the Rents of his Feu Lands, when there is not a Vaſſal, which falls out. 1. When the former is deceas'd, and his Heir is not entered. 2. When the Right of one who was reputed Vaſſal is reduced. 3. When a ſingular Succeſſor does not proſecute the Reſignation accepted. See *M'Ken.* Inſtit. B. ii. *t.* 7. § 17.

Non entry is a ſpecies of a Feudal delict, puniſh'd by yearly forfaulting to the Superior the Rents of the Lands, it endures the whole Time the Vaſſal delays to renew the Inveſtiture, and when he gets Precept or Charter; and is inſeft then he is ſaid *to have entered*: For, as *Craig* expreſſes it, *introire tum & adire, ſive intrare dicitur.* But Non-entry does not Commence till Year and Day after the Deceaſe of the Vaſſal laſt inſeft by the Superior's Warrant: The *Day*, in this and other Caſes, is added to make the *Year* the more ſurely compleat and full.

*Craig* calls Ward a ſpecies of Non-entry, becauſe the *Minor Heir* enters not to the Feu, but it differs from ſimple Non-entry, becauſe, during the Ward, the Vaſſal, tho' highly willing, yet is not admitted to enter to the Feu, On the other Hand, in Non entry, the Vaſſal is puniſhed for not entering, when it is in his Power. Ward is peculiar to the Military holding, and Non-entry is common to all ſorts of Feus. In the firſt, there are two kinds of Non-entry, as 1. When the Ward has exiſted; and there's a Non-entry following, in which there are two Caſes to be conſidered, if the *Wardatar i. e.* Donatary to the Ward, was in Poſſeſſion, he continues it for three Terms after the Majority, of the Non enter'd Vaſſal, tho' he be not Donatary to the Non entry; *next*, if he never was in Poſſeſſion during the Ward, the Superior, or his Donatary cannot enter to Poſſeſs the Feu by Non-entry, till a Decreet of general Declaratory be obtain'd, and the Summonds for citing

**Non-entry, will have Right to the full Mails.**

ing the apparent Vaſſal cannot be executed till the *annus deliberandi* expire, *Baillie* againſt *Brown*, *July* 29. 1710. obſerved by *Forbes*.

After executing this Declaratory, the Superior is intitled to the common Rents, *i. e.* theſe in uſe to have been paid by the Tenants to the Heritor, except there be a probable Excuſe verified by the Vaſſal, as in the Proceſs of *Douglas* of *Kelhead* againſt his Vaſſals, *July* 16. 1675. obſerved by *Stairs*. See *Nisbet*'s Deciſions, *P.* 132. and the Caſe of Mr. *Alexander Maitland* againſt *Brand*, *January* 22. 1706. obſerved by *Forbes*.

The Reaſonableneſs of this Caſuality is ſet forth by *Craig*, *B.* ii. *Dieg.* 19. § 4. *M'Ken. Inſtit. B.* ii. *T.* 5. § 17.

If the Lands in Controverſy be not retoured to a ſpecial Extent, but are Part of a Barony, whereof there's a known retour'd Duty aſcertained in the ancient Retours, the Rent of theſe Lands is reckon'd and regulated by a proportional Part of the whole retoured Duty. See *Craig*, *B.* ii. *D.* 19. § 19. and the Caſes, *Leſly* againſt *Pitcaple*, *March* 15. 1622. *Ker* againſt *Scot*, *February* 5. 1623. Again, if the Lands be holden in Feu-ferm, the Superior gets, before Declaratory, the yearly Feu-duty, when the retoured Duty is unknown. Earl of *Kingborn* againſt *Strang*, *July* 19. 1631. And becauſe an Infeftment of Annualrent is a new Feu, and cannot have a retoured Duty, the Superior, in the Caſe of Non-entry, according to the preſent Law and Practick gets, before Declaratory, the Blench, or other Duty, ſpecified in the Warrant of the Infeftment, which is declared to be their retoured Duty, by Act 42. Parl. *July* 1690. whereas before that Time, he got the full Annualrent. See *M'Ken. Inſtit. B.* ii. *T.* 5. § 19.

**§ 6. But it is to be conſidered, That the Non-entry ſubſequent to a Ward, pertains not to the Donatar of the Ward, except**

cept for three Terms, ſubſequent to the expiring of the Ward; for, after *that*, the ſecond Donatar will have Right. Likeas, if the Heir come to Majority, and might have entred, but deceaſes before he is entred *de facto*, leaving behind him a Son or a Brother, Minor; in this Caſe, the firſt Donatar has no Right to the Ward, of new fallen by the Minority of the ſecond Heir, but the King has Power, of new, to diſpone the ſame to a ſecond Donatar, and there is no further granted, but (as before in a ſubſequent Non-entry) three Terms after the expiring of the Minority, albeit it might ſeem, that it is not a new Ward, but the ſame Ward, by the Deceaſe of one and the ſame Fiar; and, that the Gift granted by the King, bears the Ward to be diſponed of, all Years ſince the Deceaſe of the Fiar, and ay and while the Entry of the righteous Heir: But the Lords found, That *ay and while the Entry of the righteous Heir*, reſpected *not actum*, but *facultatem et potentiam*, and in *rei veritate*, the Deceaſe of a Fiar, and the Unity of a Perſon deceaſed, infers not the Unity of Vacation, neither of Ward nor Marriage; but it is enough, that the Lands hold Ward of the King, and that any one of the Predi-

ceſſors

ceſſors was inſeft, holding Ward; for, otherways it ſhould be in the Power of the Vaſſal and his Heirs, to hinder and impede the falling of the Lands in Ward, and Benefit of the Marriage, by not entring; and, albeit the King, or any other Superior, might compel the Heir to enter, or otherways bar him from the Lands, by the Non-entry, either ſimple, or by that which is ſubſequent to the Ward; yet it is not reaſonable, that he Superior, neglecting of his own Benefit in bygone Times, ſhould prejudge him thereafter of the Ward and Marriage, when the ſame vaiks; and this was found *quoad* a Ward, in an Action purſued

*Three Terms ſubſequent to the Ward.*] The Non-entry for theſe three Terms, (and no more) are found by the Lords of Seſſion, to be of the Nature of the Ward, *i. e, The Superior may ſeek Payment, of the Rents due in that Space of Time, without any Declaratory Action.* But the *Non-entry* thereafter, (if it continued) gave Right to no more, than to the retour'd Duty, before Declaratory; and even if the *Superior*, or his Donatary, was not, by Virtue of the Ward, in Poſſeſſion of the Lands, they have, for the Non-entry, albeit ſubſequent to the Ward, Right to no more than the retour'd Duty. See Lord *Leſlie* againſt *Pitcaple*, *March* 13. 1622. But if the Superior be in Poſſeſſion of the Lands, by Virtue of the Ward, he may continue it, during the Non-entry, *Peebles* againſt Lord *Roſs*, *January* 23. 1630.

That the Words, *Ay and while the Entry of the righteous Heir*, reſpects *non actum ſed Facultatem*, was found in the Caſe

fued by the King's Majeſty, who now is, being then Duke of *Albany*, and Donatar of the Ward of the living of *Buchan*, againſt *William* Earl of *Morton*, firſt Donatar thereto; and the other in Matter of Marriage, was found betwixt Sir *John Home* of *North-Berwick*, Donatary to the Marriage of *Adam French* of *Thornydikes*, againſt *John Cranſton*, and the ſaid *Adam*'s Siſter, who came to the Lands by Deceaſe of her Brother.

Caſe of Maritage, between *French* and *Cranſton*, *July* 11. 1622.

*By the King who now is*, our Author mean'd King *Charles* the Firſt, who, while his elder Brother, Prince *Henry*, was alive, got from his Father King *James* the Sixth, that Gift.

## Sect. 3. *Of Marriage.*

§ 7. But it is to be obſerved, That if the firſt Heir, by whoſe Minority the Ward vaiks, deceaſes Minor; in that Caſe, there is no new Vacation of Ward, but the firſt Ward continues in Favour of the Donatar. And

The Lords have found, That *ſo many* ſeveral apparent Heirs, *as many* Wards and Marriages: But I have not met with a Deciſion determining a Competition, which may occur among many Donataries. See the Notes on § 10. *h. t.*

Tho'

And ſicklike, if the firſt apparent Heir die unmarried, in that Caſe the Marriage of the next apparant Heir, will pertain to the firſt Donatar, and not to the ſecond.

Tho' the Vaſſal die before he be out of Pupillarity, his Ward will have taken Place, but nothing will be due for his Marriage, becauſe he has not attained to the marriageable Years.

§ 8. But it may be *doubted*, If *the firſt Heir die married, but not infeft, and Minor, whether the King falls the Marriage of the next apparent Heir, being unmarried*, which may be diſputed, *in utramque Partem*: And for the Vaſſal, it may be alledged, That the King can fall, by Deceaſe of one and the ſelf-ſame Vaſſal, but only one Marriage, eſpecially when the apparent Heir, who was married, died Minor, and not infeft, *neque actu, neque potentia*. Next, that the Avail of the Marriage cannot be craved, but at the perfect Years of the apparent Heir, becauſe he cannot pay the Avail, but by giving Security of his Lands, which he cannot do, if he be not infeft, nor able to obtain himſelf infeft. But on the other Part, it is urged for the King, That he muſt have the Marriage of the apparent Heir of his Vaſſal, one or moe,

as

as the ſame falls out, as he does fall the Marriage of all the Heirs Famale, albeit there were never ſo many of them; and as the King does continue the Benefit of the Ward; ſo the ſecond Marriage is but a Continuation of the firſt; and albeit the King's Donatar can crave but one Marriage, in Reſpect of the Conception, of the Gift which bears the Marriage of the firſt apparent Heir *nominatim*; and in Caſe of his Deceaſe unmarried, the Marriage of the next apparent Heir; yet that cannot exclude the King frae diſponing of the ſecond Marriage, when it vaiks.

§ 9. But all Things being pondered, it ſeems the Deciſion, in Juſtice, muſt be in Favours of the King, or any other lawfull Superior, to have all the Marriages, as they vaik; but in this Caſe, the Lords will have a Care in the Modification of the Avail; and the Lords inclined to this Courſe in *North-Berwick*'s Action, and *John Cranſton*, the King's ſecond Donatar, to the Marriage of three Daughters; for the Lords gave the Benefit of the Marriages to the two Donatars, but modified the Avail of the firſt Marriage, to a very mean Matter: But yet the Lords fand, *That the Avail of the firſt Marriage*, modified

fied as ſaid is, *ſhou'd be paid by the Daughters, albeit they were neither Heirs nor Executors to their Brother, but as Heritors of the Lands by which the Marriage fell.* And fand, *That the Lands might be poinded and diſtreinzied for the ſame*; and ſo fand the Right of the Marriage real, *contra fundum*, which was well decided, becauſe the *Marriage* is a *Part* of the *Reddendo* due to the Superior, whereof he cannot be defrauded by the not Entry of the apparent Heir, to the Lands.

§ 10. *Item*, It is to be remembred, That the Ward and Marriage cannot vaik to the King, but by Deceaſe of one, who either was actually infeft in Ward-lands, or might have been infeft, as apparent Heir to his Predeceſſors; but if the King's Vaſſal was denuded of the Right of the Ward-lands, by Reſignation in the King's Hands, in Favour of his eldeſt Son and apparent Heir, reſerving his own Liferent, with Reverſion, upon a *Roſe-noble*, whereupon his Son

See *Craig*, *B.* ii. *D.* 21. § 15, and 25. towards the End. The Ward and the Marriage are two Emoluments of Superiority, of a Nature diſtinct and different, becauſe the Ward may exiſt, when there's no Place for the Marriage; and again the Marriage may be due, when the Ward was never in being, or is at an End: But when they meet together,

Son was ſeaſed, before his Father's Deceaſe. In this Caſe there is no Vacation of Ward or Marriage by Deceaſe of the Father, becauſe he was not the King's heritable Vaſſal, the Time of his Deceaſe, but

together, and both become due to the Superior, the Avail, ſingle or double of the Marriage, cannot be demanded, while the Vaſſal is under Ward. See *Craig* in the §§ above-cited.

*Text. ward* is a *debitum Fundi*, and ſimple Ward is a *debitum fructuum*, for which the Intrometters are perſonally liable, but not the Feu. See § 20. *infra h. t.* But *Marriage*, either in the ſingle or double Avail thereof, albeit it is only a perſonal Debt againſt the Heir; yet his whole other Eſtate, tho' not holding by the Service of Ward and Marriage, nor of the ſame Superior, may be adjudged for Payment of it; *yet* if he renounce to be Heir, his Perſon will be free, but the *hereditas jacens*; is liable to Adjudication; for in this Caſe of *Marriage*, *refutatio feudi*, is not admitted, unleſs the Vaſſal ſatisfy all Caſualities already fallen. See *Nisbet*'s Doubts and Queſtions, with *Steuart*'s Anſwer, *Tit. Marriage*. No. 18.

In the Caſe of many Heirs Portioners, there is only one *Avail of the Marriage* due for them all, as if there were no moe than one Perſon who is Heir. *M'Ken. Inſtitut. B.* ii. *T.* 5. § 10.

*Marriage*, with Reſpect to the *ſingle Avail* (which is two Years Rent of the Vaſſal's whole Eſtate, to which his Tocher is eſtimated) is due, *jure communi feudorum, et ex contractu feudali*, and ſo is not penal. See *Dirleton*'s Deciſ. in a Claim of the Avail of Marriage by the Earl of *Argyle contra* the Laird of *M'Naughton*, *January* 3. 1677. *P.* 203. whereas, the *double Avail* (which is three Year's Rent) is *ex delicto*, ariſing from the Vaſſal's Contempt.

*Nisbet* in his Book of Doubts, moves a Queſtion, if a Superior may purſue in his Baron-court, for Non entry, Ward

or

but was deduced in Favours of his Son, *ut ſupra.*

or Marriage; and *Stewart* makes Anſwer in the Negative. See *Tit. Baron-courts.*

## Sect. 4. *Of Relief.*

§ 11. *Item*, When the Heir of Ward-lands is Major, and craves to be entered, he muſt pay to the Superior, a *Relief* for relieving him forth of his Ward, which Relief, is the retoured Duty of the Lands, for one Year, and that by and attour the Non-entry, if the Lands be found by the Retour, to have been in Non-entry, for the Space of one Term, or more, after the expiring of the Ward.

If the Superior has, by his Ward or Non-entry, got the natural Poſſeſſion of the Lands, he may continue it, and uplift a full Year's Rent for the *Relief*. *Craig B.* ii. *D.* 20. § 29. toward the End.

§ 12. *Ad imitationem* of this Relief in Ward-lands, the Vaſſal of Blench-lands, pays alſo a *Relief*, at the Entry of the Heir, but that is only the Duplication of the Blench-duty; and as to Feu-lands, the Clauſe of the Charter commonly bears, *duplicando feudi-firmam primo anno introitus cujus libet heredis*; and if the Charter bear it not, yet the Cuſtom of the Chancella-

ry is not to give out a Precept upon a Retour of Feu-lands, but with this Clauſe, *cautiendo ſecuritatem, pro duplicatione feudi-firmæ.*

Sect. 5. *Of Retours, with Precepts thereon.*

§ 13. *Memorandum*, the Retour of Ward and Blench-lands, differs not in Form, but is ruled according to the Cuſtom of the Shire where the Lands retoured ly, without Reſpect of the Blench or Ward, but the retour'd Duty of Feu-lands is ever the Feu-duty: And as to the Quantity of the retour'd Duty in Ward and Blench-lands, it is ſometimes the Double, ſometimes the Triple, Quadruple, Quintuple, Sextuple or Septuple of the old Extent, according to the Cuſtom of retouring of Lands in every Shire, as in *Fife*, commonly the fourth or fifth Mail; and in the Weſt it is commonly the Sextuple or Septule, whereof they complain; not ſo much for the Retour, but becauſe their ſingle Mail, or old Extent, was too high, according to which they pay the King's Taxation: And in the *Merſe*, and other Countries bordering with *England*, the retoured Duty is only the ſingle of the old Extent at fartheſt; and the Reaſon of the Difference of the Height of the

the new Extent, may be taken from the Time and Reaſon of ſetting down of the ſamen, for the old Extent was made in the Time of Peace, and the new Extent was made *tempore belli*, and in Reſpect thereof; and therefore the Places of the Kingdom nearer to *England*, with whom we had Wars, and who were oftest imployed for Defence of the Kingdom, had their new Extent made to the Double, Triple, Quadruple, *&c.* and the Places more remote, as *Galloway*, and far north, had their new Extent made to the Sextuple, *&c.* but this Reaſon is not neceſſary, but probable only; yet this is certain,

§ 14. There were two Extents made of the whole Lands in *Scotland*, according to their Worth and Eſtimation at that Time, whereof one is called the old Extent, which was taken *tempore pacis*; and then the new Extent, which was taken *tempore belli*, and according to the old Extent, every Pound-land of the Kingdom pays the Taxation to the King, compting thirty Shillings for ilk Pound-land, at ilk Term, which makes three Pounds in the Year, when the Taxation is an Hundred thouſand Pounds, which makes the old Extent of the whole Lands of *Scotland*, to come to 33,333 *Lib.* 6 *ſh.* 8 *d.* or there about.

§ 15. *Item*, The new Extent is that which we call the retoured Duty, whereof the Reaſon is, becauſe all Breives do bear this Clauſe, *Et quantum valuerunt dictæ terræ olim, vel tempore pacis, et quantum nunc valent vel tempore belli.* And therefore the Inqueſt in the Service of the the Breive are bound to anſwer this Point, as well as the Reſt; and, becauſe their Anſwer or Service, muſt be retoured to the Chancellary, after which the Service is called the Retour; therefore the new Extent mentioned in the Service and Retour, is called the retoured Duty, and the old Extent cannot be called the retoured Duty, albeit it be contained in the Service or Retour, becauſe the Vaſſal is bound, when he enters to his Lands, upon his Service,

[1] For knowing the Nature of the retoured Duty, with the old and new Extent, and the Judgment of our Lawyers concerning them. Read *Craig. B.* ii. *D.* 19. § 19. *P.* 280. and *M'Ken. Inſtit. B.* ii. *T.* 5. § 18.

Until the Time of the Troubles in the Reign of King *Charles* the Firſt, the Order ſet down in § 14. for ingathering the Taxes and publick Subſidies out of Lands, laid on at extraordinary Occaſions, was obſerved; but the rebellious Parliaments after the Year 1640. introduced a new Method, which the Reader will find among the reſcinded Acts; which, after the Reſtoration in 1660. was continued by the Parliament in 1661. and ſomewhat rectified by Act 24. Parl. 1663, has ever ſince been followed.

vice, to pay the new Extent to the King, either for Relief or Non-entry, but not the old Extent.

§ 16. *Item,* The Director of the Chancellary, upon the Service being retoured, directs Precepts incloſed in white Wax (as the Breives are) to the Sheriff of the Shire where the Lands ly, which Precepts bear a Command to the Sheriff to give Seaſin of the Lands, to the Perſon who is ſerved and retoured Heir to his Predeceſſors; but with this Clauſe, *Capiendo ſecuritatem pro decem, viginti libris,* &c. or ſo much the more, as the retoured Duty comes to yearly, for ſo many Years as the Lands are found to be in Non-Entry; and alſo, for a Year's Duty of the new Extent or retoured Mails *pro Relevio,* if they be Ward-lands; and if they be Blench, for Duplication of the Blench-duty; and if they be Feu, for Duplication of the Feu-duty.

§. 17. And at Delivery of this Precept of Seaſin by the Director to the Party, there is inſert by the Director, in his Book, called *The Book of Reſponde,* a Note bearing the Sums for which the Sheriff ſhall take Surety in this Form, *Reſpondebit vicecomes*

*cecomes de B. pro ſumma —— ratione ſaſinæ dandæ tali —— de terris ——* And, acccording to this *Reſponde*, the Sheriff is charged yearly, to make Compt to the *Exchequer*, which holds yearly in *July*. Conform to this Precept, the Sheriff, when the ſame is preſented to him, takes Good Surety from the Party, for Payment of the Money, contained in the Seaſin; and thereafter he gives Seaſin, and for giving thereof, takes a *Seaſin-ox*, and albeit this Precept be not preſented to the Sheriff, nor Seaſin taken thereon; yet the Sheriff, by the Cuſtom of the Exchequer, is ſtill charged with the *Reſponde*, and compelled to pay the Samen, whereof there is no probable Cauſe, but this, That it is preſumed, that the *Party Raiſer of the Precept*, will not neglect to take Seaſin upon the Precept, eſpecially

*Reſponde.*] *Skeyne*, in his Treatiſe, *de verborum ſignificatione*, fully explains this Word, and illuſtrates this Matter; which ſee, and alſo the *Tit.* viii. § 14. of this Book.

*Seaſin-ox.*] In ancient Times, when Money was ſcarce, the Fees for Services were paid in Cattel and Sheep, as alſo Fines and Mulcts, as is manifeſt from the Books of *Regiam Majeſtatem*: But now the Sheriff exacts Money, more or leſs, according to the Value of the Lands whereof Seaſin is given, or according to the State and Condition of the Perſon

cially ſeeing the Precept bears this Clauſe, *preſentibus poſt proximum terminum minime valituris.*

Perſon infeft. Now *Craig* in *B.* ii. *D.* 7. § 24. P. 183. towards the End, makes Account of this, *If*, ſays he, *the Superior gives to his Vaſſal, Seaſin, he takes, in Sign, and Symbole thereof, an Ox, which becomes his Property; but if the Vaſſal either refuſe or delay, to give it, and if it happen that there is no Ox upon the Ground, the Superior may, for the Price and Value of it, poind, even without Citation and Sentence or Decreet.*

§ 18. But, albeit Seaſin be taken, and Security given for the Moneys contain'd in the Precept; yet, upon Supplication of the Party who was ſeaſed, made to the Lords of Exchequer, craving to be freed from the Payment thereof, upon ſome juſt Reaſons; whereof this is commonly one, That the Gift of the Ward or Non-entry, was diſponed, either to himſelf, or to a Donatar, to whom he has given Satisfaction, the Lords will relieve both the Sheriff, and the Party giver of the Security.

§ 19. But, albeit the Party ſhew a Gift of Ward, Relief and Non-entry, and thereupon be freed of the By-runs, yet he will never be freed from Payment of the Relief,



*By Act* 73. (in the new Edition it is 74.) *Parl.* 1587. It is ſtatuted, *That no Relieves be compounded, in Time coming, but that the full Avail thereof be paid to the Exchequer*

although it be contained in the Gift, becauſe ſuch is the Exchequer's Cuſtom.

*chequer; and in Caſe the Sheriff do not compt to the Exchequer, that upon Sight of the Book* Reſponde, *Letters be directed to charge the Perſons to whom the Precepts of Seaſin have been granted, or the Sheriff and his Deputes, at the Option of the Theaſurer, or both, to pay the Sums contained in the* Reſponde, *or to poind the Sheriff, or the Party, if he cannot ſhew the Sheriff's Diſcharge.*

§ 20. It is to be remembred, That albeit there be a Gift granted of *Non entry*, or *Ward-ſimple*, yet if the ſame be tax'd, the Gift of the ſimple, will not comprehend the tax'd, except the tax'd be diſponed *per expreſſum, ratio eſt*, becauſe the tax'd Duty being liquidate by the Infeftment, is a Part of the *King's proper Rent and Duty*; whereas the other is only a *Caſuality* for the Tax'd-ward, and Non-entry may be craved, and the Ground may be poinded therefore, notwithſtanding, that all the Years of the Ward be expired; but in a ſimple Ward, the Ground cannot be poinded, but the Action is only competent againſt the Intrometters with the Mails and Duties, for a Tax'd-ward, is of the Nature of a *Feu-duty*, during the Time of it, or of *Annualrent*, diſpon'd forth of Lands, and the ſimple Ward, is of the Nature of an Infeftment of Property *ad tempus*.

§ 21.

§ 21. Where Lands are retoured to be holden of *another Superior* than the King, in this Caſe, the *Director of the Chancellary*, at the Requeſt of the Party, gives forth Precepts cloſed in white Wax, directed to the Superior of the Lands, commanding him to infeft his Vaſſal in the Lands to which he is retoured Heir, the Vaſſal doing that to the Superior, which he is obliged to do of the Law: Upon this Precept, the Vaſſal, either perſonally, or by a Procurator in his Name, goes to the Superior, and requires him to give him an Infeftment, which Infeftment (otherwiſe called) Precept of Seaſing) the Vaſſal or his Procurator, preſents to his Superior, Written *in mundo*, and if the Superior refuſe, or delay, he takes Inſtruments thereupon, in Preſence of a Nottar and Witneſſes; and returns the ſamen to the Director, who thereupon gives forth a ſecond Precept called *meminimus*, whereby the Superior is of new required, and Inſtruments taken *ut ſupra*, upon the report whereof, there is a third Precept directed, called *furca*, which is uſed by the Vaſſal, according to the other two; and upon the Report of this laſt, the Director gives a Precept to the Sheriff of the Shire,

where

where the Lands ly, commanding him to give to the Vaſſal Seaſin of theſe Lands, in Reſpect of the Superior's contempt.

*Meminimus*] ſo called, becauſe in his ſecond Precept, the Sovereign takes notice of a former, which he Remembers had been directed to the ſame Superior.

*Furca*] The Reaſon of this Denomination, (as I had it by Tradition from experienced Writers, ſometime ſince deceaſed) is, becauſe, as a Fork has two grains; ſo, this 3*d*. Precept makes a Reference to two others that had been formerly directed; or next, it has an alternative, or two views, That if the Superior does not give Obedience to this third Mandate, by infefting the Bearer: Then, as the next Remedy, he is certified; the King will Iſſue out a Precept, directed to his own Sheriff, who he is ſure will Obey.

This § will be better underſtood by Students, who are unacquainted with the Practice in this Caſe, if they'll read and conſider the Stile and Nature of the Precepts, to be found in the Appendix.

§ 22. But commonly the Superior, before the directing of this laſt Precept, for giving of Seaſin, uſes to paſs *Suſpenſion*, before the Lords of Seſſion, Summons the Vaſſal to compear before the Lords, to hear and ſee the Charges raiſed upon theſe Precepts, to be ſuſpended, which Suſpenſion is commonly granted by the Lords, by *Conſignation of a Precept of Seaſin* ſubſcribed by the Superior, and upon the Day of the Compearance, the Reaſons of the Suſpenſion are diſcuſt by the Lords, and

Juſtice

Juſtice done therein, according to the relevancy thereof; and the *Reaſons of Suſpenſion*, are commonly thir, That the Precepts are Conditional *Vaſſallus faciendo Superiori quod de jure facere oportet*, and that by the Retour, the Lands are found to be in Non-entry ſo many Years, which muſt be paid; which Reaſon is Relevant by the Law, and admitted by the Lords, becauſe as it is the Condition of the Precept, ſo it is verified by the Retour, but there may be other Things due to the Superior (whereupon alſo they uſe to found Reaſons of Suſpenſion) ſuch as, the Feu-duty *aught and* in diverſe Years bygone, the Liferent of the Vaſſal deceaſed, or of the appa-

The Doctrine of this § is a ſummary of ſeveral Deciſions Obſ. by *Dury*, which the reader may conſider at his leaſure, they are, L. *Covington* againſt Captain *Craufurd July* 1. 1623. Town of *Edinburgh* Superior, againſt *Logan* Charger, *December* 21. 1626. The like Captain *Scot* againſt *Elliot* of *Stobs*, *March* 11. 1636, *&c.*

The immediate Superior's Charter, given in Obedience, either to Precepts out of the Chancellary, in Favour of the laſt Vaſſal's Heir, or to a Charge of Horning by a Compriſer, after Decreet of Tinſel, *(loſs)* of the Superiority againſt the immediate Superior, has not the Effect of a Charter confirming a baſe Infeftment given to a Sub-vaſſal, ſo that ſtill the immediate Superior has Right to all Caſualities ariſing *ex delicto* of his immediate Vaſſal; ſuch as, Forfaulture, Recognition, *&c.* As *M'Ken.* Obſervyes, *Inſtit.* B. ii. *t.* 7. § 13.

In

apparent Vaſſal, through being Year and Day at the Horn, the Lands fallen in the Superior's Hands by *Recognition*, either by the Nature of the Holding, as being Ward, or by a Clauſe irritant, *not to anallie without Conſent of the Superior*, but none of thir will be found Relevant in a Suſpenſion, and notwithſtanding thereof, the Precept

In the Caſe of *Peebles* againſt Lord *Roſs*, *January* 23. 1630. The Lords did not ſtop a Charge, againſt the Superior, on a Precept forth of the Chancellary to infeft a Vaſſal, upon account of not Payment of the Duties of the Lands, during Non-entry, which were not *liquidate*, or upon account of *Recognition*, (by which the Superior claim'd the Lands) which was not declared; but ordain'd the Decreet, finding the Charges orderly proceeded, ſhould bear a *Reſervation* of whatever was the *Superior*'s Right *pro ut de jure*: And likewiſe in the Caſe *L.* of *Mochrum* againſt *L.* of *Martoun*, marked by *Stairs* in his Index, *Feb.* 20. 1662. a Precept of Seaſin upon Obedience was found, not to hinder Reduction and Improbation, nor to import an acknowledgment of the Vaſſal's Right.

In the Caſe of the Hoſpital of *Glaſgow* againſt *Campbel*, *July* 19. 1664. It was found, That a Superior, by receiving a Vaſſal upon a Charge, did not derogate from his Right of Ward; albeit, he made no Reſervaton thereof, becauſe the Infeftment being given in Obedience, was a neceſſary Act.

In a Proceſs, L. *Caprington* againſt L. *Keir*, *July* 27. 1624. wherein the firſt Purſues the other to receive him as his Vaſſal, in Lands, the Purſuer did hold of L. *Foulſheil*'s, (who had been charged to enter to the Superiority according to Act 147 *Par.* 1374) who again held the ſame of L. *Keir*, the Proceſs being ſuſtained (as is in the Notes on § 26 *b. t.*) The Lords found, that *Keir* ought not to receive

*Capering-*

Precept conſigned by the Superior, will be ordained to be given up to the Vaſſal, only the Lords *reſerve* to the Superior, his Right and Action againſt the Vaſſal, for his ſaid Duties and Caſualities.

*Caprington*, until the whole retour'd Duties owing through the Non-entry of *Foulſheils* the immediate Vaſſal were paid; and for liquidating thereof, the Lords aſſign'd a Term without further Dyets. And *Dury* Obſerves, this Deciſion was followed *July* 16. 1628. In a Caſe between the Earl of *Wigton* and the Lord *Teſter*.

§ 23. But it is to be remembred, where the Superior is willing to enter his Vaſſal, there is no neceſſity to the Vaſſal to Retour himſelf to the Lands, but the Superior may infeft him in the Lands as Heir to his Father by *a Precept of Clare conſtant, &c.* And Seaſin taken upon this Precept, gives the Vaſſal as good Right to the Lands, as if he had been retoured.

To know what *Craig* ſays, to very good purpoſe, of theſe Precepts. See his Book ii. D. 7. § 23. in the Beginning. *P.* 183.

§ 24. But there is difference between a Seaſin upon a Precept of *Clare conſtat*, and a Seaſin upon a *Retour*, That the Seaſin upon a Retour, verifies him to be Heir to his Predeceſſor *& active & paſſive*, but

the Seaſin upon the *Clare conſtat* only, *paſſive & non active*, except againſt the Superior *contra quem valet utroque modo*, and

For a Clear Idea of the Nature of a Precept of *Clare conſtat*, Read and conſider the Stile of it in latine, to be found in *Dallas's* Stile Book, *P.* 819. and in an Engliſh Stile Book, in 8*vo*. *P.* 146. and 149.

*Craig* in his Book ii. D. 7. § 23. *P.* 183. making a Compariſon between *a Precept on a ſpecial Retour*, and a *Precept of Clare Conſtat*; ſays, That Seaſin on this laſt, is not of ſo much ſtrength and effecacy, as is the other; For, albeit a Precept of *Clare Conſtat*, be valid againſt the Superior who gives it; Yet nevertheleſs, it is not a ſufficient Title, in a Reſciſſory Action, as a Reduction, or Improbation, *&c.* Yea, it is not good, to ſue for Mails and Duties, when the Tenants plead, that they are doubly diſtreſſed; in which Caſe, a Seaſin on this kind of Precept, is not ſufficient to exclude a Precept grounded on a Service, and Retour, unleſs the uſer of that kind of Seaſin, produce a Seaſin to his Anceſtor, proceeding on a Service, or has been in immemorial Poſſeſſion, without Interruption. But on the Main, the Lords of Seſſion, have by their Interlocutories declared, That in Queſtions of Heritage, ſuch Seaſins would ſcarce ſuffice, *&c.*

Tho' Heirs, by their Right of Blood, may warn Tenants to remove, and when ſerved Heir, and duly Infeft (tho' it be after the warning, or after the Term at which the Tenants were to remove) may inſiſt in their Proceſs of removing. But it is not ſo, if the Heir come to be *ex-poſt*-infeft, by Vertue of a Precept of *Clare conſtat* becauſe, that Precept would never make the Purſuer Heir to his Anceſtor, or prove him to be ſuch *Active*: Albeit, it was enough, to prove againſt him *Paſſive*; for albeit, the Seaſin by Vertue of the Precept of *Clare conſtat*, be enough to Maintain the Perſon infeft, in Poſſeſſion of the Lands, or give Action againſt any, who had Right flowing from that Author, Yet ſuch Saſines, will not furniſh Actions

for

and alſo is valid *quoad*, the real Right of the Lands, as fully, as upon a Retour.

for any other Thing, they might ſeek *Active*, as Heirs thereby to their Predeceſſors; whereas, if this Seaſin had proceeded on a Retour; albeit, the Seaſin thereon, were after the Term of the Warning, yet the ſame will be drawn back, and the Lords will thereupon ſuſtain Proceſs of removing. See in *Dury*, *Elphingſton* againſt *Guthrie* *January* 20. 1625. *P.* 257. Moreover, Precepts of *Clare conſtat* are *excepted from the Act* 35. *Par.* 1693, which ordains *Precepts of Seaſin granted, or to be granted, to continue in Force, and to be ſufficient Warrant for taking Inſeſtment, in Favour of the Party to whom they are given, their Heirs and Succeſſors, either by a general Service, or by Diſpoſition, or by Adjudication, as well after, as before, the Death of the Granter, or of the Party, to whom they are granted, or both.*

§ 25. And farther, it is to be adverted, That the Superior, by ſuffering his Vaſſal to enter by the Sheriff, tynes nothing but a *Seaſin Ox*, for notwithſtanding thereof, he remains Superior as before.

The immediate and recuſant Superior, gets Payment of all the Duties and Caſualities of Superiority, incumbent on the Feu Lands. As may be gathered from a Deciſion noted by *Dury*, *Stark* againſt L. of *Airth*, *December* 18. 1630. *P.* 549. *The King*, ſays he, *will inſeſt the Vaſſal, in Place of the immediate Superior, diſobeying*, quo caſu, *the Feu Duties, and other Caſualities, will not the leſs appertain to the immediate Superior of the Vaſſal, and not to the King.* This is alſo more fully cleared, by a Deciſ. *March* 24. 1633. in a Caſe, *Hay* againſt *L. Auchnames* *Dury*, *P.* 633.

§ 26.

§ 26. It is to be conſidered, That the Form of Precept againſt the Superior, for infefting his Vaſſal, is only in this Caſe, where the Superior is infeft in his Superiority, but where he is not infeft, but only apparent Heir to the *Superiority*: In this Caſe, the Vaſſal craves no Precept upon this Retour, becauſe it would be unprofitable to him, to be infeft by one who is not infeft himſelf; But follows the Order preſcribed by Act of Parliament, of King *James* the III, *Anent charging the Superiors apparent Heir, to enter to the Superiority, within forty Days if he be in the Country, and upon ſixty, if he be forth thereof, after which Charges, the Day being expired*, the Vaſſal raiſes Summons before the Lords, againſt him, upon 21 Days warn-

*Dury* Obſerves a Caſe in *July* 27. 1624. *P.* 142. which may Illuſtrate this § L. *Caprington* Purſues the L. of *Keir* to receive him, as Heir retour'd to his Father, Vaſſal in ſome Lands holden of the L. of *Foulſhiels*, who again held them of the L. of *Keir*, and *Foulſheils* being charged to enter to the Superiority, within 40 Days, conform to the Act 57. *Par.* 1474. with Certification, *&c.* Therefore he Purſues *Keir* (Superior to *Foulſheils*) to enter him. This Purſuit was ſuſtained; albeit, it was alledged for *Keir*, That *Caprington* could be in no better Caſe than *Foulſheils* would have been; who, if he had been deſiring to be received as Vaſſal, and Heir to his Predeceſſor, by the Defender he could not do the ſame, by this ſummar Purſuit, but

warning, and alſo againſt his own Superior's Superior, to hear and ſee his own Superior decerned, to tyne his Superiority dur-

 ing

but ought to have his Recourſe, to ſeek Precepts out o the Chancellary to that Effect, conform to the Order in ſuch Caſes; and ſo *Caprington* ought to do the like. Which Alledgance was repelled, and this Order ſuſtained. Likeas the Lords declared, they would ſuſtain the ſame, when the like Queſtion occurred.

There is another remarkeable Caſe obſerved by *Dury*, *Stark* againſt L. *Airth December* 18. 1630. The State whereof is this, The Laird of *Airth* being obliged to infeft *Stark*, in certain Kirk lands, which he, (L. *Airth*) held of *Monkland*, *Stark*, for not Performance, Denunces him, about this Time, *Monkland* had reſigned the Superiority in the King's Hands, wherefore *Stark* raiſes Proceſs againſt the Director of the Chancellary, and L. *Airth* concluding, that he ought to have Precepts forth of the Chancellary for infefting him, to be holden of the King, which the Lords ſuſtained. See the Deciſion, in which there are other Things worth noticing.

But it may happen, That the Perſon who wants to be infeſt, hath become Superior. As *Dury* Obſerves, fell out, Telling, in *P.* 719, That upon *July* 21. 1634. A Suplication was given to the Lords, Repreſenting, That the Suplicant was prebendary of A. Of which Prebendary, the Lands of B. (whereof he was Heritor) were holden; ſo, That he could not grant a Precept by himſelf, to himſelf, to take Seaſin in theſe Lands, therefore craved a Warrant to the Director of the Chancellary, to give out Precepts, and Charges to the Sheriff of the Shire, to give him Seaſin of theſe Lands. This Suplication was granted: For it was conſidered by the Lords, That no Perſon could have prejudice thereby, and that it was alſo needleſly craved by the Supplicant; for he being Heritor of that Land, which held of a Prebendar of a Kirk Benefice, *viz.* The Priory of *Creil*, and he being alſo Prebendar himſelf druing his

ing his Life-time, and the mediate Superior to be decerned to enter and receive him his

his Lifetime, of that Prebendry, whereby he became for his Lifetime Superior to himself of these Lands, he might, as Prebendary, infeft himself as Heritor, by his Precept direct, as Prebendar, for he had two Relations: And this was of Old done by the Earl of *Bothwell*, who being Prior of *Coldingham*, and Heritor of Lands holden of the said Priory, directed Precepts as Prior, to infeft himself as Heritor: And the same was found Lawful, and sustained; but says *Dury*, I like the Form desired by this Suplication rather, whereby there was no Confusion, as in Properties and Superiorites, where the Superiorities are also Heritable, *quo casu*, the Property accressing to any who is Heritable Superior: There is no necessity of a new Seasin, seeing the Seasin of the Superiority will carry with it the Property, where there is no other Proprietor: But it is not so in these Benefices conferred upon Persons temporaly provided for there Lifetime, where there Provisions may give them Right, to the Fruits of all belonging to their Benefices, during their Lifetime; but will give them no longer Right to any Lands, or other Things holding of that Benefice, without a new Right lawfully acquired and established in their Person.

My Lord *Stairs* Observes, the like Case fell out *Nov.* 26. 1668. *P.* 567. Vol. 1. of his Decisions. And it was thus, The Daughters and Heirs of Mr. *James Mortoun*, presented to the Lords a Suplication; setting forth, That their Father was infeft in an Annualrent out of the Lands of B. That they upon a Decreet for Payment, had apprised the Property, in which they were infeft, holding of the King, and that in the Decreet of apprising, there was a Reservation of the Infeftment of Annualrent, with a Protestation, that the apprising was to be without prejudice thereto; and they further represented, That they were desirous to be infeft in the Annualrent: But being Superiors thereof, by their Infeftment in the Property, they conceived it was improper for them to infeft themselves

his Vaſſal, upon the which Summons, the Superior is decerned to tine his Superiority



ſelves, and therefore prayed the Lords to grant Warrant for Precepts forth of the Chancellary, &c. The Lords conſidering the Caſe, argued whether it were more ſecure and legal, That they ſhould be inſeft by the King, or if they, as being inſeft in the Property, ſhould grant Precepts for inſefting themſelves in the Annualrent, or whether their Inſeſtment in the Superiority, would conſolidate the Annualrent without Inſeftment, the difficulty, on the King's Part, was, That he inſefts none but thoſe who hold of himſelf, or upon Diſobedience of an immediate Superior, *ſupplendo vices.* But to this it was anſwered, That the King may ſupply the Place of the immediate Superior, either when he will not, or cannot inſeft his Vaſſal, which laſt was the Caſe of the Petitioners, and both being extraordinary Remedies, the Lords may give the Warrant craved, as they have granted it in former Caſes, the deſficulty as to inſefting themſelves, was, That the Right of Property, *& jus nobilius*, did extinguiſh the Right of Annualrent, yet in Caſe the Right of Property ſhould happen to be reduced, they behoved to recur to the Annualrent, wherethrough there was not an abſolute Extinction, but in *tali caſu*, which moved them to reſerve the Annualrent, at the Time of their Appriſing. The difficulty as to the third Way was, that if their Superiority ſhould be reduced, they would be without Inſeſtment at all. After full Deliberation, The Lords found, the Supplicants might inſeft themſelves by their own Precept, or, as was deſired, might get Precepts, from the King *periculo petentium*, or might make uſe of both together.

*Dirleton* in his Doubts, Tit. *Conſolidation*, moves a Queſtion thus, One has got an Aſſignation to a Compriſing of Lands holding of himſelf, whither *eo ipſo*, will the Property conſolidate with the Superiority? He gives his Opinion for the affirmative, but thinks it fit, that the Superior ſhould, before a Nottary and Witneſſes, declare his Intention to

(and *de facto* tynes it) during his Lifetime, and the whole Casualities thereof.

have the Property Consolidated with the Superiority, and thinks an Instrument taken upon this Declaration, should be equivalent, as if the Compriser had been infeft, and had resign'd *ad remanentiam*, and that it should be registred. To all which, Sir *James Steuart* in his Observation upon this Question seems to agree. For other Cases of this kind, read the said whole Title of Consolidation. I have been more full in the Notes on this Matter, because the Subject is curious and singular, and that it has not been touched by our Lawiers who have written Doctrinally of the Law.

For clearing the latter part of this § 26. concerning the Casualities, a recusant Superior loses (which wants to be made Compatible with what is said by the Author in § 25. and in the Decision noted thereon.) See the Notes on § 32.

§ 27. But it is to be remembered, That if the mediate Superior be not infeft, the Vassal will be compelled to take out his Decreet of Tinsel of Superiority, and thereafter, to raise the like Charges against the mediate Superior, to enter to his Superiority, with Certification *ut supra, & sic deinceps*, against all other Superiors interjected, while he come to the King, and then the Summons concludes against the Director

The Lords of Session in their Decisions, shew great Inclination to shorten the ancient tedious Form set forth in this

Director, to give forth Precepts for Seaſin, to the Vaſſal, in the Lands.

this §. See *Stark* againſt L. *Aith December* 18. 1630. and the Caſes cited there.

§ 28. *Item*, If the Superior hold the Lands Ward, and be Minor, and unentered, he may be charged by his Vaſſal to Enter to his Superiority within forty Days, and Summoned to that Effect: But the Lords will not Decern him to tyne his Superiority *durante Warda*, and only Declares the Diligence done by the Vaſſal, to be as effectual to him as if he were ſeaſed, both for ſloping the Non-entries of the Lands, if any be, in reſpect of the Superior, and alſo in reſpect of the Vaſſal, *quoad effecta proprietatis* againſt his Tenants, or others having Intereſt.

§ 29. *Item*, It is much queſtioned, in the Caſe where the Superior is decerned to loſe his Superiority, whether he tynes it, during his own Lifetime, or his Vaſſal's Lifetime; or both, which has great and probable Reaſons on all ſides: for if the Superior, who was decerned to tine his Superiority, Deceaſe, and he who ſucceeds to him, Enter to the Superiority:

It would ſeem reaſonable, That the Vaſſal, ſhould become Vaſſal to him who is entered, and not Remain Vaſſal to the mediate Superior, whereof this may be a great Argument, that the mediate Superior receiving the Benefit which is due to him by the Law, by Entry of his own Vaſſal, (whereby he will fall all the Caſualities of the Superiority, which will juſtly appertain to him, as the Eſcheat of Liferent, *&c.*) That therefore he ſhould not alſo retain the Caſualities, which may Vaik to him, as Superior to his Vaſſals Vaſſal.

§ 30. On the other Part it is urged, That the Sub-vaſſal being entered by the mediate Superior, and become once his Vaſſal, cannot ceaſe to be his Vaſſal, without his own Conſent, ſeeing he has this Benefit, *vel jus quæſitum quod non poteſtei invito auferri*, viz. That he holds either immediately of the King, or if of ano ther Superior, by which he has fewer Superiors interjected betwixt him and the King. *2do.* The ub-vaſſal is not put *in tuto*, for it may be, the Superior who Enters, may ſhortly thereafter die *eo vivente*, and that the next Superior, ſhall ly out of the Superiority; in which Caſe, he ſhall ly under the Danger of Non-

entry.

entry, for Fault of a Superior, and not get a Superior, untill he uſe the former Order. 3*tio* The mediate Superior may be prejudg'd becauſe, albeit he gets a Vaſſal by his Entry, yet, he gets only the Vaſſal of a Superiority, and not of a Property, ſo that if the Sub-vaſſal ſhould be Year and Day at the Horn, either before, or after the Entry of the immediate Superior, the Life-rent of the Sub-vaſſal, ſhould pertain to the immediate Superior, who is newly entered; and not pertain to the mediate Superior, *quod eſt abſurdum ex lege.*

§ 31. *Item*, It is thought, That the Superiority moſt be loſt, during the Lifetimes of both *conjunctly*. That is to ſay, of the Superior and the Vaſſal, otherwiſe, if the Vaſſal died, the immediate Superior, who has loſt his Superiority, being living, the Heir of the Vaſſal ſhould not have a Superior to enter by, but ſhould be forced to Charge his immediate Superior to Enter him, with Certification, he ſhould loſe his Superiority, *quod abſurdum*, becauſe he has loſt it already.

§ 32. But in this, there would be a greater Queſtion, if the immediate Superior



It appears, That this Book has been Written before the Year 1634. Becauſe the Lords, in that Year, made an Act

ior did Enter, and obtain himſelf infeſt, before the Vaſſal's Deceaſe; but all thir Queſtons I leave to be diſputed, becauſe they are not decided.

Act of *Sederunt*, explaning the Act 57. *Par.* vii. *James* iii. A. D. 1474. Which is an Anſwer to the Author's Queſtions, for if this Treatiſe had been compoſed after that Act, our Author would have been more poſitive in the Matter of the above § §; now by that Act of *Sederunt. It is ordained, That the Superior ſhall tine his Superiority for his own Lifetime, & not for his Vaſſal's Lifetime; and the Lords declare this to be the meaning of the Act of Parliament*: But before this Act, the Lords had *decided*, That Infeftments by the immediate Superior, upon Refuſal and Diſobedience, &c. did only exclude the immediate Superior from the Caſuality of Non entry: But *declared*, That he ſtill had Right to all other Caſualities, as Ward, Liferent Eſcheat, Recognition, &c. *Hay*, contra L. *Auchnames March* 24. 1632.

§ 33. *Item*, To this Queſtion, this Conſideration may be added, That if the Vaſſal were to ſell the Lands, whether the Confirmation of the mediate Superior, ſhould be aſufficient Right to the Acquirer or not, and the Reaſon of this Queſtion, is Becauſe a great Part of the Rights of Lands, depends upon the Confirmation of the Right Superior,

The immediate Superior being duly infeft, and having rendered himſelf capable to receive a Vaſſal, it is moſt conſequential to the Doctrine delivered above, That he can receive Reignations, grant Charters, and take Payment of the Compoſition-money, for this Priveledge and Caſuality

Superior, and for clearing thereof, the particulars following are to be adverted to: For,

is not forfaulted. Now the Inſeftments to be given to a Purchaſſer, are either Publick or Private, which are treated of in the next Title.

# TITLE V.

## *Of publick and baſe Inſeftments.*

§ 1. LAnds may be ſold to be holden either of the Anallier, or of the Superior; the

When in ancient Times, Lands were ſold and conveyed from one to another, there was written a Contract of Alienation, ſigned by both Parties, wherein the Anallier, on his Part, obliged himſelf to grant to the Purchaſer, two diſtinct Charters, each containing a ſeveral Holding, the one called a *Charter de me*, the other was named a *Charter a me*; the firſt did bear, That the Lands ſold, were to be *holden de me*, *i. e.* of the Diſponer, for paying a Sum or Piece of Money, or the like, in Name of Feu-duty, or Blench-duty; and in this Charter, there was a Precept of Seaſin accordingly, whereby the Purchaſer, when inſeft, became Vaſſal to the Anallier: This makes a new Feu, which was not formerly called a Sub-feudation, and the Perſon who gets it, is named *Valvaſſor*, or *Sub-vaſſal*, we, in our Law-language, term it a baſe Inſeftment, from the French Word *Bas*, *i. e. below*, *inferior*, &c. becauſe it is under another, and the Lands have two Superiors, the immediate, *i. e.* the Diſponer, and another mediate, who is

the

the firſt is called a baſe Infeftment, and the other is called a publick Infeftment, *in*

the Seller's Superior. The other Holding is, *a me, de Superiore meo*, from the Diſponer, *i. e.* not of the Diſponer, but to be holden of his Superior; and albeit, on this *Precept a me*, Seaſin may be given, and an Inſtrument extended; yet that does not eſtabliſh any Right in the Lands, becauſe, in all Feus, there muſt be a Superior and a Vaſſal; and in this Caſe there is neither of the two, for the Granter of the Precept has referred the Purchaſer, to his (the ancient) Superior, who has not ſignified any Intention to receive the Buyer to be his Vaſſal, neither can he be ſummarly, by a preſent Charge, compelled thereto; wherefore, our Author calls the Seaſin ſo taken, an Infeftment *in inchoatione, ſed non in perfectione*, it may alſo be termed *in fieri, ſed non in facto, in deſtinatione & intentione, ſed non in actu & executione*, but when the Precept, with the Inſtrument of Seaſin following on it, is ratified and confirmed by the Superior, the Infeftment is conſummated, and becomes publick, having the ſame Force as an Infeftment upon Reſignation, in the Hands of the Superior, as is declared in § 13. *h. t.* with ſome Exceptions ſet forth in the Notes on that §, both theſe Sorts of *Infeftments, i. e.* as well that on a *Precept a me*, as the other upon a *Charter of Reſignation*, are called *Publick*; becauſe, in ancient Times, Superiors, who were Men of large Fortunes, had a formal well conſtituted Court, conſiſting of a Baillie, a Clerk, and of great many Suitors, called in our old Law, *Sectatores curiæ*, choſen from among the *Pares curiæ, i. e.* the Vaſſals; now theſe Suitors were tyed to conſtant Attendance on the Court, where they ſerved as an Inqueſt, which muſt be ſummoned; and albeit this Court ſat either weekly, or *pro re nata*; yet there were three Head-courts yearly, to which all the Vaſſals of the Barony were bound to give Suit and Preſence, and this Attendance is a Part of the *Redendo* expreſſed in the Charter, which mentions the ſeveral Times of the ſitting of the Court. Now, anciently no new Vaſſal, neither Heir, nor ſingular Succeſ-

for

*in inchoatione ſed non in perfectione*, until it be confirmed.

ſor was received, till he was brought into the Court, where the Vaſſal produced either the Superior's *Confirmation* of the *Infeftment a me*, or his own Charter of Reſignation, containing a Precept directed to his Baillie, and demanded Seaſin, &c. but before Infeftment was given, the new Vaſſal took the uſual *Oath of Fealty* to his Superior, and got his Name put into the Roll of Court, after which he was ſeaſed in the Lands: Now, all this being done and tranſacted publickly, in this open and notorious Manner, in the Face of the Court, gave to the Infeftment, the Epithete of *Publick*. Again, a baſe Infeftment is alſo called *Private*, becauſe it is given in a Corner, and privately, by a new Superior of Lands, which were not in a ſubaltern Feu before; and the Law favours not ſuch private Conveyances, becauſe of their being clandeſtine in their Form, ſavour of fraudulent and colluſive Tranſactions, which cannot bide the Light. See the Notes on § 2. *h. t.* This was the Way our Judges and Lawyers thought of old, which had its own Weight; but now, when all Infeftments whatever, are void, unleſs they be duly recorded in a publick national Regiſter appointed for them, there ſeems to be now no Ground for this Diſtinction, with Reſpect to the Efficacy and Force in theſe ſeveral Infeftments; and albeit, ever ſince the Regiſters were, in the Year 1617. eſtabliſhed in a Manner more effectual and ſolemn, than by any other Method before; yet nevertheleſs, a Difference in Point of Preference, between theſe Infeftments obtained, till the Parliament, by Act 13. Parl. 1693. declared, *That all real Rights whereon Seaſin is to be taken, ſhall be preferrable, according to the Date of the Regiſtration of the Inſtrument of Seaſin, without Reſpect to the Diſtinction between baſe and publick Infeftments, or being cled or not cled with Poſſeſſion.*

§ 2. A baſe Infeftment holden of the Diſponer, being cloathed with Poſſeſſion, is

is a perfect Inſeftment, *in ſuo Genere*, but is not ſo perfect and publick as the other to be holden of the Superior.

See *M^cKen. Inſtit. B.* ii. *T.* 7. § 5, 6 *&c.* with the Notes, where you'll find a Definition of Poſſeſſion, with the Diviſion thereof, into natural and civil, and the ſeveral Kinds of this laſt.

To free a baſe Inſeftment from the Imputation of candeſtine, colluſive or fraudulent, the ancient Law required a Poſſeſſion of the Lands by a Purchaſer himſelf, or by others in his Name, which rendered the Right, in ſome Meaſure, known; becauſe the Neighbours are ſuppoſed, not to be ignorant of the Condition and State of the Tenants, and Lands lying nigh to them, and when they change Maſters.

Now, albeit our ancient Cuſtom required Poſſeſſion to compleat a baſe Inſeftment; yet, without Poſſeſſion, it has been ſuſtained to exclude the Terce of the Granter's Relict, in the Caſe of *Bell* againſt *Rutherfoord*, *January* 27. 1669.

§ 3. A baſe Inſeftment is ever preferred to an Inſeftment to be holden of the Superior, if it be not confirmed by the Superior, becauſe this laſt is not an Inſeftment, till it be confirmed; and it is ſo null of the Law, that the Nullity thereof is ever received by Way of Exception, if the Titlo or

An Inſeftment *a me* not confirmed, is not null *ad omnem Effectum*; for, by it the Receiver *inducitur in Poſſeſſionem*, and may not only continue to poſſeſs without the Superior's Conſent, but alſo may, by Virtue of his ſaid Inſeftment, purſue the Tenants for paying their Rents. In the Caſe of *Campbel* againſt Lady *Kilchattan*, *January* 15. 1663. obſerved by *Gilmuir*, it is called a baſe Inſeftment, and being grant-

or Infeftment alledged to be null, bears to be holden of the Superior.

granted to a Wife, was found ſufficient againſt a ſingular Succeſſor.

§ 4. *Item*, Albeit it be confirmed by the Superior; yet the baſe Infeftment, which is cloathed with Poſſeſſion, is preferred thereto, and the publick Infeftment confirmed as ſaid is, will only carry the Receiver to the Superiory of that baſe Infeftment, but the Property will pertain to the Poſſeſſor, by Virtue of the baſe Infeftment.

§ 5. This is true, not only where the baſe Infeftment is prior to the publick, but alſo where it is poſterior to the Charter given to be holden of the Superior; but before the

When, to the perfecting of a Right, ſeveral different Acts muſt be done at Times dividuous, the Deed of Right is not perfected till the laſt Act, which coaleſces and brings all the Preceedings to be, as it were one, and conſummates the whole, thus; for Example, in the Conveyance of Lands, there was, in old Times, a mutual Agreement between the Seller and the Buyer, the firſt bound to give two Charters of the Lands ſold, *one* for a *Holding a me*, with a Precept of Seaſin conform, the *other Charter* was for a *Holding de me*, with a Precept accordingly; this Contract of Sale was in a Paper *per ſe*, ſigned by both Parties, and delivered. In Implement of the Obligation by the Anallier, two Charters were extended in common Form, ſigned by him, and

the Confirmation thereof, *quia tunc medium impedimentum interveniens* of the baſe Infeftment cloathed with Poſſeſſion, before

delivered to the Purchaſer; and this was the ſecond Step. *3dly*. The Buyer took Seaſin, either by the Precept *de me*, or by that *a me*, or by both; but ſtill the real Right of the Lands was imperfect. Wherefore, *4thly*, The Haver of the Seaſins, to conſummate his Infeftment, cauſed record theſe Inſtruments, either in the general or particular Regiſter for Seaſins which were marked and redelivered. Yet ſtill there's another Step to be made, *viz*. *5thly*. The Purſuer either proſecutes and obtains Poſſeſſion, natural or civil, or both, which brings his Infeftment *de me* to its outmoſt Perfection; or, he applies and gets from the Superior, a Confirmation of his Charter *de me*, and Inſtrument thereupon; till which was obtained, this Brench of the Right was incompleat. Now, if it ſhould fall out, That the Proprietary of the Lands had given to another, ſuch like Obligement to infeft; and, that he the Purchaſer, was, through all the Steps above ſet down, paſſing to perfect his Right; and if thereafter a Competition did ariſe between the two, the Rule of Deciſion is, *Prior tempore, potior jure*; Now, this Priority of Time is not noticed, in any of all the four foregoing Advances, ſo much as it is in the fifth and laſt, which crowns the whole Progreſs; ſo that if one of theſe Rights were firſt in Date, either of Obligation, or of Charter, or of Seaſin, or of Regiſtration of the Inſtrument; yet if the other Right were laſt in all theſe Stepts, and did, before that firſt in Date, *&c.* attain to Poſſeſſion, or procured the Superior's Confirmation, it would be preferred; becauſe the Priority in Time, on which the Potiority of Right is founded, is computed from the Date of the final and perfecting Act. This is an infallible Rule for judging the Preference of Rights, which require two or moe Gradations towards making them compleat, as in Aſſignation of Rights, of Reverſion, of Bonds, Rents of Lands, *&c.* which muſt be intimated, and an Inſtrument extended thereupon: So in

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before the Confirmation, hinders the Confirmation to be drawn back to the Date of the Charter confirmed.

a Competition between two Aſſignations, the firſt Intimation ( tho' the Aſſignation intimated, be laſt in Date ) operates a Preference to another ſuchlike Right ( tho' prior in Date, yet was ) intimated after the other.

§ 6. *Item*, A baſe Infeftment, whether anterior or poſterior to the publick, if it be not cloathed with Poſſeſſion; but that the publick be confirmed, before that they apprehend Poſſeſſion, will ever be poſtponed to the publick, and the publick preferred thereto: But this tholls an Exception of baſe Infeftments granted by Husbands to their Wives, depending on Contracts of Marriage; which, in Favour of the Married, are compted both publick and cloathed with Poſſeſſion, in Reſpect it is eſteemed, That the Husband bruiked the Property by his Wife's Right, and that his Poſſeſſion is counted her Poſſeſſion: But if the Infeftment granted to the Wife, was granted *ſtante matrimonio*, and baſe, and that by and attour the Lands to which ſhe was provided by Contract of Marriage: In that Caſe her baſe Infeftment has no Priviledge, before a publick, except it be cleared, That there

there was no Contract of Marriage at all, or that ſhe had quit the Lands to which ſhe was provided by Contract of Marriage, and gotten the other for the ſame: In which Caſes, ſhe will bruik her Lands, with the like Priviledge, as if the ſame had depended upon the Contract of Marriage; for, where there is no Contract of Marriage betwixt the Parties, it is thought juſt and reaſonable, that the Husband may give a conjunct

A Jointure to a Wife, conſtituted by an ante-nuptial Contract, however great it be, is irrevockable by the Husband, and quarrellable by none other than anterior Creditors, who muſt qualify a *Leſion*. As alſo, a Jointure conſtitute by a poſt-nuptial Contract, if the Wife had no former Settlement made to her, is not revockable by the Husband, unleſs it be exorbitant, which is to be judged by the Lords of Seſſion. But an additional Jointure, conſtitute without any previous Cauſe or Motive, ariſing from the Wife, is, at all Times, revockable by the Husband, and is effectual only in the Caſe, he continue to the laſt Moment of his Life, in the ſame good Will to his Spouſe, and that no Creditor, whether anterior or poſterior, is thereby hurt.

A baſe Infeftment, whether in Favour of Wife, Child or Stranger, can never be denominated publick; for theſe two, *Baſe* and *Publick*, are oppoſite, the one to the other. See *Nisbet*'s Doubts, and *Steuart*'s Anſwer, *Tit. Publick Infeftment.*

Yea, a baſe Infeftment, confirmed by the Superior, can never be called publick. See *Dury*, L. *Clackmannan* againſt *Brown*, *November* 17. 1627. *P.* 214. and *Penuit*, *January* 1628. *P.* 335. Nevertheleſs, as our Author, ſo other Law-writers, uſe the Word *Publick*, when they ſpeak of baſe Infeft-

conjunct Fie, *ſtante Matrimonio*, provided it be effeirand to his Eſtate, and on noways exorbitant.

Infeftments cloathed with Poſſeſſion, which is an improper Term; but then it has no other Meaning, than this, That it is not a ſecret Deed, but made publickly known.

§ 7. *Item*, A baſe Infeftment apprehending Poſſeſſion, *per conſtitutum*, that is to ſay, where the Lands are ſet back to the Diſponer, for Payment of a Duty, which Duty is paid to the Receiver of the baſe Infeftment, the ſaid baſe Infeftment is counted cloathed with Poſſeſſion, *per hanc poſſeſſionem civilem*, ſicklike as if he were naturally in Poſſeſſion.

*Per conſtitutum.*] See *M'Ken. Inſtit. B.* ii. *Tit.* 7. § 12. where there is an Exemplification, in the Caſe of a Wadſet, and Back-tack by the Wadſetter to the Reverſer.

§ 8. *Item*, The like is, where the Haver of a baſe Infeftment bruiks it *per uſufructuarium*, whoſe Liferent is given or reſerved in the baſe Infeftment.

§ 9. But in thir two laſt Caſes, the baſe Infeftment is only preferred to the publick, where the Queſtion is, *Inter extraneos, ſed ubi eſt inter ſuos*, viz. *liberos ex una, et extraneos ex altra.* The Stran-

gers with the publick Infeftment, are ever preferred to the baſe granted by a Father to his Children, either *per conſtitutum*, or *per Reſervationem uſus-fructus.*

See *M'Ken. Inſtit. B.* ii. *T.* 7. § 11. It may be thought, That the Matter in the above and following §§ will be decided and determined by Act 13. Parl. 1693. which has been in Force theſe 33 Years paſt; wherefore it may ſeem unneceſſary to ſet down Caſes about the Validity of baſe Infeftment, when one curious may ſatisfy himſelf by conſulting the Deciſions. A Parent is not hindered to make a Settlement, and to grant Proviſions to his younger Children, in a fair Way, provided he prejudge not his Creditors.

§ 10. *Item*, Infeftments of Annualrent given baſe, are counted cloathed with Poſſeſſion, if, after the Date of the baſe Infeftment, the Giver thereof make Payment of the Annualrent, for a Term or moe; albeit this Payment being made by the Debitor, who is obliged hereto by his Bond, may

This is one of the many Sorts of civil Poſſeſſion introduced by Law: But even this Way there was an Hazard and Difficulty, in that the Debitor was Keeper of the Diſcharge of Annualrent, the neceſſary Document of Poſſeſſion, which being denied, the Annualrenter was in Danger, for Poſſeſſion being *facti*, behoved to be relevantly proven; and in a Competition of many Creditors, upon an inſufficient Eſtate, the Oath of the common Debitor who paid the Annualrent, would not be admitted for a Proof, which only could be made by the true Diſcharge in Writing, given at the Time of Payment: As a Safe-guard againſt this Inconveniency, the Law and Cuſtom preſcribed, That the Debitor ſhould grant

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may as well be referred to the Bond, as to the Infeftment, and that the Creditor received no natural nor real Poſſeſſion, by uplifting of the Annualrent forth of Lands, or from the Tenants, Occupiers thereof.

to the Creditor, a private Writing, called an *Antapotha*, in which he confeſſeth and declares, That he had made Payment of the Annualrent, with which his Land ſtood burdened, and had accordingly got from the Creditor, a Diſcharge one or moe, and this ſigned before famous Witneſſes, proved Poſſeſſion of the Annualrent, which was needful to perfect the baſe Infeftment: And tho' now it be not thereto needed, yet an *Antapotha* is uſeful for proving Interruption of Preſcription of a Debt, Bond, or Infeftment of Annualrent, &c. But to anſwer all theſe Ends, the Diſcharge might be regiſtred.

§ 11. *Item*, It is thought, That an Infeftment of Warrandice, albeit baſe, in Caſe of Eviction of the principal Lands, will be preferred to a poſterior publick Infeftment, albeit the ſame did not apprehend Poſſeſſion, before the Eviction, and *fictione juris*, the Poſſeſſion of the principal Lands, is holden for Poſſeſſion of the



Before the Act in Parl. 1693. concerning baſe Infeftments, it was clearly decided for baſe Infeftments in Warrandice Lands, that Poſſeſſion of the principal Lands, is holden for Poſſeſſion of theſe given in Warrandice, *as well* when the Infeftment was taken *ſimul* with the principal Lands, and alſo when

Warrandice, but this is not *ſine Scrupulo*, and may be made diſputable.

when the baſe Infeftment in the Warrandice Lands, was *ex intervallo.* See *Brown* againſt *Scot*, *January* 9. 1666. and *Forbes* againſt *Innes*, *February* 20. 1668. and others of this Kind.

§ 12. In the Concourſe of two baſe Infeftments, the Prior is ever preferred to the Poſterior, except the ſecond be cloathed with Poſſeſſion for the Space of 8 or 10 Years: In the which Caſe, the Poſterior is preferred, *in judicio poſſeſſorio*, that is to ſay, in Removings, or double Poindings; for in this Caſe, the Exception proponed upon the baſe Infeftment, albeit poſterior, cloathed with the ſaid Number of Years Poſſeſſion, is ever found relevant, notwithſtanding of the other's Priority, except he can reply alſo upon Poſſeſſion apprehended by his prior Infeftment, either civil or natural; but *in juditio petitorio*, *viz.* in Actions of Reduction, the prior baſe Infeftment is preferred to the poſterior, without Reſpect of the Poſſeſſion.

§ 13.

*Without Reſpect of the Poſſeſſion.*] The Doctrine in this laſt Sentence, *in judicio petitorio*, &c. never obtained in our Practick. See *M'Ken.* Obſerv. on Act 105. Parl. 1540. *P.* 142.——Seven Yeats peaceable Poſſeſſion, intitles the Perſon infeft in the Property of Lands, to the Benefit of a poſſeſſory Judgment, but more of this in *Tit. x.* of this Treatiſe.

§ 13. *Item*, That which is ſpoken of publick Infeftments, to be holden of the Superior by Confirmation, is alike true in publick Infeftments of Lands or Annualrents, granted by the Superior to the Receiver, upon the Reſignation of the Anallier; for a publick Infeftment upon Reſignation, and upon Confirmation from the Superior, are alike in the Practick of *Scotland*, *et ſunt in jure noſtro pares termini*; and yet, albeit they be alike *quoad Superiorem*, yet they have ſome Imparity and Difference otherwiſe, for



With Reſpect to Comprehenſion or Extent, there's no Difference between a Confirmation and a Reſignation. See the Notes on § 1. *h. t.*——In the following Caſes, there is a Diverſity, 1. A Charter *a me* of Lands, at the Date, not erected into a Barony, proporting nevertheleſs, *That theſe Lands were to be holden in free Barony*, being confirmed by the King, and the Charter of Confirmation bearing, *To be holden in libera Baronia*, is of the like Effect, as if the Lands had been formerly erected by Charter of Reſignation, by which regularly Erections are made; but, in Reſpect the Charter deſign'd not a Place, where Infeftment might be given for the whole Lands, the Seaſin of one of the Lands was ſuſtained for no other than theſe, which were contiguous to the Place where Infeftment was taken, L. *Clackmannan* againſt *Allardice*, *November* 16. 1630. *Dury P.* 538. 2. The Force of a Charter of Confirmation runs back to the Date of the Infeftment confirmed, whereas a Charter of Reſignation is imperfect, till Seaſin be taken on it. See *Nisbet's* Queſtions, and *Steuart's* Anſwers, *Tit. de duobus inveſtitis per modum confirmationis*, &c. *P.* 171. 3. Albeit in the Caſe of Recognition, Confirmation ſecures the Infeftment confirmed;

an Infeftment upon Reſignation, comprehends *univerſitatem jurium*, and ſpecially *omnia jura reverſionum abſque ceſſione*, whereas an Infeftment confirmed does not com-

firmed; yet, if before that, near the major Part of the Lands was alienated, and the Feudal-delict was inchoated; and ſo *jus regi acquiſitum*, that baſe Infeftment will fall *in computo*, to make the Lands recognoſce; whereas, Reſignations which paſs in Courſe (and no Infeftment being taken on the Charter) are not equivalent to Confirmations, and will not ſtop Recognition; nevertheleſs, after Seaſin on the Charter of Reſignation, which imports the Superior's Conſent, no baſe Rights granted by the Vaſſal, can concur to make up a Recognition to the Prejudice of the Right of the Charter: However, Infeftment on a Charter of Reſignation, after Recognition is incurred, albeit, before it be giſted, will not ſecure it ſelf. The Reaſon of the Difference is, That Reſignations paſs in Courſe, and at paſſing, the Superior conſiders not the Caſuality of Recognition; whereas, in the Caſe of Confirmation, he behoved to have that Caſuality in View, ſeeing he confirmed a Right, which, *ab initio*, was granted without his Conſent. See the Caſe of the King's Advocate againſt the Creditors of *Cromartie*, *November* 23. 1683. and that of Sir *John Hay* of *Muirie* againſt *Powrie* and *Phinhaven*, *March* 15, and 20. 1683. both obſerved by *Falconer*. See the Index of his Deciſions. 4. The Vaſſal is not denuded, until the Infeftment upon the Charter *a me* is confirmed by the Superior, who again cannot be compelled to grant a Charter of Confirmation; whereas, after Reſignation is made and accepted, the former Vaſſal is *quod ammodo* denuded, and the Superior can be compelled to grant Charter thereupon. See *M'Ken. Inſtit. B.* ii. *Tit.* 7. § 17. 5. If the Diſponer had died before Reſignation was made, the Procuratory, in Favour of the Purchaſer, took no Effect; but, albeit after Seaſin on the *Charter a me*, the Anallier ſhould die; yet nevertheleſs, the Superior may grant a Confirmation. See in *Dury P.* 727. Lord *Johnſton* againſt

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comprehend properly *jura reverſionum*, except they be aſſigned; at leaſt, it has been often diſputed, but yet never fully found.

the Earl of *Queensberry*, *July* 17. 1634. *Dirleton's* Doubts, &c. *Tit. Confirmation and Reſignation.* However this Point of Difference is taken off by Act 35. Parl. 1693.

§ 14. *Item*, after Reſignation made by the Vaſſal, in the Superior's Hand (which commonly is done by a Procuratory, and Inſtrument of Reſignation) in Favours either of the Superior, *ad remanentiam*, or in Favours of a third Party, *in Favorem*, the Reſigner can do no Deed in Favours of any other Party, in Prejudice of the Reſignation ſo made, *ut ſupra*; and if, betwixt the Reſignation made in Favours of a third Party, and accepted by the Superior, the Reſigner ſhould give a baſe Infeftment to be holden of himſelf, in Favours of any other Party; that baſe Infeftment, albeit it ſhould apprehend Poſſeſſion, before the Superior granted the Infeftment upon the Reſignation, yet the ſame would be null, and redeemable, as granted *a non habente poteſtatem*, that is, by the Diſponer, who was denuded by Reſignation foreſaid; and yet, if the ſaid Diſponer had denuded himſelf, not by Reſignation, but by Charter to be

holden of the Superior, with Seaſin following thereupon, he might, at all Times, before the Confirmation of the ſaid Charter, have granted a baſe Infeftment, which apprehending Poſſeſſion before the Confirmation, would be preferred to the publick Infeftment, ſo paſſing by Confirmation, as ſaid is, *& ratio differentiæ eſt hæc*, becauſe in the Reſignation *intervenit actus duplex*, one of the Reſigner, another of the Superior, accepting the Reſignation; but in the other, there is only the Act of the Diſponer, but no Act of the Superior, till the Date of the Confirmation.

§ 15. And, albeit after the Reſignation actually uſed, baſe Infeftment can prejudge it; yet, if, after the Reſignation uſed and accepted, the Reſignant ſhould make a new Reſignation, in Favours of another Party, whereupon the Superior ſhould give Charter and Seaſin; this ſecond Reſignation, with Infeftment following thereupon, would be preferred to the ſaid prior Reſignation, whereupon no Infeftment followed; or, at leaſt, if any followed, it was after the Date of the Infeftment paſt upon the ſecond Reſignation, and the Reaſon of the Difference is this, That albeit *utrobique eſt duplex actus*, yet the Deed of the Superior

*eſt*

*eſt tantum actus imperfectus & inchoatus quoad eum, & quoad eſſe materiale, & quoad eſſe formale & probatorium*; for the Acceptation by the Superior, has no other Warrant, but the Aſſertion of the Nottar, who is Nottar to the Inſtrument of Reſignation, which, by the Law of the Kingdom, is not ſufficient in heritable Rights, nor will not compel the Superior, being otherways unwilling to give Infeftment conform thereto; and, albeit the Inſtrument of Reſignation were ſealed and ſubſcrived by the Superior, the Time of the making thereof (which *quoad eſſe probatorium* would be ſufficient of the Law) yet it would not be *jus reale* to the Perſon

Our Author's Opinion, *That by Reſignation in the Hands of the Superior accepted, the antient Proprietary becomes diveſted of all Rights in the Lands, &c.* Is not warranted by our Law and Practick. Sir *John Nisbet* in his Book of Doubts and Queſtions, Tit. *de Reſignationibus in Quæſt. 7ma. P.* 165. *P.* 166. moves this Queſtion, *de Reſignationibus a Domino directo acceptatis, an diveſtiant reſignantes*, and Cenſures this Miſtake of Sir *Thomas*'s, whom, in *P.* 165. he Charactariſes thus, *Hopæus etiam juris noſtri peritiſſimus ſed (ut pleriſque videbatur) nimiæ & captioſæ ſubtilitatis, atomum & punctum diſtinguere videtur, ait enim, &c.* And proceeds to Narrate his Opinion in this Point, which he refutes: But Sir *John* falls into a Miſtake of the ſame kind, by ſubtiliſing too much, when he ſays, the ſole Act of Reſignation, made by the antient Vaſſal, and accepted by the Superior, denudes the Proprietary ſo far, as he cannot make

ſon in whole Favours the Reſignation was made, but only be a Ground for a perſonal Action, to compel the Superior and his Heirs to give Infeftment conform thereto; and therefore, if a third Party ſhould either acquire the *Superiority* from the Superior, and paſs Infeftment thereupon; or, if the Superior ſhould give Infeftment of the *Property* to any other Perſon, upon the Reſignation of the Vaſſal, who thereupon ſhould take

make any effectual After-conveyance of the Lands reſigned. This is more Extenſive, than the Doctrine delivered by Sir *Thomas*, who deſtinguiſhes between Charters *a me* and *de me*, which want to be confirmed to Wards, making them compleat Rights, and actual Reſignation accepted, and Inſtruments taken thereon, which muſt be perfected by a Charter of Reſignation and Infeftment, Sir *James Steuart* in his Obſervation on this part of the Doubts and Queſtions, *P.* 262. 263. ſeems to be diſſatisfied with Sir *John*, for thus cenſuring his Kinſman; and declares, he would be of *Hope*'s Opinion: Were it not, That according to the Analogy of our Law, a baſe Infeftment cled with Poſſeſſion, ſeems to plead the Preference, notwithſtanding of a prior Reſignation made and accepted, where no Infeftment followed; for, (continues he) Seaſin being the Tradition, perfects the Tranſmiſſion, and the Poſſeſſion upon it, makes it ſufficiently Publick, *i. e. Notorious*, again, it is certain, and not doubted, that the firſt Reſignation does not diveſt the Reſigner, becauſe the real Right of the Lands ſtill Remain radically with him, untill another be legally infeft, towards which, actual Reſignation is but one of ſeveral Steps in the Progreſſion to follow, for the Reſigner is not denuded by his Superior's accepting of Reſignation, but by the Infeftment upon his Charter

take firſt Seaſin. There is no Queſtion, but the real Right either of the Superiority or Property would fully ſubſiſt, and ſtand in the Perſon of theſe who received the foreſaids Infeftments, in Manner foreſaid, and that notwithſtanding of the ſaid firſt Reſignation made by the Vaſſal, and accepted by the Superior, in Manner above-ſpecified.

Charter of Reſignation, ſo that an Infeftment on a ſecond Reſignation, being before the Seaſin on the firſt Reſignation will be preferred. See *Dirleton*'s Doubts, &c. anſwered, Tit. Confirmation, *No.* 6. *P.* 47, and 48. and Tit. *Duobus inveſtitis per modum confirmationis*, &c. *P.* 171, and 172. and the above-cited Portion of Tit. *de Reſignationibus*. See in *Dury* —— againſt —— *July* 22. 1626. *P.* 225. and *P.* 331. *M'Ken.* Inſtit. B. ii. *t.* 7. § 17. and alſo the Notes on § 1. *h. t.*

§ 16. *Memorandum*, The Superior may not be compelled, either to accept a Reſignation, or to confirm an Infeftment, but at his own Pleaſure Εἰσεκτικὸν and is commonly a Years Duty or above, to any Superior who receives a new Vaſſal, except the King, whoſe Compoſition is made by the

A Superior is not bound to receive freely and directly a new Vaſſal, *i. e.* to accept a Reſignation of the Feu by his old Vaſſal, in Favour of a Purchaſſer; but if once Reſignation be made and accepted (which is teſtified by a Nottary's Inſtrument extended on that Occaſion) the Superior is obliged to grant a Charter in common Form; yea further, if before he Subſcrive one, he Diſpone the Superi-

the Lords of Theſaury and Exchequer. The only Remedy which Buyers have, where the Superior is unwilling to receive them, is, to Compriſe the Lands from the Seller, whereupon by the Act of Parliament in *Anno*

Superiority to another who is infeft, this ſingular Succeſſor is bound (as his Author was) to grant ſuch a Charter, for both can, by courſe of Law, be compelled. This mater is fully treated by *Nisbet* in his Book of Doubts, *Tit. de reſignationibus*, to which I refer the Reader, but for his preſent Satisfaction, becauſe the Book may happen not to be at Hand, I have ſubjoined his Words, in *Quæſt.* 5*ta.* *P.* 164. ——— *Ea autem eſt cauſa dominii directi, ut quandocunque Dominium, utile, per Reſignationem, cum eo conjunctum eſt, qui eam receperit, vel ejus ſucceſſor, etiam ſingularis gravatus, ſit Reſignatorio & ejus ſucceſſoribus, Dominum utile reſtituere.*

*Si facere cunctetur vel renuat Dominus directus, in promptu remedium eſt, ut ſciz. coram ſenatu ſeu collegio judicum in cauſis civilibus ſupremo, actio ſummaria intentetur, & exhibito inſtrumento Reſignationis, & noviſſima carta, & inveſtitura auctoribus conceſſa, petatur, juxta eam, novam fieri Reſignatorio, vel ejus hæredi, ſententiæ latæ ſi Dominus directus haud pareat, ſed adeo contumax ſit, ut Rebellis, & ex-lex denuncietur, banno publico & cornu, pro tuba, inflato, ut moris eſt, quod ideo* cornuatio *apud nos dicitur, Demum juſſu & mandato Senatus, Cancelarii director, præceptum ſaſinæ diriget, pro Reſignatorio vel ejus hærede inveſtiendo, ita ut de Domino directo teneat, nec vaſſallus, jure ſuo fraudetur, nec dominus, ſuo, etiam culpa ſua decidet, Mulctandus tamen, ob pervicaciam, & rebellionem, bonis omnibus mobilibus, tam rebus quam nominibus, Regi caducis quod Eſchetam vocamus ——— Ista ſunt intelligenda de prædiis quæ de ſubditis tenentur, Rex enim & Quæſtores Regii, quique alii ejusmodi rationibus ſunt, id quod juſtum eſt haud gravate facere præſumuntur.*

*Dury* Obſerves a Deciſion *P.* 730. In the Caſe of *Hay of Crimonmogat*, who, upon a Procuratory of Reſignation in his

*Anno* 1469. by King *James* the 3*d* they compel the Superior to Enter and receive them, they paying a Years duty to the Superior, by the Modification of the Lords.

his Favours, had charged the Bailies of *Aberdeen*, to infeft him in ſome Tenements in *Aberdeen* holding Burgage: In diſcuſing a Suſpenſion of this Charge, the Lords found, That the Magiſtrates ought to infeft this Perſon upon the foreſaid Procuratory, without his paying a Years Rent of the Land, or any other Compoſition therefore, albeit other Superiors of other Lands, not Burgage, are not compelled to receive ſuch Reſignation, and to change their Vaſſals againſt their will, becauſe theſe Tenements are not holden of the Superiors, as Superiors, but in Burgage of the King; and the Magiſtrates, are but the King's Bailies; and ſo ſhould have nothing but the Services of Burgh.

Concerning Charters of Compriſing, See *Tit.* xi. of this Treatiſe.

§ 17. But albeit, the Superior cannot be compelled to receive a Buyer, yet he will be compelled to receive the Heir of his Vaſſal, for Payment of his retoured Duty.

See *Tit.* iv. *b.* § 21, 22, 26, 27, 28. with the Notes.

§ 18. The neceſſity of Confirmations to be paſt by the Superior, is double, one for Perfection of the Right, if the Infeftment be given, to be holden of the Superior, another, for eſchewing of Dangers, that may follow by Forfaulture, Recognition, &c.

*&c.* If the Infeftment be given to be holden of the Diſponer.

See *Tit.* iv. above § 3. with the Notes, and § 20. *h. t. ſ.*

§ 19. *Item*, The Confirmation of all Infeftments of Kirk-lands, is neceſſary by Act of Parliament, and the want of Confirmation of Kirk-lands, renders the Infeftment thereof null, *ipſo jure.*

The Act here referred to, is Act 88. *Parl.* 1564. See Act 7. *Par.* 1584. and Act 187. *Par.* 1593. with *M'Ken.* Obſervations on theſe three Acts.

Albeit, The original Feu of Kirk-lands be not confirmed either by Pope or King, yet it is thought, That a Confirmation by the King, of Rights granted by the Feuar, to be holden of the King, will ſupply that want. For this Confirmation, is but a Formality. *Nisbet's* Doubts reſolved. *Tit.* Confirmation, *No.* 1. *P.* 145.

There's no neceſſity to confirm Feus of Lands which hold Ward of Church-men, nor Offices by Commiſſions from Church-men, which may be granted and perfected, or tranſmitted without Seaſin, becauſe the Acts of Parliament mention only Feu Lands.

§ 20. *Item*, The Confirmation of a baſe Infeftment, ſaves from Forfaulture and Recognition, but not from Ward, except the Infeft-

See the above § 18. *h. t.* Now when Lands are ſold, they are annallied, either Irredeemably to the Purchaſſer and his Succeſſors, never to come back again to the Seller or his Heirs; or they are granted Redeemable, *i. e.* They are

Infeftment be given to be holden of the Superior.

are only given in Pledge, and for Security of a Sum of Money, upon Payment whereof, they return to the Diſponer, which we call a Wadſet and Reverſion, of which in the next Title.

# TITLE VI.

## *Of Wadſets and Reverſions.*

§ 1. WHere Lands are diſponed in Wadſet under Reverſion, either the Wadſet is to be holden of the Superior, or of the Diſponer, if to be holden of the Superior, there is neceſſity of a *Regreſs* to be

The Word *Wadſet* comes from the Dutch *Wad*, or the Engliſh Saxon Wed, in Barbarous Latine *Plegium*, i. e. *Pignus*, a Pledge, and from another Dutch Word *Zetten*, *Zett*, (whence our Word *Sett* is derived) which ſignifies to Place, appoint, and ſet apart, and ſo *Wadſet* in our Law-latine, is *Plegii datio*, in Reg. Majeſt. *L.* iii. *c.* 2. § 6. *Cum autem creditur alicui, ſolet id plerumque fieri, ſub plegii datione, quandoque ſub vadii poſitione*, and *ponere vadum*, in the ſame Book ſignifies, to Wadſet, *c.* ii. § 1. *Creditur quandoque ex mutuo, res aliqua, ſub vadii poſitione quod cum fit, quandoque res mobiles, ut catalla, ponuntur in vadium*, § 2. *Quandoque res immobiles, ut terræ & tenementa, & reditus, ſive in denariis, ſive in aliis rebus, exiſtentes.* And in the Margine, *vadium eſt pignus ſeu Hypotheca*, &c. *Skeen* in his Treatiſe, *de verb. ſignif.* Derives *Vadium*, from an old Word *Weddum*

be granted by the Superior to the Vaſſal, giver of the Wadſet, otherwiſe when he Redeems by Virtue of the Reverſion, the Superior cannot be compelled to Receive him

*Weddum* uſed in the *Briton* Laws; and he ſays, *immobile vadium*, ſignifies immoveable Goods, as Lands Wadſet, or annallied under Reverſion.

The ſame *Skeen* in his Annotations on Chap. 5. Lib. iii. *Reg. Maj.* Explains two ſorts of Wadſets, and there cites Texts of the Laws, Canon and Civil, by which intereſt or Annualrent for the Loan and Uſe of Money is allowed.

A Wadſet, is a *Pignoratitious contract* whereby a landed Man who gets from one, the Loan of Money, Diſpones, in Recompenſe and Security thereof, Lands and Tenements, and gives power to the Creditor, to uplift, and to Diſpoſe at pleaſure upon the Rents, Mails and Duties of the Lands, ſo long as the Money is not re paid, with and under this Condition, that as the Creditor, (who is now called *Wadſetter*) may require Payment of this Money, ſo the Debitor, granter of the Wadſet, (now termed *Reverſor*) may premoniſh the other to Receive, and by making Payment, may Redeem and get back the Land, which part of the Agreement, is, by the *Civilians*, called *pactum de retrovendendo*, and by us a *Reverſion*. Now, in *Scotland*, the only habile and ſure Way to eſtabliſh a Right in Lands, is by Charter and Seaſin, wherefore upon this Right, (*i. e.* Diſpoſition under Reverſion,) the Wadſetter is infeft, and by himſelf, or a Tenant, enters to the Poſſeſſion of the Lands.

*Wadſets* are devided into *proper* and *improper*, both which are defin'd by *McKen.* in his Inſtit. B. ii. t. 8. § 12. and 13. fit to be read. Now, albeit the granter of the Wadſet ſtand bound to Pay the publick Burdens, the Lords have found, *that* will not make the Wadſet improper, becauſe there are other hazards, as *War*, *Plague*, &c. mentioned in Act 62. Par. 1661. which the Wadſetter is liable to, *December* 9. 1685 *Cunningham* againſt *Dowie* obſerved by *Falconer*. Another *Characteriſtick* of a proper

*Wadſet*

him, becauſe he did not conſent to the Reverſion, but only to the Alienation, which, *quoad eum*, was ſimple and abſolute; and if the King, or any other Superior give *a*



*Wadſet*, is, that it contains no Back-tack, nor Obligement to pay Annualrent, but is a ſimple Right of Property. See in *Dury*, *P.* 526. the Caſe of *Nisbet* againſt E. of *Caſſillis*, *July* 6. 1630.

Improper Wadſets commonly contain'd a Back-tack, ſet by the Wadſetter to the Reverſer, with this Caution, that the free Tack duty muſt not exceed the legal Intereſt under a ſevere Certification ſpecified in our Statutes.

Wadſets, as well proper as improper, did contain an Obligement by the Granter, that after Redemption of the Lands, he ſhould give to the Wadſetter a Tack, for a certain Number of Years, or during Life, for Payment of a Tack-duty, which, by Act 19. Parl. 1449. muſt be for the Mail paid at the Time of the Wadſet, or near thereto, otherwiſe a Tack for Half-mail or thereby is not to be kept. And this, for many Years, was the common and ordinary Reaſon of Reduction of Wadſet-rights, concerning which ſeveral Deciſions have been pronounced.

*Reverſion.*] From the Latin *reverto*, a reverting, or returning back, *viz.* the Lands from the Wadſetter to the firſt Proprietary; and ſignifies either the Clauſe, Proviſion or Condition mentioned above, either ingroſſed in the Contract of Wadſet, or the Obligement apart, for that End, given by the Wadſetter to the Debitor. *Skein*, in his Treatiſe *de verb. ſignif.* in explaining this Word, gives the old Form and Stile of a Charter of Wadſet, (dated in *Auguſt* 1419.) in which the Clauſe of Reverſion is ingroſſed; and he ſays, in old Times, the Reverſion was inſert in the Charter, as is manifeſt by divers Charters (in the Regiſters) given by King *David* II. contain the Tenor of the Reverſion after the Clauſe *Tenen. & Haben.* &c. But now, continues he, the Charter is given by the Seller of the Lands, and the Reverſion by the Buyer there-

of,

*Letter of Regreſs*; in that Caſe, when the Order of Redemption is uſed and declared, the Uſer of the Redemption is immediately ſeaſed, upon the Sight of the Regreſs, and Supplication made to the Lords thereupon, who

of, ſeverally ſealed and ſubſcribed; and the Buyer keeps the Charter, and the Annallier keeps the Reverſion: Which Form appears to have had its Beginning in the Days of King *James* III. who, in Act 27. *Parl.* 1469. ſays, the buying and ſelling of Lands by Charter and Seaſin, and the taking again of Reverſions was a new Invention; and for Preſervation of theſe Letters of Reverſion, they are by that Act allowed to be regiſtred in the King's Regiſters, if required. *Craig*, in B. ii. of his *Feus*, *Dieg.* 6. diſcourſes learnedly and fully of Reverſions, which is proper to be read. But neither *Skein*, nor *Craig*, nor our Author, ſpeak of an Eik to a Reverſion; which is a Writing in ſome reſpect counter to the Letter of Reverſion granted by the Wadſetter to the Diſponer; whereas an Eik is given by the Debitor or Reverſer to the Wadſetter, in which he, *i. e.* the Proprietary of the Lands given in Wadſet, acknowledges the Receipt of Money, more than was lent at firſt, as ſpecified in the Letter of Reverſion; and declares, That the former Wadſet-right ſhould not be redeemable by him, until the laſt Debt was paid, as well as the firſt; and this Eik muſt be regiſtred in the ſame Manner as was the principal Letter of Reverſion. Now, with reſpect to theſe Eiks, it is to be obſerved, that they obtained only in proper Wadſets, when the Lands were of Value above the Money firſt lent, and newly borrowed, at leaſt to be more than ſufficient for the Annualrent of both; whereas, in improper Wadſets, there is commonly a Back-tack-duty, correſponding to the legal Intereſt of the Debt to be paid to the Wadſetter, and no more by that Right can be demanded; for, ſo long as that is paid, the Debitor is in uſe to poſſeſs naturally the Wadſet Lands. Hence an Eik to

an

who will give Command to the Director, to give forth Precepts for that Effect, if the Lands be holden of the King, or direct



an improper Wadſet, or to an Infeftment of Annualrent, is very inept, unleſs that through the ancient Back-tack's being made void, the Wadſetter enter to the Poſſeſſion of the Lands, or unleſs, by the Eik, in a new Back-tack, there be an Additional Back-tack-duty, correſponding to the Annualrent of both the old and the new principal Sums, for when the Debitor is bound not to Redeem, without paying both theſe Debts, and in the mean Time of not Redemption, Pays no additional Tack-duty, or Intereſt for the Sums laſt borrowed, he'll be ſlow to uſe an Order of Redemption, becauſe it would bring on him a new and heavy Burden.

*Regreſs*] is a Written Obligation by the Superior of the Wadſet Lands, granted to his ancient Vaſſal, making mention, that he had diſpon'd theſe Lands to the Wadſetter, who is infeft by Charter to be holden of him, (the Superior;) But that he the Wadſetter had given a Letter of Reverſion in due Form; and, purſuant to an Agreement, *&c.* he the Superior, binds himſelf and Succeſſors, that how ſoon the Lands ſhall be redeemed, the Reverſor ſhall have full Acceſs and Regreſs to the Property, and heritable Poſſeſſion of the ſame; and now, as then, admits him to be his immediate Tenant and Vaſſal as before, and obliges himſelf to grant and ſubſcrive *gratis*, Charters, Precepts, *&c.* needfull for that Effect, to be written and form'd at the Expence of the Vaſſal. See the Form of a Letter of Regreſs in our Stile-Books.

This Letter and Bond of Regreſs, is not neceſſary, if the Reverſion, be ingroſſed in the Contract of Wadſet, for it being a Proviſion of the Reſignation, muſt be ingroſſed in the Charter, in which Caſe, the Superior has conſented to the Wadſet, and to his Vaſſal's reverting, *&c.* See *Craig*, B. ii. D. 6. § 19. in the beginning.

In the Conſtruction of Law, Rights of Annualrents out

Letters of Horning, to Charge other Superiors to receive their Vaſſals.

of Lands and Tenements, are comprehended under the Word *Wadſet*, for an Infeftment of Annualrent, is, in Effect, no other than a Wadſet of Rents. See *M'Ken.* Obſ. on Act 16. Parl. 1617.

§ 2. But if the Wadſet be given to be holden of the Diſponer; in that Caſe, ſo ſoon as the Order of Redemption is uſed and declared, there is no neceſſity of a new Seaſin to the Redeemer, but it is Sufficient, that the *Wadſet-haver*, Subſcrive a Renounciation, and grant the Lands to be lawfully redeemed, and the Reaſon wherefore there is no neceſſity of a new Seaſin, is, becauſe the giver of the Wadſet was never diſſeaſed, he remaining ſtill Vaſſal to his own Superior, but allenarly did give a baſe Seaſin to be holden of himſelf, which, by the Renounciation, Accreſſes to the Seaſin and Infeftments which he has ſtanding

The Proper and Formal Way to extinguiſh ſuch baſe Infeftments, is to inſert in the Renounciation, a Procuratory of Reſignation of the Lands, *in the Hands* of the Superior, (*i. e.* the granter of the Wadſet,) *in his Favour, & ad perpetuam remanentiam*, to the End the Property may be conſolidated with the Superiority for ever. And after Reſignation made, to Regiſter duly the Renounciation, with the

ing in his Perſon, holden of his own Superior, and is, in Effect, a Conſolidation of the Property, (which was Wadſet) with the Superiority which remained in his Perſon, unwadſet and undiſponed.

the Inſtrument of Reſignation *ad remanentiam*, which not only extinguiſhes the Wadſet, but alſo re-eſtabliſhes the free and full Right of the Lands, in the Perſon of the ancient Proprietary, which laſt Effect, the Renounciation alone would not have brought about.

§ 3. All Reverſions, are *ſtricti juris, & non tranſeunt in heredes, vel aſſignatos, niſi eorum expreſſa fiat mentio, in corpore reverſionis*, and yet, if the Right of Reverſion be compriſed, it will pertain to the Com-



Reverſions are *ſtricti juris*, That is, they muſt be judged of literally, and ſo, as the Reverſor ought not to claim or get more than what is preciſely expreſſed in this Writing which is in Law, and by the Judge, to be interpreted ſtrictly, for the Words thereof, are not to be exponded by a benign Interpretation, in Favour of either Party, but are to be taken in their natural and ordinary Signification: Beſides, the Tenor of this Letter of Reverſion is not to be extended to Perſons, or Caſes not expreſſed; as alſo, all and every one of the Conditions and Proviſions, &c. let forth therein, muſt be literally obſerved, otherwiſe the Order of Redemption will be void. It is otherwiſe in Contracts, and Actions *bonæ fidei*. To this *ſtrictum jus*, or *ſummum jus*, is opponed, *æquitas*, or *æquum & bonum*, or *bona fides*, all which are common Terms in the *Roman* Law, adopted by our Conſtitution, and frequently made uſe of in our Practick and by our Law-writers. For an Expoſition of theſe Words, ſee *Spotſ. Scots-Law-Lexicon.*

Now

priſer; albeit, the Reverſion was only made to Heirs and not to Aſſignies, as was practiſed *inter* the Earl of *Errol* and *Buckie*, whereof the apparent Reaſon is, that the compriſing is not a voluntary Aſſignation, but

Now, ſeeing Emptions-venditions, for being Contracts of the Law of Nations, *bonæ fidei*, or full of Equity, are to be largely and extenſively interpreted, ſo as the Words and Expreſſions therein, are not to be exponded ſtrictly, & *ad literam*, but with Moderation, and Correction of the ſtrictneſs of Law, where through, the Will and Intention, more than the Words, of the Parties, are to be noticed, and the Judge many Times orders Things to be done, which are neither mentioned in a Libel, nor demanded, becauſe they are Equitable, and natural Conſequences of the principal Claim. See more of this in *Spoſ. Elements of the Laws of Scotland*: Now, ſeeing Diſpoſitions of Lands are ſo benignly interpreted, how comes it to paſs, that Reverſions, which either are *pars contractus*, being *ex in continenti* adjected, or are ingroſſed in the Wadſet-right, ſhould not be largely, but ſtrictly interpreted? It may be thought, the Reaſon of the Diverſity lyes in this, That the Law of Nations, and conſequently the Municipal Law of this Country, tend to confirm Property, when once acquired, and for that end, do interpret Contracts of Alienation, in a large and rational Manner, that they may be laſting; whereas, on the other Hand, what may ſhake or looſe theſe Settlements, is with difficulty admitted: But, notwithſtanding this Difference between Contracts *ſtricti juris*, and theſe called *bonæ fidei*; yet, even in the firſt ſort, Juſtice and Equity, with the rational Will and Deſign of Parties, is to be conſidered, ſo that *quoties aliud dictare videtur, ſtricti juris regula, aliud æquitas adeoque res, ratione naturali, in mente boni viri poſita, ac juſtis decretis, eſt temperanda, ita ut in utramque partem, nec ratione rigidi juris, nec ratione æquitatis nimium concedatur*: And according to this Doctine, our Practick is, A Father

but neceſſary and judicial, but if the Reverſion bear to be made to the Receiver and his Heirs excluding all Aſſignies, the Matter would be more diſputable, and in my Judgement it ſhould alſo exclude a Compriſer.

Q 4 § 4.

ther having diſponed to a Son, Lands under Reverſion, with a Power to redeem from the Son, but did not bear theſe Words, *From the Son's Heirs or Aſſignies*, the Lords found, The Father had by that Reverſion a Power to redeem, after the Son's Deceaſe, from his apparent Heir, albeit there was no Order of Redemption uſed by the Father while his Son lived. And found, That Reverſion was not perſonal, ſo as it became extinguiſhed by the Son's Deceaſe, L. *Newark* againſt his Son, *June* 26. 1626. in *Dury*, P. 377. *Muir* againſt *Muirs*, *February* 6. 1630. *ibid.* P. 490. Yea further, the Place of Premonition, *&c.* in uſing Redemption, may change from that pointed at in the Reverſion, becauſe the Views Parties had at the Time of wadſetting may be altered, and a Regard being ſtill had to the Intention of the Contracters, and the preſent Conveniency of the Parties concerned now at the Redemption, *December* 11. 1638. *Findlayſon* againſt *Weems*, in *Dury*, P. 866. and *February* 1. 1667. the Creditors of Sir *James Murray* againſt *James Murray*, obſ. by *Stair* in Vol. 1. Deciſ. P. 432.

The Author's Judgment in the End of this § will not hold, becauſe the Caſe of a Creditor, and conſequently a Compriſer, is moſt favourable; for not only corporeal Things, but alſo incorporeal, as Rights, Powers and Faculties, merely perſonal, to acquire and recover, or to augment one's Fortune and Eſtate, may be affected by Creditors, who ought not to be hurt by the Remiſneſs and Negligence of the Debitor; and therefore the Law and our Practick with good Reaſon and Equity give to Creditors a Right and Liberty to ſeize upon any thing their Debitor abſtains from, and which he might attain to, and if he did, would be a Fund for Payment of his Debt. See the Caſe of Dr. *Scot* againſt *Dickſon* of *Hadrig*, *March* 19. 1631. in *Dury*, P. 584.

§ 4. *Item*, If the order of Redemption be uſed by the Party to whom the Reverſion is made, in his own Time, the Right thereof is tranſmiſſable in an Aſſigney, albeit, the Reverſion was not made to his Aſſigney, or did exclude his Aſſignies.

[1] In the Caſe of *Murray* againſt *Myles*, *March* 3. 1630. obſ. by *Dury*, P. 498. and *Spotſ*, Pract. Tit. Redemption, § 30. P. 265, a Reverſion being granted perſonally to *Myles* himſelf allenarly, in his own Lifetime, the Lords found, That albeit the Reverſion was only perſonal, yet ſeeing he to whom it was granted, had uſed the Order of Redemption before his Deceaſe, and had intented Summons of Declaratory, his dying before the Sentence, after the Order, made not the Order to ceaſe, nor the Reverſion to be extinct, but that it might be proſecuted by his Aſſigny, or by his Heir if he had not made an Aſſigny, ſeeing by the Order he had declared his Will, and thereby had redeemed.

§. 5. *Item*, Where the Party having Right to the Reverſion, makes Aſſignations thereof to diverſe Perſons, the laſt Aſſigna-

[1] See the Notes on § 1. *h. t.* and the Notes on § 5. *Tit.* v. *h.* the laſt Act crowns and perfects the Work. By Act 16. Parl. 1617. Aſſignations of Bonds for granting Reverſion and Regreſſes are ordained to be regiſtred within 60 Days after their Date. But in the Caſe of the Earl of *Marſhall* againſt his Brother, *July* 29. 1623. obſerved by *Dury*, P. 78. the Lords found, That an Aſſignation made to an Order of Redemption uſed by the Cedent, was not comprehended in the above Act, and ſo needed not to be regiſtred. As alſo, in another Caſe, between the Earl of *Tullibardine* and the Baron of *Monesk*, *March* 2. 1636. obſer. by *Dury*,

ſignation, with the firſt Intimation thereof, is preferred to the firſt Aſſignation after intimate.

*Dury, P.* 599. the Lords were of Opinion, That Aſſignations to Reverſions were not comprehended in the above Act of Parliament, and that they (the Lords) could not extend it.

§ 6. But where a Reverſion is compriſed, there needs no Intimation, but the firſt Compriſer is preferred to the ſecond Compriſer, albeit he intimate firſt.

A Compriſing is a legal Aſſignation, and was judicially allowed by the Lords, and theſe Allowances were recorded in the Bill-chamber, wherethrough, *fictione juris*, they became intimated to all the Leidges, & *apud acta*. See of this Treatiſe, *Tit.* xi. § 17. in the End, and § 12, and 13. of the ſame Title.

§ 7. *Item*, Where the Right of Reverſion is diſponed, not by Way of Aſſignation, but by Infeftment proceeding upon Reſignation: In that Caſe there is no Neceſſity of Intimation; but the Party infeft upon Reſignation, will be preferred to a ſecond Aſſigney who has made firſt Intimation, & *Ratio eſt*, becauſe that when the Right of Reverſion paſſes by Infeftment upon Reſignation, or by Way of Compriſing, the Reſignant, or Party from whom it is compriſed, is totally and fully denuded, & *non remanet*

*remanet penes eum juris aliquod veſtigium vel color*; but where Aſſignation is made, and no further, it is not thought that he is fully denuded, till Intimation be made.

§ 8. But it is to be remembred, That where Lands are wadſet to be holden of the Superior, under Reverſion, That the Right of this Reverſion is only tranſmiſſable by Way of Aſſignation, and not by Way of Reſignation or Infeftment, whereof this is the Reaſon, Becauſe the Lands being once reſigned already in Favours of the Receiver of the Wadſet, the ſamen cannot be of new reſigned; and if any Reſignation be made, otherways nor by the Receiver of the Wadſet and his Heirs, the ſamen is null and invalid; and conſequently, *quia actus principalis eſt invalidus*, which is the Reſignation of the Lands; therefore alſo the Right of the Reverſion, which, in Reſignations, *tranſit cum univerſitate*, falls *in conſequentiam*. *Et ratio rationis*, is, That *jus Reverſionis eſt jus mere in-corporeum*, whereof the Right is properly, *et habili modo*, tranſmitted by Aſſignation, and cannot be tranſmitted *per ſaſinam niſi acceſſorie ad rem corpoream cui inhæret*; and albeit it may be alledged, That *jus ſuperioritatis, cui inhæret eſt jus incorporeum*

*uti-*

*uti omnia jura, quæ jura, ſunt incorporea*; yet this makes not *jus ſuperioritatis* to be *jus incorporeum*, no more than *jus proprietatis*; becauſe, *utrumquæ jus & ſuperioritatis & proprietatis ſunt rei corporeæ*, id eſt, *Fundi cujus Dominium acquiri non poteſt, niſi per Traditionem corpoream, hoc eſt, Saſinam, ſed jus Reverſionis non eſt rei corporeæ jus, ſed jus in corporeum in re, quæ licet ſit corporea, tamen non habet neceſſitatem, traditionis ad ejus acquiſitionem*; and *jus reverſionis*, is, in Effect, no other, but *ſervitus in Fundo alieno, quæ acquiri poteſt abſque traditione*, id eſt, *Saſina per ſimplicem diſpoſitionem, quia in juribus hiſce in-corporeis non requiritur poſſeſſio*; and therefore, the *Servitutes prædiorum ruſticorum, vel urbanorum acquiruntur ſola Diſpoſitione abſque Saſina*, as the Servitudes of Multures, and of Aquæducts, *in ruſticis, & altius non tollendi, in urbanis*.

§ 9. And where it may be opponed, That the Right of Annualrent is *ſervitus*, and ſicklike *uſus fructus in Fundo*, (*i. e.* a Liferent, *&c.*) yet both paſſes by Seaſin. It is anſwered, That the Caſe is not alike, becauſe that an Annualrent *eſt quaſi pars Fundi, et uſus fructus eſt jus fructuum Fundi ad tempus, & ſic potius ſunt jura, rei corpo-*

*corporeæ, quam jura in re corporea*; and albeit, to the Right of a Liferent, *quo ad conſtitutionem ab initio*, there is Neceſſity of a Seaſin, without which it cannot be eſtabliſhed formally, nor ſeparate from the Fie of the Lands, whereof it is an *Uſu-fruct*; yet after the *Uſu-fruct* is once lawfully conſtitute by a Seaſin, it is thereafter tranſmiſſable by Aſſignation, *ſine Saſina*.

§ 10. And the Right of Liferent which pertains to the Superior, through the Vaſſal's Rebellion, by the Space of Year and Day,

A Superior's Right to his Vaſſal's Liferent, is a conſequential Emolument of his *dominium directum*, and according to the feudal Cuſtoms, and by our Law and Conſtitution, accreſſes to the Superior, who may imploy the Rents of the Feu, to hire one to ſerve him in Place of his Vaſſal, who being Rebel, cannot appear in Publick, as Kirk or Market: And by the ancient Cuſtom all Commerce and Converſation with him, was unlawful; but now, albeit Diſtinction is made between Rebels for Treaſon, or other odious Crimes, and Rebels by Denounciation, for not Payment of a civil Debt; yet nevertheleſs the old Law, inducing the Preſumption of Incapacity, obtains. This Caſuality is called an *Eſcheat*, and becauſe it laſts during the Vaſſal's Lifetime, it is term'd a *liferent Eſcheat*. Now the Word is French, *Eſchute* from *Eſchoir*, to fall, in Barbarous-law-latine, *Eſchaeta, cadentia Caſualitas*. *Skein* in his marginal Notes on *Cap.* 48. *de Eſchetis, Quon. attach.* ſays, *Pertinet ad Dominum, ex alterius, veluti Vaſſalli ſui, caſu & delicto. Eſcheat*, in the legal Senſe, ſignifies the Emolument and Profit, either of moveable Goods, or of Rents of Lands, pertaining

to

Day, pertains to the Superior by the Law, and he may diſpone the ſamen to a Donatar, *ſine Saſina*, becauſe the Right thereof pertains to him, by Diſpoſition of the Law.

to a Subject or Vaſſal; and which, for his Treſpaſs noted by the Law, fall, accreſs, and belong to the Sovereign, or that Vaſſal's immediate Over-lord, reſpectively, *i. e.* the Moveables to the King, and the Rents of the Feu lands to the Superior. Eſcheats are of two Sorts, 1. *Regal* are the Obventions, Fines and Forfaultures which belong to our Kings, by the ancient Rights of their Crown, and ſupreme Dignity. Frequent Mention is made of Eſcheats in *Reg. Majeſt.* and other Books of our ancient Law. 2. *Feudal*, and is one of the Caſualities of Superiority, accrewing to every Over-lord of a Feu, as well Subject as Sovereign. *Craig* treats of this very ſlightly in his Feus, *B.* iii. *D.* 6. § 6. *P.* 370. They are called *Caſualities*, becauſe they are uncertain, the Time of their falling not being known, neither can one be aſſured, if they will fall at all; and they are either *ex contractu Feudali*, as Ward, Marriage, Relief, *&c.* or *ex delicto Feudali*, and theſe reſpect either the Property of the Feu, as Recognition, Purpreſture. Diſclamation, not paying the Feu-duty, *&c.* or they touch the Rents, Mails and Duties of the Lands, as Non-entry Marriage, (which have been treated of in *Tit.* iii. *S.*) and Liferent Eſcheat, the Subject of the following Title, in which our Author handles ſingle Eſcheats, becauſe of the Connection they have with the Liferent.

TITLE

# TITLE VII.

## *Of ſimple and liferent Eſcheats.*

§ 1. THe Right of the liferent Eſcheat, which is in the Perſon of the Donatar, falls under a ſimple Eſcheat, albeit frae the Beginning, it could not vaik by a ſimple Rebellion, but by a Rebellion *poſt Annum & Diem*; *et Ratio eſt*, becauſe it is not, *quoad donatarium*, a liferent Right, but only a Right to the Mails and Duties of the Lands, enduring the Rebel's Lifetime; but it is much doubted, whether, if liferent Eſcheat, which pertains to the Superior, by his Vaſſal's Rebellion, being

It was decided in our Author's Time, That the liferent Eſcheat of a Vaſſal, falls under the Superior's liferent Eſcheat. *Sibbald* againſt L. *Lethindie* and L. *Clunie*, *February* 26. 1623. obſerved by *Dury*, *P.* 51. and *Douglas* againſt L. *Wedderburn*, *March* 8. 1628. *P.* 357. but this Rule is not univerſal; wherefore, it is to be noticed, which of two, the Superior or the Vaſſal, were firſt Rebel, and at the Horn Year and Day; for, if the Superior was firſt Rebel, the Feu-duties, and all other Caſualities whatever, *tam ex delicto quam contractu*, fall under the Superior's liferent Eſcheat; and when, thereafter the Vaſſal comes to be Year and Day at the Horn, his Liferent accreſſes to other Caſualities, tho', before the Vaſſal's Rebellion, the Donatar of the Superior's Eſcheat, could claim no more than the Feu-duties; but, by the Eſcheat, it is augmented, and becomes the

ing once eſtabliſhed in the Superior's Perſon, does fall in Eſcheat by the Superior's ſimple Rebellion, or not, *ratio dubitationis* ariſes from the Similitude of the Caſe, which it hath with the Right of the Liferent, eſtabliſhed in the Perſon of the Donatar, albeit there be a great Difference; for a Liferent accreſcing to the Superior, is *pars ſuperioritatis*, and, in Effect, is become Property to the Superior, during the Vaſſal's Lifetime; whereas, the Liferent in the

the full Rents of the Feu-lands. On the other Hand, if the Vaſſal was firſt Rebel, and at the Horn Year and Day, the liferent Eſcheat falls to the Superior, and the Mails and Duties of the Feu, are at his Gift and Diſpoſal, during the Vaſſal's Lifetime, and that *principaliter, et per ſe*; whereas, in the other Caſe, when the Superior was firſt Rebel, his Eſcheat comprehended only the Feu-duties payable by his Vaſſal, *principaliter*, which is all the Rent a Superior can claim from an heritable Tenant, out of Feu-lands; but when the Vaſſal's liferent Eſcheat came thereafter to fall, the ſuperplus Fruits of the *Dominium utile*, *i. e.* the whole Product of the Ground, accreſſes to the Feu-duties, and becomes Part of the Superior's liferent Eſcheat, *acceſſorie, & jure accreſcendi*, to the Profits of the *dominium directum*. See *M'Ken. Inſtit. B.* ii. T. 5. § 26, 27. and alſo his Obſ. on Act 15. Parl. 1617.

The Author's Diſtinction of the Right of a Liferent, when in the Perſon of a Superior, which he calls *pars Superioritatis*; and when, in that of a Donatary, which he terms a *jus ſeparatum a Superioritate*, ſeems to be of great Subtility, but is of no Import, becauſe a Donatary hath all the Right which the Superior had, ſeeing he comes in his Place, and may purſue declaratory Actions, in the Name, either of

the Donatar's Perſon, *eſt jus ſeperatum a ſuperioritate*; and in my Opinion, a Liferent accreſing to a Superior, by his Vaſſal's Rebellion, cannot vaik by a ſimple Eſcheat in the King's Hands, except the Superior be Year and Day at the Horn, and ſo does fall under a liferent Eſcheat.

of his Author, or his own; for his Right is the ſame it was when his Cedent, the Superior, had it; and in this Caſe, the Time of the Deceaſe, of either Superior or Donatary, is not regarded, for it continues during the Vaſſal's Life, and extinguiſhes by his Death only.

§ 2. *Item*, The like is in liferent Tacks, which, by Act of Parliament, falls under a liferent Eſcheat, and not under a ſimple; and yet, if the liferent Tacks be aſſigned in Favours of a third Perſon, it will fall under the Aſſignies ſimple Eſcheat, as was decided betwixt Sir *Robert Ker* and the Heirs of the Earl of *Lothian*; and the Reaſon is, becauſe there is not a formal Right of Liferent, eſtabliſhed in the Perſon of the Aſſigney, as it was in the Perſon of the ſimple Tackſman.

§ 3.

The Act cited, is Act 15. Parl. 1617. and the Deciſion in the Caſe of the Heirs of the Earl of *Lothian* and Sir *Robert Ker*, is dated *July* 29. 1625. and obſerved by *Dury*, *P.* 184.

§ 3. And the like of this in a Liferenter of Lands, whoſe Liferent cannot vaik by ſimple Eſcheat, in the Superior's Hands; and yet, if the Liferenter aſſign the Liferent to a third Perſon, the Right thereof will fall under the ſimple Eſcheat of the Aſſigney, to whom it is diſponed.

The Conveyance makes not that moveable in the Perſon of the Aſſigney, what was not ſo in that of the Cedent for an Aſſignation alters not the Nature of the Subject diſponed: But the true Reaſon of this, and of what is ſaid in the foregoing § is, becauſe the Aſſigney has not, during his own Life time, theſe Tacks or Annuities, which, in his Reſpect, are temporary, ſeeing they may become extinct in his own Time, and if the Liferenter ſurvive him, will be profitable to his Succeſſors.

§ 4. By Act of Parliament in *June* 1592. Eſcheats diſponed in Favour of the Rebels, are declared null; and the ſecond Donatar, who purchaſes a new Right from the King, will be preferred to the firſt, if the ſecond can prove the firſt to have been ſimulate for the Behoof of the Rebel, but this Act of Parliament, provides no Remedy for Eſcheats diſponed by other Superiors than the King, or by Lords of Regality, in Favours of the Rebels, in Reſpect it only annuls the Gift granted to the Behoof of the Rebels, and ſo gave Occaſion to a new Gift, in Favours of a ſecond Donatar;

but if there be not a ſecond Gift granted to a new Donatar, there is none to quarrel the firſt Gift, of Nullity; and ſeeing the Lords of Regality, in ſimple Eſcheats, and other Superiors, in liferent Eſcheats, are not in Uſe to make ſecond Donatars, or may not do it without Danger of Warrandice,

The Act cited, is 145. Parl. xii. K. *James* VI. holden in *June* 1592. which contains moe remarkable Caſes concerning Rebels at the Horn, than our Author notices in this §. For it is thereby ſtatuted, 1. That no Conveyance ſhall be valid in Defraud of a Debt for which the Cedent remains Rebel at the Horn, unrelaxed. 2. That no Gift of Eſcheat, or Aſſignation thereof, in Favours of the Rebel, ſhall be valid againſt a Creditor, for whoſe Debt that Rebel is at Horn. 3. As alſo, That it ſhall be a relevant Exception againſt a Gift of Eſcheat, or Aſſignation thereof, That the Rebel, or his Wife, or Bairns, or near Friends, remain in Poſſeſſion of his Tacks and Goods, to his own Uſe and Behoof. 4. And if Eſcheats and Liferents be given any otherways, than to the Behoof of the Party injured; or if the Donatary be found irreſponſal, the Gift is declared to be null, and the Theſaurer ſhall be obliged to give it to a reſponſal Perſon, who ſhall be Debitor to the Perſon, at whoſe Inſtance the Horning is raiſed, or ſhall take Caution for his Relief. 5. And whereas, Perſons convicted, or ſtanding out Rebels for Treaſon, Murder, or other odious Crimes, under Colour of fraudful Diſpoſitions made by themſelves, or of Gifts of their Eſcheat ſimulately, purchaſed by themſelves, or transferred in their Favours, their Wives, Bairns, &c. for their Behoof, commonly have Fruition of their Goods, and Poſſeſſion of their Houſes, to the Defraud of the Laws, and to the Prejudice of the Crown, whereby wicked Men, after committing miſchievous Deeds, are encouraged; for Remedy whereof, it is ordained, That theſe fraudful and ſimulate Diſpoſitions of Eſcheat, ſhall not ſerve

to

dice, where they are obliged to diſpone the Eſcheats ſo oft as the ſamen va ks; therefore it is doubted, what Remedy may be had againſt Eſcheats diſponed to Rebels by Lords of Regality, or other Superiors, bye (*i. e. beſides*) the King; which Doubt is ſolved by the Anſwer made to the Queſtion



to ſuſtain theſe Rebels in their Contempt; but it ſhall be lawful to the Sovereign, and to his Theſaurer, to intromit with the Eſcheat Goods in Poſſeſſion of the Rebel, or of his Wife, Bairns, Family, or tender Friends, upon the Ground, and in the Houſe, poſſeſſed by him, before he was put to the Horn; or, in Caſe, after his Denunciation, he has been received into the ſame, and that the Theſaurer cauſe ſuch Houſes be kept upon the Expence of the Eſcheat Goods.

The Words *Simulation* and *Simulate*, (as ſimulate Rights) are Terms of the *Roman* Law, and frequent with us. *Simulare* is the doing, to outward Appearance, what is allowed of, when, at the ſame Time, a Thing unlawful, is tacitely and hiddenly deſigned and brought about; as when an Uſurer makes a Semblance of buying what's given in Uſury, as a Compliment for the Uſe of Money. See *Spotiſ. Scots Law-Lexicon h. v.*

The firſt Part of this Act 145. is illuſtrated by Act 18. Parl. 1621. By the dayly Practick in the Seſſion, voluntary Deeds after Rebellion, are not hurtful to the Debt in the Horning, and Gifts to the Rebel, of his own Eſcheat, if given before he be relaxed, falls back to the Sovereign. See 1 *Dury*, P. 237. E. *Kingborn* contra *Wood*. If given after Relaxation, by the ſecond Article of the forecited Act, It is declared to be of none Effect againſt the Debt in the Horning. By the third Article, the Marks of Simulation are given. *Firſt*, It is to be noticed, That this Objection is competent to be propoued in the general Declaratory, and ought not to be reſerved againſt the ſpecial Declaratory; for

immediately before expreſſed, *viz.* That a Liferent diſponed to a Donatar, falls under the ſimple Eſcheat of the Donatar; and therefore, the Liferent being diſponed to the Behoof of the Rebel, vaiks by ſimple Eſcheat in the King's Hands, whilk the King may diſpone upon: And this is clear in

for it may happen, that the Donatary, after the general being in Poſſeſſion of a Rebel's Goods, will not ſeek a ſpecial Declaratory. *Spotiſ. Pract.* Tit. *Eſcheat*, § 47. *Secondly*, A Creditor may very well take the Rebel's Eſcheat, with his own Knowledge, Procuring and Conſent; from which it ought not to be inferred, that the Gift is to the Rebel's Behoof. *Id. ibid.* § 18. But in the Caſe, *Douglas* againſt L. *E. Nisbet*, *March* 11. 1624. *Dury* obſerves further, That the Lords repelled an Alledgance proponed by a ſecond Donatary. That the Gift was not only given at the Rebel's Requeſt and Deſire; but alſo, expede the Seals upon the Rebel's Expence, and by his Moyen obtained, the *Ratio decidendi* given, is, becauſe the Donatary was a true Creditor, inſiſting in a Declaratory, for getting Payment of a juſt Debt; and therefore, the Gift could not be found to be ſimulate; but it was contrariwavs decided in the above Caſe between E. of *Kinghorn* and *Wood*, and the Cauſe of Difference lay in this, That there the Donatary was not a Creditor. And in a Plea, *Dickſon* againſt *M'Millan*, obſerved by *Stairs*, Vol. ii. P. 239. Retention of Poſſeſſion, and the Rebel's Concourſe, was elided by the Oath of the Donatary, affirming it was for Payment of juſt Debts owing to himſelf *per* Bonds produced. And in the Caſe of *Pallat* againſt *Veitch*, *December* 26. 1676. obſerved by *Nisbet*, *Deciſ.* P. 201. The Preſumption of the Gift's being ſimulate, becauſe the Rebel is ſuffered to poſſeſs, takes Place where the Rebel has a viſible and conſiderable Eſtate of Lands or Tacks, and is in Poſſeſſion thereof: But when the Rebel's Eſtate is either not conſiderable, conſiſting

in Liferents, where the Superior, Diſponer thereof, has no Right to the ſimple Eſcheat; but where the Superior is a Lord of Regality, and therethrough has alſo Right to the ſimple Eſcheat, the Queſtion is more difficil, *& meo judicio eget conſtitutione imperatoria.*



ing only of an Acre or two, or *in nominibus*, and not known to the Donatar; ſo that the Donatar had Reaſon, not to trouble himſelf, and to look after, either that which was inconſiderable, or which was not known to him, there is no Ground to preſume that the Gift is ſimulate.

To infer Simulation, it is to be obſerved, That the Retention of Poſſeſſion muſt be after the Gift is expede, and not before; as is cleared by the forecited Caſe of *Dickſon.*

Simulation may be proven either directly, by the Oath of the Donatary, or may be inferred from Preſumptions, as are all other Frauds and Simulations.

For clearing the Doubt mov'd by the Author in the End of this §. the preſent Practick of the Lords is to be noticed; for it is found, That if any having, by ſingular Titles, Right to the Goods of another Man, and ſuffer him to continue in Poſſeſſion, that Right is ſo far forth look'd on to be ſimulate, That if the Aſſigney ſhould compear, and with his Right, ſtop a Poinding, he'll be liable to the Poinder, for his Debt, *in valorem*, of the Goods that might have been poinded.

It may be thought, that the forecited Act 145. Parl. 1592 has been calculated againſt Rebels for Treaſon or attrocious Crimes, and not againſt Rebels by Horning, on a civil Obligation, which is the Subject of the Title. The Knowledge of the Cauſe, and Occaſion of this Act, would illuſtrate the Law Part of it; and this maks me wiſh we had a particular Hiſtory of our Law, eſpecially of our Statutes, giving an Account of their Riſe, Cauſe and Occaſion.

§ 5. The Gift of ſimple Eſcheat does comprehend all moveabl Goods and Geir pertaining to the Rebel, all Bonds and Obligations moveable, all Tacks and Aſſedations not containing a formal Liferent, together

It is a general Rule in our Practick, every Thing which falls not under liferent Eſcheat, falls under ſingle Eſcheat.

Rentals, Tacks for nineteen Years, Debts and Steilbow-goods, are, in this Point, reckon'd moveable, *Balf.* Tit. *Eſcheat, Cap.* iv. And as to Steilbow, it was found, *December* 5. 1628. *Lawſon* againſt *Boghal*'s Tenants, That a Donatary of Eſcheat may ſeek the Goods which were given in Steilbow by the Rebel, to his Tenants, even before the Tack expire. See *Spotiſ. Pract.* Tit. *Morning.* § 35. Now, under the Compaſs of a liferent Eſcheat falleth the annual Profit of all immoveable Goods, ſuch as of Lands, Annual-rents, heritable Bonds, and others, immediately holding of the King, or other Superior; licklike Reverſions, liferent Tacks of Lands, or Tythes. *Spotiſ. Pract.* Tit. *Eſcheat,* § 4. and if one denounced Rebel, and continuing Year and Day at the Horn, (whereby his liferent falls) acquire Lands after that Year and Day, and continue ſtill at the Horn unrelaxed, till Year and Day again, after Acquiſition of theſe Lands, the Rents will belong to the Superior, by Virtue of the Eſcheat, as if the Rebel had purchaſed the ſame before expiring of the firſt Year and Day.

In a ſpecial Declaratory of the Eſcheat of L. *Edmonſton* at the Inſtance of *Lewis Somervail*, obſerved by *Dury, February* 2. 1627. *P.* 267. the Lords found, That the Purſuer's Gift being given in *Auguſt*, and bearing ſpecially Diſpoſition of Goods pertaining to the Rebel, at the Time of the Rebellion, and of the Gift which was granted within the Year, could not extend to that whole Year's Farm, but only to the Half thereof, *viz.* to the *Whitſunday*'s Term before the Gift, and not to the *Martinmas*'s Term after the Gift; but the Lords found, That the Farms of the Rebel's own labouring, pertained to the Donatary; and that the Gift, albeit

ther with the Crop of the ſawen Corns, being upon the Ground the Time of the Rebellion, and alſo, the Mail and Duties of the Lands, for the Term, at, or after the Rebellion.

albeit it was in *Auguſt*, extended to the whole Farms of that Crop, which were in the Rebel's Hands in *Manſing* Even, as if he had died in *Auguſt*, not being Rebel, the ſame would have pertained to his Executors.

It is likewiſe to be noticed, That a general Declaratory, puts not the Rebel's Tenants in *mala fide*, to pay their Farms to their Maſters, and the Lords are in Uſe to ſuſtain ſuch Payments made before Intention of the ſpecial Declaratory, except the Rents had been arreſted before. *Spotiſ. Praſt. Fit. Eſcheat*, § 10, 13.

§ 6. *Item*, The ordinary Form of Gifts of Eſcheat (which paſſes the Privy-ſeal) bears, not only Goods and Geir moveable, Tacks, *&c.* but alſo Reverſions, albeit Reverſions being heritable Rights, cannot fall under Eſcheat, and there can no Solution be made to this Difficulty, but *ſtylus curiæ*, or that the Word *Reverſions* be expounded of Reverſions of Tacks, or Bonds that falls under Eſcheat.



In the preſent Stile of Gifts, Reverſions are not inſert; but the liferent Eſcheat of a Wadſetter, after Redemption by the Reverſor, affects the Sum for which the Wadſet was granted; ſo that the Money muſt be employed, *de novo*, to the Wadſetter in Fie, and the Annualrent to the Donatary of Eſcheat, during the Rebel's Lifetime, as was done in the Caſe of *James Tarlaiefer* contra *Maxton* and *Cunningham* June 29. 1661. obſerved by *Stairs*.

§ 7. *Item*, A ſingle Eſcheat does, by the common Interpretation of the Lords, comprehend no more moveable Goods nor Gear, but ſuch as pertained to the Rebel, the Time of the Denunciation, or which he acquires within Year and Day after Denunciation; but if the Rebel has remained at the Horn many Years before the Date of the Gift; in that Caſe it comprehends the whole moveable Goods and Gear acquired by the Rebel, and which pertained to him, during the whole Years of his Rebellion, and preceeding the Date of the Gift.

§ 8. And ſicklike, if the Rebel remain at the Horn for divers Years after the Gift: In this Caſe the Donatar has no Right thereto, by his Gift, except the Gift bear, *per expreſſum*, thir Words, *Together with all other Goods and Gear which ſhall accreſce to the ſaid Rebel, during the Time of his Rebellion, and av until he be relaxed.* And if the Gift bear not this Clauſe,

There are three ſeveral Caſes ſet down in the above cited Deciſion, concerning *Lewis Somerveil*. *Firſt*, If the Gift proport a Diſpoſition of the Rebel's Goods pertaining to him, at the Time of his Rebellion. *Secondly*, If it give Right to all that belonged to the Rebel at the Date of the Gift. Or *Thirdly*, If it contain Aſſignation of all his Goods, which ſhould

Clauſe, that which accreſces by the Continuation of the Rebellion, after the Date of the firſt Gift, may be diſpon'd by the King to a ſecond Donatar, who will be preferred to the firſt, in ſo far as concerns the ſamen.

ſhould pertain to him, within Year and Day after the Denunciation; or, within Year and Day after the Date of the Gift. and, we may add a *Fourth*, Of all Goods, *&c.* which pertained of before to the Rebel, the Time of his Denunciation to the Horn; or, which have accreſced and belonged to him at any Time ſince; or, which ſhall fall and belong to him in any Time coming, during his Rebellion, now pertaining to the King, by Reaſon of Eſcheat, *&c.* The firſt Caſes are literally interpreted, and the Gift is extended to no more than is Specifice diſponed, E. *Kinghorn* againſt *Wood*, *November* 25. 1626. in *Dury P.* 237. And where the Gift bore the Diſpoſition of the Rebel's Goods, which he had the Time of the Denunciation; and ſinceſyne, or which he ſhould acquire thereafter, while he were relaxed. The Lords found, That Gifts of that Tenor, would extend to all the Goods which the Rebel had, at the Time of his Rebellion, or at the Time of the Gift; and alſo, at any Time after the Rebellion, and before the Gift, and likewiſe which he ſhould acquire within Year and Day after the Date of the Gift, he remaining unrelaxed all that Time. To which ſpace the Lords found, Gifts of that Tenor, could at fartheſt be extended, and not any longer, otherwiſe, Gifts of ſimple Eſcheats and Liferents would be confounded. *Ibid.* and *Feb. Penult* 1623. L. *Eſſilmonth* againſt L. *Buckie*, in *Dury P.* 53. Conformably hereto, it was decided *July* 2. 1669. *Bow* againſt *Campbel*, Obſ. by *Stairs* Vol. 1. *P.* 629.

§ 9. *Item*, Albeit, there falls nothing under the ſimple Eſcheats, vaiking by Horning, but the moveable Goods *ut ſupra*, yet, where

where the Eſcheat Vaiks by Forfaulture, Baſtardy, or *tanquam ultimus hæres*. The ſame, in all theſe Caſes, comprehends all heritable Bonds, Contracts, *&c.* whereupon no Infeftment has followed, and alſo comprehends Rights of Reverſions, of Lands and Annualrents. But this is to be obſerved in the different Form of the Gift, That the ſame, in theſe Caſes, muſt bear the heritable Bonds and Contracts *per expreſſum*, and not Generally; ſo, that where two Gifts of Eſcheat ſhall happen to be diſponed, as Vacant by Forfaulture, Baſtardy, or laſt Heir. The Gift which is only General of Moveables, according to the Form of

*Moveable goods.*] At the Time our Author compoſed this Title, the Act 57. *P.* 1641. was not made, it is titled, *Act in Favours of Orphans, Fatherleſs and others.* See the Notes on the laſt § of the preceeding Title vi. Goods and Lands falling to the King through Forfaulture, Baſtardy, or as laſt Heir, were anciently denominated Eſcheat. See *Reg. Majeſt. Lib.* 11. *Cap.* 55. and *Durr P.* 717. *March* 22. 1694. *Ochiltry* contra *Miller*, calls it a Gift of a Baſtards, ſingle Eſcheat under which, the Lords found an heritable Bond, whereon there was no Seaſin, did fall, and which needed not to be conferred by Preſentation: But now we only make uſe of that Word in Matters of Denunciation and Rebellion *ex cauſa civili* and we call the Rights and Diſpoſitions of theſe Goods, Gifts, as *Gift* of Forfaulture, *Gift of Baſtardy*,, *Gift of ultimus hæres*; and theſe are extended no farther, than the Literal and ſtrict Interpretation of the Words and Tenor, will bear, becauſe theſe Caſualities are odious,

and

of Gifts, paſt upon Horning, will only be extended to Moveables ſimply, and not comprehend heritable Bonds, Contracts, or Reverſions, and the other Donatar who has a Gift thereof *per expreſſum*, will be preferred to the other general Gift.

and the Gifts of them are *juris ſtricti*: Nevertheleſs, in the Caſe of *Ochiltry* againſt *Miller*, *March* 22. 1634. A Donatary ſeeking Payment of a Sum, owing to a Baſtard, heritable Bond: The Lords found, this heritable Bond fell under the Gift of ſingle Eſcheat of Baſtardy; and becauſe there was no Seaſin, that it needed not be conferred by Preſentation. But before that Deciſion, in the Caſe of *Wallace* againſt *Muir*, *July* 9. 1629. It was found, That ſuch Bond fell under a general Gift of Baſtardy, and that there was no neceſſity of a particular Gift of the ſame in ſpecial; likeas, upon a Competition concerning the Debt, the general Gift was preferred to a particular One, which was given after it. Both theſe Caſes are obſerved by *Dury*, in *P.* 459. and 717. But under the Compaſs of a liferent Eſcheat, falleth the yearly Fruit of all immoveable Goods, ſuch as nds, Annualrents, heritable Bonds, and others, holding immediatly of the King or Superior; ſiklyke under it fall Reverſions, and liferent Tacks of Tythes. *Spotiſ. h. t.* § 4.

§ 10. But if the Gift bear any one heritable Contract, or any one Reverſion *per Expreſſum*; and if thereafter, there be ſubjoined a general Clauſe *of all Contracts and Reverſions of the like Nature*; in that Caſe, the general Clauſe ſubjoined to the particular, will be as effectual, as if the

hail

hail particulars were inſert *per Expreſſum.*

As by our Practick, it obtains in general Diſcharges, which are extended to other Particulars of the like Value, or of the ſame Specie and Nature with theſe expreſſed.

§ 11. The Eſcheat of Liferent, pertains to the lawful Superior, whether the King, or any other Subject, but the Superior, bye (*i. e. Beſides*) the King, has only Right to the Liferent of his Vaſſals who are infeft, and holds Lands of him; but, if there be no Infeftment in the Perſon of the Rebel; but, that he bruiks Lands, Teinds or Annualrents, by Way of Bond, Contract, or by Way of Tack; in this Caſe, the Liferent pertains

For confirming what is here delivered, ſee *Spotſ. h. t.* § 16. and the Caſe of *Halyburton* againſt *Steuart*, *July* 1. 1626. obſerved by *Dury*, who in that Deciſion Treats this Matter fully.

The King's Right to the Eſcheat of Perſons, who are ſingular Succeſſors; and tho' not infeft, yet have, by Diſpoſition of Lands, *&c. ajus ad rem*, ceaſes, when theſe Purchaſers are infeft, upon Precepts of Seaſin granted by the proper Superior; or otherwiſe, if the Buyer of theſe Feus, be Remiſs, in ſeeking Charter. and if, in the mean Time, the Seller become Year and Day at the Horn, his liferent Eſcheat falleth to the Superior, who will be preferred to the Mails and Duties of his own Feu-lands, before either the Buyer or the King: But in the following Caſe obſerved by *Spotſ.* and *Dury*, there's a Diſparity; and it was this, *John Meldrum*, having acquired from *Andrew Meldrum* the

pertains, not to the Superior, but to the King's Majeſty.

the heritable Right of the Lands of *Ordlie*, &c. to be holden of the ſaid *Andrew* in Feus Blench by an Infeftment, and of *George Hatton*, the ſaid *Andrew*'s Superior, by another. Afterwards *John* becoming Rebel, and remaining Year and Day at the Horn, his liferent Eſcheat is diſponed by *Andrew*, to the Laird of *Frendraught*, he not having become *George*'s Vaſſal: Thereafter he being received by *George*, the ſaid *George* purſueth a Declarator of his Liferent, as having accreſced to him, *jure Superioritatis*. It was alledged by the Laird of *Frendraught*, That it pertained only to *Andrew*, (of whom only he held, the Time of his Rebellion) and to his Donatar. The Lords found the Alledgance relevant, and excluded the Purſuer from claiming any Right to the ſaid Liferent, *January* 23, 1624. As in *Spotſ.* Pract. *h. t.* § 15.

When a Tenant or Tacks-man, who has a Tack during Life, hath been Year and Day at the Horn, his liferent Eſcheat falls to the Lands Lord.

§ 12. But if once there was a lawful Infeftment taken in the Perſon of the Vaſſal, then, if his Heir, or apparent Heir, remain at the Horn Year and Day, his Liferent Vaiks in the Hands of his immediate Superiors; albeit, the apparent Heir be not infeft.

A Summons of Declaratory of Liferent, againſt an apparent Heir not entered, was ſuſtained at the Lord *Balmerino*'s Inſtance againſt his Vaſſal; becauſe it was thought, that he could not ly forth to his Prejudice. *Spotiſ.* Pract. *h. t.* § 6.

§ 13. *Item*, When there Concurs two Dona-

Donatars, either of ſimple or liferent Eſcheat, the laſt Gift, with the firſt Diligence, by raiſing of Declarator, citing of the Party, tabling of the Summons, calling thereof, and inſiſting in the Purſuit, until Decreet be obtained, is preferred to the firſt Gift with the laſt, and poſterior Diligence, and the firſt Decreet, is ever preferred *contra omnem queſtionem*; albeit, it proceed upon a poſterior Citation, except the Donatar, who is prejudged, be able to Improve the Execution of the Summons, neither will he be heard, to Reduce the firſt Decreet, upon Reaſon of Anteriority of his Gift and Citation: But if no Decreet be pronounced, then both the Donatars, *ante ſententiam*, will be heard to Diſpute upon their Gifts and Diligence, and be preferred, or poſtponed accordingly.

Anteriority in Diligence, gives Preference in Rights, according to the ſaying, *Vigilantibus non Dormientibus jura ſubveniant, qui prior tempore, eſt potior jure.* See the Notes on *Tit.* v. § 5.

§ 14. *Item*, There falls under Forfaulture, Baſtardy and laſt Heir, not only moveable Goods *ut ſupra*, but alſo heritable Rights of Lands, Teinds and Annualrents wherein the Perſons forfaulted, and Baſtards

ſtards were infeft; but there is a Difference in the Form of the Gift thereof; for, Eſcheats Vacant, by Horning, and alſo of heritable Bonds, whereupon no Infeftment followed, Vacant by Forfaulture, or Baſtardy, *&c.* paſſes only the Privy-Seal: But where Infeftment followed, the ſamen paſſes, either by Way of Signature through the whole Seals, until it come to the Great-Seal, or by Way of Preſentation under the Quarter-Seal, otherwiſe called, the *Teſtimonial* of the Great-Seal; and the Reaſon of this Difference, ariſeth from the Diverſity of the Gifts; for heritabe Bonds, whereupon no Infeftment followed, paſs *habili modo*, by Aſſignation to the which, a Gift under the Privy-Seal is, anſwerable; but Infeftments of Lands and Annualrents cannot be tranſmitted *habili modo*, by Aſſignation, but only by Infeftment; and, as to the different Reaſon of Great-Seal and Quarter-Seal, That ariſeth alſo from the Diverſity of the holding of the Infeftment, for if the Lands pertaining to the forfaulted Perſon or Baſtard, were holden of the King; in this Caſe, the Right of theſe Lands, muſt paſs by Infeftment through the hail Seal, *viz.* Signet, Privy-Seal and Great-Seal, and upon that Infeftment, the Donatar

muſt

muſt receive Seaſin, by Precept under the Quarter-Seal: But where the Lands are not holden of the King, but of another Superior, in this Caſe the King cannot Diſpone the ſame to be holden of himſelf, and he cannot retaint them, becauſe he cannot be Vaſſal to the Superior, who is his Subject; and therefore, ſeeing the Benefit Vacant by the Forfaulture, falls to the King, and not to the Superior: The King has Place and Power, to Preſent a Vaſſal to the Superior, in Place of the Vaſſal who was forfaulted, or Baſtard; which Preſentation paſſes under the Quarter-Seal, and bears a Command to the Superior, to Enter and Receive the Perſon preſented, in Place of the other Vaſſal, whereupon the Party preſented, requires the Superior, under the Form of an Inſtrument, (according to the Form of the Chancellary, obſerved in Precepts, upon Retours of Lands, holden of other Superiors than the King) and if the Superior obey the Command of the Preſentation, there is no more to be done, but the Perſon preſented, is ſaſed by the Superior's Charter or Precept, which has Reference to the Preſentation: But if the Superior refuſe or delay, then the ſecond and third Precepts are directed as upon Retours,

and

and laſt, a Warrant to the Sheriff to give Seaſin. And I have ſeen alſo another Order obſerved, immediately after the firſt Requiſition upon the Preſentation, by obtaining Letters of Horning, by Deliverance of the Lords of Seſſion, for charging the Superior to give Seaſin: Which is alſo the Cuſtom obſerved againſt Superiors, for



*The Donatary receives Seaſin, by Precept under the Quarter-Seal.*] By Act 7. Parl. 1672. The paſſing or writing Precepts of Seaſin, to, or under the Quarter-Seal, is ſuppreſſed; and in Liew thereof, it is ordained, That every Charter ſhall, towards the End, contain a Precept of Seaſin, of all the Lands and others contained therein, which is declared to be as ſufficient, as if the ſame were paſt under the Quarter-Seal.

*Lands not holden of the King, but of another Superior.*] See the Notes on § 15. *h. t.*

Sir *John Nisbet* in his Doubts and Queſtions in Law, and Sir *James Steuart* in his Anſwers; both think, That the Subject Superior, cannot receive the Vaſſal preſented, on Pretext of Non-payment of a Compoſition due, for receiving other ſingular Succeſſors, becauſe he is ſimply obliged to receive this Vaſſal; and, conſidering, that the Lands do belong to the King, they think his Majeſty does a Favour to the Superior, by preſenting one in his Place: But further, in Reſpect, the Superiority draws into it the Right of Property, and that the Superior has not a Vaſſal, he ought to have the Rents of the Lands due, in the Interval between the Forfaulture and the Preſentation, as in a Non-entry. Now, as in this Caſe, when the Heir ſerved, runs the Precept againſt his Superior, the Caſuality ceaſes; ſo, the offer of this Preſentation, and an Inſtrument taken upon the Superior's Refuſal, will put a ſtop to his uplifting the Rent of the Lands Vacant by Forfaulture,

giving Infeftment upon Compriſings: But in my Judgment, the former Courſe is more certain; for by it, the Party, after ſome Delay, obtains a real Right by Seaſin from the Sheriff, but in this other, the hail Order reſolves in Horning, but not in a real Right.

and the Tenants or Intrometters, ſhall become liable to the new Vaſſal preſented by the King.

As a Remedy to the Inconveniency pointed at in the end of this §, by the Author; it is to be obſerved, That if the Superior do not, within the Days of the Charge, grant a Charter required by the Precept, the Donatary preſented, upon Supplication to the Lords of Seſſion, ſeting forth the Superior's Contempt, will get a Warrant to the Director of the Chancellary, for iſſuing out Precepts to the Sheriff, for giving Infeftment, as in ſome of the Caſes to be found in the Notes, § 26. *t.* iv.

§ 15. If the King be pleaſed to diſpone the Right of Forfaulture or Baſtardy in Favours of the immediate Superior, it cannot be done directly and immediately in Favours of the Superior himſelf, but muſt be done by

By an Act of the Parl. of *Great Britain, Auguſt, primo Georgii R.* 1715. Parl. 4. Seſs. 2d. It is enacted, That in Caſe a Vaſſal become guilty of high Treaſon, his Lands are to Return to his loyal Superior, and the Property ſhall be conſolidated with the Superiority, as if they had been reſigned *ad perpetuam remanentiam*, and if a Tenant become guilty of Treaſon, and convicted, his Tack, or whatever other Title by which he poſſeſſeth, is declared thenceforth

by Preſentation, in Favours of a third Perſon to his Behoof, who being infeft by the Superior, muſt reſign in the Superior's Hands *ad perpetuam remanentiam.*

forth void, and the Lands, &c. together with the ſimple and liferent Eſcheat of ſuch Tenant, is to return to the peaceable and dutyful Maſter: But if the Superior or Maſter obtain not himſelf infeft, or neglects to do Diligence, for attaining Poſſeſſion within 6 Months after Attainder, the Benefit of Forfaulture ſhall belong to the King.

§ 16. *Item*, Albeit, the Lords of Regality, has Right to the Eſcheats of the Inhabitants within their Regality, vacant by Horning; yet, where the Eſcheats vaiks by Forfaulture, the Lords of Regality

 has

This is according to the Doctrine delivered by *Craig* in his Treatiſe of Feus, B. 3. *Dieg.* 6. § 6. towards the End, P. 370. Where he mentions a Plea of Competition in this Behalf, which fell out in his Time, between the King's Advocate and the Procurator-fiſcal of the Arch-Biſhop of *Glaſgow*.

I find no Deciſion, determining the Caſe of Baſtardy, in the mean Time it may be thought, that the Deciſion would be the ſame as in Forfaulture. It is to be obſerved, That the Eſcheats of Indwellers in a Regality denounced at the Croſs of the Shire, where the Regality hath no particular Place for Denunciation, do fall to the Lord of the Regality, and not to the King or his Donatary. See *Murray* againſt *Arnold*, *June* 19. 1674, obſ. by *Stairs*, and not only the Goods belonging to the Rebel, and lying within the ſame Regality, but alſo all others his Goods and Moveables, lying in any other Territory or Shire, fall

to

has no Right thereto, but the ſame only pertains to the King.

to the Lord of Regality, becauſe moveable Goods and Sums follow the Perſon denounced, and his *Domicile mobilia ſequuntur perſonam*, *Young* againſt the Laird of *Raploch*, *June* 26. 1680.

§ 17. And as to Eſcheats vacant by Baſtardy or laſt Heir, it remains contraverted, and remains yet undecided, whether or not, the ſame pertains to the Lord of the Regality, or to the King. Caſualities vacant by Eſcheat, Forfaulture, Horning, laſt Heir, Baſtardy, *&c.* albeit, lawfully expede through the hail Seals and Regiſters requiſite; yet, the ſame eſtabliſhes no real Right or Title in the Perſon of the Receiver, except he obtain Declarator thereupon, either general or ſpecial, and after Declarator, *habetur pro Titulo*, but no otherwiſe.

Such Gift, is like to a naked Aſſignation, *i. e.* not intimated to the Debitor. See the Notes on § 20. *h. t.* concerning the Force and Effect of a general Declaratory, and of a ſpecial One, the Difference between the one and the other.

§ 18. But there is this Difference betwixt Eſcheats, or Gifts of temporary Caſualities, and betwixt Gifts of Forfaulture and Recognition, *viz.* That in the former,

former, a poſterior Gift, with prior Diligence, will be preferred: But where Infeftments are lawfully expede under the Great-Seal, upon Forfaulture or Recognition, and Seaſin lawfully following thereupon; in this Caſe, no poſterior Infeftment, albeit cloathed with prior Diligence, will be preferred to the Firſt, and the Difference is from the Nature of the Caſualities, the Firſt being a Caſuality, either of Moveables, or of a temporal Right; and the other being of an heritable Right, and conſequently of the Property of the Lands.

Becauſe Seaſin on a Charter under the Great-Seal duly regiſtrat, compleats the Right; for in this Caſe, Poſſeſſion of the Subject is not requiſite, towards the perfecting of this real Right, which, *ſui Natura*, is publick. See § 5. Tit. v. and the Notes.

§ 19. *Memorandum*, where Forfaulture paſſes in Parliament, there the Donatar needs not crave a Declarator upon his



A Declaratory upon theſe Gifts, ſerve to publiſh, to all and ſundry concerned, That either the laſt Proprietary was guily of leſe Majeſty, or of civil Rebellion, or that he died a Baſtard, or has no kind of Heir, *&c.* wherethrough his Lands and Eſtate are caducous, and fall to the King. But when the Forfaulture proceeds upon a Decreet of Parliament, or when the Gift is made by the King, with Conſent of the three Eſtates, a farther Publication is unneceſſary, becauſe all the Leiges are repreſented by theſe

Right, but where the Forfaulture paſſes by Act of Adjournal in Juſtice-Court, there a Declarator muſt be obtained.

the ſeveral Members of Parliament; and whatever is done by the Repreſentatives, or is known to them, is, in Law, preſumed to be done by the Conſtituents, and ſufficiently notified to the whole People.

§ 20. *Item*, The Difference between a general Declarator and ſpecial, is this, That the general Declarator is only a Decreet of the Lords, finding, That the Goods or Lands con-

The Decreet of general Declarator, proceeds upon a Summons, at the Inſtance of the King's Advocate for his Majeſty's Intereſt, either as King, or as Superior, or at the Inſtance of a Lord of Regality, (or his Bailie, if he hath Right,) either as Lord of the Regality, or as Superior of the Lands; or laſtly, at the Inſtance of a Subject Superior, according to the diverſe Nature of the Caſuality, againſt the Vaſſal, (if the Caſuality be an Eſcheat, ſingle or lifetent,) or if it be a Forfaulture (and the rebellious Vaſſal dead,) or a Baſtardy, or if it be an *ultimus hæres*, it is againſt the Preſumptive or apparent Heir, or the Perſon who would have ſucceeded to the Subject, if it had not been confiſcated. In this Summons, the Gift, and the Thing gifted, Moveable or Immoveable, is narrated; and then concludes, That it ſhould be declared by Decreet of the Lords of Council and Seſſion, That the Goods, or Subject of the Gift, pertained to the Rebel, or a Defunct who died Baſtard, or without an Heir; and thereafter fell, and belonged to his Majeſty, and became at his Gift and Diſpoſition, by Reaſon of Forfaulture, or Baſtardy, or laſt Heir: Through the Party's being convict of high Treaſon, &c. as in the Decreet of Forfaulture, or by his being born Baſtard,

containd in the Gift, vaiks in the King's Hands, by the Manner of Vacation contained in the Gift, and that thereby the Donatar, has good Right to the Goods or



ſtard, and deceaſing ſuch, without Heirs of his own Body, or lawful Diſpoſition made by him thereof; and conſequently, That ever ſince the ſaid Gift, theſe Goods belong to the Purſuer as Donatary, to be uſed and diſpoſed upon by him as his own, *&c.*

If it is a Gift of a ſimple Eſcheat, the Summons mentions, That the King had diſponed to the Purſuer, the Eſcheat of all Goods, Gear, *&c.* which pertained of before to ——— the Time of his Denunciation to the Horn, and fallen to the King, and at his Majeſty's Gift and Diſpoſition through the ſaid ——— his being orderly denounced Rebel, and put to the Horn for not Payment making, *&c.* (or any other Cauſe which is ſpecified in the ſaid Gift.) By Vertue whereof, the King and his Donatary have Right to the eſcheatable Goods, and ſhould be anſwered and paid thereof, and therefore it ſhould be declared by Decreet of the Lords of Council and Seſſion, That the ſaid ——— was orderly denounced Rebel and put to the Horn, by Vertue of the ſaid Letters of Horning, *&c.* and that there-through, the Eſcheat of the ſaid whole Goods and others pertaining to the ſaid ——— the Time of the ſaid Rebellion, or which belonged to him ſince, and that ſhall accreſce to him during his Rebellion, now pertains to the King; and conſequently to his Donatary the Purſuer, and that they ought to be anſwered and obeyed thereof, after the Form and Tenor of the ſaid Gift of Eſcheat in all Points.

The Summons of ſpecial Declaratory of a ſimple Eſcheat mentions, That the Purſuer had raiſed Action of general Declaratory, and had obtained Decreet in the ſaid Matter: Whereby it was found, *&c.* (as is expreſt in the Summons, and then it is ſubſumed;) by Vertue of the which Gift, and Declaratory following thereon, the Purſuer has good

Lands diſponed to him in his Gift, and does not proceed further againſt the Intrómetters with the Goods, or the Detainers of the Lands; but the Special is not only craved

Right to the eſcheatable Goods pertaining to the ſaid ——— the Time of his Rebellion, *&c.* And true it is, That the ſaid ——— the Time of the ſaid Rebellion, and ſince, had, and has belonging to him, the Goods and Sums of Money, *&c.* reſting by, or in the keeping of the Perſons afternamed, *viz.* (after which the Goods and Debts, with the Names of the Debitors, were ſpecially ſet down;) and albeit, it be of Verity, That the Purſuer has ofttimes required the Defenders to make Payment and Deliverance, *&c.* after the Form and Tenor of the ſaid Decreet of general Declaratory, Bonds and other Grounds of Debt; nevertheleſs, they wrongouſly refuſed to do the ſamen, unleſs they be compelled.

The ſpecial Declaratory of a Liferent Eſcheat which touches Land-rents, does not much differ from the other, the Difference being in the Subſumption, which is of this Tenor, ——— And ſicklike, the Perſons afternamed, Tenants and Poſſeſſors of the Lands and others afterſpecified, pertaining heritably to the ſaid Rebel, holden by him of his Majeſty, as Superior thereof, as ſaid is, are owing to the Purſuer, as Donatary foreſaid; the Mails and Duties of the ſame, aftermentioned, yearly, the Crops underwritten, of the Prices after expreſſed, each of them for their own Parts, according to the ſeveral Proportions, as is after divided, *viz.* *&c.* and albeit it be of Verity, *&c.* as in the former Summons of ſpecial Declaratory of the ſingle Eſcheat.

It may be obſerved, That a general Summons in a proper Senſe, does ſolely deſerve the Name of Declaratory; and that the ſpecial is rather a petitory Action. Beſides, the Lords of Seſſion are the ſole Judges competent to all Declaratories of all Sorts, which cannot, in Law, be proſecuted in an inferior Court. And it is well known, That after

ved againſt the Party to whom the Goods or Lands pertained, *& per cujus culpam* the ſame Vaiks in the King's Hands, but alſo it is raiſed againſt the Intrometters with the Goods for Payment thereof, or the Price of

after Decreet of general Declaratory is obtained and extracted, the Donatary may purſue Debitors or Tenants, either by Actions of Payment of Mails and Duties, &c. or by Arreſtments before any inferior Court, which could not be done, if this Action, whereby the Gift is ſpecially applyed, were Declaratory.

Now, the Difference, and peculiar Effects of theſe two, are manifeſted in the following Particulars. A Rebel may, at any Time before intenting a general Declaratory, diſpoſe of his Moveables to his Creditors, for paying Debts contracted before Rebellion; but he cannot diſpone his Lands in Prejudice of the Liferent, while it is running, and the Argument, *a ſimuli*, does not hold, becauſe the firſt Practick is only introduced in Favour of a Creditor who has a pretended Poſſeſſion of moveable Goods, and ſo has made them his own, *bona fide*. See *Spotiſ.* Pract. Tit. *Eſcheat*, § 12, and 23. and Tit. *Horn.* § 38. —— 2. After a general Declaratory of Liferent, the Donatory has no Right to the Farms, till Intimation of his Gift be made to the Tenants by Form of Inſtrument, or till Summons for Mails and Duties be executed, which is equivalent to Intimation; for, till that be done, the Tenants are not put in *male fide* to pay their Rents to their Maſter; as was found in a ſpecial Declaratory purſued by *Cleghorn* younger, againſt his Father's Tenants. *Spotiſ.* Practicks. Tit. *Eſcheat*, § 11, and 13. *Dury*, P. 336. 3. Arreſtment laid on after Gift of Eſcheat, and general Declaratory thereof obtained, will be ſtopt by the Donatary compearing in the Forthcoming, and proponing upon his Intereſt, becauſe the Rebel's Goods cannot be taken from the Donatary by any Arreſtment ſubſequent to his Declaratory. *Spotiſ.* Tit. *Eſcheat*, § 27. Again, in the Caſe of the Laird of *Corsbie*, who had compriſed

of the ſamen to the Donatar, or againſt the Tenants and Occupiers of the Lands, for Payment of the Mails and Duties of the ſamen, of all Years and Terms that the ſame has vaiked in the King's Hands.

priſed the Lands of *Eccles*, and being infeft, purſued a Removing; in which a Donatary of the Debitor's Liferent Eſcheat compeared, and pled upon a Decreet of general Declaratory of his Gift; but, in Reſpect he could not alledge Poſſeſſion of the Lands by Virtue thereof, and that he had no ſpecial Declarator thereupon, he was repelled. *Spotiſ.* Tit. *Eſcheat*, § 46. 4. In a Purſuit by L. *Muckal* againſt *Robert Steuart*, for declaring of his Liferent of ſuch Lands as he held of *Muckal*, the Lords found, That no ſuch general Summons could be ſuſtained at the Inſtance of a Subject, albeit the King has, *jure Coronæ*, ſuch Priviledge, whereby it is preſumed, That all the Subjects hold their Lands of his Majeſty, unleſs it be otherways ſhown; whereas another Superior, if he claim any Thing from his Vaſſal, he muſt qualify him to be ſuch, and muſt be ſpecial therein; and if a Subject-ſuperior libelled his Summons upon any ſpecial Lands, the Lords found it ought to be proven, That he held the Lands of him, and ſo the Summons ought to have two Diets. See *Dury*, P. 3.

§ 21. *Memorandum*, The general and ſpecial Declarator may be accumulate and ſubjoined in one Summons; but, if ſo be, the Summons bides Continuation, in Reſpect it bides Probation; whereas, if the Sum-

See in *Dallas*'s Syſtem of Stiles, ſeveral Summons of Declaratory, both general and alſo ſpecial, ſeparately and conjoined, as a Summons of general Declaratory of Baſtardy upon a Gift of Moveables, *P.* 255. The like as to Heritage,

Summons only contain a general Declarator, the ſame needs no Continuation, becauſe the ſame are verified *inſtanter*.

tage, *P.* 256. Summons of general Declaratory of a Gift of *ultimus hæres*, *P.* 258. Summons of general Declaratory of a Gift of ſingle Eſcheat, *P.* 288, 289, 292, 294. Summons of ſpecial Declaratory of ſingle Eſcheat, *P.* 290, 294, 296. Summons of general and ſpecial Declaratories of Eſcheat, ſingle and liferent, accumulate in one Summons, *P.* 297.

§ 22. But, according to the old Cuſtom obſerved before the Lords, where the Summons did contain both general and ſpecial Declarator, the Purſuer may crave Decreet upon the General, which will be granted to him by the Lords, if the Defender have no relevant Exception to ſtay the ſame: And alſo, upon that ſame Summons may crave a Day to prove the ſpecial Declarator, which will alſo be granted; and ſo, upon one Summons, there is both

This Cuſtom is in Force at this Day; but by our preſent Form of Proceſs, before the Purſuer is allowed to reſume his ſpecial Declaratory, he muſt extract a Decreet upon the General, and lay it in the Proceſs, which the Defenders, one or more, will be allowed to ſee; and, at the ſame Time, they will be ordered to be in Readineſs to debate at next Calling, upon the Libel of the ſpecial Summons. In a Summons of general Declaratory of Eſcheat, ſingle or liferent, the Title is the Letters of Horning, Execution and Denunciation, all duly regiſtrate, either the Principal, or

both granted a Decreet for the general, and *Litiscontestation* made in the ſpecial.

or Extract thereof, conform to Act 75. Parl. 1579. with the Gift by the King or Superior: But in the ſpecial Action, the Decreet of general Declaratory alone, is Title ſufficient. See *Dury*, *P.* 271. and *P.* 268. and *Spotiſ.* Pract. Tit. *Eſcheat*, § 21.

# TITLE VIII.

## *Of Signatures.*

§ 1. A Signature is properly a Letter of Gift, Donation or Diſpoſition, which paſſes under the King's Hand, in Favours of any Subject, which, according to the ſeveral Natures thereof, paſſes either under the Signet only, or under the Privy-ſeal only, or

The Word *Signature*, is French, (as are many other Terms and Words of our Law) and in General ſignifies a Subſcribing, a Sign manual, ones Hand or Mark ſet unto a Writing. In old Books, (written when a few could write) it ſignifies a Seal, or Sealing. And in this Title, and in Diſcourſe, or Papers relating to Conveyances by the Sovereign to the Subject, we expreſs by this Word, the Conveyances of Goods, moveable or immoveable, whether Property, or Rents and Caſualities, at the King's Diſpoſal, either *jure Coronæ*, or as Superior, when theſe Rights are draughted

or under the Geat-ſeal only, or under the Quarter-ſeal only, which is the Teſtimonial of the Great-ſeal; or paſſes under all the Seals, except the Quarter-ſeal.

draughted and formed, in Order to be ſigned, and when ſigned by the King. But then this Denomination is given no longer, than when theſe are in their Commencement, and not compleated; for, when they are perfected, by being recorded in Regiſters, and ſealed by Seals proper to each, they get another Name, as a Gift of Eſcheat, a Gift of Ward, of Baſtardy, &c. or when Lands are diſponed, the Signature becomes a Charter. This Word is applyed only to Rights under the King's Hand, not compleated by paſſing the Seals, as is hereafter declared, and ſignifies the ſame Thing as naked Aſſignation, or naked Diſpoſition, by a Subject. The Term *Signature* is uſed to expreſs the noting upon a Proceſs, when ſigned by the Judge. See the *Scots-law-lexicon* for this Word.

Before the Act 7. Parl. 1672. the Precept of Seaſin following on Charters under the Great-ſeal were not (as at this Time) ingroſſed with the Charter, and placed at the End of it; but was (after the Charter had been ſealed and marked by the Keeper of the Great-ſeal) brought to the Chancellary, written in a ſeparate Parchment, which the Director ſealed by the Quarter-ſeal; and this alone was a ſufficient Warrant for giving Infeftment; ſo that the Quarter-ſeal was appended to Parchments peculiar to it ſelf, and not in common with the other Seals, as ſhall be ſhown in the Appendix, wherein is declared the Manner of expeding Signatures, through all, or any of the Seals.

§ 2. There are two Kinds of Signets, one of the Secret-council, another of the Seſſion

Every Sovereign Court hath its own Seal or Signet; but the Signet which is kept by the Secretary of State, and his

Seſſion, and the Keeper of both is the King's Secretary and his Deputes.

his Deputies, is more univerſal; for, by it, we ſeal and ſtamp all Letters, Executorials and Citatory, as Summons by Warrant of the Lords, or upon their Decreet, or for Compearance before them; as alſo all Precepts directed to the Keeper of the Privy-ſeal, all theſe being written by Direction of a Writer to the Signet (called Clerks to the Signet) and ſigned by him. And this being properly the Signet of the Seſſion, Letters of Diligence, for citing incidenter Parties, in a Proceſs, or Witneſſes, tho' Written in the Office of a Clerk to the Seſſion, are alſo ſealled by this Signet: But the Dues for ſigneting, are paid to the Secretary's Depute. The Court of Juſticiary make uſe of the ſame Signet, the Clerk writing the Indictment, and Letters Executorials, which are paſſed by Warrant from the Lords, Commiſſioners of Juſticiary; and he pays to the Secretary's Depute, the Dues for ſigneting. The Lords of Seſſion, as Commiſſioners by Parliament, for Plantation of Kirks and Valuation and Sale of Tiths, make uſe of the ſame Signet with the Seſſion: But the Clerk of Court alone Writs the ſame Summons and Letters that are ſtamped, and pays the Dues for ſigneting. The Clerk to the Privy-Council, keeps for his own Court a Signet, (which had an ingraving like the other,) the Dues for ſigneting were paid to himſelf. The high Judge-Admiral hath his own Signet, of a Stamp proper to his Court, which is kept by his Clerk, who therewith Seals all Libels before the Court. The Commiſſaries of *Edinburgh*, who, in Matters conſiſtorial, are, *quodamodo*, Sovereign, as being the only Judges of theſe Cauſes in the firſt Inſtance, have their own Signet kept by their Clerk of Court, having a peculiar Stamp; the Dues for ſealing being paid to the Clerk.

§ 3. Under the *Signet of the Secret-council*, paſſes all Commiſſions and Licences granted by the Secret-council, with all Letters,

Letters, either for Citation or Horning, in Cauſes belonging to the Secret-council.

§ 4. Under the *Signet of the Seſſion*, paſſes all Letters and Summons before the Seſſion, and criminal Letters before the *Juſtice*. And ſicklike, all Signatures which are appointed to paſs through the bail Seals, muſt firſt paſs through the Signet of the Seſſion.

§ 5. All Gifts of Caſualities, ſuch as of Eſcheats, Wards, Non-entries and Baſtardy, Letters of Penſions, Proviſions, and Preſentations to Kirks, and Benefices, not being Prelacies, paſſes under the Privy-ſeal immediately, and goes no further to any other Seal.

§ 6. *Item*, All Signatures of Benefices which are great, as of Prelacies and ſuch like, all Signatures of the Officers of Eſtate, paſſes under the *Great-ſeal* only, without any other Seal. And ſicklike, all Signatures which paſſes the Signet and Privy-ſeal, paſſes alſo under the Great-ſeal.

In General it is to be obſerved, that every Signature expreſſes the Seal under which the Writ to be expede thereon, is to paſs.

§ 7. *Item*, The Letters which paſs the *Quarter-ſeal*, are either *Precepts of Seaſin* upon

upon Infeftments paſt the *Great-ſeal*, or *Letters of Preſentation of* heritable Tenants, and *Vaſſals to Superiors* of forfaulted Lands, or Lands vacant by Baſtardy: And alſo, by Act of Parliament 1587, Commiſſions of Juſticiary are ordained to paſs the Quarter-ſeal. And ſicklike, all Commiſſions for hearing Theſaury Accompts, paſs the Quarter-ſeal.

By Act 7. Parl. 1672. the writing of Precepts of Seaſin, to or under the Quarter-ſeal, is ſuppreſſed, and for ever diſcharged; and it is ordained, That, in Lieu thereof, every Charter ſhall, towards the End, contain a Precept of Seaſin of all the Lands and others contain'd therein, which ſhall be as ſufficient for taking of Seaſin, as if the ſame were paſt under the Quarter-ſeal; ever ſince which Time, the Precepts of Seaſin are ingroſſed in the Charter, and paſs under the Great-ſeal only.

The Act here cited, is the 81. Parl. xi. *James* VI.

*Commiſſions of Juſticiary*, when granted by the King, are now under the *Great-ſeal*, and *M'Ken.* in his Obſervations on the Act cited, ſays, They are ſeldom or never under the Quarter-ſeal; and that when ſuch Commiſſions were granted by the Lords of Privy-council, they were only ſigned by a *Quorum*, and under no Seal.

§ 8. *Item*, Of old, in further Corroboration of the Decreets of the Lords of Seſſion,

This might have been the Practice, when the two Courts, *viz.* the Lords of Council, and next, that called the Seſſion, obtained, before the Erection of the College of Juſtice: But I find, in our Records, extent at this Day, no Veſtage of it. However, it is worthy the Pains of a curious

ſion, the ſame were ratified by his Majeſty, under the Quarter-ſeal.

curious and critical Lawyer, to enquire into the Antiquity of this Cuſtom, with the Manner of appending the Quarter-ſeal, which may be got from the Decreets, if any be extant; alſo it were fit to know, the Period of Time when this Practice ceaſed.

§ 9. All the Signatures, when the King was in *Scotland*, paſt the King's own Hand, and were ſubſcribed at the Foot thereof; but, ſince his going to *England*, the ſame are all ſubſcribed and ſigned, either by the King with his own Hand, or by a Caſhet, (which has the King's Name, and whole Letters thereof, as he uſes to write the ſamen, engraven thereon) which Caſhet is keeped by the Chancellour, and all Signatures muſt paſs his Majeſty's own Hand, which are excepted out of the Commiſſion granted

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Since the Union of the two Crowns of *Scotland* and *England*, in the Year 1603, and to this Day, the Commiſſion to the Lords of Exchequer, giving Power to them, by themſelves, without other Warrant from the Sovereign, to paſs the Signatures therein named, extends no further, than to the Matters therein expreſſed; and therefore, all other Signatures muſt be under the King's own Hand, and Sign manual, which is now put at the Head of the Signature; and at the End thereof, there is an Abbreviat of the Signature, called a *Docket*, ſign'd by the Secretary of State, who muſt notice every Writing to be ſigned by the King; and is anſwerable,

granted by His Majeſty to the Lords of Exchequer, or which are not contained within the ſaid Commiſſion, ſuch as Remiſſions for Treaſon, Slaughter, Witch-craft, and others of the like Nature, being of great Importance.

ſwerable, if he preſent, and get the King's Hand for any Thing amiſs, hurtful either to the Common-wealth, or to His Majeſty's Honour or Intereſts. See in the Stile Book, the Form of a Docket. And becauſe it is neceſſary to have the King's Name prefixt to all Signatures; therefore ſuch, as without coming to the King's Hands, paſs the Exchequer in *Scotland*, are marked with the Caſhet, (a Cuſtom we have borrowed from *France*, there called, *Le Caſhet du Roy*, the Privy-ſignet) wherein there's no Seal, but only the King's Name, in Imitation of his Subſcription, engraven on Silver; and the Hollow filled with Ink, and ſtampt on the Head of the Signature, where the King's true Sign manual is in uſe to be ſet; ſo that, if this Stamp be artfully applied, one will ſcarce diſcern a Difference from the true Hand Writing.

§ 10. All Signatures which may be paſt by Virtue of the Commiſſion of the Exchequer here beneath, paſs by the Caſhet.

By the Words *here beneath*, is meant the Court of Exchequer here in *Scotland*; and in ordinary Diſcourſe, when we ſpeak of the King's Court, or Secretary Office at *London*, we make Uſe of the Word *above*.

§ 11. The Form of paſſing Signatures, whether the ſame be ſigned by his Majeſty, or caſheted, is this, *Firſt*, The ſame are formed by a Writer to the Signet, and marked

marked with his Name on the Back. 2*do.* They are delivered by the Party, to the Preſenter of the Signatures, (who now is Mr. *Patrick Brown*) and he makes a Roll thereof, and affixes the ſame upon the Exchequer Wall, ilk Week, about *Wedneſday*, which is four Days before the ſame be preſented to the Exchequer, which is uſual upon the *Saturday* thereafter. 3*tio.* The Treaſurer, before the ſame be preſented, conſiders the Signatures, with the Writs neceſſary for the Verification thereof, and hears Parties make Offer anent the Compoſition to be paid for the ſame. 4*to.* The ſame are paſt and compounded by the Lords of Exchequer, whereof the Quorums is now, by Virtue of the laſt Commiſſion of Exchequer, four of the Number, with the Treaſurer, or Treaſurer Depute, and the Compoſition is written at the End of the Signature by the Preſenter; which Compoſitions are made leſs or more, according to the Lords Pleaſure. 5*to.* The Signature being paſt by the Lords of Exchequer, the ſame are retained by the Preſenter, till the Party pay the Compoſition, which is paid to one of the Receivers, who toſtifies the Receipt thereof, by his Subſcription on the Back of

the Signature. *6to.* The Signatures are caſheted by the Chancellour or his Deputes, (who now is Mr. *Francis Hay*) who affixes the ſame *gratis.* *7mo.* The Signatures thereafter muſt be regiſtrate in the Regiſters of Treaſury, Comptrollary, Collectory and Treaſaury of new Augmentations, or one or other of the ſaids Regiſters, or all of them, according to the Nature of that which is diſponed in the Signature; for, albeit all theſe Offices be jointly in the Perſon of the Treaſurer; yet, becauſe their Inſtitution from the Beginning was ſeveral, and had their ſeveral Regiſters, which were, and are, the Office and Charge of ilk Officer; therefore, the ſaids Regiſters as yet remains unconfounded; likeas, the yearly Compts are as yet ſeverally made, *viz.* the Treaſury, which comprehends the hail Caſualities falling to the King yearly, and of the Comptrollary, which comprehends the Rents of his Majeſty's Property, Cuſtoms, Impoſts, Burrow Mails; and laſt, of the Collectory and Treaſury of new Augmentations, whereof the Collectory, by Inſtitute *Anno* 1561, comprehends the Superplus of the Teinds of Benefices, and the Treaſury of new Augmentations being in-

ſtitute at the making of the Act of Annexation in *Anno* 1587, comprehends the Feumails of Kirk Lands and blanch Duties of Erections.

§ 12. *Item*, After the Signatures are paſt the Regiſters, the ſame are returned by the Party to the Writer to the Signet, who wrote the ſamen; who, conform to the Warrant contained in the End of the Signature, (which bears, *And that Precepts be direct hereupon in Form, as effeirs*) draws up a Precept in Latin, direct to the Lord Privy-ſeal, making Mention of the Signature, and commanding him to expede the ſame under the Privy-ſeal; which Precept bears, in the End thereof, theſe Words, Datum *under our Signet*, the ——— Day of ——— Years; and under that is written, *Per ſignaturam S. D. N. R. et Dominorum ſcaccarij, ſupra et ſubſcriptam, vel ſupra ſignatam et ſubſcriptam.* And this Precept is ſubſcribed by the Writer to the Signet who wrote the ſame, and is ſealed with the Signet kept by the Secretary or his Deputes, who, for their Warrant, retains the Signature in their Hands, and delivers the Precept under the Signet, to the Party who carries the ſame to the Writer to the Privy-ſeal,

who, thereupon draws up a new Precept in Latin, direct to the Chancellour, Keeper of the Great-ſeal; and this Precept bears, at the End thereof, *Datum ſub noſtro ſecreto ſigillo apud*------; and has underneath it, *Per preceptum datum ſub ſigneto noſtro*-------; and this Precept is commonly written in Parchment; whereas, the firſt is only in Paper, and is ſubſcribed by the Writer to the Privy-ſeal, and has the Privy-ſeal appended thereto by a Tag, in white Wax only; and after it is ſealed, it is returned to the Writer to the Privy-ſeal, to the effect it may be regiſtrate in his Books, who writes on the Back thereof, (*Written to the Privy-ſeal, and regiſtrate ſuch a Day*) and alſo the Keeper of the Privy-ſeal, when he appends the Privy-ſeal thereto, retains the Precept under the Signet for his Warrant, and writes on the Back of his Precept, (*ſealed ſuch a Day*) thereafter delivers the ſaid Precept to the Party, who takes it to the Director of the Chancellary, who writes out a Charter in Latin, in the ordinary Form of Charters in Latin, agreeable to the Tenor and Subſtance of the Signature and Precepts; and this has, in the End, (*Datum ſub magno ſigillo*) but bears nothing

thing under it, but allenarly has the Great-ſeal appended by the Chancellour, who, or his Deputes, writes on the Back thereof, (*Sealed ſuch a Day*) and after that, it is returned to the Director, who regiſtrates the ſame in the Regiſter of the Great-ſeal, and writes on the Back, ( *Regiſtrate tali die* ) and the Chancellour, at the appending of the Great-ſeal, retains the Privy-ſeal for his Warrant. *Item*, If the Signature or Infeftment be in Favours of the Chancellour himſelf, then the Charter bears, not only that the Great-ſeal is appended, but alſo that the Privy-ſeal is adjoined, and, *de facto*, they are both appended.

§ 13. *Item*, Becauſe ſome Letters and Charters which paſs the Great-ſeal, requires no more to be done, for the Perfection of the Right therein contained, as a Charter of Confirmation, or a Letter of Remiſſion for a Crime, or a Legittimation, *&c.* and others require a further Deed to be done, for the Perfection of the Right, *viz.* that Precept of Saſine, and Saſine, follow thereupon, as is in all Charters of Lands and Annualrents, either ſimple, upon Reſignation, or containing Gifts *de novo damus*, which may be ſubjoined either to confirmation or Reſignation, in theſe Caſes, im-

mediately after the Charter has paſt the Great-ſeal, the Director of the Chancellary gives forth a Precept under the Quarter-ſeal, for ſeaſing of the Party in the Lands or Annualrents diſponed to him, and this Precept is directed with a blank for inſerting of the Bailie's Name who is to give the Saſine; but ſo, that it ever deſigns them to be Sheriffs of the Shire where the Lands ly, Bailies in that Part; which is, in Effect, a conſtitution of any ſuch Perſons, to be Sheriffs and Bailies to the giving of the Saſine; and it is at the Parties Pleaſure, whom to inſert in the Blank: And upon this Precept delivered to the Party, Saſine is taken upon the Ground of the Lands, or any one of the ſame, for the hail, if they ly contigue, or upon every one of the Lands if they ly diſcontigue; except there be an Union contained in the Charter, with Power to take Saſine upon any one of

This Order is altered by Act 7th, Parl. 1672, which ſtatutes, *That all Charters, Infeftments, Commiſſions, Gifts and other Writs which paſs the Great and Privy-ſeals, ſhall be inſert in the Regiſters of theſe Seals, reſpectively, before the Seal be appended to them; and the Writers to theſe Seals, who keep the Regiſters thereof, to mark, by their Subſcription, That the ſeveral Writings are accordingly regiſtrate; and they're ordained to keep a perfect Minute-book, containing the Names, Sirnames*

of the Lands for the hail, notwithſtanding of the Diſcontiguity, in the which Caſe Saſine taken at the Place contained in the Union is ſufficient for the whole.

*names and Deſignations of the Perſons to whom the Charters, &c. are granted, with the Name of the Lands, and ſpecial Matters therein contained: And the Keepers of the Seals are diſcharged to append the Seals to any Writing which is not atteſted to be ſo regiſtrated.*

§ 14. *Memorandum*, This Precept of Saſine, which paſſeth the Quarter Seal *ut ſupra*, in this, differs from the Precept of Saſine upon Retours, *Firſt*, That they paſs not the Quarter Seal, but are direct forth of the Chancellary cloſed within the Seal, like to that which cloſes the Brieve: And ſicklike, the ſame contains no blank, but is direct in the Body to the Sheriff of the Shire where the Lands ly, and none can give Saſine thereupon, but the Sheriff Clerk or his Deputes; and alſo none can be Nottary to the Saſine but the Sherriff Clerk, or his Deputes; and if the ſame be done otherways, the Saſine is null by divers Acts of Parliament, in *Anno* 1555, and 1567. And the Reaſon of the Difference is this, becauſe the Sheriff muſt be anſwerable to the King for the *Reſpondee*

contained in the Retours: Whereas the Sheriff in other Precepts upon Infeftments paſſing by Signatures, is not to be charged for any Thing by the King.

The Acts cited are, Act 47. Parl. 1555. and Act 30. Parl. 1563. and not 1567, which is erroniouſly, written in the tranſcribed Copies: Likeas, both theſe Acts, with reſpect to Precepts on Retours, are ratified by Act 15 Par. 1606, ſee *S. Tit.* iv. § 16. *&c.* Sheriffs, Stewarts, *&c.* compear in Exchequer yearly in the Month of *July*, to make their Æque.

§ 15. Saſine muſt be taken, not only upon the Ground of the Lands, by Deliverance of Earth and Stone, but alſo of the Mill *per expreſſum*, by Deliverance of the Clapper; and of Salmon-fiſhing by De-

See the Notes on *M'Kenzie's* Inſtitut. Title iii. § 16, 17, 18, 19. *Craig* in his Treatiſe of Fiars, gives in this Matter a fundamental Rule, *Quot ſint fundi diſcontigui aut tenementa diverſi generis nec in Charta unita totidem Saſinæ debeat intervenire, Lib.* ii. *Dieg.* 7. § 13. *P.* 181. As many Tenements, as many Saſines. Now, tho' all Lands be of one and the ſame Kind, yet they may be different Tenements, as if they be Diſcontiguous. 2. If they hold of different Superiors. 3. And albeit they all hold of the ſame Superior; yet, if they have different Tenure s, or Ways of holding. In the next Place, Things of different Nature, as Mills, Fiſhings, Patronages, Juriſdictions, are reckoned to be different Tenements, and therefore each require a ſeparate Saſine proper to themſelves, for each of them have peculiar Symbols: See the *Art and Office of a Nottary Publick.*

When

Deliverance of a Net, *quia hæc ſunt inter regalia & requirunt ſeparatam Saſinum.*

When a Mill is new built, it accreſces to the Ground, ſo that the Heritor needs not a Saſine of the Mill; but his Heir muſt, by the proper Symbol, be expreſly infeft in the Mill, as well as in the Land. Again, tho' Towers be *inter regalia*, and not being diſponed expreſly, the Vaſſal has no Right to them by his Saſine of the Lands; nevertheleſs, if the Heritor build a Tower by Licence from the Sovereign, (for they cannot be erected otherwiſe) it goes with the Ground.

*Regalia.* ] This Word is frequent in feudal Treatiſes, and ſignifies all the Things, Rights, Powers and Prerogatives which belong to the King as Sovereign, as the Power Gubernative, Legiſlative, Judicative, the Power of Life and Death, War and Peace, wafe Goods, *&c.* Minting of Money, with many moe: They are by Lawyers divided into *Regalia incommunicabilia*, and *communicabilia*, *Majora* and *Minora*. See *Craig de Feud. Lib.* i. *Dieg.* 16. *de jure Regis, in feudis & de Regalibus G. Ad Struvi Syntagma juris feudalis, cap.* 6. *Aphoriſm* 14. ——— 30. Moreover, the Enſigns of Royalty, the Crown, the Sceptre, the Sword of State, and ſuch like Things uſed at the Coronation of our Kings, are called *Regalia*: See the Relation of the Coronation of King *Charles* the I. and of his Son King *Charles* the II. in *Scotland*; and the Relation of the Coronation of King *Charles* the II. at *Weſtminſter*, ſet forth in *Baker*'s Chronicle. See the *Scots*-Law-Lexicon, *Verb. Regalia, Royalty, Prerogative, Regality.* Now, the building of a Mill, Salmon-fiſhing, Patronage of Kirks, Courts, and others ſicklike, are reckoned among the *Regalia minora* and *communicabilia.*

§ 16. For *ea quæ ſunt inter regalia*, require expreſs Diſpoſition, as a *Tower*, or *Mannour-place*, a *Mill*, a *Salmon-fiſhing*, a *Port* or *Haven*, *a Burgh of Barony*, a *Right*

*Right of Patronage, Juriſdiction of Court,* and Blood, and none of theſe can be diſponed

It is a general Rule among the Feudiſts, *Regalia ſeu quæ jure Regali habentur generali conceſſione haud tranſferruntur*, See *Struv. Syntag. jur. feud. cap.* vi. *aph.* 23. No. 2. And the Authors cited by him, It is the Opinion of Lawyers, That the *Regalia* are not conveyed and tranſferred, by a general Grant, or by the general Words, ſuch as *Part and Pertinents*, in the Charter.

What is ſaid in the End of this §, ſeems to contradict what is delivered towards the cloſe of the preceeding: However, in general, ſome Things require no ſpecial Saſine, as a Tower, Fortulace, or Juriſdiction to hold ſuch Courts as are inherent and conſequential to the Right of Property; as may be ſeen in *M'Kenzie's* Inſtit. B. 1ſt. Title 4. § 11. But again, other Things which are of greater Moment, as Patronages, criminal Juriſdiction, *&c.* require a ſpecial Saſine; and if Power of holding Courts be granted, the Heritor may impoſe and exact Fines in Conſequence thereof, impriſon Delinquents, *&c.* without any other expreſs Diſpoſition or Saſine, *Craig Lib.* ii. *de Feud. Dieg.* 8. § 4. *P.* 165. Concerning Mills, he expreſſes himſelf thus, *Sane cur molendina cum ſolo inhæreant ſub Diſpoſitionem fundi non veniant, ratio probabilis vix reddi poteſt, niſi Conſuetudo quæ ſemper invaluit.*

It is much controverted, what this Word *Pertinent* contains, ſome think it comprehends theſe Things which have been poſſeſſed as *Pertinent*: And ſeeing Poſſeſſion conſiſts in Fact, it may be thought, that the Queſtion, What is Part and Pertinent, may be proven by Witneſſes. Others again, are of Opinion, That Lands which are not contiguous and marching together, when another Man's Property is interjected, cannot be called Pertinent. Nevertheleſs Poſſeſſion of ſuch diſcontiguous Lands, paſt Memory of Man, as Part and Pertinent, was ſuſtained in a Proceſs between the Earl of *Angus* and *Home* of *Polwarth*, mentioned by *Craig, Lib.* ii. *Dieg.* iii. § 20. *Page* 149. And in a Reduction of the Earl of *Marr contra*

Vaſ-

poned *ſub nomine pertinentiarum* of Lands, albeit they all inhere in the Lands diſponed, or adhere thereto, *vel tanquam, ſuperficies in ſolo, vel tanquam diſtrictus & juriſdictio in territorio*: But yet albeit all theſe require a ſeveral Diſpoſition and expreſs, yet all require not a ſeveral Saſine, nor a diverſe Form thereof; but only the Mill and Salmon-fiſhing, and as to the reſt, if they be *per expreſſum* diſponed in the Charter, the Saſine being taken

Vaſſals, one of them alledged, that he, and his Predeceſſors were for the Space of two hundred Years infeft in theſe Lands, which were deſigned to ly in the Shire of *Aberdeen* only, and not in the Earldom of *Marr*, or Lordſhip of *Garrioch*. The Earl replied, and offered him to prove them Part and Pertinent of the Earldom of *Marr*, which the Lords ſuſtained to be proven by publick and authentick Writs, and Evidents, with this Declaration, That for proving thereof they would not think the Exchequer Rolls alone, ſufficient, except he proved it by other Evidents. Beſide *January* 23*d.* 1634. in *Spotiſ. Pract.* Tit. *Parts and Pertinents* § ult. And in a Caſe *Forſyth* contra *Dury*, *March* 1632, obſerved by *Dury*, concerning a Rigg of Land, the Lords found Diſcontiguity made not the Rigg to ceaſe to be Pertinent of two Acres; *ſpecially*, when there was no Right to the Rigg in the Perſon of the Excepient.

There is a Difference between *Part* and *Pertinents*, for as in the Caſe abovementioned, a Portion of Diſcontiguous Lands may be *Pertinent* to other Lands, but cannot be called a *Part* thereof, becauſe they were not conjoined.

In Caſes of this Kind, which are obſcure and very doubtful, the Lords of Seſſion allow to both Parties a joint Probation,

taken upon the Ground of the Lands ſimply, is ſufficient for the ſame.

bation, and determine for the moſt pregnant, as *Dury* obſerves, *P.* 561.

§ 17. *Item*, Where a Barony is diſponed, *cum annexis connexis & pertinentiis ejuſdem*, it comprehends all Towers, Manor Places, Mills, *& omnia regalia*, without

*Barony.*] Baron, a feudal Word, tho' not found in the Text of the Books of Feus; yet it is ordinary among the modern Authors, and frequent in our Practiques and Cuſtoms: It ſeems to be of a *German* or *Gothick* Original from Bar *quaſi vir* A Man of Courage and Strength, both of Mind and Body, whom the Emperors imployed in their Councils of War, and in the Armies, and alſo in the Government of Provinces in Time of Peace. (*Craig* is of Opinion, this Title is more eminent than that of *Duke*, *Marquis*, *Count* or *Earl*) And the Emperor granted to theſe Barons, by feudal Inveſtiture, Lands, under a Denomination or Title of Dignity, called a *Barony*: See *Struv. Syntag. jur. Feud. cap.* iii. *Aph.* 7. No. 24. *Craig de Feud. Lib.* i. *Dieg.* 12. § 13. *P.* 78. *Skeen Deverb Signifi.* M. *Martinij Lexicon ex Edit. Gravii. Verb. Baron*; And *Cowel*'s Interpreter *eodem.* See the *Scots*-Law-Lexicon; but at this Time, a Baron is any Heritor who has Infeftment in a Land Eſtate erected into a Barony, with Power of Pit and Gallows, with Towers, Fortalice, and Juriſdiction of Courts, &c. And the Term of *Barony* alone implies and includes all theſe.

*Annexis Connexis*] are ſynonimous with Part and Pertinent, but more general; for the Word Pertinent, reſpects Lands, or other Goods that are corporial, and annexes comprehend all theſe, and alſo Goods incorporial, as *Jura*, Rights, Servitudes, &c. But ſome will think this Diſtinction

out any Neceſſity of expreſſing the ſamen. *Quia Baronia eſt nomen Juriſdictionis & univerſitatis*; and therefore Saſine being taken at any Part of the Barony, will compre-

tion too nice, *Connexa vocantur, quæ licet inter ſe diverſa junguntur tamen ad aliquem juris effectum, vel privato hominis arbitratu, vel publica legis authoritate, Oldendorp.* And thus the Particulars ſignified by a general Word or Name, are comprehended under that Word: Now, with reſpect to the preſent Subject, it is a certain Rule in Law, that many Feus, or other Things may be brought into one General, which the Lawyers call *Univerſitas rerum.* as Heritage, and *Sciendum* ſays, *Struvius in Syntag. jur. Feud. cap.* vi. *Aph.* 10. *quod plura feuda in univerſitate quadam rerum conſtituantur:* And as Juriſdictions are expreſſed by one Word, ſo every Thing appertaining thereto is ſignified by it; as *Tenendry, Barony, Regality, Bailiary, Sheriffſhip, &c.* And the Word *Barony* comprehends, not only the Right of Judicature, with the Conſequents thereof, Emoluments and Profits, as Fines, and Amercements; But alſo the whole ſeveral Lands erected into the Barony, by which Word they are *ipſo jure* united into one, tho' there were no Clauſe for an expreſs Union, ſo that a Saſine taken at any one Place of this Barony, or united Tenendry, is, in the Meaning of Law, equivalent, as if Saſine had been given upon every one of the particular Tenements, whether they ly contiguous, or diſcontiguous, *Craig Lib.* ii. *De feudis, Dicg.* 8. § 3. Says, *Baronia nomen univerſitatis eſt ſive Juriſdictionis itaque omnia quæ ex univerſitate ſunt, ſecum trahit, neque tamen minus, ædes & domus tranſeunt, etiamſi non experimantur, ſed omnia, ut magis caveatur, ſolent exprimi:* Now, Union is an Annexation or Incorporation of two or more Grounds or Tenements into one, called Tenendry, or Barony, made by the Sovereign originally, or by him ratified, when made by a Subject, with this Effect, That one Saſine given upon one of theſe Grounds is ſufficient for all; See *Craig,*

prehend the Tower, the Mill, *& omnia coetera regalia*, albeit they be not particularly expreſt, neither in the Charter, nor in the Saſine, nor any one of them.

*Craig, Lib.* ii. *Dieg.* 7. § 13, 15, 16, 17. Now, albeit a Subject cannot, of himſelf, without Conſent of the King, conſtitue an Union of Lands diſcontiguous; yet when made, he may communicate it to his ſingular Succeſſors

See in the Appendix, the preſent Order of paſſing in Exchequer, Signatures of all Sorts, and of expeding them under the Seals.

# TITLE IX.

## *Of the Power and Juriſdiction of Barons, Sheriffs, Lords of Regalities, Stewarts and Burghs.*

§ 1. THe Juriſdiction of a Baron or Barony, properly comprehends only Courts of Blood, and Bloodwyte,

We have from the *Saxon* feudal Law the Barons Court, which is endued with Juriſdiction criminal and civil. See the Notes on Tit. viii. § 17.

A Baron in the general Signification of the Word, is on infeft in Lands, tho' not erected formally in a Barony, and this Heritor, who I ſuppoſe, is ſeaſed *cum* Bloodwytes, can unlaw his Tenant for Blood-Riot committed on

wyte, and Theft being taken with the Fang, with Pit and Gallows effeirand thereto: And alſo the Courts and Plaints in

U civil

on his Ground, *January* 30. 1662. *Johnſton* contra Laird of *Weſtnisbet*. See *Craig de Feud. Lib.* 11. *Deig.* 35. *de Curiis* 2. and 28. *de Blood-wytes*, *Page* 192. *M'Kenzie's Inſtitut. Lib.* 1. *tit.* 4. § 11.

*Wyte* ] a *Saxon* Word, ſignifies in *Engliſh*, an Injury, Fault, *Culpa*, *injuria*; or, as in our barbarous Law *Latin*, *Miſericordia*. *Skeen* calls Blood-wytes an Unlaw for Blood; For, ſays he, theſe who are infeft with Blood-wytes, have Liberty to take up all Unlaws, or Amercements of Court, for Effuſion of Blood, to hold Courts thereupon, and apply the ſame for their own Utility and Benefit.

And by *cap.* 19. *Lib.* 39. *Burg.* Blood-wytes *Stings &c.* ought not to be judged within Burgh: For, ſays *Skeen* in his Annotations on that Article, ſuch Priviledges and Immunities belong to Barons, and not to Burgeſſes; unleſs they have a Grant of the Right of Barons and Sheriffs, which is given to *Edinburgh*, *Lanark*, *Perth*, and *Stirling*.

In a Caſe between one *Edgar* and *Darling*, before the Court of *Melroſs*, the Lords ſuſtained the Bailies Decreet, referring the blooding to the Oath of the Defender being preſent, who, upon his refuſing to depone, decerned him in 50 Lib. and as much for the Blood-wyte; for, albeit it be the Cuſtom to try ſuch Deeds by an Inqueſt, yet it is as lawful to refer the ſame to the Parties Oath, when the Deed is Clandeſtine, and none preſent at the doing it: Eſpecially, ſeeing it imports neither Life nor Limb, ſee *Dury*, the Bailies of *Melroſs* contra *Darling*, *February* 1634. *P.* 704. *Spotiſ. Pract. Tit. Barony, &c.* § *ult.*

*Theft.* ] See *Reg. Maj. Lib.* 1. *cap.* 4. § 2. There are two Kinds of Thieves, as *Skeen* in his Annotations on that § has obſerved.

Infang Thief, and Outfang Thief, the firſt is defined

two

civil Matters betwixt Party and Party, who are in the Baron's Power by Act of Parliament; and alſo the taking Order with

two Ways, *Skeen* in his Treatiſe *de verb. Sig.* calls it a Liberty pertaining to him who is infeft therewith, to cognoſce upon Theft committed by his own Man, and taken within his own Lands. And next, he defines it to be a Power to repleadge, and bring Home to his own Court all Thieves, being his own Men, committing Theft within his own Bounds; and to ſit and decide upon Theft committed within the Territory of him who is infeft therewith, either by his own Man, or by any other; providing they be within his Bounds, taken with the Thing ſtollen.

Outfang Thief has likewiſe two Definitions, *Firſt*, He is a forreign Thief, who comes from another Mans Land, and is apprehended within the Juriſdiction of him who has Power to judge Thieves; in the other Senſe it is ſaid to be a Right to repleadge, and bring back, *&c.* theſe who are Fugitive, and taken with the Fang within another Man's Juriſdiction: But in ſuch Competitions the Rule in Law is, That a Thief is ordained to be puniſhed in the Place where the Theft was committed, becauſe there the Crime can be tried beſt, Act 34. Parl. 1424. Statute 2. *Robi.* cap. 4.

*Fang* ] Is a *German* or *Saxon* Word, ſignifying a Seaſure or Apprehenſion, here it ſignifies the Thing ſtollen, or taken, *cum Rubra manu*, i. e. in Hand haveand, or on Back bearand, *Reg. Maj. Lib.* 1. *cap.* 4. § 2. *Annot. ad Stat. Dav.* 2. *cap.* 2. §. 2. The *Civilians* call it *Furtum manifeſtum.*

Pit and Gallows. ] *Foſſa* and *Furca*, according to our Conſuetudinary and unwritten Law, one is ſaid to be a Baron, who has the Power of the Sword, called by the Lawyers *Merum imperium*, which we expreſs by the Words Pit and Gallows, for theſe were the Signs of it; ſo that theſe two, as the Extremes, contain the whole Effects of criminal Juriſdiction, *Craig de feud.*

with Meat and Drink, Metts and Meaſures, taking of Wearers of Hag-butts.

*feud. Lib.* i. *Dig.* 12. § 13. *P.* 78. *Skeen* in his Treatiſe *de verb. Signif.* in the Word *Foſſa*, ſays, That *Foſſa*, a Pit or Fouſy, and *Furca* a Gallows, in Latin *Cabalum*, was firſt inſtituted and granted by King *Malcome*, who gave Power to the Barons to have a Pit, wherein Women condemned for Theft ſhould be drowned; and a Gallows wherein Men Thieves and Tranſgreſſors ſhould be hanged, conform to the Doom given in the Baron Court.

Barons, by conſtant Cuſtom, are Judges competent, of Tranſgreſſions of penal Statutes, as was found *February* 3. 1674.

Barons take Order with Meat, &c.] Act 56. Parl. 1494. and Act 17. Parl. 1535.

With Meaſures, &c.] Act 114. Parl. 1587. Criminals, Part ii. tit. 13. § 3. in the End.

They apprehend Wearers of Hagbuts, &c.] Act 248.

A Baron may, for Abſence, unlaw in ten Pounds, and for Blood, in Fifty Pound *Scots*, but not above, *M'Kenzie's* Parl. 1597.

A Baron and his Bailie, may, in Time of Vacance, judge Criminals, and in judging Crimes, or civil Cauſes he proceeds as the Sheriff in his Court: And albeit the Clerks of other Courts muſt be Nottaries duely admitted, yet the Clerk of a Barony Court, needs not be a Nottar. All Confeſſions judicial muſt be ſigned by the Party: But this is not a Court of Record, and there muſt be a Decreet conform obtained in the Sheriff Court, or in the Court of Seſſion, &c. before Letters of Horning can be raiſed for rendering the Baron's Decreet effectual. For more of this ſee *Quon. Attach. Seu leges Baronum*, *M'Ken. Crimin. Part* ii. *tit.* 13. His *Inſtitut.* B. 1. *tit.* 4. § 11.

§ 2. *Item*, The Sheriff, in Criminals may preveen the Baron, by firſt Citation,

both in ſimple Blood, and alſo in Theft; and alſo has Power to ſit upon a Thief by Way of Citation which the Baron has not.

Shireſt or Sheriff, in Latin *Vicecomes*, is the King's chief Officer in his Shire or Country; his Powers and Office is largely ſet forth by *Skeen* in his Treatiſe *de verb. Signiff. verb Sheriff.* abſtracted from ſeveral Acts of Parliament. And this Diſcourſe being worth reading, I refer to it, as a larger Explanation of this Paragraph: This Word is Saxon, derived from *Sheyre*, a Diviſion or Cut, and Portion of Land, or Province ſeparated and taken from the whole; and *Reive*, a Judge, *Vicecomes*, q. d. *Provinciæ comes.* See *Cambden's Britania.*

I doubt not of our having the Name of this Magiſtrate from our Neighbours of *England*; for *Aluredus* in the League with *Guntherus* King of *Denmark*, divided *England* into *Satrapias*, i. e. Shires, *Centurias*, *i. e. Hundreds* and *Decurias*, i. e. Tithings, See *Cowel* for an Interpretation of theſe Words. *Scotland* was divided into Provinces or Shires, in the Reign of *Evenus* the I. who began to reign *Anno* 98. *ante Chriſtum*, as *Buchannan* relates in theſe Words, —— *Ac ne moleſtum eſſet regibus toties Regiones omnes (ut tum mos erat) ad jus dicendum obire, judices ordinarios, regno in conventus diviſo, juri decundo præfuit.*

§ 3. *Item*, The Sheriff has no Power in Slaughter, but where the Committer is taken with Red-hand, and he muſt do Juſtice within three Suns; and if he do it not, he muſt either preſent the Committer

*Red hand.* ] Taken incontinently after the Murder, as it were, when his Hands are ſtill reiking, or ſmoaking with

mitter to the Juſtice, or have a Commiſſion of the Council to do Juſtice upon him.

with the warm Blood of the Deceaſt, or riddened and colloured thereby. But by a *Britiſh* Act in the third Seſſion of the firſt Parliament of King *George* the I. and in the eleventh Year of his Reign; To the Intent, that no Perſon convicted by any Court of Judicature, within that Part of *Great Britain* called *Scotland*, of any Crime importing a capital or any other corporal Puniſhment, may be grieved by the over haſty Execution of ſuch Sentence, without allowing Time for Application to his Majeſty, for his gracious Pardon: It is enacted, That from and after the firſt Day of *June* 1725, no Sentence or Judgment of any civil Magiſtrate or Court of Judicature, importing a capital or corporal Puniſhment, if pronounced in *Edinburgh*, or any other Part of *Scotland*, to the Southward of the *Firth*, or River of *Forth*, ſhall be put to Execution, within leſs than thirty Days after the Date of ſuch Sentence; and if pronounced to the Northward of the ſaid River of *Forth*, ſhall be put to Execution within leſs than forty Days after the Date of ſuch Sentence.

*Three Suns.*] By Act 4. Parl. 1695, It is ſtatuted, That in all capital Crimes, wherein Inferior criminal Courts were hitherto reſtricted to try and execute within three Suns, this Time ſhall be, hereafter, reſtricted to the Trial and Sentence only, but not to the Time of Execution, which is hereby left to the Diſcretion of the Judge, not to exceed nine Days after Sentence. But this ſeems to be altered by the above cited Act.

The Juriſdiction of Sheriffs in Criminals is treated of by Sir *George M'Kenzie* in his Criminals, Part ii. Lib. 12. which ſee.

§ 4. But the Lords, or Bailie of Regality, have as great Power or Juriſdicti-

on, as the Juſtice General within the Bounds of his Regality, and may proceed upon

***Regalities.*** ] Are Feus given by the Sovereign to a Subject endued with great Powers, which peculiarly pertain to the King, and are Parts and Symbols of his Royalty; they are termed by the Feudiſts, *Feuda Regalem dignitatem habentia*; ſo that the uſing without the King's Licence, thoſe Powers and Authorities communicated by this Erection of Lands into a Regality, will import leſe Majeſty. By the Word *Regalia* is ſignified in the Law, royal Rights of a King as ſuch, and by which he is diſtinguiſhed from any other Member of the Common-wealth. As, 1. Legiſlature and Judicature. 2. Power of pardoning Criminals. 3. Power to proclaim War, and conclude Treaties of Peace and Commerce. 4. Minting of Money. 5. The Right of Property in all Mines of Gold, of Silver, and of Jewels within his Kingdom, tho' they be in the Lands of a Subject. 6. The Property of waſe or maſterleſs Goods, *nam quæ ſunt nullius ſunt Domini Regis.* 7. The Enſigns of Royalty, as a Right to have carried before him, the Crown, the Sceptre, the Sword of State, *&c.* 8. The having a Life guard of Horſe and Foot-ſoldiers, or either of them, under conſtant Pay. 9. The Right of erecting Accademies and Univerſities, and of enduing them with Grants and Priviledges. 10. To be the Fountain of Nobility, and there through a Right to grant Titles of Honour, and of ſeveral Kinds of Nobility; as of Duke, Marquiſs, Earl, *&c.* and many moe: Theſe *Regalia* are called the Prerogative Royal, and are divided into *Majora Incommunicabilia*, which are ſo high and eſſential to Majeſty, that they cannot be ſeparated from the Crown, called *Plenitudo poteſtatis quæ reſpuit diviſionem*, and is, *quaſi ſanctum ſanctorum intra quod nemo admittitur niſi princeps.* The other Sort are *Minora* and *communicabilia*, when the Sovereign aſſumes others to aſſiſt him in the Adminiſtration of the Government, *in partem ſollicitudinis*; and for rewarding their Labour, communicates to them a Portion of the Regal Emoluments and Caſualities pertaining to him as King,

or

upon Theft, Slaughter, or any other Crime upon Citation.

or as univerſal Superior of the Kingdom: Of this Kind are Regalities, for the Feuar or Proprietar of the Lands erected in a *Regality*, is called *Lord of the Regality*: And albeit, before this, he might have had Vaſſals, yet now, by this Erection, he has greater Powers than a common Superior, both in Point of Juriſdiction, and alſo in Point of Emolument and Profit: For, as to the firſt, he has, in civil Matters, a Juriſdiction as large as the Sheriff hath, and in Criminals he is veſted with greater Power than the Sheriff, and it is almoſt equal to that of the Lords of Juſticiary, See *M'Ken. Crimin. Part* ii. *tit.* 2. § 1, 2, and 5.

§ 5. *Item*, The Priviledge of a Lord of Regality, is, that not only he has ſupream Juriſdiction, and *quaſi merum imperium* upon all the Inhabitants within the Territories of his Regality, together with the Eſcheats of all Perſons convict for whatſoever Crimes (except Treaſon, whereof the Eſcheat pertains to the King) but alſo, that he has Right to Eſcheats vaikand by Horning and Rebellion, and claims alſo Baſtardy, and laſt Heir, which is not yet fully decerned and decided.

The Lords of Regality cannot judge in the four Pleas of the Crown, *M'Kenzie's* Criminals Part ii. tit. 2. § 5. And he has no Right to the Caſualities ariſing from Baſtardy, or laſt Heir, as has been noted before in tit. vii. § 16.

§ 6. *Item*,

§ 6. *Item*, The *Lord of Regality*, or his Bailie, has the Power and Liberty of Weapon-ſhawings within the Bounds of his *Regality*; and ſicklike, has the Power of Juriſdiction in civil Cauſes, in all Actions which are purſued before the Lords, except *Reductions*, *Improbations*, *Redemptions* and *Suſpenſions*.

*Weapon-ſhawings.*] Bailies of Regalities and Baronies, are ordained to uſe and exerce their Priviledge in holding of Weapon-ſhawings, Act 90, Parliament 1483. and they're to be made twice in the Year, in the Months of *June* and *October*, at ſuch Days and Place as ſhall pleaſe the Sheriff and Bailie. Act 85, Parliament 1540. Weapon ſignifies all Sorts of War-like Inſtruments, except Fire arms.

No inferior Court is competent to judge in Declaratories of any Sort, nor in Competition of real Rights.

The Lord and Bailie of Regality had the Priviledge of repleadging, even from the Juſtice General. The Difference between an Eccleſiaſtick and a Laick Regality is to be obſerved, ſee *M'Kenzie's* Criminals, Part ii. tit. ii. § 5, 6, and 7. And now ſince the Court of Juſticiary was conſtitute by Act of Parliament 1672. The Lords do Advocate from Courts of Regality Criminal Proceſſes; and *Stewart* in his Solution to *Nisbet's* Doubts, Tit. *Advocation by the Juſtices*, Page 3 and 4, ſays, That its Soveraignty in Criminals is ſo fully eſtabliſhed, that Regalities ought no more to repleadge from them, nor need they to allow the Bailie of Regality to ſit with them; but ſtill the Unlaws are to be given as formerly when repleadging was in Uſe.

§ 7. *Item*, The Lords of Regality have the Priviledge and Liberty of Chaple and Chan-

Chancellary, by directing of Brieves, and ſerving the ſame before themſelves, and the Retour and Extract of a Service, before the Bailie of a Regality, makes as great Faith, as a Retour forth of the Chancery: But it is to be obſerved, That in Regalities, the Service and the Retour is all one, in Reſpect the Clerk of the Regality, both directs the Brieve, and is Clerk to the Service; ſo that the Retour is nothing elſe, than the Extract of the Service regiſtred in his Books; whereas, in the King's Chancellary, they are diverſe, the Service being under the Subſcription of the Sheriff-clerk, and regiſtred in his Books, and the Retour thereof, being the ſame Service retoured to the Director, and regiſtred in his Books.

The Reader ſhall have, in an other Treatiſe, the Order of ſerving one Heir in general or ſpecial, to his Predeceſſor, with the ſeveral Forms of Writings, which occur in theſe Services; and alſo, the Retour and Extract of a Service before a Bailie of Regality.

§ 8. The Stewartries of *Scotland*, are Offices erected in the King's proper Lands, as the ſame fell to the Crown, or were annexed thereunto; and theſe Stewartries are not only erected with the Power of Sheriff-

riffſhip; but alſo, has the Priviledge as ample as any Regality; but, ſeeing the Stewartries are immediately ſubject to the King, and not any Subject; therefore, the Brieves of Lands within the Stewartry, are raiſed from the King's Chancery, and retoured thereto.

The Juriſdiction of a *Stewart* ſeems to have come to us from *France*, where he is called *Senechal*; and in our Law-books, written in Latin, *Seneſchallus*, tho' the preſent Name is Saxon, from *Stede*, Place and *Ward* Keeping, *i. e.* one appointed in another's Place or Stead. In ancient Times, this Officer or Magiſtrate, was very conſiderable in *Scotland*; for he was almoſt Chief under the King, and from it the Family of *Stewart* took Sir-name. In *England*, the Lord High Stewart had formerly a Power of great Extent; but of latter Times, is ſo abridged, that he has not uſually been appointed, (I mean in *England*) but only for the Diſpatch of ſome ſpecial Buſineſs, as the Arraignment of a Nobleman, in Caſe of Treaſon, and which once ended, his Commiſſion expires. See *Cowel V.* Stewart. In *Scotland* the Office and Juriſdiction makes now no remarkable Figure; beſides, the Lands lying within Stewartries now known, do belong to Subjects, and not to the King; we reckon at Preſent the following Stewartries, *Strathern*, *Monteith*, *Kirkcudbright*, *Annandale* and *Orknay*; of which only two, *viz.* *Kirkcudbright* and *Orknay*, ſend Knights to the Parliament; for *Strathern* and *Monteith* belong to the Shire of *Perth*; and the Free-holders of *Annandale* meet with theſe of *Dumfreis*, for electing a Member of Parliament: If there be any other Stewartries, they are of a clandeſtine Erection, and very obſcure. For the Etymology and Signification of this Word, ſee *Spotſ. Scots-Law-Lexicon. b. v.*

§ 9. Of the Burghs of *Scotland*, ſome are

are Royal Burghs, ſome Burghs of Regality, and ſome Burghs of Barony.

The Word Burgh, in Latin *Burgus* or *Burgum*, as ſome Criticks ſay, is derived from the Greek Πύργος, which ſignifies a Tower, a Caſtle or City; *Cluverius* aſſerts it to be a pure German Word, and that it ſignifies the placing or Situation of many Houſes together, called a Street, or Rows of Houſes cloſs to one another; not that every Congregation of Houſes was a Burgh, but only ſuch as were the Head or Chief of ſome Country or Nation. And further, That the Word, in its moſt ancient Signification, denoted an Incloſure or Hedge, which was otherways called *Tuun* or *Tuyn*, in the ſame Senſe we now uſe the Word *Town*, which have been originally built for the Accomodation and Security of the People, that they might be near one another, to give mutual Aſſiſtance in their ordinary Buſineſs; and alſo to be ready to defend themſelves againſt the Attempt of Enemies. And in theſe Towns or Burghs, there was commonly built a publick Houſe, that the People there meeting and conveening, might determine Law Caſes, and conſult about the publick Good: For a further Illuſtration of this, ſee *Cauſabon* in his Comment upon *Strabo*; *Cluverius* his *Germania antiqua*; *Du Freſn*'s Groſſary; *Wendelin* in his Salick Gloſſary of atuatick Words; Doctor *Bradie*'s hiſtorical Treatiſe of Engliſh Burghs.

In *Scotland*, every Territory, over which there was a particular Juriſdiction, had its proper Burgh, and the loweſt Degree of this Sort, is a Burgh of Barony; and to theſe ſeveral Burghs, our Kings granted diſtinctive Powers and Priviledges; But ſuch as depended upon himſelf, had the largeſt Share of his Bounty, as may be ſeen in the ſeveral Charters granted to them, and in divers Acts of Parliament.

§ 10. In the Burghs of Regality, the Lords of Regality has the full Power of creating of Bailies, except they have given Power,

Power, by their Infeftments, to Communities to chooſe their own Bailies, which Priviledge St. *Andrews*, the *Canongate* and *Muſleburgh* has, by Infeftments from the Biſhops of St. *Andrews*, the Abbots of *Dumfermline* and *Holy-rood-houſe*, reſpective.

§ 11. In Burghs of Barony, the Barons has the full Power to chooſe the Bailies.

See § 1, and 4. *b. t.* and the Notes thereon.

§ 12. As to Burghs royal, they are holden immediately of the King, and by their firſt Erections, has Power to chooſe their Provoſts and Bailies, and ſome of them are heritable Sheriffs within themſelves, as *Edinburgh*, *Strivling*, *Haddingtoun*, *&c.* and all the Burghs royal, has Power to give Saſine of the Burgage Lands, either upon Reſignation in the Bailie's Hands, or upon Retour, or immediately by Heſp and Staple; for, albeit all Tenements within Burgh, be holden of the King as Superior, yet the univerſal Cuſtom of the Kingdom, has eſtabliſhed this Right in Favours of the Royal Burrows, that they may receive and enter Vaſſals, in Name of the King's Majeſty,

Majeſty, who is Superior; but the Caſualities of the Superiorities, pertains only to the King, ſick as Liferent, Eſcheat by Horning, *&c.*

The Magiſtrates of Burghs royal, are not Superiors of Burgage-lands; but, being the King's Bailiffs and Sheriffs, within the Burghs, are commiſſioned and impowered by their Erection to ſeaſe their Burgeſſes in the Lands and Tenements lying within their Territories; for, in Effect, the Community of the Burgeſſes, are the King's Vaſſals, and not the Individuality of every Burgeſs, to whom particular Tenements are granted for Service of Burgh.

§ 13. *Item*, It is to be remembred, That in Burrow-lands holden of the King, in free Burgage, there is no Non-entry, and whenſoever the apparant Heir is ſeaſed, his Saſine is drawn back to the Day of his Predeceſſor's Deceaſe, whereof there is no Reaſon but Cuſtom.

The Reaſon why Burgage lands fall not in Non-entry, may be gathered from what is above ſaid; beſides, Non-entry being a Caſuality due to the Superior, upon the Death of his Vaſſal, never fall out in Communities or Burghs, becauſe they never die.

§ 14. *Item*, Burghs of Regality has not the Liberty of free Burrows, neither anent Trade nor Merchandize, nor yet anent the Liberty of Conventions of Burrows; but divers Burghs of Regality, are, and

and has been erected in free Burrows, with the Liberties of Burghs royal; but this is ever *butt* Prejudice of the Lords of Regality,

The Royal Burghs having, ſome Years ſince, claimed Priviledge as proper to themſelves, which, by the ancient Cuſtoms of this Kingdom, expreſt and delivered in the old Books of our Law, belonged alſo to Burghs of Regality and Barony, the Parliament did rectify this Encroahment, (to which a Statute of *Charles* I. gave Occaſion) by Act Parliament 1672, entituled, *Concerning the Priviledges of the Royal Burrows*, whereby the Priviledges of Burghs royal, of Regality, and of Barony, are cleared and diſtinguiſhed, in ſo far as relates to Trade and Traffick, in this Manner, that none other than Freemen of Royal Burrows, ſhall buy or ſell, in great or whole Sale, Wine, Wax, Silks, Spiceries, Wald, and other Materials for dying, and that none other has Power to export or import the ſame, giving nevertheleſs, Power to Gentlemen, of importing theſe or the like, for their own Uſe allenarly, and all the Lieges are impowered to export forth of this Kingdom, by Sea or Land, all Manner of Corns, of the Growth of the Kingdom, Cattel, Coal, Salt, Wool, Hides, and all other native Commodities of the Kingdom: And Burghs of Regality, or of Barony, can export all their own proper Manufacture, or ſuch Goods as ſhall be bought by them in Fairs or Markets; and the foreſaid Exporters, in Return of the Goods they carry out, or of the Fraught and Hire of the Ships, are priviledged to import Timber, Iron, Tar, Soap, Lint-ſeed, Hemp ſeed, Hemp, Onions, or Neceſſaries for Tillage or Building, or for the Uſe of their Manufactories. Thereafter,

By an Act of Parliament, *June* 1690. called, *Act in Favours of Royal Burrows*, the Statute 1672. is reſtricted, but very little, thus, *The importing of forreign Commodities, by Sea or Land, is declared to belong to Freemen Inhabitants of the Royal Burrows, allenarly, excepting Cattel, and ſuch Commodities as Noblemen and Barons import for their own Uſe, no Part thereof being to be expoſed to Sale; and the exporting*

lity, who remains ſtill Superior of the Burgh, and hail Tenements of the ſame, as is in

*porting the native Commodities of this Kingdom, ſhall belong only to ſuch Freemen, excepting Corns, Cattel, Metals, Minerals, Coal, Salt, Lime and Stone, reſerving a Priviledge to Noblemen and Barons, to export as much of the other native Commodities of the Kingdom, whether Staple Commodities or others, as anſwer the Value of what they import for their own Uſe; and all the Lieges can tranſport out of this Kingdom, all the native Commodities thereof; and the Inhabitants of Regalities and Baronies, are declared to have Power of trading,* i. e. *buying and ſelling all native Commodities, and of retailing of forreign Commodities, providing they are bought from Freemen of the Royal Burghs, bearing Scot and Lot therein, and no otherwiſe.*

From theſe two Acts, which are the fulleſt and largeſt among our Statutes, concerning the Priviledges of Royal Burghs, as to Trade, it appears that the following Priviledges belong only to theſe.

1. Selling and buying in great or whole Sale, Wine, Wax, Silks, Spiceries, Wald, and other Materials for dying, with the ſole Power of importing or exporting the ſame.

2. The ſole Power of importing forreign Commodities for Sale, indefinitely, all except Cattel, Horſe, Nolt, Sheep, and other Beſtial.

3. The Power of exporting by Sea, the native Commodities of the Kingdom, except, Corns, Cattel, Metals, Minerals, Coals, Salt, Lime and Stone.

The Following Priviledges, formerly contraverted, are reſerved entire to Burghs of Regality and of Barony, which belong alſo to Burghs royal.

1. The Power of importing forrein Cattel, Horſe, Nolt, Sheep, and other Beſtial.

2. The Power of exporting by Sea, Corns, Cattel, Metals, Minerals, Coal, Salt, Lime and Stone.

3. The Power of tranſporting by Land, out of this Kingdom, all the native Commodities thereof.

4. The

in St. *Andrews*, *Glaſgow*, *Dumfermline*, *Kinghorn*, *Kirkcaldie*, &c. and the like is

4. The Power of buying and ſelling all native Commodities.

5. The Power of retailing all forreign Commodities, providing they be bought from Freemen of the royal Burghs, bearing Scot and Lot, and no otherwiſe.

And in a Convention of the royal Burghs, met at *Dundee*, *July* 13, 1692, they declared their Willingneſs to communicate to Burghs of Regality and Barony, the Benefit of Trade allowed to them only, by the Laws and Acts of Parliament, and expreſt in the three Articles above ſet down, on Condition the Burghs of Regality and Barony, would relieve them of a proportional Part of the Tax laid on Trade, and gave Commiſſion to———, to put the Acts conceived ſolely in their Favours, to Execution, againſt unfree Traders; and to communicate the foreſaid Benefit, on Condition above-mentioned, by an Act intituled, *Act for Communication of Trade*, *June* 14, 1693. This Commiſſion and Contract is ratified, and the King and Parliament, ſtatute, *That Execution ſhall paſs againſt ſuch Burghs of Regality and Barony, as accept of this Communication of Trade, proper only to the royal Burghs of before, for their Proportion of the Tax-roll, and theſe Burghs are warranted to tax their Inhabitants, for the better enabling them to pay their Quota, and to diſcharge all Perſons to exerciſe any Kind of Trade, within their Juriſdiction, who refuſe to contribute in Payment of the Quota impoſed on the Burgh, and all Perſons whatſoever, are diſcharged to exerciſe any Kind of Trade, except they buy from the Citizens of royal Burghs, or from thoſe who pay their Proportion of the Quota.*

By this Act of Parliament, the Burghs royal are impowered to communicate the Benefit of theſe three Priviledges, that belong to them ſolely. But ſeeing,

*Beneficium non datur invito*; therefore, it may be doubted, if the Burghs royal, can force the Burghs of Regality, and of Barony, to accept theſe Priviledges, on the Conditions ſpecified in the Act, for it contains no Clauſe to oblige the

is alſo in the Burghs of Barony, as *Dyſart*, &c.

the Burghs of Regality and Barony, and their Inhabitants, whether they will or no, to embrace this Offer: And if they ſhall uſe that Sort of Trade which is prohibited to Unfreemen, they'll be liable to the Penalties contain'd in the Acts of Parliament made in favours of Burghs Royal.

And as to the Prohibition contain'd in the Act, it relates only to ſuch Perſons, who living and exerciſing Trade within theſe Burghs ſhall embrace the Offer of the Royal Burghs, but do refuſe to pay their *Quota* of the Tax-roll. For, if otherwiſe interpreted, it diſcourages all Trade, and will become highly prejudicial to the Kingdom.

§ 15. *Item.* All Burghs Royal are holden immediately of the King, either fully, *& in ſolidum*, or *in quantum* concerns the Privilege of a Burgh Royal; and the Manner of their Holding is *in libero burgagio*, for Payment of a certain Borough Mail or Duty to the King, whereof Count and Payment is made Yearly in the Exchequer, and no Boroughs have Vote in Parliament but Burghs Royal.

§ 16. *Item.* Every Royal Burgh hath its own common Good, or common Lands pertaining thereto, which pertain to the Burgh *in communi*, and are holden of the King in free Burgage *quoad* the haill Body

of the Town; but if any particular Perſon acquire an heritable Right of theſe common Lands from the Town, that is not holden of the King in free Burgage, but of the Town in Feu. Which Difference is neceſſary to be obſerved, by reaſon that Seiſins of Lands holden Burgage, have ſundry Privileges by Acts of Parliament, which do not pertain to the Feu Lands of the Town, as is the Regiſtration of Seiſins, and Reverſions within Sixty Days, *&c.*

A Burgh Royal connot feu out their common Lands without the King's expreſs Conſent, and without an Act of the Convention of Burghs, allowing that Burgh ſo to do. The Magiſtrates, and others Adminiſtrators of the common Good of Burghs, are accountable for their Management thereof, and cannot divert it to Uſes other than theſe for which it was originally granted: So that, for allowing the Magiſtrates and Adminiſtrators of this common Good to adventure Money for purchaſing a Share in the Company of *Scotland* trading to *Africa* and the *Indies*, an Act of Parliament was judged neceſſary. Which ſee, *Act* 42. *Parl.* 1695.

Before the Year 1681. Inſtruments of Seiſin of Burgage Land, were not neceſſarily regiſtred, either in the Regiſter of Seiſins for the Shire, or in the Records of the Burgh; from which many Inconveniencies did flow, and Purchaſers of Lands and Tenements within Burgh were not ſecure. But this is now helped by *Act* 11. *Parl.* 1681.

§ 17. *Item.* Royal Boroughs have this Privi-

Privilege, that they may cognoſce, and enter Heirs to Tenements of Land within Burgh *brevi manu*, and give them Seiſin by Haſp and Staple; which gives to the Heirs, ſo ſeiſed, Right to the Tenement;

A Burgh of Barony or of Regality, to which the Privilege of the King's free Burgh Royal is granted, tho neither the Lands nor the Town be holden of the King in free Burgage, but of the Prince, is, nevertheleſs, allowed to give Seiſins by Haſp and Staple, *November* 13. 1623. *Marſhal, Dury*, P. 79.

An Infeftment by Haſp and Staple, is given in this Manner: The Bailie of the Burgh, with his Clerk, and the neceſſary Witneſſes, being met at the Tenement whereof Seiſin is to be given, the apparent Heir repreſents to them, that his Father, or other Predeceſſor, died laſt veſt and ſeiſed in that Tenement; and for verifying it, he exhibits to the Bailie and his Clerk, before the Witneſſes, his Predeceſſor's Infeftment; adding withal, that it was notorious that he is apparent Heir, and neareſt in Kin to that Predeceſſor, his Father, Grandfather, or the like, and therefore he requires the Bailie to give to him State and Seiſin of that Tenement, by Haſp and Staple, conform to the Uſe and Cuſtom of Burgh. Whereupon the Bailie, albeit he know the Truth of what is ſo ſaid, enquires at the Witneſſes, or other Perſons in their Company, If he who ſought Seiſin was the apparent Heir to the Perſon laſt infeft, or habit and repute ſuch. And upon their anſwering affirmatively, he cauſes the apparent Heir take hold of the Haſp and Staple of the Door, and make him enter the Houſe, and bolt the Door upon himſelf; and coming out, he takes Inſtruments in the Hands of the Clerk of the Burgh, for certifying what was done. Which Inſtrument is duly regiſtrate in the Town Court

ment; but does only verify them to be Heirs paſſive, but not active, except they were ſerved and retoured, and is equivalent to a *Clare conſtat* which proves Heirs paſſive, but not active.

Books. The Tenor whereof is inſert in the Treatiſe concerning the Service of Heirs.

A Staple of a Door, is the Cavity into which the Bolt or Haſp is thruſt.

The Haſp is a Bar or Bolt, or other Sort of Faſtning for a Door or Window. To haſp, is to lock, bar, or bolt.

Another Way of entring one to his Predeceſſor's Lands within Burgh, is by a Cognition in this Form: The apparent Heir gets in the Town Court Houſe a Meeting of the Bailie, and of a Number of the Burgeſſes, Inhabitants within Burgh, to whom the Predeceſſor deceaſed, and the Party's Propinquity in Blood is well known, not being under Fifteen, preſents a Petition, and deſiring they would cognoſce him neareſt in Kin, and give thereupon a Decreet in common Form, according to uſe of Burgh. Whereupon the Bailie, after reading that Petition in Preſence of that Inqueſt, takes the Depoſitions of two or three of the ſaid Inqueſt, or other extraneous Witneſſes, concerning the Propinquity; and upon their deponing affirmatively, the Bailie and the Inqueſt cognoſces the Party in the Terms of his Petition, and pronounces Decreet accordingly. Thereafter the apparent Heir compearing, at, or upon the Tenement within Burgh, produces an Extract of the foreſaid Decreet, with his Predeceſſor's Infeftment, and obtains from the Bailie Seiſin in common Form. The Tenor of which Decreet and Inſtrument of Seiſin, may be ſeen in the above Treatiſe, concerning the Service of Heirs.

§ 18. *Item.* Seiſins given by Haſp and Staple, are good and ſufficient Rights of the Law, and maintain the Receiver thereof in the Right of the Tenement, not only *in judicio poſſeſſorio*, but alſo *in judicio*

There is in the Burgh of *Lawder*, lying within the Shire of *Berwick*, an ancient and peculiar Cuſtom in receiving Burgeſſes, and in giving them Right to a Burgeſs Acre. It is the conſtant Cuſtom of that Burgh, to tranſmit their Rights of Burgeſs Acres by naked Diſpoſition, and an Act of the Town Court, not only approving the Conveyance, but alſo admitting the Purchaſer to the Title and Privilege of a Burgeſs of that Burgh. Concerning which Acres there are divers other Privileges ſingular, and not elſewhere in any other Burgh of *Scotland*; the King having of old diſponed 105 Acres to 105 Perſons, who therethrough became Burgeſſes of *Lawder*, the Grant was with this Quality, that there ſhould be no more Burgeſſes than there are Burgeſs Acres, and that no Burgeſs ſhould poſſeſs more than one; and when they are tranſmitted, a Purchaſer or an apparent Heir, is never infeft, but poſſeſſes by an Act of the Borough Court, admitting him, by virtue of this Right, to ſuch an Acre (which is ſpecially nam'd and deſign'd in the Act) Burgeſs of *Lawder* in the Room of his Author, who at that Inſtant *ipſo jure* falls from his Right and Privilege of a Burgeſs) or in Place of his Father, Brother, or other Predeceſſor deceaſed. This Cuſtom in the Burgh of *Lawder* is mentioned in a Pleading between *Wilkiſon* and *Cranſton*, *June* 1663. Obſerv. by *Gilmour*, P. 67.

The Right in Things, or Property of Lands and Tenements, being explain'd, with the Power and Juriſdiction of Sheriffs, Stewarts, *&c.* the next Thing which naturally follows, is the Actions reſulting from theſe

*judicio petitorio.* And of old, thir Seiſins within Burghs, clothed with Poſſeſſion of forty or fifty Years, were counted irreduceable, and now the ſame has the like Effect by Act of Preſcription.

Rights, and competent to the Proprietaries; and they concern either the Poſſeſſion or the Property of theſe Lands, the one called *judicium poſſeſſorium*, and the other *judicium petitorium* Terms borrow'd from the *Roman* or Civil Law, which, with a ſhort Digreſſion on perſonal Actions, are treated of in the next Title.

# TITLE X.

## *Of Judgments poſſeſſory and petitory, and of Actions perſonal and real.*

§ 1. *Poſſeſſorium judicium* is properly this, where a Party is purſued to remove from Lands, and defends himſelf by an heritable Right made to him and his Predeceſſors,

The Uſe of Propriety, is to have and enjoy the Thing, and to diſpoſe thereupon with the Fruits and Profits at Pleaſure, which Benefit we cannot have without Poſſeſſion: So that Poſſeſſion is naturally tied to Propriety, from which it ought not to be ſeparated, and comprehends in it *Right* and *Fact*. The *Right* to enjoy attach'd to the Right of Property; the *Fact*, the effective Detention of the Thing, by

deceſſors, clothed with Ten Years Poſſeſſion, which will maintain him in a Removing; notwithſtanding the Purſuer be able to reply and prove, that he was inteſt in the

by putting it in the Poſſeſſion of the Landlord and Maſter, or of another in his Name. This Matter is more fully handled in the forecited Treatiſe, *Of the Elements upon the Laws of* Scotland. However, in the mean Time, for a diſtinct underſtanding of our Author's Doctrine, one muſt notice the two Kinds of Poſſeſſion, *viz.* Natural and Civil, which, with reſpect to a Landlord and his Tenant, is to be thus conſidered. The Firſt poſſeſſes civilly and intentionally, as proprietary; the other naturally, by detaining the Thing, and making Profit of it to his own Uſe. But his Poſſeſſion is in Name and Behalf of the Maſter the Proprietar, to whom, according to the Tenor of the Location, he is bound to reſtore the Thing, with the Poſſeſſion thereof: So that, according to the various Views and Circumſtances of Things and Perſons, there is Diverſity of poſſeſſory Actions.

The Word *Judicium*, in this Title, is borrow'd from the *Roman* Law, as are many other Terms uſed in our Practick; and, among the manifold Significations of the Word, as may be ſeen in Law Lexicons, it ſignifies the ſame with Action, as *judicium familiæ erciſcundæ*. And in this Section, *judicium poſſeſſorium*, poſſeſſory Judgment, is intented by a Perſon who has Title to the Uſe of the Thing, and Right of Detention thereof, againſt a Party who ſtands bound to put him in the Poſſeſſion, or diſturbs him in the peaceable enjoying of his Property, or when he is fallen out of the Poſſeſſion thereof, ſeeks to recover the ſame. Which three Caſes, the Civilians expreſs by theſe Words, *adipiſcenda*, *retinenda*, *vel recuperanda poſſeſſione*. See § 2, 3, 4. *h. t.* Now, when a Proprietar grants a Tack of his Lands, he cedes the natural

the Lands before the Defender; which Reply will be repelled *hoc loco*, that is, *in hoc judicio poſſeſſorio*, and the Purſuer will be remitted to his Action of Reduction, which

Poſſeſſion to the Tenant for a Time ſtipulated, at the expiring whereof, he warns away the Tenant, and purſues againſt him an Action of Removing, which more properly ought to be called *Judicium poſſeſſorium ratione recuperandæ poſſeſſionis, i. e.* the natural Poſſeſſion which he had granted to the Tackſman, whoſe Right to poſſeſs is now expired: So that poſſeſſory Judgments goes not without the Queſtion concerning the Title and Right of Poſſeſſion, which when peaceably continued for a certain Number of Years, the Party poſſeſſing acquires the Benefit of a poſſeſſory Judgment, that is, he cannot be diſturbed, or be put out of Poſſeſſion by thoſe poſſeſſory Actions. This hath Place only in Competitions between two pretending Heritors, where the Rule in Law obtains *potior eſt conditio poſſidentis*, and then the Party not prevailing muſt ſeek Redreſs by a petitory Judgment; in which the Diſpute is concerning the Dominion and Right of Property. Here it is to be obſerved, that a Defender may prevail *in judicio poſſeſſorio*, and thereafter loſe the Plea *in judicio petitorio*, as fell out in the Caſe between *Ker* of *Littledean*, and *Pringle* of *Stitchel*, where the Lords found, That Replies competent *in judicio poſſeſſorio*, & *bona fide* omitted, might be reſerved for a *judicium petitorium*. Likeas, in that Caſe, the Lords gave to the Purſuer a Liberty to turn his Removing into a declaratory Action, *January* 25. 1662. For Actions of Removing, ſee *Tit.* 13. *h*.

By the *Roman* Law, *Uſucapion*, or *Preſcription*, required a legal Title with *bona fides*, and three Years Poſſeſſion of Moveables. And if the Thing was immoveable, ten Years peaceable Poſſeſſion was needful in a Plea between Perſons preſent, *i. e.* living in the ſame Province; but if

which is *judicium petitorium.* And this Removing is called *judicium poſſeſſorium ratione retinendæ poſſeſſionis.*

if they reſided in different Provinces, twenty Years peaceable Poſſeſſion was requiſite, and our ancient Law required ten Years Poſſeſſion, and this was the Practick in our Author's Time; but the Lords of Seſſion, by their later Deciſions, have brought it to ſeven Years Poſſeſſion, which is our preſent cuſtomary Law. See the Caſe, *Hamilton contra* Tenants of *Overſheils*, *December* 13. 1661. The Rights competing muſt be homogenious, *i. e.* of the ſame Kind, wherethrough the Benefit of a poſſeſſory Judgment was by the Lords found only competent between two Rights of Property; but that it was not competent to be proponed againſt a Right of Annualrent, that being a Right of another Nature, and which was compatible with a Right of Property and Poſſeſſion by virtue thereof. *Adamſons* againſt my Lord *Balmerinoch*, obſerved by *Stairs* and the like by *Falconer*, *January* 1683.

The Party who craves this Benefit of a poſſeſſory Judgment, muſt be infeft in the Property of the Lands, for a naked *jus ad rem* is not a ſufficient Title whereupon to crave this Benefit. See *Johnſton* againſt *Erskine*, *February* 6. 1668. For a further Explication of *jus in re & ad rem*, ſee § 4, 13, 19. with the Notes.

§ 2. *Item*, Where any Perſon dies in Poſſeſſion of Lands, the Purſuit moved by his Heir, for Delivery of the Tower, Fortalice, and Manour-place of the Lands, is called *judicium poſſeſſorium*, as was the Diſpute anent the Manour-place of *Hallyards*, betwixt the Earl of *Mar* and the Lord

Lord *Torphichen*; and this may be called *judicium acquirendæ poſſeſſionis.*

§ 3. *Item.* There is a Third, which is *recuperandæ poſſeſſionis*, as is in Ejections, Intruſions, and Spulies, in the which this Axiom has Place in favours of the Judgment poſſeſſory, *quod ſpoliatus ante omnia eſt reſtituendus.*

They diſtinguiſh between Spulie and Ejection; the Firſt is properly ſaid of Moveables, and the Laſt concerns the Poſſeſſion of Lands; both of them, if rais'd within fifteen Days after committing thereof, have the Privilege to be ſummarly diſcuſſed.

*Spoliatus ante omnia eſt reſtituendus, i. e.* he is not obliged to diſpute the Force of the Title of his Poſſeſſion, whether good or bad.

§ 4. The Difference between Ejection and Intruſion is this, that Intruſion is *in vacuam poſſeſſionem abſque jure*, and Ejection is a violent Outputting of a Poſſeſſor.

Theſe Actions are competent; albeit the Poſſeſſor had no Title, provided he was in peaceable Poſſeſſion at the Time of the Ejection.

§ 5. *Item.* Where the violent Poſſeſſor leaves the Lands, if any Perſon enter therein, he may be purſued for *ſucceeding in the Vice*, and for Payment of the violent Profits,

Profits, ſo long as he occupies, and alſo for removing from the Lands without a Warning.

§ 6. *Item.* Where the Heritor of Lands is troubled and moleſted in the Meiths and Marches of his proper Lands, in this Caſe the Remedy is, by a Judgment poſſeſſor, called *Cognition*, or *Moleſtation*, wherein the Probation is not by Witneſſes, but by an Inqueſt of Fifteen Perſons. And by Act of Parliament 1587. and ratified 1592. thoſe Moleſtations are ordained to be purſued before the Sheriff of each Sheriffdom, and the Lords of Seſſion are excluded from all Judgment therein, except only in Cauſes of Moleſtation of Meiths and Marches, purſued by the Lords of Seſſion themſelves, and other Members of the College of Juſtice, which as yet may be purſued before the Seſſion, and proven by Witneſſes.

*Perambulations*, as well as *Moleſtations*, tend to the Trial of Marches; but there is a Difference, in that *Perambulations* are *petitory Judgments*, and concern Property, but *Moleſtations* are only *poſſeſſory*. See *Act* 14. Jam. VI. *Parl.* 11. Anno 1587. and *Mackenzies*'s Obſervations thereon. See *infra* § 10. *h. t.*

§ 7. *Item.* By the ſaid Act of Parliament, it is ordained, That where either of the Parties fear the Sheriff to be ſuſpect

or

or partial, in that Caſe the Lords of Seſſion, upon Citation of the Party having Intereſt, ſhall grant Commiſſion to two or three Advocates, making them Sheriffs in that Part, to cognoſce and decide upon the Moleſtation. And it is declared, if both Parties be alike diligent, Litiſconteſtation ſhall be made in both the Cauſes at once, and one Term aſſigned to both Parties, to prove, that either of them ſhall have the Half of the Inqueſt, and the odd Perſon to be choſen by *Cavill*, [ or *Lot.*]

The Commiſſion herein mentioned, was anciently expede under the *Quarter Seal*, commonly called, *The Teſtimonial of the Great Seal*; but this Practice has been long ſince, and is at preſent abſolutely in deſuetude, for that is now done in the Seſſion in the Form of other Acts and Commiſſions.

Both Parties having cited their reſpective Inqueſts, the Sheriff chooſes Seven out of each, and the fifteenth Man is by Lot.

§ 8. *Item. Judgments petitory* are of two Sorts, either concerning the Rights of the Lands, or concerning the Meiths and Marches of the Lands: And for the Rights of the Lands, the Judgment petitory is either by way of *Reduction* or *Improbation*, or by way of *Declarator*; and the *Reduction* is properly in the Concourſe of two

two Infeftments alike ſovereign; as alſo of two Infeftments, the one baſe, the other publick, proceeding *ab eodem authore*, where the Party being infeft, craves another Party's Infeftment to be reduced and improven. And the *Declarator* is, where there is no Infeftment to be reduced, but where Infeftments have ſome Compatibility, and may ſtand *pro parte*, *at non in toto*, as when the Vaſſal purſues againſt the Superior; for in this Caſe, there is no Infeftment called for to be reduced, but the Concluſion of the Summons is to hear and ſee the Right and Property of the Lands to pertain to the Purſuer.

In a Summons of Reduction, the Purſuer craves the Writs called for to be caſſed, annulled, decern'd and declared *void* and *null*, *&c.* for the Reaſons of Reduction libelled; and the Diſpute reſolving into a Competition, terminates in a Preference of the one Right, or Infeftment to the other: But when an Improbation is adjected, he craves theſe Writs to be found falſe and feigned. For further Inſtruction herein, ſee the Stile of theſe ſeveral Summonſes.

§ 9. *Item.* All Declarators of Recognition, expiring of Reverſions, Reductions upon Clauſes irritant, Actions of Purpreſture againſt the Vaſſal for uſurping upon the Superior's Property, are all of the Nature

ture of Judgment petitory, by way of Declarator.

For a full Knowledge of the Nature of theſe Actions, read the Libel and Summons form'd for each of them.

§ 10. *Item.* The Judgment petitory againſt any, anent Meiths and Marches of Lands, is called the *Brieve of Perambulation*, which yet remains as a Veſtige of the old Power and Juriſdiction which pertained to the Juſtice-general; for the Lords of Seſſion are not Judges to Perambulations, but only the Juſtice-general and his Deputes, and the Brieve of Perambulation is directed forh of the Chancery to the Juſtice-general and his Deputes, who, after Citation of the Parties, diſcuſſeth *ea quæſunt in jure*, by Defences and Anſwers, in his ordinary Seat of Juſtice at *Edinburgh*; but after Litiſcontеſtation, the Juſtice goes to the Ground of the Lands, and receives the Probation by Inqueſt.

See § 10. *h. t.* with the Notes.

§ 11. Albeit the Lords of Seſſion be not Judges of this Brieve of Perambulation *in prima inſtantia*, yet they are Judges therein *in ſecunda*, that is, to the Reduction of the Proceſs and Decreet of Perambulation, if any Iniquity can be qualified to have been committed in the deducing thereof, as was lately

lately found in the Proceſs betwixt *Monimusk* and *Corſindae*, where a Proceſs of Perambulation being challenged before the Lords of Seſſion by way of Reduction, was be reduced *ſuper hoc ſolo capite, that one of the Inqueſt was wrongouſly admitted or repelled*, albeit it was offered to be proven, that Ten of the Inqueſt were for the Decreet.

The Members of an Inqueſt can witneſs and give their Teſtimony about what they know, as well as Judge in the Cauſe. Now it might happen, that the Perſon repelled knew more than any of the reſt, and would have ſet forth the Caſe in ſuch clear Manner, as would have made the Ten to change their Opinion.

§ 12. *Item.* Like unto this Brieve of Perambulation, *in prædiis ruſticis*, is the Brieve of Lining, which is *in prædiis urbanis*, to the which the Provoſt or Bailies of the Burgh are properly Judges.

The Brieve of Lining is titled *breve lineationis*, becauſe the Houſe is meaſured by a Maſon's Line. See the Tenor of theſe two Brieves in the Appendix.

§ 13. *Item.* As there are ſome Judgments poſſeſſory and petitory, ſo there are ſome *Actions perſonal* and *real*, which depend upon the divers Qualities of Rights, whereof ſome are perſonal, and ſome real.

§ 14.

§ 14. A Right perſonal is, where only a Perſon and his Heirs are bound, and not the Ground of the Lands are really tied; and according hereto, a Bond, either for Payment of Sums, or for infefting in Lands or Annualrents, (before Infeftment follow thereupon) is called a perſonal Right, and an Action founded thereupon is called a perſonal Action. A real Right is, where not only a Perſon and his Heirs are bound perſonaly, but alſo *res controverſa* is tied and affected really. *Duplex eſt jus reale, vel in re, vel ad rem, & utrumque, vel in rebus mobilibus, vel immobilibus.*

§ 15. *Jus in re in mobilibus, eſt ubi proprietas rei mobilis ad aliquem pertinet; & actio quæ ob hanc competit, dicitur rei vindicatio, a quocunque poſſeſſore, ſive naturali, ſive civili.*

§ 16. *Jus ad rem in mobilibus*, was of the Law, *vel per generalem, vel per ſpecialem hypothecam.* And by our Practick, it is by Arreſtment, and the Action competent thereupon is to make the arreſted Goods forthcoming.

*Jus in re*, or a Right in a Thing, is a Power and Faculty competent by Law, and inherent in the Thing it ſelf, producing to the Proprietary an Action againſt the

the Thing, towards the Recovery thereof: For by this *Jus in re*, the Thing itſelf is tied to us, which affords the Action againſt it where-ever it can be found, without any Regard to the Perſon of the preſent Poſſeſſor; who in Form of Law muſt be cited, to ſhow Cauſe why the Purſuer ſhould not get the Thing.

*Jus ad rem* is a Right and Faculty competent by Law, whereby a Perſon is bound and obliged to give ſome Thing, to perform and do a certain Deed, or even ſometimes to ſuffer any thing to be done upon his Goods and Property, which may be uſeful to another. In this caſe the Action is directed againſt a Perſon, and not a Thing; ſo that *Jus ad rem* is equipollent to *Jus in perſonam*. See the Commentators on *tit.* 1. *lib.* 2. *Inſt. juris Romani.* Now, albeit this Oppoſition of Terms, *viz. Jus ad rem*, is not expreſly found in the Text of the Civil Law; yet it may be eaſily inferred and deduced from certain Parts of it: But theſe Terms are frequent and expreſs in the Canon Law, *cap.* 8. *de conceſſione præbend. in* 6. *&* 40. *de præbend. in* 6. from which the Civilians of the ruder Age borrowed them, but the modern Interpreters call it *Jus in perſonam.*

§ 17. *Jus in re in immobilibus eſt duplex, viz. vel in incorporeis, vel in corporeis. In rebus corporeis* there is no Reality, but by Charter and Saſine: But *in rebus incorporeis, utì eſt in ſervitutibus*, the ſame are real without Saſine, by a ſimple Conſtitution of a Party having Right to grant the ſame; ſuch as, Thirlage of Lands to a Mill, *Aquæductus, altiùs non tollendi, &c.*

The Right of Servitude is not real, unleſs the Party who claims it, is, or has been in poſſeſſion, which is requiſite, tho' it be for a very ſhort Time.

§ 18. *Item, Jura reverſionum ſunt realia; & ſi quid ſuperaddatur reverſioni, quod non eſt in corpore reverſionis, ſed in pacto ſuperaddito, illud non habetur pro reali, ſed pro perſonali*; and therefore if the Party to whom the Reverſion is granted, do oblige him apart, to alter, diſcharge or ſuſpend the Reverſion, and thereafter make a third Party Aſſigny to the Reverſion, the Aſſigny may redeem the Lands, fulfilling the Points of the Reverſion, and will not be debarred therefrom by the foreſaid Pactions, which are perſonal.

Reverſions are of their own Nature perſonal, and are improperly and without effect called real, until the Letter of Reverſion be regiſtrated, as is directed by *Act 16. Parl. 22. Ja.* VI. And if the ſuperadded Paction be alſo regiſtrated, it will be as effectual as the original Letter of Reverſion.

§ 19. *Item, Jus ad rem in immobilibus* is, when a Party having a perſonal Bond to pay him Money, or to infeft him in Land or Annualrent, uſes Inhibition againſt the Party obliged. In which Caſe, the Lands annailzied by him after Inhibition are affected to the Party Raiſer of the Inhibition; who thereupon may compriſe the Lands, and take away the Infeftment, either by way of Exception or Action: With this Difference, that where the Infeftment after

after Inhibition has taken effect, by Poſſeſſion for the Space of ten or fifteen Years before the Compriſing, in that Caſe the Lords do ſuſtain the Infeftment clothed with that Length of Poſſeſſion, and remit the Party Compriſer to his Reduction; but where the Party infeft has been in poſſeſſion but for the Space of fewer Years, commonly the Lords repell the Infeftment by way of Exception, in reſpect of the Inhibition preceeding.

As an Arreſtment is only a *nexus realis*, and does not give the Arreſter any Right in the Goods arreſted, which may thereafter be poinded by another Creditor, as alſo a poſterior Arreſter obtaining the firſt Decreet of Forthcoming would be preferred to the prior Arreſter; ſo an Inhibition is no more than an Impediment and a Bar to the Debitor, for hindring him to ſell his Lands, in prejudice of the Creditor inhibiting, but gives no Right to the Lands themſelves; and therefore the Terms, *Jus ad rem in immobilibus*, are very improperly made uſe of in this Caſe. See the Notes on §§ 13, 16.

§ 20. *Item*, Albeit the Party Inhibiter may reduce all Infeftments after his Inhibition, yet the Party whom he purſues may elide the Reduction, by offering to him to give ſatisfaction of his juſt Debt, and may give him the like by way of Exception in a Removing: But if the Party purſued for Reduction of his Infeftment, *ex capite inhibitionis*, omit this Offer, and

ſuffer Decreet to paſs againſt him, compearing in reducing his Infeftment; in this Caſe it may be doubted, if *ex poſt facto* he may be heard to make that Offer. But if the Decreet of Reduction bear not *ſimple* and *abſolute Reduction*, but *allenarly* in ſo far as the Infeftment craved to be reduced may prejudge the Purſuer in his Bond or Right; in this Caſe, I think, the Offer ſhould ever be competent to the Party againſt whom the Decreet is given.

The Defender in a Reduction *ex capite inhibitionis* is allowed to purge the Inhibition, by Payment of the Sums for Security whereof it was raiſed, and the Inhibiter is bound to grant an Aſſignation to the Debt and Inhibition; with this Proviſion, That it ſhall not be made uſe of againſt the Inhibiter Cedent his other Rights, in caſe he has an Appriſing, *&c.* on other Bonds, or a Diſpoſition poſterior to the Inhibition, *Bruce contra Mitchel, February* 11, 1676. But if there be an Appriſing following upon the Inhibition, and expired, then the Inhibiter is not obliged to accept of the Sums whereon the Inhibition proceeded, *Grant contra Grant, February* 24, 1666.

§ 21. *Item*, Reductions *ex capite inhibitionis* may be purſued either upon the Bond and Inhibition *ad hunc effectum*, to reduce the Infeftment, in ſo far as it may be an Impediment to the Compriſing; or the Party Uſer of the Inhibition may firſt compriſe, before he reduce, and make his Compriſing, with the Infeftment following

ing thereupon, to be his Title in his Reduction. In the firſt Caſe, I think the Benefit of the legal Reverſion, competent of the Law to the Party againſt whom the Appriſing is led, ſhould pertain to the Party whoſe Infeftment is reduced *ex capite inhibitionis:* But in the ſecond Caſe, I think the Matter will be of greater Difficulty, eſpecially where the Decreet of Reduction is given againſt the Party compearing.

Becauſe it is moſt adviſable for the Inhibiter to deduce a Compriſing, that he may come in *pari paſſu*, and thereby preſerve the Force and Effect of his Diligence, the Author in the enſuing Title ſhews the Order of leading it.

# TITLE XI.

## *Of Compriſings and Adjudications.*

§ 1. COmpriſings may be led either upon a perſonal Bond, or upon a real Right.

§ 2. If upon a perſonal Bond, the ſame has Force only from the Date of the Compriſing or Inhibition, if any be raiſed upon the Bond.

§ 3. But if the Ground was real, in that Caſe the Compriſing is drawn back to the

Date of the real Right: As for Example, if the Lands be compriſed for By-runs of an Annualrent, wherein the Party Compriſer was infeft, the Compriſing will be drawn back to the Date of the Infeftment of Annualrent, and will be preferred to whatſoever Infeftments of Property granted before the Compriſing, being poſterior to the Infeftment of Annualrent.

The Ground of all Compriſings muſt be a liquid Debt, *i. e.* a certain definite Sum, which may be due either by a Bond, or a real Right. The firſt is a perſonal Debt, or *debitum perſonæ*; the other is either a *debitum fundi*, or mixt, becauſe the Creditor has not only the Lands bound for Payment of his Claim, but likewiſe he has the Perſon of the Debitor obliged: And this laſts as long as either the Debitor lives, or the Lands ſubſiſt. In Compriſings on theſe two Obligations there is this further Difference, that in a Compriſing on the perſonal Bond, the whole Eſtate of the Debitor, where-ever it lyes, may be touched and included; whereas if it was deduced on the real Ground, *i. e.* the Infeftment of Annualrent, no Lands other than theſe contained in the Infeftment can be compriſed: And before that be done, a Poinding of the Ground for Payment of bygone Annualrents muſt be uſed and execute, otherwiſe the Compriſing is informal.

§ 4. And upon this Ground there may ariſe a notable Queſtion, *viz.* That an Infeftment of Annualrent was granted to a Woman in Liferent, and to her Son in Fee; the Woman, for not Payment of the Arrears of her Annualrent due to her, compriſes the Property, which Compriſing runs forth

forth unredeemed for the Space of ſeven Years: *Inter majores quæritur*, if the Son, who is Fiar of the Annualrent, loſeth and amitteth his Fee of the Annualrent, or not? *De quo cogitandum.*

See *Stair's Inſt.* tit. *Infeſtments of Annualrent*, § 11. In a Copy of this Book, which pertained to Sir *James Stewart*, late Lord Advocate, I find a Note on this Section, wherein he ſays, that the Fiar becomes Proprietary, but the Liferenter and her Succeſſors muſt poſſeſs till all the Bygones be ſatisfied and paid.

§ 5. *Item*, Lands may either be compriſed or adjudged; and Compriſing hath Place, either againſt the Party obliged, or his Heir.

As anciently a Compriſing was diſtinct from Adjudication, ſo now, ſince a new ſort of Adjudication is introduced in place of Compriſings, there is a Diſtinction among Adjudications, as ſhall be declared hereafter.

§ 6. *Nota*, Poinding muſt always go before Compriſing; and therefore, ſince I cannot poind but for a Debt whereof the Term of Payment is come and bygone, neither can I compriſe but for the like Debt. It is otherwiſe in Adjudications: For when I charge one to enter Heir to my Debitor, that I may have ſuch like Action and Execution againſt him as againſt the principal Debitor, if he renounce to be Heir, then

I have Recourſe *contra hereditatem jacentem*, that *omne jus* thereof may be adjudged to me, not only for bygone Debt whereof the Term of Payment is come, but alſo for Debts that have *tractum temporis futuri*, as Liferents, *&c.* And if another Creditor come in, he muſt not only pay in all Bygones, but alſo ſecure me for all Time coming, before I be holden to quit my Right in his favours. And ſo it ſeems that Compriſing is only Execution, but Adjudication is both Action and Execution.

This Section is not ingroſſed in the Copies, but adjected to ſome of them, as an Obſervation made by the Author *Anno* 1642. However, on account of the Matter, I have placed it in the proper Title.

Some are of Opinion, that Appriſings were known in *Alexander* II.'s Time, from *chap.* 24. of his Statutes; but it is commonly thought, that before the Year 1469, Lands and Tenements could not be affected, far leſs evicted for a perſonal Debt. The Reaſonableneſs, Neceſſity, and gradual Manner how that Cuſtom came to be altered, may be ſeen in a ſpecial Hiſtory of the Laws of *Scotland*. It was ever the Practique, that the Moveables behoved to be diſcuſſed (which was by Poinding) before the Creditor could touch the Lands; and the Debt muſt be liquidated to a ſpecifick Sum, as alſo the Term for Payment muſt be come and paſt.

§ 7. The Compriſing being againſt the Party alive, requires no more but the ordinary Form, which is, firſt to ſearch the moveable Goods and Gear of the Debitor,

at

at his Dwelling-houſe, and upon the Ground of the Lands to be compriſed; and thereafter to denounce the Lands to be compriſed upon the Ground thereof, and at the Market-croſs of the head Burgh of the Sheriffdom, Stewartry or Regality where the Lands ly; and by Citation of the Party perſonally, or at his Dwelling-houſe, to compear before the Meſſenger, Judge in the Compriſing, on fifteen Days Warning: Which Compriſing muſt be led, either upon the Ground of the Lands, or within the Tolbooth of the head Burgh of the Sheriffdom, except the Lords grant ſpecial Warrant and Diſpenſation to ſit within the Tolbooth of *Edinburgh*, or any other Place they pleaſe to appoint.

§ 8. *Item*, Where the Party Debitor is deceaſed, it is firſt neceſſary there, that the Obligation made by the Defunct be either regiſtred againſt the Heir; or, if it was regiſtred before the Defunct's Deceaſe, that it be transferred againſt the Heir: And if no Perſon be entred Heir, then the apparent Heir muſt be charged to enter Heir to the Defunct upon forty Days; with Certification, That after the expiring of forty Days, ſuch Proceſs will be granted againſt him, as if he were entred; and thereafter

after Decreet muſt be recovered againſt him, as lawfully charged to enter Heir.

Of old, no Bonds, or other Writings bearing a Clauſe of Regiſtration, could be regiſtred after the Granter's Deceaſe; and if they were put into the Regiſter, they had only the Force of a Decreet of Tranſumpt: But now, by *Act 39. Seſſ. 6. Parl. 1. K. William*, they may be regiſtred, in the ſame way as if the Party were alive; with this Difference, that no Execution can paſs on theſe Decreets of Regiſtration.

§ 9. *Item*, After this Decreet there muſt be new Letters raiſed, charging the apparent Heir to enter himſelf ſpecially to ſuch Lands and Heritages, wherein the Defunct died laſt veſt and ſeaſed, and that within the Space of forty Days after the Charge; with Certification, That Compriſing ſhall proceed againſt him, ſicklike as if he were infeft.

§ 10. And after the expiring of the forty Days upon the ſecond Letters, the Lands may be denounced to be compriſed in the ſame Manner as the ſame is led againſt the Party Debitor, being on Life.

§ 11. But it is to be remembred, that if the Party charged to enter Heir by the firſt Charge, compear, and offer to renounce to be Heir, that then and in that Caſe, upon his Renunciation, he will be aſſoilzied from the perſonal Action, reſerving to the Purſuer

Purſuer real Execution *contra hereditatem jacentem:* Whereupon the Party is to come to his Payment by Adjudication, and not by Compriſing; of the which Adjudication the Form will be deſcribed hereafter.

§ 12. *Item*, When Lands are to be compriſed, the Party compears at the Day, by himſelf or his Procurator, and produces his Claim, craving the Lands to be compriſed to him for his Money: And if no Perſon compear to oppone, the Judge puts the Matter to the Knowledge of an Inqueſt of fifteen or thirteen Perſons; who (being ſworn) conſider of the Claim, and Verification thereof; and accordingly give forth their Verdict, and ordain the Party to be infeft in the Lands compriſed, to be holden of the lawful Superior; reſerving Liberty to the Party againſt whom the Compriſing is led, to redeem within ſeven Years. After the Compriſing is led, and an Extract thereof given by the Clerk of the Compriſing, under his Subſcription, and the Subſcription of the Meſſenger, Judge of the Compriſing, with the Seals of the moſt Part of the Inqueſt; the ſame is

Writers to the Signet, and none others, could be Clerks to Compriſings.

The

is in uſe to be preſented to the Lords of Seſſion and to the Clerk of the Bills, to be conſidered, ratified and approven.

The Lords of Seſſion muſt allow this Decreet of Compriſing, by ſigning an Abbreviate thereof, which ordains Horning to paſs, for charging the Superior to enter and infeft the Compriſer: And the Allowance muſt be recorded in the Bill-chamber within ſixty Days after the Date of the Decreet; otherwiſe another Compriſing, tho' of a poſterior Date, allowed and recorded before it, will be preferred, unleſs Infeftment follow upon it, before the firſt allowed Compriſing become effectual by Infeftment, or charging the Superior.

§ 13. But the Lords Allowance is not neceſſary abſolutely to the Validity of the Compriſing, but allenarly in ſuch Caſes where Infeftment is to follow upon the Compriſing, and where the Superior of the Lands (being any other but the King) is not willing to give Infeftment conform to the Compriſing: For if nothing be compriſed but *jus incorporeum*, ſuch as heritable Bonds, Liferent Rights, Tacks, Reverſions, *&c.* in thir Caſes, becauſe the Compriſing is *jus abſolutum & perfectum*, and nothing to follow thereupon *quoad perfectionem juris*, therefore the Lords Allowance is not neceſſary; neither, tho' it were done, can it add any thing to the Validity thereof, becauſe the Lords Allowance is *abſque citatione partis*.

§ 14.

§ 14. *Item*, Where the Compriſing is of Lands, which are *res corporeæ*, whereof Saſine and real Tradition is requiſite of the Law and Cuſtom of the Kingdom; in this Caſe, if the Lands be holden of the King, there is no Neceſſity of the Lords Allowance, but the Party may immediately after the Compriſing, draw up his Signature, and crave the ſame to be paſt in Exchequer.

§ 15. And ſicklike, if the Lands be holden of another Superior than the King, the Party may paſs Infeftment upon the Compriſing, without the Lords Allowance thereof, if the Superior be willing to infeft: But if the Superior be unwilling, or in the Concourſe of more Compriſings wherein Diligence is required; in this Caſe, the Lords Allowance is neceſſary; by the which the Lords *find the Compriſing orderly proceeded, and ordain Letters to be direct to charge the Superior to give Infeftment.* And

The Superior being charged to enter the Compriſer, has it in his Choice, either to comply with the Charge, or to redeem the Compriſing, and retain the Land to himſelf, by offering to pay the Debt compriſed for, not exceeding the Worth of the Lands; or if it doth exceed, to pay the Value of them. In which Caſe the Compriſer muſt transfer his Right and Debt to the Superior, with abſolute Warrandice for the Sum received; reſerving to himſelf Action againſt the common Debitor, in

And the Party who uſes the firſt Charge hath the Advantage of the Law.

in ſo far as the Debt is not ſatisfied by the Superior: If the Superior has accepted of a Year's Rent for the Entry, he cannot after that claim his Election.

Of old, Superiors were not obliged to enter Compriſers who could not inſtruct their Debtors Infeftments; but now, Charges are ſuſtained againſt Superiors for infefting Compriſers, *ſalvo jure cujuſlibet & ſuo*, without producing their Debtors Infeftment.

§ 16. Where the Property of the Lands is compriſed at the Inſtance of more Perſons, the Party who obtained firſt Infeftment and Saſine, is preferred *quoad proprietatem*, except when the other Compriſer alledges and verifies lawful Diligence done by him to obtain Infeftment upon his Compriſing: Which Diligence, in Lands holden of the King, is, where the Party having preſented his Signature to be paſſed in the Exchequer, and is refuſed or delayed, takes Inſtruments upon the preſenting thereof; and if the Lands be holden of another Superior, it is done by charging of the Superior to give Infeftment upon the Compriſing; and where other Infeftments

By the *Act 62. Parl. 1. Charl.* II. all *Appriſings* led ſince the 1652, within Year and Day of the firſt effectual *Compriſing* by *Inſeſtment* or *Charge* againſt the Superior, come in *pari paſſu*, as if they were all contained in one *Appriſing*: But this is

feſtments are granted after this Diligence, they are underſtood to be paſt fraudulently, and that the ſame cannot prejudge the lawful Diligence foreſaid.

is to be underſtood of *Appriſings* led within Year and Day of the Date of the firſt Decreet of *Appriſing*, and not from the Date of the Infeftment following upon it, *July* 4. 1671, *Balfour contra Douglas*. Poſterior *Appriſers* in this Caſe muſt pay to the firſt effectual one the Expences of his Diligence and Infeftment or Charge: And this was found to extend to all the Expences laid out by the firſt Compriſer, who was found not to be obliged to contribute any Part thereof himſelf, ſince it was all he had in recompence for their coming in *pari paſſu*. *Compriſings* led for real Debts and *debita fundi*, as, bygone Annualrents due by Infeftment, Feu-duties, *&c.* are carried back *ad ſuam cauſam*, and are preferred according to the Date of the real Rights: So that *Compriſings* led within Year and Day of theſe come not in *pari paſſu*. It is to be obſerved, that a Charge, upon a *Compriſing*, to infeft, is not always equal to an Infeftment; for in the Caſe of a Debitor's diſponing before Denunciation of the Compriſing, and the Diſponee's being infeft after the Charge, but before the actual Infeftment on the Appriſing, the Diſponee was found preferable, *March* 10. 1683, obſerved by *Newton*.

§ 17. The legal Reverſion of the firſt lawful Compriſing, perfected by Infeftment or Diligence in manner foreſaid, pertains to the Debitor againſt whom the Compriſing is led; and it is queſtioned, whether this legal Reverſion will pertain to a ſecond Compriſer, who denounced before the Date of the firſt Compriſing, or not; becauſe in the Time of his Denunciation the

the legal Reverſion was not exiſting. And the Lords herein have given Sentence *pro & contra*, ſometimes preferring the third Compriſer, who denounced after the firſt, and found him to have Right to the legal Reverſion, excluding a ſecond Compriſer, who had denounced before the Date of the firſt Compriſing. And in my Judgment, this laſt is not ſo agreeable to Equity, as this, where they have *found the ſecond Compriſer to have Right to the legal Reverſion, albeit he denounced before the exiſting thereof*; that is to ſay, before the Date of the firſt Compriſing.

The laſt obtains in the Practick.

§ 18. *Item*, Where once the Property is lawfully compriſed, and Infeftment paſt thereupon, the ſecond Compriſer, who compriſes the legal Reverſion, has no Neceſſity to paſs Infeftments thereupon; becauſe the Compriſing of a legal Reverſion is of the Nature of an Aſſignation to a Reverſion, to the ſubſtantial Solemnity whereof there is no Neceſſity of a Saſine or Infeftment following: But yet there is this Difference betwixt them, that an Aſſignation muſt be intimate, or otherwiſe it is poſtponed to a ſecond and poſterior Aſſignation

tion being firſt intimate; whereas a Compriſing of a Reverſion, either legal or conventional, needs no Intimation.

Tho' poſterior Compriſings need not Infeftment, becauſe they carry only the Right of Reverſion; yet ordinarily ſecond Appriſers do infeft themſelves, becauſe the firſt Compriſing may be null, or become paid, or the firſt Compriſer may ly out from ſeeking *Mails* and *Duties*, or the ſecond Compriſers would remove Tenants, which none can purſue without being infeft.

§ 19. *Item*, Where the apparent Heir of the Defunct renounces to be Heir, in that caſe no Compriſing can be led againſt him; but the Party, in whoſe favours he hath renounced, muſt come to the Lands by Adjudication; whereof this is the Form: *Firſt*, He muſt have a Decreet againſt the apparent Heir *ad hunc effectum*, that he may have Execution *contra hereditatem jacentem*. *Secondly*, He muſt raiſe Summons againſt the Superior and apparent Heir for his Intereſt, making mention of his Decreet *contra hereditatem jacentem*, and that the Defunct, his Debitor, was infeft in ſuch Lands holden of the Superior; and that therefore the Right of the



By the Act of Parliament, 6th of *September* 1672, the Creditor gets Land adjudged to him by the Lords of Seſſion, proportionally

ſaid Lands ought to be adjudged to him, and that the Superior ought to be decerned to infeft him therein.

portionally to the Sums, Principal and Annualrents due to him, with a fifth Part more, beſides the Compoſition due to the Superior and Expences of Infeftment: And this Adjudication, coming in place of Compriſings, is perfected by Charter and Saſine, as Compriſings; and the Superior is obliged to receive the Adjudger. This Decreet of Adjudication is granted, when the Debitor does produce a Progreſs of Rights to a Part of his Eſtate, equal to the principal Sum and Annualrents reſting, and a fifth Part more, *&c.* and this is called a ſpecial Adjudication. But if the Debitor fail to compear, or to produce a Progreſs, and does renounce, then the Creditor gets the Debitor's whole Eſtate adjudged to him, as it might have been formerly appriſed, for Payment of the accumulate Sum of Principal, Annualrent and Penalty, if any be, without any fifth Part more: For if in ſuch a Caſe a fifth Part more were adjudged for, the Adjudication would be void and null, by Act of Sederunt, 26th *February* 1684; and this is is called a general Adjudication. Special Adjudications may be redeemed by the Debitor, or a poſterior Adjudger, or by the Superior, within five Years from the Date; and general Adjudications within ten.

§ 20. After which the Creditor will compell the Superior to give him a Charter, containing Precepts of Saſine; whereupon he may be ſeaſed, and thereby attains to the heritable Right of the Lands: And if the Superior be not infeft himſelf in the Superiority, in that caſe the Superior muſt be charged to enter to the Superiority within forty Days, conform to the Order before expreſſed, in the Form introduced in favours

vours of Vaſſals by Act of Parliament *K. James* III.

When the Creditor has got Decreet of Adjudication *contra hereditatem jacentem*, in which there is a Decerniture againſt the Superior, ordaining him to infeft the Adjudger; if the Superior does not willingly give Charter of Adjudication, Letters of Horning are raiſed upon the Decreet charging him to infeft the Adjudger, as is done in the Caſe of an Appriſer.

§ 21. Where the Creditor is infeft conform to the Adjudication, the Lands may be redeemed from him by a ſecond Creditor who obtains the like Adjudication, by payment to the firſt Creditor of the Sums of Money owing to him, with the Annualrents thereof.

See Notes on § 16. *h. t.*

§ 22. *Item*, It may be asked, What is due to the Superior who is compelled to enter the Creditor upon Adjudication? And albeit there be no Laws nor Practick to determine the ſame, yet in my Judgment it muſt be ruled according to Compriſings, *quia eſt eadem ratio & paritas terminorum.*

By *Act* 18. *Parl.* 2. *Seſſ.* 1. *Charl.* II. the Superior gets a Year's Rent for Compoſition from the Adjudger, as in Compriſings; and this Year's Rent is after Deduction of Feu-duties and real Burdens contracted with the Superior's Conſent. No Compoſition is due either by Appriſer or Adjudger of Burgage Lands to the Magiſtrates of the Burgh.

§ 23. *Item*, If the Creditor, in whoſe favours the Adjudication is granted, deceaſe before he be infeft; in this caſe his Heir muſt crave the Decreet obtained by the Defunct againſt the apparent Heir, together with the Decreet of Adjudication obtained againſt the Superior and the apparent Heir, to be transferred to him: And if there be no Decreet of Adjudication pronounced, but only a Summons thereof depending at the Defunct's Inſtance; in that caſe the Heir muſt crave transferring of the firſt Decreet *ut ſupra*, and of the Summons of Adjudication in him as Heir to the Defunct *activè*, to the effect he may have Proceſs againſt the Superior and apparent Heir, if they be on Life; and if they be deceaſed, the transferring muſt be *paſſivè*, in the Heir's repreſenting them.

§ 24. *Item*, If there was no Decreet recovered upon the Defunct's Debt, but only a Bond unregiſtred, with a Charge to enter Heir; in that caſe the Heir of the Defunct's Creditor is not to ſeek transferring, which properly is of Decreets and Summonſes; but he is to crave Regiſtration of the Bond, if it did bear a Clauſe of Regiſtration; or, if none, he is to purſue the Heir of the Debitor *viâ ordinariâ*, by a libelled

libelled Summons upon twenty one Days Warning, or privileged by the Lords on ſix Days Warning, but Diet or Table, if the Debt be proven *inſtanter* by Production of the Writ.

Action of Transference active is, where the Purſuer craves, that a Suit commenced by his Predeceſſor, who died *lite pendente*, may be transferred *activè* in his Perſon, and go on in his Name.

Action of Transference paſſive is, when the Purſuer of an Action, in the Courſe of which the Defender died, craves, that it may be transferred *paſſivè* againſt his Repreſentatives, and go on in the ſame Manner as it would have done againſt the Party deceaſt.

There is now no Uſe for the firſt of theſe, ſince the *Act* 15. *Seſſ.* 4. *Parl. Will. and Mary.* For an Heir, Executor or Aſſigny, producing their reſpective Titles of Service, Confirmation, or ſpecial Aſſignation, tho' not intimated, may proceed in any Cauſe that was depending at their Predeceſſor or Author's Inſtance.

§ 25. *Item*, If the Heir of the Debitor, againſt whom the Charge was uſed to enter Heir, be deceaſed; in that caſe all the Diligence uſed upon that Charge to enter Heir dies with the Perſon that was charged, and the Creditor will be forced *de novo* to charge the next apparent Heir to enter Heir, not to him who was charged firſt and deceaſed, but to the Defunct, who was Debitor, and thereafter to obtain Decreet againſt him; and in caſe of his Renuncia-

tion to enter Heir to the Defunct, to crave Adjudication *ut ſupra.*

If the apparent Heir, who renounced, die before Decreet of Adjudication be obtained, the whole Proceſs falls, and a new Charge to enter Heir muſt be given to the next in Blood, and apparent Heir at the time; againſt whom a new Proceſs is to be led, as was the other againſt the deceaſed apparent Heir, after the Manner ſet down in § 19. *h. t.* For till Adjudication be obtained the Lands are *in hereditate jacente*, and in Conſtruction of Law are *nullius.*

§ 26. If two Creditors obtain Decreets of Adjudication againſt the Superior, for infefting of them in the Lands, the Superior may raiſe a Suſpenſion of double Poinding, making mention, *That he is charged and diſtreſſed by two ſeveral Creditors, for one and the ſelf ſame Thing; and he cannot be obliged to infeft them both, but one of them; and therefore to deſire that they may be both ſummoned to compear before the Lords, bringing with them their Rights; and to hear and ſee it declared which of them has beſt Right, and the Party having no Right to be diſcharged of all further moleſting and troubling the Superior in Time coming.*

Upon this Suſpenſion there ariſes a Competition of Rights and Preference betwixt theſe two Adjudgers; for the more ſpeedy and effectual Proſecution and Determination whereof, there uſes to be a Summons of Reduction, Improbation and Declarator, raiſed at the Inſtance of one or both of the Competitors.

TITLE

# TITLE XII.

## *Of Reductions and Improbations.*

§ 1. WHere Summonſes of Improbation are ſimply raiſed, without Reduction, then in effect the Concluſion of the Summons, and the Reaſons of the ſame, are coincident and one Thing; to wit, *To hear and ſee the Writs called for, to be decerned to be improven and null, as falſe and feigned, and to make no Faith*; which is the Concluſion, *becauſe the ſame are falſe*; and the Purſuer, with Concourſe of the King's Advocate, offers him to prove the ſame, *per teſtes inſertos, & omni alio modo quo de jure:* And therefore, in reſpect of the Coincidence, the Form of the Summons of Improbation varies from the Form of the Summons of Reduction; for the Summonſes of Reduction are conceived in a peremptory Form, bearing firſt Production, then Reaſons of Reduction; but the Summons of Improbation begins not at Production, but keeps the ordinary Stile of a common Summons, and then concludes Production of the Writ to be improven.

§ 2. *Item*, Where Summonſes of Reduction and Improbation are joined in one Summons, which is very ordinary; in that caſe the Summons keeps the Stile of Reduction, and bears firſt Production of the Writs, and then the Reaſons.

§ 3. *Item*, When the Summons comes to be diſputed, the Purſuer may divide his Reduction from his Improbation, and may force the Party to anſwer to the Reaſons of Reduction, he granting the Production to be ſatisfied in ſo far as concerns the Reduction, notwithſtanding that the Production, in ſo far as it doth concern the Improbation, be not cloſed.

§ 4, *Item*, If the Defender be compearing in the Improbation, he cannot be abſent in the Reduction, which hath been often found by the Lords; albeit it ſeems to be very hard and prejudicial to the Defenders, who are forced to compear in the Improbation, for eſchewing of the Certification, againſt which he will never be reſtored, if he be abſent, and produce not.

The Maxim, *Minor non tenetur placitare ſuper hereditate paterna*, does not hold in Improbation, in ſo far as concerns Production, and Trial of Falſhood, tho' it obtains in the Reduction.

§ 5.

§ 5. *Item*, Albeit the Purſuers in Reductions may call for Production of Writs, and Infeftments of the Lands wherein they are infeft, made to the Defenders, either by themſelves, their Predeceſſors or Authors, or made by any other Perſon not being their Author, or made by the Defenders to others; yet the Defenders will not be obliged in the Production to produce all the Infeftments called for, but only ſuch againſt which there is a ſpecial Reaſon libelled: But if againſt the ſame there be no ſpecial Reaſon of Reduction or Improbation libelled, but that the ſame falls *in conſequentiam*, in this caſe there is no Neceſſity of Production, but it is enough that the Defender grants that the ſamen falls *in conſequentiam*.

§ 6. *Item*, In Improbations the Defender may not be compelled to produce any Writs, but ſuch as are made by the Purſuer himſelf, or his Predeceſſors to whom he ſucceeds, or by his Authors from whom he has Right.

§ 7. But if any ſuch Writs, which are neither made by the Purſuer nor his Predeceſſors, *&c.* and yet ſuch as may trouble him thereafter, be uſed in any Proceſs, either by way of Exception or by way of Reply,

Reply, againſt any Party, that Party againſt whom the ſamen is uſed, may offer to improve the ſame in that ſame Proceſs.

*Vid. tit.* 1. § 87 *& ſeqq. & tit.* 13. § 25 *& ſeqq.* Becauſe when the Compriſer or Adjudger is duly infeft by the Superior, ſundry Actions, reſpecting the Lands adjudged, are competent, particularly the Action of Removing, from the Right to out-put and in-put Tenants; therefore our Author proceeds to

# TITLE XIII.

## *Of Actions of Removing.*

§ 1. *Item*, In Actions of Removing, the Defences are either peremptory of that Inſtance, or of the Warning, or of the whole Cauſe.

§ 2. The Defences which elide the Inſtance only, are called *Dilators*; ſuch as, That the Party was not lawfully ſummoned, or, That he was out of the Country the time of the Citation, and not ſummoned upon ſixty Days Warning; or, That he was Minor, and that his Tutors and Curators were not ſummoned.

For the Nature and Species of dilatory Defences, vid. *tit.* 1. § 24 *& ſeq.* with the Notes thereon.

§ 3. The Defences againſt the Warning are,

are, either againſt the Lawfulneſs of the Warning, or, That the Tenant's Maſter is not warned.

§ 4. The Objections againſt the Lawfulneſs of the Warning are, That the Parties are not lawfully warned perſonally, or at their Dwelling-places, or upon the Ground of the Lands, and at the Pariſh-kirk on a *Sunday* before Noon, forty Days before *Whitſunday*; or, That the Warning is not ſtamped, *&c.* But commonly the Judge is in uſe to ſhow Favour, by giving Leave to the Purſuer to mend the Faults of the Warning, which ſhould not be done after the Defender has accepted the Pieces and Order of Proceſs.

The Warning at the Tenant's Houſe, or on the Ground, ſhould be before the Warning at the Kirk, *cap.* 39. *Parl.* 6. *Q. Mary.* The Term of *Whitſunday* is, by *Act* 31. *Seſſ.* 2. *Parl. Will. and Mary*, the fifteenth Day of *May.*

§ 5. *Item*, The Exception of not warning the Tenant's Maſter, is not only of the Nature of a Dilator, but alſo is peremptor of the Warning: And to the Relevancy of ſuch an Exception, it is required that the Defender alledge, That he was Tenant the time of the Warning, and of before, to ſuch a Perſon who has a real Right to the

the Lands, either by Infeftment or Tack, *&c.* and he not warned.

§ 6. *Memorandum*, This Exception may alſo be proponed for an abſolute Peremptor of the whole Cauſe, and not of the Warning only; but then it wants theſe laſt Words, *and he not warned.* And as theſe two Exceptions are different in their own Nature, ſo they muſt be elided by different Replies: For to the eliding of the firſt Form, a Reply of a better Right, than that which is qualified in the Perſon of the Maſter, is not proper, and will not be admitted, becauſe the Tenant is not obliged to diſpute upon the Maſter's Right; but a Reply upon a better Right will be moſt proper againſt the ſecond Form of Exception, and the Tenants will be compelled to anſwer thereto, where the Exception is proponed upon their Maſter's Right ſimply, and not with this Quality, That their Maſter was not warned.

§ 7. *Item*, The common Reply againſt the firſt Form of the Exception is this, That the Purſuer offers him to prove, that the Defender was Tenant to him by Payment of Mail and Duty before the Warning; which Reply is ever found relevant in favour of the Purſuer, in reſpect the foreſaid Exce-

Exception conſiſts in the Privilege which a Tenant by Cuſtom has for his Defence, not to be removed till his Maſter be warned: And therefore, when that Part of the Exception is elided, which bears, That he is Tenant to ſuch another Man, by a Reply, That he is Tenant to the Purſuer, the Force of the Exception is taken away.

§ 8. And yet if the Tenant, who propones the Exception of not warning of his Maſter, be able to make his Exception more pregnant than the Reply, either in the Circumſtance of the Payment of the Mail and Duty, or in the Manner of Probation, the Exception will be found relevant notwithſtanding the Reply: As for Inſtance, if the Tenant ſhall clear, that the Duty paid by him to the Purſuer, if any was, was paid to the Purſuer in his Maſter's Name, as for a Feu-duty or a Tack-duty due by the Maſter to the Purſuer; or if the Tenant offer to prove his Exception by Writ or Oath of the Purſuer; in which caſe a Reply, That the Tenant paid Mail and Duty to the Purſuer, (which is only offered to be proven by Witneſſes) will not be reſpected.

§ 9. *Item*, This Exception, That the Defender is Tenant to his Maſter, who is not

not warned, will not be ſuſtained, if the Purſuer offer him to prove that the Defender was Tenant in-put by him in the Lands, albeit it be true that thereafter he paid Mail and Duty to another Maſter, *quia tenens non poteſt mutare cauſam poſſeſſionis ſui domini*,. except it be cleared, that the Tenant changed the Maſter, not voluntarily, but by Order and Courſe of Law, or by a Deed done by the Maſter.

§ 10. *Item*, If it be evident and clear, by the Purſuer's own Right, that a Part of the Lands is excepted forth of the Saſine; and if the Defender alledge himſelf to be the Tenant of the Lands excepted, to that Perſon in whoſe favour the Exception is made, this Exception cannot be elided by a Reply, bearing, That the Defender is Tenant to the Purſuer, in reſpect that the Purſuer's Right is elided by his own Saſine.

§ 11. *Item*, If the Tenant having the Benefit of this Exception, That his Maſter is not warned, does omit it, the Maſter has a double Remedy: For either he may compear for his Intereſt in the Removing, and propone his Defence upon his Infeftment cled with Poſſeſſion, and ſo ſtay the Decreet of Removing; or, if Decreet of Removing be pronounced *by* [*i. e. without*]

*out*] his Knowledge, he may ſuſpend the ſaid Decreet, and will get his Right diſcuſſed in the Suſpenſion, without reſpect of the Decreet ſtanding, and will not be put to Reduction thereof.

§ 12. *Item*, If he compear before the Decreet, and deſire to be admitted for his Intereſt; he being admitted, may propone his Defence upon his Right *in duplici forma*; either that he is infeft and in poſſeſſion, and that his Tenant cannot be removed, except he had been warned; or upon his Infeftment and Poſſeſſion *ſimpliciter*: And the firſt Manner of Exception will be found relevant, becauſe theſe two Exceptions are alike ſure in the Law, *viz.* That a Tenant cannot be removed except his Maſter be warned; and *next*, That an Heritor being infeft, and in poſſeſſion, cannot be put from his Poſſeſſion but by a Warning. And this was found in the Action betwixt *Scot* of *Tuſhilaw* and the Earl of *Nithiſdale*. And if the Exception be proponed *ſimpliciter*, without this Addition, *not warned*; in that caſe the Parties come to diſpute *ſimpliciter* upon their Right, ſo far as the ſame may be diſputed in a Removing, which is *judicium poſſeſſorium*, and no further: For if the Defender

fender alledge an Infeftment cled with ten Years Poſſeſſion, it will be found relevant in the Removing, notwithſtanding of the Purſuer's Reply upon an anterior Infeftment, preceeding the Defender's Infeftment; and the Purſuer will be put to his Action of Reduction.

§ 13. The Difference betwixt theſe two Exceptions is not great: For when the Infeftment is clothed with ten Years Poſſeſſion, the ſame are coincident; but when the Infeftment is cled with fewer Years, as four or five, the Addition of *not warned* is neceſſary. But the Difference between the two Exceptions is this, that divers Replies may be proponed againſt this Exception made *ſimpliciter*, which could not be proponed againſt this Exception made *qualificatè*, [*not warned :* ] For againſt this Exception being proponed *ſimpliciter* theſe Replies will be ſuſtained, *viz.* That an Infeftment cled with ten Years Poſſeſſion, whereupon the Exception is proponed, was a Wadſet under Redemption, and redeemed. *Next*, That this Infeftment is reduced againſt the Party being lawfully ſummoned, finding the Lands to be recognoſced. But none of theſe Replies will be found relevant againſt the ſaid Exception

on

on proponed *qualificatè*; becauſe albeit his Infeftment be redeemed, reduced or recognoſced, yet he being Poſſeſſor, cannot be removed without a Warning; *& ratio rationis eſt*, Becauſe he cannot be made liable to violent Profits without a Warning. Albeit I think this moſt reaſonable and juſt in point of Law, yet I know where the Lords have ſuſtained this Reply of Redemption or Reduction againſt the Exception proponed by a Tenant, alledging that his Maſter was not warned; and where the Lords have found, that there is no Neceſſity to warn that Maſter, whoſe Infeftment is redeemed or reduced.

*Spottiſwood*, in his *Practicks*, Tit. *Removing*, obſerves two Deciſions, one in *June* 1627, *Maxwel* againſt the Tenants of *Glaſſock*, where *Maxwel* having purſued a Removing, it was *alledged* for one of the Defenders, That he was Tenant to one *Mackie*, who was heritably infeft in the Lands, and was not warned. *Replied*, That any Infeftment *Mackie* had, was decerned to make no Faith at my Lord *Harris*'s Inſtance, who was Author to the Purſuer. *Duplied*, That he ought not to diſpute upon his Maſter's Right, but it was ſufficient for him to alledge Infeftment. The Lords *repelled the Exception, in reſpect of the Reply*.

The other Deciſion was betwixt the Lord *Nithiſdale* and his Tenants, 26th *July* 1627; where, in an Action of Removing at my Lord's Inſtance, it was *alledged* for *A*, That he was Tenant to *B*, who was heritably infeft, holding of the King, and he not warned. *Replied*, That if *B* had any Infeftment, it was reduced by virtue of my Lord's Reſtitution againſt the Forfaulture. *The Exception was repelled in reſpect of the Reply.*

§ 14. *Item*, Where the Maſter ſuſpends a Decreet of Removing given againſt the Tenant, upon this Reaſon, That the Decreet of Removing was given upon Colluſion, in reſpect the Tenant omitted the foreſaid Defence, That the Maſter was not warned; the Lords do ever find this Reaſon relevant, by Production of the Maſter's Saſine, and that without reſpect of the Decreet of Removing.

§ 15. *Item*, If the Purſuer reply upon the Nullity of the Infeftment, whereupon any Exception is proponed; in that caſe, if the Nullity be *nullitas juris*, it will be received by way of Reply; but if it be *nullitas facti*, it will be repelled, in reſpect of the Infeftment ſtanding; and the Purſuer will be put to his Action of Reduction.

§ 16. Albeit of the Civil Law, theſe two, *ipſo jure*, and, *ope exceptionis*, are opponed; yet by our Practick they are all one; and to them is opponed *nullitas viâ actionis*.

§ 17. For, *omne quod nullum eſt ipſo jure, nullum eſt ope exceptionis vel replicationis*; *& è contrà*: But *nullitas facti* is not opponable by way of Exception, but muſt be purſued by way of Action.

§ 18.

§ 18. *Nullitates juris* are properly theſe, where the Propoſition of the Nullity is founded upon Law or Cuſtom; and the Aſſumption either *negativè*, *quòd non eget probatione*, or proven by the Writ itſelf, againſt which the Nullity is proponed.

§ 19. But where either the Propoſition is not founded upon a clear Law or Cuſtom, or where the Aſſumption conſiſts *in facto*, which is not proven by the Writ impugned, ſuch Nullities are not receivable by way of Exception, but by way of Action: As for Example, This Saſine is null, becauſe of Kirk-lands, not confirmed or not regiſtrate in due Time. Theſe are *nullitates juris*, where the Aſſumption is *negativè*.

§ 20. *Item*, Where it is opponed, That a Compriſing is null, becauſe uſed upon ten Days Warning, where the Law requires fifteen; and if this be proven by the Compriſing itſelf, it is *nullitas juris*, where the Aſſumption is *affirmativè* proven by the Writ impugned.

§ 21. But if it be alledged againſt an Infeftment of Kirk-lands, That they are ſet without Conſent of moſt part of the Chapter, or ſet in diminution of the Rental; in theſe Caſes, albeit the Propoſition be

founded upon Law and Cuſtom, yet becauſe the Aſſumption is *facti*, and not proven by the Writ impugned, but requires the Probation of the Number of the Chapter, and of the Truth of the Rental; therefore ſuch Nullities are not received by way of Exception, but remitted to the Reduction. And yet there is an Exception from this Rule, where the Aſſumption conſiſts *in facto*, and is not proven by the Writ impugned; and yet is daily received by way of Exception, as this, That the Evident or Bond is null, becauſe it is made by the Party being Minor, *habens curatores*, and without their Conſent.

§ 22. *Item*, There are alſo Exceptions from the other Part of the Rule, *viz.* where the Propoſition is founded upon Law or Cuſtom, and the Aſſumption either *negativè*, or proven *inſtanter* by the Writ impugned, and yet the Nullities are not received by way of Exception: As if a Tack of Teinds be alledged null upon the Act of Parliament 1594, becauſe it is ſet without Conſent of the Patron; which Nullity is not by our Practick admitted by way of Exception, whereof the apparent Reaſons are theſe: 1*mo*, Becauſe it is a Right or Tack ſtanding clad with Poſſeſſion; 2*do*, Becauſe

Becauſe the Act of Parliament 1594 *ſtatuit tantùm prohibendo, & non addit clauſulam annullantem vel irritantem.*

§ 23. This Difference was alſo of the Civil Law, *inter leges jubentes & prohibentes*; and by the Opinion of the Doctors, *Lex præceptiva vel affirmans non ſortiebatur effectum abſque declaratoria, niſi præceptivæ legi adderetur clauſula irritans: ſed in lege prohibitoria, de opinione Doctorum, non eſt neceſſe ut ſubjiciatur clauſula irritans; quia ipſa prohibitio reddit actum aliter geſtum invalidum.*

§ 24. By the Cuſtom of *Scotland* theſe ſubtle Diſtinctions are not attended; but all Nullities are to be purſued by way of Action, except where the Law declares



Of this kind is the Act of Parliament 1621, *Againſt Alienations, &c. by Bankrupts*, and yet by our Practice, the Nullity ariſing from that Act is oftimes received only by way of Reduction; for which Sir *George Mackenzie* gives this Reaſon, That the Author or Diſponer muſt be called to maintain his Right; which could not be, if the Nullity were receivable *ope exceptionis*: And if the Diſponer were called, he might elide the Purſuit, by alledging that the Debt, which his Right was ſaid to prejudge, was paid, or diſcharged or extinguiſhed by Compenſation; neither of which could be known to the Receiver. And yet in ſome Caſes this Nullity is receivable by way of Exception, *v. g.* if the Right bear to be *for Love and Favour*; for in that caſe there needs no Probation that it is fraudulent.

the Deed null by way of Exception or Reply.

Diſpoſitions of Moveables, and Rights of ſmall Moment may be annulled by Exception, 16th *June* 1671, *Bower contra* the Lady *Cowper*; 5th *January* 1669, *Simes contra Brown.* It would likewiſe ſeem that the Nullity in the *Act* 5. *Parl.* 1681, is receivable by way of Exception: For tho' the Act does not expreſly declare ſo, yet ſince the Law annulls ſuch Writs as want the Deſignation of Writer and Witneſſes, and the Subſcription of the Witneſſes, and ſince this Nullity muſt appear by Production of the Paper itſelf, it may reaſonably be received *per modum exceptionis.*

§ 25. *Memorandum*, Improbation and Falſhood are ever proponable by way of Exception or Reply, if it be proponed *debito tempore*, *hoc eſt*, *ante litem conteſtatam*, where the Writs were produced *in initio litis*: But if it was not proponed before Litiſconteſtation, Writs being produced as ſaid is, in that caſe the Improbation is repelled, and reſerved by way of Action, and that becauſe it is preſumed by the Lords that it is done *animo differendi litem*: But if the Writ offered to be improven was not produced *in modum tituli*, *ante litem conteſtatam*, but *in modum probationis*; in that caſe Improbation is ever received by way of Exception. And it is ſingular in this Caſe, that there will be two Litiſconteſtations in one Cauſe, ſeeing this

Impro-

Improbation is ever proponed *poſt concluſionem in cauſa.*

For explaining this and ſome of the following Sections, ſee § 87 *& ſeq.* of *Tit.* 1. and Notes there, and *Tit.* 12. of this Book.

§ 26. *Item*, Improbation being proponed by way of Exception before inferior Judges, the ſame can be followed only by the direct Manner, and not by the indirect, becauſe the Lords of Seſſion are only Judges to the indirect Manner of Improbation.

§ 27. *Item*, The Party Improver cannot come to the indirect Manner, where the direct is fully extant; that is to ſay, where all the Witneſſes inſert in the Writ, and Writer thereof, are living and examined: But where ſome of them are dead, in that caſe they come to the indirect Manner *per præſumptiones & indicia:* And where the Improver has the Benefit of giving in Articles of Improbation in the indirect Manner, the Party againſt whom Improbation is proponed has alſo Place to give in Articles of Approbation.

§ 28. *Item*, In the diſcuſſing of the Articles of Approbation and Improbation, *hoc eſt ſingulare*, that the Lords will not only

receive the Depoſitions of Witneſſes, but alſo examine the Parties upon Oath; whereas in all other Proceſſes, Oaths and Witneſſes are not compatible.

§ 29. *Item*, In all Improbations, either by way of Action or Exception, the Party who offers to improve, muſt conſign a certain Sum of Money, at the Diſcretion of the Judge; which he will loſe, if he ſuccumb; and take up, if he prevail.

§ 30. *Item*, Improbation either by way of Action or Exception, cannot be propoſed againſt the Extract of an Evident, but againſt the principal Evident itſelf; and therefore commonly in all Improbations, the Clerk-Regiſter and his Deputes, in whoſe Hands the principal Writ remains for Warrant of the Regiſter, are ſummoned for Exhibition thereof.

*Vid.* Notes on *Tit.* 1. § 88.

An Extract out of the Books of Seſſion or Chancery will ſatisfy the Production, except as to Saſines, Hornings or Inhibitions, becauſe the Principals are not left at the Regiſter; but an Extract out of the Regiſter of an inferior Court will not. Certification will not be granted againſt the more minute Inſtruments of Writings, ſuch as Executions, Warnings, or Minutes of Proceſs, unleſs they are very recent.

§ 31. *Item*, It is to be remembred, that all dilatory Exceptions are to be verified *inſtanter*, otherwiſe ought to be repelled.

§ 32.

§ 32. *Item*, All declinatory or dilatory Exceptions muſt be proponed before the peremptory, otherwiſe they will be repelled; and yet a Horning, which in effect is but a Dilatory, may be proponed *omni tempore* for debarring of a Party, either before or after Litiſconteſtation; and ſo of Excommunication.

See *Tit.* 1. §§ 22, 23, 31, 32. Excommunication has not now that Force, by *Act* 28. *Seſſ.* 2. *Parl.* 1. *Will. and Mary.*

§ 33. *Item*, In Actions of Removing, the Defender is obliged to find Caution for the violent Profits at the firſt Term after Litiſconteſtation; and if he fail in finding of Caution, Decreet will be given againſt him for that Cauſe to remove, except the Purſuer have a Reply to be proven, whereupon he uſeth more Diets, and Terms of Probation; for in that caſe the Judge uſeth to give the Defender longer Time, and occaſion to find his Caution; albeit in my Opinion, the Purſuer may take a Decreet for not finding Caution, albeit he prove not his Reply. But the Purſuers of Removings are commonly loath to take Decreet, while

*Violent Profits* are ſo called, becauſe they are ſuch Profits as are due by and for violent Poſſeſſion, whatſoever Way it be; and they are the Double of the Rents of Tenements within Burgh,

while their Reply be proven, if they be ſure to prove the ſame.

Burgh, and the greateſt Profits the Purſuer could have made of Lands in the Country. The Tenant being duly warned, may be purſued, even before the Term, to remove at the Term upon a Citation of ſix Days, if within *Scotland*; and ſixty, if forth thereof: And in this Proceſs he will not be allowed to propone any Defence requiring a Term to prove it, till he find Caution for the violent Profits, in caſe he ſuccumb.

§ 34. *Item*, This is a common Exception in Removings, That the Defender bruiks a Part of the Lands contained in the Removing, by a good Right flowing from the Purſuer, or from any other Perſon, and bruiks the reſt *pro indiviſo*; or otherwiſe bruiks ſome Lands not contained in his Summons, either by a Right, or as Tenant to a third Perſon; and that he bruiks the Lands from which he is warned *pro indiviſo* therewith. And theſe Exceptions are ever found relevant in Law, and cannot be taken away by any Reply, except this one, That the Lands are divided, or ſeverally kend and known.

§ 35. *Item*, In Removings, this Exception is uſually proponed, That the Defender is Tenant to ſuch a third Perſon, who has Tack and Aſſedation from the Purſuer for Terms to run the Time of the Warning, at leaſt who bruiks *per tacitam relocationem*;

*cationem*; which Exception is ſometimes admitted, ſometimes repelled, according to the Subſtance and Circumſtances of the Cauſe, and the Length and Shortneſs of the Time ſince the Tack expired.

§ 36. *Item*, This Exception is uſual in Removings, That the Purſuer, ſince the Warning, has received Mail and Duty from the Defender, and ſo acknowledged him to be a Tenant; or, That the Tenant has done Service, which is a Part of the Duty of the Land: Which Exceptions are relevant, but with this Caution, that the Mail and Duty received muſt be of the Year after the Warning is made; for as to the Year in which the Warning is made, the Tenant has Right to the Cropt after the Warning, and is obliged to pay Duty to the Maſter therefore; which is ever paid after the *Whitſunday* at which the Warning is made.

This is not relevant, if done by Command of the Purſuer's Factor or Grieve, without ſpecial Order, *March* 5, 1629, Laird of *Lee contra Kirkwood.*

§ 37. *Item*, Albeit the Tenant carry away the Cropt of Corns after he is warned, yet he has no Right to the Graſs after *Whitſunday*; but if he meddle therewith, he may be purſued for the violent Profits of the Graſs.

§ 38.

§ 38. *Item*, This Defence is commonly received in Removings, *viz.* That the Purſuer promiſed to the Defender not to remove him a Year after the Warning; and this Exception is probable by Witneſſes. And if the Exception be proponed upon a Promiſe made for Life, or for more Years than one, it is not probable by Witneſſes, but by Writ or Oath of Party.

§ 39. When Decreets of Removing were given before the Sheriffs of old, there could no Horning be direct thereupon, till the Party Obtainer of the Decreet did purſue the Party againſt whom the Decreet was obtained before the Lords, to hear and ſee Decreets, and Letters conform, granted thereupon. But now, by the late Act of Parliament 1606, *cap.* 10. this Decreet conform is not neceſſary; but Letters of Horning may be direct upon Decreets of Sheriffs, upon Supplication to the Lords, without Citation of the Party.

§ 40. But when the Party ſupplicates the Lords to get Letters of Horning, he muſt ſhew his Decreet, with the Precept raiſed thereupon, and the Executions thereof raiſed upon fifteen Days Warning, to the Clerk of the Bills.

TITLE

# TITLE XIV.

## *Of Diverſity of Decreets.*

§ 1. DEcreets, or Letters conform, are now commonly craved upon Rolments of Courts, or Decreets of Baron Courts.

Decreets-conform, upon Decreets in a Baron Court, are now ſought and obtained in the Sheriff Court, and not in uſe to be got in the Seſſion.

§ 2. *Item*, Decreets-conform are alſo craved upon Gifts and Proviſions to Benefices or Penſions, or Tacks of Teinds; in which there is no Citation of any particular Party, but allenarly a general Citation upon ſix Days Warning, at the Pariſh-kirk upon *Sunday*, or at the Market-croſs of the head Burgh of the Shire; albeit, if the Purſuers pleaſe, they may ſummon particular Parties, who have Intereſt to hear and ſee Decreets and Letters conform granted.

§ 3. *Item*, By Act of Parliament 1592, *cap.* 140. all Letters of Horning generally directed *againſt all and ſundry* are prohibited; and yet the Practick of the Lords ſuſtains uſually Horning upon ſuch Letters,

if

if the Party be charged for Payment of a Duty uſed and wont to be paid by them.

By Act 13. Seſſ. 2. Parl. 1. William and Mary, *All general Letters are prohibite, except for the King's Revenue and Miniſters Localities, without Prejudice of the Decreets of poinding of the Ground, which are to have the ſame Execution as formerly.*

§ 4. *Item*, When Decreets are given before the Lords of Seſſion, either conform to the Decreets of inferior Judges, or upon Summonſes raiſed before themſelves *viâ ordinariâ*; ſo ſoon as Decreet is given, the Decreet itſelf is an immediate and ſufficient Warrant to any Writer to the Signet to raiſe Letters of Horning and Poinding thereupon, and that without Bill or Supplication made to the Lords: And the Writer to the Signet adds to the End of theſe Letters theſe Words, *Per decretum Dominorum Concilii*; but when Letters are direct upon Supplication made to the Lords, the ſame bears, *Ex deliberatione Dominorum Concilii.*

§ 5. *Item*, Where Bonds or Contracts are regiſtred in the Books of Council by Conſent of the Party, bearing this Clauſe, *That they conſent that Letters of Horning and Poinding ſhall be direct upon a ſimple Charge of ſix or ten Days Warning*, the ſame are a Warrant to the Writer to the

the Signet to draw up Letters in the ſame Form as if the Decreet were given before the Lords upon Citation of Party. But there is a Difference betwixt Letters of Horning upon Decreets-conform, upon a general Citation, or upon regiſtrate Bonds or Contracts, which are accounted Decreets on the one Part; and Decreets given by the Lords, by Citation of a particular Party, which is called *via ordinaria*: For the *firſt* may be ſuſpended upon whatſoever Reaſon is relevant of the Law, and the Reaſon muſt be diſcuſſed *in jure*; without reſpect of a Decreet ſtanding; but in the *ſecond* Caſe, where a Party is cited particularly, albeit Suſpenſion be raiſed againſt the Decreet, yet when the Suſpenſion comes to be diſputed, the Party Obtainer of the Decreet has this Privilege to oppone againſt all the Reaſons of the Suſpenſion, (except they be Deeds done by the Charger ſince his Decreet) That notwithſtanding of the Reaſons, his Letters of Horning ought to be found orderly proceeded, in reſpect of the Decreet ſtanding unreduced. And the Reaſon hereof is, that a Decreet being given againſt a Party particularly cited, it is thought agreeable to Juſtice to debar him by way of Suſpenſion,

ſion, in reſpect of his Contumacy, and to put him to the Trouble and Neceſſity of reducing the Decreet.

§ 6. But if the Suſpender, *ſimul & ſemel* with the Suſpenſion, intent Summons of Reduction of the Decreet, and have his Reduction ready to be diſputed at the Time when the Suſpenſion comes to be diſcuſſed; the Lords are in uſe, either to lay over the Suſpenſion till the Reduction be diſcuſſed, or elſe, if they pronounce Sentence in the Suſpenſion, they pronounce it with this Quality, *Suſpending the Execution* to ſuch a reaſonable Time as they ſhall think fit; within which the Party may do Diligence to get his Reduction decided: And if at the End of that Time the Lords find, that he was diligent, *& quòd per eum non ſtetit*, they are in uſe to prorogate the Term of ſuſpending of the Execution.

The Suſpender, at the ſame time that he preſents his Bill of Suſpenſion, produces a Summons of Reduction executed; and at calling the Suſpenſion, he repetes his Reaſons of Suſpenſion and Reduction as coincident, holding the Production ſatisfied by the Charger; and upon purging his Contumacy, or giving a relevant Cauſe of Abſence, he is reponed againſt the Decreet, which is turned into a Libel, and is admitted to his lawful Defences.

§ 7. *Item*, There is another Caſe wherein *via ordinaria* is opponed to Decreets of Regi-

Regiſtration or Transferring: For albeit the Party be cited particularly to hear and ſee a Bond or Contract regiſtred, or to hear and ſee a Decreet transferred; yet that is not counted *via ordinaria*, becauſe the Summons concludes not the Party to be decerned to pay any Sum, or do any particular Deed, but allenarly to hear and ſee a Bond or Contract regiſtred, or Decreet transferred. Which Concluſion being *aliquid multiplex & collectivum*, comprehending all that which is contained in the Body of the Bonds and Contracts craved to be regiſtred, or Decreets craved to be transferred; the ſame cannot be elided but by an Exception total and univerſal, and as large and ample as is the Concluſion, *viz. That the Bond craved to be regiſtred, or Decreet craved to be transferred, is renounced and diſcharged by the Purſuer* in totum. And therefore, by the Practick of the Houſe, a partial Exception is never admitted againſt a Summons of Regiſtration or Transferring. But notwithſtanding thereof, the Lords will ordain the Bond to be regiſtred, or Decreet transferred; reſerving to the Party Defender his partial Exceptions to be diſcuſſed by way of Suſpenſion.

§ 8. But where the Lords find, that there is ſome Probability in the partial Exception, and that the Defender, in reſpect of the Greatneſs of the Sum contained in the Bond or Decreet, will hardly be able to find Caution at the Time of the Suſpenſion, they are in uſe to grant Suſpenſion *pro primo*, without Caution or Conſignation.

§ 9. *Item*, At other Times they are in uſe to reſerve the partial Exceptions to be diſputed by way of Suſpenſion, with the like Manner of Probation as was competent, if the ſame had been admitted againſt the Summons of Regiſtration and Transferring. And the Reaſon and Juſtice of this is evident : For the Defender would have Terms of Probation, if his partial Exceptions were admitted ; but when the ſame comes to Suſpenſion, wherein all muſt be proven *inſtanter*, according to the Practick, he will get no Term of Probation, except the ſame be particularly reſerved to him.

§ 10. *Item*, Albeit partial Exceptions be not admitted againſt Summonſes of Regiſtration or Transferring, yet if the Defender propone ſeverally as many partial Exceptions, as (being conjoined) will e-

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lide the Subject of the Summons *in totum*, the ſame is admiſſible.

When Decreets of Regiſtration, or of transferring Writs already regiſtred, were obtained, there were Letters of Horning raiſed on the Writ; and the Suſpenſion was raiſed by the Defender, as if he had been Granter of the Writ.

As to Actions of Transference, active and paſſive, ſee Notes on §§ 23 & 24. *tit.* 11. There is now no Uſe for Summons of Regiſtration, as to the Heirs of the Creditors in Bonds, ſince the *Act* 15. *Seſſ.* 4. *K. William*: And as to the Debitor's Heirs, a Decreet of Conſtitution has the ſame Effect.

§ 11. *Item*, There is a great Difference betwixt Decreets given *viâ ordinariâ*, that is to ſay, by a particular Citation of the Party *ad effectum particularem*, and the other Decreets, either given by Conſent, or upon general Citation; and alſo Decreets given upon Suſpenſion, which are alſo counted to be opponed to *via ordinaria*: For where a Decreet is obtained againſt a Party being lawfully cited *ad effectum particularem*, if it be obtained againſt a Party not compearing, it has the Benefit of a Decreet ſtanding, ay and while it be reduced, *ut ſupra*; and if it be obtained againſt the Party compearing, it is unreducible, and he will never be heard to call the ſame in queſtion; becauſe either he proponed his Defences, which were diſcuſſed in his contrary; or he omitted

the ſame, being competent *in prima inſtantia :* And in reſpect of his Omiſſion, he will never be heard to reduce *in ſecunda.* But in all other Decreets, the Party has Liberty to propone whatſoever Reaſons by way of Suſpenſion : And albeit Decreet be given againſt him in that Suſpenſion, yet he will be heard to ſuſpend *de novo*, upon new Reaſons, notwithſtanding the ſame was competent to him the Time of raiſing the firſt Suſpenſion. And in the Decreets of Suſpenſion which are given betwixt Parties compearing, they are in worſe Caſe than in the Decreets given upon Summonſes *viâ ordinariâ* ; in which Sentence given, *parte comparente*, cannot be reduced, *neque ſuper eiſdem deductis, neque ſuper competentibus & omiſſis :* Whereas in Decreets given upon Suſpenſions, Parties will be heard to ſuſpend, not once only, but many Times after, providing the ſame be raiſed upon new Grounds, which were not diſcuſſed in former Suſpenſions, notwithſtanding the ſame

The Lords, by Act of Sederunt *Anno* 1649, declared that they would not ſuſtain Reaſons of Suſpenſion which were *competent* and *omitted*, either in the firſt Decreet, or in ſubſequent Decreets of Suſpenſion : So that after diſcuſſing the firſt Suſpenſion,

ſame were competent, but omitted at that Time.

penſion, whatever was then competent, cannot be received by a poſterior Suſpenſion.

§ 12. *Item*, There is only one Caſe, wherein the Lords will not admit a Party to ſuſpend upon a new Reaſon, after Decreet given upon a firſt Suſpenſion; which is this, if the Charger, upon the Suſpender's Omiſſion, be prejudged of his Anſwer and Defences againſt the Reaſons; as for Example, if the ſecond Suſpenſion bear, That the Bond whereupon the Letters are raiſed is null, becauſe it is only ſubſcribed by one Notar, being in a Matter of great Importance, above 500 Merks: And if the Party Subſcriber ſuſpend in his own Time, but not upon this Reaſon, and that Decreet was given againſt him; his Heir or Cautioners cannot ſuſpend *de novo* upon this Nullity, in reſpect of the Decreet given againſt the Defunct compearing, and that the Charger is prejudged of his Defence againſt the ſaid Reaſon of Nullity, *viz. That he would refer the Truth of the Subſcription, and Command given to the Notar, to the Defunct's Oath, which*

*cannot now be had, in reſpect of the Defunct's Deceaſe.*

A Sum above *L.* 100 *Scots*, is reckoned a Matter of Importance.

§ 13. *Item*, Albeit Decreets given *parte comparente* are irreducible, either *ſuper eiſdem deductis*, or upon a Reaſon of Reduction which was competent by way of Defence, *in prima inſtantia*, and omitted; yet there be ſome Caſes, in which ſuch Decreets might be called in queſtion by way of Reduction; and that either *principaliter*, or *in conſequentiam*. *Principaliter*, where the Reaſons of Reduction are either emergent, *poſt litem conteſtatam*, *vel noviter venientes ad notitiam*: And in the emergent Reaſon, there is no Queſtion, if it was emergent *poſt ſententiam*; but if it was emergent only *poſt litem conteſtatam*, *ſed ante ſententiam*, in this Caſe if it was proponed *ante ſententiam*, and reſerved, it is competent; but if omitted *ante ſententiam*, it will hardly be admitted. And as to *noviter venientes ad notitiam*, they have been often urged *poſt litem conteſtatam*, & *ante ſententiam*, and ſometimes *poſt ſententiam* in a Reduction: But the Lords were

ex-

exceedingly loath to admit them, becauſe they thought it a loſing of all Sentences, and a Way to make *lites infinitas*; eſpecially ſeeing *notitia & ſcientia* can have no other Probation but the Oath of the Proponer, except the Party be able to induce ſuch pregnant Preſumptions, whereupon he may enforce his Knowledge *in conſequentiam.*

§ 14. Decreets obtained *in foro contradictorio* may be reduced *in ſecunda inſtantia*, if the Infeftment and Right, which was the Title of the Summons whereupon Decreet is given, ſhall be craved to be reduced or improven *principaliter*; which being done, the Decreet muſt fall in conſequence. And in this Caſe the Defender cannot oppone the Decreet obtained *in foro contradictorio*, becauſe that which is craved to be reduced *per conſequentiam*, upon a relevant Reaſon againſt the principal Title, cannot be opponed to elide the Reaſon, becauſe the Decreet is not principally craved to be reduced. But this Reduction of the principal Title is only admiſſible, where the Reaſons of Reduction are ſuch as were not competent by way of Exception of Nullity, *in prima inſtantia*; for if the ſame had been competent *in pri-*

*ma inſtantia* by way of Exception, the ſame will not be received by way of Reduction *in ſecunda*. But if the ſame was proponed *in prima*, and repelled, in reſpect of the Infeftment ſtanding; then queſtionleſs it will be received *in ſecunda inſtantia*.

§ 15. And hereupon may ariſe a great Doubt upon Nullities which are competent both by way of Exception and Action; and namely, in Improbations, whether the Omiſſion of them *in prima inſtantia* will exclude them *in ſecunda: ſuper qua cogitandum*.

Formal and direct Actions of Reduction againſt the Title of a Decreet will be now ſuſtained, tho' the Reaſons of Reduction might have been proponed by way of Exception, becauſe the Privileges of the Purſuer are greater than thoſe of an Excipient.

§ 16. *Item*, According to this Courſe, Retours, which by the Law were irreducible after three Years, if the ſame be purſued principally, may be reduced *in conſequentiam*, after twenty or thirty Years; if the Rights and Infeftments, which were the Grounds whereupon the Retours proceeded, ſhall be craved to be reduced *principaliter*

When the Heritor, by virtue of the Decreets obtained at his Inſtance againſt all Oppoſers, is in the peaceable Poſſeſſion of the

*cipaliter & primario*, and the Retours to fall *in conſequentiam*.

the Lands, he may aſſign and diſpoſe upon the Fruits and Duties thereof at his Pleaſure.

# TITLE XV.

## *Of the Force of an Aſſignation.*

§ 1. AN Aſſignation made by the Heritor of Lands, to the Mails, Farms and Duties thereof, for a certain Number of Years to come, while a certain Sum be paid which was owing by the Cedent to the Aſſigny, is not *habilis modus* to eſtabliſh a Right in the Perſon of the Aſſigny, but allenarly ſo long as the Cedent remains Heritor of the Lands: For if the Cedent reſign the Lands in the Hands of the Superior, in favour of a third Perſon, who thereupon obtains Infeftment; or if the Lands be compriſed from the Cedent, and the Compriſer infeft: In theſe Caſes, the Aſſigny will be excluded from the Benefit of the Mails and Duties aſſigned to him; and the third Perſon, who is infeft either upon Reſignation or Compriſing, will be preferred to the Aſſigny *quoad* the Mails and

and Duties of all Years and Terms after the Date of his Saſine.

An Aſſignation to Mails and Duties is no abſolute Right, nor good againſt ſingular Succeſſors in the Lands; but depends upon the Cedent's Right to the Property, with which it muſt fall, being only a perſonal Action againſt the Poſſeſſors, upon this Ground, That they are liable to the Proprietor from whom the Aſſignation flows.

§ 2. *Item*, If the Right which ſtood in the Perſon of the Cedent, was a Right of that Nature which was tranſmiſſible by ſimple Aſſignation, without Saſine, as a Right of Liferent: In this Caſe, the Aſſignation to the Liferent, being clad with Poſſeſſion, or lawfully intimate before Compriſing, will be preferred to the Compriſer or any other ſingular Succeſſor.

No Right upon which Infeftment hath followed, can be conveyed by Aſſignation, except a Liferent infeftment, which reſolves only in a temporary Right during the Cedent's Lifetime, and does not continue a formal Liferent-right in the Perſon of the Aſſignee, the Liferent-right itſelf being incommunicable.

§ 3. It is always to be underſtood, that the Liferent be aſſigned formally: For if it be not formally aſſigned, but only an Aſſignation made to the Mails and Duties for the Space of two or three Years or more; in that Caſe, if the Liferent be formally

mally diſponed or compriſed thereafter, the Aſſignation will not be valid againſt a ſingular Succeſſor who acquires a real and formal Right to the Liferent; and yet this may be doubted, becauſe whatſoever is aſſignable in whole, is alſo aſſignable in part. And it is out of Queſtion, that a Liferent is diſponable without Saſine, and therefore a Part thereof may be alſo diſponed by Aſſignation. But in my Judgment the Argument is not good, becauſe the Propoſition is not univerſally true, nor yet the Ground of Law whereupon it is founded, *quòd eadem eſt ratio totius & partis; quia totum habet ſuam diverſam rationem à partibus, & differunt omnes partes ſeparatæ à toto conjuncto.* And therefore in this Caſe, where a Liferent may be diſponed by Aſſignation, it is meant of the Liferent, *qnatenus eſt jus totale*; and by the making thereof, the Liferenter is fully and totally denuded: Whereas, by Aſſignation to Terms or particular Years, the Right ſtill remains, and the Liferenter is not denuded. And further, this Aſſignation to particular Years is *actus de jure illicitus*; for if the Liferenter die during the Years diſponed, the Aſſignation is null. And to clear that *aliquid totum eſt ceſſibile*,

*le, ubi partes non ſunt*, it appears by this Inſtance, that a Reverſion may be diſponed *in toto*, but not *in parte*, *quia eſt jus reale, unicum & unitum in ſe*; but the general Propoſition is true in perſonal Bonds, which admit Diviſion, but not in total Rights, *quæ habent unitatem juris pro forma*, as is in all Liferent-rights formally eſtabliſhed; and in the Titles of Benefices provided *ad vitam*, which are Liferent-rights, and diſponable *in toto* by Demiſſion or Reſignation, but not by Aſſignation to any particular Years of the Rents thereof: And which is further, not by a total Aſſignation to his Liferent-right of the Benefice; whereof the Reaſon is coincident with the former, becauſe the total Aſſignation denudes him not of the Right of the Benefice, but he remains Titular notwithſtanding thereof, becauſe the Title of the Benefice is not diſponable by Aſſignation.

The Author's Reaſoning in this Section ſeems more ſubtile, than ſolid or equitable, and is againſt Practick.

Not only may the Heritor aſſign the Mails and Duties of the Lands for Terms of Years, or of Life. as ſaid is; but he may alſo irredeemably alienate the Property thereof: But ſeeing Lands are commonly purchaſed with a Deſign to ſecure the ſame perpetually to the Heritor and his Heirs, he takes care to tailzie the ſame.

TITLE

# TITLE XVI.

## *Of Tailzies.*

§ 1. THere is a Difference betwixt a Bond or Contract of Tailzie, and an Infeftment of Tailzie paſt without Bond or Contract; for an Infeftment of Tailzie is *ab initio voluntatis*, and remains ever arbitrary and changeable, at the Will of the Maker of the Tailzie and his Heirs, except there be a Clauſe and Proviſion inſert in the Body of the Infeftment or Procuratory of Reſignation whereupon it proceeds, whereby the Tailzier ties and reſtrains either himſelf or his Heirs. But theſe Proviſions are extrinſick, and not of the Nature of the Tailzie.

§ 2. *Item*, As to the Bonds or Contracts of Tailzie, either they are made *ex cauſa affectionis & meræ donationis*, or *ex cauſa oneroſa*, or by way of mutual Tailzie.

§ 3. In Bonds of Tailzie made *ſine ulla cauſa* except that of Affection, the common and received Opinion is, that they are not obligatory, and in effect are counted

ed Donations *causâ mortis*, which are ever revokable.

§ 4. Some think *quòd obligant ad hoc* to make the Tailzie, and think the making thereof the Implement of the Obligation; but grant, that when the Infeftment of Tailzie is perfected, that the Maker thereof may alter or change the ſame when he pleaſes, by reſigning *de novo*, and paſſing a new Infeftment with Change of Heirs.

§ 5. And if this Opinion holds, it will follow, that a Bond of Tailzie will oblige alſo the Heir of the Giver of the ſame *ad hoc*, to perfect the Tailzie. And if this be granted, it will deſtroy the ſecond Part of their Opinion, which is, that the Infeftment of Tailzie may be changed after it is made; for none can change an Infeftment of Tailzie, after it is perfected, but they who are *proximi* and firſt in the Tailzie the Time of the Change: But the Heir of the Maker of the Bond (being poſſibly his Daughter) cannot be of the Tailzie, when the Infeftment ſhall be expede upon her Reſignation, which deſtroyeth the ſecond Part of their Opinion.

§ 6. Their Anſwer to this is, That their Opinion for the ſecond Part thereof is ſafe, in ſo far as concerns the Maker of the Tailzie;

zie; who having paſſed an Infeftment of Tailzie conform to the Bond, hath Liberty to alter in his own Time when he pleaſes; but if he die but Change, in that caſe they think, that as the Infeftment of Tailzie cannot be altered in prejudice of that Perſon who was firſt in the Succeſſion of the Tailzie, ſo the Bond, which was not fulfilled nor revoked by the Maker in his own Time, is obligatory againſt the Heir for ever; and yet they will give Place to the firſt Perſon of the Tailzie to alter the ſame when he pleaſes, as well as the Lands may be annailzied by him, or compriſed from him.

§ 7. But that a Bond of Tailzie is not obligatory *ad hunc effectum*, to paſs an Infeftment of Tailzie thereupon, where the Bond was made *ſine cauſa oneroſa*, was decided in the Action betwixt *Walter Maver* and Mr. *Thomas* his Brother, whereof the Caſe was this: *Walter Maver* being his Father's eldeſt Son of the ſecond Marriage, and having only Siſters, gave Bond to Mr. *Thomas Maver* Advocate, his eldeſt Brother of the firſt Marriage, whereby he obliged himſelf to reſign his Lands and Tenements in the Superior's Hands, for new Infeftment, to be given to himſelf and

and the Heirs-male of his Body; which failing, to the ſaid Mr. *Thomas* his Brother, and his Heirs-male. Thereafter, *Walter* being a facile young Man, was moved to do ſome Deeds in prejudice thereof; and for preventing of the ſame, Mr. *Thomas* ſerved Inhibition againſt *Walter*: Whereupon *Walter* intented Summons before the Lords, to hear and ſee the Inhibition reduced, and *ſimpliciter* ſuſpended. In the which Cauſe this Point was diſputed, That as he might alter the Infeftment if it were made, ſo he might revoke the Obligement itſelf. And on the other Part it was contended, That the Bond behoved to be fulfilled. But the Lords, by their Interlocutor and definitive Sentence, *found the Reaſon of Reduction foreſaid relevant, founded upon his Revocation of the Obligement, and reduced the Inhibition, and ſuſpended the ſame* ſimpliciter; *and that becauſe the Bond of Tailzie was given* ex

The Cuſtom of tailzying Eſtates came from *Normandy*; and the Word *Tailzie* comes from the *French* Word *tailier, to cut*, importing a cuting the ordinary Line of Succeſſion, and giving the Eſtate to others than thoſe to whom it would have deſcended by Law; and therefore, ſince by Tailzies, the ordinary and legal Courſe of Succeſſion is diverted, they are always ſtrictly interpreted. A Tailzie is properly made by naming ſeveral Perſons to ſucceed one another: And the Perſon in whoſe favours

ex nulla cauſa oneroſa; *but allenarly of Free-will.*

favours the Lands are tailzied in the firſt Place is called the *Inſtitute*, and the ſubſequent Members are called *Subſtitutes*. Both are Terms borrowed from the Civil Law. Tailzies muſt have Infeftment to give them their proper Effect.

Bonds and Contracts of Tailzie bind the Granter once to tailzie, but not to continue the ſame, if the Contract or Bond is gratuitous; but if onerous, they cannot be altered, as is afterwards obſerved.

In the Caſe of the Deciſion mentioned in the laſt Section, had the Granter not revoked, it would have bound the Heir.

§ 8. But where the Bond or Contract of Tailzie is made for a true onerous Cauſe, or where Tailzies are reciprocal in a Contract, in this Caſe the ſame are not revokable but by Conſent of Party, as was decided *Sharp* againſt *Sharp*. And yet ſuch reciprocal Contracts are reducible, where one of the Parties Contracters has in his own Time done one or more Deeds contrary to the Contract, by ſelling his Lands which he was obliged to tailzie, or doing of that which may make him unable to fulfill the ſame; as was found betwixt *Spence*



In the Caſe of *Drummond* againſt *Drummond*, 15th *July*, 1636, obſerved by *Durie*, the Lords found, that one of the Parties, though decerned by Decreet-arbitral, for certain onerous Cauſes, to tailzie his Lands to the other; yet he might ſell his Lands after he had perfected a Charter and Tailzie in Terms of the

and *Spence*, and betwixt the Earl of *Home* and *Coldingknows*.

the Decreet. From which it would appear, that the Weight and Importance of the onerous Cauſe muſt govern the Reſtraint.

The Caſes of *Sharp* and *Sharp*, and the Earl of *Home* and *Coldingknows*, are obſerved by *Spottiſwood* in his *Practicks*, and at greater Length by *Durie*, the firſt of them *January* 14, 1631; the other, *March* 4, 1634.

§ 9. But where the Tailzies are not reciprocal, or proceed not upon true onerous Cauſes, there is no queſtion but the Tailzie may be broken by the Party Maker thereof, either by himſelf or by his Heir; except there be a ſpecial and expreſs Clauſe contained in the Infeftment of Tailzie, or Bond or Contract whereupon the ſame proceeds, *That it ſhall not be lawful for his Heirs to break the ſame:* In the which Caſe, the Tailzie may not be broken, but the Party in whoſe favour the ſame is conceived, may uſe Inhibition thereupon. And yet there may be many ways found out whereby this Proviſion may be fruſtrated; and there is no queſtion but the Lands may be compriſed for anterior

In a *ſimple Deſtination*, there is nothing to hinder the Maker, or any of the ſucceeding Members of Tailzie, to alter or break the ſame, even tho' Inhibition were ſerved; becauſe there being no Obligation not to alter, there is no Foundation for an Inhibition. But if the Maker deſigns the Tailzie ſhould not be altered,

anterior Debts contracted before the Inhibition.

altered, he adjects a prohibitory Clauſe *de non alienando*: And then there can be no Alienation by any of the *Inſtitutes* or *Subſtitutes* by voluntary or gratuitous Deeds, but will be ſubject to Reduction upon the *Act of Parliament* 1621. Or Inhibition may be raiſed upon the prohibitory Clauſe, which will effectually ſecure the tailzied Lands againſt Diſpoſitions of any kind. A Prohibition to alienate or contract Debt, implies a Prohibition to alter the Order of Succeſſion.

§ 10. *Item*, There may be ſome Queſtion anent the Debts contracted after the Tailzie, and before the Inhibition: But, in my Judgment, upon ſuch Bonds, Compriſing may be uſed upon Debts contracted *ante inhibitionem*, uſed againſt the Party Maker of the Tailzie, or againſt the firſt Heir of Tailzie who ſucceedeth him as the next in the Tailzie; becauſe the Party Maker of the Tailzie remains Fiar of the Lands, and becauſe after his Deceaſe, the firſt Perſon of the Tailzie being infeft upon Retour, is alſo Fiar, and every Fiar may diſpone upon his own Lands, except he be lawfully reſtrained: And therefore *multò magis* the Lands may be compriſed from them *ante inhibitionem*.

§ 11. But, to prevent and remeid this, there is a new Form found out, which has theſe two Branches, *viz.* either to make the Party Contracter of the Debt to incur

the Loſs and Tinſel of his Right, in favour of the next in Tailzie, or to declare all Deeds done in prejudice of the Tailzie, by Bond, Contract, Infeftment or Compriſing, to be null of the Law. And as to the firſt of theſe Proviſions, there is no Queſtion but it will have effect againſt the Heir of Tailzie *ad hunc effectum*, to exclude him from the Benefit of the Infeftment, in reſpect of the Failzie committed by him againſt the Condition of the Tailzie. And this is certain *quoad* Deeds done ſince the Tailzie: But if the Debt be contracted before the Bond of Tailzie, it may be controverted, whether if a Compriſing led againſt him upon theſe Debts, ſhould be counted a Failzie *ad hunc effectum*, to deprive him of the Benefit of his Infeftment, in favour of the next Perſon of the Tailzie. But, in my Judgment, it ſhould *quoad eum*, becauſe he having accepted the Benefit of the Tailzie upon that Condition, he was bound to have paid his own Debts contracted before the Tailzie, to evite the Danger of the Failzie: For the Continuation of the Bonds and Debts unpaid after the Tailzie, are equivalent as if he had contracted them after the Tailzie. But what if after the Compriſing he redeem

deem the ſame? *Quæritur*, if *ſemel commiſſum poſſit purgari, an non?* And this Point is very diſputable *in utramque partem*: For by the Failzie once committed, *jus eſt acquiſitum* to the next of Tailzie; *& nemini poteſt tolli jus quæſitum ſine ſuo conſenſu.* And the like ſhould be in this, as *in apertura feudi* by Alienation made without Conſent of the Superior; wherein it is certain, that if once Saſine be given of Ward Lands, albeit under Reverſion, and redeemed before the Superior intent his Proceſs of Recognition, yet the ſame remains ſtill a Ground whereupon the Lands may be recognoſced. And on the other part it may be alledged, that the Compriſing not being a direct Deed of the Heir of Tailzie, but only inferred by Conſequence or Equipollence, that the like cannot be here as in Recognition. *Next*, if it be redeemed before intenting of the Proceſs by the ſecond or ſubſequent Heir of the Tailzie, all Prejudice ceaſeth; which muſt be chiefly reſpected in this Caſe: For *ratio & finis proviſionis* is, to tranſmit the Heritage to the Heirs of Tailzie, unhurt or prejudged; whereas in the other of Recognition, the chief Reſpect is not the Prejudice, but the Contempt done to the

Superior; which Contempt remains unpurged. In my Judgment, I would admit Purgation being done before the Summons raiſed at the Inſtance of the next Heir of Tailzie, becauſe ſuch Conditions are odious in Tailzies, *& contra libertatem dominii, & jus commercii:* But after the Party is cited to hear and ſee him deprived of the Heritage for the Failzie, it were hard to admit him to purge thereafter.

When the Maker of the Tailzie deſigns, that the Lands ſhould not be alienable, even for onerous Cauſes, then he adjects to the *pactum de non alienando, & non contrahendo debitum*, Clauſes *irritant* and *reſolutive*; by which it is declared, that all Deeds done contrary to, and in prejudice of the Tailzie, ſhall be void and null; and that the Contraveener ſhall loſe all Title or Right to the Lands: And becauſe ſuch Clauſes prejudged Commerce and Creditors, and were againſt the Nature of Property and Dominion, therefore there was a particular Act of Parliament made thereanent, *Act* 22. *Seſſ.* 1. *Parl. Ja.* VII. of which afterwards.

§ 12. Now *quæritur*, if the like ſhould be, where the Heir of Tailzie has directly committed againſt the Proviſion and the other Heirs of Proviſion, by giving Infeftment of the Lands, either redeemably or irredeemably? And if it ſhould be alike in this Caſe as in Compriſings? *De quo cogitandum.*

The Proviſions in the Tailzie will determine the Caſe; and Tailzies, eſpecially the irritant Clauſes, being odious, are *ſtricti juris*, and to be literally interpreted.

§ 13.

§ 13. Albeit the Compriſing or Infeftment might work *quoad* the Heir of Tailzie, to exclude him for his Failzie; yet there remains a Queſtion to be ſolved, Whether it will work againſt the Creditor who has compriſed, or to whom Infeftment was granted? To which it is anſwered, *quòd non*, except in two Caſes, *viz.* if the Lands were compriſed, or Infeftment were given, *poſt inhibitionem*; or if the Tailzie did bear a Clauſe irritant, declaring all Deeds done in prejudice of the Tailzie, by Bond, Infeftment or Compriſing, null *ipſo jure*. And there is no Doubt in the firſt Caſe, *viz. poſt inhibitionem*: But in the ſecond Caſe there is ſome greater Difficulty; for here we fall in upon the Conſideration of the ſecond Manner of Proviſions inſert in Tailzies.

§ 14. And concerning thir Proviſions, the firſt Queſtion to be moved is, If they be lawful or not? which being well reſolved, will clear all the other Queſtions.

§ 15. There is a General in the Law, which apparently will ſolve the Queſtion, *viz. Quod privatorum pactionibus non poteſt derogari juri publico*. And therefore it is to be conſidered, whether ſuch Conditions contain any thing derogatory to

the Publick or not: And whatſoever is therein exorbitant againſt the Common Law, in ſo far I think it null; but in ſo far as it is allenarly obligatory betwixt the Parties, *& omnes habentes jus ab iis*, I think it may ſtand.

§ 16. The Common Law ordains all Traitors and Rebels to be puniſhed, not only in their Bodies, but in their Lands and Goods. Now, if the Heir of Tailzie commit Treaſon, or be Year and Day at the Horn, I doubt not but in Treaſon the Fee of the Lands will pertain to the King, and in Rebellion by Year and Day the Liferent will fall, and that notwithſtanding whatſoever Form or Conception of the Condition contained in the Tailzie. *Ratio*, Becauſe Subjects cannot agree and contract upon ſuch a Condition as derogates to the publick Law introduced in favour of the King, and for Puniſhment of Crimes.

In anſwer to the Reaſoning in the laſt Section, ſee Sir *George Mackenzie's Treatiſe of Tailzies*, prope finem; and for what now obtains ſince the Union, ſee *Act 7mo Annæ, cap.* 21. and *1mo Georgii, cap.* 20.

§ 17. It may doubted if the like may be ſaid in other Superiors beſides the King's Majeſty. To which it is anſwered, That where the Superior has the only Intereſt,

I think he has prejudged himſelf, becauſe he has conſented to the Condition contained in the Tailzie; for a Tailzie cannot be made without Conſent of the Superior: And if the Right and Infeftment, granted to the Heir of Tailzie, ſhould be reduced at the Inſtance of the next Heir, by Occaſion of the Tailzie, the Superior could not oppoſe againſt the ſame; and the Infeftment being reduced, all Intereſt behoved to ceaſe, which the Superior might pretend by virtue of that Infeftment which is reduced, either for Fee or Liferent.

§ 18. And as to any other Perſon, beſides the King's Perſon and the Superior, whether they be ſimple Creditors or Compriſers, or have gotten Infeftment by Alienation, under or without Reverſion, *eorum omnium eadem eſt cauſa & ratio*, becauſe

By the *Act of Parl.* 1685, formerly cited, Tailzies which contain irritant and reſolutive Clauſes (whereby the Heirs of Tailzie are tied up from ſelling, annailzying or diſponing the tailzied Lands, or any Part of them, or from contracting Debts, or doing Deeds whereby the ſame may be appriſed, adjudged or evicted from the other Subſtitutes in the Tailzie, or the Succeſſion fruſtrated or interrupted; and which declare all ſuch Deeds to be in themſelves null and void, and that the next Heir of Tailzie may purſue Declarator thereof, paſſing by the Contraveener without repreſenting him, and ſerve Heir to the Perſon who died laſt infeft in the Fee) are only allowed, on condition that the irritant and reſolutive Clauſes be inſert in the Procuratory of Reſignation, Charters, Precepts and Inſtruments

cauſe they cannot have the Right, *niſi cum ſua conditione & cauſa.*

ments of Saſine, and the Tailzie itſelf preſented to the Lords judicially, and regiſtred according to the Direction of the *Act*: And the Proviſions and irritant Clauſes muſt be repeated in all the ſubſequent Conveyances of the tailzied Eſtate to any of the Heirs of Tailzie; in which caſe the Tailzie is declared real and effectual againſt the Contraveener and his Heirs, and againſt their Creditors by Appriſing, Adjudication or other Titles. And it is declared, that the omitting to repeat the irritant Clauſes in ſubſequent Conveyances to any Member of the Tailzie imports a Contravention againſt the Omitter and his Heirs, to make the Eſtate fall to the next Heir of Tailzie; but not againſt Creditors and ſingular Succeſſors contracting *bonâ fide* with the Perſon who ſtood infeft in the Eſtate, without any irritant or reſolutive Clauſe in the Body of his Right.

APPEN-

# APPENDIX.

## NUMB. I.

*Containing an Account of all the Religious Houſes that were in* Scotland *at the time of the Reformation.*

### CHAP. I.

*Of the Diviſion of Churchmen.*

ALL our Churches formerly belonged either to *Regulars* or *Seculars*.

The *Regulars* followed the Rule of St. *Auguſtine* Biſhop of *Hippo* in *Africa*, St. *Bennet*, or ſome private Statutes approved by the Pope; and lived, ſlept and took their Diet together, under the ſame Roof. They were either *Canons*, *Monks* or *Friars*; and their Houſes were called *Abbacies*, *Priories* or *Convents*.

The *Seculars* had their private Rules compoſed by their Chapters, or borrowed from other Colleges abroad; which Statutes were not commonly approved of by *Rome*. They lived ſeparately in their Cloiſters, or in private Houſes

ſes near to their Churches; and were governed by a Dean [*Decanus*] or Provoſt [*Præpoſitus*].

Thoſe that followed St. *Auguſtine*'s Rule were, 1. the *Regular Canons of St. Auguſtine*, [*Canonici Regulares*,] ſo called from their Founder or Reformer; 2. the *Præmonſtratenſes*; 3. the *Red-Friars*, or, *De redemptione captivorum*; 4. the *Dominicans* or *Black-Friars*; 5. the *Lazarites*; and, 6. the *Canons of St. Anthony*.

The others, that followed St. *Bennet*'s Rule, were, 1. the *Benedictines of Marmoutier*, [*Majoris Monaſterii*;] 2. of *Cluny*, named *Cluniacenſes*; 3. of *Tyron*, [*Tyronenſes*,] ſo called from their principal Houſes in *France*; 4. the *Ciſtertians*, [*Ciſtertienſes*,] otherwiſe called *Bernardines*; and, 5. thoſe who were deſigned *of the Convent of Vallis-caulium*, [*Val des choux*,] in the Dioceſs of *Langres* in *France*.

The *White-Friars*, or *Carmelites*, had their Beginning and Name from Mount *Carmel* in *Syria*, renowned for the Dwelling of *Elias* and *Eliſha* the Prophets, whom they pretend were their Founders. *Albertus*, Patriarch of *Jeruſalem*, and Native of the Dioceſs of *Amiens*, cloſed them up in Cloiſters, and gave them ſome Rules or Statutes, in the Year 1205; which were confirmed by Pope *Honorius* III. in the Year 1217, and ſince by ſeveral of his Succeſſors.

The *Franciſcans*, ſo named from St. *Francis* of *Aſſiſe* in *Italy*, who eſtabliſhed them in the Year 1206. They followed the Rule that St. *Francis* compoſed for them; and were confirmed by Pope *Innocent* III. in the Year 1209.

The

The *Carthuſians*, who were eſtabliſhed upon the *Carthuſian* Mountains in the Dioceſs of *Grenoble* in the Province of *Dauphine*, followed alſo their private Conſtitutions, which were given them by their Founder, and approved of by Pope *Alexander* III. in the Year 1176, and the ſucceeding Popes.

All theſe religious Orders were either endowed with ſufficient Rents for maintaining them, or were allowed to beg for their Living. From whence ariſeth a new Diviſion of Churchmen; the one called *Rented Religious*, who were endowed with ſeveral Mortifications; the others, *Begging Friars*, or *Mendicants*, who had little or nothing ſettled upon them. The firſt were the Canon-Regulars, Monks of different Orders, ſpecified above; as, *Benedictines*, *Ciſtertians*, *Carthuſians*, *Vallis-caulium*, and the *Red-Friars*, *&c.* The others were the *Black*, *Gray*, and *White Friars*.

I ſhall therefore proceed to give an Account of all the Monaſteries, Priories, collegiate Churches, Hoſpitals, and other religious Houſes that were amongſt us in *Scotland* at the time of the Reformation, together with the Names of their Founders, Year of Foundation, and Counties in which they were ſituate, in the following Order.

CHAP.

## CHAP. II.

### *Of the Canon-Regulars and their Monaſteries.*

THE Canon-Regulars of St. *Auguſtine* were firſt brought to *Scotland* by *Atelwolphus*, Prior of St. *Oſwald* of *Noſtel* in *Yorkſhire*, and afterwards Biſhop of *Carlile*; who eſtabliſhed them at *Scone* in the Year 1114, at the Deſire of King *Alexander* I. They had twenty eight Monaſteries in *Scotland*, which were as follow.

I. *SCONE*, in *Stormont*, a Subdiviſion of the Shire of *Perth*, ſituate a Mile above *Perth*, upon the River *Tay*, was an Abbey, founded by King *Alexander* I. in the Year 1114, and was dedicate to the *Holy Trinity* and St. *Michael* the Archangel. It was the Place where our Kings were accuſtomed to be crowned, and where the fatal Marble Chair, now at *Weſtminſter*, was uſually kept. It formerly belonged to the *Culdees*, if we truſt *George Buchanan* and ſome other Writers. The *Extracta ex Chronicis Scotiæ*, in the Advocates Library, ſays, That the firſt Prior of this Place was *Robertus Canonicus Sancti Oſwaldi de Noſtellis in Anglia*. It was erected into a temporal Lordſhip by King *James* VI. in favour of Sir *David Murray*, a Cadet of the Family of *Tullibardine*, in the Year 1604.

II. *LOCH-TAY*, an Iſland ſituate in Loch-*Tay*, in the Shire of *Perth*, was a Cell or Priory belonging to *Scone*, founded by the above King *Alexander* in the Year 1122. Here *Sibylla* his Queen, Daughter to *Henry Beau-clerk* King of *England*,

*England*, died, and is buried. The moſt Part of the Buildings of this Monaſtery are ſtill extant.

III. *INCH-COLME*, an Iſland in the River of *Forth*, two Miles from *Aberdour* in *Fife*, was an Abbey, founded by the ſaid King *Alexander* about the Year 1123, and dedicate to St. *Columba* Abbot of *Hye*, according to the *Extracta ex variis Chronicis Scotiæ*, which gives the following Account of its Foundation: *Æmonia inſula, ſeu monaſterium nunc Sancti Columbæ de Æmonia, per dictum Regem fundatur, circa annum Domini* 1123, *miraculosè. Nam cùm idem nobilis Rex, tranſitum faciens per paſſagium Reginæ, exorta tempeſtas valida, flante Africo, ratem cum naucleris vix vitâ comite compulit applicare ad inſulam Æmoniam, ubi tunc degebat quidam heremita inſulanus; qui, ſervitio Sancti Columbæ deditus, ad quandam inibi capellulam tenui victu, utpote lacte unius vaccæ, & conchis ac piſciculis marinis contentatus, ſedulè ſe dedit: de quibus cibariis Rex cum ſuis, tribus diebus vento compellente, reficitur. Et quia Sanctum Columbam à juventute dilexit, in periculo maris, ut prædicitur, poſitus, vovit, Se, ſi ad præfatam inſulam veheretur incolumis, aliquid memoriâ dignum ibidem facere. Et ſic monaſterium ibidem conſtruxit Canonicorum, & dotavit. Alanus de mortuo mari,* [Mortimer,] *miles, Dominus de Aberdour,* mortifies to this Abbacy *omnes & totas dimidietates terrarum, villæ ſuæ de Aberdour Deo & Monachis de inſula Sancti Columbæ, pro ſepultura ſibi & poſteris ſuis, in Eccleſia dicti monaſterii.*

*Walter*

*Walter Bowmaker*, Abbot of this Place, was one of the Continuators of *John Fordon*'s *Scoti-chronicon*, as is to be ſeen in the *Liber Carthuſianorum de Perth*, in the Advocates Library. He died in the Year 1449. *James Stewart* of *Beith*, a Cadet of the Lord *Ochiltree*, was made Commendator of *Inch-colme* or *St. Colme* on the Surrender of *Henry* Abbot of that Monaſtery. In the Year 1543, his ſecond Son, *Henry Stewart*, was by the ſpecial Favour of King *James* VI. created a Peer, by the Title of *Lord St. Colme*, in the Year 1611.

IV. *St. ANDREW's*, ſituate upon the Seaſide in the Shire of *Fife*, was a Priory or Cathedral Church, dedicate to St. *Andrew* the Apoſtle, and founded by the forenamed King *Alexander*. The Canons were brought from *Scone*, by *Robert* Biſhop of St. *Andrew*'s, in the Year 1140. This Place formerly belonged to the *Culdees*. The Prior of this Church wore, in all publick Meetings, and in ſolemn Services upon Feſtival Days, the Pontifical Ornaments, *viz.* a Mitre, Gloves, Ring, Croſs, Croſier, and Sandals or Slippers, as the Biſhops; and in Parliament had the Precedence of all Abbots and Priors, by an Act made in his favours by King *James* I. *Vid. ſupra, p.* 110. in the Notes.

The Cells or Priories belonging to St. *Andrew's* were, *Loch-leven*, *Port-moak*, *Monimusk*, the *Iſle of May*, and *Pittenweem*.

V. *LOCH-LEVEN*, in the Shire of *Kinroſs*, formerly a Houſe belonging to the *Culdees*, in whoſe Place the Canon-Regulars were introduced

duced by the Biſhops of St. *Andrew*'s. The Priory was dedicate to St. *Serf* or *Servanus*, a Monk or Pilgrim, who, as is reported, came from *Canaan* to *Inchkeith*, and got *Merkinglaſs* and *Culroſs* for his Poſſeſſions. *Brudeus*, a *Pictiſh* King, founded this Place in honour of him, and gave the Iſle of *Loch-leven* to his *Culdees*; which King *David* I. beſtowed upon St. *Andrew*'s, with the other Poſſeſſions belonging thereto. The Priory is little more than a Mile South-weſt from the Caſtle of *Loch-Leven* in the Loch, the Ruins whereof appear as yet. Our famous Hiſtorian, *Andrew Winton*, was Prior of this Place. His Hiſtory, which is in old *Scottiſh* Metre, is ſtill extant in the Advocates Library. It begins at the Creation of the World, and concludes with the Captivity of King *James* I. in *England*, during whoſe Reign he died.

VI. *PORT-MOACK*, ſo called from St. *Moack*, ſituate in St. *Servanus*'s Iſle, in the Shire of *Kinroſs*, on the North-ſide of the Water of *Leven*, was founded by *Eogaſch* King of the *Picts*, and was formerly inhabited by the *Culdees*. It was conſecrate to the Virgin *Mary*, and was united to St. *Leonard*'s College by *John Winram* Sub-prior of St. *Andrew*'s, the 5th of *October* 1570. Nothing of this Monaſtery remains ſave the Pariſh-church, which anſwers to the Presbytery of *Kirkaldy*.

VII. *MONIMUSK*, in the Shire of *Aberdeen*. It was formerly poſſeſſed by the *Culdees*. *Gilchriſt* Earl of *Mar*, in the Reign of King *William* the *Lyon*, built here a Priory for the Canon-

Regulars of St. *Andrew*'s. After which the *Culdees* were turned out of their Poſſeſſions; which were beſtowed upon the Canons of this Place by the Biſhops of St. *Andrew*'s. The Place was dedicate to the Virgin *Mary*, and was annexed to the Biſhoprick of *Dunblane* by King *James* VI. in the Year 1617.

VIII. The *ISLE OF MAY*, in the Shire of *Fife*, at the Mouth of the Frith of *Forth*, belonged of old to the Monks of *Reading* in *Yorkſhire*; for whom King *David* I. founded here a Cell or Monaſtery, and dedicate the Place to all the Saints. Afterwards it was conſecrate to the Memory of St. *Hadrian*. *William Lamberton*, Biſhop of St. *Andrew*'s, purchaſed it from the Abbot of *Reading*; and, notwithſtanding the Complaints made thereupon by *Edward Langſhanks* King of *England*, beſtowed it upon the Canon-Regulars of his Cathedral; which Story is to be ſeen in *Prynne*, *Vol.* 3. *p.* 554. It was of old much frequented by barren Women, who went thither in Pilgrimage.

IX. *PITTENWEEM*, in the Shire of *Fife*, was dedicated to the Virgin *Mary*, and had a great many Lands belonging to it, with the Churches of *Rind*, *Anſtruther-Weſter*, *&c.* which are now erected into a Regality, called the Regality of *Pittenweem*, of which the Lairds of *Anſtruther* are heritable Bailies. Colonel *Stuart*, Captain of his Majeſty's Guards, is deſigned *Commendator of Pittenweem* in the Year 1567. His Son *Frederick Stuart* was afterwards, by the Favour of King *James* VI. raiſed to the Dignity of *Lord Pitten-*

*Pittenweem*, in the Year 1609; but dying without male Iſſue, the Honour became extinct.

X. *CARLILE*, in *Cumberland*, almoſt encompaſſed with the Rivers of *Eden*, *Peteril* and *Cand*. This City was depopulated by the *Danes*; and, after it had been buried in Aſhes near 200 Years, began to flouriſh again in the Reign of King *William Rufus*. *Henry* I. of *England* founded here the Cathedral Church, and cauſed conſecrate it to the Virgin *Mary* in the Year 1111. The Canons were brought from *Noſtel* near *Pontefract* in *York-ſhire*, at the Deſire of *Mathilda* his Queen. The firſt Biſhop of that See was *Athelwolphus*, King *Henry*'s Confeſſor, mentioned above. The Church was endowed with ſeveral rich Gifts by King *David* and Prince *Henry* his Son, as alſo by ſeveral of our Countrymen, who were during a Number of Years Maſters of that City.

XI. *HOLY-ROOD-HOUSE*, or, *Domus Sanctæ Crucis*, at the Eaſt-end of the City of *Edinburgh*, in the Shire of *Mid-Lothian*, was an Abbey, built by King *David* I. in the Year 1128, and dedicated to the Holy Croſs. The Canons were brought from St. *Andrew*'s. *John Bothwell*, Commendator of this Place, and Son to *Adam* Biſhop of *Orkney*, was advanced to the Peerage of this Realm, *December* 20th 1607, by the Title of *Lord Holy-rood-houſe*.

The Cells or Priories depending on *Holy-rood-houſe* were, *St. Mary's Iſle*, *Blantire*, *Rowadill*, *Cruſay* and *Oronſay*.

XII. *St. MARY's ISLE*, near *Kirkcud-*

*bright* in *Galloway*, was founded, in the Reign of *Malcolm* IV. or rather *David* I. by *Fergus* Lord of *Galloway*, and called *Prioratus Sanctæ Mariæ de Trayll.* The Prior hereof was a Lord and Member of Parliament.

XIII. *BLANTIRE*, in *Clydeſdale*, a Priory of this Order, was founded before the Year 1296; for at that time, *Frere William Priour de Blantyr* is a Subſcriber to *Ragman's Roll*, *Prynne*, *p.* 663. *Walter Stuart*, Commendator of this Place, was Lord Privy-Seal in the Year 1595, and ſhortly after Treaſurer, upon the Maſter of *Glammis*'s Dimiſſion. He was made a Peer, by the Title of *Lord Blantire*, the 10th *July* 1606, from whom is deſcended the preſent Lord *Blantire.*

XIV. *ROWADILL*, in the Iſle of *Harries*, and Shire of *Roſs*, founded by *Macleod* of *Harries.* It was ſituate on the South-eaſt Point of that Iſland, on the Sea-coaſt under *Ben-Rowadill.*

XV. *CRUSAY*, in the Weſtern Iſles, founded by St. *Columba.*

XVI. *ORONSAY*, one of the Weſtern Iſles in the Shire of *Argyle*, founded alſo by the ſaid St. *Columba.* It gives the Title of *Lord* to *Archibald* Earl of *Ilay.*

XVII. *COLUNSAY*, one of the Weſtern Iſles, alſo in the Shire of *Argyle*, was an Abbey, founded by the Lord of the Iſles; the Canons whereof were brought from *Holy-rood-houſe.* We have little Knowledge of what paſt there or in the other Iſles, not only by their Diſtance from the

the South, but more eſpecially by the Loſs of their Records.

XVIII. *CAMBUS-KENNETH*, in the Shire of *Clackmanan*, was founded by King *David* I. in the Year 1147. The Canons of this Place were brought from *Aroiſe*, near to *Arras* in the Country of *Artois*. The Abbots hereof were formerly deſigned, in the Subſcription of Charters, *Abbates de Striveling*, the Abbey being ſituate about half a Mile below that Town, upon the North-ſide of the River of *Forth*. *Alexander Miln*, Abbot of this Place, was the firſt Preſident of our Seſſion, at the Inſtitution of the College of Juſtice by King *James* V. in the Year 1532, and was employed in divers Embaſſies by the ſaid King. This Abbacy belongs now to *Cowan*'s Hoſpital in *Stirling*, being ſometime ago purchaſed from the *Areskines* of *Alva*.

The Priories belonging to this Abbacy were, *Inſula Sti Colmoci* and *Roſneth*.

XIX. *INSULA Sti COLMOCI*, in *Menteith*, is ſaid to have been founded by *Murdoch* Earl of *Menteith*, who was killed at the Battle of *Duplin* in the 1332. But it was certainly founded before his Time: For we find in *Prynne*'s *Collections*, *Vol.* 3. *p.* 653. that *Adam Priour de l' Iſle de Saint Colmoch* ſwore Fealty to *Edward* I. in the Year 1296, as did alſo *Alexander* Earl of *Menteith*, Father to the above Earl *Murdoch*.

XX. *ROSNETH*, in the Shire of *Lenox* or *Dumbarton*, founded by the old Earls of *Lenox*, and conſecrated to the Virgin *Mary*. It was firſt

united to the Royal Chapel of *Stirling* by King *James* IV. and afterwards diſſolved. Although it is ſaid by ſome, that this Place was a Monaſtery of Canon-Regulars, founded as above; yet by the Cartulary of *Paiſley*, in the Advocates Library, *fol.* 356. it appears that it was only a Pariſh-Church, given by *Amelec*, Brother to *Maldwin* Earl of *Lenox*, to the Abbey of *Paiſley*, in the Reign of King *Alexander* II.

XXI. *INCHMAHOME*, an Iſland ſituate in the Loch of *Menteith*, (otherwiſe called, from this Monaſtery, the Loch of *Inchmahome*,) in the Shire of *Perth*, was an Abbey, founded of old for Canons of *Cambus-kenneth*. It was alſo united by King *James* IV. to his Royal Chapel of *Stirling*. Thereafter it was diſſolved from the College, and beſtowed by King *James* V. upon *John* Lord *Erskine*, who was Commendatary Abbot thereof, and afterwards created *Earl of Mar* by Queen *Mary*, and at the Death of *Matthew* Earl of *Lenox* was choſen Regent, in the Year 1571. Although this Place be mentioned, in moſt of our old Liſts of religious Houſes, as a diſtinct Monaſtery from that of the *Inſula Sti Colmoci*; yet, for very good Reaſons, too long to be inſerted here, I'm very apt to believe they were one and the ſame.

XXII. *JEDBURGH*, or *JEDWORTH*, in *Teviotdale*, was an Abbey, ſituate on the Weſt-ſide of the River of *Jed*, near to the Place where it falleth into the River *Teviot*. King *David* I. founded this Place for Canons brought from *Beauvais*, [*Bellovacum*,] who were there eſtabliſhed

by

by *Yvo Carnutenſis*, in a Monaſtery dedicated to St. *Quintine*, (*in monaſterio Sti Quintini Bellovacenſis*,) whereof he was Provoſt before he became Biſhop of *Chartres*. It was erected into a temporal Lordſhip, in favour of Sir *Andrew Ker* of *Ferniherſt*, Anceſtor to the Marquis of *Lothian*, 2d *February* 1622.

The Cells or Priories belonging to *Jedburgh* were, *Reſtennote* and *Canonby*.

XXIII. *RESTENNOTE*, in *Angus*, ſituate a Mile to the North of *Forfar*, and encompaſſed with a Loch except at one Paſſage, where it had a Draw-bridge. Here all the Papers and precious Things belonging to *Jedburgh* were carefully kept. *Robert* Prior of this Place ſwears Fealty to *Edward Langſhanks* in the Year 1296, according to *Prynne*.

XXIV. *CANONBY*, a Priory, ſituate upon the River of *Esk* in *Eskdale*, and Shire of *Roxburgh*. It is uncertain by whom, or at what Time it was founded, though we are pretty ſure it was before the Year 1296, for then *William* Prior of this Convent ſwears Fealty to *Edward* I. King of *England*. This Monaſtery was frequently overturned and burnt by the *Engliſh*, and the Prior and Canons thereof obliged to abandon their Dwelling during the Heat of the Wars; by which means their Records being ſo often deſtroyed and loſt, I can give no further Account of it.

XXV. *INCHAFFRAY*, [*Inſula miſſarum*,] in *Strathern*, a Subdiviſion of the Shire of *Perth*, was an Abbey, founded by *Gilbert* Earl of *Strathern*, in the Year 1200, the Canons whereof were

brought from *Scone*. It was dedicate to the Memory of St. *John* the Evangeliſt. Frere *Thomas* was Abbot of *Inchaffray* in the Year 1296; and *Mauritius*, Abbot of this Place, was preſent with King *Robert* the *Bruce* at *Bannockburn*; to which he brought, as is reported, the Arm of St. *Filan*; whereof *Boethius*, *lib.* 14. *fol.* 314. and *Leſly*, *lib.* 7. *p.* 232. *James Drummond*, Son to *David* Lord *Drummond*, having acquired a Right to this Monaſtery from *Alexander Gordon* Biſhop of *Galloway*, then Commendator thereof, it was by the Favour of King *James* VI. in the Year 1607, erected to him in a temporal Lordſhip, by the Stile of *Lord Maderty*.

The Cells or Priories belonging to *Inchaffray* were, *Strathfillan*, *Scarinche* and *Abernethy*.

XXVI. *STRATHFILLAN*, ſituate on the Water of *Dochart* in *Braidalbin*, a Subdiviſion of the Shire of *Perth*, was a Priory, founded by King *Robert* the *Bruce*, and conſecrate to St. *Fillan*, in conſideration of the Aſſiſtance he had from that Saint at the Battle of *Bannockburn* in the Year 1314. At the Diſſolution of religious Houſes, this Priory, with all its Revenues and Superiorities, was given by the King to *Campbell* of *Glenorchy*, Anceſtor to the Earl of *Broadalbin*, in whoſe Poſſeſſion it ſtill remains.

XXVII. *SCARINCHE*, in the Iſle of *Lewis*, and Shire of *Roſs*, founded by the *Macleods* of the *Lewis*, in Honour of St. *Catan*, (*in honorem Sti Catani, cujus exuvias ibidem aſſervari traditione acceptum eſt.*)

XXVIII.

XXVIII. *ABERNETHY*, formerly the chief Seat of the *Pictiſh* Kings, near the Mouth of the River of *Ern*, in the Shire of *Perth*, firſt a Retreat for St. *Brigide* or St. *Bride*, and ſome Virgins; thereafter a Biſhop's Seat, and in following Years poſſeſſed by the *Culdees*. It was firſt founded by *Nectanus*, a *Pictiſh* King; and at length it became a Priory of Canons brought from *Inchaffray* in the Year 1273.

All theſe Canons mentioned above wore a white Rob, with a Rochet [*Rochetum*] of fine Linen above their Gown, a Surplice in the Church, [*Superpellicium*,] and an Almuce [*Almutium*] formerly on their Shoulders, thereafter on their Left Arm, hanging as far down as the Ground. This Almuce was of a fine black or gray Skin, brought from foreign Countries, and frequently lined with Ermine; and ſerves to this Day to diſtinguiſh the Canon-Regulars from the other religious Orders.

## CHAP. III.

### *Of the Canons of St.* Anthony.

THis Order of St. *Anthony* had only one Monaſtery in *Scotland*, which was ſeated at *Leith*, in the Shire of *Mid-Lothian*, and is now called the *South-Kirk*. The Religious hereof were brought from St. *Anthony* of *Vienne*, in the Province of *Dauphiny* in *France*, the Reſidence of the Superior-General of that Congregation. Their Houſes were called *Hoſpitals*, and their Go-

Governors *Præceptores*. It appears by a Charter of *Humbertus*, Chief or General of the Order, in the Year 1446, that theſe of *Leith* did not live very peaceably together. Upon the common Seal of their Chapter, they carried a St. *Anthony*, clothed with an old Gown or Mantle of an Hermite; and towards his Right Foot a wild Sow: And upon the Circumference of it the following Words, *Sigillum commune Capituli Sancti Anthonii prope Leith*. They followed the Rule of St. *Auguſtine*, and wore a black Gown, with a blue T of Stuff on their Left Breaſt. They had neither an Almuce nor a Rochet, whereof the Canon-Regulars and Biſhops made uſe.

## CHAP. IV.

### *Of the Red Friars and their Monaſteries.*

THe Red Friars (who pretend to be Canon-Regulars, notwithſtanding that that Name, which they are willing to aſſume, is ſtrongly controverted by their Adverſaries) are likewiſe called *Trinity Friars*, or *Mathurines*, from their Houſe at *Paris*, which is dedicate to St. *Mathurine*; as alſo, *De redemptione captivorum*, their Office being to redeem Chriſtian Captives from Turkiſh Slavery. They were eſtabliſhed by St. *John* of *Matha*, and *Felix de Valois*, an Anchorite at *Cerfroid*, (*apud Cervum frigidum in territorio Meldenſi*,) about three Miles from *Grandalu*. *Innocent* III. approves this Inſtitute, and grants ſeveral Privileges to the Order, which were

were confirmed by Pope *Innocent* IV. the 26th *November* 1246. St. *Thomas* of *Aquinas* and St. *Anthonine* commend this Order in their Sums.

Their Houſes were named *Hoſpitals* or *Miniſtries*, and their Superiors *Miniſters*, [*Miniſtri.*] Their Subſtance or Rents were divided into three Parts, one of which was reſerved for redeeming Chriſtian Slaves from amongſt the Infidels. *Tertia verò pars* (ſay their Conſtitutions) *reſervetur ad redemptionem captivorum, qui ſunt incarcerati pro fide Chriſti à Paganis.*

By a Bull of Pope *Innocent* III. dated the 21ſt *June* 1209, it appears that they had ſix Monaſteries in *Scotland* whilſt he was Pope. Thereafter the Number increaſed amongſt us; and at the Reformation we find mention of thirteen Houſes, which were ſituate at the following Places.

I. *ABERDEEN*, the chief Town of the Shire of that Name, founded by King *William* the *Lyon*, where now the Trades Hoſpital ſtands, and Trinity Church. The King gave thereunto the Lands of *Banchory*, *Coway*, *Merelloſ*, a Fiſhing in *Dee* and *Don*, with the Mills of *Skerthak*, *Rothenny*, *Tullifully* and *Maniſmuch*. *Ragman's Roll*, in the Year 1296, makes mention of *Frere Huwe Miniſtre de l' ordre de la Trinité d' Aberdeen*, &c.

II. *DUNBAR*, in the Shire of *Haddington*, was founded by *Patrick* Earl of *Dunbar* and *March*, in the Year 1218. The Lands of this Monaſtery were at the Reformation granted to *George Hume* of *Friarſlands*, Anceſtor to *Hume* of *Furde*.

III.

III. *HOWSTON*, in the Shire of *Renfrew*, was founded in the Year 1226. Friar *John*, Maſter of the Trinity Hoſpital of *Howſton*, is made mention of in the Year 1296, by *Prynne*, *p.* 656.

IV. *SCOTLAND-WELL*, ſituate on the North-ſide of the Water of *Leven*, in the Shire of *Kinroſs*, called in *Latin*, *Fons Scotiæ*, was an Hoſpital, firſt founded by *William Malvoiſine* Biſhop of St. *Andrew*'s, who died about the Year 1238; which was afterwards beſtowed upon the Red Friars, by *David de Benham* Biſhop of St. *Andrew*'s, his immediate Succeſſor. His Charter is dated *in craſtino Circumciſionis Domini*, *anno* 1250. The Pariſh-church of *Moonzie*, on the Top of a Hill to the South of *Carny* in *Fife*, in the Presbytery of *Cowpar*, with the Pariſh-church of *Carnock* in the Presbytery of *Dumfermling*, belonged to this Place. This Foundation and Gift occaſioned the Regular Canons of St. *Andrew*'s to complain to the Pope, that the Biſhop had introduced the Red Friars into a Pariſh belonging to them, (*eorundem Prioris & Capituli neglecto conſenſu.*) Whereupon we have a Bull of Pope *Innocent* IV. about the Year 1250, for preventing ſuch Enterpriſes to the prejudice of the Chapter of St. *Andrew*'s. The Ruins of the Church and Houſe are yet to be ſeen at the Foot of the *Biſhop's Hill.*

V. *FAILEFURD*, in the County of *Air*, founded in the Year 1252. There is a Charter of *Joannes de Graham*, deſigned *Dominus de Thorboltun in Kyle Seneſcalli*, granting, *pro ſalute animæ ſuæ, & Iſabellæ ſponſæ ſuæ*, &c. *Deo, &*

*domui*

*domui Failefurd, & fratri Johanni Miniſtro, & fratribus ordinis ſanctiſſimæ Trinitatis & Captivorum, jus patronatûs & advocationis Eccleſiæ de Thorbolton. Datum apud Failefurd, in craſtino Epiphaniæ Domini, anno gratiæ* 1337. This Charter is confirmed *apud Dundonald, 5to die menſis Auguſti, anno* 1368, by *John* Lord *Kyle* and Earl of *Carrick*, who was afterwards King, and was named *Robert* III.

VI. The *MINISTRY* or *CROSS-CHURCH* of *Peebles*, founded by King *Alexander* III. in the 1257. See *Boethius, lib.* 13. and *Joan. Major, ad annum prædictum.* King *Robert* II. grants to Friar *Thomas*, deſigned *Capellano ſuo, pratum regium juxta villam de Peebles.* And *Frere Thomas Miniſtere de Sancte Croix de Peebles*, is recorded in *Prynne*'s *Collections, p.* 662.

VII. *DORNOCK*, in *Sutherland*, founded by Sir *Patrick Murray*, in the Year 1271. The Lands belonging to the Miniſtry of *Berwick* were given to this Place, after the *Engliſh* had poſſeſſed themſelves of that City.

VIII. *BERWICK* upon *Tweed*, founded by one of our Kings. Friar *Adam*, Miniſter of the Order of the Trinity Friars of *Berwick*, ſwears Fealty to King *Edward* I. in the Year 1296.

IX. *DUNDEE*, in the Shire of *Angus*, founded by *James Lindſay*. His Charter is confirmed by King *Robert* III. *apud Perth, die* 24. *Auguſti, anno regni ſui ſecundo*, i. e. 1392.

X. XI. XII. XIII. The remaining Monaſteries of this Order were ſituate in the following Places, *viz.* at *CROMARTY*, or *CRENACH*, in

in the Shire of *Cromarty*; at *LOCH-FEAL*, in the Shire of ; at *BRECHIN*, in the Shire of *Angus*; and at *LUFNESS*, upon the Frith of *Forth*, in the Shire of *Eaſt-Lothian*: All which Places are mentioned in ancient Charters and Records, as Houſes belonging to this Order; but having ſeen no diſtinct Account of them, I am uncertain when, or by whom they were founded.

Their Habit was white, with a red and blue Croſs patée upon their Scapular. Their general Chapter was held yearly at *Whitſunday*, *in octavis Pentecoſtes*. Their Way of Living was much conform to that of the Canons of St. *Victor* at *Paris*. At their firſt Inſtitution their Superior-General was elective, and choſen by the general Chapter.

## CHAP. V.

### *Of the* Præmonſtratenſes *and their Monaſteries.*

THE *Præmonſtratenſes* were ſo named from their principal Monaſtery, *Præmonſtratum*, in the Dioceſs of *Laon* in *France*, which the Monks of this Order pretend was ſo called from its being *Divinâ revelatione præmonſtratum*. This Order is alſo called *Candidus ordo*, becauſe their Garb is entirely white. They followed the Rule of St. *Auguſtine*, which they ſay was delivered to them in golden Letters, from himſelf, in a Viſion; and were founded by St. *Norbert*, a *German* Archbiſhop of *Magdeburgh*, who obtained for himſelf and

and Succeſſors in that See the Title of *Primate of Germany*. His Order was confirmed by Pope *Honorius* II. and *Innocent* III. He retired with ſome Companions about the Year 1120. There were of this Order ſix Monaſteries in *Scotland*, at the following Places, *viz.*

I. *SOULS-SEAT*, [called *Sedes animarum*, or, *Monaſterium viridis ſtagni*,] in *Galloway*, near *Stranrawer*. St. *Malachias*, an *Iriſhman*, is ſaid to have founded here the firſt Community: Which is ſurely a Miſtake; for it is certain, that the firſt Religious of this Order were brought here directly from *Præmontré* in *France*, as *Johannes le Page* relates, in his *Biblioth. Præmonſt. lib.* 1. *p.* 333. It was the Mother of *Holywood* and *Whitehorn*, and was founded by *Fergus* Lord of *Galloway*, who became a Canon-Regular in the Abbacy of *Holy-rood-houſe*, in the Year 1160, after he had founded ſeveral Abbeys and religious Places, and endowed them with conſiderable Revenues for the Subſiſtence of the Canons or Monks, whom he brought home and ſettled in *Galloway*.

II. *HOLY-WOOD*, in *Galloway*, called in *Latin*, *Monaſterium ſacri nemoris*, and in the Pope's Bulls, *Dercongall*. For Pope *Honorius* III. in his Bull, *datum Reate*, 15. *Kalend. Januarii*, *Pontificat. ſui anno decimo*, *ſuper controverſia inter Walterum Glaſcuenſ. Epiſcop. & Wilhelmum Paiſletenſ. Abbat.* addreſſes the Bull *Abbati de Dercongall*, *Glaſguenſ. Dioceſ.* *Dungald Abbé de Saint Boyſe* (according to *Prynne*, *Vol.* 3. *p.* 653.) ſwears Fealty to *Edward* I. of *England*,

*anno*

*anno* 1296. *Johannes de Sacro Boſco*, who is famous for his Book *De Sphæra*, is thought by ſeveral People of Learning to have been a profeſſed Religious of this Place.

III. *WHITEHORN*, or, *CANDIDA CASA*, a Biſhop's Seat in *Galloway*. *Fergus* Lord of *Galloway*, who flouriſhed in the Reign of King *David* I. founded here a Priory of this Order, who were Dean and Chapter of that Cathedral. *Morice*, Prior of this Convent, ſwore Fealty to *Edward Langſhanks* King of *England* in the Year 1296. This Church was famous for the great Reſort of Pilgrims, who flock'd thither from all Parts to viſit St. *Ninian*'s Sepulchre, whom they call commonly the firſt Biſhop of *Galloway*. We had two famous Priors of this Place; the one called *Gavin Dunbar*, Prior hereof in the Year 1514, and afterwards Archbiſhop of *Glaſgow*; the other, *James Beton*, a Son of the Family of *Balfour* in *Fife*, firſt, Archbiſhop of *Glaſgow*, and then of St. *Andrew*'s, and Chancellor of *Scotland*.

IV. *DRYBURGH*, ſituate on the River *Tweed*, a little below *Melroſs*, in *Teviotdale*, was a famous Abbey, founded by *Hugh Moreville* Conſtable of *Scotland*, and his Wife *Beatrix de Bello Campo*, in the Reign of King *David* I. *Walter Stuart*, Father to King *Robert* II. grants to this Place the Patronage of the Church of *Maxton*, in the Shire of *Roxburgh*, and Dioceſs of *Glaſgow*. *Kilrinny* in *Fife* was alſo given to this Monaſtery by *Ada*, Mother to King *Malcolm* IV. and King *William* the *Lyon*: And by the ſame Charter

Charter ſhe gives them alſo *dimidiam carrucatam terræ de Pitcortyne, & unum toftum in burgo meo de Carele.* The Author of the *Monaſticon Hibernicum* informs us, that there were two Monaſteries in *Ireland* which acknowledged the Abbacy of *Dryburgh* for their Mother, *viz.* the Abbacy of *Drumcroſs* in the County of *Armagh*, and the Abbey of *Woodborn* in the County of *Antrim.* It was erected into a temporal Lordſhip by King *James* VI. in favour of *Henry Erſkine*, a younger Son of the Earl of *Mar*, thereafter created *Lord Cardroſs*, Anceſtor to the preſent Earl of *Buchan.* There is a Chartulary of this Place, containing all the Charters that were granted thereto, in the Advocates Library.

V. *TUNGLAND*, in *Galloway*, was founded by *Fergus* Lord of *Galloway*, in the twelfth Century. *Alexander* Abbot of *Tungland* is one of the Subſcribers to *Ragman's Roll* in the Year 1296. *Leſly* tells us a very merry Story of another Abbot of this Place, *p.* 331. *ad annum* 1507; who, undertaking to be in *France* before the King's Ambaſſadors who were going thither, by flying in the Air, and accordingly taking his Flight from the Walls of the Caſtle of *Stirling*, met with a Reward ſuitable to the Nature of the Undertaking, by falling, and breaking his Thighbones. A like Story is related by *Radulphus Hygdenus*, *lib.* 6. *p.* 284. *ad annum Chriſti* 1065.

VI. *FERNE*, in *Roſs*, was an Abbacy, founded by *Ferquhard* the firſt Earl of *Roſs*, in the Reign of King *Alexander* II. It was annexed to the Biſhoprick of *Roſs* in the 20th Parlia-

ment of King *James* VI. in the Year 1607, and is frequently called in Charters *Abbacia de nova Farina.* Mr. *Patrick Hamilton*, Abbot of this Place, was the firſt called in queſtion for Religion at the Dawning of the Reformation, and burnt at the Gate of St. *Salvator*'s College in St. *Andrew*'s, in the Year 1527.

All theſe different Orders followed the Rule of St. *Auguſtine*, and ſome private Conſtitutions.

The *Jacobines*, or Black Friars, who are elder than thoſe of St. *Bennet* by forty Years, follow alſo St. *Auguſtine*'s Rule; but being liſted amongſt the Begging or Mendicant Friars by the Councils, I have not thought fit to ſpeak of them in this Place; and ſo ſhall proceed to the Monks who obſerved the Rule of St. *Bennet*, referring the Black Friars to their peculiar Chapter.

## CHAP. VI.

### *Of the* Benedictines, *or Black Monks, and their Monaſteris.*

ST. *Benedict* or *Bennet*, Founder of this Order, was the firſt who brought the Monaſtical Life to be eſteemed in the Weſt. He was born at *Nurſi*, a Town of *Italy*, about the Year 480, and eſtabliſhed his Followers about the fifth Century; who were ſometimes called *Benedictines*, from the proper Name of their Founder; and ſometimes *Black Monks*, from the Colour of their Habit.

*Berno* built a new Monaſtery near *Cluniacum*, and

and began to reform the *Benedictines* about the Year 940. Thence came the Congregation of *Cluny*. Moreover the Order of St. *Bennet* hath been the Source of ſeveral others, who follow the Rule of their firſt Founder.

Theſe Monks were either brought from Monaſteries depending upon the Abbacy of *Fleury la Riviere* on the River of *Loire* in *France*, from *Tyron* in the Province of *Perche*, or *Cluny* in *Burgundy*; as alſo the *Ciſtertians*, and thoſe of the Congregation of *Vallis-caulium*, called *Val-des-choux*, likewiſe in *Burgundy*.

Thoſe who had Relation to *Fleury la Riviere* had three Convents in this Country, which were ſituate at the following Places.

I. *COLDINGHAM*, in the Shire of *Berwick*, two Miles from *Aymouth*, was a Priory, founded by King *Edgar* in honour of St. *Cuthbert*, in the Year 1098, who beſtowed it upon the Monks of *Durham* in *England*. It formerly was a Nunry, renowned in our Hiſtory, (as you will ſee in its proper Place.) *Bede* calls this Place *Coludum*, and *Ptolemy*, *Colania*. *Hugh* Biſhop of *Biblis* in the Holy Land, obtained of Pope *Benedict* XI. all the Profits and Revenues of this Priory during his Lifetime, after that the *Saracens* had ſeiſed upon his Biſhoprick; which King *Edward* I. finding prejudicial to the Crown, ſtopt, and declared the Gift null, *Prynne*, *Vol.* 3. *p.* 1059. King *James* III. annexed this Place to his Royal Chapel of *Stirling*, and made an Act of Parliament, diſcharging all Subjects to attempt any thing contrary to this Union, under the Pain of

Treaſon. After his Death, *Alexander Stuart*, natural Son to King *James* IV. was made Commendator hereof, and was killed with his Father at the Battle of *Floudon*, in the Year 1513. The laſt who bore that Title was *John Stuart*, Son to *Francis* Earl of *Bothwel*. There are a vaſt Number of original Charters, granted by our Kings, *&c.* to this Monaſtery, ſtill extant in the Archives of the Church of *Durham*, an exact Liſt of which is to be ſeen in Manuſcript in the Advocates Library.

II. *DUMFERMLING*, a noble Monaſtery, in the Shire of *Fife*, ſituate four Miles above the *Queensferry*. It was begun by King *Malcom* III. or *Canmore*, and was finiſhed by King *Alexander* I. ſirnamed the *Fierce*. This City is famous for being the Burial-place of ſeveral of our Kings, and the Place that gave Birth to King *Charles* I. It was formerly governed by a Prior: For *Eadmerus*, *Hiſt. Novel. lib.* 5. *p.* 136. ſpeaking of the Meſſengers that were ſent by the above King *Alexander*, in the Year 1120, to *Radulph* Archbiſhop of *Canterbury*, for procuring *Eadmer* to be Biſhop of St. *Andrew's*, ſays, *Horum unus quidem Monachus, & Prior Eccleſiæ Dumfermelinæ, Petrus nomine.* Perhaps it was then an Hoſpital: For it is deſigned in ſome old Manuſcripts, *Monaſterium de monte infirmorum.* However, King *Malcom* and King *Alexander* gave ſeveral Lands to this Place; which was afterwards changed into an Abbey by King *David* I. who brought thither thirteen Monks from *Canterbury* in the Year 1124. *Muſſelburgh* and

and *Inveresk*, with the Pariſh-church, Mills and Harbour, were given to this Abbey by King *Malcom* and his Son St. *David*. *Burntiſland*, called of old *Weſter-Kinghorn*, with its Caſtle and Harbour, belonged alſo to this Place; with *Kinghorn*, *Kirkaldy*, and ſeveral other conſiderable Towns and Lands mentioned in the Chartulary of this Place in the Advocates Library.

The firſt Abbot of this Monaſtery was *Gosfridus*, of whom the Hiſtory of *Florentius Vigornienſis* gives the following Account: *Vir religionis eximiæ, Cantuariæ Prior, Gosfridus nomine, Rege Scotorum David petente, & Archiepiſcopo Wilhelmo annuente, Abbas eligitur ad locum in Scotia qui Dumfermling dicitur: ordinatus eſt autem à Roberto Epiſcopo Sti Andreæ anno* 1128. This *Gosfrid*, or *Gaufrid*, died in the Year 1153; For the *Chronicon Stæ Crucis*, *ad annum prædictum*, ſays, *Obiit Gosfridus, primus Abbas de Dumfermling, & nepos ejus Gaufridus in loco ejus ſucceſſit.* The laſt Abbot of this Place was *George Durie*, Commendator and Archdean of St. *Andrew*'s. The Church and Monaſtery were dedicate to the Holy Trinity, and St. *Margaret* Queen of *Scotland*. It was united to the Crown by the 189th Act of King *James* VI.'s 13th Parliament.

At the general Diſſolution of the Monaſteries, *Dumfermling* was firſt given to Secretary *Pitcairn*, then to the Maſter of *Gray*, and in the End was conferred upon *Alexander Seton*, a younger Son of *George* Lord *Seton*, who was firſt advanced to the Honour of a Lord of the Realm

by the Title of *Lord Urquhart*, the 3d *Auguſt* 1591, and thereafter was created Earl of *Dumfermling*, the 3d *March* 1605.

*Muſſelburgh* was likewiſe erected into a Lordſhip, in favours of the Lord *Thirleſton*, and excepted from the general Annexation made in the Year 1587; And by the ſame Act, the Conventual Brethren of this Place, having embraced the Reformation, were no ways to be deprived of their Portions during their Lifetime.

III. *URQUHART*, in the Shire of *Murray*, near *Elgin*, was a Cell or Priorry belonging to *Dumfermling*, and founded by King *David* I. in honour of the Bleſſed Trinity, in the Year 1125, as appears by his Charter in the Chartulary of *Murray*, (*fol. verſ.* 29.) in which he grants, *Priori & fratribus ibidem Deo ſervientibus, Fothapir, per ſuas rectas diviſas, & commune paſcuum animalium & unam piſcinam in Spee, & in firma burgi de Elgine viginti ſolidos, & de dominicis hominibus, quorum ſunt in Fothapir, rectitudinem piſcis quæ ad Tayn pertinet, & decimam cani de Argayle, de Morref & placitorum, & totius lucri ejuſdem Argayle.* — *Pothent, juxta Heryn, per ſuas rectas diviſas, & Scalingas de Fenechty, & omnes rectitudines quas Monachi de Dumfermling in Morref habere ſolebant*, &c.

There are ſeveral Priors of this Place mentioned in the two Chartularies of *Murray*, which are ſtill preſerved amongſt the curious Collection of Manuſcripts belonging to the Faculty of Advocates: For *Richard* Prior of *Urquhart* ſubſcribes the fixing of the Cathedral of *Murray* at *Spiny*,

and

and the Foundation of eight Canons ſettled there by Biſhop *Bricius*, Brother to *William* Lord *Douglas*, in the Reign of King *William* the *Lyon*.

*Thomas* Prior of *Urquhart* is preſent at a Synod of *Andrew* Biſhop of *Murray*, held at *Elgin* in the Year 1232; and is ſubdelegate for compoſing a Difference betwixt the Biſhop of *Murray* and *David de Strathbolgyn*. *Robert* Prior of *Urquhart* is preſent at a Synod called at *Elgin* in the Year 1369, *de decimis ſolvendis, de plauſtris ducentibus meremia*.

## CHAP. VII.

### *Of the* Tyronenſes *and their Monaſteries*.

THeſe Monks had their Name from their firſt Abbey, called *Tyronium*, [*Tyron*,] in the Dioceſs of *Chartres*; and not from the *Latin* Word *Tyro*, as ſome would have it; ſignifying thereby their Novitiate. There *Rotrou*, Earl of *Perche* and *Mortagne*, gave to St. *Bernard*, Abbot of St. *Cyprian* in *Poictou*, a Settlement, in the Year 1109, after he had wandred a long Time through *Britanny* and *Normandy*. They likewiſe followed the Rule of St. *Bennet*, and had ſix Monaſteries in *Scotland*, ſituate at the following Places, *viz*.

I. *KELSO*, or, *DE CALCHOU*, in the Shire of *Roxburgh* or *Teviotdale*, ſituate at the Mouth of the River of *Teviot*, upon the North-ſide of the *Tweed*. This Abbey was firſt founded at *Selechirche* or *Selkirk*, by King *David* I.

whilſt he was Earl of *Cumberland*, in honour of the Virgin *Mary* and St. *John* the Evangeliſt. From thence it was taken to *Roxburgh* by the ſaid King, *cùm locus non erat conveniens Abbaciæ*, as the Charter bears. At laſt it was ſettled at *Kelſo*; where St. *David*, being King, founded an Abbey for theſe Monks in the Year 1128, at the Perſwaſion of *John* Biſhop of *Glaſgow*. The Abbey had its firſt Confirmation from Pope *Innocent* II. who died in the Year 1143. In the Chartulary of this Place, in the Advocates Library, there is a Bull of Pope *Alexander* III. allowing the Abbot to wear a Mitre, and make uſe of other Pontifical Ornaments, and to be preſent at all general Councils. *Innocent* III. grants great Privileges to this Abbey, and exeems the Abbot from all Epiſcopal Juriſdiction. They had alſo Grants of Freedom and Independency from *Robert* Biſhop of St. *Andrew*'s, in whoſe Dioceſs they were; for he declares that Church *ſolutam, & ab omni exactione liberam*; and that the Monks and Abbots might take their Ordination and other Sacraments of the Church from any Biſhop they pleaſed in *Scotland* or *Cumberland*. And notwithſtanding they were tranſported from *Selkirk* and *Roxburgh*, yet they continued to have the Churches of both Places, and the Tithes with the Schools of *Roxburgh*. They had likewiſe the Churches of *Molle*, *Sprouſton*, *Hume*, *Lambden*, *Greenlaw*, *Symprink*, *Keith*, *Mackerſton*, *Maxwell* and *Gordon*, with ſeveral others. They had alſo an Annuity of three Merks *Sterling* payable out of the Cuſtoms of *Perth*, upon St. *John* the

*Baptiſt*'s

*Baptiſt*'s Day, given them by King *Alexander*, as the Charter more fully bears, which is recorded in the Chartulary of this Place, (*fol. verſ.* 147.) The Church of *Innerlethan* was alſo granted to the Monks of this Place by King *Malcom* IV. who by our Hiſtorians is ſirnamed the *Maiden*, as appears by his Charter ſtill extant in the Chartulary of *Kelſo*, (*fol. verſ.* 16.) in which is this remarkable Clauſe, *Præcipio etiam* (ſays the King) *ut prædicta Eccleſia de Innerlethan*, in qua primâ nocte corpus filii mei poſt obitum ſuum quievit, *ut tantum refugium habeat in omni territorio ſuo, quantum habet Weddel aut Tyninghame, & ne aliquis ita ſit temerarius, ut pacem prædictæ Eccleſiæ & meam, ſuper vitam & membra ſua audeat violare. Teſtibus*, &c. This ſhews plainly how far our Hiſtorians are miſtaken in naming him *King Malcom the Maiden*.

The firſt Abbot of *Selkirk* was *Herbert*, mentioned in the Foundation. He ſucceeded *John* Biſhop of *Glaſgow* in the Year 1147. And the laſt was *James Stuart*, natural Son to King *James* V. Abbot of *Kelſo* and *Melroſs*. He died in the Year 1559. After him Cardinal *de Guiſe* was named Abbot by *Mary* of *Lorrain*, Queen-Dowager, but never got Poſſeſſion thereof. The Abbacy of *Kelſo* belongs at preſent to the Duke of *Roxburgh*, whoſe Anceſtor, Sir *Robert Ker* of *Ceſsford*, obtained it in the Year 1605 from King *James* VI. upon the Forfeiture of *Francis* Earl of *Bothwell*, Admiral of *Scotland*.

II. *LESMAHAGOW*, in *Clydeſdale*, contiguous to the Barony of *Douglaſdale*, was a Cell of

of *Kelſo*, founded by King *David* I. in the Year 1140, and dedicated to St. *Machut*. King *Robert* the *Bruce* grants, *Sancto Machuto, & Monachis apud Leſmahagow Domino ſervientibus, ad luminare circa tumbam Sancti Machuti perpetuò ſuſtinendum, decem mercas Sterlingorum annui redditûs, de redditibus molendinorum ſuorum de Maldeſlay, liberas & quietas ab omnibus exactionibus & demandis, in liberam, puram & perpetuam eleemoſynam.* The ſaid Sum was to be paid *iiſdem religioſis, vel eorum actornato, ſingulis annis, infra villam de Lanrik, per manus Vicecomitis ſui, qui pro tempore fuerit, ad duos anni terminos, viz. quinque mercas ad feſtum Pentecoſtes, & alias quinque mercas ad feſtum Sancti Martini in hyeme, ſine contradictione vel ſtrepitu aliquali.* *Henry* Abbot of *Kelſo* and his Chapter grants to Sir *William Douglas* (therein deſigned *miles*) their Lands of *Pollenell* in the Barony of *Leſmahagow*, *totam terram noſtram de Pollenell, in tenemento de Leſmahagow, pro fideli conſilio & auxilio & patrocinio.* Theſe Lands were granted to him *pro toto tempore vitæ ſuæ*, in giving yearly to the Priory of *Leſmahagow duas libras ceræ, in feſto Sancti Martini in hyeme, nomine firmæ & recognitionis.* The Charter is dated *in craſtino Purificationis beatæ Mariæ Virginis, apud Glaſgow, in plena curia Juſticiarii, anno gratiæ* 1270.

*John* of *Helcame*, Brother to King *Edward* of *England*, burnt this Monaſtery, together with thoſe that had retired thither to ſhelter themſelves from the Cruelty of the Enemy; and in the 1560 the

the Reformers pulled down the Monaſtery and Church, after they had burnt the Relicks of the Martyrs, which had been kept there for ſeveral Years.

III. *KILWINNING*, in *Cuningham*, one of the Subdiviſions of the Shire of *Air*, ſome few Miles North of *Irvine*, near the *Iriſh* Sea. This ſtately Monaſtery was founded by *Hugh Moreville* Conſtable of *Scotland*, in the Year 1140, and dedicated to St. *Winnin*. The Monks hereof were brought from *Kelſo*. King *Robert* I. grants to this Place the Lands of *Halland*, *juxta burgum de Irvine*, as alſo *viginti ſolidos*, *quos annuatim de terra ſua de Kilmernoch heredibus de Baliolo reddere ſolebant*. *Johannes de Menetheth*, *Dominus de Arran & de Knapdale*, gives to the ſaid Monks *jus patronatûs & advocationis Eccleſiarum Sanctæ Mariæ & Sanctæ Brigidæ inſulæ de Arran*, *cum ſuis Capellis & terris*. The Charter is given at *Kilwinning*, the 12th *October* 1357.

The laſt Commendatary Abbot of this Place was *Gavin Hamilton*, a great Enemy to the Congregation and to *John Knox*. He was employed in ſeveral Negotiations by the Queen-Regent and her Daughter Queen *Mary*, and was killed at the *Water-gate* in the *Canongate*, *Edinburgh*, the 28th *June* 1571. He had, in the Year 1552, made *Hugh* Earl of *Eglinton* Juſticiary, Chamberlain and Bailie of *Kilwinning*, and had given him a conſiderable Salary for diſcharging theſe Offices. His Grant is confirmed by the Queen, and may be ſeen in the 21ſt Book of our publick Records, *Chart.* 77.

At

At the general Diſſolution of the religious Houſes, *Alexander* Earl of *Glencairn* (a great Promoter of the Reformation) obtained a Grant of the Abbey of *Kilwinning*: But upon the 5th of *January* 1603, *Hugh* Earl of *Eglinton*, Son to the former, got a new Grant of the ſaid Abbey to himſelf and his Heirs, upon the Reſignation of Mr. *William Melvil*, Son to Sir *John Melvil* of *Raith*, with all the Lands and Tithes, in Property and Superiority, which had belonged at any time thereto, erected into a temporal Lordſhip, with the Patronage of the Churches of *Kilwinning*, *Irvine*, *Dumbarton*, *Kilmarnock*, *Loudon*, *Ardroſſan*, *Kilbirny*, &c.

IV. *ABERBROTH*, or *ABERBROTHOCK*, in *Angus*, ſituate near the Sea-ſhore, on the Burn *Brothock* or *Brothe*, was a ſumptuous Abbey, founded by King *William* the *Lyon* in the Year 1178, and conſecrated to the Memory of *Thomas* Archbiſhop of *Canterbury*, called by the *Engliſh Thomas Becket*. The Monks hereof were brought from *Kelſo*. This Place is named in ſeveral Manuſcripts *Monaſterium Bajocenſe*, and by *Dempſter*, *Aberbredock-kuidel*. King *Robert* the *Bruce* grants ten Merks *Sterling* to this Abbey, *ſingulis annis percipiend. de thanagio de Monifoth, ad ſuſtinendum luminare circa tumbam bonæ memoriæ Willielmi Regis Scotorum*, and ſeveral other Gifts for divers Uſes. King *John* of *England* grants likewiſe to the Inhabitants of this Town the ſame Privileges that his Subjects enjoyed through all his Kingdom of *England*, except in *London*; and Pope *Lucius* III. con-

confirms, in the Year 1182, all Donations that were made to this Monaſtery.

The firſt Abbot of this Place was *Reginaldus*, a Monk of *Tyron*, whom *John* Abbot of *Kelſo* exeems and declares free from his Juriſdiction in the Year 1178; to which Charter *Richardus de Aberbuthenoth*, or *Arbuthnot*, *Clericus Regis*, is a Witneſs. The ſaid *Reginaldus* was conſecrated, at King *William*'s Requeſt, by *Matthew* Biſhop of *Aberdeen*, *vacante Eccleſiâ Sancti Andreæ*. The ſecond Abbot was *Dominus Henricus*, a profeſſed Monk of *Kelſo*; whom the ſaid Abbot exeems likewiſe from all Subjection to his Convent, in the Year 1179, notwithſtanding he had ſworn Obedience to him and his Succeſſors ſome Years before. *Bernard* Abbot of this Monaſtery was Chancellor under King *Robert* the *Bruce*, and afterwards Biſhop of the Iſles. There is an Indenture betwixt *John Geddy*, Abbot of this Place, and the Burgeſſes of the Town of *Aberbroth*, whereby the Abbot obliges himſelf and his Succeſſors to maintain the Pier, *ſumptibus ſuis & expenſis portum ſalutarem, in quo naves applicare valeant, & ſalvè quieſcere.* It is dated the 2d *April* 1394. Pope *Pius* II. in the Year 1461, orders the Biſhop of St. *Andrew*'s to give notice to his Brethren, that he had exeemed the Abbot of this Place from aſſiſting at their yearly Synods, and that he was fully reſolved to excommunicate all thoſe who would trouble them upon that Head: Yet it does not appear that *John* Biſhop of *Brechin* and *Alexander* Biſhop of *Murray* were afraid of theſe Thunderbolts. As alſo Pope *Bennet*,

*Bennet*, by his Bull dated at *Avignon*, *6to Kal. Junii*, *Pontificatûs ſui 2do*, grants to *John* Abbot of *Aberbroth* the Privilege of making uſe of, and wearing the Pontifical Ornaments, *ut tu fili Abbas, & ſucceſſores tui dicti monaſterii Abbates, qui pro tempore fuerint, mitrâ, annulo, & aliis Pontificalibus inſigniis, liberè poſſitis uti*, &c. And Pope *Martin*, by his Bull dated at *Florence*, *5to Id. Junii*, *Pontificatûs ſui anno 3tio*, allows *Walter* Abbot of *Aberbroth* and his Succeſſors to give the minor Orders, *ut tu fili Abbas, & ſucceſſores tui Abbates dicti monaſterii, qui erunt pro tempore, Monachis & Clericis ſecularibus ſervitoribus dicti monaſterii, minores ordines conferre valeatis.*

The laſt Commendatary Abbot of this Place was *John Hamilton*, ſecond Son to the Duke of *Chaſtleherault*, who was afterwards created Marquis of *Hamilton*. This Abbey, which was one of the richeſt in *Scotland*, was erected into a temporal Lordſhip, in favour of *James* Marquis of *Hamilton*, Son to the former, upon the 5th of *May* 1608. It afterwards belonged to the Earl of *Dyſart*: From whom *Patrick Maule* of *Panmure*, Gentleman of the Bedchamber to King *James* VI. did purchaſe it, with the Right of Patronage of thirty four Pariſh-Churches belonging thereto.

V. *FYVIE*, ſituate upon the Water of *Ythan* in *Buchan*, was a Cell or Priory of *Aberbroth*, founded with a Pariſh-Church in honour of the Virgin *Mary*, by *Fergus* Earl of *Buchan*, in the Year 1179: And his Donation of it to the Abbacy

bacy of *Aberbroth* was afterwards confirmed by *Margaret* Counteſs of *Buchan* his Daughter, who married Sir *William Cuming* Knight, who by that Marriage became Earl of *Buchan*. I find one *Albertinus Cuſtos domûs de Fyvyn* in the Year 1323. There is likewiſe a Letter of *Bernard* Abbot of *Aberbroth*, and Chancellor of *Scotland*, addreſſed to him, *De diſciplina regulari ſervanda, datum apud Aberbroth, die Lunæ, in feſto Sancti Martini in hyeme, anno gratiæ* 1325, which is recorded in the Chartulary of *Aberbroth*, (*fol. verſ.* 14.) *Johannes de Sancto Andrea* is named *Cuſtos domûs de Fyvyn* in the Year 1451; and upon the 20th of *May* in the Year 1484, *Alexander Maſon*, Prior of *Fyvie*, names, with the Conſent of the Chapter, *David Lighton*, Archdean of *Roſs*, Abbot of *Aberbroth*, *per viam compromiſſi*. The Priory ſtood on a plain Ground, near to a little Water, and had a pleaſant View of the neighbouring Woods.

VI. *LUNDORES*, ſituate in the Foreſt of *Ernſide*, on the River *Tay*, below the Town of *Newburgh*, in the Shire of *Fife*, was a rich Abbey, founded by *David* Earl of *Huntington*, Brother to King *William*, upon his Return from the Holy Land, about the Year 1178. Earl *David* beſtowed this Place upon the *Tyronenſes* of *Kelſo*, whom *Boethius* highly commends, as being *morum innocentiâ clari*. *Robert* the *Bruce*, Competitor with the *Baliol*, derives his Title to the Crown from his Mother, Daughter to this Earl. *David* Duke of *Rothſay*, eldeſt Son to King *Robert* III. who was ſtarved at *Faulkland* by his Uncle,

Uncle, (as is commonly reported,) was buried in the Church of this Abbey, which was dedicated to the Virgin *Mary* and St. *Andrew* the Apoſtle. There is a Bull of Pope *Innocent* III. granted at *Lateran*, in the Year 1198, the ſecond Year of his Pontificate, containing all the Lands and Privileges granted to this Place, and is addreſſed *Guidoni Abbati monaſterii Sanctæ Mariæ de Lundores, ejuſque fratribus. Johannes Scotus*, Earl of *Huntingtон*, confirms likewiſe to the ſaid Monks all the Donations which had been made to them by his Father. The Monks of this Place had twenty two Pariſh-Churches belonging to them, and were very rich. This Abbey was erected into a temporal Lordſhip by King *James* VI. the 25th *December* 1600, in favour of *Patrick Leſly* Son to *Andrew* Earl of *Rothes*.

## CHAP. VIII.

### *Of the* Cluniacenſes *and their Monaſteries.*

THe *Cluniacenſes* were ſo called from the Abbacy of *Cluny* in *Burgundy*, near the River of *Groſne*, four Leagues from *Macon* in *France*, where *Berno* revived the Rules of St. *Bennet*, adding ſome new Conſtitutions; and when he was a-dying, placed *Odo* as Abbot or Superior of this new Monaſtery. The Monks of this Inſtitution had four Monaſteries in this Kingdom, ſituate at the following Places.

I. *PAISLEY*, in the Shire of *Renfrew*. It formerly was a Priory, and afterwards changed into

into an Abbey of Black Monks, brought from *Wenlock* in *England*, and was founded by *Walter* Son of *Alan* Lord High Steward of *Scotland*, in the Year 1164. It was the common Burial-place of that noble Family, until they became Kings of *Scotland*: And although King *Robert* II. the firſt of this Race who attained to that Dignity, was buried at *Scone*; yet nevertheleſs his firſt Lady, *Eliſabeth Muir*, (who has made a great Noiſe in our Hiſtory,) and *Euphemia Roſs* his Queen, were both buried here, as likewiſe *Marjory Bruce* his Mother. The Monks of this Place are ſuppoſed to have written a Chronicle of our Affairs, called *The black Book of Paiſley*, from its Cover. This curious Monument of Antiquity, cited frequently by *Buchanan*, belonged to Preſident *Spotiſwood*, and after his Death was carried into *England* by General *Lambert*, and is now in the King's Library at St. *James*'s.

*George Schaw*, Abbot of this Place, enlarged and beautified this Monaſtery. He built the Refectory and other Offices neceſſary for the Monks, the Church and the Precinct of the Convent, and enlarged the Gardens and Orchards, which he incloſed with a Wall of hewn Stone, about a Mile in Circuit, in the Year 1484. In one of the Corners of this curious Wall, towards the outer Side, there was a Niche, with a Statue of the Virgin *Mary*, with this Diſtich engraven under her Feet:

*Hac ne vade viâ, niſi dixeris Ave Maria:*
*Sit ſemper ſine væ, qui tibi dicit Ave.*

One of his Succeſſors was *John Hamilton*, natural Son to *James* Earl of *Arran*; who was then Biſhop of *Dunkeld*, and afterwards Archbiſhop of St. *Andrew*'s. The Biſhop reſigned it, in the Year 1553, *6to Id. Decembris*, with the Queen's Conſent, (*reſervatis ſibi fructibus*,) in favour of Lord *Claud Hamilton*, a Child of ten Years of Age, notwithſtanding that it is expreſſed in the Bulls of Pope *Julius* that he was fourteen Years old. This Lord *Claud* was third Son to *James* Duke of *Chaſtleherault*, Governor of *Scotland*. He adhered to Queen *Mary*'s Intereſt, and was at the Field of *Langſide* in the Year 1568; for which he was forfeited: And *Paiſley*, then in the Crown's Hands, was beſtowed by the Regent upon *Robert* Son to *William* Lord *Semple*, heritable Baillie of *Paiſley*, and Juſticiary of that Regality. But Lord *Claud* being afterwards reſtored to his Fortune, was in the Year 1591, by the Favour of King *James* VI. created Lord *Paiſley*. His Son, *James* Earl of *Abercorn*, diſponed the Abbacy of *Paiſley* in favours of *William* firſt Earl of *Dundonald*, with whoſe Poſterity it ſtill remains.

II. *FEALE*, in *Kyle*, one of the Subdiviſions of the Shire of *Air*, was a Cell or Priory depending upon *Paiſley*, and conſecrated to the Virgin *Mary*. The Founder thereof is unknown, as alſo the Year of Foundation: Our Hiſtory only remarks, that the Prior of this Place was one of thoſe who hindred the Caſtle of *Dumbarton* from being ſurrendred to the *Engliſh*,

*Anne*

*Anno* 1544, in oppoſition to the Earl of *Lenox*, then Governor of it.

III. *CROSRAGUEL*, *CROCEREGAL*, or *CROSRAGMOL*, in *Carrick*, alſo one of the Subdiviſions of the Shire of *Air*, ſituate in the Pariſh of *Kirkoſwald*, two Miles diſtant from *Mayboil*, was founded by *Duncan*, Son of *Gilbert* Earl of *Carrick*, in the Year 1244, as we are informed by the Chartulary of *Paiſley*. There is a Charter of King *Robert* the *Bruce* to this Place, which he calls *Croceragmer de terra de Dungrelach*, given at *Berwick*, the 18th Year of his Reign; and a Confirmation by the ſaid King of all the Churches and Lands granted to this Place, by *Duncan Neil*, [*Nigellus*,] *Robert* his Father, and *Edward* the *Bruce* his Brother, Earls of *Carrick*, dated at *Cambus-kenneth* the 20th *July*, and the 21ſt Year of his Reign. The laſt Abbot of this Place was *Quintine Kennedy*, Brother to the Earl of *Caſſils*. The famous *George Buchanan* had afterwards a conſiderable Sum of Money paid him yearly out of this Abbacy, which gives him Occaſion in Charters to deſign himſelf *Penſionarius de Croſragmol*. Both the Temporality and Spirituality of this Abbey was by King *James* VI. in the Year 1617, annexed to the Biſhoprick of *Dumblane*.

IV. *ICOLMKILL*, in the Iſle of *Jona* or *Hye*, [*Inſula Sancti Columbæ*,] near the Iſle of *Mull*, in the Shire of *Argyle*, was a famous Monaſtery, founded by St. *Columba*; who coming from *Ireland* into *Britain* in the Year 565, to preach the Word of God to the Provinces of

the *North Picts*, and having converted them, he obtained this Iſland, where he laid the Foundations of this Monaſtery, and was himſelf the firſt Abbot. *Bede* informs us, that his Succeſſors and Followers differed from the Church of *Rome* in the Obſervation of *Eaſter*, and the Clerical Tonſure, until the Year 716. *Uſher* aſſures us, that the firſt Inhabitants of this Monaſtery were Regular Canons, [*Clerici*;] which Opinion *Gabriel Pennotus* confirms, by ſeveral ſtrong Arguments drawn from the Books of the Taxes or Impoſitions that were laid upon the Clergy, and are kept at *Rome*. The old Cloiſters being ruined by the ſeveral Incurſions of the *Danes*, the Monaſtery became in following Years the Dwelling of the *Cluniacenſes*; who, in the Reign of King *William*, loſt all their Benefices, *cum cura animarum*, in *Galloway*, which were beſtowed upon the Canons of *Holy-rood-houſe* at *Edinburgh*, the *Benedictines* not being allowed by their Conſtitutions to perform the Duties and Functions of a Curate. Forty eight of our Kings are ſaid to have been buried in the Church-yard of this Abbey, as alſo four *Iriſh* Kings, together with eight *Daniſh* or *Norvegian*, whereof there are as yet ſeveral undefaced Monuments and Inſcriptions extant. This Abbey was annexed to the Biſhoprick of *Argyle* by King *James* VI. in the Year 1617.

CHAP.

## CHAP. IX.

### *Of the* Ciſtertians, *or* Bernardines, *and their Monaſteries.*

THe *Ciſtertians* were a religious Order, begun by *Robert* Abbot of *Moleſme*, in the Dioceſs of *Langres* in *France*, in the Year 1098. Theſe Monks were called *Monachi albi*, White Monks, for diſtinguiſhing them from the *Benedictines*, whoſe Habit was entirely black; whereas the *Ciſtertians* wore a black Coul and Scapular, and all their other Cloaths were white. They were named *Ciſtertians* from their chief Houſe and firſt Monaſteries, *Ciſtertium* in *Burgundy*; and *Bernardines*, becauſe St. *Bernard*, Native of *Burgundy*, fifteen Years after the Foundation of the Monaſtery of *Citeaux*, went thither with thirty of his Companions, and behaved himſelf ſo well to their Humour, that he was ſometime after elected Abbot of *Clairvoux*, [*Abbas Clarevallenſis.*] This *Bernard* founded above 160 Monaſteries of his Order; and becauſe he was ſo great a Propagator of it, the Monks were called from his Name *Bernardines*. They were divided into thirty Provinces, whereof *Scotland* was the twenty ſixth, and had thirteen Monaſteries in this Country, ſituate at the following Places.

I. *MELROSS*, in the Shire of *Teviotdale*, ſituate upon the River *Tweed*, was an old Monaſtery in the Time of the *Saxons*, mentioned by *Bede*, in the Year 664. Here St. *David*, find-

ing the former Monaſtery decayed, laid the Foundations of a new Building, which he beſtowed upon the *Ciſtertians*, whom he brought from *Rievalle*, an Abbey in *Yorkſhire*. This new Monaſtery was founded in the Year 1136, according to the *Extracta ex variis chronicis Scotiæ*, which relates it in the following Words: *Monaſterium de Melroſs idem Rex David fundavit, anno Dom. MCXXXVI. de cujus quidem fundatione habentur hæc metra*;

*Anno milleno centeno ter quoque deno*
*Et ſexto Chriſti, Melroſs fundata fuiſti.*

It was dedicated to the Virgin *Mary*, as all the other Houſes of this Order were, which I ſhall not repeat. *Hugh Giffard* Lord *Yeſter* grants the Monk-lands of *Yeſter*, *& unam toftum in villa ſua de Yeſter, & duas bovatas terræ in villa ſua prædicta*; and *William*, firſt Earl of *Douglas*, grants likewiſe the Patronage of the Church of *Cavers* to this Abbacy, which was one of the fineſt *Gothick* Buildings in *Europe*, and a good Part of it ſtill remains entire.

Several Abbots of this Place were diſtinguiſhed for their Piety and Learning. *Richard*, the firſt Abbot hereof, died at *Clairvaux* in the Year 1149, *non ſine ſanctitatis opinione*. St. *Walter*, ſecond Abbot of this Place, who died in *Auguſt* 1159, was afterwards canoniſed. *Adam*, alſo Abbot of this Houſe, was ſent Ambaſſador to King *John* of *England* in the Year 1209. He was choſen Biſhop of *Caithneſs* in the Year 1213, and

and was burnt in his Kitchen at *Hawkirk* in the Year 1231. *Robert* of *Kildalach*, formerly a Monk and Abbot of *Dumfermling*, thereafter Chancellor of *Scotland*, was made Abbot of this Place in the Year 1269, and died in the Year 1273. *Johannes Fogo*, Abbot alſo of this Monaſtery, was Confeſſor to King *James* I. And *Andrew Hunter*, Abbot of this Place, was Confeſſor to King *James* II. and Lord High Treaſurer in the Year 1449. About the time of the Reformation, *James Douglas* was Commendator of *Melroſs*, by whoſe Care and Induſtry all the original Evidences were preſerved, and are ſtill extant, in the Cuſtody (as I am informed) of the Earl of *Morton*. *Thomas* Lord *Binny* was created Earl of *Melroſs* the 20th of *March* 1619.

II. *NEWBOTTLE*, ſituate on the River of *Southesk* in the Shire of *Mid-Lothian*, was an Abbey, founded by King *David* I. in the Year 1140. The Monks hereof were brought from *Melroſs*, together with their Abbot *Radulphus*. *Patrick Madort*, a learned Divine, who is mentioned from the Year 1462 until the Year 1470, recovered a great Number of original Writs and Charters belonging to this Place, which were tranſcribed into a Chartulary, which is now in the Advocates Library. The laſt Abbot or Commendator of this Place was *Mark Ker*, a Son of Sir *Walter Ker* of *Ceſsford*; whoſe Son of the ſame Name got this Abbacy erected in his favours into a temporal Lordſhip, 15th *October* 1591, and is Anceſtor to the preſent Marquis of *Lothian*.

III. *DUNDRENAN*, an Abbey, ſituate on *Solway* Frith, about two Miles from *Kirkcudbright* in *Galloway*, was founded by *Fergus* Lord of *Galloway* in the Year 1142. The Monks hereof were brought from *Rievall* in *England*. *Sylvanus* was the firſt Abbot of this Place. He died at *Belleland*, 7mo *Id. Octobris*, *anno* 1189. The laſt Abbot hereof was *Edward Maxwell*, Son to *John* Lord *Herries*; after whoſe Death King *James* VI. annexed this Place to his Royal Chapel of *Stirling*. The Chronicle of *Melroſs* is thought to have been written by an Abbot of this Monaſtery. The firſt Part thereof is certainly penn'd by an *Engliſhman*, and is a Continuation of *Bede*'s Hiſtory. The ſecond Part appears to have been writ by a *Scotſman*, familiar and contemporary with our *Stuarts*. The *Oxford* Edition, publiſhed in the Year 1684, does not agree with our Manuſcripts. *Alan* Lord of *Galloway*, ſirnamed *the Great*, Conſtable of *Scotland*, was buried in this Place in the Year 1233.

IV. *HOLME*, or *HOLMCULTRAM*, ſometimes deſigned *Harehope*, near to the Sea, and about twelve Miles diſtant from *Carlile*, in *Cumberland*, was founded by *Henry* Earl of *Huntington*, 3tio *Kal. Januarii*, *anno* 1150. The firſt Charter granted to this Place may be ſeen in *Dugdale*'s *Monaſticon Anglicanum*, *part.* 1. *p.* 886. and the Confirmations made thereof by King *David*, *Malcom* IV. and King *William*, are likewiſe to be ſeen in the ſaid *Monaſticon*, *Vol.* 3. *p.* 34 & 38. *Robert* the *Bruce*, Earl of *Carrick*, and Father to our *Robert* I. was here buried;

and

and near to him the Bowels of *Edward Langſhanks*, who died at *Burgh* upon *Sand*, in his Expedition againſt King *Robert* the *Bruce*. The Rolls of *Robert* II. make mention, that the Monks of this Abbacy were forfeited for adhering to the *Engliſh* Intereſt: And the Lands of *Prieſtfield*, the *Grange* near *Edinburgh*, and *Spittleton*, belonging to them, were given to *John* Lord *Kyle*, Earl of *Carrick*, his Son; who diſponed them to *Riccarton*, Nephew to Cardinal *Wardlaw* Biſhop of *Glaſgow*.

V. *KYNLOSS*, or rather *KEANLOCH*, in *Murray*, was a famous Abbey, founded by St. *David*, 12*mo Kal. Januarii*, *anno* 1150. This Monaſtery derives its Name from the Situation, being placed at the Head of a little Loch or Inlet of the Sea, at the Mouth of the River of *Findorn*: For *Kean*, in the old Language, ſignifies *the Head*; and *Loch*, *a Lake*. Nevertheleſs *Dempſter*, following the old and popular Tradition, calls it *Killoſs*, and gives us the following Account of it, and Reaſon of its Foundation: *Killoſs*, *in Moravia*, *nomen habet à floribus*, *qui*, *præter anni naturam*, *derepente vicino in campo pullularunt*, *dum Duffi Regis corpus relevaretur*. *Cœnobium*, *poſt duo fere ſecula quàm Duffus occubuit*, *fundatum in memoriam miraculi quod ibidem contigiſſe memoratur*. *Boethius*, ſpeaking of this Place, informs us, that there was a Bridge upon the Water, under which King *Duffus* was concealed; and that the Village at the End of the Bridge was called *Killfloſs*, i. e. *Templum florum*: And purſuing the Story, he adds,

adds, *Nunc ibi cœnobium eſt, cum ampliſſimo templo, Divæ Virgini ſacro, atque auguſtiſſimo, ædibuſque magnificæ ſtructuræ, piorum cœtu Ciſtertienſis inſtituti inſigne, nulli in Albione religionis obſervatione ſecundum.*

The firſt Abbot of this Place was *Aſcelinus*, who, together with the Monks, was brought from *Melroſs*. He died in the Year 1174, and was ſucceeded by *Reinerius*, who is mentioned as a Witneſs in a Charter granted by King *William* to *Richard* Biſhop of *Murray*, of his Biſhoprick, and of the Church of *Elgin*, &c. This *Reinerius* was publickly invoked and called upon by the Pilgrims, and thoſe that frequented the publick Roads. The Reaſon why they repoſed ſo much Truſt in him is related by *Dempſter*, in the following Words: *Eò quòd duos viatores, ad loca ſanctiora Scotiæ peregrinantes, occiſos, ſeu mutuo conflictu, ſive viarum obſeſſoribus, ad vitam revocaverit*; *quare* (adds he) *peregrini per Scotiam eum invocabant*. *Robert Red*, Abbot of this Place, was Official of *Murray* in the Year 1530, Commendator of *Beaulieu* in the 1535, Biſhop of *Orkney* in the 1557, and Preſident of the Seſſion. He was employed in divers Negotiations at the Courts of *Rome*, *France* and *England*; and died at *Diep* in *Normandy*, the 15th *September* 1558, in his Return from *France*, where he had been aſſiſting at the Marriage of Queen *Mary* with the Dauphin. He is much commended by Archbiſhop *Spotiſwood* for his Integrity and Care in the Adminiſtration of Juſtice.

Mr. *Edward Bruce*, Commiſſary of *Edinburgh*, after-

afterwards a Lord of the Seſſion, was Commendator of this Place at the Reformation, and in the Parliament made a long and learned Diſcourſe, ſhewing the Right that Prelates had to ſit and vote for the Church in the Houſe. He was created by King *James* VI. *Baron Bruce of Kinloſs*, by Letters-patent bearing date 8th *July* 1604, which Dignity of a temporal Lordſhip was enjoyed by his Son *Thomas Bruce*, who by King *Charles* I. was created *Earl of Elgin* the 19th *June* 1633.

VI. *COUPAR*, in *Angus*, was an Abbey, founded by King *Malcom* IV. and endowed with conſiderable Revenues. *Matthew Paris* will have it to have been founded the Year after the Council of *Tours*, and conſequently in the Year 1165; for that Council was held 12*mo Kal. Junii*, *anno* 1164: Yet *Angelus Manriquez*, the Hiſtorian of the *Ciſtertian* Order, and the Author of the Book of *Coupar*, who was certainly better informed of what paſt amongſt us than a Stranger, in the Life of King *Malcom*, ſays, *Anno* 1164, *de conſilio Sancti Waltheni Abbatis de Melroſs, Rex Malcolmus fundavit monaſterium de Cupro in Angus. Boethius*, deſcribing this Abbey, (*lib.* 13. *fol.* 279.) ſays, *Ea eſt abbacia Divæ Virgini ſacra, ampliſſimis dotata redditibus. Inhabitant eam viri religioſi ordinis Ciſtertii, multâ pietate celebres, nec in hunc uſque diem ullo notati manifeſto flagitio.*

The *Hays* of *Errol*, next to our Kings, were the principal Benefactors to this Monaſtery. For *William de Haya* grants thereto the Lands of *Lid-*

*derpole*

*derpole* or *Ederpole.* His Gift is confirmed by King *William* the *Lyon*, *apud Strevelin.* *David de Haya*, his Son, grants alſo, *pro anima Wilhelmi patris ſui, & Elenæ ſponſæ ſuæ, cum conſenſu Guilberti heredis ſui, unum rete ſuper aquam de Thei*, with three Acres of arable Ground. *Guilbert de Haya, miles, Dominus de Errol*, grants to the Monks of this Place, *liberum tranſitum, ſine impedimento, cum bobus ſuis, ſuper terras ſuas, per omnes vias & ſemitas.* *Nicolaus de Haya* confirms to them *illam bovatam terræ in Carſo, quam habent ex dono Rogeri filii Baudrici, unà cum illo annuo redditu quem dicti Monachi ſibi reddere ſolebant.* And *Gilbertus de Haya, Dominus de Errol*, Conſtable of *Scotland*, grants to this Monaſtery, *in quo progenitores ſui ſepulti erant, & ipſe etiam elegerat ſepeliri, jus patronatûs Eccleſiæ de Errol, & capellæ de Inchmartin, cum earum juribus & pertinentiis.* This Gift is confirmed by Pope *Clement*, *apud villam novam Avenionenſis dioceſis, 4to Kal. Aprilis, pontificatûs ſui anno nono.* The original Bull is ſtill extant amongſt our publick Records in the Laigh Parliament-houſe. After the Reformation, King *James* VI. created a ſecond Son of Secretary *Elphinſton Lord Coupar*, the 20th *December* 1607; but he dying without Iſſue in the Year 1669, the Honour devolved to my Lord *Balmerino.*

VII. *GLENLUCE*, or *Vallis lucis*, in *Galloway*, gives Name to a conſiderable Bay in that Country, and was an Abbey, founded in the Year 1190, by *Rolland* Lord of *Galloway* and Conſtable of *Scotland.* The Monks of this Monaſtery were

were brought from *Melroſs*. *Walter*, Abbot of this Place, was ſent to *Scotland* by *John* Duke of *Albany*. *Laurence Gordon*, Son to *Alexander* Biſhop of *Galloway* and Archbiſhop of *Athens*, was likewiſe an Abbot of this Place. King *James* VI. erected in his favours *Glenluce* into a Temporalty in the Year 1602, which was confirmed by Act of Parliament 1606. After his Death, *John Gordon*, Dean of *Salisbury*, Son to the ſaid Biſhop, fell to be Lord *Glenluce*, and diſponed the Lordſhip to Sir *Robert Gordon* his Son-in-law. Afterwards *Glenluce* was united to the Biſhoprick of *Galloway* by Act of Parliament; and at length Sir *James Dalrymple*, Preſident of the Seſſion, a Gentleman of an ancient Family in *Carrick*, was created *Lord Glenluce*. His Son Sir *John Dalrymple*, King's Advocate, Juſtice-Clerk and Secretary of State, was likewiſe Lord *Glenluce* and Earl of *Stair*.

VIII. *SAUNDLE*, *SANADALE* or *SADAEL*, in *Cantyre*, formerly a Shire by itſelf, but now united to the Shire of *Argyle*, was an Abbey, founded by *Reginaldus* Son of *Somerled* Lord of the *Iſles*, who was defeated and ſlain at *Renfrew* in the 1164, in his Rebellion againſt King *Malcom* IV. although all our Hiſtorians ſay it was founded by one *Sorle Maclardy*, which ſeems to be a Corruption for *Soirle Mackilvrid* or *Somerled*, the Son of *Gilbrid*, who was Father to the above *Reginald*, Anceſtor to the *Macdonalds*. The Founder mortified thereunto the Lands of *Glenſaddil* and *Baltebean*, together with the Lands of *Caskeu* in the Iſle of *Arran*. Sir

*Duncan*

*Duncan Campbell* of *Lochow*, who was created *Lord Campbell* in the Year 1445, mortifies alſo to this Abbacy the Lands of *Blairantibert* in the Shire of *Argyle*, *pro ſalute animæ ſuæ*, &c. *Dempſter* mentions one *Thomas* Abbot of *Saundle*, who flouriſhed about the Year 1257. He commends him for the Auſterity of his Life and Chaſtity, and calls him, *Vir magnâ vitæ auſteritate, & continentiâ celebris.* He informs us likewiſe, that ne wrote ſeveral Books, which were kept in the Library of St. *Andrew*'s; but at preſent there are none to be found in that Place penn'd by his Hand. King *James* IV. annexed this Abbacy to the Biſhoprick of *Argyle* in the Year 1507.

IX. *CULROSS*, or *KYLLENROSS*, ſituate upon the Frith of *Forth*, in the Shire of *Perth* and Dioceſs of *Dumblane*, was an Abbey, founded in the Year 1217, by *Malcom* Earl of *Fife*. The Church of this Place was dedicated, not only to the Virgin *Mary*, but alſo to St. *Serf* the Confeſſor, [*Sanctus Servanus*,] whoſe Feſtival was kept yearly upon the firſt Day of *July*. The Chronicle of *Melroſs* gives us an Account of the Foundation of this Monaſtery in the following Words: *Fundata eſt abbacia de Kulinroſs à Domino Malcolmo Comite de Fife, ad quam abbaciam miſſus eſt conventus, 7mo Kal. Martii, de Kinloſs, cum Domino Hugone primo Abbate.* *John Hog* was Abbot of this Place the 14th *April* 1484, at which Time *Culroſs* was erected into a Burgh of Barony. The laſt Abbot of this Place was *Alexander*, Son to Sir *James Colvil* of *Ochiltry*. Sir *James Colvil*, Brother to the ſaid *Alexander*,

was

was raiſed to the Dignity of *Lord Colvil of Culroſs* in the Year 1604, at which Time the King made him a Grant of this diſſolved Abbey.

X. *DEER*, in *Buchan*, ſituate upon the Water of *Ugie*, half a Mile diſtant from *Old-Deer*, was an Abbey, founded by *William Cuming* Earl of *Buchan*, who gave thereunto a great many Lands in thoſe Parts, and beſtowed it upon this Order of Monks in the Year 1218, who were brought to this Place from *Kinloſs*. The firſt Abbot of this Monaſtery was one *Alexander* Prior of *Kinloſs*, who died *8vo Id. Septembris*, *anno* 1233, while he was going to *Citeaux* in *France*, to aſſiſt at the general Chapter, and was buried in a Monaſtery of the ſame Order, called *Vallis Sanctæ Mariæ*. He was ſucceeded in the 1234 by *Herbertus* Abbot of *Coupar*. The laſt Abbot of this Monaſtery was *Robert Keith*, Brother to the Earl *Mariſchal*; of whom *Dempſter* gives the following Account: *Robertus Keithus, Comitis Martialis frater, eruditione & vitæ continentiâ clarus, Abbas Deerenſis, multa egiſſe dicitur, quo collapſos Eccleſiaſtici ordinis mores reſtitueret, nonnulla ſcripſit, obiit Lutetiæ 12mo die Junii, anno 1551, ſepultus in æde ſacra Carmelitarum, ante aram Sancti Niniani.* There is another Elogium of this Abbot, which ſays that he was buried at *Paris*, *in fano Carmelitarum, juxta forum Sancti Mauberti*, with this Epitaph, *Cy giſt venerable Prelat Robert Keith Eſcoſſois, frere du Conte Mareſchal, Abbé du monaſtere de Dier, qui trepaſſa 12me Juin 1551.* The ſaid *Dempſter* ſpeaks of one *Samuel* Prior of *Deer*,

*Deer*, during the Time that the foreſaid Abbot was alive; of whom he gives the following Account: *Samuel Deiranus Prior, vir ad miraculum omnibus bonis artibus eruditus, præcipuè mathematicis, in quibus tantum excelluit, ut vulgò Magus haberetur, varia reliquit ingenii monumenta, obiit anno* 1567, *ſepultuſque eſt in ſacello Divi Matthæi Roſſelini, non longè ab Edinburgo.* Afterwards another *Robert Keith*, Son to *William* Earl *Mariſchal*, was by the Favour of King *James* VI. created a temporal Lord hereof, by the Stile and Title of *Lord Altrie*. He left only one Daughter; ſo the Peerage failed in him, and his Eſtate and Honours fell to *George* Earl *Mariſchal*.

XI. *BALMERINACH*, in *Fife*, called by *Leſly*, *Balmuræum*, and by *Fordon*, *Habitaculum ad mare*, was an Abbey, of a beautiful Structure, begun by King *Alexander* II. and his Mother *Emergarda*, Daughter to the Earl of *Beaumont*, in the Year 1229. This Lady bought the Lands of *Balmerinach*, and paid therefore 1000 Merks *Sterling*, to *Richard de Ruele*, Son of *Henry*, who reſigned *Balmerinach*, *Cultrach* and *Balandean*, *in curia Regis Alexandri, apud Forfar, die poſt feſtum Sancti Dionyſii, anno* 1215; upon which Ground *Emergarda* founded this Monaſtery; which was of old a ſtately Building, pleaſantly ſituate, near the Shore, hard by the ſalt Water of *Tay*; and is now for the moſt part in Ruins. The Monks of this Place, which was dedicated to St. *Edward* as well as the Virgin *Mary*, were brought from *Melroſs*. *David de Lindſay*

*Lindſay* gives them an Annuity out of his Mill of *Kirkhuet*, which was confirmed by King *Alexander* II. in the 1233.

*Symon, filius & heres Symonis de Kinnir*, grants them, *in eleemoſynam, medietatem totius terræ ſuæ in feudo de Kinnir*, which is now called *Little Kinnir*. His Charter was confirmed by the ſaid King *Alexander*, *21mo Septembris, anno regni ſui 22do*. The Preceptory of *Gadvan*, near *Dinbug* in *Fife*, with the Houſe and Lands, belonged alſo to this Abbey; and two or three Monks of their Order conſtantly reſided in that Place.

*Laurentius de Abernethie*, Son of *Orm*, gave *Corbie*, called alſo *Birkhill*, from a Park of Birks ſurrounding the Houſe, to this Monaſtery; and in his Charter is expreſſed the Reaſon of his Donation, *viz.* Becauſe Queen *Emergarda* dying *3tio Id. Februarii*, *anno* 1233, and being buried in the Church of *Balmerinach*, *ante magnum altare*, had by her Teſtament left him 200 Merks *Sterling*.

After the Reformation, King *James* VI. erected *Balmerinach* into a temporal Lordſhip, in favours of Sir *James Elphinſton* of *Barnton*, Principal Secretary of State, the 20th *April* 1604. He had likewiſe been a Lord of the Seſſion, and Preſident after the Lord *Fivie*.

XII. *SWEET-HEART*, [*Abbacia dulcis cordis*,] in *Galloway*, called by *Leſly*, *Suavi-cordium*, was an Abbey, founded in the Beginning of the thirteenth Century, by *Dervorgilla*, Daughter to *Alan* Lord of *Galloway*, Niece to *David*

Earl of *Huntington*, and Spouſe to *John Baliol* Lord of *Caſtlebernard*, who died in the Year 1269, and was here buried. *Andrew Winton*, Prior of *Lochleven*, informs us, that after his Death, his Lady cauſed take out his Heart, and ſpice and embalm it; and putting it in a Box of Ivory, bound with Silver, and enamelled, cloſed it ſolemnly in the Walls of the Church, near to the High Altar; from whence it had the Name of *Sweet-heart*, which was afterwards changed into that of *New Abbay*.

The firſt Abbot of this Place was *Henry*, who died in his Journey to *Citeaux* in the Year 1219. He was ſucceeded by *Ericus magiſter Converſorum ejuſdem domûs*. Afterwards, *John* Abbot of this Place ſwears Fealty to *Edward Langſhanks* in the 1296, according to *Prynne*, *p.* 652. and he is there deſigned *Johan Abbé de Doux-quer*. There is a Charter by another *John* Abbot of this Place, dated at *New-Abbay*, the 23d *October* 1558, and granting *Cuthberto Broun de Cairn*, *in emphyteoſim*, *totas & integras quatuor mercatas terrarum de Corbully*, *in baronia ſua de Lokendolo*, *infra ſeneſcallatum de Kirkcudbright*; *reddendo annuatim ſummam octo mercarum uſualis monetæ regni Scotiæ*, *ad duos anni terminos*, *viz. Pentecoſtes*, *& Sancti Martini in hyeme*.

*Gilbert Brown*, deſcended of the Family of *Garſluith*, is among the Monks that aſſent thereto. He was the laſt Abbot of this Abbey. *Calderwood*, in his Hiſtory, informs us, that he ſat in Parliament the 17th *Auguſt* 1560, whilſt the *Confeſſion of Faith* was approved; and in the 1605 he

he was apprehended by the Lord *Cranſton*, Captain of the Guards appointed for the Borders, and was ſent to *Blackneſs*, and after ſome Days was tranſported to the Caſtle of *Edinburgh*, where he was kept until his Departure out of the Kingdom. He died at *Paris*, 14th *May* 1612. Sir *Robert Spotiſwood*, Preſident of the Seſſion, and Secretary of State to King *Charles* I. was deſigned *Lord New-Abbey*, being then in poſſeſſion of this diſſolved Abbey.

XIII. *MACHLINE*, in *Kyle*, a Diſtrict of the Shire of *Air*, ſaid to be founded by King *David* I. The Charter of Foundation is related in that Chartulary of *Melroſs* which was not long ſince in the Hands of the Earl of *Haddington*: Although by another Chartulary of *Melroſs*, yet extant in the Advocates Library, it would rather appear, that it was the *Stuarts* who founded *Machline*, and beſtowed it upon *Melroſs*; for we have in that Chartulary (*fol. verſ.* 27.) a Confirmation by King *Alexander* II. of the Grant of *Machline*, made by *Walter* Son of *Alan* Lord High Steward of *Scotland*, to the Abbacy of *Melroſs*; and another of King *Alexander* III. confirming the Gift of *Alexander* Lord High Steward of *Scotland*, of *Machline*, to the ſaid Abbacy. In all which Charters it ſeems to be acknowledged, that *Machline* was given by the *Stuarts* to *Melroſs*, and not by King *David*; elſe he would be named as Founder of this Abbacy.

## CHAP. X.

### *Of the Monks of* Vallis-caulium *and their Monaſteries.*

THe Monks of this Order of *Vallis-caulium*, *Vallis-olerum*, or *Val-des-choux*, are ſo named from the firſt Priory of that Congregation, which was founded by *Virard*, in the Dioceſs of *Langres*, betwixt *Dijon* and *Autun* in *Burgundy*, in the Year 1193. They are a Reform of the *Ciſtertians*, and follow the Rule of St. *Bennet*. By their Conſtitutions they were obliged to live an auſtere and ſolitary Life, none but the Prior and Procurator being allowed to go out of the Cloiſters for any Reaſon whatſoever. They were brought to *Scotland* by *William Malvoiſin* [*De malo vicino*] Biſhop of St. *Andrew*'s, in the Year 1230, and had three Monaſteries amongſt us, ſituate at the following Places, *viz.*

I. *PLUSCARDIN*, in *Murray*, ſituate about ſix Miles above *Elgin*, on the North-ſide of the River *Lochty*, which falls into the *Loſſie* at *Pittendrich*, was a rich Priory, founded in Honour of St. *Andrew*, by King *Alexander* II. in the Year 1230, and named *Vallis Sancti Andreæ*. *Dempſter* fancies that it belonged formerly to the Knights of St. *John* of *Jeruſalem*, tho' without the leaſt Foundation for that Aſſertion. Others, who confound the Religious of *Vallis-caulium* with the *Camaldules*, will have it to have been a Priory of that Congregation; where-

as

as the *Camaldules*, eſtabliſhed by *John Gualbert* a *Florentine*, in a Place called *Vallis Umbroſa*, near the *Appennine* Hills in *Italy*, in the Year 1040, were properly Hermits, and of a different Order from thoſe of *Vallis-caulium*, who were not eſtabliſhed till the Year 1193, as is related above.

King *Robert* the *Bruce* grants to this Place a Fiſhing on the River *Spey*; and *Simon* Prior of *Pluſcardin* is Witneſs to a Charter of *Andrew* Biſhop of *Murray*, dated the 30th *December* 1239. *Hector Foreman*, a Monk of this Place, is likewiſe Witneſs to a Donation of *Gavin Dunbar*, made to his Cathedral of *Aberdeen*, of 50 Merks out of the *Quarrelwood* in the Shire of *Elgin*, the 28th *September* 1529. It is commonly reported, that the famous Book of *Pluſcardin*, ſeen and peruſed by *George Buchanan*, was penn'd here. But there are ſome who with greater Probability take it to have been only a Copy of *Fordon* belonging to this Monaſtery. The Conſtitutions of the Order at the Beginning were here ſtrictly obſerved; but the Monks afterwards becoming vitious, the Monaſtery was reformed, and became a Cell ſubject to *Dumfermling*. At the Diſſolution of the Monaſteries, this rich Priory was beſtowed by King *James* VI. upon Sir *Alexander Seton*, who was afterwards created *Earl of Dumfermling*.

II. *BEAULIEU*, now *BEWLY*, in *Roſs*, [*Prioratus de bello loco*,] was founded in the 1230, by *James Biſſet*, a Gentleman of a conſiderable Eſtate in that Shire. The Terms of its Foun-

dation were, *ut pro ipſo, dum viveret, orarent Monachi; poſt mortem, funus corpuſque exciperent, atque animam de corpore abeuntem, per continua ſacrificia & opera pietatis proſequerentur.* His Charter is confirmed by Pope *Gregory*, 3*tio Non. Julii, pontificatûs ſui anno* 4*to.*

*Andrew* Biſhop of *Murray* ratifies to *Beaulieu* their Tithes and Fiſhing upon *Spey*, as alſo the Teind-ſheaves of the Pariſh of *Abertarf*, granted formerly to them by *William Biſſet* Knight. His Charter is ſubſcribed by fifteen Canons of the Church of *Murray*. The Church of *Conwath* belonged alſo to this Place. *Robert Reid*, Biſhop of *Orkney*, was Commendator hereof in the 1535. After the Reformation, *Walter* Abbot of *Kinloſs*, and Prior of *Beaulieu*, gives a Tack of ſome Lands belonging to the Monaſtery to *John* and *Alexander Clerks*, dated the 19th *November* 1568. At the Diſſolution of the Monaſteries, *Hugh* Lord *Fraſer* of *Lovat* acquired this Priory from the laſt Prior thereof, and tranſmitted it to his Poſterity, with whom it ſtill remains.

III. *ARDCHATTAN*, ſituate on the North-ſide of *Loch-Etyf* in *Lorn*, a Subdiviſion of the Shire of *Argyle*, was a Priory, founded in the Year 1230, by *Duncan Mackoul*, Anceſtor (as is commonly ſaid) to the *Macdougals* of *Lorn*. *Peter*, Prior of this Place, is one of the Subſcribers to *Ragman's Roll* in the Year 1296. There is a Commiſſion, dated the 7th *May* 1506, and addreſſed to the Prior of *Beaulieu*, from *James* Prior or General of this Order, impowering him to viſit *Ardchattan*, and to make ſuch Regulations

ons there as he ſhall find requiſite for obſerving the Rule and Conſtitutions of the Order. The Proprietor of this Place is to this Day by the Country People called *Prior of Ardchattan*; and there are ſome Remains of this old Monaſtery yet extant. It was annexed to the Biſhoprick of *Argyle* by King *James* VI. in the Year 1617.

## CHAP. XI.

### *Of the* Carthuſians.

THeſe Monks were eſtabliſhed by *Bruno*, a Doctor of *Paris*, and a Canon of *Rheims*, in the Year 1086, in the wild Mountains of *Grenoble* in *France*, under the Protection of the Virgin *Mary* and St. *John* the Baptiſt. The Reaſon of his Retreat is reputed to have proceeded from the following Accident, which fell out during the Funeral Service performed for *Raymond Dion*, a Profeſſor of the Univerſity of *Paris*, who had been in very great Eſteem, not only for his Doctrine, but alſo for the apparent Integrity of a good Life: But (as the Story goes) the dead Corpſe all on a ſudden ſat upright in the Bier, and cried with a lamentable Voice, *Juſto Dei judicio condemnatus ſum.* Theſe Words it uttered three ſeveral Days. *Bruno* being preſent at this Sight, and taking occaſion, from the Strangeneſs of the Thing, to make a ſerious Diſcourſe to the Aſſembly, he concluded, that it was impoſſible for them to be ſaved, unleſs they renounced the World, and retired into Deſarts. Here-

upon he, with ſix of his Scholars, retired to the *Carthuſian* Mountains in *Dauphiny*, where he was aſſiſted with all things by the Biſhop of that Place, named *Hugo*, who afterwards became one of his Diſciples. They built in that Deſart little Cells, at ſome Diſtance each from another, where they lived in Silence. They propoſed to follow the Rule of St. *Bennet*, adding thereto ſeveral other great Auſterities. They came into *England* in the Year 1180, and from thence into *Scotland* in the Year 1429. They had only one Eſtabliſhment amongſt us, ſituate near *Perth*, called *Monaſterium vallis virtutis*, which King *James* I. founded after his Captivity in *England*, according to the following Monkiſh Verſes.

*Annus millenus vicenus ſicque novenus*
*Quadringentenus Scotis fert munera plenus:*
*Semina florum, germina morum, myſtica mella,*
*Cùm tibi Scotia ſit Carthuſia ſponſa novella.*

*Oſwald de Corda*, Vicar of the great Charterhouſe near *Grenoble*, was the firſt Superior of this Place. He died *Kal. Octobris*, *anno* 1434, and was ſucceeded by *Adam de Hangleſide*, a *Scotſman*. The Building was of a very fine Structure; and the Monks had large Revenues belonging to them. *Adam Foreman*, laſt Prior of the Charterhouſe near *Perth*, when his Houſe was demoliſhed by the Reformers, retired, together with his Brethren, to *Errol*, of which Church they were Patrons; and there he feued out, with Conſent of thoſe that ſtaid at home, to *John Foreman*, Son

Son and Heir to *Robert Foreman* of *Luthre*, for a Sum of Money, *terras ſuas de ſacello beatæ Mariæ Magdalenæ*, [the *Magdalene*'s Lands,] *nuncupatas terras de Frierton, terras de Craigy, & inſulam auſtralem burgi de Perth, unà cum piſcaria ſua ſalmonum ſuper aqua de Taye, infra vicecomitatum de Perth.* King *James* VI. afterwards confirmed to *James Moncrief*, *ſecundum tenorem cartæ feudifirmæ*, given by the Prior and Convent of the Charter-houſe of *Perth* to *John Moncrief*, the 14th *November* 1569, *locum, domum, totas & integras terras, cum pomeriis, hortis, uno vel pluribus de Charter-houſe, fundum ac ſtagnum, & aggeres ejuſdem, cum decimis ſuis incluſis, infra bondas ex antiqua conſuetudine limitatas; & duo tenementa in burgo, cum hortis, & reliqua extra burgum: ſalvis & reſervatis ſibi & ſucceſſoribus ſuis, juribus, ſervitiis & precibus, ſibi & ſucceſſoribus ſuis debitis & conſuetis.* This Charter is dated at *Leith*, the 18th of *May* 1572, and the fifth Year of his Reign. He created *George Hay* of *Neyirlyff* Commendator of the Priory of the Charter-houſe near *Perth, toto Conventu ejuſdem longo tempore præterito defuncto*; granting him *prioratum prædictum, & beneficium ejuſdem, unà cum omnibus & ſingulis Eccleſiis, decimis garbalibus, aliiſque decimis —— ad hujuſmodi prioratum ſpectantibus, ſeu juſtè ſpectare valentibus; ac cum principali maneriæ loco, domibus, ædificiis, hortis & pomeriis, infra præcinctum & clauſuram monaſterii de Charter-houſe; nec non cum voto & loco in omnibus Parliamentis, conciliis & conventionibus, ac omnibus dignitatibus,*

*tatibus, præeminentiis, honoribus, immunitatibus & privilegiis quibuſcunque, ad dictum prioratum, beneficium & dignitatem ejuſdem, ſpectantibus, per præfatum Georgium, Priorem prædictum, gaudendis, utendis & poſſidendis, in omnibus punctis, ut congruit, omni tempore à futuro.* This Patent is given at *Holy-rood-houſe*; and to ſupport his Dignity, the King grants him, by another Charter dated from the ſame Place, the 1ſt of *February* 1598, and of his Reign the thirty ſecond Year, *omnes & ſingulas terras Eccleſiaſticas de Errol, cum manſione, domibus, hortis earundem, & omnibus ſuis pertinentiis, unà cum decimis garbalibus, aliiſque decimis earundem incluſis, quæ à ſolo nunquam ſeparari ſolebant, infra parochiam de Errol,* &c. Nevertheleſs the ſaid *George Hay* finding the Rents too ſmall to ſupport the Dignity of a *Lord*, returned back to the King his Peerage, and reſigned his Title of *Lord* in his Majeſty's Hands, reſerving to himſelf and his Heirs the Patronage of the Church of *Errol*; which Reſignation with the Reſervation were accepted of by his Majeſty, and ſo the Name of *Lord and Prior of the Charter-houſe of Perth* became extinct.

Theſe Monks wore a white Gown, with a Scapular and Capuchon of the ſame Colour. They ate conſtantly in private, except upon the Feſtival Days, when they were allowed to eat together in the ſame Refectory. They wore next their Skin a *Cilicium*, or Cloth of Hair. They obſerved a conſtant Silence, and never went out of the Cloiſter, the Prior and Procurator being only

only excepted. The Laick Brothers, who wore a ſhorter Robe and Beards for Diſtinction, were ſeparate from the Prior and his Brethren in the Church, and ſat in the outer Part thereof, called *Navis Eccleſiæ:* As alſo, no Women were allowed to enter their Houſes and Churches. There were ſeveral Alterations made in their Conſtitutions, but none in the preceeding Points which I have noticed, and were exactly obſerved at *Perth*, as they are at this Day abroad.

## CHAP. XII.

### *Of the* Gilbertines.

I Shall join here, to what Account I have given of the Canons and Monks, the Religious of *Simpringham* or *Gilbertines.* This Order was eſtabliſhed by one *Gilbert*, who was born in the Reign of *William* the Conqueror. His Father was a Gentleman of *Normandy*, Lord of *Simpringham* and *Tyrington* in *Lincolnſhire*, and his Mother an *Engliſh* Lady. After he had ended his Studies in *France*, he returned home, and was ordained Prieſt by the Biſhop of *Lincoln.* Having received Holy Orders, he ſpent all his Subſtance and Patrimony on the Poor, and in Actions of Piety; and took a particular Care of diſtreſſed Girls, who were aſhamed to make known to the World their Poverty and Condition. Of this Number he ſhut up ſeven in a Monaſtery, which he had built at *Simpringham* in the Year 1146. He gave them Servants, who prepared their

their Victuals without Doors, and delivered them what was prepared through a Window. Their Life and Converſation was ſo exemplary, that many Ladies embraced their Way of living. This occaſioned *Gilbert* to build new Cloiſters; and the *Ciſtertians*, whom he was deſirous to have for their Directors, refuſing that Office, he called ſome Canon-Regulars, who undertook it: So that by this means their Monaſteries became double, that is to ſay, compoſed both of Men and Women, who dwelt under the ſame Roof, but in different Apartments. He preſcribed to the Canons the Rule of St. *Auguſtine*, and to the Nuns that of St. *Bennet*, with ſome private Conſtitutions, which were approved by the Popes *Eugenius* III. *Adrian* IV. and *Alexander* III. According to theſe Rules, a Nun was not allowed to ſpeak at the Grate, unleſs four Witneſſes were preſent. At the Reformation, this Inſtitute had twenty one Houſes in *England*, of which *Simpringham* was the Head, where their general Chapters were held yearly; the Superior of every Houſe aſſiſting at the Aſſembly, with a profeſſed Siſter of the Quire and a Converſe, who had a Vote at their Meeting; the Superior of the Canons being likewiſe preſent, but his Laick Brother had no Vote.

We had only one Monaſtery of this Order in *Scotland*, *viz.* at *DALMULLIN*, ſituate upon the River of *Air*, in the Shire of the ſame Name, and founded by *Walter* III. Lord High Steward of *Scotland*; the Nuns and Canons whereof were brought from *Syxle* in *Yorkſhire*; to whom the ſaid

ſaid *Walter* gave three Merks of Annualrent, *redditum trium mercarum argenti, & totam terram de Merns*, as appears by the Chartulary of *Paiſley*. His Charter is confirmed by King *Alexander* II. *apud Air, 28vo die Maii, ann oregni ſui 16to*, i. e. *anno* 1230. The ſaid *Walterus filius Alani, Domini Regis Scotiæ Seneſcallus*, grants likewiſe, *Beatæ Mariæ, & conventui Canonicorum & Monialium de Dalmullin ſuper Air, qui ſunt de ordine de Simpringham, Eccleſiam de Dundonald, cum capella de Crosby & Riccarton, & Eccleſiam de Sanchar.* He grants alſo to the ſaid Church *terram & paſturam de Drumley & Swinſhall, & Eccleſiam de Auchinleck*, as appears by ſeveral Charters ſtill extant in the Chartulary of *Paiſley*. All theſe Donations are confirmed by his Son *Alexander* Lord High Steward of *Scotland*, and by *William* Biſhop of *Glaſgow, apud Glaſgow, die Sabbati proximo poſt nativitatem Beatæ Mariæ Virginis, anno gratiæ* 1239; and alſo by Pope *Innocent*, at *Aſſiſe, 4to Id. Maii, pontificatûs ſui anno* 10*mo*. Thereafter the Monks and Nuns not agreeing with the Air of our Country, they returned back into *England*. Whereupon all their Rents were diſponed by the ſaid *Walter* to the Monaſtery of *Paiſley*; who gives *redditus in terris, molendinis, paſturis, piſcariis, & aliis bonis quæ Canonibus & Monialibus de Simpringham priùs contulimus, & quæ ipſi poſtmodum reſignaverint ſuâ voluntate ſpontaneâ.*

The Canons wore a white Gown, made of Lamb-skins, with a Coul ſewed to their Habit, and lined alſo with Lamb-skins.

The

The Nuns wore likewiſe a white Gown, and their Vails were alſo lined with a Lamb-skin. They obſerved a conſtant Silence in the Cloiſter, and were not admitted to their Novitiate till they were fifteen Years of Age, and could not be profeſſed, unleſs they had perfectly by heart the Pſalms, Hymns and *Antiphona* that were ſung during Divine Service. By the ſame Conſtitutions, the Canons were not allowed to enter the Apartments of the Nuns, unleſs to confeſs, or adminiſtrate to them the Sacraments while they were ſick. The Buildings, or rather the Ruins, of this Monaſtery ſubſiſted (as I am informed) not long ago.

## CHAP. XIII.

### *Of the* Templars.

THere were likewiſe among us two Orders of religious Knights, one of which was the *Templars*, or Red Friars, eſtabliſhed at *Jeruſalem* in the Year 1118, by *Hugo de Paganis* and *Gaufridus de Sancto Aldemaro*. *Baldwin* II. King of *Jeruſalem*, gave them a Dwelling near the Temple of that City, from whence they were called *Templars*. They followed the Rule of St. *Auguſtine*, and the Conſtitutions of the Canon-Regulars of *Jeruſalem*; their Office and Vow being to defend the Temple and City of *Jeruſalem*, to entertain Chriſtian Strangers and Pilgrims charitably, and guard them ſafely through the Holy Land. There was one general Prior that had the

the Government of this Order in *Scotland* and in *England.* They came into *Scotland* in the Reign of King *David* I. for the Book of *Coupar* ſays, *Sanctus David de præclara militia templi Hieroſolomitani, optimos fratres ſecum retinens, eos diebus & noctibus morum ſuorum fecit eſſe cuſtodes.* This Order was very rich, and had above 9000 Houſes in Chriſtendom; and amongſt us there was ſcarce a Pariſh wherein they had not ſome Lands, Farms or Houſes. In *Edinburgh* there were a great mnay Buildings belonging to them, as alſo in *Leith.* When any of theſe Buildings were feued out to Seculars, they had a great Care to order the Poſſeſſors to keep conſtantly the Croſs of the Order on the Top of his Houſe, as a Token that they were ſubject to them, and that he was only liable to anſwer to their Courts.

Their principal Reſidences were at

The *TEMPLE*, near the River of *Southesk* in *Mid-Lothian*, founded by King *David* I.

*BALANTRADOCH*, near the ſame River, now called *Arniſton*, which is frequently made mention of in the Chartulary of *Newbottle* in the Advocates Library.

*ABOYNE*, in the Shire of *Aberdeen*, was likewiſe a conſiderable Eſtate and Houſe belonging to this Order.

*MARYCULTER*, in the Shire of *Kincardine* alſo was a Reſidence of theſe Knights.

*OGGERESTONE*, in the Shire of *Striveling*, founded by St. *David*, was a Fort and Barony belonging to theſe Knights.

*St. GERMAN's*, in *Eaſt-Lothian*, belonged alſo

alſo to this Order, but was, long after its Suppreſſion, with moſt of its Revenues, beſtowed by King *James* IV. upon the King's College of *Aberdeen* in the Year 1494.

*TULLOCH*, in the Shire of *Aberdeen*, was likewiſe a Reſidence of theſe Knights.

*INCHTNAN*, in the Shire of *Renfrew*, alſo belonged to them, with ſeveral other Places in *Eskdale* and towards the Border of *England*.

They wore a white Habit, to which Pope *Eugenius* III. added a red Croſs of Stuff ſewed upon their Cloaks.

This Order being in a General Council, held at *Vienne* in *France* by Pope *Clement* V. ſuppreſſed, for ſuppoſed Crimes, in the Year 1312, their Houſes, Goods and Subſtance were given to the Knights of St. *John* of *Jeruſalem*.

There was ſometime ago a Manuſcript, in *Folio*, containing an Account of all the Lands and Feu-duties belonging to this Order, in the Hands of *Patrick Murray* of *Deuchar*.

## CHAP. XIV.

*Of the Knights of St.* John *of* Jeruſalem, *or* Johannites.

THe *Johannites*, or Knights of *Jeruſalem*, had their firſt Beginning from certain devout Merchants of the City of *Melphi* in the Kingdom of *Naples*, who trading to the Holy Land, obtained of the Calif of *Egypt* a Permiſſion to build a Church and Monaſtery at *Jeruſalem*,

*ruſalem*, for the Reception of the Pilgrims that came to viſit the Holy Land, and paid yearly a Tribute upon that Account. Afterwards they built a Church in honour of the Virgin *Mary*, and another conſecrated to the Memory of *Mary Magdalene*, the one being for Men, and the other for Women, who were received there with great Demonſtrations of Charity. When this City was taken by *Godfrey* of *Buillon*, *Gerard* of *Martiques*, Native of *Provence* in *France*, built there a larger Church, with an Hoſpital for the Sick and for Pilgrims, in the Year 1104, in honour of St. *John*, where he placed theſe Knights, who took their Name from that Hoſpital. And when *Saladin* expelled them out of *Jeruſalem* in the Year 1187, they retired to the Fortreſs of *Margat* in *Phœnicia*. Afterwards they ſettled at *Acre* or *Ptolemais*. Thence they followed *John* of *Luzignan* to *Cyprus*. From whence they retired to *Rhodes*. But *Rhodes* being taken by *Solyman* the Magnificent, Emperor of the *Turks*, in the Year 1522, they retired to *Viterbo* in *Italy*; and in the 1534 were placed by the Emperor *Charles* V. at *Malta*, where they ſtill remain, and are called *Knights of Malta*, which is an Iſland in the *Mediterranean* Sea, not far diſtant from *Sicily*. No Man can be admitted to this Order, without making Proof of his Birth, and juſtifying by Charters or other authentick Documents his Nobility for four Generations, both on the Father and Mother Side. He muſt be born in lawful Marriage, the Baſtards of Kings and Princes being only excepted. They have

conſtant Wars with the *Turks*, and take the three ordinary Vows of Religion, *viz.* Poverty, Chaſtity and Obedience. They wear a black Habit, with a Croſs of Gold, having eight Points, enamell'd white, in memory of the eight Beatitudes. This Order was firſt compoſed of eight Languages or Nations; whereof the Grand Prior of *Provence* is Great Commendator, the Prior of *Auvergne* is Great Marſhal, the Prior of the *Iſle of France* is Great Hoſpitalier, the Great Prior of *Italy* is Admiral, the Prior of *Arragon* is Great Conſervator, the Prior of *Germany* is Great Bailiff, the Prior of *Caſtile* is Great Chancellor, and the Prior of *England* is Great *Turcopolier*, or Colonel of the Cavalry. Upon the Suppreſſion of the *Templars*, (as is ſaid above,) they got many of their Lands. Such were the Churches, Caſtles and Tithes of *Tullach*, *Aboyne*, *Inchynan*, *Maryculter*, with the Hoſpitals of St. *German*'s in *Lothian*, *Balantrodoch* and *Kilbartha*, with the Lands and Pertinents.

Pope *Paſchal* III. confirmed this Order in the Year 1113; and Pope *Pius* II. diſpenſed with the great Rigour of their Rules, which at firſt were very ſevere, mitigating the Conſtitutions formed by *Raymond de Puy*, of an ancient Houſe in *Dauphiny*. The Great Maſter is by his Subjects ſtiled *Prince of Malta and of Goza*, which is a ſmall Iſland in the *Mediterranean* Sea, not far diſtant from *Malta*: Yet in his Patents his Title is, ——— *by the Grace of GOD Humble Great Maſter of the Sacred Hoſpital of St. John of Jeruſalem, and Warden of the Poor*

*of*

*of Jeſus Chriſt.* The Arms of the Order are *Gules*, a Croſs *Argent*, which all the Knights bear in chief with their paternal Coat.

The principal Dwelling of theſe Knights was at *Torphichen*, in the Shire of *Weſt-Lothian* or *Linlithgow*, conſecrated to St. *John*, and founded by King *David* I. King *Malcom* IV. gave, *in liberam & puram eleemoſinam, fratribus hoſpitalis Hieroſolymitani, unum plenarium toftum in quolibet burgo totius terræ ſuæ.* And King *Alexander* II. confirms, *Deo & Sancto Johanni, & fratribus hoſpitalis de Torphichen, omnes donationes terrarum, hominum, tenementorum & eleemoſinarum, quæ iis rationabiliter factæ ſunt, tam in Eccleſiis quàm in aliis poſſeſſionibus mundanis, cum ſock & ſack, cum thol & them*, &c. with other Privileges. The Charter is dated the 30th *June*, in the ſeventeenth Year of his Reign.

There have been ſeveral Preceptors of *Torphichen* amongſt us that were conſiderable Men. The firſt I find mentioned is one *Archibaldus Magiſter de Torphichen*, who is Witneſs to a Charter of *Alexander* Great Steward of *Scotland* in the 1252: And Brother *Alexander de Walles*, Warden of the Hoſpital of *Jeruſalem* in *Scotland*, ſwears Fealty to King *Edward* I. in the Year 1296, with Brother *John* of *Sautry*, Maſter of the Knights of the *Temple* in *Scotland.*

Sir *Henry Livingſton*, deſcended of the Family of *Kilſyth*, was likewiſe Preceptor of *Torphichen*; who dying in the Year 1463, was ſucceeded by Sir *William Knows*, who in the Year 1463 was made Lord High Treaſurer, upon the Re-

moval of Sir *David Guthrie* of that Ilk, and held that Office till the Year 1470; at which Time Mr. *John Laing*, Rector of *Tannadice* and Vicar of *Linlithgow*, was made Treaſurer. But upon the Acceſſion of King *James* IV. to the Throne, he was again conſtituted Treaſurer, and was afterwards made Maſter of the Houſhold in place of the Earl of *Bothwell*. He died at the Battle of *Floudon* 1513, and was ſucceeded by Sir *George Dundas*, who was a Perſon of great Learning, and a School-fellow of *Hector Boethius* at *Paris*, and was choſen Preceptor at the Appointment of the Duke of *Albany*, then Regent.

*Walter Lindſay*, Lord St. *John* of *Jeruſalem*, and Preceptor of *Torphichen*, called by the King *Dilectus conſanguineus noſter*, grants alſo a Charter to *James Dundas* of *Craigton* and *Eliſabeth Hamilton*, of the Lands of *Nether-Newliſton*, dated the 16th *February* 1533, and confirmed the 8th of *June* 1543.

The laſt Preceptor was Sir *James Sandilands*, ſecond Son to Sir *James Sandilands* of *Calder*, who ſucceeded Sir *Walter Lindſay*. He, at the Reformation, reſigned all the Lands of the *Johannites* in *Scotland* in Queen *Mary*'s Hands; who feued them out again to the ſaid Sir *James*, for 10,000 Crowns, and the yearly Annuity of 500 Merks. She alſo erected all the foreſaid Lands into a temporal Lordſhip, in favour of him and his Heirs, by a Charter under the Great Seal, dated 24th *January* 1563. Thereafter Sir *James Sandilands* diſponed all the *Temple* Lands, lying in the Shires of *Edinburgh*, *Linlithgow*, *Stirling*, *Kin-*

*Kincardine* and *Aberdeen*, in favour of *James Tenent* of *Lynhouſe*, and Mr. *Robert Williamſon* Writer in *Edinburgh*, for 10,000 Merks; reſerving to himſelf, out of this Diſpoſition, the Lands of *Torphichen*, *Liſton*, *Dennie*, *Thankerton*, *Balintrodoch* and *Maryculter*; as alſo, his Right to the Churches of *Torphichen*, *Temple*, *Inchmachan*, *Maryculter*, *Aboyne*, *Tulloch* and *Kilbartha*, with the Teinds belonging to them: And ſometime thereafter, *Tenent* and *Williamſon* conveyed their whole Right to *Thomas* Lord *Binny*, Anceſtor to the Earl of *Haddington*.

The *Temple* Lands lying within the Shires of *Eaſt-Lothian* and *Fife* were afterwards made over to Mr. *George Lauder* of *Baſs*; theſe within the Sheriffdom of *Perth* and Stewartry of *Strathern*, to *David* Lord *Scone*; the Lands lying within the Shires of *Drumfries*, *Lanerk* and *Wigton*, and the Stewartries of *Annandale* and *Kirkcudbright*, were transferred to Captain *William Roſs*, and from him by Progreſs to *Roſs* of *Auchloſſin*.

The ſame Croſs as in the *Templars* was likewiſe ordered to be put upon all Houſes that were feued out by theſe Knights: Whereupon we ſee to this Day a great Number of Croſſes upon the Top of ſeveral Buildings in the Cities of *Edinburgh* and *Leith*, which belonged formerly to them, and are as yet ſubject to the Juriſdiction of thoſe who acquired them at the Reformation.

## CHAP. XV.

### *Of the* Dominicans, *or Black Friars, and their Monaſteries.*

AFter having given an Account of the Canons and Knights who profeſſed the Rule of St. *Auguſtine*, I ſhall proceed to the *Mendicants*, of which ſort there were four different Orders, *viz.* 1. the *Dominicans*, or Black Friars; 2. the *Franciſcans*, or Gray Friars; 3. the *Carmelites*, or White Friars; 4. the *Heremites* of St. *Auguſtine*, who began under Pope *Alexander* IV. about the Year 1256; but of this laſt there was none amongſt us.

Theſe Mendicants were diſtinguiſhed from the Monks, in that theſe laſt were confined to their Cloiſters, whereas the others were allowed to preach, and beg their Subſiſtence abroad; and were diſtinguiſhed from one another by the Colour of their Habit.

The firſt of theſe was the *Dominicans*, or Black Friars, called alſo *Fratres prædicatores*, becauſe of their frequent Preaching, who were inſtituted by St. *Dominick*, firſt Contriver of the Inquiſition, deſcended of the Family of the *Guſmans* in *Spain*. He was a Canon-Regular of the Cathedral of *Oſma*, and Archdean of that Church, and became renowned by his Sermons againſt the *Albigenſes*, and founded a Congregation of Preachers, who devoted themſelves entirely to the Converſion of Hereticks. He died in the

1221,

1221, after his Order had been approved of by Pope *Innocent* III. in the 1215, and by *Honorius* III. his Succeſſor in the 1216. This Order was afterwards divided into forty five Provinces, whereof *Scotland* was the eighteenth. They were brought to this Country in the Reign of King *Alexander* II. by *William Malvoiſin* [*De malo vicino*] Biſhop of St. *Andrew's*, a *Frenchman*, and had fifteen Convents amongſt us: And notwithſtanding they profeſſed Poverty, yet when their Neſts were pulled down, they were found too rich for Mendicants. The firſt they had was at

I. *EDINBURGH*, founded by King *Alexander* II. in the Year 1230, where they built their Convent upon the very ſame Spot of Ground where the High-ſchool and Steeple ſtands at preſent, which in their Charters is called *Manſio Regis*, becauſe formerly it was a Dwelling-houſe belonging to that King; who likewiſe grants to the ſaid Friars a Street, called at preſent *Black-Friars Wynd*, *anno regni ſui* 17*mo*, *cum tranſitu ejuſdem qui dicitur Le Venelle*, *ita quòd dicti fratres*, *in prædicta platea ſeu tranſitu qui dicitur Le Venelle*, *poſſint*, *ſecundum quod videbitur iis expediens*, *domos aut ædificia conſtruere ſeu ædificare*. King *Robert* the *Bruce*, in the twentieth Year of his Reign, likewiſe gives them ſix Merks to be paid to them out of his Mill of *Liberton*. They had likewiſe twenty four Merks paid yearly out of the Lands of *Gosford*, as appears by a Charter dated 28th *March* 1474.

*Johannes Layng*, deſigned *Clericus & Regis*

*Theſaurarius, Electus Glaſguenſis*, grants them ſome Rents *de certis terris ſuis in Edinburgh, pro ſuſtentatione lampadis in choro*, dated 19th *January* 1473. All theſe Foundations were confirmed by King *James* III. upon the 14th of *May* 1473. This Convent was much renowned by Cardinal *Bagimont*'s calling before him, in the Church hereof, all beneficed Perſons, to give up the Value of their Benefices upon Oath, of which he made a ſtanding Rental called *Bagimont's Roll*, which became the conſtant Rule of taxing Eccleſiaſticks at the Court of *Rome*, when any Perſon applied for a Benefice from the Pope: For *Leſly* informs us, *lib.* 8. *p.* 341. that there was a provincial Synod held at *Edinburgh* in the Year 1512, *in cœnobio Dominicano, præſente Pontificis Nuncio Bajomano, in qua communi omnium voce, etſi repugnantibus multorum voluntatibus, fuerat fixum ut, omnia ſacerdotia, quorum redditus quadragenas libras excederent, Papæ penſionem decimarum ac diplomatum nomine numerarent. Hic cenſus, in hunc uſque diem, Bajomanus dicitur.* This Convent was burnt down to the Ground by a ſudden Fire, which happened 25th *April* 1528, and was ſcarce rebuilt at the time of the Reformation.

The Friars of this Place are ſuppoſed to have written a Chronicle of our Nation, frequently cited; but by ſuch as have peruſed the Book, it is diſcovered to be nothing elſe but a Copy of *John Fordon*, and the Continuation by *Walter Bowmaker*.

II. *BERWICK*, ſituate at the Mouth of the River *Tweed*. The Convent at this Place was found-

founded in the Year 1230, by King *Alexander* II. This Monaſtery was famous for a Parliament that was called there, in the Year 1292, by *Edward* I. King of *England*, in order to determine the Controverſy that was ſubmitted to him by *Bruce* and *Baliol*, concerning their Right to the Crown of *Scotland*.

III. *AIR*, the chief Town in the Shire of the ſame Name. The Monaſtery at this Place was founded by *William* Biſhop of St. *Andrew*'s, in the Year 1230; or rather by King *Alexander* II. according to the Author of the *Extracta ex variis Chronicis Scotiæ*. King *Robert* the *Bruce* grants them *L.* 20 *Sterling*, *pro ſuſtentatione Eccleſiæ*, *& domorum ſuarum percipiend. de firmis dicti burgi*. King *Robert* II. confirms that Gift made to *Air*, the 2d of *October*, in the ſixth Year of his Reign. St. *Antonine* ſays, that this was the firſt Houſe that the Black Friars had in this Country.

IV. *MONTROSE*, in the Shire of *Forfar*. The Convent at this Place was founded in the Year 1230, by Sir *Alan Durward*. *Patrick* Abbot of this Place is a Subſcriber to *Ragman's Roll* in the Year 1296. The Friars hereof were tranſported to an Hoſpital near to this City, founded by Mr. *Patrick Panter*, and thereafter brought back to their former Dwelling by an Allowance of the Parliament, in the Year 1524.

V. *PERTH*, the chief City of the Shire of that Name. They had a Monaſtery here, founded near the Walls of the City, in the Year 1231, by King *Alexander* II. *William* Biſhop of St. *Andrew*'s

*Andrew*'s confirms a Grant of King *Alexander* II. in favour of the ſaid Friars, dated the twenty ſeventh Year of his Reign. King *Robert* the *Bruce* grants alſo to them *quadraginta quatuor mercas Sterlingorum, percipiendas de firmis ſuis villæ de Perth, & de nova cuſtuma de Dundee & de Perth, 12mo die Aprilis, anno regni ſui 11mo.* King *James* I. was murdered in this Convent, and buried in the *Carthuſian* Monaſtery founded by himſelf near this City, according to *Boethius.*

VI. *ABERDEEN.* They had alſo a conſiderable Convent in this City, founded by King *Alexander* II. King *David* grants thereto, *pro anima Margaretæ de Logy* (his Queen, therein deſigned *Dilectæ noſtræ*) *fratribus prædicatoribus de Aberdeen, centum ſolidos Sterlingorum, de baronia de Banrydeny, infra vicecomitatum de Aberdeen, datum apud Aberdeen, 20 die Januarii, anno regni ſui 33tio. Adam, filius Duncani dicti Glep, burgenſis de Aberdeen,* gives alſo to this Place *quatuor perticatas terræ, quæ terra nunc dicitur Madercroft,* as appears by the original Charter, ſtill extant in the Advocates Library, dated at *Aberdeen, die Sabbati proxima ante feſtum Beati Thomæ Apoſtoli, anno Dom.* 1271. And by another original Charter in the ſame Place, *Annabella de Lydall, filia & heres quondam Petri Kinedy,* gives ſeveral Tenements in the City of *Aberdeen, fratribus prædicatoribus Eccleſiæ Beati Johannis Baptiſtæ de Aberdeen.* This Charter is dated the 10th *Auguſt* 1381. There is alſo in the ſaid Collection of original Charters another, granted by *Eliſabeth Gareauch, Domina de Tulligonis,*

*ligonis*, whereby ſhe gives to the foreſaid Monaſtery, *cum conſenſu & aſſenſu quondam Duncani Forbes, filii mei & heredis, unum annuum redditum viginti ſolidorum, uſualis monetæ Scotiæ, annuatim levand. de terris meis de Tulligonis, infra vicecomitatum de Aberdeen*, dated the 1ſt *May* 1490.

VII. *ELGINE*, in *Murray*. The Convent at this Place was founded by King *Alexander* II. in the Year 1233 or 1234. Of theſe Friars there is mention made in the Chartulary of *Aberbroth*, *p.* 235.

VIII. *STRIVELING*. They had likewiſe a Monaſtery founded near to the Walls of this City by King *Alexander* II. in the Year 1233. *Boethius* ſays, that *Richard* II. King of *England* (whom nevertheleſs moſt People take to have been a Counterfeit) dying in the Caſtle of *Striveling*, was buried in this Church, *ad cornu ſummi altaris*.

IX. *INVERNESS*. This Convent was founded in the Year 1233, by King *Alexander* II. King *David* II. confirms to them *decem libras Sterlingorum, in dotationem Eccleſiæ ſuæ annuatim percipiendas de firmis dicti burgi*, which were given them by his Father 21*mo Octobris*, *anno regni ſui* 8*vo*. His Confirmation is dated at *Edinburgh*, 20*mo die Aprilis*, *anno regni ſui* 30*mo*.

X. *WIGTON*, in the Shire of the ſame Name. The Convent at this Place was founded in the Year 1267, by *Dervorgilla* Daughter to *Alan* Lord of *Galloway*, and Mother to *John Baliol* King of *Scotland*.

IX.

XI. *DUNDEE*, in the Shire of *Angus*. The Convent at this Place was founded by *Andrew Abercromby* Burgeſs of that City. *John Grierſon*, Provincial of this Order for thirty Years, was here profeſſed a *Dominican*, and much eſteemed for his Learning. He wrote two Books, *De caſu ordinis, & paupertate ejuſdem*, and died in the Year 1564.

XII. *COUPAR*, in the Shire of *Fife*. The Convent at this Place was founded by the *Macduffs*, Earls of *Fife*, at the Foot of the Caſtle-hill. Afterwards it was annexed to St. *Monan*'s, and had a fine Chapel of free Stone, which was much decayed before the Annexation. It ſtood where Mr. *Melvill* of *Balgarvy*'s Houſe ſtands at preſent.

XIII. *St. MONAN*'s, in the Shire of *Fife*, ſituate upon a Rock advancing into the Sea, is alſo recorded to have been a Priory of Black Friars. The Chapel was founded by King *David* II. upon the 3d of *April*, the fortieth Year of his Reign, and was ſerved by a Hermit. By his Charter, dated at *Edinburgh*, he grants thereto the Lands of *Eaſter-Birny* in *Fife*, and ſome Lands in the Sheriffdom of *Edinburgh*. This Chapel, which was a large and ſtately Building of hewn Stone, in Form of a Croſs, with a Steeple in the Centre, was given to the Black Friars by King *James* III. at the Sollicitation of Friar *John Muir*, Vicar then of that Order amongſt us, and afterwards Firſt Provincial of *Scotland*, notwithſtanding the Oppoſition he met with from the *Engliſh*, who until then were united into one Province

Province with us: But there being at that time fifteen Convents of this Order amongſt us, it was thought a Number ſufficient to make *Scotland* a Province by itſelf. The Walls of the South and North Branches of this Monaſtery are ſtill ſtanding, but want the Roof; and the Eaſt-end and Steeple ſerve for a Church to the People of the Pariſh of *Abercromby*.

XIV. *St. ANDREW's*, founded by *William Wiſhart* Biſhop of that City, in the Year 1274, and placed at the Weſt-port of the Street called the *Northgate*. King *James* V. annexed to this Houſe at St. *Andrew's* the above two Convents of *Coupar* and St. *Monan's*, at the Deſire of Friar *John Adamſon*, Profeſſor of Divinity, and Provincial of the Order in *Scotland*. The Charter is dated at *Edinburgh*, the 23d *January*, the eighth Year of his Reign.

XV. *GLASGOW*. The Convent at this Place was founded by the Biſhop and Chapter of this City, in the Year 1270. King *Robert* I. grants to the Monks of this Place *viginti mercas Sterlingorum, pro ſuſtentatione luminarium, anno* 1315. *Iſabel* Dutcheſs of *Albany* and Counteſs of *Lenox* grants them likewiſe *terras ſuas de Ballilagan, infra parochiam de Kylmaronock & vicecomitatum noſtrum de Levenox, pro ſalute Murdaci dudum Ducis Albaniæ*. The Charter is dated *apud manerium noſtrum de Inchmiryn*, 18*vo die menſis Maii, anno Dom.* 1451.

This Order is one of the moſt conſiderable of the Church of *Rome*: For there have been three or four Popes, ſeveral Cardinals, and a great many

many Biſhops and learned Men of this Inſtitute. Their Superiors are choſen by the Plurality of Votes, according to the Statutes written by *Vincentius de Bandel de Chateau-neuf*, an *Italian*, and General of the Order. The Brethren ought to renounce all worldly Poſſeſſions. They ought to faſt (or rather abſtain from eating of Fleſh) ſeven Months together, *viz.* from *September* to *Eaſter*. They ought not to ly on Feather-beds, nor in Sheets, but on a Mattreſs. They ought to ſay every *Saturday*, in caſe there falls neither Feaſt nor Faſt upon that Day, the Office of the Virgin *Mary*. Their Patron, St. *Dominick*, by Pope *Honorius* III. was made *Magiſter ſacri palatii*; which Place to this Day is poſſeſſed by a *Dominican*, to whom belongs the Interpretation of the Scripture, and the Cenſure of all Books. They may preach every where, without the Permiſſion of the Biſhops; and are allowed to confeſs all Noblemen and their Ladies, without the Conſent of their Curates. They give the Sacraments every where, and are exeemed from all Eccleſiaſtical Cenſures. The Emperor *Henry* VII. is thought to have been poiſoned with a Hoſtie given by a *Dominican*; ſince which Time they were as a Puniſhment ordered to give the Hoſtie with the left Hand, which they obſerve to this Day.

Their Habit is a white Gown and Scapular, which they pretend was preſcribed to them by the Virgin *Mary*.

The Author of the Appendix to Archbiſhop *Spotiſwood*'s Hiſtory enumerates twenty three Houſes

Houſes belonging to this Order without *Berwick*, upon the Borders; whereas I reckon only fifteen, including alſo theſe two that were united to St. *Andrew*'s, having found no more mentioned in our publick Records or private Charters. And the Manuſcript, intituled, *Extracta ex variis Chronicis Scotiæ*, after having enumerated their Houſes, together with their Founders, as above, concludes, (as in *fol. verſ.* 296.) *Hoc ex relatione fratris Andreæ Leys aſſerentis ſe octo-genarium, anno* 1564. And ſurely he could not have been ignorant of their Number, ſince he had probably lived amongſt them a conſiderable Time, and perhaps in the higheſt Stations that theſe Friars can enjoy in their Order.

## CHAP. XVI.

### *Of the* Franciſcans, *or Gray Friars, and their Monaſteries.*

#### Sect. I. *Of the* Conventuals.

THE ſecond Order of the Mendicants are the *Franciſcans*, ſo called from their Patriarch St. *Francis*, a Merchant of *Aſſiſe* in *Italy*. They were alſo called *Minorites* [*Fratres minores*] or *Gray Friars*, from their Habit, and were eſtabliſhed by that Saint in the Year 1206, and confirmed by Pope *Innocent* III. in the 1209. Their Superiors are called *Wardens*, [*Cuſtodes.*] They follow a particular Rule, preſcribed to them by their Founder, and are divided into *Conventuals* and *Obſervantines*. Theſe laſt were reformed by

by *Bernardine* of *Sienna*, in the Year 1419; and were called *Obſervantines*, becauſe they pretend to obſerve the Rule of St. *Francis* more ſtrictly, by going bare-footed, and wearing no Shirts. And the other were called *Conventuals*, ſince Pope *Innocent* IV.'s Time. They came into *Scotland* in the Year 1219, and had eight Convents amongſt us, ſituate at the following Places, *viz.*

I. *BERWICK*, upon the Borders, was of the Cuſtody of *Newcaſtle*, and had ſome ſmall Rents conferred upon them by the Liberality of our Kings.

II. *ROXBURGH*, in the Shire of *Teviotdale*, ſituate upon the Confluence of the Rivers of *Tweed* and *Teviot*. It was likewiſe ſubject to the Cuſtody of *Newcaſtle*. The Friars hereof were allowed a Church-yard, which was conſecrated by *William* Biſhop of *Glaſgow* in the Year 1235. *Adam Blunt* was Superior or Warden of this Convent in the Year 1296.

III. *DRUMFRIES*, in the Shire of the ſame Name, ſituate upon the River of *Nith*. Here theſe Friars had a Convent, founded by *Dervorgilla*, Daughter to *Alan* Lord of *Galloway*, and Mother to *John Baliol* King of *Scotland*. In this Monaſtery, or rather in the Church of this Place, *Robert* the *Bruce*, Earl of *Carrick*, killed *Red John Cuming*, before the high Altar, in the Year 1305. And *James Lindſay*, with *Roger Kilpatrick*, killed Sir *Robert Cuming* in the Sacriſty. Whereupon they were all curſed and excommunicated by Pope *John* XXII. at *Avignon*, the 28th *June*, the ſecond Year of his Pontificate.

*John*

*John Duns Scotus*, ſirnamed *The ſubtile Doctor*, was here clothed with the Habit of St. *Francis*. He died at *Cologn*, the 8th *November* 1308, in the thirty fourth Year of his Age.

IV. *DUNDEE*, in the Shire of *Forfar*. There was alſo a Convent of this Order in this City, founded by the ſaid *Dervorgilla*. It had no Revenues, and was ſupported only by Alms. Lady *Beatrix Douglas*, Relict of *William* Earl of *Errol*, gave to theſe Friars *L.* 100 *Scots*, for ſupporting them in their Extremities, and for the Reparations of the Monaſtery. Upon which account the ſaid Friars and their Succeſſors were obliged daily to ſay a Maſs at the high Altar, *ſubmiſsâ voce, vel cum nota*; which Maſs was called, *Miſſa Domini pro anima dictæ Beatricis, ac pro animabus Wilhelmi olim ſponſi ſui, & Wilhelmi Comitis de Errol filii ejus*, &c. And if the ſaid Counteſs ſhould, as ſhe deſigned, build within the Church an Altar in Honour of the three Kings, then the ſaid Maſs ſhould be ſaid daily at the Altar conſecrated in Honour of the aforementioned Kings, as the Indenture betwixt the above Counteſs, *James Lindſay* Vicar-general of *Scotland*, and the Warden of the Convent, which conſiſted of fourteen Brethren, who ſign the Capitular Act at *Dundee*, the 25th *November* 1482, bears.

V. *HADDINGTON*. There was alſo a Monaſtery of theſe Friars in this Place; where *William* firſt Lord *Seton* was buried, who gave them ſix Loads of Coals, to be taken weekly out of his Coal-pit of *Tranent*, and the Value of three Pounds annually out of the Barns. *Edward* I.

deſaced this Place; the Quire of which was called *Lucerna Laudoniæ*, becauſe of its beautiful Structure. It appears by our Manuſcript Hiſtories, that upon the Feſtival Day of St. *Ninian*, in the Year 1421, the Waters by conſtant Rains ſwelled to ſuch a Height, that there were a great many Houſes entirely defaced in this Place, and the People went into the Church in a great Boat; ſo that the Sacriſty, with their fine Library and Ornaments for Divine Service, were ſpoiled.

VI. *LANERK*, in the Shire of *Clydeſdale*. There was a Monaſtery of this Order founded here by *Robert* the *Bruce* King of *Scotland*, in the Year 1314. There was a General Chapter held in this Place upon the 11th *July* 1490, where all the Wardens-capitulary being gathered together, they confirmed and approved the Indenture above mentioned, betwixt Lady *Beatrix Douglas* Counteſs of *Errol* and the Friars of *Dundee*, and ordered it to be put in Execution.

VII. *KIRKCUDBRIGHT*, the chief Town of the Shire of that Name. Brother *John Carpenter*, who was an excellent Engineer, and dextrous in contriving all Inſtruments of War, was profeſſed in this Place. He fortified the Caſtle of *Dumbarton*; for which he had *L.* 20 *Sterling* of yearly Allowance ſettled upon him by King *David* II.

VIII. *INNERKEITHING*, in the Shire of *Fife*. *John Gray*, a Son of the Lord *Gray*, was here profeſſed, and took the Habit of St. *Francis*. He lived to a great Age, and at the Reformation retired to *Bruſſels*, where he was murdered

murdered in the Church of the *Franciſcans*, by the Prince of *Orange*'s Soldiers, after that Don *John* of *Auſtria* had abandoned that City.

## Sect. II. *Of the* Obſervantines.

KIng *James* I. having wrote to the *Franciſcans* of *Cologn*, deſiring them to ſend him ſome of their Brethren of the *Obſervantines* to ſettle in his Kingdom, the Vicar-general accordingly ſent him Brother *Cornelius* of *Zirichzen*, a *Dutchman* of great Reputation, with ſeveral others of his Brethren. And after he had ſettled them in different Places of the Country, he returned back to *Flanders*, and died at *Antwerp*. Theſe *Obſervantines* had nine Convents in this Kingdom, ſituate at the following Places, *viz.*

I. *EDINBURGH.* The firſt Convent that was beſtowed upon them was in this City, founded by the Citizens thereof; the Buildings whereof are ſaid to have been ſo magnificent, that Brother *Cornelius* could not for a long Time be induced to accept thereof. At length, by the Perſwaſion of the Biſhop of St. *Andrew*'s, he ſettled there a Community in the Years 1446 or 1447, where Divinity and Philoſophy were conſtantly taught, until the demoliſhing of the Convent in the Year 1559.

II. *St. ANDREW's.* The *Obſervantines* had alſo a Convent in this City, which was ſituate in the Street called the *Shoegate*, where the High-ſchool erected by Dr. *Young* ſtands at preſent, and founded by *James Kennedy* Biſhop of that City, and afterwards finiſhed by *Patrick*

*Graham* his Succeſſor, about the Year 1478, and dedicated to St. *Francis*. *John Tullidaff*, Warden of this Place, was one of thoſe who condemned the thirteen Articles of *Patrick Hamilton* Abbot of *Ferne*, as contrary to the Faith of the Catholick Church, in the Year 1527. *John Wadlock*, born at *Dundee*, and Provincial of this Order, was a famous Mathematician in the Reign of King *James* V. and for the moſt part reſided at this Place. This Convent was likewiſe the Novitiate of the Order.

III. *GLASGOW.* There was alſo a Convent of thoſe Friars in this City, founded in the Year 1476, by *John* Biſhop of *Glaſgow*, and *Thomas Forſyth* Rector of *Glaſgow*. *Jeremy Ruſſel*, a Friar of this Place, and a Man of great Learning, was burnt as an Heretick in the Year 1559; and the Year thereafter the Convent was demoliſhed by the Duke of *Chaſtleherault* and the Earl of *Argyle*.

IV. *ABERDEEN.* In the midſt of this City there was a Fabrick of a great Length, which belonged to thoſe Friars, founded about the Year 1450, by the Citizens of *Aberdeen*, and Mr. *Richard Vaus* of *Many*, *&c.* It had a Church, with a little Steeple, which was conſtantly rung for conveening the Scholars to all publick Leſſons in the College.

We have in the publick Records (*Book* 9. *Chart.* 2.) a Charter of King *James* III. which gives an Account of the Foundations of the four forenamed Monaſteries, and runs thus, *viz. confirmare ſituationem loci, eiſdem fratribus pertinen.*

*infra*

*infra burgum noſtrum ac fundum & terras infra dict. locum exiſten. & content. ac eis donat. & emptas per communitatem dicti burgi, Jacobum Douglas de Caſſils, — & ſimiliter ſituationem loci, eiſdem fratribus pertinen. infra civitatem Sancti Andreæ, ac fundum & terras ibidem jacen. eis donat. per quondam Jacobum Epiſcopum Sancti Andreæ, ac ejus ſucceſſorem Patricium olim Epiſcopum Sti Andreæ, — ac etiam ſituationem loci, eiſdem fratribus pertinen. infra civitat. Glaſguen. ex dono Johannis Epiſcopi Glaſgowenſis moderni, & Magiſtri Tho. Forſithe Rectoris de Glaſgow; nec non ſituationem loci, eiſdem fratribus pertinen. in burgo noſtro de Aberdeen, ac fundum & terras infra dict. locum content. eis donat. & empt. per communitatem dicti burgi de Aberdeen, & per quondam Richardum Vaus de Many, Jacobum Biſſet, &c.* It is granted *fratribus minoribus ordinis Obſervantiæ apud Edinburgh, 21mo die Decembris, anno* 1479, *& regni ſui* 20*mo.*

V. *AIR.* The Monaſtery at this Place was founded in the Year 1472, by the Inhabitants of this City. *Vadingus* ſpeaks of a Statue of the Virgin *Mary*, which is ſaid to have wrought a great many Miracles in this Place.

VI. *PERTH.* The *Obſervantines* had likewiſe a Houſe ſituate near to the Walls of this City, towards the South, founded by the Lord *Oliphant*, in the Year 1460, which is now become a publick Burial-place. *Buchanan, lib.* 16. acquaints us, that the Houſe was deſtroyed 11th *May* 1559, and adds, *Inventa eſt apud Franciſcanos ſupellex quidem non ſolùm copioſa, ſed etiam*

*iam admodum lauta, & quæ decuplo tot quot ipſi erant abunde ſatis fuiſſet. Dominicanis nequaquam eadem erat opulentia; ſed certè tanta, ut mendicitatis profeſſionem facilè falſam redargueret: adeò ut non inſcitè quidam non fratres Mendicantes, ſed Manducantes eos appellaret.* And that Hiſtory ſaid to be written by *John Knox*, *lib.* 2. *ad annum* 1559. informs us, that the raſcal Multitude ran to the Gray and Black Friars, and that notwithſtanding they had within them very ſtrong Guards kept for their Defence, yet without Oppoſition their Gates were broke up. The firſt Invaſion was upon Idolatry: Thereafter the common People ſought Spoil. The Gray-Friars was a Place very well provided. Their Sheets, Blankets, Beds and Coverings, were ſuch, that no Earl of *Scotland* had better. Their Napry was fine. There were but eight Perſons in the Convent, yet they had eight Puncheons of ſalt Beef, Wine, Beer and Ale, beſides Store of other Victuals. Within two Days, ſo buſy were they in aboliſhing Idolatry, that the Walls only did remain of this Edifice.

VII. *STRIVELING.* The Convent at this Place was founded by King *James* IV. in the Year 1494. Here he was accuſtomed to dine in the Refectory, with the Religious. He frequently aſſiſted at Maſs in their Quire; and in Lent, retiring from all worldly Affairs, he gave himſelf here entirely up to his Devotions, and dined upon *Good Friday* on Bread and Water, upon his bare Knees, with the Community.

VIII. *ELGINE*, in *Murray*, ſituate upon the

the River *Loſſie*. The Convent at this Place was founded by *John Innes*, in the Year 1479, according to *Dempſter*.

IX. *JEDBURGH*, the chief Town in *Teviotdale*, upon the Weſt-ſide of the *Jed*, which riſes from divers Burns that meet below the Kirk *Sudan*, and falleth a little below *Jedburgh* into the River *Teviot*. There the Citizens founded a Convent for thoſe Friars, in the Year 1513. *Adam Abel*, a famous Writer, lived and died in this Monaſtery. He was firſt a Canon-Regular of *Inchaffray*, and afterwards became a Gray Friar in this Convent. He wrote a Hiſtory of our Nation in *Latin*, at the Sollicitation of *George* Lord *Seton*, intituled *Rota temporum*, which was afterwards printed at *Rome* by *John Leſly* Biſhop of *Roſs*, with ſome ſmall Alterations and Additions. Thereafter he made an Abridgment of it in *Engliſh*; the Original whereof was loſt at *Roſline* at the Revolution, when the Mob ſpoiled the Caſtle. He began at the Creation of the World, and ended in the Year 1535, in the Octave of the Nativity of the Virgin *Mary*. Afterwards he continued the Work until the Year 1536. On the firſt Leaf he begins, *In the Name of the Bleſſed Trinity, our Lady, St. Francis and St. Auguſtine*. An imperfect Copy of this Book was in the Library of Sir *George Mackenzie* of *Roſehaugh*.

Theſe Friars poſſeſſed nothing, the Places on which their Houſes ſtood only excepted. They were allowed to go conſtantly about with Wallets or Pocks on their Shoulders, to beg their Sub-

ſiſtence from well-diſpoſed People; from whence they were called *Mendicants*; and from their Wearing-cloaths, *Gray Friars*, their Habit being a gray Gown, with a Coul, and a Rop about their Middle. They went bare-footed. At the Reformation, their Poſſeſſions in the Town of *Edinburgh* were given by Queen *Mary* to that City, with thoſe of the Black Friars, the 13th *March* 1566.

## CHAP. XVII.

### *Of the* Carmelites, *or White Friars, and their Monaſteries.*

THe third Order of the Begging Friars was the *Carmelites*, who had their Beginning and Name from Mount *Carmel* in *Syria*. This Mountain is ſituate in the Tribe of *Iſſachar*, and is in Circuit about thirteen Leagues. It is covered with ſeveral Trees conſtantly green. There are a great many Fountains, ſome Villages, and ſeveral Dens or Caves to be ſeen there, wherein a great Number of Pilgrims of the Weſt dwelt of old, expoſed to the Fury of the *Turks*. St. *Lewis* King of *France*, returning from *Aſia*, brought along with him ſome of this Order, and beſtowed upon them a Dwelling-place at the End of *Paris*, where the *Celeſtines* are now eſtabliſhed. They were divided into thirty two Provinces, of which *Scotland* was the thirteenth, where they were called *White Friars*, from their outward Garment. They came into this Kingdom the

the eleventh Year of the Reign of King *Alexander* III. and had nine Convents, ſituate at the following Places, *viz.*

I. *TULLILUM*, near *Perth*. Here *Richard* Biſhop of *Dunkeld* built for them a ſtately Chapel and a large Houſe in the Year 1262. Biſhop *Thomas Lauder* founded here a Maſs for the Dead: *Miſſam quotidianam de requie cantandam*, ſays Abbot *Miln*, *in vitis Epiſcop. Dunkeldenſ.* who likewiſe informs us, that he transferred the Synods of his Dioceſs, which were accuſtomed to be held here, to his Cathedral of *Dunkeld*. Biſhop *Brown*, one of his Succeſſors, finding the Church much decayed, built the Weſt Part thereof from the Ground, and the Weſt-ſide of the Monaſtery, to which he added two Galleries of hewn Stone.

II. *DUNBAR*, in the Shire of *Eaſt-Lothian*. There was likewiſe a Monaſtery of theſe Friars founded at this Place in the Year 1263, by *Patrick* Earl of *March*.

III. *LINLITHGOW*, the chief Town of the Shire of that Name. At this Place there was a Monaſtery of this Order, founded in the Year 1290, and conſecrated to the Virgin *Mary*, by the Citizens of this Town.

IV. *QUEENSFERRY*, in the Shire of *Weſt-Lothian* or *Linlithgow*, where there was a Monaſtery of this Order, founded by the Lairds of *Dundas*, in the Year 1330, and conſecrated to the Virgin *Mary*.

V. *ABERDEEN*. There was alſo a Monaſtery of theſe Friars here, ſaid to be founded by

by *Philip de Arbuthnot* of that Ilk, Anceſtor to the preſent Viſcount of that Name, in Honour of the Virgin *Mary*, in the Year 1350. There is a Charter in the publick Records, *Book* 1. *num.* 161. granting, *fratribus de monte Carmeli burgi de Aberdeen, unum annuum redditum tredecim ſolidorum & quatuor denariorum Sterlingorum annuatim percipiend. de terra Philippi de Arbuthnot, ad emendationem fabricæ Eccleſiæ fratrum prædicatorum.* This Charter is given in the Year 1355, and confirmed by King *David* II. the 17th *Auguſt*, the thirty ſeventh Year of his Reign. The ſame King *David* confirms, *fratribus de monte Carmeli, donationem illam, quam Alexander dictus Conſtabularius burgenſis de Aberdeen fecit iiſdem fratribus de Aberdeen, ad inveniend. ceram & vinum, ad Divinum officium complend. de quatuor marcis Sterlingorum annui redditûs de terra ſua in vico caſtri ejuſdem villæ.* King *Robert* II. confirms to the ſaid Friars, in the Year 1382, a Grant made to them by *John Crab* Burgeſs of *Aberdeen*, of ten Merks *Sterling*, to be taken out of his Lands lying in *Aberdeen* and thereabouts. *Robert* Dukē of *Albany* confirms likewiſe to the ſaid Friars *donationem & conceſſionem quas fecit Wilhelmus Crab, fratribus de monte Carmeli Aberdon. de terris ſuis in territorio de Le Denburn, ex parte Boreali viæ regiæ*, &c. The Charter is dated *apud Perth, 5to Julii* 1413, *& gubernationis ſuæ anno* 8*vo.*

VI. *IRWINE*, ſituate upon the Water of *Irwine*, which riſes above *Loudon* Hill, and falleth into the Frith of *Clyde* at the Town of *Irwine*,

*wine*, and divideth *Kyle* from *Cuningham*. The Convent at this Place was conſecrated to the Virgin *Mary*, and founded by the Laird of *Fullarton*, as appears by a Charter granted by *Ranken* of *Fullarton* to the Provincial and Brethren of the Convent near *Irwine*, in the Year 1412.

VII. *BAMFF*, in the Shire of the ſame Name. Here there was a Convent of this Order, dedicated to the Virgin *Mary*; the Rents, Place and Lands whereof, were annexed to the *Old* College of *Aberdeen*, by King *James* VI. in the Year 1617.

VIII. *St. ANDREW's*. *Dempſter*, in his *Apparatus*, ſays that the *Carmelites* had a Settlement at this Place: Which does not appear probable; for he has given us no Particulars concerning it, either as to its Founders or Benefactors: And having met with no Account of it in our printed Authors or Manuſcripts, I dare not upon his bare Authority poſitively aſſert that ever the *Carmelites* had a Monaſtery in this City.

IX. *GREENSIDE*, at the Foot of the *Calton* Craigs near *Edinburgh*, founded by the Provoſt and Council of that City, in the Year 1526; the Church whereof was dedicated to the Holy Croſs.

Some alſo aſſert, that they had a Dwelling at *Inverbervy* in the Shire of *Kincardine*, and another at *Lufneſs* in the Shire of *Eaſt-Lothian*: But as I have ſeen no authentick Vouchers for this, I cannot pretend to give any Account of them.

Their Habit was white; and upon their Mantle,

tle, towards the End, were ſeveral Rolls of Stuff. But this Habit being diſagreeable to the People, Pope *Honorius* IV. ordered them to change their Garb. And accordingly they took away their Bands or Rolls from their Mantle, and wore afterwards a white Cloak, above a gray or tawny Gown.

There was a fourth Sect of theſe Mendicant Friars, named *Hermites of St. Auguſtine*, who pretend to derive their Origin from him, grounded upon ſome Letters printed under the Name of that Doctor, and addreſſed, *Ad fratres in Eremo.* But theſe Letters are by the Learned reckoned not to have been penn'd by St. *Auguſtine*, and conſequently the Ground upon which they walk is imaginary: However, that Order had no Houſes in this Kingdom. There is indeed one Father *William Paterſon*, Author of a Book, intituled, *The Proteſtants Theology*, printed in the Year 1620, and dedicated to the Earl of *Argyle*, who calls himſelf, *Ordinis Heremitarum Sancti Auguſtini Presbyter, Antwerpiæ profeſſus, & per Scotiam ejuſdem ordinis Vicarius generalis.* But theſe Titles have been only given to him in Compliment, and long after the Reformation, when there were no Religious Houſes extant in *Scotland.* So that theſe Titles which he aſſumed do not argue that there were Houſes of that Order amongſt us.

CHAP.

## CHAP. XVIII.

### Sect. I. *Of the Nuns who followed the Rule of St.* Auguſtine.

THe Nuns we had in *Scotland*, even as the Men, followed either the Rule of St. *Auguſtine*, St. *Bennet* or St. *Francis*. They were bound never to go forth of their Cloiſters after they were profeſſed, and had made their Vows, according to the Conſtitution of Pope *Boniface* VIII. Thoſe of St. *Auguſtine*'s Rule had only two Monaſteries in this Country, the one of *Chanóneſſes*, the other of *Dominican* Nuns.

I. *ICOLMKILL*, in the Shire of *Argyle*. The *Chanoneſſes* of St. *Auguſtine* had a Monaſtery in this Iſland, conſecrated to St. *Oranus*, which probably was founded before the *Benedictine* Monks had any Settlement in that Iſle. They wore a white Gown, and above it a Rochet of fine Linen, and lived in Community together a long Time after the Reformation.

II. The *Dominican* Nuns, of a ſtricter Life, reformed by St. *Katharine de Sienna*, an *Italian*, had their Dwelling about a Quarter of a Mile from the City of *Edinburgh*, at a Place called by Corruption *Sheens*, becauſe this Monaſtery was conſecrated to the forenamed *Katharine de Sienna*. This Houſe was founded by the Lady *Roſline*, Counteſs of *Caithneſs*. *James Leirmonth*, Son and Heir to *Agnes Livingſton*, gives and diſpones to the Prioreſs and Convent of the *Senys*,

*Senys*, near *Edinburgh*, *unum annuum redditum decem mercarum uſualis monetæ regni Scotiæ annuatim levand. & percipend. de tota & integra mea tertia parte terrarum & baroniæ de Livingſton, cum pertinentiis jacen. infra vicecomitatum de Linlithgow*, *datum apud Edinburgh* 15*to Novembris* 1533. This Charter is confirmed by King *James* V. the laſt Day of *December*, the ſame Year.

Sect. II. *Of the Nuns who followed the Rule of St.* Bennet, *or* Black *Nuns.*

THe *Black* or *Benedictine* Nuns followed the Rule of St. *Bennet*, and were eſtabliſhed by his Siſter St. *Scholaſtica*. They had the following five Convents, ſituated as follows, *viz.*

I. *NEWCASTLE*, ſituate upon the River of *Tyne*, in the County of *Northumberland*, founded by King *David* I.

II. *CARLYLE*, in the County of *Cumberland*. Near to this City there was likewiſe a Convent of theſe Nuns, founded by the above King *David*, in honour of St. *Bartholomew*.

III. *HALYSTON*, near *Berwick*. *Marjory*, Prioreſs of this Place, ſwears Fealty to *Edward Langſhanks* in the Year 1296, according to *Prynne*, *p.* 663.

IV. *DALMULIN*, founded by *Walter* Lord High Steward of *Scotland*. The Nuns of this Place followed alſo the Rule of St. *Bennet*, notwithſtanding that the Canons of *Sympringham*, who were their Directors, lived according to the Rule of St. *Auguſtine*.

V.

V. *LINCLUDAN*, in the Shire of *Drumfries*, was founded in the Reign of King *Malcom* IV. by *Uthred* Father to *Rolland* Lord of *Galloway*. *Alienore Prioureſſe de Lencluden del Conte de Drumfries* is mentioned by *Prynne*, *ad annum* 1296. This Priory was afterwards changed by *Archibald* the *Grim* Earl of *Douglas* and Lord of *Galloway* into a College or Provoſtry, becauſe of the lewd and ſcandalous Lives of the Nuns.

## Sect. III. *Of the* Bernardine *or* Ciſtertian *Nuns.*

THE *Bernardines* or *Ciſtertians* lived likewiſe conform to the Rule of St. *Bennet*, and followed ſome private Conſtitutions, and had thirteen Convents ſituate at the following Places, *viz.*

I. *BERWICK*, upon *Tweed*, founded by King *David* I. who grants them conſiderable Revenues. *Agnes*, Prioreſs of this Place, ſwears Fealty to King *Edward* I. in the Year 1296. Afterwards King *Robert* III. by reaſon of their frequent Adherence to the *Engliſh*, deprived them of their Poſſeſſions in *Scotland*, which he diſpoſed of in favour of the *Præmonſtratenſes* of *Dryburgh*, with Conſent of the Biſhop of St. *Andrew's*, in whoſe Dioceſs they were. His Charter is dated at *Scone*, the 9th of *March*, and firſt Year of his Reign.

II. *St. BOTHAN's*, ſituate upon the Water of *Whittiter*, in the Shire of *Berwick*, amongſt the Hills of *Lamermuir*, which are a long Chain of Mountains that divide the *Lothians* from the Shire of *Berwick*. Here there was a Priory of Nuns, ſaid to be founded by one of the Counteſſes

eſſes of *March*, in the Reign of King *William* the *Lyon*. *Adda*, Prioreſs of St. *Boythan*, (according to *Prynne*, *Vol.* 3. *p.* 653.) is one of thoſe that took an Oath of Fidelity to King *Edward* I. of *England*, in the Year 1296. For which Reaſon that Prince, by a Writ directed to the Sheriff of *Berwick*, orders all the Lands and Tenements belonging to this Convent to be reſtored to it, *ibid. p.* 666. St. *Bothan*'s is ſaid to have been a Cell depending upon *South-Berwick*.

III. *THREE-FOUNTAINS*, or *TRE-FONTANA*, in *Lamermuir*, on the Borders of *Lothian*, founded by King *David* I. was alſo a Cell of *South-Berwick*.

IV. *ELBOTTLE*, on the Frith of *Forth*, in the Shire of *Haddington*, was likewiſe a Cell of *South-Berwick*. Sir *James Maxwel* of *Inverweek*, Knight, was created *Earl of Dirleton* and *Lord Elbottle* by King *Charles* I. in the Year 1646: But dying without Iſſue-male, his Honours became extinct.

V. *GULANE*, ſituate on the Frith of *Forth*, near to *Gulanneſs*, in the Shire of *Haddington*, founded by King *David* I. is ſaid to have been alſo a Cell of *South-Berwick*.

VI. *CALDSTREAM*, ſituate upon the Banks of the River *Tweed*, in the Shire of *Berwick*, was founded by *Coſpatrick* Earl of *March*, (Father to Earl *Waldeve*) and *Derder* his Lady. It was dedicated in honour of the Virgin *Mary*. He died in the Year 1166, having mortified to this Place, by his Charter of Foundation, *unam carrucatam terræ, ſciz. dimidiam carrucatam de terra*

*terra de Layval, & aliam dimidiam de terra de Birgham, & etiam carrucatam terræ de Hirſel, quam Derder Comitiſſa ſponſa mea dedit eiſdem Monialibus.* The Nuns of this Place were brought from *Withow* in *England*. King *James* V. gives a Charter to *Iſabel Hope-Pringle*, Prioreſs of this Place, of the Lands of *Hirſel* and *Gredden*, with the Fiſhing belonging thereto upon the Water of *Tweed*. The Queen-Dowager conſents for her Right of Liferent the 6th *September* 1528.

VII. *ECCLES*, in the Shire of *Berwick*, founded, according to *Hoveden*, in the Year 1154; but the Book of *Cowpar* ſays, *Anno* 1155, *conventus Monialium ſecundò venit ad Eccles.* It was founded by the above Earl, and conſecrated to the Virgin *Mary*. *Ada de Frazer* is Prioreſs of *Eccles* in the 1296. There is in the publick Records, *lib.* 21. *num.* 537. a Charter, whereby *Mariota Hamilton*, Prioreſs of this Place, diſpones to *Alexander Hamilton* of *Innerwick* the Village and Lands of *Eccles*, in the 1567, which was confirmed by Queen *Mary* at *Edinburgh* the 11th *May* the ſame Year. This Place was erected into a temporal Lordſhip in favours of *George Home*, afterwards Earl of *Dunbar*.

VIII. *MANUEL*, near *Linlithgow*, on the Water of *Aven*, a little above the Bridge, within the Pariſh of *Moranſide*, in the Shire of *Stirling*, conſecrated to the Virgin *Mary*, and founded by *Malcom* IV. in the Year 1156. *Chriſtiana*, Prioreſs of this Place, ſwore Fealty to *Edward* I. of *England*, at *Linlithgow*, *July* 28. 1291; and *Alice* is Prioreſs of this Place in the

Year 1296. King *William* grants to theſe Nuns *totam decimam omnium reddituum meorum de vicecomitatu de Lythgow, & de firma burgi de Lythgow, & de firmis extra burgum, & de molendinis, & in denariis, & in frumento, & in farina, & in braſio, & in præbenda.* King *Alexander* II. grants to them likewiſe *molendina ſua de Lythgow, cum tota ſecta eorund. molendinorum, & cum omnibus juſtis pertinentiis ſuis.* And *Roger* of *Avenel* gives them *unam celdram frumenti ſingulis annis, de ſe & heredibus ſuis recipiend. de horreo ſuo de Abercorn, ad Natale Domini, in perpetuam eleemoſinam.* Part of the Church and Houſe, which was of hewn Stone, is yet entire, and belongs to the Earl of *Linlithgow*, to whoſe Predeceſſor it was given ſometime after the Reformation.

IX. *HADDINGTON*, in *Eaſt-Lothian*, founded by *Ada* Counteſs of *Northumberland*, and Mother to King *Malcom* IV. and King *William*, in the Year 1178, and conſecrated to the Virgin *Mary*. She gave the Lands of *Clerkington* near *Haddington* to this Convent. The Lands commonly called the *Nunlands*, now called *Huntington*, belonged likewiſe to the Nuns of this Place, together with the Churches of *Athelſton-foord* and *Crail*, in *Fife*, with their Tithes. *Eve*, Prioreſs of *Haddington*, is one of the Subſcribers to *Ragman's Roll* in the Year 1296, *Prynne*, *Vol.* 3. *p.* 656. There is a Charter of *Richard Maitland* of *Ledington*, Knight, deſigned *OEconomus monaſterii Monialium de Haddington*, who confirms, as Superior, a Grant made by *James Cockburn*,

*burn* of *Skirling*, to *William Maitland* of *Ledinton*, Heir-apparent to the Principal Secretary of the Queen, and to his Heirs-male; which failing, to *John* and *Thomas Maitlands* his Brethren, of the Lands of *Bagbie*, within the Conſtabulary of *Haddington*, dated 15th *December* 1564. There is likewiſe a Precept of Dame *Iſabel Hepburn*, Prioreſs of this Monaſtery, directed to *Richard Cranſtoun* her Bailie, ordering him to infeft *William Maitland* the younger of *Ledinton*, in their Lands of *Haddington*, which ſhe names to be *terras dominicales monaſterii noſtri de Haddington*, *terras de Mertoun*, *terras de Weſt-Hopes*, *terras de Eaſt-Hopes*, *terras de Wadende*, *terras de Newlands*, *terras de Windiſlaw*, *terras de Snowdoun*, *terras de Carfrae*, *terras de Littlenewtoun*, *cum decimis*, which ſhe had granted him in Feu, with the Conſent of her Chapter, dated at their Monaſtery of *Haddington*, the 20th Day of *October* 1567.

X. *NORTH-BERWICK*, towards the Mouth of the Frith of *Forth*, in the Shire of *Haddington*, conſecrated to the Virgin *Mary*, and founded by *Malcom* Son of *Duncan* Earl of *Fife*, in the Year 1216. *Adam de Kilconcath*, *Comes de Carrick*, confirms to the Nuns of this Place the Donation of the Patronage of the Church of *Kilconchar* (formerly given them by his Predeceſſors) by his original Charter dated at *Kilconchar* in the Year 1266. This is afterwards confirmed by *Gamelinus* Biſhop of St. *Andrew*'s, in the Year 1271. Dame *Iſabel Home*, Daughter to *Alexander Home* of *Polwart*, Prioreſs of this Place, gives

to her Kinſman *Alexander Home*, in Feu, the Teind-ſheaves of *Largo* Church in *Fife*, in the Year 1532: And Dame *Margaret Home*, likewiſe Prioreſs of this Place, and Daughter of the ſame Family, gives a Tack of the parſonage Teinds of *Logie*, in the Dioceſs of *Dumblane*, to Sir *Patrick Home* of *Polwart* and his Heirs, the 24th *March* 1555. The Lands of *Methritch* and *Kirkamaſton*, with the Churches of *Mayboil* and *Kilbride*, *&c.* belonged to this Place.

XI. *ELCHOW*, or *ELQUHOW*, in *Strathern*, upon the Water of *Tay*, was founded upon a Spot of Ground which belonged to *Dumfermling*, by *David Lindſay* of *Glenesk* and his Mother. *Madoch* Earl of *Strathern* gave the Lands of *Kinnaird* in *Fife* to this Nunry, which were afterwards feued out to *Alexander Leſly*, by *Magdalen* Prioreſs of this Place. At preſent it gives the Title of *Lord* to the eldeſt Son of the Earl of *Wemyſs*.

XII. *St. LEONARD*, near to *Perth*, was an ancient Priory, founded before the Year 1296; for *Prynne*, *p.* 655. in that Year makes mention of *La Prioureſſe de Seint Leonard, juxte la ville de Seint Johan de Perth*. The Prioreſs hereof is made mention of *ad annum* 1373, in the Chartulary of *Aberbrothock*, *p.* 225. It was afterwards ſuppreſſed by King *James* I. and annexed to the *Charterhouſe* of *Perth*, which he founded near that City, together with the *Magdalen's Lands*.

XIII. In the Chartulary of St. *Giles*, the Nuns of St. *Mary*'s Wynd in the City of *Edinburgh* are recorded. The Chapel and Convent ſtood near

near to the Walls of the Garden belonging at preſent to the Marquis of *Tweeddale*; and from its being conſecrated to the Virgin *Mary*, the Street took its Name, which it ſtill retains.

Sect. IV. *Of the Nuns who followed the Rule of St.* Francis, *or* Clareſſes.

THE Nuns who followed St. *Francis*'s Rule were eſtabliſhed by St. *Clare*, from whom they were called *Clareſſes*. She was born of honourable Parents, at *Aſſiſe* in *Italy*, and was admitted into the Order by St. *Francis* himſelf, the 19th *March* 1212, and afterwards ſoon followed by a great many other Ladies, for whom St. *Francis* wrote a particular Rule, full of Rigour and Auſterities. They had no Revenues, and depended wholly upon the Providence of God, and the Charity of the People, for their Subſiſtence. The Nuns of this Inſtitute had only two Houſes in this Country, *viz.*

I. *ABERDOUR*, in the Shire of *Fife*.

II. *DUNDEE*, in the Shire of *Angus*.

Of whom there is little or no mention made by our Writers.

Beſides the Nunries above mentioned, there was one, whoſe Order is not known, *viz.* *COLDINGHAM*, ſituate two Miles from *Eymouth*, in the Shire of *Berwick*. This was certainly the oldeſt Nunry in *Scotland*: For Hiſtorians inform us, that *Ebba* Abbeſs of this Place, together with her Nuns, diſfigured themſelves, by cutting off their Upper-lips and Noſes, to a-

void the luſtful Violence of the *Danes*: Who thereupon burnt this Monaſtery to Aſhes, together with the Abbeſs and Nuns, about the Year of Chriſt 870. See *Matth.* of *Weſtminſter*, *p.* 313. and *Camerarius*, *p.* 122. It continued in Ruins until *Edgar* King of *Scotland* rebuilt it, in the Year 1098, and beſtowed it upon the *Benedictine* Monks of *Durham*.

## CHAP. XIX.

### *Of the Collegiate Churches.*

BEſides theſe Regulars, we had ſeveral Colleges erected for Secular Canons. They were called *Præpoſituræ*, or *Collegiate Churches*; and were governed by a Dean or Provoſt, who had all Juriſdiction over them. They were inſtitute for performing Divine Service, and ſinging of Maſſes for the Souls of the Founders and Patrons, or their Friends.

Theſe Churches conſiſted of Prebendaries, [*Præbendarii*,] or Canons, [*Canonici*,] where they had their ſeveral Degrees or Stalls, and ſat for ſinging more orderly the canonical Hours; and, with their Dean or Provoſt, made up the Chapter. They were commonly erected out of ſeveral Pariſh-Churches united for that Effect, or out of the Chaplainries that were founded under the Roof of their Churches.

The Liſt of which, (being thirty three in Number) according to the Order of the Alphabet, is as follows.

I.

I. *BIGGAR*, in the Shire of *Lanerk.* The College of this Place, was dedicated to the Virgin *Mary*, and founded by *Malcom* Lord *Fleming*, Lord High Chamberlain of *Scotland*, in the Reign of King *James* V. and Anceſtor to the Earl of *Wigton*, for a Provoſt, eight Prebends, four Singing-boys, and ſix poor Men, in the Year 1545; which Foundation was firſt confirmed by Cardinal *Bethune* Archbiſhop of St. *Andrew*'s, and afterwards by the Popes Bulls. *Robert Stuart*, natural Son to King *James* V. Abbot of *Holy-rood-houſe*, and thereafter Earl of *Orkney*, gives to this College, *cum conſenſu capituli monaſterii ſui Sanctæ Crucis de Edinburgh, jus patronatûs vicariæ perpetuæ Eccleſiæ parochialis de Dunrod, Candidæ Caſæ dioceſis, ad requiſitionem Jacobi Domini Fleming, filii præfati Malcolmi conſanguinei ſui, die quinto menſis Maii, anno* 1555. In his Diſpoſition, *Magiſter Johannes Stevenſon, Protho-notarius Apoſtolicus, Eccleſiæ Metropolitanæ Glaſgowenſis Præcentor, dictæ parochialis Eccleſiæ de Dunrod Vicarius*, is deſigned *Primus Præpoſitus Beatæ Mariæ de Biggar.*

II. *BOTHAM*, in the Shire of *Eaſt-Lothian*, was founded by *Hugh Giffard*, laſt Lord *Yeſter* of that Sirname, for a Provoſt, ſeven Prebendaries, and two Singing-boys, about the Year 1418. *Alicia de Haya*, Relict of *William de Haya*, Lord *Yeſter*, mortified ſeveral Lands to this Collegiate Church, for the Benefit of a Chaplain, who was to perform Divine Service in that Church.

III. *BOTHWELL*, in *Clydeſdale*, founded by *Archibald* the *Grim* Earl of *Douglas*, for a Provoſt and eight Prebendaries, the 10th *October* 1398; to which he grants the Lands of *Oſberingſton*, in his Barony of *Bothwell*, and the Lands of *Nether-Urd*, and Mill thereof, in the Sheriffdom of *Peebles*, *in perpetuam eleemoſynam*. Mr. *William Foulis* is deſigned *Cuſtos Privati Sigilli*, & *Præpoſitus de Bothwell*, by King *James* I. the twenty third Year of his Reign.

IV. *CARNWATH*, in *Clydeſdale*, was founded by Sir *Thomas Somerville* of *Carnwath*, Anceſtor to the Lord *Somerville*, with the Conſent of *William Somerville* his Son and Heir, for a Provoſt and ſix Prebendaries, in the Year 1424.

V. *CORSTORPHIN*, in the Shire of *Mid-Lothian*, was dedicated to St. *John* the Baptiſt, and founded near the Pariſh-Church of that Place, by Sir *John Foreſter* of *Corſtorphin*, Lord High Chamberlain of *Scotland*, and Anceſtor to the preſent Lord *Foreſter*, in the Year 1429, for a Provoſt, five Prebendaries, and two Singing-boys. The Churches which belonged to this College were thoſe of *Corſtorphin*, *Dalmaboy*, *Halton*, &c. The Teinds of *Ratha*, the half of the Teinds of *Adiſton*, and the half of the Teinds of *Upper-Gogar*, belonged alſo to this Place. The firſt Provoſt thereof was *Nicholaus Bannachtyne*, who died in the Year 1470, and was buried in this Church, where his Epitaph is ſtill extant.

VI. *CARAIL*, in the Shire of *Fife*; where, at the Deſire of the Prioreſs of *Haddington*, there was erected a Collegiate Church, in the Year

1517,

1517, for a Provoſt, a Sacriſt or Treaſurer, and ten Prebendaries. The Church, which is a large Building, ſtands as yet, with the Veſtry and Quire.

VII. *CRICHTON*, in *Mid-Lothian*, eight Miles South from *Edinburgh*, was founded the 26th *December* 1449, by Sir *William Crichton* Chancellor of *Scotland*, with the Conſent of *James Crichton* of *Frendraught* Knight, his Son and Heir, for a Provoſt, nine Prebendaries, and two Singing-boys, out of the Rents of *Crichton* and *Locherwart*, a menſal Church belonging to the Archbiſhop of St. *Andrew*'s; reſerving to the Biſhop the Patronage of the Prebends of *Vogrie*, *Arniſton*, *Middleton* and *Locherwart*.

VIII. *DALKEITH*, in the Shire of *Mid-Lothian*, four Miles South from *Edinburgh*, was founded by *James Douglas* Earl of *Morton*, in the Reign of King *James* V.

IX. *DIRLETON*, in *Eaſt-Lothian*, was founded by Sir *Walter Haliburton* of *Dirleton*, in the Year 1444.

X. *DUNBAR*, in the Shire of *Eaſt-Lothian*, was founded by *George* Earl of *March*, in the Year 1392, for a Dean, an Arch-prieſt, and eight Prebendaries, who were named from their ſeveral Prebends or Benefices, *viz.* of *Dunbar*, *Pincarton*, *Spot*, *Belton*, *Pitcox*, *Linton*, *Duns*, and *Chirnſide*. The Patronage of this Church fell to the King, by the Forfeiture of *George* Earl of *March*, in the Year 1434.

XI. *DUMBARTON*, in the Shire of the ſame Name, was founded by *Iſabel* Counteſs of

*Lenox*

*Lenox* and Dutcheſs of *Albany*, about the Year 1450, and dedicated to St. *Patrick* the Apoſtle of *Ireland*, who was born in *Lenox*. The Lands of *Little-Ballernick*, *Ferkin*, and ſeveral other Lands in the Shire of *Dumbarton*, were mortified to this Collegiate Church.

XII. *DUNGLASS*, in the Shire of *Eaſt-Lothian*, was founded, for a Provoſt and ſeveral Prebendaries, by Sir *Alexander Home* of that Ilk, Anceſtor to the preſent Earl of *Home*, in the Year 1450; to which he gave *quatuor terras husbandias in villa de Chirnſide, & terram valoris unius mercæ infra husbandriam, & octo mercas annui redditûs, de quatuor terris dominicis in villa de Chirnſide, in comitatu Marchiæ, apud Dunglaſs, quinto die menſis Auguſti, A. D.* 1450. Which Donations were confirmed by K. *James* II. at *Falkland*, the ſame Year.

XIII. *FOULIS*, in the Shire of *Angus*, was founded by Sir *Andrew Gray* of *Foulis*, Anceſtor to the Lord *Gray*, for a Provoſt and ſeveral Prebendaries, in the Reign of King *James* II.

XIV. *St. GILES*, in *Edinburgh*. It was formerly a Pariſh-Church, of which the Abbot of *Scone* was Patron, and was erected into a Collegiate Church by King *James* III. in the Year 1466, out of the united Chaplainries founded formerly therein. The annexed Pariſhes of *Dumbarnie*, *Pottie* and *Moncrief*, in *Perthſhire*, with their Tithes, belonged to the Dean of this Place, who was at the King's Nomination, after the College was erected. *Gavin Douglas*, thereafter

Biſhop

Biſhop of *Dunkeld*, was ſometime Dean of this Place.

XV. *GUTHRY*, in the Shire of *Angus* or *Forfar*, was a Collegiate Church, founded by Sir *David Guthry* of that Ilk, who was Lord High Treaſurer in the Reign of King *James* III. for a Provoſt and three Prebendaries; the Number of which was afterwards increaſed, by Sir *Alexander Guthry* of that Ilk, his Son and Heir, who was ſlain at the Battle of *Floudon* in the Year 1513.

XVI. *HAMILTON*, in *Clydeſdale*, was founded in the Year 1451, for a Provoſt and ſeveral Prebendaries, by Sir *James Hamilton* of *Cadzow*, Anceſtor to the Duke of *Hamilton*.

XVII. *KILMAURES*, in the Shire of *Air*, was founded the 13th of *May* 1403, for a Provoſt and eight Prebendaries, with two Singing-boys, by Sir *William Cuningham* of *Kilmaures*.

XVIII. *KILMUND*, in *Cowel*, one of the Subdiviſions of the Shire of *Argyle*, was founded, *in honorem Sancti Mundi Abbatis*, by Sir *Duncan Campbell* of *Lochow*, Anceſtor to the Duke of *Argyle*, for a Provoſt and ſeveral Prebendaries, the 4th of *Auguſt* 1442. He grants them *tres mercatas terræ de Achinlochir in baronia de Kilmund, ſex mercatas terræ de Blaremore & Garenlect ibidem, & duas carrucatas terræ de Craighawtis in baronia de Cowall, duas mercatas terræ de Ceſflade & Cloyne in baronia de Kilmund, unam mercatam terræ de Kylanclew in Lochow, &c.* This Charter is confirmed by K. *James* II. at *Perth*, the 12th of *May* 1450.

XIX.

XIX. *KIRK-HEUGH*, ſituate upon an Eminence in St. *Andrew's*, near the Harbour. It was firſt founded upon a Rock near the Shore, a little without the End of the Pier, which was called, *The Lady's Craig*. But the Sea afterwards having ſpoilt it, it was built on dry Ground in St. *Andrew's*, and was called *Præpoſitura Sanctæ Mariæ de rupe*, or *Capella Regia*. Upon the Seal of the Chapter was engraven theſe Words, *Capella Domini Regis Scotorum*. It had a Provoſt and ten Prebendaries, and belonged formerly to the *Culdees*, until about the Beginning of the fourteenth Century. There was in this College a Statue of King *Conſtantine*, who retired from the World, and became a *Culdee* in this Place. The Kirk of *Siris* in *Fife* belonged to this Collegiate Church, which was united to the Biſhoprick of St. *Andrew's*, with ſome Exceptions, by the Parliament, in the Year 1621.

XX. *LINCLUDEN*, in *Galloway*, ſituate upon the Water of *Cludan*, where it falls into the River *Nith*, ſome few Miles above *Drumfries*, was formerly a Cloiſter of Black Nuns, as is above related. But it was afterwards changed into a Provoſtry, by *Archibald* the *Grim* Earl of *Douglas*, in the Reign of King *Robert* III. *Magiſter Alexander de Carnys, Præpoſitus de Lincludan*, is deſigned by *Archibald* Lord *Galloway*, *Cancellarius noſter*, in a Charter dated the 12th *February* 1413.

XXI. *St. MARY in the Fields*, [*Sanctæ Mariæ in campis.*] This Collegiate Church ſtood exactly where now the College of *Edinburgh* is built.

built. *Richard Bothwell*, Provoſt of this Place, is mentioned in a Charter of *Robert* Abbot of *Holy-rood-houſe*, who preſents *George Ker* to a Prebendary in this Church, *ad altare Beati Matthæi, infra dictam Eccleſiam Sanctæ Mariæ, ſecundum vim & formam fundationis, quinto die Februarii, anno* 1546; requiring him, as Patron, to grant to the ſaid *George*, *realem & corporalem poſſeſſionem hujuſmodi canonicatûs & præbendæ, cum univerſis & ſingulis ſuis feodis, fructibus, annuis redditibus, proventibus, juribus, obventionibus & profictuis quibuſcunque ejuſdem canonicatûs.* There is a Charter of King *James* V. in the publick Records, confirming a Grant made by *James Laing, uni Capellano Divina celebranti ad altare majus infra Eccleſiam Collegiatam Beatæ Mariæ in campis*, &c. *die* 19*no Junii*, 1530.

XXII. *METHVEN*, near the River of *Almond*, in the Shire of *Perth*, about four Miles from the City of that Name, was founded in the Year 1433, for a Provoſt and ſeveral Prebendaries, by *Walter Stuart* Earl of *Athol*, one of the younger Sons of King *Robert* II.

XXIII. *MINNIBOIL*, in *Carrick*, a Collegiate Church, conſecrated in honour of the Virgin *Mary*, was founded by Sir *Gilbert Kennedy* of *Dinnure*, Anceſtor to the Earl of *Caſſils*, in the Year 1441, for a Provoſt and ſeveral Prebendaries; to which he grants *omnes & ſingulas terras ſuas de Largenlen & Brokiach, infra comitatum de Carrick, apud Edinburgh*, 18*vo die menſis Maii, & anno prædicto.*

XXIV. *RESTALRIG*, in the Shire of *Mid-Lothian*,

*Lothian*, within a Mile of the City of *Edinburgh*, was founded in honour of the Bleſſed Trinity and the Virgin *Mary*, by King *James* III. who gave thereunto *rectoriam Eccleſiæ parochialis de Leſwade*; but died before the Foundation was ſettled. King *James* IV. founded there eight Prebendaries, and gave, *in Divini cultûs augmentum, fructus rectoriæ Sanctæ Mariæ de Rothſay in Bute, Sodorenſ. dioceſ. capellaniam Sanctæ Triduanæ, & viginti libras annui redditûs novi operis ſui regalis in Leith.* But dying before the Foundation was fully brought to Perfection, therefore King *James* V. by his Charter, dated at *Edinburgh*, the 10th *October* 1515, and confirmed by *George* and *John* Abbots of *Holy-roodhouſe* and *Newbottle*, placed there a Dean, nine Prebendaries, and two Singing-boys.

XXV. *ROSLINE*, in the Shire of *Mid-Lothian*, about four Miles from *Edinburgh*, was founded by *William* Earl of *Orkney* and *Caithneſs*, in the Year 1446, for a Provoſt, ſix Prebendaries, and two Singing-boys. He gave thereto the Church-lands of *Pentland*, four Acres of Medow near to that Town, with the Kips, and eight Sowms Graſs, in the Town of *Pentland*. There is above the Door, which enters from the Church to a ſubterraneous Chapel, founded by *Eliſabeth* Counteſs of *Buchan* and *Orkney*, Spouſe to the above Earl *William*, an ancient Inſcription in *Gothick* Letters, which upon that account not being legible to many, I ſhall here ſet down: *Forte eſt vinum, fortior eſt Rex, fortiores ſunt mulieres, ſuper omnia vincit veritas.* This is

a beautiful Structure, famous for its curious Workmanſhip, and is not much defaced.

XXVI. *ROYAL CHAPEL of Striveling*, erected by Pope *Alexander* VI. at the Deſire of King *James* IV. and was founded for a Dean, Sub-dean, Sacriſtan, Chanter or Singer, Treaſurer, Chancellor, Arch-dean, ſixteen Chaplains at the King's Collation, and ſix Singing-boys at his Nomination, who had by his Majeſty a Maſter of Muſick appointed them. The Dean of this Place was appointed to be the Queen's Confeſſor, with Epiſcopal Juriſdiction. That Dignity was firſt annexed to the Provoſtry of *Kirkheugh*, afterwards to the Biſhoprick of *Galloway*, and upon the Demiſſion of the Biſhop of *Galloway*, it was by King *James* VI. annexed to the Biſhoprick of *Dumblane*. It was endowed with the Abbeys of *Dundrenan* and *Inchmahome*, the Lands of *Ceſnock*, the Priory of *Roſneth*, the Parſonage of *Dunbar*, with the Arch-presbytery and Prebendary of *Spot*, *Waltame*, *Duns*, *Pincarton*, the Churches of *Damelington*, *Alloa*, the two *Cultons*, *Dalrymple*, *Kelly*, *Kirkmore*, and other Churches, Chapels and Lands, valued in King *James* VI.'s Time to a very high Rental.

XXVII. *St. SALVATOR*'s College, in the City of St. *Andrew*'s, and Shire of *Fife*, was founded in the Year 1458, for a Provoſt and ſeveral Prebendaries, by *James Kennedy* Biſhop of St. *Andrew*'s, ſecond Son to Sir *James Kennedy* of *Dunure*, by Lady *Mary* his Wife, Daughter to King *Robert* III. He annexed to this Place the Churches of *Cults*, *Kemback*, *Dininno*

and

and *Kilmany*; and dying 10th *May* 1466, was here interred, under a magnificent Tomb, with a plain Coat of Arms, without any Inſcription. *Lindſay* of *Pitſcottie*, in his Hiſtory, *p.* 68. ſays, that the Biſhop ſpent *L.* 10,000 *Sterling* on this Tomb, and as much upon the Collegiate Church, which was a vaſt Sum in thoſe Days.

XXVIII. *SETON*, in the Shire of *Eaſt-Lothian*, was founded for a Provoſt, ſix Prebendaries, two Singing-boys, and a Clerk, out of ſeveral Chaplainries, united for that Effect, by *George* ſecond Lord *Seton*, the 20th of *June* 1493. The Charter of Foundation is afterwards confirmed by *Andrew* Abbot of *Newbottle*, therein deſigned *Apoſtolicæ ſedis Delegatus*. He built likewiſe the Reveſtry or Sacriſt of *Seton*, and covered it over with Stone, in the Reign of King *James* IV. and dying a little after, was buried near the high Altar of this Collegiate Church.

XXIX. *SEMPLE*, in the Shire of *Renfrew*, was founded for a Provoſt and three Prebendaries, by *John* Lord *Semple*, in the Year 1505, near his own Houſe of *Caſtle-Semple*. This Foundation was confirmed by King *James* IV. at *Edinburgh*, the 5th of *June* 1506.

XXX. *TAYNE*, in the Shire of *Roſs*, was founded by *Thomas* Biſhop of *Roſs*, *cum conſenſu capituli ſui*, *ad inſtantiam Jacobi III. Regis*, *in honorem Sancti Duthaci Pontificis*, for a Provoſt, eleven Prebendaries and three Singing-boys, the 12th *September* 1481, *ad inſtar fundationis Eccleſiæ collegiatæ Beati Johannis Baptiſtæ de Corſtorphin*, *Sancti Andreæ diœceſis*.

XXXI.

XXXI. *The* TRINITY COLLEGE *of Edinburgh* was founded by Queen *Mary* of *Geldre*, Mother to King *James* III. who died at *Edinburgh*, in the Year 1463, and was here buried. The Pariſh-Churches of *Saultray*, *Fala*, *Lampethlaw*, *Eaſter-Wemyſs*, *Kirkurd*, *Ormiſton* and *Gogar*, were annexed to this collegiate Church, together with the Lands of *Blance*, which were mortified to the Provoſt hereof in the Year 1529. It was commonly called *The Queen's College*, and now goes by the Name of *The College Kirk*.

XXXII. *TULLIBARDINE*, in *Strathern*, a Part of the Shire of *Perth*, was founded in honour of our Bleſſed Saviour, for a Provoſt and ſeveral Prebendaries, by Sir *David Murray* of *Tullibardine*, Anceſtor to the Duke of *Athol*, in the Year 1446.

XXXIII. *TESTER*, or *ZESTER*, in the Shire of *Eaſt-Lothian*, was dedicated to St. *Cuthbert*, and founded for a Provoſt, ſix Prebendaries and two Singing-boys, by Sir *William de Haya* of *Locherward* and *Teſter*, Anceſtor to the Marquis of *Tweeddale*, in the Year 1420. Dame *Alicia de Haya*, his Relict, did conſiderably augment the Revenues of this collegiate Church in the Year 1444.

Of all theſe collegiate Churches there were eleven, the Patronage of which belonged to the King, *viz. Reſtalrig*, *Kirk-heugh*, St. *Giles*, the *Chapel-Royal* of *Striveling*, the *Trinity College*, St. *Mary in the Fields*, *Dunbar*, *Dumbarton*, *Bothwell*, *Lincludin* and *Tayne*.

# CHAP. XX.

## *Of the Hoſpitals.*

AFter the Collegiate Churches, I ſhall give an Account of the Hoſpitals that we had amongſt us. They were erected, either for receiving of Strangers, or for maintaining poor and infirm People. And though I cannot pretend to give an exact Liſt of all the Hoſpitals we had amongſt us, yet, for the Satisfaction of the Reader, I have here ſubjoined an alphabetical Catalogue of ſuch Hoſpitals as occurred to me in the Peruſal of old Writs, which I am convinced may be vaſtly augmented by others who have more Leiſure for this Study.

I. *ABERDEEN*, the chief City of the Shire of the ſame Name. There was an Hoſpital in this City, founded by *Gavin Dunbar* Biſhop of *Aberdeen*, for the Maintenance of twelve poor Men; to which, beſides other Donations, he mortified the yearly Sum of *L.* 100, to be divided amongſt them, as appears by the Charter of Foundation, dated 23d *February* 1531, which is ſtill extant in the Chartulary of *Aberdeen*, in the Advocates Library, *fol. v.* 173.

II. *BALLINCRIEF*, or *BANCRIEF*, in the County of *Edinburgh*, dedicated to St. *Cuthbert*. *Prynne* makes mention of *Walterus Magiſter domûs de Balnecrif* in the Year 1292; and afterwards, in the Year 1296, *William Fornall, Gardein del hoſpital de Seint Cuthbert de Balnecryf*,

*cryf, del Counte de Edneburk,* ſwears Fealty to *Edward* I. King of *England,* according to the ſame Author.

III. *BRECHIN,* in the Shire of *Forfar. William de Brechin, filius Henrici de Brechin, filii Comitis David,* ſo deſigned in his Foundation of the Hoſpital of *Brechin,* or *Maiſon Dieu, pro ſalute animarum Wilhelmi & Alexandri Regum Scotiæ, Johannis Comitis Ceſtriæ & Huntingtoniæ fratris ſui, Henrici patris ſui, & Julianæ matris ſuæ,* founds here an Hoſpital. *Albinus* Biſhop of *Brechin,* and *Robertus de Monte alto,* are Witneſſes to the Charter. The Original is tranſumed in a Confirmation by King *James* III. in the Year 1477.

IV. *EDINBURGH.* There was an Hoſpital likewiſe at *Edinburgh,* founded in *Bell's* Wynd. It was called, *The maiſon Dieu.*

V. *EDNEM,* in the Shire of *Roxburgh,* near *Kelſo.* The Hoſpital at this Place was dedicated to St. *Laurence,* and ſeems to have been founded by the *Edmonſtons* of *Ednem,* who were Patrons of this Place. *Johannes de Edmonſton, tutor dativus Jacobi de Edmonſton, filii heredis quondam David de Edmonſton de Ednem,* preſents Mr. *Robert Heriot* to the Chaplainry of this Place, which was vacant by the Death of Mr. *Alexander Crichton.* This is confirmed by K. *James* I. at *Edinburgh,* 27th *September* 1426.

VI. *St. GERMAN's,* in the Shire of *Haddington* or *Eaſt-Lothian.* We are uncertain by whom it was founded; but in *Ragman's Roll* we

find mention made of *Barchelmen Meſtre de la meſon de Seint German, anno* 1296.

VII. *GLASGOW.* There was an Hoſpital in this City, wherein there were ſome waiting Maids to attend the Sick. It is made mention of in the Chartulary of *Paiſley, p.* 297. where it is ſaid, *Unus lectus fundatus in hoſpitali Sancti Nicholai in Glaſgow, per venerabilem virum Magiſtrum Michaelem Fleeming.*

VIII. *HOUSTON. Prynne,* in his *Collections, Vol.* 3. *p.* 656. mentions Friar *John* as Maſter of the Hoſpital of the Holy Trinity at *Houſton.*

IX. *HOLYWOOD,* in *Galloway. Robert* II. confirms a Foundation of an Hoſpital made within the Monaſtery of *Holywood,* by *Archibald* the *Grim* Earl of *Douglas.*

X. *St. JAMES's,* at the End of *Stirling*-Bridge. There was an Hoſpital dedicated to St. *James,* which belonged to, and is mentioned in the Chartulary of *Cambuskenneth, fol. rect.* 71.

XI. *KINCARDINE O NEIL,* in the Shire of *Aberdeen,* was an Hoſpital, founded before the Year 1296; for at that Time *Prynne* makes mention of *Wautier Meſtre del Hoſpital de Kincardyn ſur Neel.*

XII. *KING-CASE,* ſituate about half a Mile from the Town of *Air,* in the Shire of *Air.* The traditional Account of which is, that it was founded by King *Robert Bruce,* for eight leprous Perſons, who are each to have eight Bolls of Meal and eight Merks *Scots* yearly; and if there is but one, he has the whole. Sir *Thomas Wallace* of *Craigie,*

*Craigie*, and his Anceſtors, have been always in uſe to preſent theſe Perſons, and cauſing Enquiry to be made into the Caſe of the Perſon or Perſons before they are received. This Hoſpital ſtill ſubſiſts.

XIII. *LANERK.* Sir *John Dalziel* obtained of King *Robert* III. in the Year 1393, to himſelf, and to *Walter Dalziel* his Son, Predeceſſor to the Earl of *Carnwath*, in Feu, a Gift of the whole Revenue belonging to St. *Leonard*'s Hoſpital within the Town of *Lanerk*, upon the Condition that he and his Heirs ſhould cauſe ſay three Maſſes every Week, *pro ſalute Domini Regis & Annabellæ Reginæ, proliumque eorum.*

XIV. *LAUDER*, a Burgh-Royal in the Shire of *Berwick*, ſituated near the River *Leider*. *Ralph* Maſter of the Hoſpital of *Lauder* is mentioned in the Year 1296 by *Prynne*, *Vol* 3. *p.* 662.

XV. *St. LEONARD's*, in the Shire of *Tweeddale*. King *James* I. grants, *Davidi Rat, Vicario ordinis Prædicatorum infra regnum Scotiæ, Confeſſori ſuo*, the Hoſpital of St. *Leonard*'s near the Town of *Peebles*. The Charter is dated at *Edinburgh*, the 25th *July* 1427.

XVI. *St. LEONARD's*, ſituate on the Road betwixt *Dalkeith* and *Edinburgh*, where there was an Hoſpital founded by *Robert Ballantine* Abbot of *Holy-rood-houſe*, for ſeven poor diſtreſſed People.

XVII. *LIGERSWOOD*, or *LIGERTWOOD*, in the Shire of *Berwick*, was an Hoſpital of long ſtanding; for in the Year 1296, *Nicol de Lycharde ſwode*, Guardian of the Hoſpi-

tal here, ſwears Fealty to *Edward* I. of *England*, *Prynne*, *Vol.* 3. *p.* 661.

XVIII. *St. MARY MAGDALENE*, in the Shire of *Weſt-Lothian*. King *James* I. in the Year 1426, diſpones to *Robert de Lynton* the Hoſpital of St. *Mary Magdalene* near *Linlithgow*, who had been nominate to that Benefice by Queen *Jean* his Spouſe. This Place was formerly governed by the *Lazarites*, a Sect of Religious who took their Name from St. *Lazar*, and were afterwards either extinguiſhed or ſeculariſed. *Lanerk* belonged likewiſe to this Sect.

XIX. *NEWBURGH*, in *Buchan*, was an Hoſpital, founded in the Reign of King *Alexander* III. by *Alexander* Earl of *Buchan*, Juſtice-General of *Scotland*.

XX. *St. NICOLAS*. This Hoſpital, of which the Biſhops of *Murray* were Patrons, was founded near the Bridge upon the Water of *Spey*, by one of the Biſhops of *Murray*. *Walterus de Moravia, filius quondam Wilhelmi de Moravia*, is a Donator to this Hoſpital, by his Gift of the Lands of *Agynway*, *ad ſuſtentationem pauperum ibidem recipiendorum*, *Chart. Murray*, *fol.* 56. *Muriel de Pollock*, Daughter of umquhile *Petrus de Pollock*, gives a Liberty to the Hoſpital of St. *Nicolas*, anent the Village of *Spey*, to build a Mill in his Lands of *Inverokel*, with ſome Land adjacent. This *Muriel* had a Daughter, called *Eva Mortach*, Lady *Rothes*. *Vid. Chart. Morav. fol.* 240. *ad annum* 1238.

XXI. *ROTHFAN*. *John Biſſet* gives to God and the Church of St. *Peter* of *Rothfan*,

for

for ſuſtaining of ſeven leprous Perſons, the Patronage of the Kirk of *Kylcalargy*, to pray for the Souls of *William* and *Alexander* Kings of *Scotland*, and the Souls of his Anceſtors and Succeſſors, about the Year 1226, *Chart. Morav. fol. v.* 27. He grants another Donation to the ſame purpoſe in the ſaid Year, *f.* 126.

XXII. *ROXBURGH*, in the Shire of *Teviotdale*. There was at this Place an Hoſpital, called, *The maiſon Dieu of Roxburgh*; the Guardian of which Place, called *Nicol de Chapeleyn*, is mentioned by *Prynne* as one of thoſe who did Homage to *Edward* I. of *England* in the Year 1296. King Robert III. gives this Hoſpital to *Robert Archbald*, the 23d *March*, and of his Reign the firſt Year, *i. e.* in the Year 1391.

XXIII. *RUTHERFOORD*, ſituate upon the River *Tweed*, in the Shire of *Roxburgh* or *Teviotdale*. The Hoſpital here, which was dedicated to St. *Mary Magdalene*, was given by King *Robert* III. to the Abbacy of *Jedburgh*, upon Condition that they were to maintain a Chaplain there, to pray for his Soul and the Souls of his Anceſtors Kings of *Scotland*. *Et ſi fortè* (ſays the Charter) *ex incurſu Anglorum, ſeu aliàs ex eventu guerræ, dictus locus de Rutherfurde forſitan ſit deſtructus, quominus idem Capellanus ibidem ſecurè poterit reſidere, dicti religioſi, per unum idoneum Capellanum, facient infra ſuum monaſterium illud fieri, quouſque idem locus de Rutherfurde in ſuis ædificiis fuerit reformatus*, &c. This Charter is dated at *Glaſgow*, the 2d *May* 1396.

XXIV. *SENEWAR.* *Bartholomew de Eggleſham* is deſigned *Warden of the New Place of Senewar*, in the Year 1296, by *Prynne*, *Vol.* 3. *p.* 659. We are uncertain where this Hoſpital ſtood; but by the Reſemblance of Names, and ſome other Circumſtances, it ſeems probable that it was the Town of *Sanquhar*, a Royal Burgh ſituate on the River *Nith*, in the Shire of *Drumfries.*

XXV. *SOLTRA*, or *SAUTRA*, in *Mid-Lothian*, ten Miles South-eaſt of *Edinburgh*, on the Road that leads to *Kelſo.* This Hoſpital was founded on the Top of the Hill called *Sautray-hill*, in the Year 1164, by *Malcom* IV. King of *Scotland*, for the Relief of Pilgrims and poor and ſickly People. There were ſome Lands belonging to this Hoſpital, near to St. *Leonard*'s near *Edinburgh.* *Alexander* of *Sautra* is recorded at the Year 1204; and *Radulphus*, *Magiſter hoſpitalis de Soltre*, is mentioned by *Prynne* in the Year 1292. *John Heriot* Vicar of *Sautra* is Witneſs to ſeveral Charters in the Year 1467. The Ruins of this Place are to be ſeen on the Eaſt-ſide of the High-way as you go from *Edinburgh* to *Kelſo*: And after you paſs the Burn called the *Back-burn of Sautra*, a little before you come to the Top of the Hill where the Hoſpital ſtood, there is a Fountain which was dedicated to the Holy Trinity, called by the Country People *The Tarnty Well*, much frequented by ſick and diſeaſed Perſons.

XXVI. *SPITTELS*, near the Port of St. *Mary*'s Wynd in *Stirling.* There was an Hoſpital,

ſpital, founded by *Robert Spittel*, Taylor to King *James* IV. for the Relief of decayed Merchants and Tradeſmen.

XXVII. *SUGGEDEN*, or *SEGGIEDEN*, ſituate upon the River *Tay*, in the Shire of *Perth*. Brother *William*, Maſter of the Houſe of St. *Auguſtine* of *Suggeden*, ſwears Fealty to King *Edward* I. in the Year 1296. See *Prynne*, *Vol.* 3. *p.* 660.

XXVIII. *TURRIFF*, formerly in the Shire of *Bamff*, but now in the Shire of *Aberdeen*. The Hoſpital at this Place was founded in the Reign of King *Alexander* III. for twelve poor old Men, by *Alexander* Earl of *Buchan*, Lord Juſtice-General of *Scotland*, and who was choſen one of the ſix Regents after the King's Death. *Prynne* mentions *William de Kirkuchbright*, *Meſtre del hoſpital de Turriff*, *del Counte de Bamff*, as one of the Subſcribers to *Ragman's Roll*, in the Year 1296. King *Robert* I. gives, *Magiſtro & domui hoſpitalis de Turriff*, *terras de Pets*, *cum pertinentiis*, *in puram & perpetuam eleemoſynam*, *pro anima Nigelli de Bruys*, *fratris noſtri*. This Charter is dated at *Kynnel*, the 6th *October*, in the twenty third Year of his Reign.

All theſe Hoſpitals were governed by a Superior, who was called *Magiſter*: But anciently that Title was attributed to the Superiors of Canons, as may be ſeen in the Council of *Mayence*, *ad annum* 813. *cap.* 9. as likewiſe in the Council of *Aix la Chappelle*, *ad annum* 816. *cap.* 134. But ſince the Reformation, that Name is promiſcuouſly

miſcuouſly uſed; before which Time, *qui onera regiminis portabat, & temporalium curam habebat, Magiſter appellabatur.*

## NUMB. II.

### *Inventary of the moveable Heirſhip belonging to the Heir of a Prelate, Baron or Burgeſs.*

*Gold Work.*

A Chain of Gold. A Pair of Bracelets of Gold. The beſt Gold Ring, or Seal Ring. The beſt Piece of Gold, commonly called *A Purſe-penny.* And ſo forth, the beſt of all ſort of Goldſmith Work.

*Silver Work.*

A Watch. A Silver Cup. The beſt Silver Piece or Goblet. A Silver Muiſt-ball. A Dozen of Silver Spoons, if there be ſo many; otherwiſe, if fewer, but one. A Silver Salt. A Silver Baſon. A Silver Stoup. A Silver Whiſtle. The beſt Brandy Taſs or Diſh. A Silver Pick-tooth. And ſo, the beſt of Silver Work.

*Copper and Braſs Work.*

The beſt Copper Kettle for brewing. An Hanging Candleſtick, with Flowers, commonly hung in the midſt of the Hall. The beſt Stand-

ing

ing Candleſtick of Braſs or Pewter. The beſt Mortar and Peſtle. A meikle Braſs Pan. A Pair of the beſt Candle-ſnuffers. A Braſs Guarden for Table-diſhes. A Braſs Scummer. A Braſs Laddle. A Cleek or Plate of Braſs. The beſt Drapping-pan, whether Braſs or Iron. The beſt three Pots of the Mould following, *viz.* A great Beef Pot, A Broth Pot, A leſs Poſſet Pot. A Braſs Choffer. A Braſs Laver. A Frying-pan, or Choffing-diſh. A Drainer. A Bed-pan. The beſt Lanthorn.

*Veſſel.*

A Dozen of Pewter Plates, if they be of one Mould; otherwiſe, only the three following, *viz.* A great Charger Plate, A Broth Plate, An Half-meſs Plate. A Dozen of the beſt Pewter Trunchers; if fewer, one. A Porringer-diſh, having commonly two Lugs. A Pewter Pot, with the Cover. A Pewter Muſtard-diſh. A Quart-ſtoup. A Pint-ſtoup. A Chopin-ſtoup. A Mutchken-ſtoup. A Gill-ſtoup. A Pewter Flagon. A Salt. A Pewter Laver. A Pewter Baſon.

*Iron Work.*

The beſt Iron Chimney, with the Raxes, Gallows, Standard, Crook and Back. A Spit, and a Jack for turning thereof. A Standard for the Drapping-plate. A Brander. A Pair of Bowls. A Pair of Tongs. An Ax. A Hammer. A Smoothing-iron. An Iron for roaſting Eggs. A Pair of Pot-clips. A Fleſh-hook. A Poring-

iron. A Bullet for breaking of Coals. A Muſtard-bullet.

*Timber Work.*

The beſt large Table, of whatſomever Timber. The beſt Meal-ambry. The beſt Preſs. The beſt Longſaddle-bed. The beſt Stand-bed of Timber. The beſt Armed-chair. The beſt Stool. The beſt Cheſt or Coffer. The beſt leſſer Table. A Glaſs-caſe for Drinking-glaſſes. A Bairns Board, with the Furms thereto belonging. A Draw-bed. A Wand Bed. A Cloak-pin. A Dreſſing-board. A Craddle. A furniſhed Bed, *viz.* The beſt Feather or Down Bed; A Bolſter and Palizes; Two Cods, with the Wears thereof; A Bed-ſheet; A Pair of the beſt Sheets; A Pair of ſpraingled Bed-plaids; The beſt ſewed Covering; A Mat; A Pair of the beſt Curtains, with the Pand thereof; A Dozen of the beſt Cuſheons; and failing that Number, one; A Canopy; A green Board-cloth, or the beſt Table-cloth of Cloth.

*Linen Cloaths.*

A Board-cloth of Dornick, Damask or Linen. A Dozen of the beſt Servits or Napkins. The beſt Dreſſing-cloth. The beſt Water-cloth or Mouth-cloth. The beſt Shirt. The beſt Ruff-band or Cravat. The beſt Napkin or Handkerchief laced. The beſt Night-cap, with the Mutch thereof.

*Cloathing.*

*Cloathing.*

The beſt Suit of Cloaths. The beſt Pair of Stockings. The beſt Pair of Silk Garters. The beſt Pair of Gloves. The beſt Hat, with the beſt Hat-band. The beſt Purſe. A Riding Coat. The beſt Cloak. A Night-gown. A Pair of Shoes.

*Armour.*

The beſt Belt and Hingers. The beſt Pair of plait Gloves. A two-handed Sword. The beſt Rapier or ſhort Sword. The beſt Gun or Fuſil. A Steel Bonnet or Head-piece. A Corſlet, with the Taſles. A Craig-piece. A Gauntlet Glove. A Band. A Pick. A Halbert or Partiſan. A Carrabine. A Riding Saddle. A Pair of Boots and Spurs. A Pair of Piſtols.

*Miſcellanea.*

The great Houſe Bible. A Pſalm-book. The Acts of Parliament. The Houſe Clock. The beſt Looking-glaſs. The Tables, Table-men and Dam-broad. A Rubber. A Biſom. A Wine Glaſs. A Spunge. A Lint Wheel. An Wool Wheel. A Beef-ſtand. A Meal-ark. A Lead Ciſtern for holding Water. A Poſſet-can, with the Cover thereof. A Girdle. A Baking-board. A Spurtle. A Pair of Cards. A Pair of the beſt Ballances, with the beſt Baulk and great Weights, *viz.* A Stone, Half-ſtone, Quarter-ſtone and Pound. A Pair of ſmall Weights, with the Braſs Weights, *viz.* The Pound, Half-

pound,

pound, Half-pound, Quarter, Ounces and Drap. The beſt Horſe, ſaddled and bridled, with the haill Furniture. The beſt Plough, with the haill Plough-graith. A Sled, with the haill Graith belonging thereto. A Crook-ſaddle, with a Pair of Creels and Gohams. An Iron Harrow, with the haill Graith thereof. A Pair of Sods, with the haill Graith thereof. A Flaughter-ſpade. A Foot-ſpade. A Stool. A Greap. A Muck-hook. A Barrow. A Paddle. A Flail. A Rake. A Fork. An Oat Riddle. A Bear Riddle. A Weight Riddle. A Sieve. A ſmall Meal-ſieve. A Tramping Tub. A Laddling. A Kirn and Kirn-ſtaff. A Firlot. A Peck and Half-peck. A Pair of Fetters, with the Lock thereof. A Hanging Lock. An Ax. An Eich. A Hammer. A Wimble. A Chizel. A Mell. A Gudgeon. A Saw. A Rule. A Pair of Cams. A Trough. A Peel. A Coalrake. A Mattock. Likewiſe the Brewing-veſſels, ſuch as Fats, Tubs, Bowies, Stands, Barrels, *&c.* which will belong to the Heir.

The Heir of Line has Right to the ſaid Heir-ſhip Moveables, and excludes all other Heirs.

Heirſhip Moveables in general are the beſt of each kind of Moveables; which are given to the Heir, becauſe he is excluded from all other Moveables. If there be Pairs or Dozens, he gets the beſt Pair or Dozen; but in others, he gets only one ſingle Thing. None have Right to Heir-ſhip Moveables, but the Heirs of Prelates, under whom

whom are comprehended all beneficed Perſons; the Heirs of Barons, under whom are comprehended all who are inſeft in Lands or Annualrents, though not erected in a Barony; and the Heirs of Burgeſſes, by whom are meant actual trading, but not honorary Burgeſſes.

## NUMB. III.

### *Form of three Precepts to a Superior.*

#### *Firſt Precept.*

GEORGIUS, *&c.* Dilecto noſtro A B, ſuperiori terrarum ſubſcript. cum pertinentibus, & Balivis ſuis, ſalutem. Quia, per inquiſitionem de mandato noſtro, per Vicecomitem noſtrum de G factam, & ad capellam noſtram retornatam, compertum eſt, quod quondam C D, pater E D latoris præſentium, obiit ultimo veſtitus & ſaſitus, ut de feodo, *ad fidem & pacem noſtram* *, in totis & integris terris de H, jacen. infra vicecomitatum de G; & quod dictus E D eſt legitimus & propinquior heres ejuſd. quondam C D ſui patris, de prædictis terris, cum pertinentibus; & quod eſt legitimæ ætatis; & quod de te ſuperiore earund. tenetur in capite;

* If the Defunct died in any preceeding Reign, the Precept bears *ad fidem & pacem nuperi Regis Georgii I.* in place of, *fidem & pacem noſtram.*

capite: vobis igitur præcipimus & mandamus, quatenus cum idem E D tibi fecerit, pro prædictis terris, quod de jure facere tenetur, ſibi vel ſuo certo actornato, latori præſentium ſaſinam earund. juſte haberi faciatis, & ſine dilatione, ſalvo jure cujuſlibet, & hoc nullo modo omittatis. Teſte me ipſo, apud Edinburgum, &c.

*Dilecto noſtro*, &c. *ſuperiori terrarum ſupraſcript. & Balivis ſuis, pro E D patri.*

*Second Precept.*

GEORGIUS, &c. Dilecto noſtro A B, ſuperiori terrarum ſubſcript. & Balivis ſuis, ſalutem. Meminimus nos alias vobis dediſſe in mandatis, quod juſte & ſine dilatione deliberari feceritis dilecto noſtro E D, vel ſuo certo actornato, ſaſinam totarum & integrarum terrarum de H, jacen. infra vicecomitatum noſtrum de G, ſalvo jure cujuſlibet; quod quidem mandatum noſtrum huc uſque facere minime curaſtis, prout intelligimus, ſuper quo miramur: Quare vobis iterato præcipimus, & firmiter mandamus, quatenus hoc eidem E D, vel ſuo certo actornato, latori præſentium, juſte haberi faciatis, & ſine dilatione, ſalvo jure cujuſlibet; & hoc nullo modo omittatis. Teſte me ipſo, apud Edinburgum, &c.

*Dilecto noſtro*, &c. as in the firſt.

*Third Precept.*

GEORGIUS, &c. Dilecto noſtro A B, ſuperiori terrarum ſubſcript. & Balivis ſuis, ſalutem.

lutem. [*Directly Word for Word, as in the firſt, until ye come to* Teſte me ipſo; *before which Words you muſt ſay,*] Quod niſi feceritis, præcipiemus, per alias literas noſtras, Vicecomiti noſtro de G, & Balivis ſuis, vel tuo immediate ſuperiori earund. quatenus hoc eidem E D juſte haberi faciant, & ſine dilatione; & hoc nullo modo omittatis. Teſte me ipſo, apud, *&c.*

*Dilecto noſtro*, &c. as in the former.

## NUMB. IV.

### *The Method of expeding Infeftments in Lands, Annualrents, heritable Juriſdictions and Offices holding of his Majeſty, through the whole Regiſters and Seals.*

INFEFTMENTS proceed either upon Precepts directed forth of the Chancery, after the Heir of the Perſon laſt infeft has obtained himſelf ſerved Heir to him in the Lands, *&c.* in which his Predeceſſor died laſt veſt and ſeiſed, or upon Charters under the Great Seal.

In caſe the Perſon to be infeft hath no Diſpoſition from his Predeceſſor, containing Procuratory of Reſignation, by which he might have reſigned in the Hands of the Barons of Exchequer, he muſt take out a Brieve from the Chancery, directed to the Sheriff, Steward or Bailie of the

Bailiary or Regality, in whoſe Juriſdiction the Lands, &c. ly, for ſerving the Claimant neareſt and lawful Heir to his Predeceſſor, whether Heir of Line, male, Tailzie, Conqueſt or Proviſion, conform to the Inveſtitures of the Eſtate. This Brieve is proclaimed by an Officer of the Juriſdiction, at the Market-croſs of the Head-burgh thereof, in Market-time of Day, in Preſence of two Witneſſes, nine Days at leaſt before the Service, making publick Intimation to all Perſons pretending Intereſt, to compear before the Judge to whom the Brieve is directed, at the ordinary Place of his Juriſdiction, upon the Day the Service is to be made, and certifying them that the Brieves will be then ſerved: And the Officer at the ſame time ſummons a ſufficient Number of Perſons to paſs upon the Inqueſt. And when the Claimant comes to be ſerved, the Officer returns the Brieve, with an Execution upon the Back thereof, ſubſcribed by him and two Witneſſes; who, in Preſence of the Judge and Inqueſt, verify the Execution upon Oath. After that the Inqueſt (which conſiſts of fifteen Perſons) are ſworn to paſs faithfully upon the Service, and they have choſen one of their Number to be Chancellor, the Clerk of Court reads the Claim, which contains theſe Heads: *That his Predeceſſor, to whom he craves to be ſerved, died laſt veſt and ſeiſed, as of Fee, at Faith and Peace, in ſuch and ſuch Lands,* &c. *That the Claimant is neareſt and lawful Heir to him: That he is of lawful Age: That the Lands,* &c. *are holden of his Majeſty: The Manner of holding: The Service by which*

*which they are holden : The preſent Worth of the Lands,* &c. *and what they were worth in time of Peace : In whoſe Hands they now are, and for what Time they have ſo continued, and for what Cauſe :* And therefore craving the Inqueſt *to ſerve the Claimant neareſt and lawful Heir to his Predeceſſor, and retour the ſame to his Majeſty's Chancellary under moſt part of their Seals.*

After the Claim is read, the Claimant, or one impowered by a Procuratory for him, doth produce his Predeceſſor's Infeftment and other Writs, for inſtructing the ſeveral Heads of the Brieve and Claim : And two Perſons (which may be two of the Inqueſt) deponing *affirmativè* to the Propinquity, he is ſerved ; and the Judge of Court and Chancellor ſigns the Interlocutor. The Clerk of Court thereupon extends the Service, and directs the ſame to the Chancellary ; where it is retoured : And thereupon a Precept is iſſued forth, directed to the Judge in whoſe Juriſdiction the Lands ly, charging him to infeft the Claimant therein, and to take Security for the Duties due from the Time of the Perſon laſt infeft his Deceaſe, to the Time of the Service. And upon this Precept the Judge infefts, and his Clerk extends an Inſtrument in favours of the King's new Vaſſal, which is regiſtred within ſixty Days of the Date thereof.

In caſe the Lands ly in different Juriſdictions, or that the Perſon who is to be ſerved ſuſpect there may Queſtions ariſe, which cannot be ſo eaſily determined by the Judge in the Country ; upon a Supplication to the Lords of Council and

Seſſion, they grant Warrant for a *Commiſſion of Brieves*, directed to their four Macers as Sheriffs, Stewards, or Bailies of Baliary or Regality in that Part. The Commiſſion is thereupon extended in the Chancellary Office, and ſigned by the Director; and the Teſtimony of the Great Seal, otherwiſe termed the *Quarter Seal*, is appended thereto. And the Macers, in preſence of the Lord Ordinary upon the Bills, accept of the Commiſſion, and give their Oath *de fideli adminiſtratione:* Whereupon Inſtruments are taken in the Hands of one of the depute Clerks of Seſſion. And to this Service a Writer to the Signet, being a Notary, is Clerk.

If the new Vaſſal hath a Diſpoſition, either from his Predeceſſor, to whom he was *alioqui ſucceſſurus*, or from a Stranger, to whom he was ſingular Succeſſor, he may be infeft upon the Precept of Seiſin contained in the Diſpoſition, which is called a *baſe Infeftment*, and thereafter obtain Charter of Confirmation of the Diſpoſition and Infeftment; or if he be not infeft baſe, he obtains Charter of Reſignation upon the Procuratory contained in the Diſpoſition in his favour. And in caſe he, as Creditor to a Vaſſal of the King, has obtained Decreet, adjudging the Lands, *&c.* belonging to the Vaſſal, to pertain to him in payment and ſatisfaction of the Sum due by the Vaſſal to him, he may obtain Charter of Adjudication. All which Charters are expede under the Seals in the following Manner.

There is a Writ called a *Signature* (which is either of Confirmation, Reſignation or Adjudication)

tion) preſented to the Barons of Exchequer, which bears, *That our Sovereign Lord, with Advice and Conſent of the Barons of Exchequer, ordains a Charter to be paſt and expede under the Seal appointed by the Treaty of Union to be kept and uſed in* Scotland, *in place of the great Seal formerly made uſe of in that Kingdom, diſponing, and for his Majeſty and Royal Succeſſors confirming* [ſuch and ſuch Lands, &c.] *to and in favours of* A B, [the new Vaſſal] *and his Heirs,* [whether of Line, male, Tailzie, Conqueſt or Proviſion.] *Which Lands,* &c. *pertained heritably of before to and were by him diſponed to and in favours of the ſaid* A B, *by Diſpoſition dated whereupon the ſaid* A B *was infeft upon the Day of and his Infeftment duly regiſtrate in* [This is the Form of a Signature of Confirmation.] Or, *and were by him, and his lawful Proctor or Attorney in his Name, ſpecially conſtitute by the Procuratory of Reſignation contained in a Diſpoſition made and granted by him in favours of the ſaid* A B, *dated duly and lawfully reſigned in the Hands of the Barons of his Majeſty's Exchequer, having Power to receive Reſignations; and thereupon grant new Infeftments in his Majeſty's Name, immediate lawful Superior thereof, at* Edinburgh, *the Day of in favours and for new Infeftment of the ſame, to be made and granted to the ſaid* A B, *his Heirs,* &c. *to be holden,* &c. *as authentick Inſtruments taken thereupon, in the Hands of Notary-publick,*

*in*

*in themſelves more fully proport.* [This is the Form of a Signature of Reſignation.] Or, *and were lawfully adjudged from him, at the Inſtance, and to and in favours of the ſaid* A B, *his Heirs and Aſſignies, heritably, for Payment and Satisfaction to them of the Sums of Money contained in the Decreet after ſpecified, extending at the Date thereof to the accumulate Sum of*
*attour the Compoſition to the Superior, and Expences of Infeftment, conform to the Decreet of Adjudication, at the Inſtance of the ſaid* A B, *againſt the ſaid* *before the Lords of Council and Seſſion, dated* *duly recorded.* [This is the Form of a Signature of Adjudication.]

The Signature is reviſed by one of the Barons of Exchequer, and the Compoſition for the Entry marked thereon; which is paid in to the General Receiver, who grants Receipt thereof on the Back of the Signature. And after the Signature is ſubſcribed by the Barons, the ſame is regiſtred in the Treaſury-regiſter, kept by the King's Remembrancer in the Exchequer, and the Cachet *GEORGE R.* ſtamped on the Head thereof. And a Precept is afterwards extended thereupon in *Latin*, and ſigned by a Writer to the Signet, *per ſignaturam ſigno manûs S. D. N. Regis ſupra ſignatam, manibuſque Baronum Scaccarii Scotiæ ſubſcriptam.* This Precept is ſtamped in the Signet Office; and the Date of ſigneting, and the Price of the Signet, is marked by the Clerk of Signet upon the Precept. The Signature is left in the Signet Office, and the Precept

cept carried to the Writer to the Privy Seal; who extends upon Parchment a Precept, which he ſigns. And that new Precept is ſealed and ſigned by the Keeper of the Privy Seal, and carried to the Chancery Office; where the Charter is extended, and ſigned by the Director of the Chancery or his Depute; and the Seal is appended thereto by the Keeper thereof, who alſo ſigns the ſame.

*Method and Nature of expeding Writs which paſs the Privy Seal only.*

I. GIfts of Eſcheat, whether ſingle or liferent, paſs by way of Signature; which the Writer draws and ſigns, and carries to the Exchequer, as any other Signature of Lands; which is reviſed and ſigned in the ſame Manner; only, before recording in the Treaſury-regiſter, the Donatar gives a Backbond, obliging himſelf to account to the Rebel and his Creditors for all his Intromiſſions, after the Debt in the Horning and Expences of the Gift are paid, or in ſuch other Terms as are agreed on. And afterwards the Signature is brought to the Writer to the Privy Seal; who extends a Gift on it on Parchment, and ſigns the ſame thus: *Written to the Privy Seal, and regiſtrate the Day of Years.* And afterwards the Keeper of the Privy Seal appends the Seal thereto, and ſigns the ſame thus: *Sealed at Edinburgh, the Day of Years.*

II. Gifts of Baſtardy or *ultimus heres*, when the

the ſame are to carry only Sums of Money or other moveable Subjects, paſs in the ſame Manner as Eſcheats do.

III. Gifts of Ward, Non-entry, Feu and other Duties, paſs by a Signature, ſuperſigned by the King, and counterſigned by the Commiſſioners of the Treaſury, and thereafter through the Exchequer, as the other Gifts do; as do all Commiſſions from the King bearing Salaries.

IV. Preſentations to Miniſters, Commiſſions to be Commiſſaries, Commiſſary-clerks and other ſmaller Commiſſions, which have no Salaries from the Crown annexed to them, paſs the Privy Seal without going to Exchequer at all.

*Writs which paſs the Quarter Seal.*

I. GIfts of Tutory-dative paſs by way of Signature in Exchequer, as other Signatures; and after recording thereof in the Treaſury-regiſter, is taken to the Chancery Office, and there a Gift is extended in Form of Chancery, and ſigned by the Director or Depute, who appends the ſaid Seal thereto.

II. Gifts of Baſtardy or *ultimus heres*, when the ſame carries any Heritage holden of a Subject, paſs by way of Signature in Exchequer, as any others do; and then the Director cauſes extend a Preſentation, directed to the Superior, to enter the Donatar therein, which is ſigned and ſealed as Tutories-dative.

*Nota*, When theſe Gifts carry Lands, *&c.* holden of the Crown, then they paſs, as any other Infeft-

Infeftment does, through all the Seals; and in all Caſes of Baſtardy and *ultimus heres*, the Donatar gives Backbond, in caſe of an Heir appearing and claiming.

III. Tutories in Law paſs by way of Service, and are ſigned and ſealed as above; as are thoſe of Idiotry, Furioſity, *&c.*

IV. Commiſſions of Brieves paſs this Seal, as is already deſcribed in the Method of expeding Infeftments.

V. There paſſes this Seal alſo a Precept, which is called *Fourth Precept*, directed to a Sheriff in that Part, for infefting in Lands holden of a ſubject Superior, after the three Precepts are run againſt him.

## NUMB. V.

## *Brieves.*

### *Brieve of Perambulation.*

GEORGIUS, *&c.* Vicecomiti & Balivis ſuis de G, ſalutem. Mandamus vobis & præcipimus, quatenus per probos, fideles & antiquiores homines patriæ, juſte, & ſecundum aſſiſam terræ, perambulari feceratis rectas metas & diviſas inter terras de E, quæ ſunt A B, ex parte una, & terras de F, quæ ſunt C D, ex parte altera, jacen. in baronia de H, vicecomitatu veſtro; & ſicut dictæ diviſæ & metæ juſte & ſe-

cundum aſſiſam terræ perambulatæ fuerint, ita eos de cætero firmiter faciatis obſervari, tantum inde facien. quod pro veſtro defectu amplius inde juſtam querimoniam non audiamus. Teſte me ipſo, apud, &c.

*Vicecomiti & Balivis ſuis de G, pro A B & C D.*

*Brieve of Lining.*

GEORGIUS, &c. Præpoſito & Balivis burgi noſtri de G, ſalutem. Mandamus vobis & præcipimus, quatenus per duodecim ex melioribus & fide dignioribus burgenſibus dicti burgi, per quas rei veritas melius ſciri poterit, magno ſacramento interveniente, juſte & ſecundum leges lineari faciatis tenementum terræ jacen. in dicto burgo, ex parte Auſtrali ejuſd. inter tenementum terræ C D ex Auſtrali, & tenementum terræ D E ex Boreali, ab una & altera partibus; & ſicut dictum tenementum terræ per dictas lineatores lineatum fuerit, ita illud de cætero firmiter faciatis obſervari, tantum inde facien. quod pro veſtro defectu, &c. *ut in præcedenti.*

*Præpoſito & Balivis burgi noſtri de G, pro,* &c.

FINIS.

