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Minor Practicks,

OR, A

TREATISE

OF THE

SCOTTISH LAW.

Compoſed by that Eminent Lawyer,

Sir THOMAS HOPE of *Craighall,*

Advocate to His Majeſty King *Charles* I.

To which is ſubjoined,

A DISCOURSE on the Riſe and Progreſs of the Law of SCOTLAND:

AND

An Alphabetical Abridgment of the ACTS of SEDERUNT, from the RESTORATION, to this preſent Year.

EDINBURGH,

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To the Right Honourable,

Sir WALTER PRINGLE
Of *NEWHALL*,

One of the Senators of the College of Justice;

My LORD,

SINCE ſo few of our Lawiers have left us any of their Works on the Subject of their Profeſſion, it is matter of ſome Surpriſe that this ſmall Treatiſe, which has in all Times been ſo univerſally eſteemed, ſhould have lay'n ſo long in Manuſcript, and that none of the *College of Juſtice*, in the Courſe of a Century, ſhould have obliged the World

with a *Publication* of it. I thought therefore, that it fell naturally enough to my Share, as *Professor of the Municipal Law*; since none of the *Faculty* had hitherto given the Publick that Satisfaction.

As I have sequestred my self from the more active Part of the Law, that I might give all my Time to the Duties of a Profession to which I am particularly called, being the first in that Province in this University; It may perhaps be expected that I should publish somewhat of my own upon the LAW of SCOTLAND; which in good Time I hope to be able to do: But till some more Experience and Knowledge in the Business of my Profession shall give me the Courage to attempt something of that kind, I thought I could not better spend my Hours of Leisure, than in preparing for *Publication*, for the Use of the Students and Practitioners of our

Muni-

Municipal Law, Editions of the Works of the more eminent Lawiers of former Times, which now lye buried in that noble Treasury of all polite Learning, and of every thing in particular relating to Law, *The Library of the Faculty*: And I chuse to begin with this, as being the most intirely *Municipal*, as well as one of the most valuable Pieces of its Kind and Size, that any of our Lawiers have yet produced.

IT is impossible to cast an Eye over these Sheets, without regreting that the Author did not intend them for publick Use: For if he could thus, without Study, and in an easy Manner, write only for the Use of his own Son; What might not have been expected from him, had he laboured an *Institute* of our Law for the Use of the Publick?

THE *Edition* of this Book claims the Protection of Your Lordship's Name by a *Twofold* Title; Your near Relation to the learned and acute Author, and Your unmerited Friendship and Favour to the Publisher, who wanted nothing so much as an Opportunity of acknowledging it on some proper Occasion.

I am, with the greatest Respect and Truth,

My LORD,

Your Lordship's most obedient and most humble Servant,

ALEX. BAYNE.

TO THE READER.

THIS ſmall Treatiſe, *upon ſome of the chief Titles of our Law, was written by Sir* THOMAS HOPE *of* Craighall, *Advocate to King* CHARLES I. *of bleſſed Memory. And we are told by ſome of the near Relations of the Family, That it was compoſed without any Study or Application, being dictated to his Sons for their Inſtruction, in Mornings while he was a dreſſing.*

The Publiſher *ſends it into the World without* Addition *or* Amendment, *as he found it in a* correct Manuſcript *taken by a good Hand from that Copy which belonged to the late Sir* ARCHIBALD HOPE *of* Rankeilor, *One of the Senators of the College of Juſtice, whom the* Publiſher *cannot mention on any Occaſion, without paying to his* Memory *all due Reſpect; in grateful* Remem-

Remembrance, that he owes to him that Part of his Education, by which he is in any Measure qualified for this Province.

That Copy, there is Reason to believe, was the original One which was left in the Library of Craighall; *considering the Lord* Rankeilor's *near Relation to the Family, the Management he had many Years of all its Concerns, and that no Copy thereof is to be found in the Possession of the Family since that Time.*

HOPE's

HOPE's Minor Practicks.

The Form of Process before the LORDS.

1. THERE is an general, that no Summons can be called before the Lords while the first Day of Compearance be bygane, except allenarly in receiving of Witnesses, which may be called upon the very first Day of Compearance.

2. *Item*, The like Order is to be observed in calling of Acts, which cannot be called upon the first

Day of Compearance, except for Witnesses, as said is.

3. *Item*, Albeit Summons cannot be called upon the first Day of Compearance, to compel the Defender to answer; yet they may be both tabulate and continued the first Day of Compearance.

4. *Item*, After the first Day of Compearance is bygane, the Pursuer may call any Day thereafter, it being within Year and Day; and if the Defender compear, he is ordained to see the Process; and if there be moe Defenders than one, for whom moe Pursuers compear, they should be ordained to see the Process in the House of any Advocate whom the Judge shall appoint.

5. *Item*, After the Pieces are seen, and delivered back to the Pursuers, he may urge the calling of his Cause as he finds Occasion; and being called, the Party Defender will be compelled to propone his Defences; whereupon the Judge pronounceth his Interlocutor Sentence: And after all the Defences are discussed, either by repelling or admitting them to Probation, the Judge assigns a Day for proving of the Libel, if the Exceptions be repelled simply, in respect of the Libel, or of the Libel and Reply. If the Party Defender his Exception be not repelled simply, but in respect of the Reply or otherwise, assigns a Time for the Defender for proving of his Exception, if the same be admitted, or otherwise assigns a Day both to the Pursuer and Defender, *viz.* to the Pursuer to prove his Summons and Reply, in respect of an Exception proponed by the Defender, which was repelled; and

and to the Defender to prove his Exception, which was not repelled but admitted; and this is called, *Litiscontestation parte comparente.*

6. *Item*, If the Defender compear not, then either the Summons requires Probation, or is proven *instanter*, or needeth no Probation, which is in Causes of Reduction and Exhibition, whilk will bear Certification, and in other Cases, such as Removings, Letters conform, *&c.* where Probation is necessary, and is not proved *instanter*: There the Pursuer desires Letters to summon Witnesses, which is the Form of *Litiscontestation parte non comparente*, and desires a Term to be assigned to him to prove; which being assigned, the Act extracted thereupon is called *Litiscontestation parte non comparente*; but when the Summons needeth no Probation, or is proven *instanter*, the Pursuer craves Decreet and Sentence, which he must have if the Party compears not.

7. *Item*, 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 while he advise the Summons, the Relevancy and Desire thereof, and advise the same 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 the Production himself, and craves Decreet, because having seen his Reason *instanter*, or because the Reason is *negative*, whilk proves itself; and in these Cases or the like, the Judges cannot assign a Term, or give a Sentence till they advise with the Lords, albeit the Defender

fender be abſent: The like in Improbations and *Ceſſio bonorum* is obſerved.

8. *Item*, If the Cauſe be 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 decerning, are, to ſuſpend till they be produced, *viz.* the Decreets and Letters called for to be produced and ſuſpended, as the proper Terms in a Reduction *parte non comparente*, are, to reduce for Non-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 Removings, *&c.* are only, *Decerns.*

9. *Item*, If the Party Defender be compearing, and all his Exceptions be 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* reſpectivè *foreſaids*, where there is no Probation neceſſary.

10. *Item*, If the Cauſe be a Suſpenſion, not only bearing Reaſons, but alſo double, treple, multiple Poinding; 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 diſpute upon the Reaſons of Suſpenſion, and if the Reaſon be found not relevant, or not verified *inſtanter*; then the proper and

and usual Words of the Lords Sentence are, *Finds the Letters orderly proceeded, notwithstanding of the Reason, or of the whole Reasons.* Or if the Reasons, or any of them be found relevant, and proven *instanter*, the proper Words are, *Suspends the Letters* simpliciter.

11. *Item*, Where the Pursuer lyes off, and will not call; in this Case the Defender may call upon his Copy, any Day after the first Day of Compearance be bygone, and crave Protestation.

12. *Item*, If the principal Cause be of that Nature, which requires to be tabulate, there can be no Protestation granted upon the Copy, till the Copy be tabled.

13. *Item*, Albeit the principal Summons be not tabulate, yet if the samen be continued, in that Case the Defender must call upon the Act of Continuation, with the Copy of the principal Summons; and in this Case the Copy needs not be tabulate, because the principal Summons is presumed to be tabulate after Continuation.

14. *Item*, After Litiscontestation made, either *parte comparente aut non comparente*, there is no calling of the Cause, neither upon the Pursuer nor Defender's Part, but upon the last Act of the Process.

15. *Item*, When the Party calls upon the Act made after Litiscontestation, if he be Pursuer to whom the Summons is admitted to Probation, and against whom an Exception one or moe is admitted, in Favours of the Defender, he first satisfies his own Term, by Production of Diligence;

gence; and thereafter craves Protestation against the Defender, or to circumduce the Term against the Defender, *quæ sunt eadem*: And if that Term be satisfied by Production of Diligence *hinc inde*, there is a new Term assigned for Probation, *& sic deinceps*, according to the ordinary Terms of Probation, received by the Practique and Custom of the House.

16. *Item*, If the Defender call upon the Act, it is either to produce his own Diligence, for proving his Exception, or to crave the Term to be circumduced against the Pursuer, anent the Probation of his Summons, or of any Reply, one or moe, if any be admitted to his Probation.

17. *Item*, When the Pursuer or Defender produces 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*.

18. *Item*, When all the Terms of Probation are finished, in this Case where the Probation pertains to the Pursuer, he must renounce further Probation, before the Process be advised: And if the Pursuer urge the Process to be advised, then if the Defender oppone, that it cannot be advised, because the Act of Renunciation is not produced, the Lords will cast off the advising of the Process till the Act be produced: But when the Defender closes his Probation, he needs not renounce further Probation, but allenarly declares, that he produces such Writs or Probation, for proving his Exception, and holds his Peace; and the Pursuer

ſuer proteſts, that the Cauſe ſhall be holden as concluded; and an Act being extracted hereupon, is equivalent to a Renunciation, and holden for Concluſion of the Cauſe; which being extracted, the Proceſs may be adviſed by the Lords, as proven or not proven.

19. After Renunciation or Concluſion of the Cauſe, and an Act extracted thereupon, none of the Parties may produce other Writs to be produced, than theſe that are expreſs'd in the Act, which commonly bear theſe Words, *That the Purſuer repetes the Depoſition of the Witneſſes and Writs produced* in initio litis, *and renounces.* And upon the Part of the Defender bear, *That he repetes the Depoſitions of his Witneſſes, and produces ſuch Writs, and holds his Peace*; whereupon the Lords ordain the Cauſe to be concluded.

20. *Item*, When the Lords adviſe the Cauſe *poſt concluſionem*, 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 conſiſts in Writ, the Party *poſt concluſionem in cauſa*, muſt ſee the whole Writs, and be heard to object againſt the ſame, wherefore the ſame proves not. And if he either oppone *nullitatem juris* or Falſhood, it will be received, and diſcuſſed by Way of Objection *contra producta*; and the Reaſon of this is good, becauſe the Lords will oftentimes admit or repel an Exception, reſerving Objections *contra producenda.*

21. *Item*,

21. *Item*, If the Falshood be opponed, it is e-
ver admitted, except the Writ against which the
Falshood is opponed, was produced *in initio litis*,
in the which Case, seeing he had the Exception
of Falshood competent to him *ante litem contesta-
tam*, he will not be heard now, because it will be
taken for a Delay; but the Falshood will be re-
served to him by Way of Action.

22. *Item*, Where an Exception of Falshood is
proponed, either *ante vel post litem contestatam*,
the Proponer must consign such a Sum of Money
as the Lords appoint.

23. *Item*, The Exception or Objection of Fal-
shood *post litem contestatam*, in respect the Fal-
shood and Trial thereof consists *in facto*, is in Ef-
fect a new Litiscontestation, which requires all the
Terms of Probation, and thereafter Conclusion of
the Cause.

24. *Item*, When the Cause is advised, the Lord
pronounces in these Terms, either *Finds proven
and decerns, or not proven and assoilies.*

25. *Item*, After the Litiscontestation in Causes
of Removing, the first Thing that the Pursuer
craves, is, That Caution be found, or else that
Decreet be pronounced; but sometimes the find-
ing of Caution will be continued, till the next
Term of the Process, if the Pursuer have Terms
to run, for proving of his Reply. Or if the Pur-
suer be warned at the Instance of the Defender,
to give his Oath *de calumnia*, if he have just Cause
to deny the Truth of the Exception; and if he be
not present to give his Oath, but desires a Day to
that

that Effect: If he take a Day, the Lords will give the ſame Day to the finding of the Caution.

26. If the Defender produce a Bond of Caution, and that the Cautioner be rejected, upon the Alledgeance of Inſufficiency; in this caſe, the Lords will aſſign an new Diet for finding of a better Cautioner.

27. At the firſt Inſtitution of the Seſſion, Summonſes were appointed to be called every Day of the Week, according to the Table; and every Day of the Week had its own Table, containing its own proper Cauſes, which were to be called thereon; and alſo there were ſome Cauſes which might be called any Day of the Week, and theſe were under the common Table.

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

29. The Keeper of the Tolbooth of old was obliged to affix on the Tolbooth-wall the Roll of the tabled Cauſes: But this is out of Uſe, and now he only receives the Summons, and inſerts a Minute thereof in his own Minute-book, and gives back the Summons to the Party, and writes on the Back thereof, *Tabulate*, and ſubſcribes his Name.

30. *Item*, To know what Summons ſhould be tabulate, there is an general, That all Summonſes which abide Twenty one Days Warning ſhould be tabulate; and no Summons that comes in upon Six Days Warning abides tabulating, except Improbation.

31. *Item*, All Summonses of Reduction and Declarator of Escheats, Redemption and Nonentries, and transferring of Actions and Decreets, abide Twenty one Days Warning.

32. *Item*, All Summonses *in facto* that require Probation, require Twenty one Days Warning, except they be verified *instanter*, or privileged either in their own Nature, or by the Lords Deliverance.

33. *Item*, Summonses of their own Nature privileged, and which come on Six Days Warning, are, Summons of Removing, Summons of Poinding the Ground, for Annualrent, for Exhibition of Evidents: All Summons of Suspension of Decreets, or Nullities of Hornings which are craved to be suspended; and also Summons to make arrested Goods forthcoming.

34. *Item*, Some Causes are privileged by the Lords Deliverance, as Causes alimentary; or because the Summonses are verified *instanter*, or referred to the Party's Oath, or because accessory to the Lords former Decreets, as Summons of special Declarator after a general.

35. *Item*, Summons of recent Spulzie being intented within Fifteen Days after the committing thereof, are privileged from the Table, and also from Continuation.

36. As to the Continuation of Summonses, there is a general, That all Summonses that consist *in facto*, and are to be proven by Witnesses, must abide Continuation, except the same be privileged, either of their own Nature, or by the Lords Deliverance

verance, as Summons to make arrested Goods forthcoming, and recent Spulzies and Summons accessory to the Lords Decreet.

37. *Item*, There is another, That all Summonses whereupon the Lords grant Certification, and give a Decreet against a Party for not Compearance, without Probation of the Summons, must abide Continuation; as Summons of Reduction of Improbation, Exhibition of Writs, *&c.*

38. *Item*, A third general, That Summonses which are verified *instanter*, albeit in their own Nature they abide Table, and are execute upon Twenty one Days Warning; yet in respect they are verified *instanter*, abide no Continuation; as in Declarators of Escheat, Nonentries, Redemption, Transferrings, *&c.*

39. *Memorandum*, There is an Exception from the last Rule of Declarators, concerning expiring of Reversions which abide Continuation, albeit they be proven *instanter*, in respect of their Importance, being for the Loss of Heritage.

40. *Item*, All Actions before the Lords have their Diet of Compearance, with Continuation of Days; and are not peremptory as before inferior Judges, but may be called at any Time within Year and Day, because during that Time, *currit instantia & non perit*: But after Year and Day, if the Summons be not called, *medio tempore*, *perit instantia*; and the Summons cannot be called, except the same be wakened, and the Party of new summoned, which may be done on Six Days Warning, or fewer; notwithstanding the principal Sum-

mons, of its own Nature, abides Twenty one Days Warning.

Of Kirks and Bishops.

41. ALL Kirks are either several Benefices, or part of Benefices. Several Benefices are called *jura patronatum*, 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 united to Benefices *ad distinctionem*, were called *patrimonial*, because they were Parts of Benefices, *nam Ecclesia unita non dicitur Ecclesia vel beneficium, sed pars beneficii.* This Distinction is clear in the Instance of all the Bishops in *Scotland*, who of old, and now by their Restitution, have standing in their Persons the Rights of Kirks both patrimonial and of Patronage: And the Kirks which are not patrimonial, whereof the Fruits and Rents pertain not to the Bishop, but wherein he has *nudum jus præsentandi*, are called *jura patronatus*; and the Person presented by the Bishop to his Kirk, has Right to the whole Rents and Fruits of the Kirk and Benefice, to the which he is presented. And albeit the Bishops plant and admit Ministers in their own patrimonial Kirks, yet the Minister has no Right to the Fruits and Rents of the Kirk, because the Minister is not Titular thereof, but allenarly hath Right to such a Portion or yearly Duty out of the Kirk

Kirk as the Biſhop appoints him for his Maintenance.

42. Churches of Patronages are either Eccleſiaſtical or Laick: Eccleſiaſtical, were theſe whereof the Patronage pertained either to the Pope or ſome Eccleſiaſtical Perſon, as Biſhop, Abbot, Prior, &c. Before the Reformation the Pope was accounted *univerſal Patron* of the whole Kirks of *Scotland*, and he was founded *quoad hoc in jure communi*; and ſince the Reformation the King has come in his Place, and is preſumed of the Law to be *Patronus univerſalis*: So that, as of old, all Patronages, except where either Eccleſiaſticks or Laicks could ſhow a particular lawful Right of the Patronage in their Perſons, ſo now all pertains to the King, except other lawful Rights be ſhown in the Perſon of any Subject.

43. At the Time of the Reformation the King got not only Right to the Patronages of great Benefices, as Biſhopricks, Abbacies, Priories, &c. but alſo the Right of all other inferior Benefices, as Parſonages, Vicarages, whereof the Patronage either pertained to the Pope, or to the Biſhops, Abbots or Priors. But in my Opinion the King had them by a diverſe Manner; for by the Act of Parliament in *Scotland*, the Pope's Authority is aboliſhed; by the which, the Patronages pertaining to the Pope were then eſtabliſhed in the King's Perſon: But as for the Patronages pertaining to Biſhops, Abbots and Priors, &c. I find no Law nor Act of Parliament which deprives them of their Patronages, but only a perpetual Cuſtom ſince that

Time that the King hath presented to all Benefices, whereof the Prelates of *Scotland* were Patrons; which Custom hath taken the first Ground not from a positive Law, whereof we have none, but from the Will and Pleasure of the King, who having the Patronage of the great Benefices in his Hands, by abolishing the Pope's Authority, presented the Prelates to the great Benefices when they were vacant *quoad patrimonium, sed non quoad jura Patronatus*, and by a second and reciprocal Act presented to the small Benefices, whereof the Prelates were Patrons of old.

44. But now the Bishops, by the late Act of Parliament 1606, in the 18th Parliament of *James* VI. are restored to all the Patronages whilk pertained to their Bishopricks, except such as were lawfully disponed before by the King's Majesty, with Consent of the Titulars who stood presented to the said small Benefices, and confirmed in Parliament.

45. *Item*, Before the Reformation there were some Laick Patronages, which pertained neither to Pope nor Prelate, but to Laick Patrons; and the Right they had behoved either to flow from the Pope after he was made universal Patron of the haill Kirks of *Scotland*, or else the Benefices have been founded with this Quality, *Reserving to the Founder, his Heirs and Successors, the Right of the Patronage*. But now all the Laick Patronages of the Kingdom which pertained to Subjects, have no other Warrant but Infeftments flowing from the King before the Reformation. And as to the other

ther Patronages which the King hath disponed since, they are not counted Laick but Ecclesiastical Patronages, that is to say, Patronages to which the King hath Right, by coming in Place of the Pope and Prelates. And it is expedient to know the Difference betwixt old Laick Patronages and these which 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 an Exception always of Lands which pertained to Benefices, being Laick Patronages which were lawfully established before the Reformation.

46. *Item*, Before the Reformation, the King's Majesty and his Predecessors had some Laick Patronages which pertained to the Crown; and it hath been a great Question how these Patronages came in the King's Hands, whether *jure coronæ simpliciter*, or by Forfeiture of the Subjects who were infeft therein of before; but it is certain that the King got the most part of them by Forfeitures, as the Patronage of the Provostry of *Lincluden*; by the Forfeiture of *Douglas*, the Patronage of the College of *Dumbar*; by the Forfeiture of the Earl of *March*, the Patronage of the Provostry of *Kirkheugh*; by the Forfeiture of the Earl of *Fife*, which is true, in respect of the mediate Way how these Patronages have last come to the Crown: But that excludes not but the same Patronages pertained of before to the Crown, *jure coronæ*, since the same Subjects that were forfeit might have had them of before from the King.

47. And it is likely that when King *Malcolm Canmore* disponed all his Lands to his Subjects, for their Service, and reserved to himself allenarly the Ward and Marriage of the Heirs; that at the same Time he disponed to his Subjects also all such Laick Patronages as he had then in the Bounds of the Lands disponed.

48. And it cannot be denied, but the Kings of *Scotland* before King *Malcolm*'s Time founded and erected the whole Bishopricks, Abbacies and Priories of *Scotland*, and so had Power in the Foundation to reserve the Patronages to themselves, as also had the like Power in erecting of small Benefices.

49. *Item*, All the Lands, Teinds and Kirks of *Scotland* out of Question pertained once to the King, *viz.* during 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 to be tied to such Conditions as the Kings reserved to themselves; and therefore *meo judicio*, all the Laick Patronages in *Scotland* have pertained to the King's *jure coronæ simpliciter*, and from them have flowed to the Subjects.

50. *Item*, Where Kirks are not erected in several Titles or Benefices, but united to other Benefices; In this Case the Titular of the Benefice hath not *jus præsentandi* of Titulars to the Kirks united, but the Kirks are planted with Ministers, according to the Laws of the Kingdom appointed for Plantation of Kirks, which is now in the Power of

of the Bishops of the Kingdom within their own Dioceses, by Act of Parliament 1612; and of before was in the Power of the several Presbyteries.

51. *Item*, When the Bishops plant a Kirk which is of their own Patrimony, they do the same, by admitting a Minister thereto, as Diocesian Bishops of all their own Kirks that are within their Diocese (wherever they lye) *formaliter*, albeit locally they may be within another Diocy: But when the Bishop plants a Kirk, whereof he is Patron; in that Case he presents not, but confers *pleno jure*: So that in other Patronages, there is requisite to a lawful Title, a Presentation from the Patron, a Collation and Admission from the Bishop, and an Institution; but in Kirks pertaining to the Bishop's own Patronage, there is only requisite Collation and Institution.

52. *Item*, In Laick Patronages, the Patrons are obliged to present within Six Months, after which Time the Bishop has *jus conferendi*, *jure devoluto*.

53. *Item*, All Benefices consist either of Temporality or Spirituality; and the Spirituality is the Kirks, or Tithes pertaining thereto; and the Temporality is the Kirks Lands.

54. *Item*, In *Anno* 1561, it was ordained by Act of Council, *That the Thirds of all Benefices should be applied to the Maintainance of the Ministers in the first Place, and the Superplus of the Thirds, to the Maintainance of the King's House; and to this Effect the whole Prelates and beneficed Persons were ordained to give up the Rental of their*

their Benefices to the Collector, or Collector's Clerk, who were appointed for that Effect: And conform thereto the Prelates or benficed Persons gave up their Rentals; which being done, the said Rentals were registrated in the Rental-books.

55. *Item*, For better Payment of the Thirds of Benefices, there were particular Places designed for Payment of the Thirds, which were called the *Assumption of the Thirds*; and after these Assumptions, the Prelates and beneficed Persons had no Power to set Tacks, nor give Pensions out of that which was assumed for Payment of the Third: but all such Tacks were null of the Law, which is established by Act of Council, *Anno* 1587, and ratified in Parliament, *June* 1592, Act 121.

56. *Item*, The Thirds were distribute amongst the Ministers in this Sort; *First*, The several Kirks were planted by the Superintendants appointed in every Province, by the General Assembly, and at the Desire of the Superintendants, or Commissioners of the General Assembly. The King and the Queen past a Commission under the Seals, to a Number of the Nobility and Ministers, for meeting and conveening at *Edinburgh*; and for modifying the Stipend to the Ministers of these Kirks which were planted; which Meeting was called the *Platt*; and this *Platt* sat yearly in *November* or thereabout: And this Form continued ever till the Bishops were restored in *Anno* 1606; and as yet the Books of Modification and Assignations of Ministers Stipends are extant, from the Year of GOD 1561, to 1606, and are in the

the Keeping of the Clerks of the General Assembly, and his Deputes, who now also at the Command of the Bishops, every one of them within their own Diocy, inserts in the saids Books of Assignation, the Names of such Ministers, with the Quantity of their Stipends, as they gave Warrant for; and the said Clerks and their Deputes had and have Power to give Extract out of the Register, and to subscribe the same, which makes Faith in Presence of the Lords of Council; and whereupon the Lords *brevi manu*, without Decreet, grant Letters of Horning, arresting and Poinding in Favours of the Ministers.

57. *Item*, Whatsoever of the Third was not assigned to Ministers, 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 Ministers, and according to this Superplus Book, the King's Collector did charge for this Superplus for the King's Use; and with it also for the omitted Benefices, which the Prelates and beneficed Persons ommitted in the Upgiving of the Rental; and also for common Kirks and Friars Lands, which also with the Thirds, were appointed for the Uses foresaid.

58. *Memorandum*, The common Kirks pertained to the Chapters of the Bishopricks *in communi*, till the Year 1594, at which Time they are erected by Act of Parliament in several Parsonages and Benefices, and ordained to be conferred on Ministers as other Benefices.

59. *Item*

59. *Item*, The Remanent of the Thirds for th King's Use, is now for the most part extinguished by the Restitution of Bishops, who have Right to their own Third, and partly by the Erection o Priories and Abbacies, by the which, the Third are discharged to the Lords of Erection, the planting the Kirks. Likewise in the Parliament 1617 and 1621, there was Commission granted by the Parliament for Plantation of Kirks, which hath made the old Books of Assignation of Minister Stipends, and yearly Platt thereof, to become ou of Use, and the only Use thereof to be, as said is in inserting of the Ministers Names by Warrant from the Bishop.

60. Every Bishop had their own Chapter, that is, a Number of Persons and Vicars within their own Diocy, by whose Consent the Affairs concerning the Bishoprick were done, and that reciprocally; for the Bishop can do nothing without the Consent of the most part of the Chapter, nor yet the Persons of the Chapter in their particular Benefices, without Consent of the Bishop, Dean and Chapter, or most part thereof.

61. But there is an Exception here from the 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 Convents Seal of the Priory, was to the Archbishop instead of a Chapter; and the Reason hereof hath been apparently, because the Arch-bishop of St. *Andrews* at the Foundation of the Priory, which was erected

erected by himſelf, and founded out of the Rents and Fruits of his own Benefice, or out of ſuch Kirks as did ly within his own Diocy, and were of before of his Chapter, did by that Foundation extinguiſh the Chapter Kirks, and make them patrimonial to the Priory; and in reſpect thereof, the Prior and his Convent remained to the Biſhop in Place of a Chapter, in whoſe Place now the Parliament ordained a new Chapter, by Act of Parliament 1604, which the Lords find only to be for the Biſhop, and not mutual, as it was of old, by Decreet in *Anno* 1624.

62. *Item*, As the Biſhops had their Chapters, ſo Abbacies and Priories had their conventual Brethren, whoſe Conſent, or the moſt Part of them, was neceſſary to all Tacks and Feus: But now the Convent-Brethren are all dead, and there is none to be put in their Places: And by Act of Parliament 1584, all Monks Portions are ordained to pertain to the King after their Deceaſe: But now all thir Monks Portions are diſponed upon by the King to the Lords of Erection in their ſeveral Erections; and the ſame only remains in Abbacies and Priories not erected; and in thir, the common or Convent Seal is in Place of the Convent.

63. *Item*, There are ſome Abbacies, which have a Convent, and are neither called Priories nor Abbacies, but Monaſtries, whereof there are three or four in *Scotland*, *viz.* the Monaſtry of *Falfoord*, *Peebles*, *Scotlandwall*, and the Monaſtry of the Trinity Friars in *Aberdeen*.

64. *Item*,

64. *Item*, Besides all these, there were collegiate Kirks, which consisted of a Provost, and so many Prebendars, who were obliged to do certain divers Services in the Collegiate Kirks; and these were founded in *Scotland* by Noblemen and great Barons, as *Kirkheugh* by the Earl of *Fife*, *Linchuden*, by *Douglas*, *Tayne*, by the Earl of *Ross*, *Dunbar*, by the Earl of *March*, *Dumbarton*, by the Earl of *Lennox*, *Crighton*, by *Bothwell*, and *Abernethy* by *Angus*, whereof the most Part are come to the King by the Forfeiture of the Founders.

65. *Item*, Other Gentlemen who could not attain to the founding of Colleges, erected Chappels, and Chaplanries, in which they had divine Service: And by the Act of Parliament 1567, it was declared, *That it shall be lawful to all Patrons of Prebendaries and Chaplanries, to bestow the same upon Bursars.*

66. *Item*, The Kings of *Scotland* had also their own College-Kirks erected for their own Use, which is called the Chapel-Royal of *Stirling*, whereof the Principal Administrator was, and is called, *Dean of the Chapel-Royal*; and the rest were and yet are called *Prebendars*, and are obliged to serve in the King's Chapel, where the King commands by the Dean, who is now the Bishop of *Dumblain*; whereas before it was ever annexed to the Bishoprick of *Galloway*.

Of

Of Testaments.

67. THE Bishops of old had double Jurisdiction, one Spiritual, of the Kirk of their Diocy; and the other Civil, over all the Inhabitants of their Diocies; and to that Effect appointed their Officials, who had Power to judge in all Matters concerning Teinds, Minors, Orphans, and poor Widows; and such had Power to confirm all Testaments, of all that died within their Diocies; and for confirming thereof, had their Quota, which was *vicesima pars* of the Defunct's Part.

68. *Item*, This Jurisdiction was taken from the Bishops at the Reformation; and the Queen made Commissars within each Diocy, with the same Power which the Officials had; and now the Bishops are restored thereto by Act of Parliament 1609, with this Provision always, That there shall be four Commissars in *Edinburgh*, who shall be Judges in all *Scotland* to Divorcements, and Reduction of inferior Commissars Decreets; of which Four, two to be admitted by St. *Andrews*, and two by *Glasgow*, albeit their Residence be only within the Diocy of St. *Andrews*.

69. Defunct's Testaments were of old confirmed by the Officials, and now by the Commissars, whither the samen were Testaments Testamentar, or Dative; but with this Distinction, That the Nomination of Executors made by the Defunct,

was

was confirmed immediately without the Necessity of a preceeding Sentence: But where there was no Nomination by the Defunct, there behoved to preceed a Decreet of the Commissars, decerning Datives, whereof this is the Order that was and is kept.

70. The Procurator-fiscal of each Commissariot immediately after the Defunct's Decease, causes serve an Edict upon a *Sunday*, at the Kirk-door upon Nine Days Warning, to warn the Wife, Bairns and others, having Interest, to compear before the Commissar, and to hear and see Executors decerned and confirmed to the Defunct, at which Diet, if any compeared for the Defunct, and produced a Nomination ; and if no other compeared and opponed against the same, the Producer is admitted by the Procurator-fiscal to confirm the Testament ; and to that Effect to give up an Inventar: But if no Nomination was produced, then if the Relict and Bairns compeared, and desired the Office of Executry, the Judge decerns them Executors ; whereupon they give out a Decreet which is called Dative : And if none compeared the Judge decerneth his own Procurator-fiscal. But thereafter by a Supplication given in to the Judge, by the Relict and Bairns, and any other in Kin, or else not of Kin, by a Creditor, or any having any reasonable Interest, they will be surrogate in Place of the Procurator-fiscal, in the Office of Executry, which is called, *Decreet of Surrogation.*

71. *Item*

71. *Item*, The essential Points of a Confirmation, are, the giving up of the Inventar, swearing thereto, and finding of Caution to make it furthcoming to all Parties having Interest; and the Inventar consists of these three Parts; *First*, Of the Goods and Gear of the House, and Corns, being the Grouth of the Mains, or in their Barns or Barn-yards, with Horses, Oxen, *&c.* *Next*, Debts owing to the Defunct; and *last*, Debts owing by the Defunct; and after this the total Sums of the whole are drawn up, which are either divided or undivided according to the Condition of the Inventar and Estate of the Defunct when he died; for if Debts exceed the Goods, there is *nulla divisio:* And if the Defunct have Wife and Bairns, the Division is *tripartite*, whereof a Third to the Wife, another to the whole Bairns, without the Heir: And the Third is called the Dead's Part, because he had Power to dispone the same to whom he will; but if it be not disponed, this Third also falleth to the Bairns beside the Heir; and if the Defunct did name Executors, Strangers, and did not expresly dispone upon this Third Part by Legacy or otherways, then the Executors by Act of Parliament, have the Third of the Defunct's Part for their Charges.

72. *Item*, If any Thing was omitted in the upgiving of the Inventar of the Testament, or ill appretiate, or given up within the just Worth, then at the Instance of any Party who has Interest; or of the Procurator-fiscal, there is an Edict raised for decerning Executors dative *ad omissa & male* ap-

appretiata, which muſt be execute againſt the Executors confirmed, on Nine Days Warning; and at the Day of Compearance the Purſuer will be preferred to the Executors confirmed, *propter dolum & malam fidem* of the Executors confirmed, except they be able to purge the Fraud by pregnant Preſumptions and Circumſtances: And this Teſtament *ad omiſſa* is confirmed by the ſame Order, as the Principal, except allenarly that this receives no Diviſion, in reſpect both the Relict and Bairns may be excluded *ob malam Fidem*; and the whole, without Diviſion, will pertain to the Executor-dative *ad omiſſa*; and yet if either the Relict or Bairns purge the Fraud, *ut ſupra*, they will be admitted to crave their own Part, as in the principal Teſtament.

73. *Item*, The Executors in the principal Teſtament, for eſhewing of this Prejudice, which may ariſe by the *omiſſa*, are in Uſe, at the Time of Confirmation of the principal Teſtament, to proteſt that they may be heard to eik any Thing that is omitted when the ſame ſhall come to their Knowledge; and they may upon Supplication to the Commiſſars (where any Thing omitted cometh to their Knowledge) add the ſame to the Principal Teſtament, which is done without new Confirmation, and admitted by the Commiſſar, providing it be done before ſerving the Edict *ad omiſſa*, and providing that which is craved to be added, exceed not One thouſand Pounds or the Half of the principal Inventar, which the Commiſſar will not

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do by Way of eik, but will have the same done by Way of new Confirmation.

174. *Mem.* Albeit a Father's Testament, who has a Wife and Bairns, receive a tripartite Division, yet where it wants any of them, it receives only 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, albeit she have Bairns, because *non debetur legitima liberis respectu matris; quia mater non habet liberos in potestate ut pater.* But if her Husband be living, and Bairns gotten betwixt them, then her Testament receiveth a tripartite Division, *viz.* A Third to her self, one to the Husband, and one to the Bairns, which is in respect of the Legitim Portion, which is due to the Bairns, after the Father's Decease, albeit there be no Legitim due to them by Decease of the Mother; and if there be no Bairns, the Testament receiveth a bipartite Division, *viz.* one Half to the Defunct, and another to the Husband.

175. *Item,* Albeit the Heir be excluded from all Portion of the Father's Testament, yet *quoad matrem,* he comes alike with the Brothers and Sisters.

176. *Item,* In Testaments, *non est jus representandi,* as in Lands and Heritages; but nearest of Kin in Degree, excludeth all other of further Degree, albeit more near *quoad successionem* in Heritage: For in Heritage there is *jus representandi;* and the Son, Oy, &c. have the same Right and Place which the Father had: But in Testaments,

the Father's Brother or Sister, will exclude the Brother or Sister's Bairns, and have the sole Benefit of Executry.

77. *Item*, The Benefit of the Confirmation of the Testament, is this, That the Executor confirmed is no further tied in Law to Payment of the Defunct's Debts, but *secundum vires inventarii*; whereas any Person one or more intromitting with the Defunct's Goods before Confirmation, may be conveened as universal Intromitters for the Defunct's whole Debts, albeit the same exceed the Intromission never so much. And the only Way to purge and free themselves, is, to confirm *ante Sententiam*, otherwise, *tenetur in solidum*.

78. *Item*, Where the Testament is confirmed the only Way to free them from Debts which exceed the Inventar, is, to obtain a Decreet of Exoneration before the Commissars, to which they must summon the whole Creditors and others generally.

79. *Item*, The Commissars do never admit of Exoneration, but by Way of Exception, but before the Lords 'tis ordinary. If the Executor conveened offer him to prove that the Inventary is exhausted by true Debts, proceeding upon Decreets, or proven by Writ, whereof he made Payment, before the Intention of the Cause against him, it will be sustained.

80. *Item*, In Testaments, all these who are of a like Degree, are admitted to the Office of Executry, albeit some thereof be *germani*, some *uterini tantum*, and some of them *consanguinei tantum*; whereas

whereas in Succeſſion of Heritage, the Brother or Siſter German excludeth all others who are either *conſanguinei* or *uterini*.

81. *Item*, In Teſtaments the Succeſſion is granted to all who are of one Degree, which is divided amongſt them *quoad capita non quoad ſtirpes*, albeit it be otherwiſe in Succeſſion of Heritages, which is divided *quoad ſtirpes non quoad capita*.

82. *Item*, The Teſtator cannot diſpone in Teſtament that which is Heritage, or Heirſhip Goods, but he may name a Tutor to his Bairns, who are *infra pubertatem*.

83. *Item*, Albeit in Teſtaments, Executors confirmed have *beneficium inventarii*, yet if the Creditor offer him to prove that the Executor intromitted with a Number of Goods, which he has *dolosè* omitted. The Lords are in Uſe to admit this Reply *ad hoc* to make the Executor liable to the whole Debt for the which he is purſued, albeit the Intromiſſion be leſs than the Debt.

84. *Item*, An Executor nominate or decerned dative, may purſue before Confirmation, providing he have Licence of the Commiſſars to 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 thereon.

85. *Item*, Licence is commonly granted by the Commiſſars *ad diem vel uſque ad ſententiam excluſivè*; and if any Licence be granted *includendo ſententiam*, or if the Sentence happen to be pronounced before the outrunning of the Day to

the

the which the Licence was granted ; in this Cas
the Lords ordain the Sentence not to be ex-
tracted till the Pursuer report to the Clerk of the
Process the Confirmation of the Testament, or o-
therwise find Caution to confirm betwixt and
such a Day designed by the Lords.

86. *Item*, The Caution found in the confirmed
Testament, cannot be pursued till the Executor
be discussed.

87. *Item*, Albeit commonly the Confirmation
bear, That the Caution is found by the Executor,
yet if the Executor be Pupil and Minor, and gives
not up, nor makes Faith upon the Inventar him-
self, but the Inventar is given up and sworn by the
Mother or Tutor, or nearest of Kin, *&c.* In this
Case the Caution is understood to be found by
these who give up the Inventary, and not by the
Minors ; and the Minors may pursue those that
give up the Inventary, and intromitted with the
Goods and Gear confirmed, and obtained Sentence
against them ; and if they shall not be found *sol-
vendo* after the Discussing of them, they may pur-
sue the Cautioner contained in the Testament ;
and it will be no relevant Defence to the Caution-
er to alledge that he is Cautioner for the Execu-
tor ; and that therefore he can have no Action a-
gainst him, but ought to relieve him, in respect
the Caution is holden to be found not by the Mi-
nor, but by the Upgiver, as said is.

88. *Item*, Where there are more Executors than
one confirmed, and they all die to one, he remains
Executor *in solidum per jus accrescendi* : But if
he

e die,then the Teſtament ſo far as is not execute, uſt be of new confirmed *quoad non executa*; and xecutors decerned and confirmed to that Effect; nd that is counted *non executum*, which was not ctually intromitted with, nor uplifted before their eceaſe, which chiefly has reſpect *ad nomina deitorum*.

89. *Item*, Where there are more Executors han one, they muſt all be conveened; and if any f them be omitted, the Commiſſars do refuſe Proceſs; but I have ſeen the Lords grant Proceſs, the Sum purſued for was within that Part of the onfirmed Teſtament, which by the Diviſion of he haill, would fall to the Executors conveend.

90. *Item*, Where all the Executors are purſued r a Debt, the Lords commonly find that they annot be conveened *in ſolidum*, but *pro virili arte*: But if all be deceaſed but one, he is coneenable *in ſolidum*, reſerving him Action and elief againſt the Heirs and Executors of his Coxecutors.

91. *Item*, Where there are more Executors conrmed, they muſt all purſue; and one cannot purue without another; at leaſt, if the Co-executor efuſe to concur to the Purſuit, they muſt be caled for as Defenders for their Intereſt, which is ver obſerved before the Commiſſars. But, I ave ſeen the Lords ſuſtain the Purſuit of one of he Executors, without Citation of the reſt, reſerving always the Purſuit to the Executors Part that urſueth.

92. *Item*, This Exception is ordinary, wher Parties are pursued as universal Intromitters : No Process, because there are Executors confirmed before the Intention of the Cause.

93. *Item*, This other Exception is admitted before the Commissars, but not before the Lords That there are intromitters who are not called.

94. *Item*, The Defence commonly proponed to purge universal Intromission is necessary ; Intromission with such particular Goods and Gear whereupon he also 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 accounted necessary Intromission, where the Relict and Bairns meddle with Goods within the House *custodiæ causa* ; but if they sell them, it is not necessary, *nisi servando deterior fiet*.

95. *Item*, The Executor is liable in Payment of moveable Debts, and of old could not be pursued for an heritable Bond ; but now the Lords promiscuously sustain Action against the Executors and Intromittors, as well for heritable as moveable Bonds, and that without discussing the Heirs, whereas the Heir is not conveenable for moveable Sums, *nisi post annum & diem*, after the Defunct's Decease, albeit he be already entred Heir.

96. *Item*, 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

Day, neither for moveable or heritable Bonds; yet if he voluntarily enter Heir, by serving and retouring himself Heir to his Predecessors either generally or specially, or by accepting a Precept of *clare constat* from his Superior, for infefting him in Lands, as Heir to his Predecessors: In this Case, he may be pursued for heritable Bonds, *etiam intra annum & diem*, and yet may not be pursued for moveable Bonds till the Year be bygone; and the Reason is, because by entring Heir, he has renounced the Benefit of *annum deliberandi*, but not renounced the Benefit introduced in his Favour by an Act of Parliament, whereby the Heir is made free from all Pursuits for moveable Sums within Year and Day.

97. *Item*, Albeit the Lords grant Action for heritable Bonds within Year and Day, where the Heir is entred, yet they will not grant them against him, as behaving himself as Heir, by all the Ways whereby *gestio pro hærede* is inferred, by the Law and Custom of this Kingdom; and that because it is not liquid and clear by these Deeds, that he has renounced the Benefit of Deliberation, and the same requires Probation *de facto*, as to prove Intromission with the Heirship-Goods, or Mails and Duties of Lands, Teinds and Annualrents to which the Defunct had Right, and *dubius est eventus probationis*, and the Pursuer may not possibly prove the Intromission: In the which Case, the Lords behoved to assoilzie, and consequently find themselves to have done unjustly, by granting Process within Year and Day.

98. *Item*,

98. *Item*, It may be asked, Whether the Lords will sustain Process within Year and Day, against an universal Successor to the Defunct's Lands and Heritages? To the which it is answered, That this Member of Summons, as universal Successor may have a double Sense; for either it may be understood of universal Succession to the Lands and Heritages after the Defunct's Decease; in the which Sense it is coincident with the other Member before specified, of behaving as Heir by Intromission with the Mails and Duties, &c. & *in hoc sensu*, repeats the former Answer which was made to that Member; or otherwise universal Successor may be understood of the apparent Heir who was infest by his Predecessor in his own Lifetime, *sed post contractum debitum*, whereupon he is pursued; and in this Case it is not certain what the Lords will find, neither has it ever been practised; and there may be Reasons *pro* and *contra*, because the universal Successor may be esteemed *tanquam hæres*: But I think the Lords would incline to grant no Action till Year and Day be bygone, because he is pursued as apparent Heir, and for his Father'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 infers *gestionem pro hærede*, 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 hærede*: And further, he has not *jus deliberandi* within Year and Day; for albeit

albeit he would renounce the Lands wherein he is infeft, yet the Lords will not suffer him, but bind him to the Payment of all the Debt before the Fee, albeit the Debt exceed twice the Fee, which in my Judgment is nowise equitable.

Of moveable and heritable Bonds.

99. *Item*, The Distinction betwixt a moveable and heritable Bond of old was this, *viz.* The moveable Bond was, that which was made to the Creditor by simple Bond, for Payment of the Money at any Term, with a Penalty, and did not contain Obligement to infeft in Annualrent, nor to pay Annualrent to the Creditor, as well infeft as not infeft ; and an heritable Bond was, where the Debitor sold Lands or Annualrents 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 Forty Days Warning, more or fewer, as the Party pleaseth.

100. *Item*, This heritable Bond was made moveable, by using Requisition for the principal Sum, conform to the Condition of the Bond, and by raising and using Letters of Horning thereupon, for Payment of the principal Sum. But if the Creditor, after Requisition, received Annualrent, the Bond ceased to be moveable, and returned to its own Nature.

101. And

101. And this Diſtinction of moveable and h ritable Bonds, as it was juſt, ſo it was neceſſary, reſpect of the Diſtinction of an heritable Right a Infeſtment, which makes an heritable Bond juſt to be accounted *Heritable*, to which the Heir ha only Right, and not the Executor: For as t Heir (if Infeſtment had followed) could only b ſerved to the Annualrent, ſo he has only Right t crave the Infeſtment to be expede to him, whic was not done to the Defunct; and is in the Caſe as if the Defunct had bought Lands either abſolute ly or under Reverſion, and died before he got In feſtment. And this Diſtinction is neceſſary alſo becauſe it diſtinguiſheth betwixt that which is due t the Heir, and that which is due to the Executor; be twixt that which is due to the Relict, and tha which is due to the Bairns; and alſo diſtinguiſhet betwixt what Debts ſhould be paid by the Heir, an theſe that ſhould be paid by the Executor, or where of the Heir might crave Relief of the Executor.

102. But now the Forms of Bonds are ſo con ceived, and the Lords decide ſo uncertainly, tha it is exceeding hard to diſcern the Diſtinction be twixt heritable and moveable Bonds; for firſt, the Bonds are now conceived, bearing a Clauſe of *An nualrent*; and after that a Proviſion, *That the Creditor ſhall have Power to crave his principal Sum at any Time, without Requiſition*; Which confounds the Nature of heritable and moveable Bonds: For in the beginning of the Bonds, they are conceived *heritable*; and by a poſterior Clauſe, the ſame are made *moveable* at the Pleaſure of the

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Creditor, without expreſſing any external Act to diſtinguiſh whether it be heritable or moveable.

103. *Item*, The Lords, in the Deciſion of theſe Points, have been uncertain; for ſometimes they judged no Bonds to be heritable, except they bore Clauſe to infeſt: Othertimes they found a Bond heritable without a Clauſe of Infeſtment, if it bore Obligement to pay Annualrent to the Creditor, as well infeſt as not infeſt. And laſt, they have found it heritable, albeit it want both Clauſes, if it bears Obligement to pay Annualrent.

104. *Item*, The Bonds which commonly bear Obligement for Payment of Annualrent ſimply, bear firſt an Obligement to pay the principal Sum at a certain Time; and in caſe of Failzie, to be at the Pleaſure of the Creditor: Whereupon it often falls out to be diſputed, if the Bonds be heritable or moveable, *ante eventum termini*. Which Queſtion falleth out if the Creditor die before the Term, or if the Creditor be denounced Rebel before the Term: And in theſe Caſes the Lords have found the Sum to pertain to the Executor, and not to the Heir. Or if the Creditor was denounced before the Term, they have found the Sum to fall in Eſcheat to the King, by Eſcheat. And if the Debitor die *ante terminum*, they find it a Debt payable by the Executor, and whereof the Heir will be relieved, if he be compelled to pay *poſt annum & diem*, in reſpect the Creditor hath Power to purſue whom he pleaſeth *poſt annum & diem*; and if the Debitor die *poſt terminum*, the Bond will be counted heritable *quoad* the Heirs of the Debitor, al-

albeit it may be moveable *quoad creditorem*, if h
died before the Term, and will pertain to his Exe
cutors, & *contra*. If the Creditor died after th
Term, it will be heritable *quoad eum & ejus hære
des*; and yet it will be moveable *quoad debitorem*
if he died before the Term. Of old, the Lord
would grant No-Procefs againft the Executor fo
an heritable Bond, but now they grant Procefs
And there is no Law to give the Executor Relie
againft the Heir, as the Heir hath againft the Exe
cutor for his Relief, when he pays a moveabl
Debt; and which is worfe, the Relict and th
Bairns are defrauded, by this Confufion, of thei
natural and legal Portion, feeing the Executor wil
only be obliged to make Count to them of the In
ventary of the Teftament, with Deduction of the
heritable Debt which they have been compelled to
pay.

Of Heirs.

105. *ITem*, Albeit the Heir may be purfued *poft annum & diem*, yet becaufe there are di
verfe Sorts of Heirs, as the Heir general, Heir of
Line, Heir of Tailzie or Provifion, Heir of Con
queft, and Heir of fecond Marriage: Therefore
it is expedient to know by what Method the Heir
is to be purfued; wherein this Courfe hath been
conftantly kept by the Lords, That the general
Heir, or Heir of Line, fhall be firft purfued and
difcuffed before the Heir of Tailzie, and Provifion,
and

and Conquest, and Marriage: And when the Heir of Line is discussed, then the Pursuit is sustained against the remanent.

106. *Item*, The Heir of Line is properly *in successionibus ex linea recta*, and general Heirs comprehend both *in recta & collaterali*; and in *recta linea* there may be Heirs of Line of the first and second Marriage, and Heirs of Tailzie and Provision of them, but not of Conquest, which has only Place in *successione collaterali*.

107. It may be questioned whether the Heir of the second Marriage, or the Heir of Tailzie, should be first discussed? It would appear that the Heir of Tailzie should be first discussed, because the Heritage is parted betwixt him and the Heir of Line: And what the Heir of the second Marriage has commonly, he has it by Virtue of his Parents Contract of Marriage; and the Heir of the second Marriage is not *hæres alioqui successurus*, but allenarly by Provision. And on the other Part it is to 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; and where both, or any one, is Male, there is no Place for the Heir of Tailzie, which is made for excluding the Female: And therefore the Question will fall to be decided, where the Heirs of the first and second Marriage are both Females; in which Case they are both Heirs of Line, and so must first be discussed before the Heir of Tailzie.

108. *Item*, The Heir general must first be discussed, before the Heir of Conquest: And in Successions,

cessions, Heritage descends, Conquest ascends, and that is counted Heritage, to the which not only the Defunct succeeds as Heir to his Predecessors, but that also wherein he was infeft by his Predecessors, he being then apparent Heir.

109. *Item*, If the Heir of Conquest be once infeft, then the Conquest changeth its Nature, and will not ascend, but descend.

110. *Item*, The general Heir falls to the Heirship-Goods, and also hath Right to Tacks of Lands or Teinds, because nothing is counted Conquest, but whereupon Infeftment had or might have followed; and therefore it may be doubted, if heritable Bonds bearing Obligement of Annualrent, but not Obligement to infeft, should pertain to the Heir of Conquest, or to the Heir general.

111. And sicklike the Heir general will have Right to Reversions and Assignations to Gifts of Ward, Nonentry and Escheat; but with this Caveat in Reversions, That if the same be of Lands to which the Heir of Conquest doth succeed, in that Case, they will pertain to the Heir of Conquest, and not to the Heir general: As was decided betwixt *Robert Pitcairn* Abbot of *Dunfermling* his Heirs, *&c.*

112. And sicklike the Heir general has Right to the Office of Tutory of the Son and Daughter of the Defunct, and in respect thereof hath this Advantage, That he may procure the Bairn to enter Heir to his Father; which being done, the Lands cease to be Conquest, and become Heritage: And if the Bairn dies without Heirs of his Body,

Body, the Tutor will succeed and his Heirs to the Lands, and not the Heir of Conquest; whereas if he Bairn had died not infest, the Lands would fall o the Heir of Conquest, and not to the Heir general: And the Reason of the Difference is, because n the 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 o be served to the Lands, as Heir to the Bairns who were last infest, and not as Heir to the Father, in whose Person it was Conquest.

113. *Item*, In Successions the Male doth exclude the Female, except only in a Case which is ingular by the Practick of *Scotland*, which is this, That the Sister-german is preferred to the Succession of Lands and Heritages wherein her Brother-german died last infest and seased, and excludes the Brother who is in the same Degree with the Defunct, but not German, but only Father's Bairns, lbeit if his Brother had died uninfest, the second Brother being of the other Marriage, would have succeeded to the Lands, & *ratio differentiæ est*, because the Brother, albeit not German *quoad patrem*, is preferred to all the Females, but not so *quoad fratrem*, who is infest 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, the passing or not passing of Infeftments alters the Case and Course of Succession.

114. *Item*, The like Case is where a Number of Daughters succeed to the Father, who succeed *pro æquis portionibus ubi non est masculus*; and if the

Daughters ſome of them be German, and ſome on-
ly on the Father's Side: If one of the German
die infeſt, her Siſter-german ſucceeds to her, an
not the remanent; but if ſhe die uninfeſt, *omn*
ſuccedunt ex æquo. And ſicklike, where a Numbe
of Siſters did ſucceed to the Father, and one o
them die leaving behind her a Bairn; if the Bair
die not infeſt, the remanent Siſters-german, *ſucce-*
dunt ex æquo, becauſe they are to be ſerved Hei
to their Siſter who died laſt veſt and ſeaſed, or t
the Father, if their Siſter was not infeſt. But i
the Bairn was infeſt, either as Heir to the Mo-
ther, or as Heir to the Mother's Father; in tha
Caſe, becauſe the Succeſſion muſt be to the Bair
who died laſt veſt and ſeaſed, therefore it muſt g
to the neareſt of Kin on the Father's Side, and no
on the Mother's Side: And therefore the Brothe
or Siſter of the Bairn deceaſed (if there was an
of the ſecond Wife's) would be preferred to th
Succeſſion; and where there was none, the Fa-
ther himſelf will be preferred; and failzieing o
him, his neareſt of Kin upon the Father's Side.

115. But it is to be conſidered, that ſeeing thi
Diverſity is only in reſpect of Infeſtment, tha
therefore in the Caſes where there is no Infeſtmen
either not requiſite or not paſt, the Heir to th
Defunct is the neareſt upon the Father's Side: A
for Example, If one die leaving three Daughters,
and that he had Right to ſome Reverſions an
Tacks of Lands; and if one of the Daughters die
leaving a Bairn, who before its Deceaſe was ſerve
and retoured general Heir either to his Mother o
Goodſire;

oodsire ; in this Case, *jus est acquisitum perfectè* the Bairn : Which after the Bairn's Decease, lls to the nearest of Kin on the Father's Side, d not on the Mother's Side. And sicklike, if e Father of the three Daughters had heritable onds or Contracts whereupon he got no Infeft-ent before his Decease ; in this Case, the Bairn the Sister-Defunct being retoured general Heir, said is, transmits the Right to the nearest of n upon the Father's Side : But if either the Fa-er or three Daughters were infeft upon heritable onds or Contracts, or if the Daughter deceased tained herself infeft upon the heritable Bonds or ontracts ; in these Cases, or either of them, the irn being only served general Heir, but not in-t, would not transmit the Succession to the Fa-er's Side, but to the Mother's Side ; because ei-er the Mother or the Mother's Father died last ft and seased, to whom the Heirs of the Bairn the Father's Side cannot possibly succeed.

Of Ward and Nonentry.

16. *ITem*, If the Lands which pertained to the Defunct hold Ward of the Superior, the eir being Minor cannot enter till he be of perfect ears, which in the Male is Twenty one, and in the emale Fourteen Years : But if the Superior dif-nse with the Minority, they may enter ; and e King's Majesty does never refuse to grant Dif-enfation (which passeth the Cashet and Signet only)

only) providing the Donator crave the ſame, and conſent thereto; otherwiſe the Licence and Diſpenſation bears this Clauſe, *That it ſhall be but Prejudice to the King and his Donator to the Right of the Ward.*

117. *Item*, The Donator to the Gift of Ward may enter immediately to the Lands without a Declarator, and may uplift the Mails and Duties, and warn the Tenants to remove: And the common Exception that uſes to be proponed in Removing is, That the Defenders are Tenants to ſuch a Perſon who is heritably infeſt, and he not warned, is not relevant againſt a Donator to a Ward, becauſe the Donator 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.

118. *Item*, The Tacks or Infeſtments made by the Defunct will not defend the Tenants or Perſons to whom the ſame is made from the Donator's Action of Removing: And albeit the Infeſtments 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 is, becauſe all Confirmations granted by the King bear this Clauſe, *Saving and Reſerving to his Majeſty and his Succeſſors the Rights, Duties and Services due to them forth of the Lands whereof Confirmation is granted.* But where the Infeſtment is given to be holden of the King, and confirmed, that ſtays the Ward *pro tanto*, becauſe the King cannot have the Ward of the Lands wherein he has a Vaſſal living; but the Ward is ſuſpended. In the

he Infeftment confirmed was temporal, and for Lifetime only; as is commonly in Infeftments granted by the Husband to the Wife, and if the Infeftment confirmed was heritable, then the Ward could not vaick by the Decease of the Disponer, nor by the Minority of his Heir; because he was fully disseased of the Right of the Lands before his Decease.

119. *Item*, The Relict will have Right to the Terce, notwithstanding of the Ward.

120. *Item*, If the Heir enter not after the Expiring of his Minority, then the Lands are in Nonentry, and not in Ward, because the Ward is ended; and during the Ward it could not be called *Nonentry*, because the Heir could not enter; and therefore Nonentry begins after Expiring of the Ward: But the Nonentry subsequent to the Ward, is of the Nature of the Ward, and not of the Nature of common Nonentry, especially if the Wardatar be in Possession; for then he continues his Possession without obtaining Declarator upon the Nonentry, and he has Right to the full Mails and Duties, and may remove Tenants, as he did the Time of the Ward: Whereas in Nonentry, there is not a Title and Right without a Declarator; and when the Declarator is obtained, there is no more due for the Years preceding the Declarator, but the retoured Duty, if any be: But where no Retour is, in that Case the Donator to the simple Nonentry will have Right to the full Mails.

121. But it is to be considered, that the Nonentry subsequent to a Ward, pertains not to the

Donator of the Ward, except for three Terms af-
ter Expiring of the Ward ; for after that, the se-
cond Donator will have Right. Likeas also the
first Donator to the Ward, if the Heir come to
Majority, and might have entred, but deceaseth
before he entred *de facto*, leaving behind him
Son or Brother, Minor ; in this Case, the first
Donator has no Right to the Ward of new, fal
by the Minority of the second Heir ; but the
King hath Power of new to dispone the Ward to
second Donator : And there is no other Right
granted but three Terms after the Expiring of the
Minority, albeit it might seem that it is not a new
Ward, but the same vaicking by the Decease of
one and the self same Fiar ; and the Gift granted
by the Fiar bears the Ward to be disponed for all
Years since the decease of the Fiar, and ay and
while the Entry of the righteous Heir ; but the
Lords fand, That ay and while the Entry of the
righteous Heir respected not *actum*, but *faculta-
tem vel potentiam*, and *in rei veritate* ; the de-
cease of one Fiar, and the Unity of one Person de-
ceasing, 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 of
the Predecessors was infeft holding Ward ; for o-
therwise 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 o-
ther Superior, might compel the Heir to enter, or
otherwise to bar them from the Lands by the

Non-

Nonentry, either simple, or by that which is subsequent to the Ward; yet it is not reasonable that the Superior's neglecting of his own Benefit in bygone Time, should prejudge him of the Ward and Marriage hereafter, when the same vaicks: And this was found *quoad* the Ward, in an Action pursued by the King's Majesty, then being Duke of *Albany*, and Donator to the Ward of the Living of *Buchan*, against *William* Earl of *Morton*, being first Donator thereto. And the other, in the Matter of Marriage, was found betwixt Sir *John Home* of *North-Berwick*, Donator to the Marriage of *Adam French* of *Thornidykes*, against *John Cranston* and the said *Adam* his Sisters, who came to the Lands by decease of their Brother. But it is to be observed, that if the first Heir (by whose Minority the Ward vaicks) deceaseth Minor; in that Case there is no new Vacation of the Ward, but the first Ward continues in Favour of the Donator. And sicklike, if the first apparent Heir die unmarried; in that Case the Marriage of the next apparent Heir will pertain to the first Donator, and not to a second. But it may be doubted, if the first Heir die married, but Minor, and not infeft, whether the King's Majesty falls to 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 cannot fall by the Decease of one and the same Vassal, but to one Marriage, especially where 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 may be urged for the King's Majesty, That he might have the Marriage of the apparent Heir of his Vassal, one or more, as the same falls out; and he doth fall the Marriage of all the Females, albeit there were never so many of them. And as the King's Majesty continues his Benefit of the Ward, so the second Marriage is but a Continuation of the first: And albeit the King's Donator can but crave 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 it cannot exclude the King's Majesty from disponing of the second Marriage when it vaicketh.

122. But all Things being pondered, it seems that the Decision, in Justice, must fall in Favour of the King or any other lawful Superior, to have all the Marriages as they vaick: But in this Case the Lords will have a Care of the Modification of the Avail; and so the Lords inclined in this Case, in *Northberwick*'s Action and *John Cranston* the King's Donator, of the Ward of Marriage of the Daughters; for the Lords gave the Benefit of the two Marriages to two Donators, but modified the Avail of the first Marriage to a very mean Matter: But yet the Lords found, That the Avail of the first

ſt Marriage, modified, as ſaid is, ſhould be paid y the Daughters, albeit they were neither Heirs or Executors, but as Heritors of the Lands by hich the Marriage fell; and found, That the ids Lands might be poinded, diſtrinzied, and ap-riſed for the ſame, and ſo found the Right of the Iarriage real *contra fundum*; which was well de-ided, becauſe the Marriage is a Part of the *Red-endo* due to the Superior, whereof he cannot be efrauded by the Nonentry of the apparent Heir o the Lands.

123. *Item*, It is to be remembred, That the Vard and Marriage cannot vaick to the King, but y the Death of one who was either actually infeſt n Ward-Lands, or might have been infeſt as pparent Heir to one of his Predeceſſors: But if he King's Vaſſal was denuded of the Right of the Vard-Lands by Reſignation in the King's Hands, n favours of his eldeſt Son, and apparent Heir, re-erving his own Liferent, with the Reverſion, up-n a Roſe-noble, whereupon his Son was ſeaſed efore his Fathers Deceaſe. In this Caſe there is o Vacation of Ward, or of Marriage by the De-eaſe of the Father, becauſe he was not the King's eritable Vaſſal before his Deceaſe, but was de-uded in Favours of his Son, *ut ſupra*.

124. *Item*, When the Heir of Ward-Lands is major, and craves to be entred, he muſt pay to is Superior a Relief for relieving him out of his Vard; which Relief is the retoured Duty of the Lands for one Year, and that by and attour the Nonentry, if the Lands be found by the Retour to have

have been in Nonentry for the Space of one Term or more, after expiring of the Ward.

125. *Ad imitationem* of this Relief in ward Lands, the Vaſſals of blench Lands do pay alſo 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 feudifirmam primo anno introitus*; and if the Charter bear it not, yet the Cuſtom of the Chancery, is, not to give out a Precept upon a Retour, but with the Clauſe, *Capiendo ſecuritatem pro duplicatione feudifirmæ.*

Old and new Extent.

126. MEmorandum, The Retour of ward and blench Lands, differ not in Form, but is ruled according to the Cuſtom of the Shire where the Lands are retoured, without Reſpect of the holding blench or ward; but the retoured Duty of the Feu-Lands, is always the Feu-duty: And as to the Quantity of the retoured Duty in blench and Ward-Lands, it is ſometimes the double, ſometimes the triple or quadruple, ſextuple or ſeptuple of the old Extent of the Lands in every Shire; as in *Fiſe*, commonly fifth or quadruple; and in the *Weſt*, it is commonly the ſixth or ſeptuple; whereof they complain not ſo much for the Retours, but becauſe their ſimple Mail of old Extent was too high, according to which they pay the King's Taxation; and in the *Merſe*, and other Pro-

rovinces bordering with *England*, the retoured
uty is only the single or the double of the old
xtent at furthest.

127. And the Reason of the Difference of the
eight of the new Extent may be taken from the
ime and Reason of setting the same; for the old
xtent was made in Time of Peace, and the new
xtent was made in Time of War; and in respect
ereof, the Places of the Kingdom nearest to *En-
and*, with whom we had Wars, and who were of-
n employed for Defence of the Kingdom, had
eir new Extent made to the double, simple, qua-
uple, &c. And the Places more remote, as *Gal-
way*, and far North, had their new Extents made
the sextuple or septuple: But this is not ne-
ssary, but probable; only this is certain, That
ere were two Extents made of the whole Lands
the Country, according to the Worth and Esti-
ation at the Time; whereof one is called the
d Extent, which was taken *tempore pacis*, and
e new, which was taken *tempore guerræ*; and ac-
rding to the old Extent, every Pound Land pays
thin the Kingdom its Taxation to the King,
unting 30 Shill. for each Pound Land at each
erm, which was Three Pound a Year, when the
axation was *L.* 10000, which makes the old Ex-
nt of the whole Lands come to 33333 *l.* 6 *s.* 8 *d.*
thereby.

128. New Extent, is that which we call the re-
ured Duty, whereof the Reason is, because all
rieves bear this Clause, *Et quantum valuerunt
ctæ terræ olim vel tempore pacis, & quantum nunc
valent*

valent tempore guerræ ; and therefore the Inquest in the Service of their Brieve, are bound to insert this Point as well as the rest ; and because the Answer or Service must be returned to the Chancery, after which the Service is called a 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 Land upon his Service, to pay the new Extent to the King, either for Relief or Nonentry, but not the old Extent.

129. *Item*, The Director of the Chancery, upon their Service being retoured, directs Precepts inclosed in white Wax, as the Brieves are to the Sheriff of the Shire where the Lands ly, which Precept bears a Command to the Sheriff to give Sasine of the Lands to the Person who is served and retoured Heir to his Predecessor, but with this Clause, *Capiendo securitatem pro decem aut viginti libris, &c.* or so much more as the retoured Duty comes to yearly, for so many Years as the Lands by Retour are found to be in Nonentry ; and also for a Years Duty of the new Extent or retoured Mail *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 ; and at the Delivery of this Precept of Sasine by the Director to the Party, there is insert by the Director in his Book, called, *The Book of Respondeo*, a Note of the Sums, for the which the

She

[Sh]eriff ſhall take Security in this Form, *Reſponde-[at] vicecomes pro ſumma & ratione ſaſinæ, &c. [da]ndæ tali, &c. de terris, &c.* And according to [th]is *Reſpondeo*, the Sheriff is charged yearly to [m]ake his Accompt to the Exchequer, which is [he]ld yearly in *July*.

130. Conform to this Precept, the Sheriff, when [th]e ſame is preſented to him, takes good Security [fr]om the Party for Payment of the Money con-[ta]ined in the Precept, and thereafter gives Saſine, [an]d for giving Saſine, takes a Saſine Ox: And al-[be]it the Precept be not preſented to the Sheriff, [no]r Saſine taken thereof, yet the Sheriff, by Cu-[ſt]om of the Exechequer is ſtill charged with the [R]eſponde, and compelled to pay the ſame, where-[of] there is no probable Cauſe but this, That it is [p]reſumed, that the Party Raiſer of the Precept [w]ill not neglect to take Saſine on the Precept, e-[ſp]ecially ſeeing it bears this Clauſe, *Præſentibus poſt [pr]oximum terminum minime valituris.*

131. But albeit Saſine be taken, and Security [gi]ven for the Money contained in the Precept, yet [u]pon Supplication of the Party, who was ſeaſed, [m]ade to the Lords of Exchequer, craving to be [fr]eed of the Payment thereof, upon ſome juſt Rea-[ſo]n, whereof this is commonly one, That the Gift [of] the Ward and Nonentry was diſponed to him-[ſe]lf, or to a Donator, to whom he has given Sa-[ti]sfaction; the Lords will relieve both the She-[ri]ff, and the Party Giver of the Security: But al-[b]eit the Party ſhow a Gift of Ward, Nonentry, [a]nd Relief, and therefore be freed from the By-runs

runs, yet he will be never freed from Payment of the Relief, albeit it be contained in the Gift, because such is the Custom of the Exchequer.

132. *Item*, It is to be remembred, That albeit there be Gift granted of Nonentry or Ward simply, yet if the same be taxed, the simple Gift will not comprehend the Taxt, except the Taxt be disponed expresly; *ratio est*, because the Taxt-duty being liquid by the Infestment, is a Part of the King's proper Rent and Duty; whereas the other is a Casuality only; for the Taxt-ward and Nonentry may be craved, and the Ground poinded therefore, notwithstanding that all the Years of the Ward are expired: But in a simple Ward, the Ground cannot be poinded, but the Action is only competent against the Intromitters with the Mails and Duties; for a Taxt-ward is of the Nature of a Feu-duty during the Time of it, or of Annualrent disponed furth of the Lands, and a simple Ward is of the Nature of an Infestment of Property, *ad tempus*.

Precepts directed to the Superior.

133. WHere Lands are retoured to be holden of another Superior than the King, in this Case the Director of the Chancery, at the Request of the Party, gives forth Precepts closed in white Wax, directed to the Superior of the

e Lands, commanding him to infeft his Vaffal
the Lands to the which he is retoured Heir,
e Vaffal doing that to the Superior, which he is
liged to do of the Law, upon which Precept the
affal either perfonally or a Procurator for him,
es to the Superior, and requires him to give In-
ftment; which Infeftment, otherwife called Pre-
pt of Safine, the Vaffal or his Procurator pre-
nts to the Superior, written *in mundo*; and if the
perior refufe or delay, takes Inftrument there-
on in Prefence of a Notar and Witneffes, and
turns the fame to the Director, who thereupon
ves forth a fecond Precept, called *Meminimus*,
herewith the Superior is of new required, and In-
uments taken, *ut fupra*; upon the Report where-
, there is a third Precept directed, called *Furca*,
hich is ufed by the Vaffal, according to the other
o; and upon the Report of this laft, the Di-
ctor gives a Precept to the Sheriff of the Shire
here the Lands ly, commanding him to give the
affal Safine of thefe Lands, in refpect of the
perior's Contempt. But commonly the Superi-
s, before the directing of the laft Precept for giv-
g of Safine, ufe to pafs Sufpenfions before the
ords of Seffion, and fummons the Vaffal to com-
ar before the Lords, to hear and fee the Charge
ifed upon thefe Precepts fufpended; which Suf-
nfion is commonly granted by the Lords, by
onfignation of a Precept of Safine fubfcribed by
e Superior; and at the Day of Compearance,
e Reafons of Sufpenfion are difcuffed before the
ords, and Juftice done therein, according to the
Re-

Relevancy thereof. The Reasons of the Suspension are commonly these, 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 Nonentry so many Years, which must be paid; which Reason is relevant in the Law, and admitted by the Lords; because, as it is the Condition of the Precept, so it is verified by the Retour.

134. But there be many other Things due to the Superiors, whereupon also they use to found the Reasons of Suspension; such as the Feu-duty owing of divers Years bygone, the Liferent of the Vassal deceased, or the apparent Vassal 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 annailzie without the Consent of the Superior: but none of these will be found a relevant Ground of Suspension; and notwithstanding thereof, the 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 his Vassal for the said Duties and Casualities.

135. But it is to be remembred, That 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 constat*; and Sasine taken upon this Pre-

cept

[exc]ept, gives the Vassal as good Right to the Lands, [a]s if he had been retoured.

Precepts of Sasine and Clare constat.

136. BUT there is a Difference betwixt a Sasine upon a Retour, and a Sasine [u]pon a Precept of *Clare constat*: The Sasine upon [th]e Retour verifies him to be Heir to his Predecess[o]r, & *active* & *passive*; but the Sasine of *Clare* [co]*nstat* only *passive*, except against the Superior, [co]*ntra quem valet utroque modo*; and also is valid [q]*uoad* the real Rights of these Lands as fully as [u]pon a Retour.

137. And further it is to be adverted, That the [S]uperior by suffering his Vassal to be entred by [th]e Sheriff, tines nothing but the Sasine Ox; for [n]otwithstanding thereof, he remains Superior as [b]efore.

138. For it is to be considered, That this Form [o]f Precept against the Superior for infefting his [V]assal, is only in this Case, where the Superior [st]ands infeft in his Superiority; but where he is not [in]feft, and only apparent Heir to the Superiority; [i]n this Case the Vassal craves no Precept upon his [R]etour, because it would be unprofitable to him [t]o be infeft by one who is not infeft himself, but [f]ollows the Order prescribed by the Act of Par-

 liament

liament *James* III. anent charging the Superior's apparent Heir to enter to the Superiority within 40 Days if he be within, and upon 60, if he be without the Kingdom.

Tinsel of Superiority.

139. AFter which Charges, the Days being expired, the Vassal raiseth Summons upon 21 Days Warning before the Lords; and also against the Superior's Superior, to hear and see his own Superior tine his Superiority, during his Lifetime; and the mediate Superior to be decerned to enter and receive the Vassal to the Lands; upon which Summons, if the Vassal get a Sentence and Decreet, then the Superior is decerned to tine his Superiority, and *de facto* tines it during his Lifetime, and all Casualities thereof.

140. But it is to be remembred, That if the mediate Superior be not infest, 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 the Summons concludes against the Director, to give forth Precept for seasing the Vassal in the Lands.

141. *Item*, If the Superior holds the Lands Ward, and be Minor, and unentred, he may be charged by

y his Vaſſal to enter to his Superiority within
o Days, and ſummoned to that Effect; but the
Lords will not decern him to tine his Superiority
urante warda, but only declares the Diligence
one by the Vaſſal, to be as effectual to him, as if
e was ſeaſed, both for ſtaying the Nonentry of
he Lands, (if any be) in reſpect of the Superior;
nd alſo in reſpect of the Vaſſal *quoad effecta pro-
rietatis* againſt his Tenants, and others having
ntereſt.

142. *Item*, It is much queſtioned, in the Caſe
where the Superior is decerned to loſe the Supe-
iority, whether he tines it during his own, or his
Vaſſal's Lifetime, or both, whilk hath great and
robable Reaſons on all Sides: For if the Superi-
r, who was decerned to tine the Superiority, de-
eaſe; and he who ſucceeds to him, enters to the
uperiority, it would ſeem reaſonable that the
Vaſſal ſhould become Vaſſal to him who thus en-
ers, and not remain Vaſſal to the Superior me-
iate; whereof this may be a great Argument,
That the mediate Superior receiving the Benefit
hat is due to him by Law, by the Entry of his
wn Vaſſal, whereby he will fall all the Caſuali-
es of the Superiority, which will juſtly pertain to
im, as the eſcheat of Liferent, &c. that therefore
e ſhould not alſo retain the Caſualities which
ay vaick to him as Superior to his Vaſſal's
Vaſſal.

143. On the other Part it is urged, That the
ub-vaſſal being entred by the mediate Superior,
nd become once his Vaſſal, cannot ceaſe to be his

Vassal, without his own Consent, seeing he has th
Benefit, *vel jus quæsitum quod non potest ei invit*
auferri, *viz.* That he holds either immediately o
the King, or of another mediate Superior, b
which he has fewer Superiors interjected betwix
him and the King.

144. *2do*, The Sub-vassal is not put *in tuto*
for it may be that the Superior shall die shortl
after he enters *eo vivente*; and that the next Suc
cessor shall ly out of the Superiority; in whic
Case he shall ly under the Danger of Nonentr
for Fault of a Superior, and not get a Superior ti
he use the former Order.

145. *3tio*, The mediate Superior may be pre-
judged, because albeit he get a Vassal by his Entry
yet he only gets a Vassal of Superiority, and no
of Property; so that if the Sub-vassal should b
Year and Day at the Horn, either before or afte
the Entry of the immediate Superior, the Liferen
of the Sub-vassal would pertain to the immedi-
ate Superior, who is newly entred, and not to th
mediate Superior, *quod est absurdum ex lege.*

146. *Item*, It is thought that the Superiority
must be lost during the Lifetime of both conjunctly
that is to say, of the Superior and Vassal, other-
wise, if the Vassal died, the immediate Superior
who has lost his Superiority, being alive, the Hei
of the Vassal would not have a Superior to ente
to, but would be forced to charge his immediat
Superior to enter with Certification, That h
should lose his Superiority, *quod est absurdum*, be-
cause he has lost it already.

147. Bu

147. But in this there would be a greater Que-
ſtion, if the immediate Superior did enter and ob-
in himſelf infeſt befor the Vaſſal's Deceaſe : But
l theſe Queſtions I leave to be diſpute, becauſe
ey are not decided.

148. *Item*, To the Queſtion, this Conſideration
ay be added, What if the Vaſſal were to ſell his
ands? Whether the Confirmation of the mediate
uperior would be a ſufficient Right to the Ac-
uirer or not? And the Reaſon of this Queſtion
, becauſe a great Part of the Right of the Lands
epends upon the Confirmation of the right Supe-
or; and, for clearing hereof, the Particulars fol-
wing are to be adverted to; for Lands may be
ld to be holden either of the Anailzier or of
e Superior: The firſt is called a baſe Infeftment,
d the other is called a publick Infeftment, *in-
oatione ſed non perfectione*, till it be confirmed.

Baſe and publick Infeftments.

49. A Baſe Infeftment being diſponed to be
holden of the Diſponer being cloathed
ith Poſſeſſion, is a perfect Infeftment *in ſuo ge-
ere*, but is not ſo perfect and publick as the other
 be holden of the Superior.

150. A baſe Infeftment is ever to be preferred
 an Infeftment given to be holden of the
uperior, if it be not confirmed by the Supe-
ior, becauſe it is not an Infeftment till it is con-

 firmed;

firmed ; and it is so null of the Law, that the Nullity thereof is ever received by Way of Exception, if the Title and Infeftment alledged to be null, bears to be holden of the Superior.

151. *Item*, Albeit it be confirmed by the Superior, yet the base Infeftment which cloathed with Possession is preferred thereto, and the publick Infeftment confirmed, as said is, will only carry the Receiver, to the Superiority of that base Infeftment, but the Property will pertain to the Possessor by Virtue of the base Infeftment.

152. 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 Confirmation thereof, *quia tunc medium impedimentum interveniens* of the base Infeftment cloathed with Possession before the Confirmation, hinders the Confirmation to be drawn back to the Date of the Charter confirmed.

153. *Item*, Base Infeftment, whether anterior or posterior to the Publick, if it be not cloathed with Possession, but that the Publick be confirmed before they apprehend Possession, will be postponed to the Publick, and the Publick preferred thereto. But this suffers an Exception of base Infeftments granted by Husbands to their Wives, depending upon Contracts of Marriage, which in Favour of Marriage are accounted 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 was her Possession

ssion. But if the Infeftment granted to the Wife, was granted *stante matrimonio*, and base, and that by and attour the Lands to the which she was provided by Contract of Marriage, in that case her base Infeftment has no Privilege before a publick, except it be cleared that there was no Contract of Marriage at all, and that she had quitted the Lands to the which she was provided by the Contract of Marriage, and gotten the other for the same; in which Cases she will bruik her Lands with the like Privileges, 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 Fee *stante matrimonio*, providing it be effeiring to his Estate, and not exorbitant.

154. *Item*, A base Infeftment apprehending Possession *per constitutum*, that is to say, where the Lands are set in Tack to the Disponer, for Payment of a Duty, which Duty is paid to the Receiver of the base Infeftment, the said Infeftment is accounted cloathed with Possession, *per hanc constitutionem civilem*, sicklike as if he were naturally in Possession.

155. *Item*, The like is, where the Haver of a base Infeftment bruikes *per usum fructuarium*, whose Liferent is given or reserved in the base Infeftment.

156. But in these two last Cases, the base Infeftment is only preferred to the Publick *inter extraneos*, *sed ubi est inter suos & liberos ex una, &*

extraneos ex altera; the Strangers, with the Publick, are ever preferred to the Base granted by a Father to his Children, either *per constitutum*, or *per reservationem usufructus*.

157. *Item*, Infeftments of Annualrent given base, are accounted cloathed with Possession after the Date of the base Infeftment, if the Giver thereof make Payment of the Annualrent for one Term or more, albeit this Payment being made by the Debitor, who is obliged thereto by his Bond, may as well be referred to the Bond, as to the Infeftment; and that the Creditor recived no real nor natural Possession by uplifting the Annualrent furth of the Lands, or from the Tenants Occupiers thereof.

158. *Item*, 'Tis thought that an Infeftment of Warrandice, albeit base, in Case of Eviction of the principal Lands, will be preferred to a publick posterior Infeftment, albeit the same did not apprehend Possession before the Eviction, in respect it could not apprehend Possession before it; and *fictione juris* the Possession of the Principal Lands is holden for Possession of the Warrandice; but this is not *sine suo scrupulo*, and may be made disputeable.

159. In the Concourse of two base Infeftments, the prior is ever preferred to the posterior, except the second be cled with Possession by the Space of Eight or Ten Years, in the which Cases the Possessors are preferred *in judicio possessorio*; That is to say, in Removings, and double Poindings, in which Case the Exceptions proponed upon the base

ase Infeftment (albeit pofterior) cloathed with he faid Number of Years, is ever found relevant, otwithftanding the other's Priority, except he an reply upon Poffeffion alfo apprehended by his rior Infeftment either civil or natural ; but in *ju-icio petitorio, viz.* in Actions of Reductions, the rior bafe Infeftment is ever preferred to the po-terior, without refpect to the Poffeffion.

160. *Item*, That which is fpoken of publick In-eftments to be holden of the Superior by Confir-nation, is alike true in publick Infeftments of Lands or Annualrents granted to the Receiver by he Superior, upon the Refignation of the Annail-ier for a publick Infeftment, upon a Refignation nd Confirmation from the Superior, are alike in he Practick of *Scotland, & funt jure noftro pares ermini*; and albeit they be alike *quoad fuperiorem*, et they have fome Imparity and Difference other-vife: For an Infeftment upon Refignation com-rehends *univerfitatem jurium*, and fpecially *omnia ura Reverfionum abfque ceffione*; whereas an In-eftment confirmed doth not properly comprehend *ura Reverfionum*, except they be affigned; at leaft t has often been difputed, but never yet found ful-y refolved.

161. *Item*, After Refignation made by the Vaf-al in the Superior's Hands (which is commonly lone by Procuratory and Inftrument of Refignati-on) in Favour either of the Superior *ad remanen-iam*, or in Favour of a third Party *in favorem*. The Refigner can do no Deed in Favour of ano-her Party, in Prejudice of the Refignation made

ut

ut ſupra; and if betwixt the Reſignation made i
Favour of a third Party, and accepted by the Su
perior, the Reſigner ſhould give a baſe Infeftme
of the Lands to be holden of himſelf, in Favour o
another Perſon, that baſe Infeftment, albeit it ſhou
apprehend Poſſeſſion, before the Superior grante
the Infeftment upon the Reſignation, yet the ſam
will be null and reduceable, as granted *à non ha-*
bente poteſtatem, that is, by the Diſponer who wa
denuded by the Reſignation: And yet if the Diſpo
ner had denuded himſelf, not by Reſignation, bu
by Charter to be holden of the Superior, and Sa
ſine following thereupon, he might at all Times be
fore the Confirmation of the ſaid Charter, grant
baſe Infeftment, which apprehending Poſſeſſion be
fore Confirmation of the ſaid Charter, would b
preferred to a publick Infeftment; ſo paſſing th
Confirmation, as ſaid is, & *ratio differentiæ* e
becauſe in the Reſignation intervened *duplex actu*
one of the Reſigner, another of the Superior ac
cepting the Reſignation: But in the other, ther
is only the Act of the Diſponer; but not any Ac
of the Superior, till the Date of the Confirmatio

162. And albeit after the Reſignation actuall
uſed, no baſe Infeftment can prejudge it, yet
after the Reſignation uſed and accepted, the Re
ſignant ſhould make another Reſignation in Favo
of any other Party, whereupon the Superior ſhou
give Charter and Saſine; this ſecond Reſignatio
with Infeftment following thereupon, would b
preferred to the ſaid prior Reſignation whereon n
Infeftment followed; and the Reaſon of the Diffe
renc

ce is this, that albeit *utrobique est duplex actus*, the Deed of the Superior is *tantum actus im-fectus, & inchoatus quoad eum, & quoad esse eriale, & esse formale & probatorium*; for the eptation of the Superior has no other Warrand the Assertion of the Notary who was Notar to Instrument of Resignation, which by the Law he Kingdom is not sufficient in heritable Rights, will not compel the Superior (being otherwise illing) to give Infeftment conform thereto: l albeit the Instrument of Resignation was seal- and subscribed by the Superior the Time of the ing thereof, which (*quoad esse probatorium*) ld have been sufficient of the Law, yet it would be *jus reale* to the Person in whose Favour the ignation is made, but only be the Ground of a onal Action, to compel the Superior and his rs to give Infeftment conform thereto; and efore if a third Party should either acquire the eriority from the Superior, and pass Infeft-t thereupon; or if the Superior should give ftment of the Property to any other Person n the Resignation of the Vassal, who thereupon ld take first Sasine, there is no Question but real Right either of the Superiority or of the perty, would fully subsist and stand in the Per- of these who received the foresaid Infeftment, that notwithstanding of the foresaid first Re-ation made by the Vassal, and accepted by the erior, as said is.

63. *Memorandum*, The Superior cannot be pelled either to accept a Resignation, or to confirm

confirm an Infeftment, but at his own Pleasure and Εἰσδεκτικὸν is commonly a Year's Duty to the Superior who receives a new Vassal, except the King, whose Composition is made by the Lords of Exchequer.

164. The only Remede which Buyers have where the Superiors are unwilling to receive them, is to comprise the Lands from the Seller, whereupon the Act of Parliament *James* III. 1469 they will compel the Superior to enter and receive them, they paying a Year's Duty to the Superior by the Modification of the Lords.

165. *Item*, Albeit the Superior cannot be compelled to receive a Buyer, yet he will be compelled to receive an Heir of his Vassal, by Payment of the retoured Duty.

Necessity of Confirmation.

166. *ITem*, 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 which may follow by Forfeiture and Recognition, if the Infeftment be given to be holden of the Disponer.

167. *Item*, The Confirmation of all Kirk-Lands is necessary, by Act of Parliament; and the Want of Confirmation of Infeftments of Kirk-Lands renders the Infeftments null *ipso jure*.

168. *Item*,

168. *Item*, The Confirmation of a base Infeftment saves from Forfeiture and Recognition, but not from Ward, except Infeftment be given to be holden of the Superior.

Of Wadsets, Reversions and Regress.

169. *ITem*, Where Lands are disponed in Wadset, under Reversion, either the Wadset to be holden of the Disponer or of the Superior: if to be holden of the Superior, there is a Necessity of Regress to be granted by the Superior to the Vassal who gives the Wadset, otherwise when he redeems by Virtue of the Reversion, the Superior may not be compelled to receive him, because he did not consent to the Reversion, but only to the Alienation, which *quoad eum* was simple and absolute.

169. And if the King or any other Superior give a 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 thereon, who will give Command to the Director to give forth Precepts for that Effect, if the Lands be holden of the King; or direct Letters of Horning to charge other Superiors to receive their Vassals.

170. *Item*,

170. *Item*, If the Wadset be given to be h
den of the Disponer, in that Case, so soon as t
Order of Redemption is used and declared, th
is no Need of a new Sasine to the Redeemer, b
it is sufficient that the Wadset-Haver subscrib
Renunciation, and grant the Lands lawfully
deemed: And the Reason wherefore there is
Necessity of a new Sasine is, because the Giver
the Wadset was never disseased, he remaining f
Vassal to his own Superior; but gave allenarly
base Sasine to be holden of himself, which by t
Renunciation accresceth to the Sasine which he h
standing in his Person, holden of his own Superi
and is in Effect a Consolidation of the Prope
which was wadset with the Superiority, which r
mained in his Person unwadset and undisponed.

Of the Nature of Reversions.

171. ALL Reversions are *stricti juris*, & n
transeunt in hæredes vel assignatos, n
eorum expressa fiat mentio in corpore reversioni
and yet if the Right of a Reversion be comprise
it will pertain to the Compriser, albeit the Reve
sion was only made to Heirs, and not to Assigni
as was practised betwixt the Earl of *Errol* and B
kie, whereof the apparent Reason is, That t
Comprising is not a voluntary Assignation, but n
cessary and judicial. But if the Reversion bear
be made to the Receiver and his Heirs, excludi
all others his Assignies, the Matter will be mo
di

ſputeable ; and in my Judgment it ſhould in that
ſe alſo exclude a Compriſer.

172. *Item*, If the Order of Redemption be uſed
the Party to whom the Reverſion is made in his
n Time, the Right thereof is tranſmiſſable to
Aſſigney, albeit the Reverſion was not made to
Aſſignies, nor did exclude Aſſignies.

173. *Item*, Where the Party having Right to
e Reverſion makes Aſſignation thereof to divers
rſons ; the laſt Aſſignation, with the firſt Inti-
ation thereof, is preferred to the firſt Aſſignation
t intimated.

174. But where a Reverſion is compriſed, there
eds no Intimation, but the firſt Compriſer is pre-
red to the ſecond Compriſer, albeit he intimate
ſt.

175. *Item*, Where the Right of Reverſion is
ſponed, not by way of Aſſignation, but by In-
tment proceeding upon Reſignation ; in that
ſe there is no Neceſſity of Intimation, but the
rty infeſt upon Reſignation will be preferred to a
cond Aſſignation firſt intimated, & *ratio eſt* ;
at the Right of Reverſion paſſeth by Infeſtment
on Reſignation, or by way of Compriſing, the
ſignant, or Party from whom it is compriſed, is
ly and totally denuded *ad non remanet apud eum
is aliquod veſtigium vel color* : But where Aſ-
nation is made, and no further, it is thought
t he is not fully denuded till Intimation be
de.

176. But it is to be remembred, where Lands
wadſet to be holden of the Superior, under Re-
verſion,

version, that the Right of this Reversion is on
transmissable by way of Assignation, and not
way of Resignation and Infeftment, whereof th
is the Reason, because the Lands being once r
signed already in Favour of the Receiver of t
Wadset, the same cannot be of new resigned
And if any Resignation be made otherwise than
the Receiver of the Wadset and his Heirs, th
same is null and invalid, and consequently *qu*
actus principalis est invalidus, which is the R
signation of the Lands: Therefore also the Rig
of the Reversion, which in Resignations, *tran*
cum universitate, and falls *in consequentiam*, *& rat*
rationis est, *quod jus Reversionis sit merè incorp*
reum, whereof the Right is properly and *habi*
modo transmitted by Assignation, and cannot
transmitted *per Sasinam nisi accessoriè ad rem co*
poream cui inhæret. And albeit it may be alledge
That *jus superioritatis*, is *jus incorporeum uti omn*
jura sunt, *quia omnia jura qua sunt jura incorpore*
yet this makes not *jus superioritatis* to be *jus i*
corporeum, no more than *jus proprietatis*, becau
utrumque jus & proprietatis & superioritatis su
rei corporeæ, *id est*, *fundi*, *cujus dominium acqui*
non potest, *nisi per traditionem corpoream*, *hoc e*
Sasinam : Sed jus Reversionis non est jus rei corp
reæ, *sed jus incorporeum*, *in re quæ licet sit corpore*
non tamen habet necessitatem traditionis ad ejus a
quisitionem, *& jus Reversionis*, is in Effect no
ther but a Servitude, *& servitus in fundo alie*
acquiri potest absque traditione vel Sasina, *per si*
plicem dispositionem, *quia in juribus hisce incorp*
re

is non requiritur poſſeſſio, ſed quaſi poſſeſſio; and erefore the Servitudes *prædiorum ruſticorum, vel banorum, acquiruntur ſola diſpoſitione abſque Saa,* as the Servitudes of Multures and of Aqueucts *in ruſticis*; *& altius non tollendi in urbanis.*

177. And where it may be opponed, That the ights of Annualrents are Servitudes, and ſicklike *uſfructus in fundo,* but yet paſſeth by Saſine: It anſwered, That the Caſe is not alike, becauſe Annualrent is *quaſi pars fundi, & uſusfructus jus fructuum fundi ad tempus, & ſic potius ſunt ra rei corporeæ, quam jura in re corporea.* And alit to the Right of an Annualrent *quoad conſtituonem ab initio,* there is a Neceſſity of Saſine, ithout which it cannot be eſtabliſhed formally, or ſeparate from the Uſe of the Lands, whereof is an Uſufruct; yet after the Uſufruct is once wfully conſtitute by a Saſine, it is thereafter anſmiſſable by Aſſignation *ſine Saſina.*

178. And the Right of Liferent which pertains the Superior, through the Vaſſal's Rebellion by e Space of Year and Day, pertains to the Supeor by the Law; and he may diſpone the ſame to Donatar *ſine Saſina,* becauſe the Right pertains him by Diſpoſition of the Law.

Of Liferent Eſcheat.

79. ITem, The Right of the Liferent Eſcheat, which is in the Perſon of a Donatar, falls nder ſimple Eſcheat; and albeit from the Begin-

F ning

ning it could not vaik by a simple Rebellion, but by a Rebellion *post annum & diem*; *& ratio est*, because it is not *quoad donatorem* a Liferent Right, but only a Right to Lands, and Mails and Duties thereof, enduring the first Rebel's Lifetime. *Quid dicendum est* of Rentalers Liferent, Whether doth it fall to the Heritor, or to his Superior of whom he holds, or to the King? *Respondeo*, Where there is no Infeftment in the Person of the Rebel, the Liferent pertains to the King.

180. But it is much doubted, whether Liferent Escheat, which pertains to the Superior by his Vassal's Rebellion, being once established in the Superior's Person, doth fall in Escheat by the Superior's simple Rebellion or not? *Ratio dubitationis* ariseth from the Similitude of the Case which it hath with the Liferent Right established in the Person of the Donatar, albeit there be a great difference; for a Liferent accrescing to the Superior, *est pars superioritatis*, and in Effect is become Property to the Superior during the Vassal's Lifetime: Whereas the Liferent in the Donatar's Person is *jus separatum à superioritate*; and in my Opinion a Liferent accrescing to the Superior by the Vassal's Rebellion, cannot vaik, by simple Escheat, in the King's Hands, except the Superior be Year and Day at the Horn, and so doth fall under a Liferent Escheat.

181. *Item*, The like is in Liferent Tacks, which by Act of Parliament fall under *Liferent Escheat*, and not under a *simple*; and yet if the Liferent Tack be assigned in Favour of a third Person,

Person, it will fall under the Assigney's 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 Liferent established in the Person of the Assigney, as it was in the Person of the Tacksman.

182. And the like of this is in a Liferenter of Lands, whose Liferent cannot vaik by simple Escheat in the Superior's Hands ; and yet if the Liferenter does assign the Liferent to a third Person, the Right thereof will fall under the simple Escheat of the Assigney, to whom the Liferent is disponed.

183. By Act of Parliament 1592, Escheats disponed in Favours of the Rebel are null ; and the second Donatar who purchaseth 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.

184. But this Act of Parliament provides no Remedy for Escheats disponed by other Superiors than the King, or by Lords of Regalities in Favours of Rebels, in respect it only annuls the Gift granted to the Behoof of the Rebel, and so gives 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, where they are obliged to

dispone the Escheats so often as the same vaiks: Therefore 'tis doubted what Remedy may be had against Escheats disponed to Rebels by Lords of Regalities, or other Superiors beside the King; which Doubts are solved by the Answer made to the Question immediately preceeding, *viz.* That a Liferent disponed to a Donatar falls under the simple Escheat of a Donatar: Therefore the Liferent being disponed to the Behoof of the Rebel, vaiks by simple Escheat in the King's Hands, which the King may dispone upon: And this is clear in Liferents, where the Superior Disponer thereof has no Right to simple Escheats; but where the Superior is a Lord of Regality, and therethrough also hath Right to the simple Escheat, the Question is more difficult, & *meo judicio, eget constitutione Imperatoria.* The Gift of simple Escheat doth comprehend all moveable Goods and Gear pertaining to the Rebel, all Bonds and Obligations moveable, all Tacks and Assedations not containing a formal Liferent, together with the Cropt of the same Corns being upon the Ground in Time of the Rebellion, and also the Mails and Duties of the Lands for the Time, at or after the Rebellion.

185. *Item*, The ordinary Form of Gifts of Escheat which passeth the Privy-Seal, bears not only Goods, Gear, Moveables, Tacks, &c. but also Reversions, albeit Reversions be heritable Rights, and cannot fall under any Escheat; and there can no Solution be made to this Difficulty, but *stilus curiæ*, or that the Word *Reversions* be exponed,

Of

Of Reversions of Tacks, and Bonds that fall under Escheat.

186. *Item*, A simple Escheat doth by the Interpretation of the Lords comprehend no more moveable Goods and Gear but such as pertain to the Rebel the Time of the Denunciation, or which he acquired within Year and Day after the Denunciation, or accresced to him: 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 pertaining to him during the whole Years of his Rebellion, and preceeding his Gift.

187. 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* these Words, *Together with all other Goods and Gear which shall accresce to the said Rebel during the Time of his Rebellion, ay and while he be relaxed.* And if the Gift bear not this Clause, that which accresceth by the Continuation of the Rebellion, after the Date of the first Gift, may be disponed by the King to a second Donatar, which will be preferred to the first, in so far as concerns the same.

188. *Item*, Albeit there fall nothing under simple Escheat, vaiking by Horning, but the moveable Goods, *ut supra*, yet where the Escheat vaicks by Forefeitry, Bastardy, or *tanquam ultimus hæres*, the same in all these Cases comprehends all heritable Bonds whereupon no Infeftment followed, and also comprehends Rights of Reversions

 of

of Lands and Annualrents: But this is to be obser-ved 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 Forfeiture, Bastardy or last Heir, the Gift, which is only generally of Moveables, according to the Form 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. But if the Gift bear *per expressum* only an heritable Contract or Bond, or only 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 whole Particulars were insert *per expressum*.

189. *Item*, The Escheat of Liferent belongs to the lawful Superior, whether the King or any Subject; but the Superior, beside the King, has only Right to the Liferent of these Vassals who are infeft and hold Lands of him: But if there be no Infeftment in the Person of the Rebel, but that he bruiks Lands, Teinds, Annualrents, by way of Bond, Contract or Tack; in this Case the Liferent pertains not to the Superior, but to the King's Majesty. But if there was once a lawful Infeftment taken in the Person of the Vassal, then if his Heir, or apparent Heir, remain at the Horn Year and

nd Day, his Liferent vaiks in the Hands of his mmediate Superior, albeit the apparent Heir be ot infeſt.

190. *Item*, Where there concurs two Donaars, either of ſimple or Liferent Eſcheat, the ſt Gift, with the firſt Diligence, by raiſing of eclarator, citing of the Party, tabulating the ummons, calling thereof, and inſiſting in the Purit till Decreet be obtained, is preferred to the rſt Gift, with the laſt and poſterior Diligence; nd even the firſt Decreet is preferred *extra omnem uæſtionem*, albeit it proceed upon a poſterior Ciation, except the Donatar who is prejudged be ble to improve the Execution of the Summons. either will the Donatar be heard to reduce the rſt Decreet, upon Reaſon of Anteriority of his ift and Citation: But if no Decreet be pronouned, then both the Donatars, *ante ſententiam*, will e heard to diſpute upon their Gifts and Diliience, and be preferred and poſtponed accordngly.

191. *Item*, There falls under Forfeiture, Baardy and laſt Heir, not only moveable Goods, *ut upra*, but alſo heritable Rights of Lands, Teinds, nnualrents, wherein the Perſon forfeited and Baards were infeſt. But there is a Difference in the orm of the Gift thereof; for Eſcheats vacant by orning, and alſo of heritable Bonds whereupon o Infeſtment has followed, vaiking by Forfeiture, aſtardy, &c. paſſeth only the Privy-Seal: But here Infeſtment followed, the ſame paſſeth either y way of Signature through the whole Seals, till

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 heritable Bonds, whereupon no Infeftment has 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 by Infeftment only.

192. And as to this different Reason of the Great and Quarter Seal, That ariseth also from the Diversity of the Holding of the Infeftment; for if the Lands pertaining to the forfeited Person or Bastard were holden of the King, in this Case the Right of the saids Lands must pass by Infeftment through the whole Seals, *viz.* Signet, Privy Seal and Great Seal; and upon that Infeftment the Donatar must receive Sasine by Precept under the Quarter Seal. But where Lands were 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 retain them, because he cannot be Vassal to the Superior, who is his Subject: And therefore seeing the Benefit, vacant by the Forfeiture, 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 forfeited or Bastard; which Presentation passeth under the Quarter Seal, and bears a Command to the Superior to enter and receive the Person presented in Place of the other Vassal,
where-

ereupon the Party presented requires the Superior under the Form an of Instrument, according the Form of the Chancery observed in Precepts on Retours of Lands holden of other Superiors n the King; and if the Superior obey the Command of the Presentation, there is no more to be ne, but the Party presented is seased by the Superior's Charter or Precept, which has Reference the Presentation.

193. But if the Superior refuse or delay, then the ond and third Precepts are directed as upon Re rs; and last a Warrant to the Sheriff to give S a e: And I have also seen another Order observed mediately after the Use of the Presentation, by obning Letters of Horning by Deliverance of the ords of Session, for charging of the Superior to e Sasine, which is also the Custom observed ainst Superiors for giving Infestment upon Comisings. But in my Judgment the former Course more certain; for by it the Party, after some De, obtains a real Right by Sasine from the She; but in this other, the whole Order resolves Horning, and not in real Right.

194. *Item*, If the King be pleased to dispone e real Right of Forfeiture or Bastardy in Favour the immediate Superior, it cannot be done di-ctly and immediately in favour of the Superior mself, but must be done by Presentation in fa-ur of a third Party, to his Behoof; who being eft by the Superior, must resign in the Superior's ands, *ad perpetuam remanentiam.*

195. *Item*,

195. *Item*, Albeit the Lords of Regality hav Right to the Escheats of the Inhabitants withi their Regality vacant by Horning, yet where th Escheats vaik by Forfeiture, the Lords of Regali ty have no Right thereto, but the same only per tains to the King.

196. And as to Escheats vacant by Bastardy or last Heir, it has been controverted, and remain yet undecided, whether or not the same pertain t the Lords of Regality or to the King.

197. Casualities vacant by Escheat, Forfeiture Horning, Bastardy, last Heir, &c. albeit lawfull expede thro' the whole Registers and Seals requi site, yet the same establisheth no real Right no Title in the Person of the Receiver, except he ob tain Declarator thereupon, either general or special and after Declarator, *habetur pro titulo*, and no o therwise. But there is this Difference betwixt Es cheats and Gifts of temporal Casualities, and Gifts o Forfeiture and Recognition, *viz.* That in the former a posterior Gift with a prior Diligence will be preferred; but where Infeftments are lawfully expede upon Forfeiture under the Great Seal, and Sasine lawfully following thereupon, in this Case no posterior Infeftment, albeit clade 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 Lands.

198. *Mem.*

198. *Mem.* Where Forfeiture passeth in Parlia-
ent, then the Donatar needeth no Declarator
on his Right; but where the Forfeiture passeth
Act of Adjournal in Justice Courts, then a
eclarator is needful, and must be obtained.

199. *Item*, The Difference between a special
d general Declarator is this, That the general
eclarator is only a Decreet of the Lords, find-
g, *That the Goods or Lands contained in the
ift, vaik in the King's Hands, by the Manner
Vacation contained in the Gift; and that there-
the Donatar has good Right to the Goods or
ands disponed to him in his Gift*; and doth not
oceed further against the Intromitters with the
oods, or Detainers of the Lands; but the spe-
al is craved, not only against the Party to whom
e Goods or Lands pertained, & *per cujus culpam*
e same vaiked in the King's Hands; but also
is raised against the Intromitters with his
oods for Payment thereof, or the Prices of the
me to the Donatar; or against the Tenants and
ccupiers of the Lands for Payment of the Mails
d Duties of the same, for all Years and Terms
e same vaiked in the King's Hands.

200. *Mem.* The special and general Declarator
ay be accumulate and comprised in one Sum-
ons; but if it be, the Summons bides Continua-
on, in respect it bides Probation; whereas if the
ummons only contain general Declarator, the
me needs not Continuation, because the same is
erified *instanter*.

201. But

201. But according to the old Cuſtom obſe ved before the Lords, where the Summons di contain both general and ſpecial Declarator, th Purſuer may crave Decreet upon the genera which will be granted to him by the Lords, if th Defender have no relevant Exception to ſtay th ſame; and alſo on the ſame Summons may cra a Day to prove the ſpecial Declarator, which al will be granted; and ſo upon one Summons the is both granted a Decreet for the general, an *Litis-conteſtation* made in the ſpecial.

Of Signatures and Seals.

202. A Signature is properly a Letter of Gi Donation or Diſpoſition, which paſſet under the King's Hand in favour of any Subje which, according to the ſeveral Natures thereo paſſeth either under the Signet allenarly, or unde the Privy Seal allenarly, or under the Quarte Seal allenarly, which is the Teſtimonial of th Great Seal, or paſſeth under all theſe Seals, excep the Quarter-Seal.

203. There are two Kinds of Signets, one o the Secret Council, another of the Seſſion; an the Keeper of both is the King's Secretary and hi Deputes.

204. Under the Signet of the Secret Counci paſs all Commiſſions or Licences granted by the Secret Council, with all Letters, either for Citati-

on

or Horning in Cauſes belonging to the Secret uncil.

205. Under the Signet of the Seſſion paſs all tters and Summonſes before the Seſſion, and crinal Letters before the Juſtices; and ſicklike, Signatures which are appointed to paſs thro' e haill Seals, muſt firſt paſs through the Signet of e Seſſion.

206. *Item*, All Gifts of Caſualities, ſuch as of cheats, Wards, Nonentries, Baſtardies, Letrs of Penſion, Proviſions and Preſentations to rks and Benefices, not being Prelacies, paſs unr the Privy Seal immediately, and go no further any other Seal.

207. *Item*, All Signatures of Prelacies, and eat Benefices; and alſo all Signatures of the Ofers of State, paſs under the Great Seal only, ithout any other Seal; and ſicklike, all Signares, which paſs only the Signet and Privy-Seal, ſs alſo the Great Seal.

208. *Item*, The Letters which paſs under the uarter Seal, are either Precepts of Saſine upon feſtments paſt under the Great Seal, or Letters Preſentation of heritable Tenants and Vaſſals, to periors of forfeited Lands, or Lands vaiking by aſtardy, and alſo by Act of Parliament 1587, ommiſſions of Juſticiary are ordained to paſs the uarter Seal; and ſicklike, all Commiſſions for earing of the Treaſurer's Accompts, paſs the uarter Seal.

209. *Item*, Of old, in further Corroboration of e Decreets of the Lords of Seſſion, the ſame were

were ratified by His Majeſty under the Quarter Seal.

210. All Signatures, when the King was in *Scotland*, paſt the Kings own Hand, and were ſubſcribed at the Foot thereof; but ſince his going to *England*, the ſame are all ſubſcribed and ſignet by the King, either with his own Hand, or by a Caſhet, which has the King's Name, and whole Letters thereof, as he uſeth to write the ſame, engraven therein: Which Caſhet is kept by the Chancellour; and all Signatures muſt paſs his Majeſtie's own Hand, which are excepted out of the Commiſſion granted by His Majeſty to the Lords of Exchequer, or which are not contained within the ſaid Commiſſion, ſuch as Remiſſions for Treaſons, Slaughter, Witchcrafts, and others of the like Nature, being of great Importance.

211. *Item*, All Signatures which may be paſt by Virtue of the Commiſſion of the Exchequer here beneath, paſs the Caſhet.

212. *Item*, The Form of paſſing Signatures, whether the ſame be ſigned by His Majeſty, or caſhetted, is this, *Firſt*, The ſame are formed by a Writer to the Signet, and marked by his Name on the Back. 2*do*, They are delivered by the Party, to the Preſenter of the Signatures, who is Mr. *Patrick Brown* for the preſent, and he makes a Roll thereof, and affixeth the ſame upon the Exchequer Wall every Week, about *Wedneſday*, which is Four Days before the ſame be preſented to the Exchequer, which is uſually upon *Saturday* thereafter. 3*tio*, The Treaſurer, before the ſame be

presented, considers the Signatures with the
rits necessary for Verification thereof, and hears
rties make Offers anent the Composition to be
d for the same. *4to*, The same are past and
nponed by the Lords of the Exchequer, where-
the Quorum is now, by Virtue of the last Com-
ssion of Exchequer, any Four of the Number,
h the Treasurer or Treasurer-depute; and the
mposition is written at the End of the Signature,
the Presenter; which Compositions are made
s or more, at the Lords Pleasure. *5to*, The
natures being past by the Lords of Exchequer,
same are retained by the Presenter, till the
rty pay the Composition, which is paid to one
the Receivers, who testifies his Receipt thereof,
his Subscription on the Back of the Signature.
o, The Signatures are cashetted by the Chancel-
or his Deputs. *7mo*, The Signatures must
ereafter be registrate in the Register of the
easury, Comptrollary, Collectory and Treasury
new Augmentations, or one or other of the
ds Registers, or all of them, according to the
ture of that which is disponed in the Signature;
r albeit all these Offices be jointly in the Person
the Treasurer, yet because their Institution from
Beginning was several, and had their several
gisters, which were and are the Charge of each
ficer: Therefore the saids Registers remain yet
confounded; likeas the yearly Compts are yet
erally made, *viz.* At the Treasury, which com-
ehends the whole Casualities, which fall to the
ng yearly; and of the Comptrollary, which com-
pre-

prehends the Rents of His Majeſty's Property, Cuſtoms, Impoſts, Burrow-mails; and, laſtly, Of the Collectory and Treaſury of new Augmentations, whereof the Collectory being inſtituted in *Anno* 1561, comprehends the Superplus of the Thirds of Benefices, and the Treaſury of new Augmentations, being inſtituted at the making of the Act of Annexation, *anno* 1587, comprehends the Feu-Mails of Kirk-Lands, and blanch Duties of Erections.

213. *Item*, After the Signatures are paſt the Regiſter, the ſame are retoured by the Party to a Writer to the Signet, who wrote the ſame, and 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, directed 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* And under that is written, *Per Signaturam manuum vel Caſhettæ, S. D. N. Regis ſupra ſignat. & dominorum Scaccarii, ſubſcript. vel ſupra ſignat. & ſubſcript.* And this Precept is ſigned by a Writer to the Signet, and ſealed with the Signet kept by the Secretary and his Deput; who, for their Warrant, retain the Signature in their Hands, and deliver 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

Lord

ord Chancellor, Keeper of the Great Seal, for
peding of the ſaid Signature under the Great
al; and the Precept bears at the End thereof,
tum ſub ſecreto noſtro Sigillo, apud, &c. and has
derneath, *per præceptum datum ſub ſigneto, &c.*
nd the Precept is commonly written on Parch-
ent; whereas the firſt was only on Paper, and
bſcribed by the Writer to the Privy Seal; and
s the Privy Seal appended thereto, by a Tagg,
white Wax only. After 'tis ſealed, 'tis returned
the Writer to the Privy Seal, to the Effect it
ay be regiſtrate in his Books, who writes on
e Back thereof, *Written to the Privy Seal, and*
giſtrate ſuch a Day. And alſo the Keeper of the
rivy Seal, when he appends the Privy Seal there-
, retains the Precept under the Signet for his
arrant, and writes on the Back thereof, *Sealed*
ch a Day; thereafter delivers the ſaid Precept to
e Party, who takes it to the Director of the
ancery, who writes out a Charter in Latin, af-
r the ordinary Form of Charters, agreeable to the
enor and Subſtance of the Signature and Pre-
pts; and this has in the End, *Datum ſub magno*
gillo, but bears nothing under it, but allenarly
s the Great Seal appended by the Chancellor,
o, or his Deputes, writes on the Back thereof,
aled ſuch a Day; and after that 'tis returned to
e Director, who regiſtates the ſame in the Re-
ter of the Great Seal, and writes on the Back,
giſtrate, tali die; and the Chancellor, at the
pending of the Great Seal, retains the Privy Seal
r his Warrant.

 214. *Item*,

214. *Item*, If the Signature or Infeftment be in Favours of the Chancellor himself, the Charter bears, not only that the Great Seal is appended but also that the Privy Seal is adjoined thereto and, *de facto*, they are both appended.

Of Sasine, and the Precepts.

215. *ITEM*, Some Letters and Charters, which pass the Great Seal, require no more to be done for Perfection of the Right contained therein, as a Charter of Confirmation, a Letter of Remission for a Crime, and Legitimation, *&c.* But others require a further Deed to be done for 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, after the Charter has past the Great Seal, the Director of the Chancery 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 Baillies Name, who is to give the Sasine; but so that it ever designs him to be Sheriff of the Shire where the Lands ly (*Balivis in hac parte*) which in Effect is a Constitution of such Persons to be Sheriffs and Baillies to the giving of the Sasine, whom the Parties please to chuse and insert in the Blank; and upon this

this Precept delivered to the Party, Sasine is taken, either upon the Ground of the Lands, or any one of them, for the Whole, 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 on any of the Lands for the whole, notwithstanding of the Discontiguity; in the which Case, Sasine taken at the Place appointed in the Union, is sufficient for the Whole.

216. *Mem.* This Precept of Sasine which passeth the Quarter-Seal, *ut supra*, in this differs from the Precept of Sasine following upon Retours: *First*, That these do not pass the Quarter-Seal, but are direct forth of the Chancery, closed within the Seal like to that, that closeth the Brieves. And sicklike, the same contains no Blank, but is directed in the Body to the Sheriff of the Shire where the Lands ly; and none but the Sheriff or his Deput can give Sasine thereupon; nor can any be Notar to the Sasine but the Sheriff-Clerk or his Deputes; and if the same be done otherwise, the Sasine is null by divers Acts of Parliament, in *Anno* 1555 and 1557; 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 Signature, is not to be charged for any Thing due to the King.

217. Sasines must be taken not only upon the Ground of the Lands by Delivery of Earth and

 Stone;

Stone; but also of the Mill *per expressum*, by delivery of the Clapper; and of Salmond Fishing, by Delivery of a Net, *Quia hæc sunt inter Regalia, & requirunt separatam sasinam; nam ea quæ sunt Regalia*, require an express Disposition, as a Tower, a Mannor-Place, Mill, Salmond-fishing, a Port or Haven, a Burgh of Barony, a Right of Patronage, Jurisdiction of Court, Blood; and none of these can be disponed *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 do not all require a several Sasine, nor a divers Form thereof, but only the Mill and Salmond-fishing. And as to the rest, if they be *per expressum* disponed in the Charter, the Sasine being taken upon the Ground of the Lands simply, is sufficient for the same.

218. *Item*, Where a Barony is disponed *cum annexis, connexis & pertinentibus ejusdem*, it comprehends all Towers, Mannor-places, Mills, & *omnia Regalia*, without any Necessity of expressing the same, *Quia Baronia est nomen jurisdictionis & universitatis*; and therefore Sasine being taken upon any Part of the Barony, will comprehend the Tower, the Mill, and other *Regalia*, albeit they be not particularly exprest neither in Charter nor Sasine.

Of the inferior Juriſdictions.

19. THE Juriſdiction of a Baron or Barony, properly only comprehends Courts of lood, and Bloodwit, and a Thief with the Fang, ith Pit and Gallows effeiring thereto; and alſo the ourts and Pleas in Civil Matters betwixt Party d Party, wherein the Baron has Power by Acts Parliament; and alſo the taking Order with eat and Drink, and the Prices thereof, Metts and eaſures, taking of Bearers of Hagbuts, *&c.*

220. *Item*, The Sheriff in Criminals may pre- een the Baron by the firſt Citation, both in ſimple lood, and in Theft; and alſo has Power to ſit up- a Thief by Way of Citation, which the Baron s not.

221. *Item*, The Sheriff has no Power in Slaugh- r, but where the Committer is taken with red and; and he muſt do Juſtice within three Suns; d, if he do it not, he muſt either preſent the ommitter to the Juſtice, or have a Commiſſion om the Council to do Juſtice upon him.

222. But the Lord or Baillie of Regality has great Power and Juriſdiction, as the Juſtice Ge- ral, within the Bounds of his own Regality, and ay proceed upon Theft, Slaughter or any other rime upon Citation.

223. *Item*, The Privilege of a Lord of Regali- is, That not only he has ſupreme Juriſdiction, *quaſi merum imperium* upon all the Inhabitants

within the Territory of his Regality, together with the Eſcheat of all Perſons convicted for whatſoever Crime except Treaſon, the Eſcheat whereof doth belong only to the King: And alſo hath Right to Eſcheats vacant by Horning and Rebellion; and claims alſo Baſtardy and laſt Heir, which is not fully decided as yet.

224. *Item*, The Lord of Regality or his Baillie, has the Power or Liberty of Weaponſhawings within the Bounds of the Regality: And ſicklike has the Power of Civil Juriſdiction in Civil Cauſes in all Actions which are purſued before the Lords, except Reductions, Improbations, Redemptions and Suſpenſions.

225. *Item*, The Lords of Regality have the Privilege and Liberty of Chapels and Chancery, by directing of Brieves, and ſerving of the ſame before themſelves; and the Retour and Extract of the Service before the Baillies of Regality, maketh as great Faith, as a Retour forth of the Chancery.

226. But it is to be obſerved, That in Regalities, the Service and Retour is all one, in Reſpect the Clerk of the Regality both directs the Brieves and is Clerk to the Service; ſo that the Retour is nothing elſe but the Extract of the Service, regiſtrate in his Book; whereas in the King's Chancery they are divers, the Service being under the Subſcription of the Sheriff-clerk, and regiſtrate in his Books; and the Retour thereof being the ſame Service, retoured to the Director, and regiſtrate in his Books.

227. *Item*,

227. *Item*, The Stewartries in *Scotland*, are Of-
es erected in the King's proper Lands, as the
men fell to the Crown, or were annexed there-
; and these Stewartries are not only erected
th the Power of the Sheriffs, but also have the
wer of Regalities: But seeing the Stewartries
e immediately subject to the King, and not to
y Subject; therefore the Brieves of Lands with-
the Stewartry are raised from the King's Chan-
ry, and retoured thereto.

228. *Item*, Of the Burrows of *Scotland*, some
e Royal, some Burrows of Regality, and some
urghs of Barony.

229. In Burrows of Regality, the Lords of Rega-
y have the full Power of creating Baillies, ex-
pt they have given Power by their Infeftment
the contrary, to chuse their own Baillies:
hich Privilege, St. *Andrews*, the *Canongate*,
usselburgh, &c. have by Infeftments from the
ishop of St. *Andrews*, Abbots of *Holy-rood-house*,
d *Dumfermling respective*.

130. *Item*, In Burghs of Barony, the Barons
ve full Power to chuse their Baillie.

231. *Item*, As to Burrows Royal, they are hol-
n immediately of the King; and by their first
rections have Power to chuse their Provost and
aillies, and some of them are heritable Sheriffs
ithin themselves, as *Edinburgh*, *Stirling*, *Hading-
n*, &c. and all the Burrows Royal have Power
give Sasine to their Burgage-Lands, either upon
esignation in the Baillies Hands, or upon Retour,
r immediately by Hesp and Staple; for albeit all

Tenants within Burgh hold of the King as Superior, yet the universal Custom has established this Right in Favour of the Burrows, that they may receive, and enter Vassals in Name of the King's Majesty, who is Superior; but the Casualities of Superiority belong only to the King, such as Liferent Escheat by Horning, *&c.*

232. *Item*, it is to be remembred; Of Burrow-Lands, holden of the King in free Burgage, there is no Nonentry; and whensoever the apparent Heir is seased, his Sasine is drawn back to the Day of his Predecessor's Decease; whereof there is no Reason, but Custom.

233. *Item*, Burrows of Regality have not the Power of free Burrows, neither anent Trade and Merchandise, nor yet anent the Liberty of Convention of Burrows: But divers Burrows of Regality have been erected in free Burrows, with Liberty of Burrows Royal; and this is ever but Prejudice of the Lord of Regality, who remains still Superior of the Burrow, and whole Tenants within the same, as in St. *Andrews*, *Glasgow*, *Dumfermling*, *Kinghorn*, &c. and the like also is in the Burrows of Barony, as *Dysert*, &c.

234. *Item*, All Burrows Royal are holden immediately of the King, either fully and *in solidum*, or *in quantum* concerns the Privilege of a Burrow Royal; and the Manner of their Holding is *in libero burgagio*, for Payment of a certain Burrow-Mail to the King, whereof Compt and Payment is made yearly to the Exchequer; and no Burrows have Voice in Parliament, but Burrows Royal.

235. *Item*,

235. *Item*, Every Royal Burrow hath its own common Good, or common Lands pertaining thereto, which pertain to the Burgh in common, and are holden of the King in free Burgage *quoad* the whole Body of the Town. But if any particular Person acquire heritable Right of these common Lands from the Town, they are not holden of the King in free Burgage, but of the Town in Feu; which difference is necessary to be observed, by reason that Sasines 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 Sasines and Reversions within Sixty Days.

236. *Item*, Burrows Royal have this Privilege, that they may cognosce and serve Heir to Tenements of Lands within Burgh *brevi manu*, without Service or Retour, and enter them thereto, and give them Sasine by Hesp and Staple; which gives the Heirs so seased, Right to the Tenements, but doth not verify them to be Heirs *activè*, except they were served and retoured, and is equivalent to *Clare constat*, which proves Heir *passivè*, but not *activè*.

237. *Item*, Sasines given by Hesp and Staple, are 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 petitorio*.

238. And of old the Sasines within Burgh, clade with Possession 40 or 50 Years, were counted irreduceable; and now the same have the like Effect by Act of Prescription.

Of

Of Judgments possessory and petitory.

239. *Possessorium judicium* is properly this, where a Party is pursued to remove from Lands, and defends himself by an heritable Right made to him or his Predecessors, clade with 10 Years Possession, which will maintain him in a Removing; notwithstanding that the Pursuer be able to reply and prove, That he was infeft in the Lands before the Defender. Which Reply will be repelled *hoc loco, id est, in hoc judicio possessorio*, and the Pursuer remitted to his Action of Reduction, which is *judicium petitorium*: And that of Removing is called *judicium possessorium ratione retinendæ possessionis*.

240. *Item*, Where any Person dies in Possession of Lands, the Pursuit moved by the Heir for Delivery of the Tower, Fortalice and Mannor-place of the Lands, is called *judicium possessorium*; as was the Dispute anent the Mannor-place of *Halyards*, betwixt the Earl of *Mar* and Lord *Torphichen*: And this may be called *judicium acquirendæ possessionis*.

241. And there is a *Third*, which is *recuperandæ possessionis*, as in Ejections, Intrusions and Spulzies; in which this Axiom hath Place in Favour of the Judgment possessory, *quòd spoliatus ante omnia est restituendus*.

242. The

242. The Difference betwixt Ejection and Intrusion is this, That Intrusion is *in vacuam possessionem absque jure*, and Ejection is a violent outputting of a Possessor.

243. *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 so long as he occupies, and for Removing from the Lands without a Warning.

244. Where the Heritor of Lands is troubled and molested for the Meiths and Marches of his proper Lands, in this Case the Remeid is by a Judgment called *Cognition* or *Molestation*, wherein the Probation is not by Witnesses, but by an Inquest of 15 Persons: And by Act of Parliament 1587, and ratified 1592, these Molestations are ordained to be pursued before the Sheriff of each Sheriffdom; and the Lords of Session are excluded from all Judgment therein, except in Causes of Molestation of Meiths and Marches pursued before the Lords of Session themselves, which, as yet, may be pursued before the Session, and proven by Witnesses.

245. *Item*, By the said Act of Parliament it is ordained, *That where either of the Parties fear the Sheriff to be suspect and 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 either of the Parties be alike diligent, Litis-*

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 Cavel and Lot.

246. *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 Reduction is properly in the Concourſe of 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 or improven: And the Declarator is, where there is no Infeftment to be reduced, but where Infeftments have ſome Competibility, and may ſtand in Part, *at non in toto*, as when the Vaſſal purſues againſt the Superior; for in theſe Caſes there is no Infeftment called 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.

247. *Item*, All Declarators of Recognition, Expiring of Reverſions, Reductions upon Clauſes irritant, Actions of Purpriſions againſt the Vaſſal, for uſurping upon the Superior's Property, are all of the Nature of Judgment petitory, by way of Declarator.

248. *Item*,

248. *Item*, The Judgment petitory anent Meiths and Marches, 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 Perambulation, but only the Justice-General or his Deputes; and the Brieve of Perambulation is directed forth of the Chancery to the Justice-General and his Deputes, who after Citation of the Parties, discusseth *ea quæ sunt in jure*, by Defences and Answers, in his ordinary Seat of Justice at *Edinburgh*. But after Litiscontestation, the Justice goes to the Ground of the Lands, and receives the Probation by Inquest.

249. 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, if any Iniquity can be qualified to have been committed in the denouncing thereof; as was lately seen in the Process betwixt *Monimusk* and *Corsindae*, where a Process of Perambulation was challenged before the Lords of Session, by way of Reduction, to 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.

250. *Item*, Like unto this Brieve of Perambulation, which is *in prædiis rusticis*, is the Brieve of Lining, which is *in prædiis urbanis*, to the which the Provost and Baillies of the Burgh are properly Judges.

251. *Item*,

251. *Item*, As there are some Judgments petitory and possessory, so there are some Actions personal and real which depend upon the divers Qualities of Rights, whereof some are personal, some are real.

252. A Right personal is where only a Person and his Heirs are bound, and not the Ground or Lands are really tied; and according thereto, a Bond either for Payment of Sums, or Infefting in Lands and Annualrents before Infeftment follow thereupon, is called a *personal Right*; and an Action founded thereupon is called a *personal Action*.

253. A real Right is not only where a Person and his Heirs are bound personally, but also *res controversa* is tied and affected really therewith.

254. *Duplex est jus reale, vel in re, vel ad rem, & utrumque; vel in rebus mobilibus vel immobilibus. Jus in re in mobilibus, est ubi proprietas rei mobilis ad aliquem pertinet; & actio quæ ob hanc competit, dicitur rei vindicatio, à quocunque possessore, sive naturali, sive civili.*

255. *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.

256. *Jus in re in immobilibus est duplex, viz. vel in corporeis, vel in incorporeis. In rebus corporeis*, there is no Reality but by Charter and Sasine. But *in rebus incorporeis, ut est in servitutibus*, the same are real without Sasine, by a simple Constitution of a Party having Right to grant the same;

such

ſuch as, Thirlage of Lands to a Mill, *Aquæductus, altius non tollendi*, &c.

257. 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 Aſſigney to the Reverſion, the Aſſigney may redeem the Lands, fulfilling the Points of the Reverſion, and will not be debarred therefrom by the foreſaid Pactions, which are perſonal.

258. Item, *Jus ad rem in immobilibus* is where a Party having a perſonal Bond to pay to him in Money, or to infeft him in Lands or Annualrents, uſeth 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 Inhibition has taken Effect by Poſſeſſion for 10 or 15 Years before the Compriſing; in that Caſe, the Lords do ſuſtain the Infeſtment clade 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 repel the Infeftment by way of Exception, in reſpect of the Inhibition preceeding.

259. Item,

259. *Item*, Albeit the Party Inhibitor may reduce all Infeftments after his Inhibition, yet the Party whom he purſues may elide the Reduction, by offering to give Satisfaction of the juſt Debt, and may give him the like by way of Exception in a Removing.

260. 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 is doubted if *ex poſt facto*, he may be heard to 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 and Right; in this Caſe I think the Offer ſhould ever be competent to the Party againſt whom the Decreet is given.

261. *Item*, Reductions *ex capite inhibitionis*, may either be purſued upon a 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 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 to be of greater Difficulty, eſpecially the

Party

Party compearing, against whom Decreet of Reduction is given.

Of Apprisings and Adjudications.

262. COmprisings may be led either upon a personal Bond, or upon a real Right. 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. 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 the Byruns 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 Infeftment of Property granted before the Comprising, being posterior to the Infeftment of Annualrent.

263. And upon this Ground there may arise a notable Question, *viz.* That 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 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.*

264. *Item*, Lands may be either compriſed or adjudged; and Compriſing hath Place, either againſt the Party obliged, or his Heir.

265. The Compriſing againſt the Party being on Life, requires no more but the ordinary Form, which is firſt, to ſearch the moveable Goods and Gear of the Debitor, 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 lye, 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*.

266. *Item*, Where the Party-Debitor is deceaſed, there it is firſt neceſſary that the Obligation made by the Defunct be either regiſtred againſt the Heir; or if it was regiſtred before the Defunct's Death, to be transferred *contra* him.

267. 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 Decreet muſt be recovered againſt him, as lawfully charged to enter Heir.

268. *Item*,

268. *Item*, After this Decreet, there must be new Letters charging the apparent Heir to enter specially to such Lands and Heritage wherein the Defunct died vest and seased, and that within the Space of Forty Days after the Charge; with Certification, That Apprising shall proceed against him, sicklike as if he were infeft.

269. And after the Expiring of the Forty Days used 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.

270. 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 in that Case, upon his Renunciation, he will be assoilzied from the personal Action, reserving to the Pursuer real Action, *contra hæreditatem 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.

Of Comprisings.

271. *ITem*, When Lands are to be comprised, the Party compears at the Day, by himself or his Procurator, and produces his Claim; craving such 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 15 or 13 Perſons, who (being ſworn) conſider the Claim and Verifications thereof; and accordingly give forth their Verdict, and ordains 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.

272. After the Compriſing is led, and an Extract thereof given by the Clerk of the Compriſing, under his Subſcription, and the Subſcription of the Judge or Meſſenger of the ſaid Compriſing, with the Seals of the moſt part of the Inqueſt; the ſame is in uſe to be preſented to the Lords of the Seſſion and to the Clerk of the Bills, to be conſidered, ratified and approven of by them. But the Lords Allowance is not abſolutely neceſſary to the Validity of the Compriſing, but allenarly in ſuch Caſes where Infeſtment is to follow upon the Compriſing, and where the Superior of the Lands being another than the King, is unwilling to give Infeſtment conform to the Compriſing: For if nothing be compriſed but *jus incorporeum*, ſuch as, Heritable Bonds, Liferent Rights, Tacks, Reverſions; 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, could it add any thing to the Validity of the Right, becauſe the Lords Allowance is *abſque citatione partis*.

273. Where the Compriſing is of Lands which are *res corporeæ*, whereof Saſine and real Tradi-

tion

tion is requisite of the Law and Custom of the Kingdom; in this Case, if the Lands be holden of the King, there is no Allowance, or 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.

274. 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, 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 Party who uses the first Charge hath the Advantage of the Law.

275. 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 past 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 the charging of the Superior to give Infeftment upon the Comprising;

And where other Infeftments are granted after this Diligence, the fame are underftood to be paft fraudulently, and that the fame cannot prejudge the lawful Diligence forefaid.

276. *Item*, The legal Reverfion of the firft lawful Comprifing, perfected by Infeftment or Diligence in manner forefaid, pertains to the Debitor, againft whom the Comprifing is led; and it is queftioned whether this legal Reverfion will pertain to a fecond Comprifer, who denounced before the Date of the firft Comprifing, or not; becaufe in the Time of his Denunciation, the legal Reverfion was not exifting. And the Lords herein have given Sentence *pro & contra*, fometimes preferring the third Comprifer who denounced after the firft, and found him to have Right to the legal Reverfion, excluding a fecond Comprifer who had denounced before the Date of the firft Comprifing. And in my Judgment this laft is not fo agreeable to Equity, as this where they have *found the fecond Comprifer to have Right to the legal Reverfion, albeit he denounced before the exifting thereof*; that is to fay, before the Date of the firft Comprifing.

277. Where once the Property is lawfully comprifed, and Infeftment paft thereupon, the fecond Comprifer, who comprifes the legal Reverfion, has no Neceffity to pafs Infeftments thereupon, becaufe the comprifing of a legal Reverfion is of the Nature of an Affignation to a Reverfion, to the fubftantial Solemnity whereof, there is Neceffity of a Safine or Infeftment following: But yet there is this Difference betwixt them, that an Affignation

tion muſt be intimate, and otherwiſe is poſtponed to a ſecond and poſterior Aſſignation being firſt intimate; whereas an Compriſing of a Reverſion, either legal or conventional, needs no Intimation.

278. 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 hæreditatem jacentem*. *Secondly*, He muſt raiſe Summons againſt the Superior and apparent Heir for his Intereſt, making mention of his Decreet *contra hæreditatem jacentem*, and that the Defunct his Debitor was infeft in ſuch Lands holden of the Superior; and that therefore the Right of the ſaids Lands ought to be adjudged to him, and that the Superior ought to be decerned to infeft him therein.

279. After which the Creditor will compel 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 of Vaſſals, by Act of Parliament K. *James* III.

280. Where the Creditor is infeſt 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.

281. It may be asked, What is due to the Superior who is compelled to enter the Creditor upon Adjudication? And albeit that the Lords have found no Composition due upon Adjudication, and there be no Law nor Practick to determine the same, yet, in my Judgment, it must be ruled according to Comprisings, *quia est eadem ratio & paritas terminorum.*

282. 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 Heirs representing them.

283. If there was no Decreet obtained against the Defunct's Debts, 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 transfer-

ferring, which properly is of Decreets and Summonses; but he is to seek Registration of the Bond, if it bear a Clause of Registration; or, if it bear none, he is to pursue the Heir of the Debitor *via ordinaria*, by a libelled Summons upon 21 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.

284. 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 the Charge to enter Heir dies with the Party who 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 Renunciation to enter Heir to the Defunct, to crave Adjudication, *ut supra*.

285. If two Creditors obtain Decreets of Adjudication against the Superior, for infefting them in the Lands, the Superior may raise a Suspension of double Poinding, making Mention, *That he is charged and distressed with 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 the Rights, and to hear and see which of them has best Right; and the Party having no Right, to be discharged of all further troubling and molesting the Superior in Time coming.*

Of

Of Reductions and Improbations.

286. 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 Conincidence, 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 peremptor 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.

287. *Item*, Where the Summonses of Reduction and Improbation are joined in one Summons, which is very ordinary; in that Case, the Summons bears the Stile of Reduction, and bears first Production of the Writs, and then the Reasons.

288. *Item*, When the Summons comes to be disputed, the Pursuer may divide his Reduction from his

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.

289. If the Defender be compearing in the Improbation, he cannot be absent in the Reduction, which has been oft found by the Lords, albeit it seemed 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.

290. *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 of Reduction and Improbation libelled; and if there be no special Reason libelled against the same, 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*.

291. *Item*, In Improbation the Defender may not be compelled to produce any Writs, but such as are made by the Pursuer himself, or his Pre-

Predeceſſors, to whom he ſucceeds, or by his Authors from whom he has Right; but if any ſuch Writs, which are neither made by the Purſuer, nor his Predeceſſors, and yet ſuch as may trouble him thereafter, be uſed in any Proceſs, either by Way of Exception, or by Way of Reply againſt any Party, that Party againſt whom the ſamen is uſed, may offer to improve the ſame in that ſame Proceſs.

Of Warnings and Removings.

292. ITEM, In Actions of Removing, the Defences are either peremptor of that Inſtance or of the Warning, or peremptor of the whole Cauſe. 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.

293. The Defences againſt the Warning, are either againſt the Lawfulneſs of the Warning, or that the Tenant's Maſter is not warned.

294. The Objections againſt the Lawfulneſs of the Warning, are, That the Parties are not lawfully warned perſonally, or at their Dwelling-Place and 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 ſtoped

&c.

&c. But commonly the Judge is in Uſe to ſhow Favour, by giving Leave to the Purſuer to mend the Faults of his Warning, which ſhould not be done, after the Defender has accepted the Pieces and Order of Proceſs.

295. *Item*, The Exception of not warning of 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 before, to ſuch a Perſon who has a real Right to the Lands, either by Infeftment or Tack, &c. and he not warned.

296. *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.*

297. 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.

298. *Item*,

298. *Item*, The common Reply against the first Form of 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 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.

299. And yet if the Tenant who propones the Exception of not warning of his Master, be able to make his Exception more pregnant nor the Reply, either in the Circumstance of the Payment of Mail and Duty, or in the Manner of Probation, the Exception would be found relevant, notwithstanding of the Reply: As for Instance, if the Tenant shall clear, that the Duty paid by him to the Pursuer (if any was paid to the Pursuer in his Master's Name) is for a Feu-duty or 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.

300. *Item*, The Exception, That the Defender is Tenant to his Master who is not warned, will not be sustained, if the Pursuer offer him to prove that

that the Defender was Tenant input by him in the Land, albeit it be true, That thereafter the Tenant 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.

301. *Item*, If it be evident and clear by the Pursuers own Right, That a Part of the Lands is excepted forth of the Sasine; and if the Defender alledge himself to be 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 Pursuers Right is elided by his own Sasine.

302. *Item*, If the Tenant having the Benefit of this Exception, That his Master is not warned, do omit, the Master has a double Remedy for it; either he may compear for his Interest in the Removing, and propone his Defences upon his Infeftment, cled with Possession, and so stay the Decreet of Removing; or, if the Decreet of Removing be pronounced by his Knowledge, he may suspend the said Decreet, and get his Right discussed in the Suspension, without Respect of the Decreet standing, and will not be put to the Reduction thereof.

303. *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

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*.

304. And the first Manner of the said Exception will be found relevant, because these Exceptions are alike sure in the Law, *viz.* That the 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 *Tusielaw*, 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 samen may be disputed in a Removing, which is *judicium possessorium*, and no further: For if the Defender 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 Defenders Infeftment; and the Pursuer will be put to his Action of Reduction.

305. The Difference betwixt these two Exceptions is not great; for where the Infeftment is cled with Ten Years Possession, the same are coincident: But where the Infeftment is cled with fewer Years, as Four or Five, the Addition of *Not warned*, is necessary. But the Difference of the two Exceptions is this, That divers Replies may

may be proponed againſt this Exception made *ſimpliciter*, which could not be proponed againſt this Exception *qualificatè* (not warned).

306. For againſt this Exception being proponed *ſimpliciter*, theſe Replies will be ſuſtained, *viz.* That an Infeſtment cled with Ten Years Poſſeſſion, whereupon the Exception is proponed, was a Wadſet under Redemption, and is redeemed. *Next*, That this Infeſtment 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 proponed *qualificatè*, becauſe, albeit his Infeſtment 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.

307. *Item*, Notwithſtanding that I think this moſt juſt and reaſonable 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 Infeſtment is redeemed or reduced.

308. *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 Rea-

 ſon

ſon relevant, by Production of the Maſter's Saſine, and that without Reſpect of the Decreet of Removing ſtanding.

309. *Item*, If the Purſuers reply upon the Nullity of the Infeftment, whereupon 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. Albeit of the Civil Law theſe two (*ipſo jure*) and (*ope exceptionis*) be opponed; yet by our Practick they are all one; and to them is opponed *nullitas viâ actionis*; for *omne quod nullum eſt ipſo jure, nullum eſt ope exceptionis vel rei vel facti, & è contra*: But *nullitas facti* is not opponable by Way of Exception, but muſt be purſued by Way of Action.

310. *Nullitates juris* are properly theſe, where the Propoſition of Nullity is founded upon Law or Cuſtom; and the Aſſumption either *negative quod non eget probatione*, or proven by Writ itſelf, againſt which the Nullity is proponed. 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 Action. As by Example, this Saſine is null, becauſe of Kirk-Lands, and not confirmed, or not regiſtrate in due Time; theſe are *nullitates juris*, where the Aſſumptions are *negativè*.

311. *Item*

311. *Item*, Where it is opponed, That a Comprising is null, because used only upon Ten Days Warning, where the Law requires Fifeteen; and if this be proven by the Comprising itself, it is *nullitas juris*, where the Assumption is *affirmativè* proven by the Writ impugned.

312. But if it be alledged against an Infestment of Kirk-Lands, That it is set without Consent of the most Part of the Chapter, or set with the 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 it 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.

313. *Item*, There is also an Exception 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 is 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 Practique admitted

by Way of Exception, whereof the apparent Reasons are these; 1*mo*, Because it is a Right or Tack standing cled with Possession. 2*do*, Because the Act of Parliament 1594, *statuit tantum prohibendo*, & *non addit clausulam anullantem vel irritantem.*

314. This Difference was also of the Civil Law, *inter leges jubentes & probibentes*; and by the Opinion of the Doctors, *Lex præceptiva vel affirmans non sortiebatur effectum absque declaratoria, nisi præceptivæ legi adhæreret clausula irritans: sed de lege prohibitiva, ex opinione doctorum, non est necesse, ut subjiciatur clausula irritans; quia ipsa prohibitio reddit actum aliter gestum invalidum.*

315. By the Custom of *Scotland*, these subtile Distinctions are not attended; but all Nullities are to be pursued by Way of Action, except where the Law declares the Deed null by Way of Exception or Reply.

316. *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 *Litis-contestation*, Writes 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.*

317. But if the Writ offered to be improven was not produced *in modum tituli*, *ante litem contestatam*

testatam, 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 *Litis-contestations* in one Cause, seeing this Improbation is ever proponed *post conclusionem in causa*.

318. *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.

319. *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*.

320. 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.

321. *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.

322. *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.

323. *Item*, Improbation either by Way of Action or Exception cannot be proponed againſt the Extract of an Evident, but againſt the principal Evident itſelf; and therefore commonly in all Improbations, the Clerk-Regiſter and his Deputs, in whoſe Hands the principal Writs remain, by Warrant of the Regiſter, are ſummoned for Exhibition thereof.

324. *Item*, It is to be remembred, That all Dilator Exceptions are to be verified *inſtanter*, otherwiſe ought to be repelled.

325. *Item*, All declinator or dilator Exceptions muſt be proponed before the Peremptor, otherwiſe they will be repelled : And yet a Horning, which, in Effect, is but a Dilator, may be proponed *omni tempore* for debarring of a Party either before or after *Litis-conteſtation*, and ſicklike of Excommunication.

326. *Item*, In Actions of Removing, the Defender is obliged to find Caution for the violent Profits, at the firſt Term after *Litis-conteſtation*; 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

albeit he prove not his Reply. But the Pursuers of Removings, are commonly loath to take Decreet, while their Reply be proven, if they be sure to prove the same.

327. *Item*, This is a common Exception in Removings, That the Defender bruiks a Part of the Lands contained in the Romoving, 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.

328. *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*; 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.

329. *Item*, This Exception is usually 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 his Master therefore; which is ever paid after the *Whitsunday* at which the Warning is made.

330. *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.

331. *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. But 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.

Of the Diversity of Decreets.

332. 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

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. 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 15 Days Warning, to the Clerk of the Bills.

333. *Item*, Decreets, or Letters conform, are now commonly craved upon Rolments of Courts, or Decreets of Baron-Courts.

334. *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 Sheriffdom; albeit, if the Pursuers please, they may summon particular Parties who have Interest, to hear and see Decreet and Letters conform granted.

335. *Item*, By Act of Parliament 1592, *cap.* 140, all Letters of Horning generally direct, *against all and sundry*, are prohibited; and yet the Lords, by their Practick, sustain such Letters, if the Party be charged for Payment of a Duty used and wont to be paid by them.

336. *Item*, When Decreets are given before the Lords of Session, either conform to the Decreets of inferior Judges, or upon Summonses used before themselves *via ordinaria*, so soon as the Decreet

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 writes 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.*

337. *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 warrant to the Writer to the Signet to draw up Letters in the same Form as if the Decreet were given before the Lords upon Citation of Party.

338. But there is this Difference betwixt Letters of Horning upon Decreets conform, upon a general Citation, or upon registred Bonds or Contracts, which are accounted Decreets on the one part, and Decreets given before 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

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 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, in respect of his Contumacy, and to put him to the Trouble and Necessity of reducing the Decreet.

339. 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, *& quod per eum non stetit*, they are in use to prorogate the Term of the suspending of the Execution.

340. There is another Case wherein *via ordinaria* is opponed to Decreets of 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

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 only to hear and see a Bond or Contract registred, or Decreet transferred. Which Conclusion being *aliquid multiplex & collectivum*, comprehending all that, which is 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.

341. 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.

342. 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.

343. *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

mitted 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.

344. *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 elide the Subject of the Summons *in totum*, the same is admissable.

345. *Item*, There is a great difference betwixt Decreets given *via ordinaria*; 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 unreduceable, 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

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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 the raising of the first Suspension.

346. And in the Decreets of Suspension which are given betwixt Parties compearing, they are in worse Case than in the Decreets given upon Summonses *via ordinaria*; 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 were competent, but omitted at that Time.

347. *Item*, There is only one Case wherein the Lords will not admit a Party to suspend upon a new Reason, after Decreet given upon the first Suspension; which is this, If the Charger, by 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 the Decreet was given against him; his Heir or Cautioners cannot suspend

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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.*

348. *Item*, Albeit Decreets given *parte comparente*, are irreduceable, 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.*

349. *Principaliter*, where the Reaſons of Reduction are either emergent, *poſt litem conteſtatam*, or *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.

350. 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 exceedingly loath to admit them, becauſe they thought it a loſing of all Sentences, and a Way to make *lites infinitas*, ſpecially ſeeing *notitia & ſcientia* have no other Probation but the Oath of the Proponer, ex-
cept

cept the Party be able to induce ſuch pregnant Preſumptions whereupon he may enforce his Knowledge *in conſequentiam*.

351. 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 conſequentiam*. And in this Caſe the Defender cannot oppone the Decreet obtained *in foro contradictorio*, becauſe that which is craved to be reduced *in conſequentiam*, upon a relevant Reaſon againſt the Principal, cannot be opponed to elide the Reaſon, becauſe the Decreet is craved to be reduced: But this Reduction of the principal Title is only admiſſable, 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 prima 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*.

352. And hereupon may ariſe a great doubt of 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*; *de quo cogitandum*.

353. *Item*,

353. *Item*, According to this Courſe, Retours, which by the Law were irreduceable after three Years, if the ſame be purſued principally, may be reduced *in conſequentiam*, after twenty or thirty; if the Rights and Infeftments, which were the Grounds whereupon the Retours proceeded, ſhall be craved to be reduced principally and primarily, and the Retours to fall *in conſequentiam*.

Of Assignations.

354. AN Aſſignation made by an 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 Aſſigney, is not *habilis modus* to eſtabliſh a Right in the Perſon of the Aſſigney, 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 obtained Infeftment; or if the Lands were compriſed from the Cedent, and the Compriſer infeſt: In theſe Caſes, the Aſſigney will be excluded from the Mails and Duties, and Benefit thereof aſſigned to him; and the third Perſon who is infeſt, either upon Reſignation or Compriſing, will be preferred to the Aſſigney *quoad* the Mails and Duties of all Years and Terms after the Date of the Saſine.

355. *Item*, If the Right which ſtood in the Perſon of the Cedent, was a Right of that Nature which was tranſmiſſable by ſimple Aſſignation, without Saſine, as a Right of Liferent: In this Caſe, the Aſſignation to the Liferent, being cled with Poſſeſſion, or lawfully intimate before Compriſing, will be preferred to the Compriſer, or to any other ſingular Succeſſor.

356. It is always to be underſtood, that the Liferent be aſſigned formally; for if it be not formally aſſigned, but only an Aſſignation made of the Mails and Duties for the Space of two, three or more Years: In that Caſe, if the Liferent be formally diſponed or compriſed thereafter, the Aſſignation will not be valid againſt a ſingular Succeſſor who acquires a real and formal Right with 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 alſo be 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, *quod eadem ſit 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, *quatenus eſt jus totale*; and by the making thereof, the Liferenter is fully and totally denuded: Whereas, by Aſſignation to Terms or particular

cular 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, ubi partes non ſunt*, it appeareth 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 Dimiſſion or Reſignation, and 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.

Of Tailzies.

357. THere is a Difference betwixt a Bond or Contract of Tailzie, and an Infeſtment of Tailzie paſt without Bond or Contract; for an Infeſtment 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 Tailzie.

358. *Item*, As to the Bonds or Contracts of Tailzie, they are either made *ex causa affectionis & meræ donationis*, or *ex causa onerosa*, or by way of mutual Tailzie.

359. 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 Donations, *mortis causa*, which are ever revokable. Some think, that *obligant quoad 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 an new Infeftment with Change of Heirs.

360. 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

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.

361. 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, 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. 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*; it was decided in the Action betwixt *Walter Maver* and Mr. *Thomas* his Brother, whereof the Cause was this: *Walter Maver* 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 his Heirs Male of his Body; which failing, to the said Mr. *Thomas* his Brother and his Males. Thereafter, *Walter* being a facile young Man, and moved to do some Deeds in Prejudice thereof; and for Prevention thereof, Mr. *Thomas* served Inhibition against *Walter*: Whereupon *Walter* intented Summons before the Lords, to hear and see the Inhibition reduced, and *simpliciter* suspended. In 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 nulla causa onerosa, *but allenarly of Free-will.*

362. 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*.

363. And yet such reciprocal Contracts are reduceable, where one of the Parties Contractors 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 fulfil the same; as was found betwixt *Spence* and *Spence*, and betwixt the Earl of *Home* and *Coldingknows*.

364. But

364. 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 Infestment 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.

365. And yet there may be many Ways found out by the which this Provision may be frustrated; and there is no Question but the Lands may be comprised for anterior Debts contracted before the Inhibition.

366. *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, *multo magis*, the Lands may be comprised from them *ante inhibitionem*.

367. 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.

368. 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 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

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 'tis 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 Recognitions. *Next*, if it be redeemed before the 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.

369. Now *quæritur*, if the like ſhould be, where the Heir of Tailzie has directly committed againſt the

the 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*; 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 the which it is anſwered, *Quod 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; and concerning thir Proviſions, the firſt Queſtion to be moved is, If they be lawful or not? Which being well ſolved, will clear all the other Queſtions. 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. The Common

Law

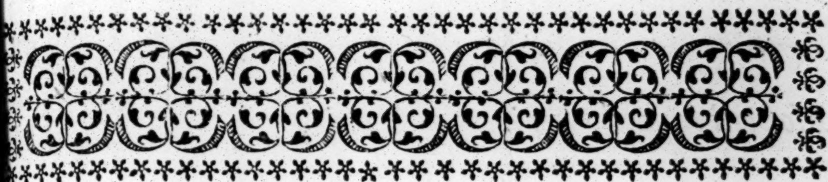
Law ordains all Traitors and Rebels to be punished, not only in their Bodies, but in their Lands and Goods. Now, if the Heir of Tailzie commit Treason, or be Year and Day at the Horn, I doubt not but in Treason, the Fee of the Lands will pertain to the King; and in Rebellion, by Year and Day, the Liferent 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. It may be doubted if the like may be said in other Superiors besides the King's Majesty. To the 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 Failzie, 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.

370. 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

ſion, *eorum omnium eadem eſt cauſa & ratio*, becauſe they cannot have the Right, *niſi cum ſua conditione & cauſa*.

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 ſicklike Action and Execution againſt him, as againſt the principal Debibitor; if he renounce to be Heir, then I have Recourſe *contra hæreditatem 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 which have *tractum temporis futuri*, as Liferents, &c. And if another Creditor come in, he muſt not only pay me all Bygones; but alſo give me Security for all Time coming, before I be holden to quite my Right in his Favour; and ſo it ſeems that Compriſing is only Execution, but Adjudication carries both Action and Execution.

FINIS.



INDEX.

	Page.
APPRISINGS *and Adjudications,*	105
Assignations,	137
Base and publick Infeftments,	61
Bishops and Kirks,	12
Comprisings,	107
Confirmation,	68
Diversity of Decreets,	128
Escheat Liferent,	73
Extent Old and new,	50
Form of Process before the Lords,	1
Heirs,	38
Heretable Bonds,	35

Impro-

Inferior Jurisdictions, 93
Judgments possessory and Petitory, 98

Moveable and heritable Bonds, 35

Nonentry and Wards, 43

Precepts directed to the Superior, 54
Precepts and Sasines, 90

Reductions and Improbations, 114
Reversions and Regress, 69

Signatures and Seals, 84

Tailzies, 139
Testaments, 23

Warnings and Removings, 116

A DISCOURSE ON THE *Rise and Progress* OF THE LAW of SCOTLAND, AND THE Method of Studying it.

By ALEXANDER BAYNE. J. P.

For the Use of the STUDENTS of the MUNICIPAL LAW.

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A DISCOURSE ON THE Riſe and Progreſs OF THE *Law of* Scotland.

ALL the Sciences are, in the General, uſeful, as they convey to our Minds the Knowledge of Truths of different Natures, by which we not only improve and cultivate the natural Lights of Reaſon, but in the Exerciſe of our Faculties, in our Enquiries of that Kind, we attain to a Habit of diſcerning accurately, the different Natures of Things, of diſtinguiſhing

ſtinguiſhing them with Exactneſs, and of judging better of them by thoſe acquired Helps, than it i poſſible for us to do, by the bare Lights of ou natural Reaſon, without the Aid of the Sciences For, by their Means, we are enabled to range ou Thoughts into better Order, and to communi cate and explain them, with greater Perſpicuity i all Matters wherein we happen to be conver ſant.

Of all the Sciences, that which tends directly to the Service of Religion, claims the firſt Place ; th others being of a lower Rank, are properly diſtin guiſhed from that of Theology, by the Name o *Humane Sciences.*

Among the humane Sciences, that which ha the neareſt, and moſt immediate Relation to th Order of Society, and to the publick Good, is without Queſtion, the Science of the higheſt Cha racter ; and, as being the moſt uſeful to Mankind is beſt entituled to the firſt Place, and ſuch is th Science of the Law.

It is the Law which regulates the Juſtice tha Men owe to one another, in all the various Af fairs and Intercourſes of Life ; and it compre hends not only the Rules by which theſe Affair and Intercourſes are governed, but the Rules o the Functions, and Duties of thoſe to whom th Adminiſtration thereof, is committed.

As the Science of the Law, is that which is o the greateſt Account to Mankind in general, ſo with reſpect to each particular State, is the Know ledge of its proper Law ; the Knowledge of th

Laws

Laws of other States and Kingdoms, is no otherwise to be considered, as truly useful to us, than as it may conduce to the better Understanding of our own: For altho' the Study of any Law engages a close Exercise of the rational Faculties; and by such Exercise, the Judgment and Understanding is instructed, whereby it becomes an Accomplishment; yet still, I say, the Knowledge of the Laws of other Countries is chiefly useful, as it may conduce to give us a more perfect Knowledge of our own; for it is our own proper and peculiar Law, which ought to be our chief Study. And I may be bold to say, That our own Municipal Law does not only recommend it self to us, chiefly as being ours, but also by its own inherent Excellency; which will appear to us in a strong Light, in this Consideration.

As the Laws of all the present flourishing States of *Europe* are in a greater or less Measure form'd after those antient Models, wherein right Reason shin'd forth in its brightest Lustre; so the Excellency of the particular Laws of any Country, is generally ascrib'd to the nearer Resemblance they bear to those admirable Laws of Antiquity.

Now in this View, our own Municipal Law compared with the Municipal Laws of other Kingdoms, is well entituled to the first Class in Rank and Dignity,

Because the Spirit of that Law, which has been so universally received, shines forth in our Law, in a most conspicuous Manner, and bating the Remains of Feudal Law, which the Barbarity of

later Ages had introduced, and made unavoidabl to us, especially in Matter of Succession; the o-ther Parts of our Law, are either form'd afte the Pattern of the *Roman* Law, or directly borrow-ed from it, without the least Mixture of Norther Barbarism.

Thus our own Municipal Law does not onl recommend itself to the Study of the Ingenious as it participates in a large Measure of the Spiri of those excellent Laws of Antiquity; but by be-ing the established Rule of the Administration o Justice in the Country to which we belong, th Knowledge thereof becomes a necessary Part o Education to all those who either purpose to serv their Country in a more publick Station, or wh desire to be useful to their Friends and Neigh-bours in a private Life.

And since the Knowledge of our Law is so ne-cessary an Accomplishment, it is a Happiness tha the Study of it is rendered so much the more a-greeble by its borrowed Lustre from the *Roma* Law.

The History of our Law lies very much in th Dark; for our Lawyers of former Times hav left us few of their Works, and none of them ar of that Kind: So that we have but few Helps t guide us in our Enquiries after the Sources fro which many of our ancient Laws and Customs hav sprung.

In those Reigns of our ancient Kings, wherei Civil Feuds and Discords made the Use of Arm so well known among us, we are not to expec t

to find the Veſtiges of Law: For Laws were of little Account, when every Head of a Family, or Chief of a Name aſſumed to himſelf a Power to determine all Matters of Controverſy with his Neighbours, by the Dint of his Sword. And the few Laws which may have then prevailed, were, in all Probability, founded only in long Uſage and Cuſtom; of which, no Doubt, the Remains are blended and mixt with our preſent Law, altho' the Darkneſs and Obſcurity which cover the Hiſtory of thoſe antient Times, forbid us the Pleaſure to diſtinguiſh them from theſe conſuetudinary Laws, which are of later Date.

The oldeſt Laws we have any Account of, are theſe of *Kenneth* II. who began to reign about the Year 834, of which *Hector Boetius*, and ſome others have given us a formal Regiſter, but upon what Authority is altogether uncertain; and at beſt it is likely to have been no other than Oral Tradition.

However our learned Sir *Thomas Craig* pays that Regard to theſe Laws, as to make Uſe of their Authority to prove the Time when the Feudal Law was firſt introduced into *Scotland*; and on the ſame Occaſion he mentions ſome other Laws of *Kenneth* III. But ſtill we are not to take that learn'd Author's Notice of theſe Laws, as a Proof of their being abſolutely authentick, when we conſider the Occaſion on which he mentions them; namely, to prove that the Feudal Law was introduced into *Scotland*, before it found its Way into *England* by the Conqueſt: For that

was a Point which he seem'd to be very forward to establish; and no Doubt the Passion he had for the Honour of his Country, would easily and naturally induce him to lay hold of the smallest Helps, and to build upon the Authority of Laws, which perhaps on any other Occasion he would have very much called in Question. I say therefore, we are not blindly to receive them on his Word, since we have no Manner of Account of them, but in the Writings of Men who lived some Ages after; and to whom the Authority of these Laws in the Ninth Century, was as little known with any Measure of Certainty, as it is to us at present.

Next to these in Age are the Laws of *Malcolm* II. who began his Reign in the Year 1004, of which Sir *John Skeen* affirms he has given us an authentick Collection, which he has prefixed to his Edition of the Books of *Regiam Majestatem*; but whether these are the Laws of *Malcolm* II. is much to be questioned. The learned Sir *Henry Spelman*, among others, seems very much to doubt of their Antiquity, in these Words, *Plurima enim illic vocabula recentioris ævi, mores etiam nonnulli, magistratuumque & ministrorum nomina.* He observes in them the Customs, Language and Names of Magistrates and other Officers of a much later Age, and altogether unknown in those Times.

This learned Author, who on several other Occasions does not seem in the least disposed to detract from the Antiquity of our Laws, is the more to

to be regarded, and eſpecially when he gives an Opinion in a Matter of which he was ſo great a Judge, namely, the Antiquity of certain Offices, and certain Words and Phraſes. He thinks that the Officers of the King's Houſhold, and Courts of Judicature were not ſo regulated at that Time, nor the Fees of theſe Officers ſo aſcertained as they appear to be in theſe Laws. And the Words, *Wrang* and *Unlauch*, therein-mentioned, the Author of the *Scots Hiſtorical Library*, Biſhop *Nicolſon*, thinks were not in Uſe in the Days of *Malcolm* II. Sir *Thomas Craig* ſpeaks alſo of theſe Laws of *Malcolm* II. as being authentick: But ſtill it is for proving a Point, as I juſt now obſerved, that he was very deſirous to eſtabliſh; which is the Occaſion of his giving them as Vouchers, namely, That we had the Feudal Law before the Conqueſt. Of his Opinion however is the learned *Baſnage*, in his Commentary on the Cuſtoms of *Normandy*; he takes theſe Laws which are aſcrib'd to *Malcolm* II for authentick; and upon their Authority, admits the Feudal Law to be of longer ſtanding in *Scotland*, than even in *Normandy*.

But the firſt conſiderable Body of Laws aſcribed to us, is contained in theſe Books, which, from their initial Words, are called the Books of *Regiam Majeſtatem*. In the Compiler's Preface, who ſeems to have been ſome private Man, they are ſaid to have been collected by the Order of King *David*, with the Advice and Council of the whole Realm, as well Clerks as Laicks.

That these Laws have been considered as a Part of our Law, from the Reign of *James* III. downwards to the Reign of *Charles* I. appears by several Commissions granted at sundry Times, for revising and correcting the Laws, wherein the Books of *Regiam Majestatem* are always mentioned as a Part of our Law. But whither that Collection, as it stands, would have been so esteemed, had these Commissions taken Effect, has by some been called in Question; and particularly by our learned *Craig*, who rejects the Authority of these Books with great Indignation, in these Words, *Ut caliginem nostratium omnium oculis & animis offusam quaque misere hactenus occæcati fuimus, detergam, assero, nihil in eis libris contineri quod ad mores nostros, sive usum nostrum forensem conducat, neque unquam scriptoris illius fuisse institutum, ut aut nostris hominibus prodesset, aut leges nobis præscriberet; autor enim eorum librorum fuit Ranulphus de Glanvilla, Comes Cæstriæ, qui tractatum de legibus & consuetudinibus Angliæ regnante Henrico II. edidit.*

It cannot be denied, but that there is a great Resemblance between *Glanvill*'s Book, which begins with the Words, *Regiam potestatem*, and ours, which begins with these of *Regiam majestatem*; and so remarkable is the Resemblance in many Respects, that the one seems to be the Copy of the other; but which is the Original, is the Question? Sir *Henry Spelman*, talking of this, very modestly says, *In præfatione, dispositione, canone verborum, integrorumque capitulorum textu, adeo inter*

inter se passim consentiunt, mutatis vel ascriptis, quæ utriusque gentis postulat ratio, ut alter ex altero manifestè cognoscatur desumptus; sed an nos è Scotia Jurisprudentiam nostram reportaverimus, judicent alii.

Some of the learned Antiquaries of our own Country, have endeavoured to prove these Laws to have been collected in the Time of our *David* I. And were that so, we should have the Honour of having given a Collection of Laws to *England*: For *Glanvill*, according to Sir *Henry Spelman*, *non elatus est Justitiarius Angliæ*, was not made Lord Chief Justice of *England*, till the Year 1180, which was 25 Years after our King *David*'s Reign.

But I'm afraid that the Proofs of these Laws being collected in the Time of King *David* I. and into that Shape we now find them, are very lame; for the most material of the Proofs are these, That in the Statutes of King *William*, who began his Reign in the Year 1165, Twelve Years after the Death of King *David*; and in the Statutes of King *Alexander* his Son, some of the Laws of King *David*, therein referred to, are extant in the Books of *Regiam majestatem*.

Now, with all Submission, that Argument proves no more than this, That there are of the Laws of King *David*, in that Collection, which may well be; but still the Bulk of what is there presented to us, may notwithstanding be of a later Date.

That King *David* may have made and collected some excellent Laws, is not to be doubted,

 from

from what *Buchanan* ſays of him, *Erat enim cuivis Regum in cæteris virtutibus par, audiendi vero cauſas tenuiorum facilitate longe ſuperior. Si quis judicium falſum judicaſſet, res judicatas non reſcindebat, ſed judicem litis æſtimationem cogebat victo pendere.*

A Prince ſo careful of the Adminiſtration of Juſtice, may well be thought to have enacted ſome Laws: But theſe Laws of his, which we find in the Books of *Regiam majeſtatem*, do not there appear in that ſimple and plain Dreſs, which muſt have been peculiar to his Time. The Statutes of *William* and *Alexander*, of a poſterior Date, preſerve yet a more antient Appearance than any of thoſe which are to be met with in the *Regiam majeſtatem.* When we look at the Law of Death-bed, and that of *Minor non tenetur placitare*, &c. in the Statutes of King *William*, we find in them few Words, and theſe put together in a plain and ſimple Manner, that gives an Idea of theſe antient Times: But when the ſame Laws preſent themſelves to us in the Books of *Regiam majeſtatem*, they loſe all their Plaineſs and Simplicity, and are adorned not only with more modern Terms, but in all Appearance with Foreign ones. This every Reader of any Taſte muſt needs be ſenſible of, if he does but in the leaſt compare them.

But further, we find in the *Regiam majeſtatem* a great many Paſſages borrowed from the Civil Law; and how the Civil Law ſhould have been known in *Scotland*, in the Time of King *David* I. is beyond the Comprehenſions of every one,

who

who but considers, that King *David* began his Reign in the Year 1124, and that it was several Years after when the Pandects being found at *Amalphi*, the Civil Law began only to be taught in the Schools of one *Irnerius* at *Bononia* : Who then can believe that *Scotland* should have caught so many Fragments of Civil Law, as are to be found in *Regiam majestatem*, at a Time when it was hardly yet revived in *Italy*, after having been so long buried in Ruins and Desolation, which had overspread that Country where it had once flourished.

In a Word, there needs no other Argument, than that one to prove the Laws of *Regiam majestatem* to have been collected some considerable Time after King *David*, when the Civil Law may reasonably be believed to have found its Way into *Britain* : So that what is said in the Compiler's Preface concerning the Order of King *David*, must be understood, with respect only to some Part of these Laws, which may have been King *David's*, but can never be referred to the whole Contents of these Books, which must needs have been the Production of some later Age. It is not unlikely that King *David* may have made a Collection of Laws; and perhaps this very Preface may have belonged to them; and by some Accident became ignorantly applied to the whole Books of *Regiam majestatem*, tho it truly belonged only to a small Part of them; for Sir *John Skeen* has not thought fit to give us any Account of the Manuscripts from which he collected those Books which he has joined together.

There

There is nothing more certain than this, that there are in these Books, Laws and Terms that were never known, nor made Use of in *Scotland.* Who is it, for Example, that has ever read in the Law of any Country, but of *England*, that subsequent Marriage does not legitimate the Children procreated before it? But such is the Law of the *Regiam Majestatem*, which is a very pregnant Proof, that Part of the Contents of these Books is borrowed injudiciously from their Law: And for ought I could ever learn, there was never a Charter seen in *Scotland* which granted Lands to be held in Soccage; yet the *Regiam Majestatem* speaks much of that Tenure, which indeed is well known in the *English* Law. But surely had any of our Lands been ever held in Soccage, or had that been a Tenure known in our Law, we should have seen many Charters of that Character, considering how many of our oldest Charters are still preserved: For my part, I cannot well conceive what has made so many of our Countrymen complain of Sir *Thomas Craig*, for declaring against the Authority of that Book, I mean of the whole Collection as it stands; for in my Opinion he has done more Honour to our Law in the discarding from it a Collection of Laws, which he justly says, *Nunquam auctoritatem juris, vel edicto, vel principali constitutione, obtinuit*, never received the Sanction of the Legislature, than those Men do who would blindly adopt them without Distinction upon a wild Imagination of their Antiquity, which has no Foundation.

These

These Statutes, subjoined to the Books of *Regiam Majestatem*, of King *William*, *Alexander* II. *Robert* I. *David* II. *Robert* II. and *Robert* III. are the only undisputed Remains we have of any written Law before the Reign of King *James* I. and they are of little more Use now than to shew us the Sources of some few Things which are held for Law at this Day: But the Bulk of them is gone into desuetude, as are many of those Acts of our Kings which are of a much later Date.

Having thus considered the few Remains we have of any written Law preceeding the Reign of *James* I. and which for the most part are now obsolete; I come next to take a short View of the two chief Sources from which our Law has sprung, the *Feudal* and the *Civil Law*. At what Time the Feudal Law may have been introduced into *Scotland*, seems to be very uncertain: And to settle that Point, from what Helps may be gathered from History, would require more Time than I have at present to bestow upon it. Our learned *Craig* affirms, That the Feudal Law was in Use with us before it was received into *England* by the Conquest, and he thinks it likely that we had it from *France*, *Ex contracta cum Gallis amicitia & morum frequentia*, by our frequent Correspondence and Intercourse with that Nation.

It is from this Law we derive what is proper to us *in materia successionis hæreditariæ, sive in acquisitione hæreditatis novæ quam nos conquestum dicimus sive in amissione*. In matter of Succession, and in the Ways by which we either acquire the Property

Property of Lands or lose it, which makes a great part of our Law.

It would appear that of old there was a great Penury of any written Law with us, and in that I think we have been very happy; for having no written Law of our own, besides a few of our ancient Customs, blended with what we have got from the Feudal Law, which in part may have been reduced into Writing, we have the more naturally had Recourse to the Civil Law; and as *Craig* says, *The Reason that the Civil Law has prevailed so little in* France, Germany *and* Spain, *and even in* England, *and so much with us, is this, That in these Kingdoms their Municipal Laws and Customs have been all committed to Writing; whereas with us, there being a great Penury of any written Law, we naturally in most Cases follow the Civil Law.*

I consider therefore the Civil Law, as having become for some Time our proper written Law; and of this we find a very particular Proof in the Chartulary of the Abbacy of *Paisley*, in which is recorded in the Year 1234, an authentick Writing, intituled, *Litera condemnationis missa Alexandro Regi*, wherein are set forth the Proceedings of the *Decanus de Carrick & Cuningham, & Magister Scholarum de Air*, who had been delegated by Pope *Gregory* IX. to judge concerning the Property of the Lands of *Kilbuck*, *Inter Abbatem & Conventum de Paislet, & Gilbertum filium Samuelis de Renfrew laicum.* In this Letter the Judges not only acquaint the King, that they had given Judgment in this Matter, *de consilio virorum prudentum, &*

& *tam in Jure Canonico quam Civili peritorum eis assidentium*; but it appears likewise that they had put their Sentence in Execution after the Form of the Civil Law, *per primum & secundum Decretum*.

The Churchmen were the chief Lawyers we had then, and for a long Time afterwards; and to them undoubtedly it is owing that our Law participates so much of the Civil Law, which they were naturally led to study, because of the Connection between the Civil Law and the Canon Law, which it was so much their Business to know. *It is probable*, says Sir *Thomas Craig*, *that our old Court of Session was composed chiefly of Ecclesiasticks, who being well instructed in the Civil and Canon Laws, gave Judgment according to their Prescripts.* And when that excellent Prince, King *James* V. instituted a perpetual Court of Session, he did not chuse out of the Nobility the Men of high Dignity and Honour to fill his Bench, but the Learned in both Laws, who following the *Roman* Law in their Decisions, recommended it to Posterity.

In those early Times, not only all the Law, but all the Learning, was with the Churchmen, insomuch that even at the Institution of the College of Justice, the most part of the Judges were Ecclesiasticks; and there is little Room to doubt, but that Churchmen being Judges, and the Civil Law being so nearly allied to the Canon Law, by being its Model and Pattern; the Civil Law came thus more to be made Use of, and in the greater

Abun-

Abundance adopted into our Law than otherwise i
would have been.

Thus the Civil Law was at first introduced, an
by these Steps it has become so considerable a Par
of our Law, so that we not only follow its Rule
and Decisions, chiefly in what relates to Moveables
as Sir *Thomas Craig* says ; but also in Pactions
Transactions, Restitutions, Arbitrations, Servi
tudes, Contracts of all Kinds, Evictions, Pledges
Tutories, Actions, Exceptions and Obligations
I say, we not only make Use of it in all these Con
tracts and Obligations, but by the Help of it w
have given a just Temperament to many of the Se
verities and Hardships in the other Parts of th
Law, and have made them more conformable t
right Reason and natural Equity. Thus in man
of our Decisions, we find the Severities of Feuda
Penalties justly mitigated, from Reasons which th
Civil Law had inspired. *For to tell truly*, says Si
Thomas Craig, *the Civil Law is so diffused throug
all our Affairs, that there hardly occurs a Case o
Question wherein the great Use of the Civil La
does not manifestly appear.* Herein, I say, wa
our great Happiness, that having no written La
of our own, we had naturally Recourse to the Ci
vil Law ; for if, as in other Nations, our own an
cient, and perhaps barbarous Laws and Customs
had been committed to Writing, we had like them
been tenaciously addicted to our own Laws, and
partially fond of what had been handed down to u
by our Ancestors, we had disdained to adopt th
Laws of another Nation, how much soever pre-
ferable

ferable to our own. Thus our Want of written Law was our great Felicity, and thus the Civil Law became our written Law for a Courſe of many Years.

Being therefore plentifully ſupplied from the Pandects and Code with Laws touching private Right; Our later Kings we ſee have not found it neceſſary to give us any conſiderable Number of Laws of that Character. To what other Cauſe can it be owing, that King *James* I. has given us ſo few Laws concerning private Right, but that he found his Judicatures in Poſſeſſion of ſo rich a Source of Laws, and ſo well founded on the Principles of natural Equity.

That Prince was one of the moſt accompliſhed Men in his Time, and he had the beſt Education which that Age afforded. It was natural for a Prince thus adorned to apply himſelf to the Arts of Government: And as he gave us many Laws concerning the publick Policy of the Kingdom, ſo doubtleſs he would have given us a greater Number of Laws concerning private Right, than he has done, had not the Uſe of the Civil Law, of which he found his Kingdom in Poſſeſſion, made that unneceſſary.

To the ſame Cauſe it muſt needs be owing, that in the Five following Reigns ſo few Laws were enacted concerning private Right; and this is ſo remarkable, that if we reckon the whole Laws of that Character, which are recorded among the Acts of Parliament of the firſt Five *James*'s and of Queen *Mary*, they will hardly amount to the Number

Number of one Hundred. Now if the Civil Law had not lent its Aid, it is not to be imagined but the Disputes which must have happened concerning private Right, during the Course of so many Years, must have suggested to our Parliaments the enacting a far greater Number of Laws touching private Right, than that handful which appear among our Acts of Parliament. I consider therefore the Civil Law as having been the Rule of Judgment in all Cases, wherein our own particular Statutes and consuetudinary Laws were silent: So that the Civil Law was in old Times our proper written Law.

In Course of Time as our Courts of Judicature began to flourish, our Law gradually received Improvements; and what we borrowed from the Civil Law, was either adopted simply without any Alteration, or was varied a little, according as our different Manners and Genius made an Alteration necessary: And that was effected, partly by Acts of Parliament touching private Right, which increased in Number in the Reign of *James* VI and his Successors; partly by the Decisions of our Lords of Session. And thus by Degrees our Law is become what at this Day we find it; which tho collected originally from these Sources that I have described, yet is now by a long Tract of Time made the proper and peculiar Law of our Country.

Now altho' we have thus collected and adopted a proper Law of our own, which is partly written, partly consuetudinary; yet as in the infinite Va-

riety

riety of Cases which daily emerge, some Questions will often occur which by no Rule in our Law can well be decided. Our Judges therefore have Recourse to the Civil Law, and are thereby so far governed, as they find the Rule of Decision therein set forth, nowise disconform and inconsistent with our own Law and Practick: And therein the Judges are well justified by several Acts of Parliament, whereby it is declared, *That the Lieges shall be governed by the King's own Laws,* [that is, our own peculiar Laws and Customs,] *and by the Common Laws of the Realm,* [that is, the Civil Law;] so that we consider the *Roman* Laws, which are not disconform to our own fixed Laws and Customs, to be our Law. For in the Reign of *James* V. we find the King's Advocate commencing an Action of Forfeiture against an Heir, for the High Treason of his Father, on no other Foundation but the Civil Law; which tho' murmured against by the Generality of the Nation as a Novelty, was yet justified by the Parliament as legal; and for no other Reason, but because it was agreeable to the *Roman* Law. And in King *James* VI. his Time, we find the Legislature, in the abrogating of some former Laws, thought it necessary to give a *non obstante* to the Civil Law, as well as to our own particular Laws and Constitutions. From all which it manifestly appears, that the Civil Law has all along been considered as our Law, and is justly made the Rule of Judgment in all Cases wherein our Law is silent; and

 when

when ſuch Deciſions will prove nowiſe derogatory to our own proper Laws and Cuſtoms.

Having thus briefly ſurvey'd the Riſe and Progreſs of our Law, I ſhall in the next Place turn my Diſcourſe to what more immediately concerns the Work before our Hand. Some of you, *Gentlemen*, whoſe firſt Year it is to ſtudy the Municipal Law, muſt be made acquainted with the general Plan of my Prelections, to which you are altogether Strangers: To the End that you may the better enter into the Advice I am to give you concerning the Proſecution of your Studies.

And as in this Matter of Advice, after what Manner you are to ſtudy, and to make my Prelections beneficial; I muſt diſtinguiſh you, *Gentlemen*, who have done me the Honour to be the Hearers of my Prelections in former Years, from you who come new only to commence Students of the Law of your Country. I ſhall firſt therefore addreſs myſelf to you, *Gentlemen*, who are of this laſt Claſs, and who are but entring upon this Study, after I have given you a general View of my Method of prelecting.

The Text I chuſe is Sir *George Mackenzie*'s Inſtitutions, which is the moſt complete Work of its Kind of any thing which that ingenious and learned Author has left us. 'Tis wrote very much in the Spirit and Manner of a Text Book, ſhort and conciſe, and full of Matter. 'Tis plain our Author has had my Lord *Stair*'s greater Body of the Law in his Eye when he compiled this Inſtitute, and to that 'tis probably owing that the Matter is remark-

ably

ably more crouded in it than in any other of our Author's Performances. What is it then we do not owe, in Matter of Law, to the Labours of the Author of the Original, my Lord *Stair*, when we consider, that even this Text-Book has ſprung out of his larger Commentary ? And that without the greater Work of the one, we had not in all Probability been favoured with the leſſer Work of the other in that Perfection we find it.

As there is then in every Page almoſt of this ſhort Inſtitute, a great deal of Matter compriſed in little Room, my firſt Buſineſs will be ſhortly to give you our Author's Meaning in other Words, and a little more copiouſly than it was proper for him to do, who meant only to deliver the Elements of our Law for others to comment upon. This being done, I retouch the ſame Matters in a more formal Diſcourſe, and I add to them ſuch other Matters as are coincident with the Subject of the Paragraph I'm upon, which are to be gathered partly from my Lord *Stair*'s Inſtitutions, partly from the later Deciſions, and ſome of the other Authors upon our Law.

Theſe coincident Matters are ſuppletory to our Text, and I give you References to the moſt material of them in ſhort Notes which I dictate.

It will therefore be your Care, *Gentlemen*, to take down theſe Notes as accurately as you can, and to endeavour to make them your own ; but I am not to expect that you are, during the firſt Year, to examine the Authorities to which I refer with any great meaſure of Study.

The Text, as I already observed, is to be your first Care, and you will find sufficient Work for you at home in perusing the Text with Application, and in consulting the Acts of Parliament to which it refers, and in writing over your Notes fair, and entring them into a Book from the loose Papers you make Use of here: Which second Writing of the Notes will have its own Effect, and serve to imprint the Subject Matter of the Notes upon your Memory to better purpose than several Readings would do.

You'll carefully examine and consider the Portion of Text which happens for the Time to be here explained to you, and by a repeated Reading you would endeavour to commit the Subject Matter thereof to your Memory as effectually as you can.

Your next Care would be to read the Acts of Parliament, which are quoted by our Author as the Authorities of what he delivers; and compare the Authorities with the Text, which will contribute to give you a right Notion of the Matter, and will help you also to remember it the better.

When you have thus considered the Text and the Acts of Parliament referred to, the next thing I recommend to you, is, to recollect these Matters of Law which I have discoursed of, that are not in the Text, by the Help of the Notes which I shall dictate to you. You will find for the most part in these Notes a Reference to some Acts of Parliament, some Decision or other Authority: Now the Acts of Parliament referred to, I would have you in all Cases to peruse; but I cannot ad-

vise

vise you to consult in this first Course all these Authorities which I shall cite: That would be too great a Task for you at the Beginning, and might contribute rather to perplex than to instruct you. It is fit however you mark all these Authorities with the View of being useful to you afterwards, and that you may have them to consult when you come to a closer Study; and to do that which I shall just now propose to those who are farther advanced.

The present Use I propose to you to make of these Notes, is to endeavour to understand aright what they contain, and to fix them on the Memory as well as you can; and to that End you would keep them in Order.

There is yet one thing I would particularly recommend to you, and that is to glance over, before you come hither, the Text which is to be the Subject of Discourse; that will be a Help to you, and a likely Means to understand it the more perfectly, when you hear it explained to you in this Place: For you must needs the more readily follow me in discoursing upon these Matters, after you have first taken such a View of them yourselves, as your own reading of the Text can give you.

But you, *Gentlemen*, who are farther advanced in the Study of our Law, and who have already gone one Course with me, will find Subject Matter, from my *Discourse*, to note an Expression sometimes which may serve either to enlarge or to illustrate the Note which you have already taken:

And while others are employed in Writing, you will perhaps find it needful to keep your Eye on your former Notes, and to correct any thing in them which perhaps through Inadvertency or Mistake you had not well taken down; by which means you will bring your Notes to be more correct and accurate than possibly they are.

But when you are at home, I'm to look for a closer and more extensive Application from you than from the first Year's Students. Your Business it ought to be to consult the Authorities I refer you to, with Care and Exactness; and from thence to extend your Notes, and begin to form a System for your selves, which will be of the greatest Benefit to you imaginable, and enable you to undergo a stricter Examination than you have yet done, or than was proper for me to put you to in my first College of that kind, while you was perhaps a little raw, as well as I somewhat unexperienced in the Matter of a strict Examination: You will by such Practice be enabled readily to apprehend a Case, when I propose one to you, and become ready in the Application of the Rule which decides the Question.

It is to be my Care to set before you the Principles of our Law in as agreeable a Light, and to explain them in as distinct a Manner as the outmost Application can enable me. In digesting with my self the Method of managing this Province, I have had two Things chiefly in View: One is to assist you fully to understand and comprehend the Principles of our Law in their just Extent; And the

the other is, to furnish you with all the Means I could think of to enable you to retain them, and to make them your own, after they are fully comprehended.

For when we consider the Use of the Knowledge of Law, it is not enough in the Study thereof to know and comprehend the Rules and Principles of it; but we must be at Pains to fix them on the Memory: For what would it signify to have once comprehended aright the Import of Rules and Principles, if they are not well and distinctly retained, so as to be in a Readiness at all Times for Use and Application.

There is no one Science wherein it is more necessary to have a ready Use of one's Knowledge than that of Law: For there are few Cases which occur to us that are anywise involved in Circumstances, which can either be well stated, or the Question arising therefrom clearly resolved and decided, but from a complex View of many Principles at once. For in the Application of the Principles to particular Cases, one Principle is often limited and restrained, sometimes enlarged and extended by another, according to the particular Circumstances of the Case: And it is impossible to have this complex View of Rules and Principles, but from a distinct Memory of them. As there is therefore no one Science wherein it is more necessary to have the ready Use of one's Knowledge than that of the Law, so we ought to study it after such Manner and Method as will most effectually commit Things to our

Memory, because it is by the Memory alone we have the ready Use of our Knowledge.

It has for that Reason been always the Method of Students, especially those of the Law, to accompany their Reading with Writing; and without Question, the taking down in Writing the Substance and Heads of what we gather in the Course of our Study, is of the greatest Benefit; for the Action of Writing being slower, and thereby laying us under a Necessity to dwell upon the Subject, stamps a more lasting Impression: And the abridging and preparing our Notes and Excerpts, engages us in a close Attention, and proves a sort of Test, by which we discern, if we comprehend aright what we are about; for one can never abridge, till he comprehends well. For these Reasons, the Use of Writing in the Course of any Study, and especially of the Law, which takes in so large a Field of various Matters and Things, is productive of very real and solid Advantages: It imprints an accurate Memory of the Matters which have been the Subject of our Study; and an accurate Memory of what we have learn'd, gives us the ready Use of our Knowledge: So that the best and clearest Survey of the Rules and Principles of our Law which you can take in this Place, will be of little Avail, if the same Things are not laboured over again by your own private Application. You are to consider me only as an useful Assistant and Helper, to pave your Way, and to conduct you in a regular and constant Train; but it is your own Care alone that can perfect and accomplish

accomplish. You may here, I hope, lay the Foundation, and acquire a just Notion and Comprehension of Terms and Principles; but it will depend on yourselves to acquire the useful Remembrance of them. All the Assistance I can give you in that Behalf, is to offer you my best Advice concerning the Means to acquire that useful Remembrance.

Our Text is to be your first Care. You'll in this Place, I dare hope, see its full Import and Meaning; but the Question is, how to make it your own. The natural and ordinary Way, is frequent Perusal of that Portion thereof, which for the Time happens to be the present Subject of Study. But I am sensible, that frequent Perusal of such a thing turns irksome. The Imagination must receive some Entertainment from what we read, otherwise there ensues a Weariness and disrelish, which dissipates the Attention, and gives to our Study the bare Form of it, without the Effect. This is a very common and natural enough Consequence of a repeated Reading of the same Words, and yet a repeated Reading, or somewhat equivalent, is necessary to accomplish our End, namely, to acquire that useful Remembrance which I have already described.

Give me Leave then to propose to you a Method, which is somewhat more laborious indeed, than a repeated reading of the same Thing, but is less irksome and painful, by being more entertaining to the Imagination; and at the same Time extremely profitable and instructive; and that is, to frame

frame and compose gradually, as we proceed in our College, each for his own private Use, a short System of Rules and Principles.

I am not to imagine, that one who is but just entring upon his Study, and to whom Matters of Law are altogether new, will be able to form any Thing of this Sort, in any tollerable Manner; and indeed I would not advise one, at the very Entry, to grasp at more than he can well accomplish. The Text itself, and the Acts of Parliament which I shall refer to, with the Notes which I shall dictate, considered attentively, and with Care, is all the Subject of private Study, which I dare recommend to one who has never studied any Law before; but those who have either been studying the Civil Law, or who have acquainted themselves a little with our own, ought to carry their private Study its full Length; to consult the other Books of our Law, and to have a View of collecting for their own particular Use the Flowers of their reading, and of forming them into the best Shape, and disposing them into the best Order they can.

But before I point out the Materials, which are to compose this System of private Use, I must first take notice to you, how easily these Flowers may be gathered, and the Assistance you may expect from me for that Purpose.

You will observe, That our Author's Manner of Writing, is not to lay down the Principles of our Law, by Way of Position, and in detatched Sentences, but after the Form of a continued Discourse, by which he connects often in the same

Pa

Paragraph ſeveral Matters ; which, tho' bearing a
atural Relation to each other, and very often a
eceſſary one, yet ſtill as they are diſtinct Mat-
ers, they may be ſeparated ; and, for the Sake of
reater Perſpicuity in the Explanation, it is fit to
parate and diſtinguiſh them : Therefore, in the
terpreting of our Text, I chuſe to paraphraſe
very the ſmalleſt Portion of it, that comprehends
Matter which will ſuffer to be viewed ſeparately
om the other Matters to which it is joined, to
e End that nothing in the Text may eſcape us.
Thus I mark out, and parcel the Contents of every
ection in ſuch a Manner, that you cannot fail
take Notice of every Thing that is material in
, and to diſcern and diſtinguiſh the eſſential Cha-
cters of every Thing therein treated of. From
e Text therefore, with an eaſy Application, you
ay be able to extract in your own Phraſe and Ex-
eſſion, the eſſential Rules and Principles ; and
eſe being committed to Writing, I would pro-
ſe, ſhould ſerve for the firſt Materials of your
ſtem.

After having paraphraſed the Text to you, I
ll have Occaſion to take Notice of ſome few
ules, which are not to be found in the Text ;
eſe Rules ſometimes extend, and ſometimes li-
it the Principles in our Text ; and, as they oc-
r, I ſhall firſt Diſcourſe of, and then dictate them
you, to ſerve as another Ingredient of your
ſtem.

But becauſe your Time here will not permit
ch Dictating, and much of it would become te-
dious

dious to you. And whereas there are many o-
ther Matters besides these Rules, which our Te
wants, consisting sometimes of practical Observ
tions, or concerning the History of our La
which will deserve your particular Notice and R
membrance : Therefore I purpose, as a Help
your Memory in that Behalf, to quote to y
either some Decision, some Act of Parliament,
some other Authority from our Law-Books, whi
may serve to illustrate and explain the particul
Matter discoursed of, and from which, by co
sulting the Books referred to, you may call
Mind, and make your own, what without the He
of such Reference would escape you. But the
in taking down these References, it will always
necessary to subjoin a Word or two, to characteri
the Matter for which the Reference is made, so
to distinguish it ; otherwise so many Reference
without a distinguishing Character to each on
would in your private Study perplex you. Wh
you gather from these References, will deserve
Place in your private System, which is, you see,
be composed of the Rules of Law contained
the Text ; and the Notes which you take do
here, together with such Enlargements of them
your own private Study shall enable you to ma
from these References.

The first Ingredient then of your private S
stem is to be collected from the Text.

It may appear perhaps to some, to be a nee
less and unnecessary Trouble to excerp any Thi
from the Text.

Bu

But we are to conſider, That when we attempt
o expreſs our Author's Meaning in a different
Phraſe and Manner, and thereby to make it as it were
ur own, we not only commit the Matters which
contains, more effectually to the Memory, but
e are thereby naturally guided to a ſtricter
earch and Enquiry into its full Meaning, by ex-
mining whether we have fully expreſſed it : And
n this Exerciſe I can aſſure you we ſhall often
nd in our Author ſomewhat meant, which we
hould not otherwiſe have adverted to, if we had
ot attempted to expreſs his Thoughts in our own
Way.

I do not mean, that you are to excerp the Mat-
ers in the Text in their very Words, but that
ou ſhould collect them in your own Words, at
eaſt give them a different Caſt, and mould them
nto another Shape ; for the great Benefit which I
ropoſe you are to reap, will ariſe from the Study,
o expreſs what our Author delivers in a Manner
ifferent from what he has done, taking Care al-
ays to miſs nothing that is Material ; for in that
Caſe you will find two Advantages, namely, Com-
rehending fully, and remembring diſtinctly.

'Tis impoſſible for me to ſuggeſt to you any
articular Directions how you may accompliſh
hat I am now propoſing. One muſt be gover-
ed therein as his own Fancy and Judgement di-
ects him : For all the Help another can poſſibly
ive in a Matter of this Sort, is to point in the
eneral at what may be done, and the Uſe of it,
but

but the Manner and Way of Execution muſt b left entirely to one's ſelf.

The Way in general by which I conceive yo may beſt accompliſh this Part of your Study which relates to the Text, is ;

Firſt, To obſerve in each Paragraph how fa the Subject-Matter thereof can be branched ou into two or more diſtinct Particulars.

The firſt Thing you are to obſerve in each Paragraph, is, how many Particulars the Subject Matter thereof will bear to be divided into : An the next is, To form theſe Particulars into ſo many ſeparate and diſtinct Articles. The fewe Words the Articles are conceived in, the better providing that nothing of the Matter is loſ When you have thus converted a Portion of th Text into Articles, you are next to ſubjoin th Notes I give you in their proper Places, as additional Articles. Your laſt Care is, to add to a what further Enlargements you ſhall gather fron the Authorities which the Notes refer to, or whic you may collect from my Diſcourſe on the Subject Matter of theſe Notes.

This leads me to take Notice, That ſome of you *Gentlemen*, who have already taken down th Notes which I dictate, with Exactneſs ; and wh have them in Order, need not to write them her over again : But you may perhaps make it a Queſtion how you ſhall be uſefully imployed here during thoſe Intervals, wherein others are employe in writing theſe Notes ? And my Anſwer to tha is, That you may take the Opportunity of noting

wha

what occurs to your ſelf from my Diſcourſe, and Explanation of theſe Matters, which may enable you when you are at home, to make ſome proper Enlargements of your Notes, and help to make out your Syſtem. Your previous Knowledge of the Subject will naturally induce an Attention to what is any Thing particular and material in my Diſcourſe; and therefore, when I come to the dictating of a Note, you will have Reſpite enough, to take a Note in your own Way, of what you thus gather from my Diſcourſe, which, I ſay, may ſerve to enlarge your Syſtem; and to give you a more thorough Underſtanding of the Matter than you have yet conceived: For you will find in the Progreſs of this ſecond Courſe of Study, that there are many Things which will now brighten up to you, of which at firſt you conceived but an imperfect Notion. When therefore you happen to hear any Thing which ſerves to clear up the Matter you had formerly noted, you cannot be better imployed than in marking it.

This Method of private Study may appear perhaps to you to be ſomewhat laborious; but I can aſſure you, on the other Hand, it is profitable and infinitely more agreeable and entertaining than mere reading without collecting. The moſt Part of thoſe who have ſtudied any Science with Application, will agree in this, That it is worth the pains to take Notes of our Reading, altho' we ſhould never look on them afterwards.

I affirm then, That this Method of Studying is the moſt entertaining, and the moſt inſtructive.

It

It is laborious indeed; but that we muſt lay our Account with in the Acquiſition of any Thing. The preſent Senſe of doing what is fit for us, and the future Proſpect of acquiring an uſeful Knowledge muſt ſweeten the Labour; but this is certain, That the more diſinclined a Man finds himſelf to Study, the more Reaſon he has to follow this Method, becauſe it induces a cloſer Attention; for while we are ſtudying how to collect properly, and to form a good deal of Subſtance into a ſhort Note; we are more intereſted; we have a much greater Share in the Scene of Action, than if we had nothing in View, but barely to read, and that certainly entertains the Imagination better, keeps it cloſer at Work, engages a firmer Attention, and thereby diverts Wearyneſs. Let the Opinion of the Labour which attends this Study, be loſt in the Conſideration that it is to be made eaſy, by being gradual, and to be perfected by being regular and conſtant. I muſt not omit to take Notice of one Thing, which is likely to happen ſometimes, and to guard you againſt the Miſchiefs that attend it.

In the Purſuit of this Method of Study, you may happen to fall in Arrear with your Task, thro' Avocations, which ſometimes are unavoidable; and being perhaps ſcared at the Bulk of it, and that this Arrear cannot be overtaken in your preſent Courſe, you may encline to take the common Remedy, and to give up your Method altogether, I will therefore here give you a ſeaſonable Precaution.

When

When you happen to fall a little Backward, never mind what is paſt, ſo as to divert you from what is preſent : Be ſure always in the firſt Place to mind the Buſineſs of the Day, and let Arrears only be your ſecond Care. If your Blanks are too numerous for you, let them ſo ſtand till the Courſe is over, and take them up with your Conveniency; for which I ſhall readily give you my Aſſiſtance at any Time.

I cannot make an End of this Diſcourſe, without obſerving to you how much both you and I are indebted to the Man who laid the firſt Foundation of reducing our municipal Law into a Syſtem, by the Help whereof, its Profeſſors are rendered better able to teach, and its Students to learn, than it was poſſible for either to have done in the former Age. To the immortal Praiſe therefore of the learned Sir *Thomas Craig* of *Riccarton* be it recorded, That of theſe Syſtems which we now enjoy, he laid the firſt Foundations, in his elaborate and univerſally eſteem'd Treatiſe of Feus.

Before that Book ſaw the Light, the Students of our Municipal Law wandered in Darkneſs and Obſcurity, in Search of a Knowledge that was not then attainable, with any tolerable Meaſure of Eaſe or Certainty.

The Difficulties which then attended the Study of our Law, are well ſet forth and deſcribed in the Publiſher's Preface of that admirable Treatiſe; and it is therein we may ſee how much we are indebted to that great and learned Author, not leſs

conspicuous for his Learning and Judgment, tha
for his exemplary Piety and Virtue.

Before we were made happy in the Enjoymen
of that Treatise, the Candidates for the Bar, unde
the utmost Uncertainty what Course to steer, an
what Method to follow for attaining the Know
ledge of the Law of their Country, had no Man
ner of Help whereby to guide them in the Pro
secution of their Studies, and to point them to
wards the right End, but what was to be gather
ed in Scrapes, from an Attendance at the Bar, o
upon the Consultations of Lawyers, who often un
der the same Uncertainty, what was the Law, coul
but ill give such Responses, as were fit to be mad
the first Elements of a Science for those who wan
ted to be initiated: So that the same Knowledg
which now with moderate Application may be ac
complished in the Course of a few Years, wa
then hardly to be attained in an Age, and but i
an imperfect Manner. In those Days all our Mu
nicipal Law consisted either of Acts of Parliamen
or of the Decisions of the Lords of Session; fo
the Books of *Regiam majestatem*, and the othe
Treatises joined thereto by Sir *John Skeen*, had ne
ver received the Sanction of the Legislature; an
if they had even been made Use of as our Law
were for the most Part gone into Desuetude.

Even our Acts of Parliament lay then burie
among our other antient Records, till they wer
published first in a black Character by one *Lek*
previck, and afterwards by Sir *John Skeen*, o
which even the Copies became so rare, that soo
afte

after their Publication, they were not to be purchased but with the greatest Difficulty: Nor were these a great Help to the Students; for many of them had gone into Desuetude, and but a few concerned private Right. The Decisions of the Lords of Session would have contributed more to that End, if they could have then been purchased as they may now; but these partly lay hid in the Libraries of a few, and partly were various and uncertain, subject to Alteration at the Will of the Judges.

Such was the State of our Law, and such the unhappy Condition of its Students, when first Sir *Thomas Craig* like another *Justinian* (to use the Words of the Publisher of his Book) *Lucem è tenebris eruit, & sub nomine* trium librorum de feudis, *totum jus Scoticum complexus est, & omnes ferè materias juris, clarè, dilucidè & distinctè exponit, & ad fontes Juris Civilis & Feudalis omnia ducit; Jus Anglicum frequenter, Jus Gallicum non rarò adtingit; ita ut paucæ sint in Europa gentes, ubi jus Civile & Feudale viget, quibus non sit futurus utilis hic liber.*

It is with great Pleasure, *Gentlemen*, I observe, That many of you have attended my last Years Prelections with some Punctuality; and I do assure you, that I look upon the Assiduity of any one who has done me the Honour to be my Hearer, as a Reward that gives me infinitely more Delight than any Thing else given me under that Name, can possibly do; for I have but little Satisfaction, if you will believe me, in the Enjoyment

of an Honorary, which is not followed with som
Reasonable Measure of Application of the Perso
who gives it.

I hope I need not recommend it to you, to fo
low out with your own Application what you hav
here laid the Foundation of: All that was in m
Power, was only to conduct you; but it is you
own Endeavours at home that must do the Work
and bring it to its proper Bearing.

Such of you, *Gentlemen*, who purpose to tak
Charge of the Management of other Mens Bus
ness, cannot but see the Indispensible Necessity o
making your self fit to go through the Affair
which shall be committed to you, with Credit an
Reputation. I need no other Argument to re
commend Assiduity to you; for sure I am,
that Argument does not of it self speak forcibl
enough, all I can say besides will be to little Pu
pose.

Such of you, *Gentlemen*, on the other Hand wh
don't mean to study our Law in the View of con
ducting other Mens Concerns, may yet find goo
Reason to pursue the Study with Application, fo
the better Administration of your own. But be
sides, *Gentlemen*, you will consider what an Orna
ment it is to know the Law of your Country
Is there any Thing more frequently the Subject o
Conversation, or which bears a greater Part in i
than the Cases that daily occur in Law? Doe
not the Interest often of the Parties, so extensive
ly shed its Influences, as to induce all within th
Sphere of their Relation or Acquaintance, an
eve

even within the Reach of their Reputation and Name, if they are Parties of Diſtinction, more or leſs to take Part in their Succeſs or Diſappointment? Have we not often ſeen Subjects of that Kind enhance the Converſation of the whole Country for a whole Seaſon, while Caſes of leſſer Note and Figure having ſtill an Effect of the like kind, enhance the Converſation of a particular Corner and Neighbourhood; and, on theſe Occaſions, is it not a Mark of Diſtinction for a Gentleman to be able to acquit himſelf tolerably?

Do we not ſee the moſt Part of the polite World, embelliſh their Converſation from a Knowledge of Hiſtory, and the *Belles Lettres*? Are not Ornaments for Converſation, as uſeful as well as entertaining to be gathered from the living Law of a Country, and with leſs Hazard of Pedantry? Let us but conſider then the Knowledge of our Law, as the proper Embelliſhment of a Gentleman, without Regard to the uſeful Part; and does it not even in that abſtracted Light deſerve your Application?

But when we conſider it as an uſeful Ornament, pray, *Gentlemen*, what more agreeable Perſonage can one form to himſelf, than that of a Country Gentleman, living decently and frugally on his Fortune, and compoſing all the Differences within the Sphere of his Activity, giving the Law to a whole Neighbourhood, and they gratefully ſubmitting to it.

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AN

Alphabetical Index

AND

ABRIDGMENT

OF THE

Printed ACTS of *Sederunt*

OF THE

Lords of Council and Seſſion,

From **June** 1661, to **January** 1726.

EDINBURGH:

Printed by Mr. THOMAS RUDDIMAN, 1726.

AN

Alphabetical Index

AND

Abridgement of the printed Acts of Sederunt *of the Lords of Council and Session*, &c.

A.

Acts.

THAT no Act nor Decreet, either in Inner or Outter-house, be extracted, till Twenty four Hours elapse after reading thereof, in the Minute-book.
January 20. 1671.

After an Act before Answer is extracted, no proponing of Alledgeances competent and omitted; and the same Terms to be granted in such Acts as Pursuers ordinarily get in others; and if the Relevancy of some Points be determined, that the Party bur-

burdened with Probation, have the same Terms as are allowed them *respective* in Acts of *Litis-contestation*; and after Conclusion of such Probation, no other Point in the Act can be proven; and if, before Answer, the Term be circumduced for not Production against Writs founded on, the Alledgeance or Reply in such Cases, shall be holden as not proponed.

July 23. 1674.

Acts once warrantably extracted, are not to be altered on Supplication, seeing before Extract, the other Party may get a Scroll thereof.

February 24. 1680.

Acts ordaining Depositions to be taken on the Quantities, before Rights of Competitors are discussed, discharged, and all such Acts already extracted, discharged to come in amongst concluded Causes, but remitted to the Ordinary to determine in the Competition. The Act proceeds on a Narrative, That that Practice was a great Hinderance to conclude Causes, and Probation before Relevancy, contrary to the Form of Process.

Jully 15. 1692.

Adjudication.

Decreets of Adjudication, on Production of the Writs by the Debitor, and Probation of the Rental, ought to be for the principal Sum, Annualrents thereof, and a Fifth more, without the Penalty of the Bond; but when the Decreet is only in Absence of the Debitor, without Probation of the Rental, the same should be for the principal Sum, Annualrents and Penalty, if any be in the Writ adjudged on: And such Decreets in Absence of the Debitor, without Probation of the Rental, and adjudging the Debitor's Estate, without Restriction, if extracted for a Fifth more, attour the Principal, Annualrents and Penalty, to be null in Time coming.

26. *February* 1684.

And the 9th of *December* 1681, *Geddie* against *Telfer*, the Lords would not accumulate Annualrent on Annualrent, where the Adjudication was special, and extracted for a Fifth more.

That

That no Writer to the Signet, ſhall write, form, or give out any Summons of Adjudication founded upon a ſpecial Charge to enter Heir, until the Forty Days mentioned in the Execution of the ſpecial Charge, be fully elapſed and expired.

Feb. 18. 1721.

That a principal ſigned Abbreviate of Adjudication, when given in to the Clerk of the Bills to be recorded, ſhall be retained by the ſaid Clerk, to be the Warrant of poſterior Extracts. And for the Adjudgers further Satisfaction and Security, the Judge, Pronouncer of the Decreet, may ſign two or more Abbreviats for the Parties Uſe, if he ſhall deſire it.

January 18. 1715.

Advocation, *ſee* Suſpenſion.

That Advocations or Suſpenſions of Cauſes for keeping Conventicles, be only paſt by the Lords in Preſence, in Time of Seſſion, or three Lords in Time of Vacance, and on Conſignation.

June 24. 1673.

Advocates.

That all Advocates admitted ſince the Year 1648, or to be admitted in Time coming, and all Expectants, pay to the Advocates Box, the Advocate 20 Merks, and the Expectant 10 Merks, Horning on ſix Days to paſs therefore, on a ſubſcribed Roll by the Theaſurer; and no Suſpenſion thereof but on Conſignation.

Feb. 28. 1662.

Recommend to all Intrant Advocates, to contribute liberally and voluntarily for a Library to be erected for the Uſe of the College of Juſtice.

Feb. 7. 1679.

Act ratifying an Act of the Faculty of Advocates, augmenting the Dues on Intrant Advocates, by Examination, to 500 Merks; and thoſe who enter by Bill, without Examination, to 1000 Merks, and the Failziers to be debar'd their Offiee. The ſaid Augmentation is for maintaining a Library, and a Profeſſor of Law; with Power to the Lords to modify the ſame as they ſhall ſee Cauſe.

January 28. 1684.

That

That all Advocates entring by Bill, without undergoing the ordinary Trial by Examination, shall be examined by the Lords *in præsentia*, in their Knowledge of Stiles, Form of Process, and Principles of our Law; and that the Lords be informed of their honest Deportment.

July 6. 1688.

But this extraordinary Way by Bill, is not to be granted to a Cousin-German, or any nearer by Affinity or Consanguinity to any of the Lords.

Novem. 24. 1691.

The Lords will admit no Advocate the extraordinary Way, but whom they know to be honest, and fit for that Office, and who has attended the House a considerable Time for qualifying himself; and thereon they will remit him to the Dean of Faculty, with a Certificate of his Consignation of the ordinary Dues, and that tho' he hath not studied the *Roman* Civil Law. And the Lords Cousin-Germans and others debarred from this Act as before.

June 25. 1692.

That each Advocate have but one Servant. *Feb.* 26. 1678.

That all Advocates imployed in one Cause, meet, and consult jointly, that they may advise how to carry on the Process unanimously, and that the same be not refused on any personal or other quarrel amongst Advocates, under the Pain of Deprivation.

June 7. 1677.

If at Calling against more Defenders, the Clerk mark one Advocate indefinitely, and he return the Process without qualifying his Compearance, he is to be repute Compearer for all the Defenders.

Novem. 25. 1680.

That in Process against Debitors, where an Advocate compears for any of them, for whom he returned not the Process, he shall not propone a Defence, till he mark and subscribe with his Hand, That he compears for that Person, conform to the Act of Parliament.

Decem. 10. 1687.

Ad-

Advocates or Writers Servants, signing their Masters Names to Petitions, Outgivings or Returns of Processes, or Bills of Suspension, or other Bills, which their Masters use to draw, declared punishable, as Falsars and Forgers.

Feb. 7. 1679.

Agent *see* Clerk.

Aliment.

No Aliment to be granted to Persons on Pretext they have a depending Action, unless it clearly appear that there will be a free Superplus to that Party at the Event of the Process; and in Case of Competition of real Rights, that no Aliment be granted till a Decreet of Preference be obtained, unless there appear a clear Fund out of which it may be granted, without Prejudice to any of the Competitors. *Item*, That no Aliment be granted to Persons having Right to a Reversion or Property after the Distresses are purged, unless it appears that there is an Overplus Rent over and above the Annualrents of the Competitors.

July 31. 1690.

Annualrent.

That Factors named by the Lords, shall be liable for Annualrent, for what Rents they recover, or by Diligence might recover within a Year after the same are due.

Ibidem.

Answers to Bills of Suspension, *see* Suspension.

Appeal.

Appeal by the Marquis of *Huntly*'s Managers when Abroad, disclaimed by himself. *Jan.* 1675.

Appearand Heir.

If appearand Heirs grant Bonds whereon Adjudication or Apprising of their Predecessor's Estate follow for their Behoof, or if the

the ſame come in their Perſons, either before or after the Expiring of the Legal, they ſhall be liable to their Predeceſſor's Creditors.

Arreſtments, *ſee* Poinding.

Aviſandum, *ſee* Proceſs.

****

B.

Bankrupt.

THat all Charges to put Bankrupts at Liberty, contain this Proviſion, That they go out of Priſon betwixt 9 and 12 of the Clock before Noon, with their upper Cloaths, the Half yellow, and the other brown; and that they ſhall be impriſonable when they want it off.

January 23. 1673.

Creditors preferred to the Price of Bankrupts Lands, ſhall diſpone their Rights and Diligences to the Purchaſer, with Warrandice *quoad* the Sums received; and, in Caſe of Eviction, they are to refound the Sum paid them, effeiring to the Eviction, and their ſaid Sum with Annualrent thereof, from the Date of the Sentence, Intimation being always made to the Creditors of the Proceſs of Eviction before *Litis-conteſtation* thereintil; and this declared to be the Import of Warrandices preceeding the Act.

March 13. 1685.

Proceſs for ſelling Bankrupts Eſtates, to have ſummar Diſpatch, as other Adjudications (Sales are to be now by Adjudication, *W. and M. Parl. Seſſ.* 2. *Act* 20.) and tho' taken up to be ſeen, Terms ſhall be granted for proving the Rental, and that the Purſuer prove that there are Adjudications and other real Rights affecting the Lands, exceeding the Value, if the Defender deny he is a notour Bankrupt; and that the ſame Term be aſſigned for proving the Rental, and other real Creditors are to be admitted

to

to concur and prove the Rental, that the said summar Process be not hindred.

Feb. 24. 1692.

That the Clerks of Session keep a separate Register, for registrating Dispositions of Bankrupts Estates made by Persons ordained by the Lords to sell the same, conform to the Act of Parliament 1681, with a Minute-book relating thereto.

January 10. 1685.

Processes of Sale of Bankrupts Lands and Estates, shall be raised and carried on, and the Decreet thereupon shall be expede in the Manner directed by Nine several Articles in the Act.

Novem 23. 1711.

Bar.

The Macers discharged to let any Person within the Bar of the Inner-house, or innermost Bar of the Outer-house, during the Time the Lords or Ordinary are there, save in the Outer-house, the Keeper of the Minute-book, King's Solicitor, and one Servant of the King's Advocate, under the Pain of Imprisonment to the Party Offender, and Deprivation to the Macer negligent. *July* 22. 1665. And that these who go within the said Inner-bar of the Outer-house be fined in 3 *lib. Scots*; and the Macer negligent to execute this Act, to pay the same himself, and be imprisoned during Pleasure.

Novem. 3. 1671.

That the Macers on their Peril let none come within the Bar of the Inner-house, when Causes are debating, save the Lord Advocate, Clerks of Session, and of the Bills, and one Macer, and the Lord Treasurer and his Deput, or Commissioners of the Treasury, while the King's Causes are debating.

Decem. 16. 1686.

That Persons, other than the Lord Advocate, Solicitor and Advocate's Servant, going within the Inner-bar of the Outer-house, where the Clerks and Keeper of the Minute-book stay, be fined

ed in Half a Dolar to the Poor's Box, and the Macers negligen or spairing, to pay the same themselves.

Novem. 6. 1690.

That none, save Advocates and Writers to the Signet, go withi the Advocates Bar in the Outer-house, under the Pain of Depri vation to the Bar-keeper. The Act is extended to Noblemen and those who have been formerly Senators of the College o Justice.

Feb. 1702.

Side-Bar.

Several Orders concerning the Side-bar, and the Manner o the Lords hearing Causes thereat, *November* 4. 1686. *Januar* 16. 1690, and *June* 10. 1691. But this Bar wholly taken away and that no Party be obliged to answer or attend thereat; an to supply the Want of the said Side-bar, that no Acts be calle on *Saturday* before Noon, but that the Ordinary put a Period t such Causes, the said Forenoon, as have been called the preceedin Days of that Week, by Course of the Roll, and nothing don thereintil. Regulations of the Session, Article 13. *Anno* 169 To prevent all Side-bar Callings, of which there is no previou Advertisement to the Advocates concerned, by Rolls put upo the Wall the Night before; That the Lords shall strictly keep t their Side-bar Hours; and that the Keepers of the Rolls for th Outter-house, shall affix upon the Wall weekly, each *Monda* the particular Days, Hours, and Names of the Lords that are t be Ordinaries at the Side-bar that Week. This Act, after som other Regulations concerning the Side-bar, ordains, That any ver bal Stop shall have no Effect to hinder the Decreet from goin out. And ordains all written Stops to be subjoined to the Re presentations craving the same; and shall not continue in Forc above a Fortnight in Session Time; and if granted in Vacanc shall not endure after the Eight Day of the next Session, excep the saids Stops be renewed.

11. *November* 1708,

Bill and Bills of Suspension, *see* Suspension

No Bill to be received for stopping or altering of conclude Causes, nor Decreet or Interlocutor thereon, at advising thereo unle

unless the same be presented within two Days after pronouncing.

Novem. 9. 1677.

The Clerks discharged to give up Bills whereon there are Deliverances relating to Interlocutors or Decreets, except where the same is appointed to be seen and answered.

July 13. 1678.

That all Bills reclaiming against Interlocutors in Presence, shall be offered within Six *Sederunt* Days after pronouncing the Interlocutor reclaimed against, and that more than two reclaiming Bills from the same Party, after their first Bill against the Interlocutor in Presence, shall be received and admitted.

July 9. 1709.

That none of the Clerks shall receive more reclaiming Bills against any Interlocutor in Presence than one, unless upon new Matter of Fact, and sufficient Evidences given, that it is recently come to the Parties Knowledge.

Novem. 26. 1718.

That all Petitions, Answers, Informations, shall bear an Advocate's Name subjoined thereto, who shall be considered as the Drawer, and answerable for what is therein contained; and that all reclaiming Bills have the Date when given in, and bear the Date of the Interlocutor reclaimed against.

Decem. 19. 1710.

Summons of *Bonorum*, *see* Process.

After calling of Summons of *Bonorum*, tho' there be no Compearance, yet the same shall be enrolled in the next Weeks Roll for the Outer-house, and a Roll of the Creditors conveened in that Process, to be affixed on the Wall of the Outer-house, and that it be specially libelled and instructed how the Pursuer became *lapsus*.

Decem. 1. 1685.

Boxes, *see* Informations.

C.

Macers Caption, *see* Process.

Causes, and Causes concluded, *see* Bills.

That the ordinary Lords, *per vices*, weekly meet in the Parliament House, on *Tuesday*, *Thursday* and *Friday* in the Afternoon, from Three to Five Hours at Night, for hearing of Parties on concluded Causes, and make Report in Writ of the Probation, and mark the particular Points of the Oaths and Writs insisted on for either Party, that the same being prepared, may be advised in the Terms of the Act of Parliament.

Novem. 1. 1693.

Causes delete, *see* Inrollment.

Juratory Caution, *see* Suspension.

Cess, *see* Lords.

Charger, *see* Suspension.

Citydale of *Leith*.

Act ordaining the Persons therein named, to advise how far the 6000 *lib. Sterling* for buying to the Town of *Edinburgh* the Citydale of *Leith*, being a Burgh of Regality, may be uplifted out of the Chamber of Imposition. *Sept*. 8. 1663.

Clerk, *see* Registration.

That there be only three Clerks of Session, and these to be nominate by the Lords, and to have Deputations from the Lord Register; and if his Office be vacant, to act by Warrant of the Lords, *June* 20. 1676. But this Act altered; and that the saids Clerks be nominate by the present Lord Register, any Thing in the said Act notwithstanding.

June 8. 1680.

That the Clerks to the Seſſion cauſe their Servants in their reſpective Offices, give Bond, that during their Service they ſhall not agent in Proceſſes for either Party, under the Pain of 100 Merks *toties quoties*, to be diſpoſed of at the Sight of the Lords; and that the ſaid Bond be taken of all Servants in Time coming, at their Entry, and recommended to the Clerk Regiſter, to ſee this Act kept *.

Novem. 28. 1682.

That each principal Clerk of Seſſion, ſhall have a Box for receiving Bills and Informations, that the Clerks may be duly appriſed of the Bills and Anſwers which they are to move, or of the Cauſes which are to be reported.

July 1. 1709.

That Letters of Horning, on 15 Days, be directed againſt the former Clerks to the Bills or their Repreſentatives, charging them to deliver to the preſent Clerk to the ſaid Office, what Money has been conſigned in that Office, and not given up, as the ſame are marked in the Records of the Bill Chamber.

Decem. 22. 1683.

The Clerk to the Bills declared liable to Parties Damages, as well when he refuſeth a ſufficient Cautioner, or holden and repute ſuch, as when he receives an inſufficient Cautioner.

Feb. 18. 1686.

That all Clerks of Shires, Stewartries or Bailliaries, before they enter to exerce, be preſented to the Lords of Seſſion, to be approven by them, conform to the 78. *Act. Parl.* 5. *Ja.* V.

July. 28. 1680.

College of Juſtice.

Act declaring the Members of the College of Juſtice free from Payment of the Annuity for the Miniſters Stipends in *Edinburgh*, Watching, Warding, Cuſtomes, Cauſey-Mails, Shoar-Dues, and Impoſitions on Meat and Drink for their Families, and Goods carried to and from the Town of *Edinburgh*, and collected

* *See an Exception of this Act in D.*

any where within the Liberties thereof; and Certificates of Goods belonging to them, to be renewed once in the Half Year at least: And also, That they are free of the Civil Jurisdiction of the Town; and for the Criminal, the Lords will make Enquiry anent the former Custom, and when a special Stent is imposed, whereto the Members foresaid shall be liable, that to the End the Stent may be laid on equally, an Advocate or Writer to the Signet is to meet with the Stent Masters of each Quarter, for valuing the Tenements within Burgh; which Valuation the Magistrates are to intimate to the President, Dean of Faculty, and Keeper of the Signet, Ten Days before, in Time of Session, and Twenty in Time of Vacance. And the Members, of the College of Justice declared to be the Lords of Session, Advocates, Clerks of Session and Bills, Writers to the Signet, Under-Clerks, and one Substitute, for registrating in each Clerks Office; the three Deputes of the Clerks to the Bills, Clerks of Exchequer, Directors of the Chancery, their Deput, and two Clerks thereof, the Writer to the Privy Seal and his Deput, Clerks to the general Registers of Sasines and Hornings, Macers of the Session, Keeper of the Minute-Book, Keeper of the Rolls of the Inner and Outer-houses. And the saids Privileges are extended also to one Servant of each Lord, and each Advocate, Four Extracters in each of the three Clerks Chambers, Two Servants employed by the Clerk Register in keeping the publick Registers; and the Keepers of the Session-House and of the Advocates Library. But these last Persons to whom the Act is extended, keeping Shops, Merchandizing or exercing any other Trade within Burgh, forfeit the Benefit of the Act. The Act is a Decreet of Declarator against the Town of *Edinburgh*.

Feb. 23. 1687.

Commissar Clerk, *see* Testament.

That when Persons are examined on Commission, there be paid to the Under-Clerks half Dues, *viz.* A Merk for each Party, and half a Merk for ilk Witness, and that at the Return of the Report, and before *Avisandum* be put up in the Minute-book.

Novem. 17. 1685.

Commission, *see* Minute-book, and the very preceeding Act and Macers.

Com-

Commissions ordained to be granted to Debitors, sick, or out of the Country, for deponing, in the Terms of the Act 12. *July* 1661, to be reported betwixt and the of *November* next.

July 31. 1661.

Commission for granting Infestments, *see* Infestments.

Compearance, *see* Advocates.

Competition, *see* Acts.

Compt and Reckoning.

That for the more speedy Dispatch of Processes of Compt and Reckonings they shall be inrolled in the Regulation-Roll, the Accomptant or Defender shall give in a Charge against himself, Discharge and Instructions thereof; Auditors thereof shall be appointed, and the whole Accompts with the Writs and Instructions produced, shall be fitted and prepared for the Ordinary, according to the Direction of the five first Articles of the Act.

Novem. 22. 1711.

Confirmation.

That all the Creditors of deceased Persons using Diligence within Half a Year of the Defunct's Death, by Citation of his Executors confirmed, or Intromitters with his Goods, or by confirming Executors Creditors, or citing other Executors confirmed; the saids Executors using any such Diligence within the said Time, are to come in *pari passu*, the Posterior paying to the Executor Creditor first confirmed his Expences proportionally with his Sums pursued for.

Feb. 28. 1662.

Consent, *see* Registration.

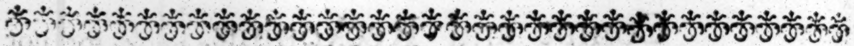
Copies, *see* Interlocutors *and* Suspensions.

Creditors *see* Confirmation.

Curators.

The Clause in the Act of Parliament anent Tutors and Curators, who make no Inventary, their being debarred of Expences, declared to extend to all Expences wared out by them on Pursuits and Diligences, tho' necessarily and profitably for whatsomever Cause, except the Expences of Entertainment of Pupils and Minors, or on their Houses and Estates.

Feb. 25. 1693.



D.

Damage, *see* Clerk.

Death-bed, *see* Kirk.

Decisions.

The printing and publishing of *Stair's* Decisions approven of by the Lords, and Thanks rendred to him therefore.

June 10. 1681.

Declinator, *see* Solicitation.

When the Ordinary is relevantly declined, or shall decline himself; on Application of the Party, or Desire of the Ordinary, the Lords will appoint one of their Number to hear that Cause the same Week. *Decem.* 14. 1689.

Decreet, *see* Acts and Macers.

That no Member of, nor any depending on the College of Justice, Advise, speak or suggest any Manner of Way, in Publick or

or private, what imports injustice in the Lords Decreets and Sentences, under the Pain of Exclusion from their Offices, and that it be included in their Oath *de fideli*, taken at their Admission; and that these who have been the Occasion of this Act, disown their Protestations under the said Penalty; and all other Members obliged to give their Oath for the Discovery thereof. The Act is extended to all other Subjects, impowering the Lords to Warrants to apprehend them.

June 17. 1674.

The Act is a Letter from the King.

That with booked Decreets of Registration, the principal Writs decerned to be registrate, be also kept.

Novem. 21. 1676.

That Decreets be not scored out of the Minute-book for not Payment of the Macers, and Minute book Keeper's Dues; but that the Collector of the Clerks own Dues uplift these also, and compt to them conform to the Responde-book, which is to mention the Date of the Decreet extracted, as it stands in the Minute-book.

June 30. 1687.

But now Decreets are not to be extracted till a Certificate be produced under the Hand of the Keeper of the Minute-book, that he has got Payment of his own and the Macers Dues therefore; and the Extracter contraveening, to be extruded; and the Clerks ordained to make patent their Responde-books to the Macers, and Keepers of the Minute-book.

December 31. 1690.

When Decreets are put up in the Minute-book, the same shall express the Names of all the Defenders, otherwise to be null, as to those not insert, except in Actions of Mails and Duties, Removings and Poindings of the Ground against Tenants; but if any of the Defenders called, or a third Party propone on his Right, and Decreet be given against them, their Names shall be put up in the Minute-book.

Decem. 10. 1687.

That Ministers get Letters of Horning against their Parishioners, on their presenting a Decreet of Locality obtained by their Predecessors, with their own Presentation, Collation and Institution, and that without Necessity of obtaining a Decreet, conform as Use was formerly.

June 22. 1687.

Act ratifying former Acts anent stopping of Decreets, Acts and Interlocutors, &c. and declaring no Stop shall be granted after six Days from the Date of the pronouncing, and the same only to endure till the first Diet the Ordinary have for hearing thereof; and that at craving the said Stop, a written Condescendence be given in, of the Grounds whereon the Stop is craved, that the other Party may see the same; and that there be also given in an Amand for the Poor's Box, if the Interlocutor hath been disingenuously misrepresented; and Lords and Clerks Servants discharged to deliver Informations or agent, except in their own or their Masters Causes, under the Pain of Extrusion of the House, and further Punishment, as the Lords shall see Cause.

Novem. 7. 1690.

Defender, *see* Compearance and Decreet.

Defunct, *see* Inventary.

Deleting, *see* Process and Pursuer.

Dispensation.

Dispensations to inferior Courts in Time of Vacance, shall only be in Time coming till the 20th of *August* and *March* *respective.*

July 21. 1696.

Disposition, *see* Bankrupt.

Dues, *see* Suspension, Clerks and Macers.

Dyvour, *see* Bankrupt and Process of *Bonorum.*

E.

Edict and Eik, *see* Testament.

Edinburgh.

ACT impowering the Magistrates of *Edinburgh*, for cleansing the Town of Filth and Beggars, to lay on a Stent of 500 *lib. Sterling* yearly, for three Years after *Candlemas* 1687, to be paid by the whole Inhabitants in the Town, *Canongate* and Suburbs, according to the Rent of the Houses possest by them; and that this Stent suffice, and that the Magistrates be liable to cleanse the Town and Suburbs therefore, as the Lords shall ordain in all Time coming; and the Members of the College of Justice subject themselves to this Act, notwithstanding of their Privileges.

January 29. 1687.

Equivalent.

That all Arrestments and Intimations of Assignations of the Equivalent, shall be laid on and made in the Hands of the Commissioners conveened in their ordinary Meeting, or during the Intervals of their Meetings at the Office of Equivalent, on every lawful Day, betwixt the Hours of 9 and 12 before Noon, and 2 and 6 in the Afternoon, *Saturdays* Afternoons excepted. But if at these Times there shall neither be a Commissioner to receive Copies of the said Arrestments, nor the said Intimations; nor any of their Clerks, authorised for that Effect, attending at the said Office; or if the Doors of the Office shall be found shut; then it shall be lawful to make the Arrestments and Intimations foresaid, at the Door of the said Office, and leave and affix Copies thereon, in due and legal Manner as accords.

June 21. 1707.

Executors, *see* Creditors.

Executors Creditors obliged to do Diligence as other Executors for what they confirm, and they are only obliged to confirm so much as will pay themselves, leaving the rest to an Executor *ad omissa*, who is to be liable to all Parties as principal Executors

tors. And Executors Creditors deponing they doubt of the Verity, Existency, or Probation of any Debt, to have Licences to be returned when the Commissar thinks fit, and on Caution to confirm, as in Case of Licences formerly.

Feb. 7. 1679.

Exhibition, *see* Oath.

Expences, *see* Curator.

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F.

Factors.

THat Factors upon sequestrated Estates, shall make and produce Rentals of the Estate, and give yearly in a Scheme of their Accompts, Charge and Discharge to the Clerk of the Process, according to the Direction of the five last Articles of the Act.

Novem. 22. 1711.

That Writers and other Dependants upon the Session, shall not be capable of being named Factors upon Bankrupt Estates by the Lords of Session, notwithstanding they should impetrate the Consent of the Creditors; and any Factory extracted contrary to the Direction of this Act shall be void and null, without Prejudice to the Creditors to call these Factors and their Cautioners to accompt as if they were lawfully appointed.

Novem. 23. 1710.

Factors, *see* Annualrent.

That no Factor or Tacksman of sequestrated Estates, either by themselves, or by interposed Persons for their Behoof, shall transact or compone Debts affecting the same; and that if such Purchases or Transactions are made, contrary to the Direction of this Act, they shall be held as equivalent to a Renunciation or Discharge of the Debts, so as to disburden and free the Debitor and Lands of the same.

Decem. 25. 1708.

Fiars.

Fiars.

That Sheriffs and their Deputies shall determine and fix the fiar Prices of each Kind of Victual of the Product of their Sheriffdom, upon the Verdict of an Inquest, which shall consist of fifteen, whereof Eight shall be Heritors, proceeding upon the Testimony of proper Witnesses, to be summoned to the same Time and Place to which the Inquest is called, or other good Evidence adduced, or according to their own proper Knowledge of the Prices.

Decem. 21. 1723.

Flesh.

All Persons whatsomever allowed to sell Flesh, and Butcher-Beef, in the Flesh Markets of *Edinburgh* on *Tuesday*, *Thursday* and *Saturday*, and that as freely as any Flesher Burgess of the said Burgh. The Act is in Pursuance of the 122. *Act*, *Part.* 7. *J.* V.

Feb. 17. 1682.

Fowl.

The Magistrates of *Edinburgh* impowered to exact the Oaths of Poultry-men and Inkeepers, anent their contraveening the Acts anent the Price of Fowls.

Jan. 15. 1669.

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G.

General Letters, *see* Letters.

Gratis Warrants, *see* Warrants.

Ha-

H.

Habite, *see* Lords, Dyvours, and Bankrupts

Hearings.

WHen new Hearings are procured betwixt 8 and 9 in the Mor-ning, if the Procurers Procurators be absent, the Lords sha[ll] notwithstanding proceed to act or decree, and the Cause is no[t] to be heard thereafter. And if the other Parties Advocates b[e] absent, that Parties Procurators are not thereafter to be heard, ti[ll] they give in two Dollars to the Poor's Box.

July 11. 1673.

Horning, *see* Registration.

That all Hornings and Inhibitions, which have been omitte[d] to be booked the Time of the Usurpers, be now booked.

January 3. 1679.

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I.

Commission for Infeftments.

WHere Commissions are granted to Sheriffs in that Part fo[r] giving Infeftment, That the Warrant by the Lords to th[e] Director of the Chancery bear, That before expeding the Com-mission, Caution be found to the Lord Treasurer or Treasure[r] Deput, That the Sheriff in that Part shall be comptable for th[e] retoured Duties; and that the same be attested by one of th[e] Clerks of the Exchequer, and that the Director record the Com-mission in the Books of the Chancery.

January 20. 1683.

Infor-

Informations, *see* Solicitation.

Printers discharged to receive in, or print any Informations or other Papers relating to Processes or Interlocutors or Decreets in these Processes, without special Warrant from the Lords.

January 2. 1685.

All Acts against Solicitation renewed, and for preventing thereof, that each Lord have a Box, with a Slit on its Top, which shall stand on a Bank in the Parliament-house, from Three to Seven at Night, and thereintil shall be put all Informations, Bills, Answers, &c. and that each Lord keep the Key thereof himself; and receiving in of Informations otherwise, to be holden Solicitation, except in the Lord Reporter, who may receive the same from the Clerk with the Process; and that the Reporter give in a Note to the Boxes the Night before, of the Causes he is to report next Day, that the Lords read not more Informations than shall be needful, either Party oft delaying till they see others Informations.

Novem. 29. 1690.

That for the Summer Session 1691, the Boxes stand in the Parliament-house, only till Six at Night.

June 2. 1691.

The Lords will not regard Matters of Fact in Bills and Informations, except the Proposer instruct the same by Writs marked in the Margin, and related thereto, or offer to prove the Alledgeance, that the same be set down in large Characters, and bear the Point for or against which they are proposed; and that nothing be insert but in Relation to the Points in the Minute of Dispute; and that the Answers be in the same Order as the Alledgeances are in the Minutes.

Feb. 6. 1692.

Lords and Clerks Servants discharged to agent, or deliver Informations, except in their own or their Master's Causes, under the Pain of Extrusion out of the Parliament House, and further Punishment as the Lords shall see Cause.

Novem. 7. 1690.

In-

Inhibition, *see* Horning.

That Creditors using Inhibition against their Debitors infeft Wadset or Annualrent, if they make Intimation by Instrume to the Persons having Right of Reversion, that the Wadsetter Annualrenter stands inhibite at their Instance, and produce Presence of the Party and Notar, the Inhibition duly registrat In that Case the Lords will not sustain Renunciations and Grar of Redemption, unless the same proceed by Process, where the Inhibitor must be called.

February 19. 1680.

Inner-house Bar, *see* Bar.

Inner-house Roll, *see* Roll.

Inrollment, *see* Roll.

Instructions by the King to the Commissar

1. You are to decide in Causes concerning Benefices, Teinc Scandal, Confirmations of Testaments; all Causes testamentar and all Causes wherein Oath is required, if the same exceed n 40 *Lib.* and in all other Causes where Parties submit themsel to your Jurisdiction.

2. In Actions of Declarator of Nullity of Marriage, Divorce Bastardy, or Adherence, where the same has any Connecti with the Lawfulness of Marriage or Adultery; all which belo to the Commissars of *Edinburgh privative:* But when the A herence is pursued on Account of malicious Desertion only, a when there is no Question of the Nullity or Lawfulness of t Marriage, the inferior Commissars may decide.

3. That in Processes for *res leves*, not exceeding 40 *L.* the be two Diets of Citation; and the Defender's Oath, if instant offered, shall be taken. If the Defender desire to see, a short Tin shall be given. If the Claim be referred to his Oath, and he appe not, to be warned *pro tertio*, and cited personally, or to be h den as confest. If the Claim be small, and neither referred Oath, nor instantly verified, he is to get a short Time to answ *verbo*; and if conveened as representing any other Person as E ecuto

[Proc]utor, Intromitter, &c. you are to assign a Term to qualify, and [g]ive in his Defences in Write.

4. The same Method must be observed *in arduis*; and that the [D]ispute be in Write, as the Difficulty of the Case requires.

5. The Clerk shall have one Book for all the ordinary Dyets [an]d Acts; and another for Acts of *Litis contestation*, wherein [sh]all be summarly set down the Substance of the Libels, Alledge[an]ces and *Litis-contestation* thereon; which Record shall be suf[fic]ient, without Necessity of either Extract or Register, or ex[tra]cting an Act of *Litis-contestation ad longum*, except the Parties [de]sire a long Extract of the same.

6. That your Clerks keep a Register of all Decreets, and [th]at those within 40 *lib.* be curtly recorded.

7. After *Litis contestation* the Party cannot pass from his Com[pe]arance, but all such Acts and Decreets shall be *parte comparente*.

8. That your Summons be execute by a sufficient Man be[fo]re two Witnesses, and questioning the same shall not stop [th]e principal Cause; and if any of your Executions be found [fa]lse and improven, the Contrivers and Abettors thereof, de[pe]nding on your Court, shall be declared uncapable of Trust [h]ereafter, and further punished, according to their Accession [th]ereto.

9. You may summon Witnesses to compear under such pecu[n]ial Fines as you think fit; and on Contempt, your Officers are [t]o uplift these Fines and poind therefore, the Half thereof to your [o]wn Use, and the other to the poor; and to fine them in greater [S]ums on the second Summons, or to raise Letters of Horning, as [y]ou shall think fit, and that you be still present at examining of [W]itnesses.

10. Your Procurators shall not persist to make frivolous Al[le]dgeances under Pain of Deprivation.

11. At advising, you are not to consult, or suffer any Procura[t]or to be present.

12. You shall decern liberal Expences, and ordain Execution [th]erefore, as for the principal Sum.

13. You may direct your Precepts to your own Officers, Mes[se]ngers, or any other Officers in your Bounds; and, on their Deforcement, you may judge thereon and inflict the ordinary Pu[n]ishment of Deforcers, excepting Eschear, which must be sued [fo]r before the Judge competent.

14. If temporal Judges cognosce in Causes belonging to you, [y]ou may direct Precepts inhibiting them.

15. If

15. You ſhall give forth Inhibition of great and ſmall Teind on Sight of the Parties Title allenarly.

16. If Reduction be intented before the Commiſſars of *Edinburgh*, of any of your Decreets, you may not the leſs cauſe your Sentence be execute; and if not purſued within Year and Day the Party being of Age, and in the Kingdom, your Decreet ſtand unreduceable.

17. You and your Clerk muſt live within your Commiſſariots under Pain of Deprivation, except on grave Occaſions you hav Liberty from the Biſhop.

18. You ſhall have a Regiſter of all the Teſtaments you confirm, and ſhall yearly give authentick Doubles thereof to the Biſhop.

19. The Clerk at compting on the Firſt of *May* and *November* yearly, ſhall depone to the Biſhop, That all the Teſtaments confirmed are booked in the Books then produced.

20. You ſhall give forth no Precepts in Matters above 40 *lib.* till the Decreet be extracted.

21. On your being ſick or declined, the Biſhop is to depute another in your Room.

22. You muſt find Caution to compear the firſt of *May* and *November* yearly, and compt with the Biſhop or his Quote-maſter for the Quote and Contribution-money to the Commiſſars of *Edinburgh*, under the Pain of 500 *lib. toties quoties.*

23. If your Clerk confirm Teſtaments, which are not booked and compted for to the Biſhop, your Office vaiks *ipſo facto.*

24. Your Biſhops Licence muſt be had to admit Procurators who, with your ſelves, are to wear Gowns; but you may create your own Officers.

25. That the Profits of Summonſes, Sentences; and other Writs, with the Seal and Signet, two Parts thereof be the Commiſſars, and the Third the Clerks, he furniſhing Paper, Wax, Ink and Chamber.

The Orders to be obſerved in Confirmation of Teſtaments follow immediately in the Books of *Sederunt*; and alſo Inſtructions to the Commiſſar Clerks; both which ſee in TESTAMENT.

Inſtrument, *ſee* Notars, Suſpenſion and Kirk.

Interlocutor, *see* Bills and Petition.

Acts, Decreets or Proteſtations, their Warrants ſhall be ſigned by the Ordinary, ere he go off the Bench, and Interlocutors on Debate that Day, or the next thereafter, except theſe pronounced on *Friday* or *Saturday*, on *Monday* thereafter at fartheſt; otherwiſe the ſame ſhall not be ſigned, but the Proceſs entred of new in the Books of Inrollment; and the Lords are to attend from Six to Seven at Night for ſigning the ſaid Interlocutors.

Decem. 13, 1690.

That the laſt Week's Ordinary come to the Outer-houſe, from Nine, till the Ordinary come out the following Week, and hear Cauſes wherein he hath given Interlocutor. See the Act in LORDS.

November 4. 1686.

To prevent Confuſion at the Side-bar, the Ordinary, after his Week is ended, will ſit in the Outer-houſe the Week following, Half an Hour before the Bell ring, till the Ordinary that Week come out to alter Interlocutors on Alledgeances to be given in in Write, which is to be put in the Clerks Hands, that the other Party may have a Copy thereof.

July 7. 1691.

The Lords will admit of no Bills for altering any Interlocutor, or the State of the Proceſs, without producing with the Bill, the Proceſs, or at leaſt the Copy of the laſt Interlocutor, under the Hands of the Clerks or Servants that wrote thereon; and the Clerks of the Outer-houſe ordained to give Copies of Interlocutors, within 24 Hours after pronouncing thereof.

Novem. 13. 1691.

That all Interlocutors pronounced by the Ordinary in Abſence, be ſigned the ſame Day they are pronounced; and that Interlocutors, Acts, Decreets and Proteſtations pronounced upon Debate, be ſigned by the Ordinary, within Six Days after pronouncing, otherwiſe to be void and null: And diſcharges all Interlocutors to be ſubſcribed after the riſing of the Seſſion. That all Acts, Decreets and Proteſtations be put up in the Minute book of the Date they are ſigned; and that no reclaiming Bill offered

to the whole Lords against the Interlocutor of the Ordinary, shall contain any new Alledgeance in Law or Fact, not insisted in before the Ordinary; nor shall they be received, unless presented within Eight *Sederunt* Days after subscribing the Interlocutor.

July 8. 1709.

Inventar, *see* Curator.

The nearest Relations on Father or Mothers Side, or either of them, who are present at the Death of their Friends, so soon as they become *moribundi*, ordained to lock the Places where their Writs, Money, and other precious Moveables are, and to seal the Keys, and deliver the same to the next Judge ordinary, until it appear that there is no Nomination of Tutory by the Defunct out of these Places; and that then the nearest of Kin inspect these Places for that Effect, and proceed no further but for finding the same, and thereafter that all be closed up, and the Keys sealed; and that Intimation be made to the Tutors nominate, that they make Inventary conform to the Act of Parliament; and if the apparent Heir be no Pupil but Minor, that the Keys be sealed as before, and nothing opened till the Minor, or some authorised, be present; and, if Need be, the Relict or Children of the Defunct, at Sight of the Judge Ordinary, or Justice of Peace, may take out as much of the Money lying by the Defunct, on their Receipt, as will bury him. And when any Person dies out of his own House, that the Master or Mistress where he is, seal his Keys, Money, *&c.* as aforesaid, until the nearest Relation be acquainted; and, if the Keys, *&c.* be in the Hands of the Defunct's Wife, or others in the Family, that they give up the same to be sealed. And declared, That the saids Persons neglecting to observe this Act, shall be holden embezelers of the Defunct's Writs, Money, Moveables, *&c.* conform to the Act of Parliament, *Ch.* II. *Parl.* 2. *Sess.* 3. *Act.* 2.

Feb. 23. 1692.

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K.

Keeper of the Rolls, *see* Rolls.

Kirk

Kirk and Market.

WHERE a Writ is quarrelled as done *in lecto*, and it is proven that the Party was ſick before the ſigning thereof, the Lords will not ſuſtain the going to Kirk and Market, unleſs it be in the Day-Time, and when there was a Convocation in the Kirk or Kirk-yard for ſome Civil or Eccleſiaſtick End, or when People are gathered together in publick Market; and that all Inſtruments for that End expreſly bear, That it was taken in the Audience and View of the People gathered together as aforeſaid, otherwiſe the Lords will not regard the ſame.

Feb. 29. 1692.

L.

Latin, *ſee* Writs.

Leſſons.

AN Act of *Sederunt*, *Anno* 1650, diſcharging Leſſons by young Gentlemen for Proof of their Literature, at any Time of Seſſion, when the ſame may be prejudicial to the Adminiſtration of Juſtice, renewed, and alſo diſcharging the ſame, the laſt Month of the Seſſion.

Novem. 28. 1661.

General Letters.

General Letters to paſs at the Lords Inſtances for the Contribution due to them, out of the Prelacies of the Kingdom. The Act preſcribes the Manner of Execution againſt the Biſhops, Abbots, *&c.* liable.

Novem. 17. 1668.

All general Letters diſcharged, except on a Decreet conform, for the King's Cuſtoms, Rents and Caſualities, or for Contribu-

 tion-

tion-Money due to the Lords, or ſuch as are expreſly warranted by Acts of Parliament.

June 8. 1665.

That all Letters paſſing the Signet (except Summonſes) exceeding one Sheet, be ſigned by the Writer to the Signet, on the Margin, at the Juncture of the Sheets.

July 8. 1691.

Liberty and Liberation, *ſee* Priſon and Dyvour.

That no Charge to ſet at Liberty, be paſt on juratory Caution.

Novem. 8. 1682.

Lord, and Lords of Seſſion.

That the Fifteen ordinary Lords of Seſſion, wear the ordinary Habite and Robes of ordinary Lords of Seſſion, without Reſpect to their Dignity or Quality.

June 5. 1661.

That any Intrant Lord of Seſſion before he be admitted, ſit three Days with the Ordinary in the Outer-houſe, and report to the Lords the Points of any Proceſs taken to Interlocutor; and alſo, that he ſit one Day in the Inner-houſe; and after Diſpute is brought to a Period before Interlocutor, he reſume the Caſe, and firſt give his Opinion.

July ult. 1674.

The Lords of Seſſion diſcharged of the current Supply. The Act is a Letter from the King.

July 19. 1671.

The Lords diſcharged of all Taxes, and Supplies to be impoſed in Time coming, by either Parliament or Convention. This Act proceeds on a Letter from the King, which, with the Act, is recorded in the Books of *Sederunt.*

Novem. 19. 1684.

That

That for preventing Confusion at the Side-bar, the Lord Ordinary come out to the Outer-house, on the following Week, and Half an Hour before the Bell ring, till the Ordinary next Week come out; and, on Application, alter Interlocutors as he thinks fit. Se this Act in INTERLOCUTORS, *July* 7. 1691, and another also to the same Purpose, *Novem.* 4. 1686. whereby it is further statute, That the Application for reversing Interlocutors, shall be within a Week after they are pronounced, otherwise the Parties are left to reduce or suspend as accords.

Several Regulations are appointed to oblige the Lords to give due and punctual Attendance every *Sederunt* in Time of Session, and also in their Turns, in the Time of Vacance, by the Forfeiture of certain Sums in the respective Cases mentioned in the Act.

Decem. 25. 1708.

That the Lord, who is next to be in the Outer-house, shall be Ordinary on the Bills, and that the Lord who was Ordinary in the Outer-house the Week immediately preceeding, shall be upon the concluded Causes; and that the two Lords, who in Seniority are next and immediately before the Ordinary on the concluded Causes, shall be Ordinary on the Oaths of Witnesses.

June 5. 1711.

That for the more ready and easy Administration of Justice, the 17 Articles of Regulation be observed, as directed by an Act of the 20. *November* 1711.

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M.

Macers.

THAT the Macers to the Session have half Dues for the Oaths of Persons examined on Commission, *viz.* 12 *s. Scots* for each Party, and 6 *s.* 8 *d.* for ilk Witness, and the same to be collected by the Keeper of the Minute-book.

Feb. 5. 1681.

Magistrates, *see* Prisoners.

Market, *see* Kirk.

Minor, *see* Curator.

Minute-book, *see* Act and Decreet.

The Minute-book ordained to be read on the Advocates Servants, their Loft.

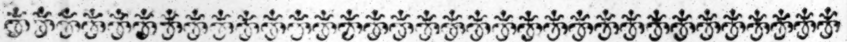
Novem. 3. 1671.

That there be paid to the Keeper of the Minute-book 4 *shil. Scots* instead of the two Shillings formerly paid for each Cause that is enrolled.

June 6. 1663.

That all Keepers of Registers of Sasines, Reversions, Inhibitions, Hornings, *&c.* for the Security of Purchasers, shall immediately after receiving in of the saids Writs, make a Minute thereof in a Book, to be signed by the several Presenters; and the saids Books are to be made up by the several Registers, from and after a short Day in the Act, under the Pain of Deprivation, and the Damage to the Party; and that no Blank be left in the said Book.

July 15. 1692.



N.

Notars.

THAT Letters on Six Days, be direct at the Clerk-Register's Instance or his Depute, to the Admission of Notars, charging the Relict, Executors, and Cautioners of Notars, to bring in and Deliver to them, the Protocols of deceast Notars, conform to the Acts of Parliament; and also charging Notars who have informal

informal or defective Protocols, to produce them at the Head Burgh of the Shire, before the said Deput; and when Cautioners are insufficient, to renew the same; and that general Letters be direct for that End, on a List subscribed by the Lord Register; and that Notars admitted in the Usurpers Time, admit of new; and that all Persons hereafter, who shall be admitted to Sheriff, Stewart, Bailliary, and Regality Clerkships, before they enter to exerce, be presented to the Lords, and examined by them, conform to the 78. *Act. Parl.* 5. *Ja.* V.

July 29. 1680.

Notars discharged to subscribe for Persons who cannot write, except he know the Person designed in the Writ, or that the same be attested by these who subscribe Witnesses to the Notar's Subscription; or by other credible Persons, which the Notar is to mention when he subscribes for the Party.

July 21. 1688.

That none be admitted Notar, but on a Petition given in to the whole Lords in Presence, with a Certificate subscribed by credible Persons, That the Petitioner is of good Fame, and has had good Breeding, for qualifying him to exerce that Trust: And that the Ordinary on the Bills, and other Lord Examinator being met together, take exact Trial of the Person's Knowledge and Qualifications before he be admitted.

July 30. 1691.

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O.

Oath in a *Bonorum*.

THAT in Process of *Bonorum*, the Pursuer depone if he hath any Lands, Heritage, Sums of Money or Goods, more than is contained in his Disposition and Inventary in Process; if since his Imprisonment he hath made any other Disposition than that produced, or if he made any before his Imprisonment, and that he condescend on the same, if any be; or if since his Imprisonment he hath put out of his Hands any Goods, Gear, or Money

belonging to him: And if the Pursuer deny, and his Oath be redargued, his Decreet of *Bonorum* shall be null, and he shall never get another thereafter, *February* 8. 1688.

And further, That the said Pursuer depone if he hath cancelled & put out of his Hands any Writs since his Imprisonment, and that he condescend thereon if he be guilty.

July 18. 1691.

Oath of Calumny.

That the ordinary Terms of an Oath of Calumny, if the Party has Reason to deny or alledge the Points whereon he is required to depone, are ambiguous; and that hereafter when a Party seeks an Oath of Calumny on an Alledgeance found relevant, the other be interrogate, whether he does not know the same to be true? And if the Party against whom any Point or Alledgeance is to be proven, require the Oath of Calumny of the other proponing the same, that he be enquired whether he knows the Thing that he proposeth is not true? And a Party is not obliged to give an Oath of Calumny *in facto proprio & recenti*, that being an Oath of Verity.

January 13. 1692.

Oath in Exhibition.

That in Exhibitions Parties may not only be interrogate if they have or had the Writs in Question, since the Citation, or fraudfully put them away at any Time; but also, that they shall answer all special pertinent Interrogators, in Relation to their having or putting the Writs away, or as to their Knowledge and Suspicion by whom they were taken away, or where they are now; and that notwithstanding the Party shall not be decerned against, unless it be found he had the same since the Citation, or fraudfully put them away at any Time.

February 22. 1688.

Oath in a Suspension, *see* Suspension.

Oath in Writ.

The giving in of Oaths in Writ discharged, but that the Party depone on the Points of the Act, and such Interrogators relative thereto, as the Ordinary shall find pertinent.

July 15. 1692.

Ordinary, *see* Lord, Causes and Interlocutors.

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P.

Parliament-house, *see* Session.

Pension.

THE Lords Sallaries and King's Pensions are not arrestable; so decided as to Servants Fees, *Feb.* 18. 1662. This Act is not amongst the printed Acts, but is mentioned in *Stairs* Institutions, *Book* 2. *Tit.* 5. *Par. ult.* *June* 11. 1613.

Bills craving Warrant to the Directors of the Chancery to issue out Precepts to grant Infeftment on Retours, on the Sheriff's Refusal to infest, shall only be past by the Lords in Presence, and the Director discharged to direct Precepts to Sheriffs in that Part, except the Bill be past, as said is.

Feb. 15. 1678.

Petition, *see* Interlocutor, Act, Information, and *gratis* Warrant.

The Clerks discharged to read any Petition relating to Interlocutors in the Outer-house, except the same bear, that the Ordinary on Amand refused the Lords Answer.

Novem. 4. 1686.

Poinding

Poinding.

That the Lords will receive all double Poindings for purging Arrestments as incident Processes, with the principal Cause, without any new Enrollment.

Feb. 1. 1677.

Preparing, *see* concluded Causes.

Printing, *see* Informations.

Prison.

That Magistrates of Burghs permit none to go out of their Prisons without Warrant from the Lords of Session, or Privy Council, except in the Case of Sickness and extreme Danger of Life attested on Oath, and under the Hand of a Physician, Chirurgeon and Minister of the Gospel in the Place; which Testificate shall be recorded in the Town Books; and that the Magistrate allow the Party only Liberty to abide in some House within the Town during his Sickness, they being always answerable that the Party escape not; and, on his Recovery, to return to Prison, otherwise the saids Magistrates to be liable for the Debt imprisoned for.

June 14. 1671.

That Magistrates or Jaylors liberate Persons, on Production of a sufficient Discharge of the Debt or Debts imprisoned for, if the same exceed not 200 Merks, and that without Necessity of Suspension and Liberation, the said Discharge being always registrate, and an Extract thereof left in the Jaylor or Magistrates Hands; and providing the same also consent to the Debitor's Liberation.

Feb. 5. 1675.

That Suspension and Liberation be not granted, unless the Procurer produce at the Bill Chamber, an Instrument of Intimation to the Creditor personally, or at his Dwelling-place, if within the Kingdom, mentioning, That on a particular Day, or within the Latitude of a Week of the Time condescended on, he was about

bout to apply for Liberation; and if the Week after that Day on hich he was to apply is expired, the Intimation must be renewed.

July 21. 1675.

That no Charge to set at Liberty be past on juratory Caution.

Novem. 8. 1682.

Privileged Summons, *see* Summons.

Prizes.

That the Lords conclude on such Orders as shall be necessary or bringing before them, and deciding Causes concerning Prizes n a summar Way; in respect the Persons for the most Part concerned, are Strangers: And the Subjects of *Spain* and *Sweden* are particularly recommended. The Act is the King's Letter.

January 3. 1667.

That the Treaty of *Breda* is void by the War, and no Ally can claim any Benefit thereby, when they carry Counterband, or have Goods of the Enemies on Board; and that any Number of *Dutchmen* being on Board, be not a Ground of Confiscation, as in the last War, but only if any Part of the Ship belong to any Inhabitant within the Dominions of the States-General, the whole Ship and Cargo is then to be declared Prize; and if the Master reside in *Holland*, the Lords are to judge as they shall think according to Law. This Act is a Letter from the Secretary.

July 8. 1673.

Processes.

That for the better and further regulating of Processes, and for the greater Dispatch of Business, by fixing and ascertaining the Diets of hearing and advising of Causes, *Friday* Forenoon be set apart for advising Bills without Answers, and Bills and Answers formerly given in, but remaining unadvised; and that there be no Reports upon the said Forenoons, except by particular Appointment: And that all the Ordinaries, except for the Outer-house, shall assist at the Advising of the said Causes: And that *Saturday* be wholly imployed in discussing the Rolls of such Causes as are appropriated for that Day, excepting always Bills of

Course

Courſe, or upon extraordinary Emergent. That no reclaiming Bill againſt an Interlocutor *in præſentia*, condemning in, or aſſoilzieing from Expences be allowed, and only one reclaiming Bill againſt ſuch Interlocutor of an Ordinary. That all Parties or their Advocates ſhall be obliged to confeſs or deny the Facts alledged againſt them, which might be admitted to Probation, to the End, that if it ſhall appear after Probation, that the Facts were known to him, he ſhould pay all the Expences, without any Modification, or Caution to the other Party, by his calumnious Denial; and that in all Decreets to be extracted, the Facts founded upon, not expreſly denied, ſhall be held as acknowledged; and to which, Want of Proof ſhall never be allowed to be objected. That no Prorogations after extracted Acts ſhall hereafter be granted, without Expences to be modified for the Party's Damage.

Feb. 1. 1715.

That after the firſt Calling, which is to be markt by the Under-Clerk on the Summons, within Year and Day of the laſt Day of Compearance, it ſhall not be lawful to the ſaid 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*'s to be markt on the ſaid Proceſs, ſhall be ſigned by the Ordinary.

Feb. 26. 1718.

That the laſt Nine *Sederunt* Days of the Winter Seſſion, and the laſt Seven *Sederunt* Days of the Summer Seſſion, ſhall be employed in finiſhing Proceſſes formerly commenced; and therefore prohibites, during the ſaid Days, all Side-bars, except for the Uſe of the Ordinary on the Bills. And reſtricts the Outer-houſe's weekly Rolls, to Acts, and the Regulation Roll: And that during the laſt Four *Sederunt* Days of the Winter Seſſion, and the laſt two Days of the Summer Seſſion, no Ordinary ſhall go to the Outer-houſe, except for calling the ſaid Acts and Regulation Roll. That the Purſuers of Reductions, or Reductions and Improbations, ſhall not hereafter be obliged to ſeek the Authors of the Defenders leaving it to the Defenders to ſeek their own Authors, or to intimate to them their Diſtreſs, as they think fit: And that in all Proceſſes of Transferring, it ſhall be ſufficient for the Purſuer, without ſpecially libelling the whole Procedure of the original Pro-

Proceſs, to libel his active Title, and the paſſive Title againſt the Defender, with the Concluſion of the original Summons.

Feb. 16. 1723.

Proceſs, *ſee* Reporting.

That Defenders get no Sight of Proceſs in the Summer Seſſion, which hath been ſeen by them in the Winter, except there be material Ammendments made of the Summons or new Pieces produced.

Novem. 8. 1665.

That after Diſpute in a Cauſe, and *Aviſandum* made to the Lords, the Clerk ſhall that Day carry the Proceſs to the Ordinary, that he may peruſe the ſame, in Order to report the Points taken to Interlocutor. That no part of a Proceſs be lent up to Parties or others after *Aviſdandum* therein.

June 2. 1675.

That the Clerks give up Proceſſes to none but to Advocates and their Servants.

Feb. 26. 1678.

That Macers detain Perſons complained on for not reproducing of Proceſſes, not only till the Proceſs be reproduced, but until they ſatisfy the Macer for executing the Warrant for apprehending them; and the Complainer declared free of any ſuch Expence.

Novem. 11. 1691.

Proceſs of *Bonorum*, *ſee Bonorum*, and Oath therein.

That when Proceſſes of *Bonorum* are kept up, Decreet be not pronounced, but the Purſuer complain to the Lords *in præſentia*, in common Form.

Novem. 6. 1666.

That no Proceſs of *Bonorum* be granted, but on Certificate by a Magiſtrate, That the Purſuer has lyen one Month in Priſon; and on Decreet he ſhall not be liberate till he ſit one Hour be-twixt

twixt 9 and 12 in the Day Time, at the Croſs, on the Dyvour Stone, with a Bonnet and Hoſe, of partly brown, and partly yellow Colour, which he is to wear in all Time thereafter; and if he be found wanting, or diſguiſing the ſame, he is to loſe the Benefit of the *Bonorum*; and if the Magiſtrates Certificate be falſe, or the Dyvour not liberate in Manner foreſaid, he ſhall be liable for the Debt for which the Bankrupt is impriſoned; and the Lords will not diſpenſe with this Act, but when innocent Misfortune is libelled and proven.

July 8. 1688.

Protection.

That no Protection be granted on Account that the Perſon under Caption is a Witneſs, unleſs with the Petition therefore, there be given in a Declaration by the Party, at whoſe Inſtance he was cited, That he is a neceſſary Witneſs; and if at the Concluſion of the Cauſe the Citation ſeem colluſive, the Lords are to fine the Party Colluder.

Feb. 1. 1676.

Proteſtation, *ſee* Suſpenſion.

Proteſtation-Money.

That there be paid of Proteſtation-Money by each Suſpender that keeps up his Suſpenſion 8 *lib. Scots*, if the Sum charged for be under 100 Merks or within the ſame, or if above 100 Merks or not a liquid Sum 10 *L.* and for Remits againſt Raiſers of Advocation 15 *lib. Scots*.

July 4. 1661.

Proteſtation.

That wherever a judicial Proteſtation ſhall be admitted by the Ordinary, thro' the keeping up of Suſpenſions and Advocations, the Party ſhall not be reponed againſt the ſame, but upon Payment of 10 Shillings to the contrary Party: Nor ſhall Parties be reponed againſt Decreets finding the Letters orderly proceeded, pronounced for not diſputing the Reaſons of Suſpenſion and Advo-

Advocation, but upon Payment of the like Sum. And that where a Purſuer before any inferior Court, advocates his Cauſe, and does not inſiſt within 15 Days after admitting of the Advocation, and cauſe call and give out the ſame, that immediately thereafter the Defender may call for the Advocation, and put up a Proteſtation; and the Clerks of the Bills are thereby ordained to give up all Proteſtation-Money conſigned in their Hands, without Payment of any Fee for the ſame. In this Act alſo there is Proviſion made, whereby the Defenders in Improbations may have Opportunities to make Productions, after extracting of the Act for the ſecond Term.

January 1. 1709.

Protutors.

Protutors who intromit with a Minors Eſtate, and act therein without a Right of Tutory or Curatory eſtabliſhed in their Perſons, declared liable as well for what they might have intromitted with, if they had been Tutors and Curators, as for what they ſhall intromit with *de facto*, ſicklike, and in the ſame Manner as Tutors and Curators are liable by the Law of this Kingdom.

July 10. 1665.

Pupil, *ſee* Curator,

Purſuer.

When Purſuers inſiſt not in Cauſes in the Outer-houſe, that the ſame be delete, and not continued till the next Week's Roll.

December 20. 1690.

****

Q.

Quote, *ſee* Teſtament.

Re-

R.

Register of Sasines and Inhibitions, *see* Minute-Book.

Registers and Records.

THat all Clerks keep the principal Writs given in to them to be registrate, and give forth only Extracts thereof, as before the 1651, and that the Clerk of Session do once in two Year deliver the same to the Clerk Register.

June 11. 1661.

The Clerks ordained to registrate Writs, tho' an Advocate subscribe not his Consent; and all Extracts so given out since *November* last, declared warrantable.

Decem. 9. 1670.

Three Lords appointed to revise and receive the publick Registers from Sir *Archibald Primrose* of *Carington*, late Lord Register, and put the same in Order, and make an Inventar thereof. The Act proceeds on a Letter from the King.

July 4. 1676.

Report of the saids Lords, and Order to a Writer in *Edinburgh* to inventar all the Records of Parliament, Council, Session, *&c.* and on *Carington*'s deponing, that the same Records in the Parliament House and Castle, are without Embezelment as he received them, that an Act of Exoneration be extended in his Favour.

July 13. 1676.

Act ordaining the Persons intrusted with the publick Records, their Oaths to be taken, that without Embezelment they are intire, and in the same Order as in the Inventary insert in the Books of *Sederunt*, and ordaining the Keys of the laigh Parliament-house, and Chamber in the Castle, where the Registers are, to be delivered to *Glendook* now Lord Register; and ordaining Clerk *Gibson* to compt to him for his Intromission with the Profits of that Office.

Feb. 22. 1678.

That the Sheriffs of the Shires mentioned in the Act, meet within the Days therein prescribed, and compare the Registers, conform to the Act of Parliament *1672*, and report their Diligence; and that Letters of Horning be directed for that Effect, under the Penalties in the said Act; and charging them to pay the Penalty already incurred for not comparing and reporting when ordered so to do by missive Letters from the Lords, dated 31. *July* last.

January 4. 1677.

That the Sheriff Clerks bring in their Registers of Horning to be markt by the Clerk-Register, and that each Horning registrate hereafter, bear in the marking thereof, the particular Leaf wherein it is registred; and the Clerks discharged to write on Bills of Caption, whose Horning is not so marked; and that the Sheriff Clerk registrate no Hornings, but against Persons living within the Shire.

Novem 19. 1679.

Registration.

That no Execution by Charge, Poinding or Arrestment shall pass upon Writs registrate in the Town-Court Books of *Edinburgh*, or any other Town-Court Books within *Scotland*, unless such Writ bear special Warrant for that Effect.

Decem. 10. 1713.

Decreet of Registration.

That with booked Decreets of Registration, the principal Writs decerned to be registred be also kept. *Novem.* 21. 1676.

Registring, *see* Bankrupt.

Renunciation and Grant of Redemption, *see* Inhibition.

Lord Reporter and Reporting.

That only two Lords report in one Day, and that they do the same in Order; and that the Rolls bear the Reports, and the

Time, and when Informations are given in; that they be marked on the Back who is Reporter.

Novem. 4. 1686.

But the Ordinaries on the Bills, and Outer-house, are understood to be supernumerary to the saids two Reporters.

Jan. 16. 1690.

That every Reporter the Night before give in a Note to each Box of the Causes he is to report next Day. See the Act in INFORMATIONS.

Novem. 29. 1690.

That in Causes to be reported, the Process be brought to the Ordinary as follows, *viz.* Processes taken to Interlocutor to be reported on *Tuesday*, to be brought to the Ordinary on *Wednesday*, to be reported on *Thursday*; and these on *Wednesday*, to be brought to the Ordinary on *Thursday*, to be reported on *Friday*; and these taken to Interlocutor on *Thursday*, *Friday* and *Saturday*, to be brought to the Ordinary on *Monday*, to be reported on *Tuesday* or *Wednesday* following, otherwise the Process shall go to the Roll again.

Decem. 13. 1690.

The Lord on the concluded Causes shall report the Probation in Writing, and mark the particular Points of the Oaths or Writs insisted on. See the Act in concluded CAUSES.

Novem. 1. 1693.

Reproduction, *see* Process.

Resignation.

That all Resignations hereafter, made in Superior's Hands, by the Use of any other Symbol than that of Staff and Baston, shall be void and null.

February 11. 1708.

Retours, *see* Precepts.

Reversion, *see* Inhibition.

That Magistrates of Royal Burghs, and their Successors in Office, take sufficient Caution of their Clerks, present and to come, that they shall insert in their Books, all Sasines of Lands, Tenements, or Annualrents within their respective Burghs, within 60 Days after the Dates thereof; and in like Manner all Reversions, Bonds for granting Reversions, Renunciations, and Grants of Redemption, as is prescribed by the Act of Parliament 1617, anent registrating the saids Writs without Burgh; and that the said Surety be under the Pain of any Damage that shall befal any Party, thro' Latency of the saids Writs, which shall be past by the Clerks, or presented to them, to be insert in their Books; and if Parties neglect to insert the saids Writs, the Lords will hold them as latent and fraudulent Deeds, kept up to prejudge Purchasers *bona fide*, and for onerous Causes.

Feb. 22. 1681.

Rights, *see* Competition.

Roll, *see* Pursuer.

All Decreets or Protestations, their Warrants are to be signed ere the Ordinary go off the Bench, and Interlocutors on Debate that Day or the following, save those on *Friday* and *Saturday*, which are to be signed on *Monday* thereafter, otherwise the same shall not be signed, but the Process is to go to the Roll again. See the Act in INTERLOCUTORS.

Decem. 13. 1690.

When Processes taken to Interlocutor are not duly brought to the Ordinary in Order to be reported, the Process is to go to the Roll again. See the Act in REPORTING.

Decem. 13. 1690.

That Causes delete be not inrolled again, till all the Causes inrolled before that was scored, be presented, and the Ordinary ordained to give in to the Lords weekly a List of the Causes scored, to be booked, to ly before the Lords, and that Processes otherwise inrolled, may be objected against.

Novem. 8. 1695.

That to prevent the Abuſes concerning the Inrollment o. Cauſes, the Keeper of the Books of Inrollment prefix the Arithmetical Numbers of 1, 2, 3, *&c.* to each Cauſe, as they ſtand inſerted in the Books of Inrollment, and that the Keeper preſent the Books of Inrollment at the firſt coming out of each Week's Ordinary, upon *Tueſday* Morning, that the Ordinary may ſign the Docquet ſubjoined cloſe to the Cauſes taken up upon the *Saturday* immediately preceeding.

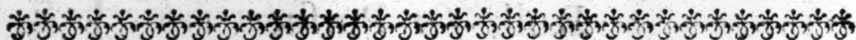
Decem. 27. 1709.

Inner-houſe Roll, and Keeper thereof.

That all Cauſes coming in to the Inner-houſe ſummarly, without abiding the Courſe of the Roll, pay the ordinary Dues to the Keeper of the Inner houſe Roll, before they can be called; and that a Liſt of theſe Cauſes be affixed on the Wall weekly.

July. 23. 1696.

Keeper of the Outer-houſe Roll, *ſee* Suſpenſions.



S.

Sallary, *ſee* Penſion.

Sale, *ſee* Bankrupt.

Saſines, *ſee* Reverſions.

Seal.

THat the Seal for Sealing Writs that go out of the Country be made furthcoming to the Lords and Clerks, ſo oft as they have Uſe therefore. *Novem. 26. 1663.*

Seſſion and Parliament-houſe.

All Diſorder the laſt Day of the Seſſion in the Parliament-houſe or Cloſs diſcharged, under the Pain of Impriſonment for 3 Months; and the ſaids Perſons being Servants to any Member of the College of Juſtice, to be thereafter for ever debarred the Houſe; and, if

if they escape, their Masters obliged to enter them to Prison within 8 Days after their said Disturbance, under the Pain of 200 Merks; and Persons guilty of the said Misdemeanor not belonging to the House, to be imprisoned three Months, and banished *Edinburgh*. *Feb.* 21. 1663.

Hugh Riddel sent to the Plantations for cutting Silver Buttons off a Gentleman's Coat in the Outer-house, during the sitting of the Lords. *July* 20. 1675.

Side-bar, *see* Bar.

Signet.

That the Keepers of the Signet and their Deputes for the Time, shall be careful that good and sufficient Wax, fit to receive the Impression of the Signet, guarded with a Ring of Paper upon the said Wax, be used in all Time coming, to prevent the great Inconveniencies and Abuses which the Want of an Impression or Stamp upon the Wax might give Occasion to. *Feb.* 14. 1706.

That all Summonses, Letters and other Writs passing the Signet, shall bear the Day of the Month, and Year of God, in Words written at Length, and not in Figures, and underneath the same, these Words, *Signed by me*; To which the Keeper or his Deputes shall subjoin the ordinary Subscription of his Name.

Solicitation.

All Solicitation discharged, and also all Information otherwise than by Write; and, if by Missives, these are to be shown to the haill Lords, except when allowed judicially, or before Auditors, when both Parties are to be heard, or at passing of Bills of Suspension or Advocation before the Ordinary; or when by Consent of Parties, or by the Lords Recommendation to accommodate any Process, the Matter is referred. And the Contraveeners, Noblemen fineable in 300 Merks, Baron or Knight 200 Merks, and every other Person in 100 Merks for the Poor, attour Deprivation to Members of the College of Justice, and Dependers thereon; and declared a Reason of Declinator against any Lord, if he did not his utmost to prevent that Information. The Informations are by this Act to be delivered to the Lords Servants.

Novem. 6. 1677.

When any Procefs comes to be advifed, if any of the Lords or others move that the Lords purge themfelves of verbal Information or Solicitation, that the fame be done, and that Soliciters and verbal Informers be delete and punifhed. *Decem.* 24. 1679.

That the forefaids two Acts againft Solicitation be printed and affixed on the Wall of the Outer-houfe; and that the faid Acts be obferved in all Points; likeas, the Lords on their Honour have engaged to obferve the fame; and ordain this Engagement to be renewed each Seffion. Subfcribed by the Lords at *Sederunt.* *Novem.* 11. 1690.

Stop, *fee* Decreets.

Subfcription, *fee* Advocates and Notars.

Summons, *fee* Procefs.

That Summonfes be fully libelled before they be executed, and a full Copy of the Libel given with the Citation; and that each of feveral Defenders fhall receive a full Copy of fuch Part thereof as concerns them *refpective*, under the Exception of certain Actions mentioned in the Act. That with the Procefs fhall be returned the Defences both dilatory and peremptor in Writing, figned by the Party or his Procurator, which fhall comprehend an Acknowledgement or Denial of the Facts libelled, otherwife they fhall be held as acknowledged. That after the Return of the Procefs, other Defences coming to Knowledge, or Writs which the Defender founds upon, and has in his Cuftody, fhall 48 Hours before Calling, be put into the Clerks Hands, for the Purfuer to fee and perufe the fame; and in the Cafe of feveral Defenders, after the Procefs is returned into the Clerks Hands by the Advocate, principally appointed to fee the fame, the fame may be feen for the Space of Six Days by the Advocates for the other Defenders, who fhall therewith return their Defences in Writing, and the Vouchers thereof. This Regulation which was declared by this Act of the 16. *February* 1723, to be of Force till the 15. *November* 1725, is continued till the 1. *January* 1728, and explained in feveral Particulars, by an Act of the 31. *December* 1725.

That all Summonfes in Ufe to abide Continuation, be continued as

as formerly, and Acts extracted thereon, whereon Diligence is to follow, as before the 1651. *June 6. 1661.*

That in Place of second Summonses, the first contain two Diets and be subscribed by the Clerk Register his Depute, or any Clerk of the Session, and pay such Dues as the Summons and Letters paid when signeted apart. *July 11. 1672.*

Summons of *Bonorum*, *see Bonorum.*

Privileged Summons.

That all Summonses be on 21 Days Warning, and none be privileged by the Lords Deliverance, except Removings, recent Spulzies, recent Ejections, where the Summonses are execute within 15 Days after the Deed, Intrusions, and coming *in vice*, Causes alimentary, Exhibitions, Furthcomings of arrested Goods, Transferrings, Poindings of the Ground, Wakenings, special Declarators, Suspensions, Prevento's, and Transumpts; and that recent Spulzies, Ejections, Intrusions and Succeedings *in vice*, be execute on 15 Days, and the rest of the foresaid Summonses be execute on six Days, and that the second Citation be also on six Days, and the Writers contraveeners fineable in 100 Merks for the first Fault, and Deprivation for the second. The Act is not extended to Burghers and Suburbers in *Edinburgh*, who may be summoned by the second Citation on 24 Hours.

July 21. 1672.

Supply, *see* Lords.

Suspension, *see* Liberation.

When Suspensions are to be discussed on the Bill before Suspenders be heard on their Reasons, the Dues, as if the Suspension were expede, shall be paid to the Clerk to the Bills or his Servant, for which he shall hold compt to the Register.

January 24. 1679.

When Reasons of Suspension are to be discussed on the Bill, a Receipt of the Secretaries Dues shall be given on the Back of the Bill, or in a Paper apart, by the Keeper to the Signet, otherwise at

at Calling, the Bill is to be refused, and the Letters ordered to be farder execute. *Novem. 6. 1683.*

When Reasons of Suspension or Advocation are to be discussed on the Bill, that the Secretaries Dues be paid to the Clerk to the Bills, and that a Receipt of the Keeper of the Books of Inrollment, his Dues, be shown within 24 Hours after the Clerk to the Bills receives the Warrant to discuss, from the Clerk who wrote thereon, otherwise the same to be cancelled.

Novem. 11. 1691.

That with the Bill craving Warrant to discuss Reasons of Suspension or Advocation on their Bills, shall be given in to the Lords a Recept by the Keeper to the Signet, of the Secretary's Dues, without which the Clerks are not to produce the same, and that the Deliverance bear the Production of the said Receipt; and in Case of not Payment, the Warrant to be null. And Clerks to the Bills and Session, discharged to take in Summonses of Reduction unsignetted, either into Process, or with Bills of Suspension; and that Extracts of the Signet of Suspensions or Advocations, pay only 58 *Shill. Scots*; and that they be given out without Delay, on Payment, as said is. And that hereafter Copies, or attested Doubles of Suspensions, be not holden as Principals in any Case, and the Clerks discharged to minute the same, and Extracters to extract any Act or Decreet in the Cause, unless the principal Letters, or Extracts thereof, off the Signet, be extant in Process: And the Keeper of the Minute-book also discharged to hold any Copy or attested Double for a Principal, under Pain of being liable for the Damage to the Signet, and to the Lords for Contravention of this Act.

Novem. 30. 1692.

When Reasons of Suspension are referred to the Charger's Oath, if relevant, and he be present, the same shall be received, if absent, that the Suspenders Oath of Calumny be taken, That he has just Reason to propone the Reason of Suspension, and he deponing *affimative*, or if absent, the Bill to be passed with this Quality, That the Suspender shall be liable to the Charger's whole Charges therethro', on Accompt to be given in by him on Oath, to be paid without Modification, if he succumb in the Suspension.

Feb. 29. 1688.

That

That hereafter, Bills of Suſpenſion be only preſented to the Ordinary on the Bills, who is to continue from *Tueſday* to *Tueſday* in the next Week, and that the ſaid preſenting be only by the Clerk; and the Ordinary may ſtop Execution for a Month after preſenting the Bill; and if the ſame be refuſed, that the Lord ſign it on the Back, and that it be kept by the Clerk; that if another be preſented to the Ordinary, any following Week on the ſame Grounds it may be ſtopped unleſs preſented to the whole Lords in Time of Seſſion, or Three in Time of Vacance: And further, when Bills are refuſed, that the Clerk mark alſo on the Back thereof what Inſtructions were produced.

Feb. 9. 1675.

When Bills of Suſpenſion are paſt, but no Caution found, the ſame ſhall only protect againſt Execution for 14 Days after the paſſing thereof, except the Ordinary on the Bills diſcharge the expeding of the Bill until a further Day, or allow the Suſpender a longer Time for expeding thereof, not above a Month from the Date of the Deliverance paſſing the Bill; which being elapſed, the Charger may proceed in Execution; and an indefinite Stop is to continue 14 Days after the Date of the Deliverance foreſaid, but Prejudice of Deliverances by the Lords in Preſence, when Suſpenſions are to be diſcuſſed on the Bill; and, in the mean Time, Executions diſcharged, in which Caſe Execution is ſtopped until the Cauſe be decided, or the Stop taken off. And the Clerk diſcharged to write the Date of any Deliverance of the ſaids Bills, but in Preſence of the Ordinary, and that it be the true Date whereon the ſame is ſubſcribed.

July 3. 1677.

That 14 Days be the only Time allowed for ſeeing and expeding Bills of Suſpenſion, and all other Stops, ſave when the Reaſons are to be diſcuſſed on the Bill, declared void; and that the Clerk keep a Minute-book of all paſt and refuſed Bills, to be patent to the Leiges *gratis*, and he, under his Peril, diſcharged to preſent a new Bill, after a former was paſt and elapſed; and Suſpenders on falſe or abſtracted Writs, to be condemned in large Expences attour Proteſtation Money, in Caſe Proteſtation go out; and if Writes founded on, be not produced at diſcuſſing, they are to be holden falſe and forged, and the Forgers thereof to be inſiſted againſt, *November 9. 1680*; and that the Ordinary mark on the Back of the Bill, the haill Writs founded on, in the Rea-

ſons

ſons of Suſpenſion; and that the Suſpender be not heard at diſcuſſing, if he produce not the ſame, but condemned in large Expences, beſides Proteſtation-money, the Writs being preſumed to be falſe; and that the Clerk retain Inſtruments of Notars, and Copies of Writs produced, they being alſo marked on the Back of the Bill, and may lend the ſame to the Charger, on Receipt, to be produced at diſcuſſing the Suſpenſion.

Novem. 11. 1691.

That with Bills of Suſpenſion on juratory Caution, an Inſtrument be given in, bearing the Day whereon he was to preſent the Bill, and that he intimated the ſame to the Charger perſonally, or at his Dwelling-houſe, if within this Kingdom; and the ſaid Bill is to be given in within ſix Days after the ſaid Day, or another Intimation to be made, and that the Ordinary before reporting the Bill in Time of Seſſion, or three Lords in Time of Vacance, cauſe publickly call the Charger before the paſſing of the Bill; and that the Suſpender depone whether he has Lands in Property, Wadſet Liferent, or Bonds, Tickets or Contracts, for Sums of Money; and that it be a part of the written Oath; and that the Party at Sight of the Ordinary conſign valid Diſpoſitions and Aſſignations thereof; and that no Bill bearing Offer of ſufficient Caution, be expede on *juratory Caution*, but that the ſame bear, on *juratory Caution*, that the Ordinary, before paſſing, may conſider the Reaſons of Suſpenſion more ſtrictly; and taking Oaths in Supplement by Commiſſion diſcharged; but that the Suſpender compear and depone before the Ordinary on the Bills, and that no Charge to ſet at Liberty be granted on juratory Caution.

Novem. 8. 1682.

No Suſpenſion to be granted on Arreſtments laid on after extracting Decreets, whether on Decreets or Dependences, but the ſame ſhall come in by Way of Double Poinding, and therein both Creditor and Arreſter may be called.

Feb. 1. 1677.

That in Suſpenſions of Proteſtations, the Deliverance of the Bill bear the ſame to be the ſecond, *&c.* Suſpenſion; and if otherwiſe expede at the Signet, the Lords will recal the Suſpenſion, as contrary to the Act of Parliament.

July 10. 1677.

Suſpen-

Suspensions of Charges for his Majesty's Annuities or Excise, should not pass but by the whole Lords.

Decem. 6. 1677.

Answers to Bills of Suspension in Time of Vacance, are to be given in that Week, when the Lord to whom the Bill was presented, is Ordinary, unless the Bill have been given in on *Friday* or *Saturday*, when the Answers shall be appointed to be given in on *Tuesday*, to be considered by the Ordinary the following Week. And as to Bills given in, in Time of Session, that the Ordinary in whose Week they were given in, determine thereintil, without referring to any other Ordinary.

Novem. 11. 1691.

Written Answers to Bills of Suspension or Advocation discharged, except where the Ordinary shall think fit to allow the same.

June 2. 1675.

That Cautioners in Suspensions shall not only be taken bound for what is contained in the Charge, but also for what Expences of Plea shall be decerned; and that the Attesters of Cautioners shall not only be taken obliged for their Sufficiency at the Time of attesting, but shall be bound as Cautioners for the Cautioner, and liable subsidiarly in their Order, as fully as the Cautioners themselves; and that the Cautioner in the Suspension shall be simply liable in his Order, whether the Decreet be turned into a Libel or not. *Decem. 27. 1709.*

Suspensions.

That Bonds of Cautionries in Suspensions, be in all Time coming conceived alternatively, to pay or perform respectively to the Charger, or to such, and to whom Payment or Performances shall be decerned to be made by the Decreet to follow on the said Suspension, to the End that other Parties than the Charger, compearing with their Interests at discussing, competing for preference, and preferred, may be thereby enabled to give a summar Charge on the Bond of Cautionry when thus conceived.

Novem. 23. 1717.

That the Ordinary on the Bills be authorised and impowered, whether in Session Time, as well as Vacation, to grant Commissio

mission to take the Oath of an absent Party, on any relevant Point alledged for the passing or refusing Bills of Suspension; and to allow a competent Time, not exceeding a Month, when granted by one Ordinary, nor two Months when granted by three Ordinaries for reporting the same, during which Time a Sist is to be granted on the Bill.

Decem. 6. 1718.

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T.

Taxes, *see* Lords.

Testament.

ORders for confirming of Testaments, which follow immediately in the Books of *Sederunt*, to the King's Instructions to the Commissars.

General Edicts shall be served twice yearly, and particular Edicts granted when required, which being served, and the Persons having Right decerned, they shall give up Inventary on Oath; and when Wives die, the Husband must depone anent his Debts; and in Testaments datives, these Debts are only to be received as owing by the Defunct; Servants Fees for one Year preceeding the Defunct's Decease, Duties of Lands or Teinds for one Year, Apothecaries Druggs immediately imployed before the Defunct's Decease, House Mails for Half a Year at most, Pensions and Ministers Stipends, Steelbow Goods, and Corns to the Master. In a Testament, testamentary Debts given up by the Defunct, must be allowed; but if none be expresly given up, but may be by the Defunct recommended to his Executors, then no Debts are to be allowed but the said privileged Debts; and the Gear being divided according to Law, the Defunct's Part pays only Quote. Children *forisfamiliat* get no Share of this Division, and Confirmation must proceed notwithstanding; and that it be adverted the Prices of Goods be not under or over the common Rate, in Prejudice of the Quote; the Oath of the Executors must be taken, and if Man or Wife survives, what is omitted thereof, they probably know belongs to the Bishop.

Licences shall only be granted where Sums are desperate. The Procurator-fiscal is to be confirmed, if the Persons nominate, nearest

nearest of Kin, Creditors and Legataries seek not to be confirmed, Datives always being duly given thereto; and if after Dative, but before Confirmation, any Party desire to be surrogate, they shall be Executors surrogate in Place of the Fiscal, and Datives being given out, that the Debts may be better known, the Intromitters with the Defunct's Goods within the Jurisdiction, are to be called to give up Inventar thereof, who, if they compear not, Four or Five of the Defunct's Neighbours are to be summoned; who being sworn, shall give up Inventary of the Dead's Goods, and declare the Quantity thereof, the Division it comes under, and the Expence to be made thereon, shall be modified yearly at making of Accompts.

That the Procurator-fiscal find Caution to make furthcoming to the Bishop what Goods he intromits with, and shall compt yearly, and get 3 Shilling *per* Pound that he brings in and makes Payment of. That they take up all Defunct's Names within the Commissariot, and shall compt twice a Year for the Diligence to be done by him, in taking up, as said is; and under Pain of Deprivation of their Office, shall not conceal Names of dead Persons, transact or forbear to charge, or take Money for that Effect; all Executors nominate are to confirm within three Months at farthest.

If any decerned Executor compear not personally to depone on Testificate of a Minister, of his Inability or other reasonable Cause of Absence; with the Bishop's Consent, Commission may be granted.

When an Edict is execute to a Day, and the Party crave a Day to give up Inventary, and confirm, ye shall continue the decerning the Party Executor till the said Day, that all may be done *simul & semel*.

Testaments must make no Faith without Confirmation; an Eik shall not exceed the Third of the Inventary, without the Bishop's Knowledge, and but once.

That the Inventars be given up as they were the Time of the Defunct's Decease, and 12 *d.* of each Pound, shall be the Quoat of all Testaments, both great and small, as well Dative as others, and the Quoat can only be mitigate by the Bishop.

The Commissar Clerk shall have one Book for Testaments, markt by the Bishop or his Clerk; and when that is filled up, he must get another, and another for Registration. They and all that Court are to serve the Leiges thankfully at the Rates appointed by the

the Bishop. The saids Instructions and Orders are approven an[d] signed by *Jo. Nisbet. Jo. Baird.*

Transferring.

Summonses of Transferring being seen and returned, may b[e] called before the Ordinary in the Outer-house, and he procee[d] therein tho' not inrolled.

July 26. 1688.

Treaty, *see* Prize.

Tutor, *see* Curator.

W.

Wadset, *see* Inhibition,

Wakening.

THAT Wakenings of Processes be execute on 24 Hours a[-]gainst Persons for the Time within *Edinburgh* or *Leith*, an[d] on Six Days against all other Parties within the Kingdom, and o[n] 15 Days against Persons out of the Kingdom.

June 11. 1661.

All Processes now sleeping by the Surcease of Justice since *No-vember* 1688, and which were not sleeping before that Time, for the Ease of the Leiges, are to be wakened by three blank Sum-monses of Wakening for each Shire, which by edictal Citation at the Market Crosses of the head Burghs of the Shires are to b[e] execute against all Defenders on Six Days, and the Blanks to b[e] filled up on a Note to be given in by the Pursuers to the Sheriff Clerks, with 6 *shil. Scots* with each Note; and the several Execu-tions signed by the Executor and Witnesses, with the Summons, are to be transmitted to any Clerk of the Session, who shall giv[e] the Executions to the Party, that he having expede a Copy of th[e] said blank Summons under the Signet, may put all in the Pro-cess

cess: And where first Summonses are given, but not the second, that the second be raised in King *W.* and Q. *M.* their Names; and if execute for both Diets, but not called, that the same be wakened by the said edictal Citation. The Act is not extended to concluded Causes, they never having been in Use to be wakened; and but Prejudice to Pursuers to use the ordinary Way of Wakening.

Novem. 6. 1689.

Warrant to discuss, *see* Suspension.

Gratis Warrant.

That Petitions for *gratis* Warrants be particular as to the Cause wherein the Warrant is to be used, and that the Warrant be restricted conform, and endure only three Years, unless renewed.

Novem. 20. 1686.

Witnesses.

That the Ordinary, who examines Witnesses, immediately after Examination set down on the Act or Warrant for examining, the Names of the Witnesses examined by him, and subscribe the same, otherwise the Lords will not regard the Depositions not being so marked and signed.

July 7. 1688.

Writs, *see* Extracts.

That all Writs in Use before 1652, to be written in *Latin*, be for hereafter written in that Language.

June 5. 1661.

FINIS.