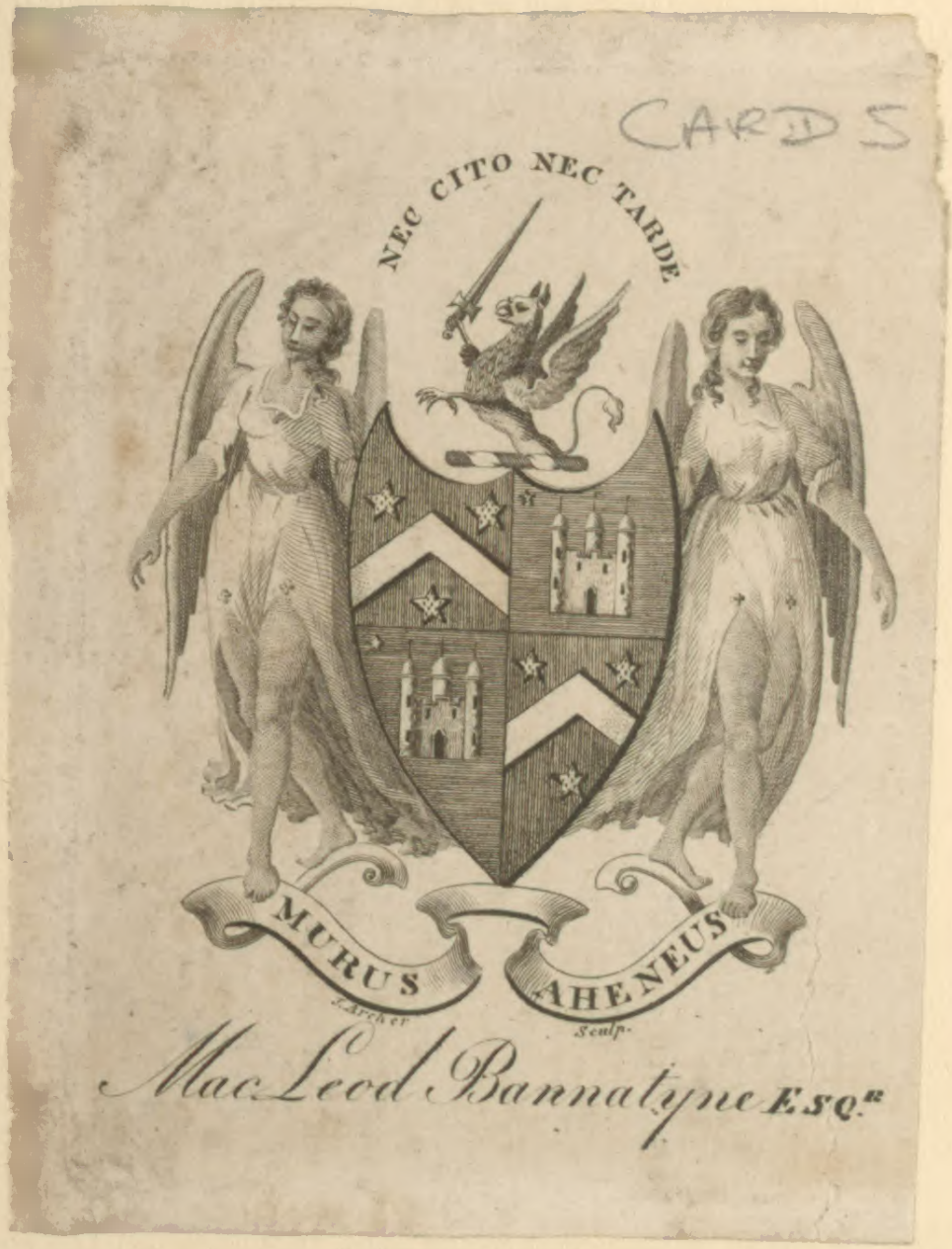

Mac Leod Bannatyne Esq.re

Harry Daley.

by

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,

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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INDEX.

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 Outter 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 De-

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* respective *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 reſpectivè.*

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 ever 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 conteſtatam*, he will not be heard now, becauſe it will be taken for a Delay; but the Falſhood will be reſerved 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 Falſhood *poſt litem conteſtatam*, in reſpect the Falſhood and Trial thereof conſiſts *in facto*, is in Effect a new Litiſconteſtation, which requires all the Terms of Probation, and thereafter Concluſion of the Cauſe.

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 finding 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 Purſuer 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

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

26. If the Defender produce a Bond of Cau- on, and that the Cautioner be rejected, upon he Alledgeance of Insufficiency; in this case, the ords will assign an new Diet for finding of a bet- er Cautioner.

27. At the first Institution of the Session, Sum- onses were appointed to be called every Day of he Week, according to the Table; and every ay of the Week had its own Table, containing s own proper Causes, which were to be called ereon; and also there were some Causes which ight be called any Day of the Week, and these ere under the common Table.

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

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

30. *Item*, To know what Summons should be bulate, there is an general, That all Summon- which abide Twenty one Days Warning should tabulate; and no Summons that comes in upon k Days Warning abides tabulating, except Im- bation.

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

erance, as Summons to make arrested Goods forthoming, 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 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 or 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 o-

ther

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 *Kirkbeugh*; 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 omitted 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 the 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 of Priories and Abbacies, by the which, the Thirds are discharged to the Lords of Erection, they 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 Ministers Stipends, and yearly Platt thereof, to become out 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 no 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 *Kirkbeugh* 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 heir Diocy; and the other Civil, over all the Inabitants of their Diocies; and to that Effect apointed their Officials, who had Power to judge in l Matters concerning Teinds, Minors, Orphans, nd poor Widows; and ſuch had Power to conrm all Teſtaments, of all that died within their Diocies; and for confirming thereof, had their *uota*, which was *viceſima pars* of the Defunct's art.

68. *Item*, This Juriſdiction was taken from the iſhops at the Reformation; and the Queen ade Commiſſars within each Diocy, with the me Power which the Officials had; and now the iſhops are reſtored thereto by Act of Parliament 609, with this Proviſion always, That there ſhall e four Commiſſars in *Edinburgh*, who ſhall be udges in all *Scotland* to Divorcements, and Reuction of inferior Commiſſars Decreets; of which our, two to be admitted by St. *Andrews*, and two *Glaſgow*, albeit their Reſidence be only within e Diocy of St. *Andrews*.

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

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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, re, the giving up of the Inventar, ſwearing thereto, nd finding of Caution to make it furthcoming to ll Parties having Intereſt; and the Inventar conſts of theſe three Parts; *Firſt*, Of the Goods and ear of the Houſe, and Corns, being the Grouth of e Mains, or in their Barns or Barn-yards, with orſes, Oxen, &c. *Next*, Debts owing to the Deanct; and *laſt*, Debts owing by the Defunct; nd after this the total Sums of the whole are rawn up, which are either divided or undivided acording to the Condition of the Inventar and Eate of the Defunct when he died; for if Debts kceed the Goods, there is *nulla diviſio*: And if e Defunct have Wife and Bairns, the Diviſion is *ipartite*, whereof a Third to the Wife, another to e whole Bairns, without the Heir: And the hird is called the Dead's Part, becauſe he had ower to diſpone the ſame to whom he will; but it be not diſponed, this Third alſo falleth to the airns beſide the Heir; and if the Defunct did me Executors, Strangers, and did not expreſly ſpone upon this Third Part by Legacy or otherys, then the Executors by Act of Parliament, ve the Third of the Defunct's Part for their harges.

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

appretiata, which muſt be execute againſt the Ex ecutors confirmed, on Nine Days Warning and at the Day of Compearance the Purſue will be preferred to the Executors confirmed *propter dolum & malam fidem* of the Execu tors confirmed, except they be able to purge th Fraud by pregnant Preſumptions and Circum ſtances: And this Teſtament *ad omiſſa* is confirme by the ſame Order, as the Principal, except al lenarly that this receives no Diviſion, in reſpe both the Relict and Bairns may be excluded o *malam Fidem*; and the whole, without Diviſion will pertain to the Executor-dative *ad omiſſa* and yet if either the Relict or Bairns purge th Fraud, *ut ſupra*, they will be admitted to crav their own Part, as in the principal Teſtament.

73. *Item*, The Executors in the principal Te ſtament, for eſhewing of this Prejudice, which ma ariſe by the *omiſſa*, are in Uſe, at the Time o Confirmation of the principal Teſtament, to pro teſt that they may be heard to eik any Thing tha is omitted when the ſame ſhall come to thei Knowledge; and they may upon Supplication t the Commiſſars (where any Thing omitted comet to their Knowledge) add the ſame to the Princi pal Teſtament, which is done without new Con firmation, and admitted by the Commiſſar, providin it be done before ſerving the Edict *ad omiſſa*, an providing that which is craved to be added, ex ceed not One thouſand Pounds or the Half of th principal Inventar, which the Commiſſar will no

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

74. *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.

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

76. *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* wherea

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 *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 Caſe the Lords ordain the Sentence not to be extracted till the Purſuer report to the Clerk of the Proceſs the Confirmation of the Teſtament, or otherwiſe 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 give not up, nor makes Faith upon the Inventar himſelf, 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 *ſolvendo* after the Diſcuſſing of them, they may purſue the Cautioner contained in the Teſtament and it will be no relevant Defence to the Cautioner to alledge that he is Cautioner for the Executor; and that therefore he can have no Action againſt him, but ought to relieve him, in reſpect the Caution is holden to be found not by the Minor, but by the Upgiver, as ſaid is.

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

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he die, then the Testament so far as is not execute, must be of new confirmed *quoad non executa*; and Executors decerned and confirmed to that Effect; and that is counted *non executum*, which was not actually intromitted with, nor uplifted before their Decease, which chiefly has respect *ad nomina debitorum*.

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

90. *Item*, Where all the Executors are pursued for a Debt, the Lords commonly find that they cannot be conveened *in solidum*, but *pro virili parte*: But if all be deceased but one, he is conveenable *in solidum*, reserving him Action and Relief against the Heirs and Executors of his Co-executors.

91. *Item*, Where there are more Executors confirmed, they must all pursue; and one cannot pursue without another; at least, if the Co-executor refuse to concur to the Pursuit, they must be called for as Defenders for their Interest, which is never observed before the Commissars. But, I have seen the Lords sustain the Pursuit of one of the Executors, without Citation of the rest, reserving always the Pursuit to the Executors Part that pursueth.

92. *Item*, This Exception is ordinary, where 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 infeft 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 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

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

Of moveable and heritable Bonds.

9. *Item*, The Diſtinction betwixt a moveable and heritable Bond of old was this, *viz.* The moveable Bond was, that which was made to he 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 o pay Annualrent to the Creditor, as well infeft s not infeft; and an heritable Bond was, where he 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 moveble, by uſing Requiſition for the principal Sum, conform to the Condition of the Bond, and by raiing 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 heritable Bonds, as it was just, so it was necessary, in respect of the Distinction of an heritable Right and Infeftment, which makes an heritable Bond justly to be accounted *Heritable*, to which the Heir hath only Right, and not the Executor: For as the Heir (if Infeftment had followed) could only be served to the Annualrent, so he has only Right to crave the Infeftment to be expede to him, which was not done to the Defunct; and is in the Case as if the Defunct had bought Lands either absolutely or under Reversion, and died before he got Infeftment. And this Distinction is necessary also, because it distinguisheth betwixt that which is due to the Heir, and that which is due to the Executor; betwixt that which is due to the Relict, and that which is due to the Bairns; and also distinguisheth betwixt what Debts should be paid by the Heir, and these that should be paid by the Executor, or whereof the Heir might crave Relief of the Executor.

102. But now the Forms of Bonds are so conceived, and the Lords decide so uncertainly, that it is exceeding hard to discern the Distinction betwixt heritable and moveable Bonds; for first, the Bonds are now conceived, bearing a Clause of *Annualrent*; 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 Cre-

reditor, without expreſſing any external Act to iſtinguiſh whether it be heritable or moveable.

103. *Item*, The Lords, in the Deciſion of theſe oints, have been uncertain; for ſometimes they dged no Bonds to be heritable, except they bore Clauſe to infeft: Othertimes they found a Bond eritable without a Clauſe of Infeftment, if it bore n Obligement to pay Annualrent to the Creditor, s well infeft as not infeft. And laſt, they have ound it heritable, albeit it want both Clauſes, if it ears Obligement to pay Annualrent.

104. *Item*, The Bonds which commonly bear bligement for Payment of Annualrent ſimply, ear firſt an Obligement to pay the principal Sum t a certain Time; and in caſe of Failzie, to be at ne Pleaſure of the Creditor: Whereupon it often lls out to be diſputed, if the Bonds be heritable r moveable, *ante eventum termini*. Which Que- ion falleth out if the Creditor die before the Term, r if the Creditor be denounced Rebel before the erm: And in theſe Caſes the Lords have found he Sum to pertain to the Executor, and not to he Heir. Or if the Creditor was denounced be- ore 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 ayable by the Executor, and whereof the Heir will e relieved, if he be compelled to pay *poſt annum & diem*, in reſpect the Creditor hath Power to urſue whom he pleaſeth *poſt annum & diem*; and the Debitor die *poſt terminum*, the Bond will be ounted heritable *quoad* the Heirs of the Debitor,

al-

albeit it may be moveable *quoad creditorem*, if he died before the Term, and will pertain to his Executors, & *contra*. If the Creditor died after the Term, it will be heritable *quoad eum & ejus hæredes*; and yet it will be moveable *quoad debitorem*, if he died before the Term. Of old, the Lords would grant No-Process against the Executor for an heritable Bond, but now they grant Process: And there is no Law to give the Executor Relief against the Heir, as the Heir hath against the Executor for his Relief, when he pays a moveable Debt; and which is worse, the Relict and the Bairns are defrauded, by this Confusion, of their natural and legal Portion, seeing the Executor will only be obliged to make Count to them of the Inventary of the Testament, with Deduction of the heritable Debt which they have been compelled to pay.

Of Heirs.

105. *Item*, Albeit the Heir may be pursued *post annum & diem*, yet because there are diverse Sorts of Heirs, as the Heir general, Heir of Line, Heir of Tailzie or Provision, Heir of Conquest, and Heir of second Marriage: Therefore it is expedient to know by what Method the Heir is to be pursued; wherein this Course hath been constantly kept by the Lords, That the general Heir, or Heir of Line, shall be first pursued and discussed before the Heir of Tailzie, and Provision,

and

nd Conqueſt, and Marriage: And when the Heir f Line is diſcuſſed, then the Purſuit is ſuſtained gainſt the remanent.

106. *Item*, The Heir of Line is properly *in ſucſſionibus ex linea recta*, and general Heirs comrehend both *in recta & collaterali*; and in *recta inea* there may be Heirs of Line of the firſt and ſeond Marriage, and Heirs of Tailzie and Proviſion y them, but not of Conqueſt, which has only lace in *ſucceſſione collaterali*.

107. It may be queſtioned whether the Heir of ne ſecond Marriage, or the Heir of Tailzie, ſhould e firſt diſcuſſed? It would appear that the Heir f Tailzie ſhould be firſt diſcuſſed, becauſe the Heitage is parted betwixt him and the Heir of Line: nd what the Heir of the ſecond Marriage has ommonly, he has it by Virtue of his Parents Conact of Marriage; and the Heir of the ſecond Marriage is not *hæres alioqui ſucceſſurus*, but almarly by Proviſion. And on the other Part it is be conſidered, that the Heirs of the firſt and ſeond Marriage may be either both Male or both Female, or the one Male and the other Female; nd where both, or any one, is Male, there is no lace for the Heir of Tailzie, which is made for xcluding the Female: And therefore the Queion will fall to be decided, where the Heirs of the rſt and ſecond Marriage are both Females; in hich Caſe they are both Heirs of Line, and ſo uſt 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 the Bairn had died not infeft, the Lands would fall to the Heir of Conqueſt, and not to the Heir gene-ral: And the Reaſon of the Difference is, becauſe in the laſt Caſe the Heir of Conqueſt is to be ſerv-ed to the Lands, as Heir, not to the Bairn, but to the Father. And in the other Caſe, the Tutor is to be ſerved to the Lands, as Heir to the Bairns who were laſt infeft, and not as Heir to the Fa-ther, in whoſe Perſon it was Conqueſt.

113. *Item*, In Succeſſions the Male doth ex-clude the Female, except only in a Caſe which is ſingular by the Practick of *Scotland*, which is this, that the Siſter-german is preferred to the Succeſ-ſion of Lands and Heritages wherein her Brother-german died laſt infeft and ſeaſed, and excludes the other who is in the ſame Degree with the De-funct, but not German, but only Father's Bairns, albeit if his Brother had died uninfeft, the ſecond Brother being of the other Marriage, would have ſucceeded to the Lands, *& ratio differentiæ eſt*, becauſe the Brother, albeit not German *quoad pa-trem*, is preferred to all the Females, but not ſo *quoad fratrem*, who is infeft after the Father's De-ceſſe; for in this Caſe the Practick of the Coun-try prefers the Siſter-german: So that in this Caſe, as in the former, the paſſing or not paſſing of In-ſtruments 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 ſuis portionibus ubi non eſt maſculus*; and if the

Daughters ſome of them be German, and ſome or ly on the Father's Side: If one of the Germar die infeft, her Siſter-german ſucceeds to her, an not the remanent; but if ſhe die uninfeft, *omne ſuccedunt ex æquo.* And ſicklike, where a Numbe of Siſters did ſucceed to the Father, and one c them die leaving behind her a Bairn; if the Bair die not infeft, 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 infeft. But the Bairn was infeft, either as Heir to the Mo ther, or as Heir to the Mother's Father; in th 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 nc 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 c him, his neareſt of Kin upon the Father's Side.

115. But it is to be conſidered, that ſeeing th Diverſity is only in reſpect of Infeftment, th therefore in the Caſes where there is no Infeftmer 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 Daughter 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 c Goodfire

odsire ; in this Case, *jus est acquisitum perfectè* the Bairn : Which after the Bairn's Decease, s 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 nds or Contracts whereupon he got no Infeſtnt 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-r or three Daughters were infeft upon heritable nds or Contracts, or if the Daughter deceaſed ained herſelf infeſt upon the heritable Bonds or ntracts ; in theſe Caſes, or either of them, the rn being only ſerved general Heir, but not in-, would not tranſmit the Succeſſion to the Fa-r's Side, but to the Mother's Side ; becauſe ei-r the Mother or the Mother's Father died laſt and ſeaſed, to whom the Heirs of the Bairn the Father's Side cannot poſſibly ſucceed.

Of Ward and Nonentry.

. *Item*, If the Lands which pertained to the Defunct hold Ward of the Superior, the r being Minor cannot enter till he be of perfect rs, which in the Male is Twenty one, and in the ale Fourteen Years : But if the Superior diſe with the Minority, they may enter ; and King's Majeſty does never refuſe to grant Diſſation (which paſſeth the Caſhet and Signet

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 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 Perſon who is heritably infeft, 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 Infeftments 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 Infeftment be confirmed by the King, except the ſame be given to be holden of the King, yet the ſame will not defend againſt the Removing; and the Reaſon 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 where Confirmation is granted.* But where the Infeftment 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 where he has a Vaſſal living; but the Ward is ſuſpended.

e Infeftment confirmed was temporal, and for fetime only; as is commonly in Infeftments anted by the Husband to the Wife, and if the feftment confirmed was heritable, then the ard could not vaick by the Deceafe of the fponer, nor by the Minority of his Heir; beufe he was fully diffeafed of the Right of the nds before his Deceafe.

119. *Item*, The Relict will have Right to the rce, notwithftanding of the Ward.

120. *Item*, If the Heir enter not after the Exing of his Minority, then the Lands are in Nonry, and not in Ward, becaufe the Ward is end; and during the Ward it could not be called *nentry*, becaufe the Heir could not enter; and refore Nonentry begins after Expiring of the ard: But the Nonentry fubfequent to the Ward, of the Nature of the Ward, and not of the Nae of common Nonentry, efpecially if the Wardabe in Poffeffion; for then he continues his Pofion without obtaining Declarator upon the Nonry, and he has Right to the full Mails and Du, and may remove Tenants, as he did the Time the Ward: Whereas in Nonentry, there is not Title and Right without a Declarator; and en the Declarator is obtained, there is no more for the Years preceding the Declarator, but retoured Duty, if any be: But where no Rer is, in that Cafe the Donator to the fimple nentry will have Right to the full Mails.

121. But it is to be confidered, that the Nonry fubfequent to a Ward, pertains not to the

Donator of the Ward, except for three Terms a
ter Expiring of the Ward ; for after that, the se
cond Donator will have Right. Likeas alſo th
firſt Donator to the Ward, if the Heir come t
Majority, and might have entred, but deceaſed
before he entred *de facto*, leaving behind him
Son or Brother, Minor ; in this Caſe, the fir
Donator has no Right to the Ward of new, fa
by the Minority of the ſecond Heir ; but th
King hath Power of new to diſpone the Ward to
ſecond Donator : And there is no other Righ
granted but three Terms after the Expiring of th
Minority, albeit it might ſeem that it is not a ne
Ward, but the ſame vaicking by the Deceaſe
one and the ſelf ſame Fiar ; and the Gift grante
by the Fiar bears the Ward to be diſponed for a
Years ſince the deceaſe of the Fiar, and ay an
while the Entry of the righteous Heir ; but th
Lords fand, That ay and while the Entry of th
righteous Heir reſpected not *actum*, but *facult
tem vel potentiam*, and *in rei veritate* ; the d
ceaſe of one Fiar, and the Unity of one Perſon d
ceaſing, infers not the Unity of Vacation, neith
of Ward nor Marriage. But it is enough, that th
Lands hold Ward of the King, and that any
the Predeceſſors was inſeft holding Ward ; for
therwiſe it ſhould be in the Power of the Vaſ
and his Heirs to hinder and impede the falling
the Lands in Ward and benefit of the Marriag
by not entring : And albeit the King, or any
ther Superior, might compel the Heir to enter,
otherwiſe to bar them from the Lands by t
No

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 by-gone 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 be unmarried; in that Caſe the Marriage of the next apparent Heir will pertain to the firſt Donatar, 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

rſt 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 aids Lands might be poinded, diſtrinzied, and ap-riſed for the ſame, and ſo found the Right of the Marriage 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 Ward and Marriage cannot vaick to the King, but y the Death of one who was either actually infeft n Ward-Lands, or might have been infeft 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 ajor, 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 ands for one Year, and that by and attour the onentry, 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 a Relief at the Entry of the Heir, but that is only the Duplication of the blench Duty: And as to Feu-Lands, the Clauſe of the Charter commonly bears, *Duplicando 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 *Fife*, 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-

Provinces bordering with *England*, the retoured Duty is only the ſingle or the double of the old Extent at furtheſt.

127. And the Reaſon of the Difference of the Height of the new Extent may be taken from the Time and Reaſon of ſetting the ſame; for the old Extent was made in Time of Peace, and the new Extent was made in Time of War; and in reſpect thereof, the Places of the Kingdom neareſt to *England*, with whom we had Wars, and who were often employed for Defence of the Kingdom, had their new Extent made to the double, ſimple, quadruple, *&c.* And the Places more remote, as *Galloway*, and far North, had their new Extents made to the ſextuple or ſeptuple: But this is not neceſſary, but probable; only this is certain, That there were two Extents made of the whole Lands of the Country, according to the Worth and Eſtimation at the Time; whereof one is called the old Extent, which was taken *tempore pacis*, and the new, which was taken *tempore guerræ*; and according to the old Extent, every Pound Land pays within the Kingdom its Taxation to the King, counting 30 Shill. for each Pound Land at each Term, which was Three Pound a Year, when the Taxation was *L.* 10000, which makes the old Extent of the whole Lands come to 33333 *l.* 6 *s.* 8 *d.* or thereby.

128. New Extent, is that which we call the retoured Duty, whereof the Reaſon is, becauſe all Brieves bear this Clauſe, *Et quantum valuerunt dictæ 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-

Sheriff ſhall take Security in this Form, *Reſponde-it vicecomes pro ſumma & ratione ſaſinæ, &c. Vandæ tali, &c. de terris, &c.* And according to his *Reſpondeo*, the Sheriff is charged yearly to make his Accompt to the Exchequer, which is held yearly in *July*.

130. Conform to this Precept, the Sheriff, when the ſame is preſented to him, takes good Security from the Party for Payment of the Money contained in the Precept, and thereafter gives Saſine, and for giving Saſine, takes a Saſine Ox: And albeit the Precept be not preſented to the Sheriff, nor Saſine taken thereof, yet the Sheriff, by Cuſtom of the Exechequer is ſtill charged with the *Reſponde*, and compelled to pay the ſame, whereof there is no probable Cauſe but this, That it is preſumed, that the Party Raiſer of the Precept will not neglect to take Saſine on the Precept, eſpecially ſeeing it bears this Clauſe, *Præſentibus poſt proximum terminum minime valituris.*

131. But albeit Saſine be taken, and Security given for the Money contained in the Precept, yet upon Supplication of the Party, who was ſeaſed, made to the Lords of Exchequer, craving to be freed of the Payment thereof, upon ſome juſt Reaſon, whereof this is commonly one, That the Gift of the Ward and Nonentry was diſponed to himſelf, or to a Donator, to whom he has given Saſisfaction; the Lords will relieve both the Sheriff, and the Party Giver of the Security: But albeit the Party ſhow a Gift of Ward, Nonentry, and 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 Infeftment, 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 Infeftment 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 Vaſſal the Lands to the which he is retoured Heir, e Vaſſal doing that to the Superior, which he is bliged to do of the Law, upon which Precept the aſſal either perſonally or a Procurator for him, pes to the Superior, and requires him to give In-ftment; which Infeftment, otherwiſe called Pre-pt of Saſine, the Vaſſal or his Procurator pre-nts to the Superior, written *in mundo*; and if the perior refuſe or delay, takes Inſtrument there-on in Preſence of a Notar and Witneſſes, and turns the ſame to the Director, who thereupon ves forth a ſecond Precept, called *Meminimus*, herewith the Superior is of new required, and In-uments taken, *ut ſupra*; upon the Report where-, there is a third Precept directed, called *Furca*, hich is uſed by the Vaſſal, according to the other o; and upon the Report of this laſt, the Di-ctor gives a Precept to the Sheriff of the Shire here the Lands ly, commanding him to give the aſſal Saſine of theſe Lands, in reſpect of the perior's Contempt. But commonly the Superi-, before the directing of the laſt Precept for giv-g of Saſine, uſe to paſs Suſpenſions before the rds of Seſſion, and ſummons the Vaſſal to com-ar before the Lords, to hear and ſee the Charge ſed upon theſe Precepts ſuſpended; which Suſ-nſion is commonly granted by the Lords, by nſignation of a Precept of Saſine ſubſcribed by Superior; and at the Day of Compearance, Reaſons of Suſpenſion are diſcuſſed before the rds, and Juſtice done therein, according to the

Re-

Relevancy thereof. The Reasons of the Suspen sion are commonly these, That the Precept are conditional, *Vassallus faciendo superiori, quo de jure facere oportet*; and that by the Re tour the Lands are found to be in Nonentry s many Years, which must be paid; which Reaso is relevant in the Law, and admitted by the Lords because, as it is the Condition of the Precept, so is verified by the Retour.

134. But there be many other Things due t the Superiors, whereupon also they use to found th Reasons of Suspension; such as the Feu-duty ow ing of divers Years bygone, the Liferent of th Vassal deceased, or the apparent Vassal being Yea and Day at the Horn, the Lands fallen in the Su perior's Hands by Recognition, either by the Na ture of the Holding, as being Ward, or by a Claus irritant, not to annailzie without the Consent o the Superior: but none of these will be found relevant Ground of Suspension; and notwith standing thereof, the Precept consigned by the Su perior will be ordained to be given up to the Vas sal, only the Lords reserve to the Superior hi Right and Action against his Vassal for the sai Duties and Casualities.

135. But it is to be remembred, That wher the Superior is willing to enter his Vassal, there i no Necessity to the Vassal to retour himself to th Lands; but the Superior may infeft him i the Lands as Heir to his Father by a Precep of *clare constat*; and Sasine taken upon this Pre cep

ot, gives the Vaſſal as good Right to the Lands, if he had been retoured.

recepts of Saſine and Clare conſtat.

36. BUT there is a Difference betwixt a Saſine upon a Retour, and a Saſine n a Precept of *Clare conſtat*: The Saſine upon Retour verifies him to be Heir to his Predeceſ- *& active & paſſive*; but the Saſine of *Clare at* only *paſſive*, except againſt the Superior, *ra quem valet utroque modo*; and alſo is valid d the real Rights of theſe Lands as fully as a Retour.

37. And further it is to be adverted, That the rior by ſuffering his Vaſſal to be entred by heriff, tines nothing but the Saſine Ox; for ithſtanding thereof, he remains Superior as e.

38. For it is to be conſidered, That this Form recept againſt the Superior for infefting his l, is only in this Caſe, where the Superior s infeft in his Superiority; but where he is not , and only apparent Heir to the Superiority; s Caſe the Vaſſal craves no Precept upon his r, becauſe it would be unprofitable to him infeft by one who is not infeft himſelf, but s the Order preſcribed by the Act of Par-

liament *James* III. anent charging the Superior 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* tine it during his Lifetime, and all Casualities thereof.

140. But it is to be remembred, That if the mediate Superior be not infeft, the Vassal will be compelled to take out his Decreet of Tinsel of Superiority, and thereafter to raise the like Charges against the mediate Superior, to enter to the Superiority with Certification, *ut supra*, & *sic de inceps*, against all other Superiors interjected, who he come to the King; and the Summons concluded 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

his Vassal to enter to his Superiority within Days, and summoned to that Effect; but the ords will not decern him to tine his Superiority *rante warda*, but only declares the Diligence ne by the Vassal, to be as effectual to him, as if was seased, both for staying the Nonentry of e Lands, (if any be) in respect of the Superior; d also in respect of the Vassal *quoad effecta proietatis* against his Tenants, and others having tereſt.

142. *Item*, It is much questioned, in the Case here the Superior is decerned to lose the Superity, whether he tines it during his own, or his ssal's Lifetime, or both, whilk hath great and obable Reasons on all Sides: For if the Superi- who was decerned to tine the Superiority, deſe; and he who succeeds to him, enters to the periority, it would seem reasonable that the ssal should become Vassal to him who thus ens, and not remain Vassal to the Superior meie; whereof this may be a great Argument, at the mediate Superior receiving the Benefit t is due to him by Law, by the Entry of his n Vassal, whereby he will fall all the Casualiof the Superiority, which will justly pertain to , as the escheat of Liferent, &c. that therefore should not also retain the Casualities which y vaick to him as Superior to his Vassal's sal.

143. On the other Part it is urged, That the -vassal being entred by the mediate Superior, 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 c 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 tute* 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 nc 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 Liferer of the Sub-vassal would pertain to the immed ate Superior, who is newly entred, and not to th mediate Superior, *quod est absurdum ex lege.*

146. *Item*, It is thought that the Superiorit must be lost during the Lifetime of both conjunctl that is to say, of the Superior and Vassal, other wise, if the Vassal died, the immediate Superio who has lost his Superiority, being alive, the He of the Vassal would not have a Superior to ente to, but would be forced to charge his immedia 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 Queſtion, if the immediate Superior did enter and obtain himſelf infeft befor the Vaſſal's Deceaſe: But all theſe Queſtions I leave to be diſpute, becauſe they are not decided.

148. *Item*, To the Queſtion, this Conſideration may be added, What if the Vaſſal were to ſell his Lands? Whether the Confirmation of the mediate Superior would be a ſufficient Right to the Acquirer or not? And the Reaſon of this Queſtion is, becauſe a great Part of the Right of the Lands depends upon the Confirmation of the right Superior; and, for clearing hereof, the Particulars following are to be adverted to; for Lands may be held to be holden either of the Anailzier or of the Superior: The firſt is called a baſe Infeftment, and the other is called a publick Infeftment, *inchoatione ſed non perfectione*, till it be confirmed.

Baſe and publick Infeftments.

149. A Baſe Infeftment being diſponed to be holden of the Diſponer being cloathed with Poſſeſſion, is a perfect Infeftment *in ſuo genere*, but is not ſo perfect and publick as the other to be holden of the Superior.

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

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

151. *Item*, Albeit it be confirmed by the Supe rior, yet the base Infeftment which cloathed wit Possession is preferred thereto, and the publick In feftment confirmed, as said is, will only carry th Receiver, to the Superiority of that base Infeftmen but the Property will pertain to the Possessor b Virtue of the base Infeftment.

152. This is true, not only where the base In feftment is prior to the publick, but also where is posterior to the Charter given to be holde of the Superior, but before Confirmation thereo *quia tunc medium impedimentum intervenieus* the base Infeftment cloathed with Possession befor the Confirmation, hinders the Confirmation to b drawn back to the Date of the Charter confi med.

153. *Item*, Base Infeftment, whether anteric or posterior to the Publick, if it be not cloathe with Possession, but that the Publick be confirme before they apprehend Possession, will be postpone to the Publick, and the Publick preferred there to. But this suffers an Exception of base In feftments granted by Husbands to their Wive depending upon Contracts of Marriage, which i Favour of Marriage are accounted both publick and cloathed with Possession, in respect it is esteem ed that the Husband bruiked the Property by h Wife's Right, and that his Possession was her Po

ſſion. But if the Infeſtment granted to the ife, was granted *ſtante matrimonio*, and baſe, nd that by and attour the Lands to the which e was provided by Contract of Marriage, in that aſe her baſe Infeftment has no Frivilege before a ublick, except it be cleared that there was no ontract of Marriage at all, and that ſhe had uitted the Lands to the which ſhe was provided the Contract of Marriage, and gotten the other r the ſame; in which Caſes ſhe will bruik her ands with the like Privileges, as if the ſame had pended upon the Contract of Marriage: For here there is no Contract of Marriage betwixt e Parties, it is thought juſt and reaſonable that e Husband may give a conjunct Fee *ſtante ma-imonio*, providing it be effeiring to his Eſtate, and ot exorbitant.

154. *Item*, A baſe Infeftment apprehending oſſeſſion *per conſtitutum*, that is to ſay, where the ands are ſet in Tack to the Diſponer, for Pay-ent of a Duty, which Duty is paid to the Re-iver of the baſe Infeftment, the ſaid Infeftment accounted cloathed with Poſſeſſion, *per hanc nſtitutionem civilem*, ſicklike as if he were natu-lly in Poſſeſſion.

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

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

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

157. *Item*, Infeftments of Annualrent give base, are accounted cloathed with Possession aft the Date of the base Infeftment, if the Giver ther of make Payment of the Annualrent for one Ter or more, albeit this Payment being made by th Debitor, who is obliged thereto by his Bond, ma as well be referred to the Bond, as to the Infef ment; and that the Creditor recived no real no natural Possession by uplifting the Annualrent furt of the Lands, or from the Tenants Occupie thereof.

158. *Item*, 'Tis thought that an Infeftment o Warrandice, albeit base, in Case of Eviction of th principal Lands, will be preferred to a public posterior Infeftment, albeit the same did not ap prehend Possession before the Eviction, in respec it could not apprehend Possession before it; an *fictione juris* the Possession of the Principal Land is holden for Possession of the Warrandice; bu this is not *sine suo scrupulo*, and may be made di puteable.

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

base Infeftment (albeit posterior) cloathed with the said Number of Years, is ever found relevant, notwithstanding the other's Priority, except he can reply upon Possession also apprehended by his prior Infeftment either civil or natural; but in *judicio petitorio*, *viz.* in Actions of Reductions, the prior base Infeftment is ever preferred to the posterior, without respect to the Possession.

160. *Item*, That which is spoken of publick Infeftments to be holden of the Superior by Confirmation, is alike true in publick Infeftments of Lands or Annualrents granted to the Receiver by the Superior, upon the Resignation of the Annailzier for a publick Infeftment, upon a Resignation and Confirmation from the Superior, are alike in the Practick of *Scotland*, *& sunt jure nostro pares termini*; and albeit they be alike *quoad superiorem*, yet they have some Imparity and Difference otherwise: For an Infeftment upon Resignation comprehends *universitatem jurium*, and specially *omnia jura Reversionum absque cessione*; whereas an Infeftment confirmed doth not properly comprehend *jura Reversionum*, except they be assigned; at least it has often been disputed, but never yet found fully resolved.

161. *Item*, After Resignation made by the Vassal in the Superior's Hands (which is commonly done by Procuratory and Instrument of Resignation) in Favour either of the Superior *ad remanentiam*, or in Favour of a third Party *in favorem*, the Resigner can do no Deed in Favour of another Party, in Prejudice of the Resignation made

ut

ut supra; and if betwixt the Resignation made in Favour of a third Party, and accepted by the Superior, the Resigner should give a base Infeftment of the Lands to be holden of himself, in Favour of another Person, that base Infeftment, albeit it should apprehend Possession, before the Superior granted the Infeftment upon the Resignation, yet the same will be null and reduceable, as granted *à non habente potestatem*, that is, by the Disponer who was denuded by the Resignation: And yet if the Disponer had denuded himself, not by Resignation, but by Charter to be holden of the Superior, and Sasine following thereupon, he might at all Times before the Confirmation of the said Charter, grant a base Infeftment, which apprehending Possession before Confirmation of the said Charter, would be preferred to a publick Infeftment; so passing the Confirmation, as said is, *& ratio differentiæ est* because in the Resignation intervened *duplex actus* one of the Resigner, another of the Superior accepting the Resignation: But in the other, there is only the Act of the Disponer; but not any Act of the Superior, till the Date of the Confirmation.

162. And albeit after the Resignation actually used, no base Infeftment can prejudge it, yet if after the Resignation used and accepted, the Resignant should make another Resignation in Favour of any other Party, whereupon the Superior should give Charter and Sasine; this second Resignation with Infeftment following thereupon, would be preferred to the said prior Resignation whereon no Infeftment followed; and the Reason of the Differenc-

ence is this, that albeit *utrobique est duplex actus*, et the Deed of the Superior is *tantum actus imerfectus, & inchoatus quoad eum, & quoad esse ateriale, & esse formale & probatorium*; for the cceptation of the Superior has no other Warrand t the Assertion of the Notary who was Notar to he Instrument of Resignation, which by the Law f the Kingdom is not sufficient in heritable Rights, nd will not compel the Superior (being otherwise nwilling) to give Infeftment conform thereto: nd albeit the Instrument of Resignation was seald and subscribed by the Superior the Time of the aking thereof, which (*quoad esse probatorium*) ould have been sufficient of the Law, yet it would ot be *jus reale* to the Person in whose Favour the esignation is made, but only be the Ground of a rsonal Action, to compel the Superior and his eirs to give Infeftment conform thereto; and erefore if a third Party should either acquire the periority from the Superior, and pass Infeftent thereupon; or if the Superior should give feftment of the Property to any other Person on the Resignation of the Vassal, who thereupon ould take first Sasine, there is no Question but e real Right either of the Superiority or of the operty, would fully subsist and stand in the Per- of these who received the foresaid Infeftment, d that notwithstanding of the foresaid first Renation made by the Vassal, and accepted by the perior, as said is.

163. *Memorandum*, The Superior cannot be mpelled either to accept a Resignation, or to confirm

confirm an Infeftment, but at his own Pleasur and Εἰσδεκτικὸν is commonly a Year's Duty t the Superior who receives a new Vassal, excep the King, whose Composition is made by the Lord 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, where upon the Act of Parliament *James* III. 1469 they will compel the Superior to enter and receiv them, they paying a Year's Duty to the Superior by the Modification of the Lords.

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

Necessity of Confirmation.

166. *Item*, The Necessity of Confirmations to b paſt by the Superior is double; one fo Perfection of the Right, if the Infeftment be given to be holden of the Superior; another for eschew ing of Dangers which may follow by Forfeiture an Recognition, if the Infeftment be given to be hol den of the Disponer.

167. *Item*, The Confirmation of all Kirk-Land is neceſſary, by Act of Parliament; and the Wan of Confirmation of Infeftments of Kirk-Lands ren ders 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: 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 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 Right 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 hol den of the Disponer, in that Case, so soon as th Order of Redemption is used and declared, ther is no Need of a new Sasine to the Redeemer, bu it is sufficient that the Wadset-Haver subscribe Renunciation, and grant the Lands lawfully re deemed: And the Reason wherefore there is n Necessity of a new Sasine is, because the Giver o the Wadset was never disseased, he remaining stil Vassal to his own Superior; but gave allenarly base Sasine to be holden of himself, which by th Renunciation accresceth to the Sasine which he ha standing in his Person, holden of his own Superior and is in Effect a Consolidation of the Propert which was wadset with the Superiority, which re mained in his Person unwadset and undisponed.

Of the Nature of Reversions.

171. ALL Reversions are *stricti juris*, & *no transeunt in hæredes vel assignatos, nis eorum expressa fiat mentio in corpore reversionis* and yet if the Right of a Reversion be comprised it will pertain to the Compriser, albeit the Rever sion was only made to Heirs, and not to Assignies as was practised betwixt the Earl of *Errol* and *Buc kie*, whereof the apparent Reason is, That th Compriising is not a voluntary Assignation, but ne cessary and judicial. But if the Reversion bear t be made to the Receiver and his Heirs, excludin all others his Assignies, the Matter will be mor dif

isputeable ; and in my Judgment it should in that Case also exclude a Compriser.

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

173. *Item*, Where the Party having Right to the Reversion makes Assignation thereof to divers persons ; the last Assignation, with the first Intimation thereof, is preferred to the first Assignation first intimated.

174. But where a Reversion is compriſed, there needs no Intimation, but the first Compriser is preferred to the second Compriser, albeit he intimate first.

175. *Item*, Where the Right of Reversion is disponed, not by way of Assignation, but by Infeftment proceeding upon Resignation ; in that case there is no Necessity of Intimation, but the party infeft upon Resignation will be preferred to a second Assignation first intimated, *& ratio est* ; that the Right of Reversion passeth by Infeftment upon Resignation, or by way of Comprising, the Resignant, or Party from whom it is compriſed, is fully and totally denuded *ad non remanet apud eum quicquam aliquod vestigium vel color* : But where Assignation is made, and no further, it is thought that he is not fully denuded till Intimation be made.

176. But it is to be remembred, where Lands are wadset to be holden of the Superior, under Reversion,

verſion, that the Right of this Reverſion is only tranſmiſſable by way of Aſſignation, and not by way of Reſignation and Infeftment, whereof this is the Reaſon, becauſe the Lands being once reſigned already in Favour of the Receiver of the Wadſet, the ſame cannot be of new reſigned: And if any Reſignation be made otherwiſe than by the Receiver of the Wadſet and his Heirs, the ſame is null and invalid, and conſequently *quia actus principalis eſt invalidus*, which is the Reſignation of the Lands: Therefore alſo the Right of the Reverſion, which in Reſignations, *tranſit cum univerſitate*, and falls *in conſequentiam*, *& ratio rationis eſt*, *quod jus Reverſionis ſit merè incorporeum*, whereof the Right is properly and *habili modo* tranſmitted by Aſſignation, and cannot be tranſmitted *per Saſinam niſi acceſſoriè ad rem corpoream cui inhæret.* And albeit it may be alledged, That *jus ſuperioritatis*, is *jus incorporeum uti omnia jura ſunt*, *quia omnia jura qua ſunt jura incorporea*; yet this makes not *jus ſuperioritatis* to be *jus incorporeum*, no more than *jus proprietatis*, becauſe *utrumque jus & proprietatis & ſuperioritatis ſunt rei corporeæ*, *id eſt*, *fundi*, *cujus dominium acquiri non poteſt*, *niſi per traditionem corpoream*, *hoc eſt*, *Saſinam*: *Sed jus Reverſionis non eſt jus rei corporeæ*, *ſed jus incorporeum*, *in re quæ licet ſit corporea*, *non tamen habet neceſſitatem traditionis ad ejus acquiſitionem*, *& jus Reverſionis*, is in Effect no other but a Servitude, *& ſervitus in fundo aliena acquiri poteſt abſque traditione vel Saſina*, *per ſimplicem diſpoſitionem*, *quia in juribus hiſce incorporeis*

non requiritur possessio, sed quasi possessio; and refore the Servitudes *prædiorum rusticorum, vel anorum, acquiruntur sola dispositione absque Sa-*, as the Servitudes of Multures and of Aque-ts *in rusticis*; *& altius non tollendi in urbanis.* 77. And where it may be opponed, That the hts of Annualrents are Servitudes, and sicklike *fructus in fundo*, but yet passeth by Sasine: It nswered, That the Case is not alike, because Annualrent is *quasi pars fundi, & ususfructus ius fructuum fundi ad tempus, & sic potius sunt rei corporeæ, quam jura in re corporea.* And al-to the Right of an Annualrent *quoad constitu-em ab initio*, there is a Necessity of Sasine, hout which it cannot be established formally, separate from the Use of the Lands, whereof an Usufruct; yet after the Usufruct is once fully constitute by a Sasine, it is thereafter smissable by Assignation *sine Sasina.*

78. And the Right of Liferent which pertains he Superior, through the Vassal's Rebellion by Space of Year and Day, pertains to the Supe-by the Law; and he may dispone the same to onatar *sine Sasina*, because the Right pertains im by Disposition of the Law.

Of Liferent Escheat.

. *Item*, The Right of the Liferent Escheat, which is in the Person of a Donatar, falls er simple Escheat; and albeit from the Begin-

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

180. But it is much doubted, whether Lifere
Eſcheat, which pertains to the Superior by his V
ſal's Rebellion, being once eſtabliſhed in the S
perior's Perſon, doth fall in Eſcheat by the Sup
rior's ſimple Rebellion or not? *Ratio dubitatio*
ariſeth from the Similitude of the Caſe which
hath with the Liferent Right eſtabliſhed in the Pe
ſon of the Donatar, albeit there be a great dif
rence; for a Liferent accreſcing to the Superi
eſt pars ſuperioritatis, and in Effect is become Pr
perty to the Superior during the Vaſſal's Lifetim
Whereas the Liferent in the Donatar's Perſon
jus ſeparatum à ſuperioritate; and in my Opini
a Liferent accreſcing to the Superior by the V
ſal's Rebellion, cannot vaik, by ſimple Eſcheat,
the King's Hands, except the Superior be Year a
Day at the Horn, and ſo doth fall under a Lifere
Eſcheat.

181. *Item*, The like is in Liferent Tacl
which by Act of Parliament fall under *Lifere*
Eſcheat, and not under a *ſimple*; and yet if t
Liferent Tack be aſſigned in Favour of a thi
Perſc

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

disponе 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 Lands and Annualrents: But this is to be observed in the different Form of the Gift, that the same in these Cases must bear the heritable Bonds and Contracts *per expressum*, and not generally; so that where two Gifts of Escheat shall happen to be disponed, as vacant by 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 nmediate Superior, albeit the apparent Heir be ot infeft.

190. *Item*, Where there concurs two Donatars, either of simple or Liferent Escheat, the ist Gift, with the first Diligence, by raising of Declarator, 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 Citation, except the Donatar who is prejudged be ble to improve the Execution of the Summons. Neither will the Donatar be heard to reduce the rst Decreet, upon Reason of Anteriority of his ift and Citation: But if no Decreet be pronounced, then both the Donatars, *ante sententiam*, will e heard to dispute upon their Gifts and Diligence, and be preferred and postponed accordngly.

191. *Item*, There falls under Forfeiture, Bastardy and last Heir, not only moveable Goods, *ut upra*, but also heritable Rights of Lands, Teinds, Annualrents, wherein the Person forfeited and Bastards were infeft. But there is a Difference in the Form of the Gift thereof; for Escheats vacant by Horning, and also of heritable Bonds whereupon no Infeftment has followed, vaiking by Forfeiture, Bastardy, *&c.* passeth only the Privy-Seal: But where Infeftment followed, the same passeth either by 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-

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

193. But if the Superior refuse or delay, then the second and third Precepts are directed as upon Retours; and last a Warrant to the Sheriff to give Sasine: And I have also seen another Order observed immediately after the Use of the Presentation, by obtaining Letters of Horning by Deliverance of the Lords of Session, for charging of the Superior to give Sasine, which is also the Custom observed against Superiors for giving Infeftment upon Comprisings. But in my Judgment the former Course is more certain; for by it the Party, after some Delay, obtains a real Right by Sasine from the Sheriff; but in this other, the whole Order resolves in Horning, and not in real Right.

194. *Item*, If the King be pleased to dispone the real Right of Forfeiture or Bastardy in Favour of the immediate Superior, it cannot be done directly and immediately in favour of the Superior himself, but must be done by Presentation in favour of a third Party, to his Behoof; who being infeft by the Superior, must resign in the Superior's Hands, *ad perpetuam remanentiam*.

195. *Item*,

195. *Item*, Albeit the Lords of Regality have Right to the Escheats of the Inhabitants within their Regality vacant by Horning, yet where the Escheats vaik by Forfeiture, the Lords of Regality have no Right thereto, but the same only pertains to the King.

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

197. Casualities vacant by Escheat, Forfeiture, Horning, Bastardy, last Heir, *&c.* albeit lawfully expede thro' the whole Registers and Seals requisite, yet the same establisheth no real Right nor Title in the Person of the Receiver, except he obtain Declarator thereupon, either general or special, and after Declarator, *habetur pro titulo*, and no otherwise. But there is this Difference betwixt Escheats and Gifts of temporal Casualities, and Gifts of Forfeiture and Recognition, *viz.* That in the former, a posterior Gift with a prior Diligence will be preferred; but where Infestments are lawfully expede upon Forfeiture under the Great Seal, and Sasine lawfully following thereupon, in this Case no posterior Infestment, 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 Parliament, then the Donatar needeth no Declarator on his Right; but where the Forfeiture passeth Act of Adjournal in Justice Courts, then a declarator 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 ft, 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 nds 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 mmons only contain general Declarator, the me needs not Continuation, because the same is erified *instanter*.

201. But

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

Of Signatures and Seals.

202. A Signature is properly a Letter of Gift, Donation or Diſpoſition, which paſſeth under the King's Hand in favour of any Subject, which, according to the ſeveral Natures thereof, paſſeth either under the Signet allenarly, or under the Privy Seal allenarly, or under the Quarter Seal allenarly, which is the Teſtimonial of the Great Seal, or paſſeth under all theſe Seals, except the Quarter-Seal.

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

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

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 cri- nal Letters before the Juſtices; and ſicklike, Signatures which are appointed to paſs thro' haill Seals, muſt firſt paſs through the Signet of Seſſion.

206. *Item*, All Gifts of Caſualities, ſuch as of heats, Wards, Nonentries, Baſtardies, Let- s of Penſion, Proviſions and Preſentations to ks and Benefices, not being Prelacies, paſs un- the Privy Seal immediately, and go no further any other Seal.

207. *Item*, All Signatures of Prelacies, and at Benefices; and alſo all Signatures of the Of- rs of State, paſs under the Great Seal only, hout any other Seal; and ſicklike, all Signa- es, which paſs only the Signet and Privy-Seal, alſo the Great Seal.

208. *Item*, The Letters which paſs under the arter Seal, are either Precepts of Saſine upon eftments paſt under the Great Seal, or Letters Preſentation of heritable Tenants and Vaſſals, to eriors of forfeited Lands, or Lands vaiking by tardy, and alſo by Act of Parliament 1587, mmiſſions of Juſticiary are ordained to paſs the arter Seal; and ſicklike, all Commiſſions for ring of the Treaſurer's Accompts, paſs the arter Seal.

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

were ratified by His Majeſty under the Quarte 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 t *England*, the ſame are all ſubſcribed and ſignet b the King, either with his own Hand, or by Caſhet, which has the King's Name, and who Letters thereof, as he uſeth to write the ſame, en graven therein: Which Caſhet is kept by th Chancellour; and all Signatures muſt paſs his Ma jeſtie's own Hand, which are excepted out of th Commiſſion granted by His Majeſty to the Lord of Exchequer, or which are not contained with the ſaid Commiſſion, ſuch as Remiſſions for Treaſons, Slaughter, Witchcrafts, and others of the lik Nature, being of great Importance.

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

212. *Item*, The Form of paſſing Signature whether the ſame be ſigned by His Majeſty, c caſhetted, is this, *Firſt*, The ſame are formed b a Writer to the Signet, and marked by his Nam on the Back. 2*do*, They are delivered by th Party, to the Preſenter of the Signatures, who Mr. *Patrick Brown* for the preſent, and he makes Roll thereof, and affixeth the ſame upon the Ex chequer 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 ſam

e preſented, conſiders the Signatures with the Writs neceſſary for Verification thereof, and hears Parties make Offers anent the Compoſition to be paid for the ſame. *4to*, The ſame are paſt and omponed by the Lords of the Exchequer, where- f the Quorum is now, by Virtue of the laſt Com- niſſion of Exchequer, any Four of the Number, ith the Treaſurer or Treaſurer-depute; and the Compoſition is written at the End of the Signature, y the Preſenter; which Compoſitions are made eſs or more, at the Lords Pleaſure. *5to*, The ignatures being paſt by the Lords of Exchequer, he ſame are retained by the Preſenter, till the Party pay the Compoſition, which is paid to one f the Receivers, who teſtifies his Receipt thereof, y his Subſcription on the Back of the Signature. *to*, The Signatures are caſhetted by the Chancel- or or his Deputs. *7mo*, The Signatures muſt hereafter be regiſtrate in the Regiſter of the Treaſury, Comptrollary, Collectory and Treaſury f new Augmentations, or one or other of the aids Regiſters, or all of them, according to the Nature of that which is diſponed in the Signature; or albeit all theſe Offices be jointly in the Perſon f the Treaſurer, yet becauſe their Inſtitution from he Beginning was ſeveral, and had their ſeveral Regiſters, which were and are the Charge of each Officer: Therefore the ſaids Regiſters remain yet nconfounded; likeas the yearly Compts are yet everally made, *viz.* At the Treaſury, which com- rehends the whole Caſualities, which fall to the King 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

d Chancellor, Keeper of the Great Seal, for eding of the said Signature under the Great ; and the Precept bears at the End thereof, *m sub secreto nostro Sigillo, apud, &c.* and has erneath, *per præceptum datum sub signeto, &c.* the Precept is commonly written on Parch- t ; whereas the first was only on Paper, and cribed by the Writer to the Privy Seal ; and the Privy Seal appended thereto, by a Tagg, hite Wax only. After 'tis sealed, 'tis returned he Writer to the Privy Seal, to the Effect it be registrate in his Books, who writes on Back thereof, *Written to the Privy Seal, and strate such a Day.* And also the Keeper of the y Seal, when he appends the Privy Seal there- retains the Precept under the Signet for his rrant, and writes on the Back thereof, *Sealed a Day* ; thereafter delivers the said Precept to Party, who takes it to the Director of the ncery, who writes out a Charter in Latin, af- the ordinary Form of Charters, agreeable to the nor and Substance of the Signature and Pre- s ; and this has in the End, *Datum sub magno llo*, but bears nothing under it, but allenarly the Great Seal appended by the Chancellor, , or his Deputes, writes on the Back thereof, *ed such a Day* ; and after that 'tis returned to Director, who registates the same in the Re- er of the Great Seal, and writes on the Back, *istrate, tali die* ; and the Chancellor, at the ending of the Great Seal, retains the Privy Seal his Warrant.

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

Of Saſine, and the Precepts

215. *ITEM*, Some Letters and Charters, wh paſs the Great Seal, require no m to be done for Perfection of the Right contai therein, as a Charter of Confirmation, a Lette Remiſſion for a Crime, and Legitimation, *&c.* others require a further Deed to be done for Per ction of the Right, *viz.* That Precept of Saſine, Saſine follow thereupon, as is in all Charters Lands and Annualrents, either ſimple, upon Re nation, or containing Gifts *de novo damus*, wh may be ſubjoined either to Confirmation or R ſignation. In theſe Caſes, after the Charter paſt the Great Seal, the Director of the Chanc gives forth a Precept under the Quarter-Seal, ſeaſing of the Party in the Lands or Annualre diſponed to him: And this Precept is direct with a Blank for inſerting of the Baillies Name, w is to give the Saſine; but ſo that it ever deſig him to be Sheriff of the Shire where the Lands (*Balivis in hac parte*) which in Effect is a Co ſtitution of ſuch Perſons to be Sheriffs and Bailli to the giving of the Saſine, whom the Part pleaſe to chuſe and inſert in the Blank; and up

t

his Precept delivered to the Party, Saſine is taken, ither upon the Ground of the Lands, or any one of hem, for the Whole, if they ly contigue, or upon very 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 or the whole, notwithſtanding of the Diſcontiuity; in the which Caſe, Saſine taken at the lace appointed in the Union, is ſufficient for the Vhole.

216. *Mem.* This Precept of Saſine which paſeth the Quarter-Seal, *ut ſupra*, in this differs from he Precept of Saſine following upon Retours: *Firſt*, That theſe do not paſs the Quarter-Seal, ut are direct forth of the Chancery, cloſed with- the Seal like to that, that cloſeth the Brieves. And ſicklike, the ſame contains no Blank, but is irected in the Body to the Sheriff of the Shire here the Lands ly; and none but the Sheriff or is Deput can give Saſine thereupon; nor can any e Notar to the Saſine but the Sheriff-Clerk or his Deputes; and if the ſame be done otherwiſe, the aſine 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 anwerable to the King for the Reſpondee contain- d in the Retours; whereas the Sheriff in other Precepts upon Infeftments paſſing by Signature, is ot 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; 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

Of the inferior Jurisdictions.

219. THE Jurisdiction of a Baron or Barony, properly only comprehends Courts of ...lood, and Bloodwit, and a Thief with the Fang, ...th Pit and Gallows effeiring thereto; and also the ...urts 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... the Baron by the first Citation, both in simple ...ood, 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..., 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 ...mmitter to the Justice, or have a Commission ...m 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 ...y proceed upon Theft, Slaughter or any other ...ime 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-
s erected in the King's proper Lands, as the
en fell to the Crown, or were annexed there-
and these Stewartries are not only erected
h the Power of the Sheriffs, but also have the
ver of Regalities: But seeing the Stewartries
immediately subject to the King, and not to
Subject; therefore the Brieves of Lands with-
he Stewartry are raised from the King's Chan-
y, and retoured thereto.

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

229. In Burrows of Regality, the Lords of Rega-
have the full Power of creating Baillies, ex-
t they have given Power by their Infeftment
the contrary, to chuse their own Baillies;
hich Privilege, St. *Andrews*, the *Canongate*,
sselburgh, &c. have by Infeftments from the
hop of St. *Andrews*, Abbots of *Holy-rood-house*,
Dumfermling respectivè.

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

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

Tenants within Burgh hold of the King as Super or, yet the universal Custom has established th Right in Favour of the Burrows, that they ma receive, and enter Vassals in Name of the King Majesty, who is Superior; but the Casualities Superiority belong only to the King, such as Life rent Escheat by Horning, &c.

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

233. *Item*, Burrows of Regality have not th Power of free Burrows, neither anent Trade an Merchandise, nor yet anent the Liberty of Con vention of Burrows: But divers Burrows of Re gality have been erected in free Burrows, wit Liberty of Burrows Royal; and this is ever b Prejudice of the Lord of Regality, who remai still Superior of the Burrow, and whole Tenan within the same, as in St. *Andrews*, *Glasgow*, *Dun fermling*, *Kinghorn*, &c. and the like also is in th Burrows of Barony, as *Dysert*, &c.

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

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 Infeftment 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 Comprifer 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 Infeftment is to follow upon the Compriſing, and where the Superior of the Lands being another than the King, is unwilling to give Infeftment 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 Tradition

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 ſame are underſtood to be paſt fraudulently, and that the ſame cannot prejudge the lawful Diligence foreſaid.

276. *Item*, The legal Reverſion of the firſt lawful Compriſing, perfected by Infeftment or Diligence in manner foreſaid, pertains to the Debitor, againſt whom the Compriſing is led; and it is queſtioned whether this legal Reverſion will pertain to a ſecond Compriſer, who denounced before the Date of the firſt Compriſing, or not; becauſe in the Time of his Denunciation, the legal Reverſion was not exiſting. And the Lords herein have given Sentence *pro & contra*, ſometimes preferring the third Compriſer who denounced after the firſt, and found him to have Right to the legal Reverſion, excluding a ſecond Compriſer who had denounced before the Date of the firſt Compriſing. And in my Judgment this laſt is not ſo agreeable to Equity, as this where they have *found the ſecond Compriſer to have Right to the legal Reverſion, albeit he denounced before the exiſting thereof*; that is to ſay, before the Date of the firſt Compriſing.

277. Where once the Property is lawfully compriſed, and Infeftment paſt thereupon, the ſecond Compriſer, who compriſes the legal Reverſion, has no Neceſſity to paſs Infeftments thereupon, becauſe the compriſing of a legal Reverſion is of the Nature of an Aſſignation to a Reverſion, to the ſubſtantial Solemnity whereof, there is Neceſſity of a Saſine or Infeftment following: But yet there is this Difference betwixt them, that an Aſſignation

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 infeft conform to the Adjudication, the Lands may be redeemed

from him by a ſecond Creditor who obtains the like Adjudication, by Payment to the firſt Creditor of the Sums of Money owing to him, with the Annual-rents 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

is Improbation, and may force the Party to answer to the Reasons of Reduction, he granting he Production to be satisfied, in so far as concerns he 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 nd produce not.

290. *Item*, Albeit the Pursuers in Reductions, ay call for Production of Writs and Infeftments f the Lands wherein they are infeft, made to the efenders, either by themselves, their Predecessors r Authors, or made by any other Person not beg their Author, or made by the Defenders to oers, yet the Defenders will not be obliged in the roduction to produce all the Infeftments called r, but only such, against which there is a special eason of Reduction and Improbation libelled; nd if there be no special Reason libelled against e same, but that the same falls *in consequentiam*; this Case there is no Necessity of Production, t it is enough that the Defender grants that the men falls *in consequentiam*.

291. *Item*, In Improbation the Defender may t be compelled to produce any Writs, but such are made by the Pursuer himself, or his

Pre-

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

Of Warnings and Removings.

292. *ITEM*, In Actions of Removing, the De fences are either peremptor of that In ſtance or of the Warning, or peremptor of th whole Cauſe. The Defences which elide the In ſtance only, are called Dilators; ſuch as, that th Party was not lawfully ſummoned, or that he wa out of the Country the Time of the Citation, an not ſummoned upon Sixty Days Warning, or tha he was Minor, and that his Tutors and Curator were not ſummoned.

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

294. The Objections againſt the Lawfulneſs o the Warning, are, That the Parties are not lawfu ly warned perſonally, or at their Dwelling-Place and upon the Ground of the Lands, and at the Pa riſh Kirk on a *Sunday* before Noon, Forty Day before *Whitſunday*, or that the Warning is ſtoped

&c

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

295. *Item*, The Exception of not warning of the enant's Maſter, is not only of the Nature of a ilator, but alſo is peremptor of the Warning: nd to the Relevancy of ſuch an Exception, it required that the Defender alledge, That he as Tenant the Time of the Warning, and be- re, to ſuch a Perſon who has a real Right to e Lands, either by Infeftment or Tack, *&c.* and e not warned.

296. *Memorandum*, This Exception may alſo e proponed for an abſolute Peremptor of the hole Cauſe, and not of the Warning only; but en it wants theſe laſt Words, *And he not warned.*

297. And as theſe two Exceptions are different their own Nature, ſo they muſt be elided by ifferent Replies: For to the eliding of the firſt orm, a Reply of a better Right than that which is ualified in the Perſon of the Maſter is not proper, nd will not be admitted, becauſe the Tenant is ot obliged to diſpute upon the Maſter's Right, ut a Reply upon a better Right will be moſt roper againſt the ſecond Form of Exception; nd the Tenants will be compelled to anſwer hereto, where the Exception is proponed upon heir Maſter's Right ſimply, and not with this uality, That their Maſter was not warned.

298. *Item*,

298. *Item*, The common Reply againſt th firſt Form of Exception, is this, That the Purſue offers him to prove, That the Defender was Te nant to him by Payment of Mail and Duty befor the Warning, which Reply is ever found relevan in Favour of the Purſuer, in Reſpect the foreſai Exception conſiſts in the Privilege, which a Te nant by Cuſtom has for his Defence, not to be remo ved till his Maſter be warned; and therefore whe that Part of the Exception is elided, which bears That he is Tenant to ſuch another Man, by Reply, That he is Tenant to the Purſuer, th Force of the Exception is taken away.

299. And yet if the Tenant who propones th Exception of not warning of his Maſter, be abl to make his Exception more pregnant nor th Reply, either in the Circumſtance of the Paymen of Mail and Duty, or in the Manner of Probation the Exception would be found relevant, notwith ſtanding of the Reply: As for Inſtance, if th Tenant ſhall clear, that the Duty paid by him t the Purſuer (if any was paid to the Purſuer in hi Maſter's Name) is for a Feu-duty or Tack-duty due by the Maſter to the Purſuer; or if the Te nant 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, wil not be ſuſtained, if the Purſuer offer him to prove that

hat 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 Infeftment cled with Ten Years Possession, whereupon the Exception is proponed, was a Wadset under Redemption, and is redeemed. *Next*, That this Infeftment is reduced against the Party being lawfully summoned, finding the Lands to be recognosced. But none of these Replies will be found relevant against the said Exception proponed *qualificatè*, because, albeit his Infeftment be redeemed, reduced, or recognosced, yet he being Possessor, cannot be removed without a Warning; for *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 Infeftment 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 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 *negativè 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 regiſtrat 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 Infeftment 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 & prohibentes*; 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 im-

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

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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 loosing of all Sentences, and a Way to make *lites infinitas*, specially seeing *notitia & scientia* have no other Probation but the Oath of the Proponer, except

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 infeft: 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 infeft, 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 th Person of the Cedent, was a Right of that Natur which was transmissable by simple Assignation, with out Sasine, as a Right of Liferent: In this Case, th Assignation to the Liferent, being cled with Po session, or lawfully intimate before Compriſing will be preferred to the Compriſer, or to any othe singular Successor.

356. It is always to be understood, that th Liferent be assigned formally; for if it be not for mally assigned, but only an Assignation made the Mails and Duties for the Space of two, thre or more Years: In that Case, if the Liferent b formally disponed or compriſed thereafter, the A signation will not be valid against a singular Succe sor who acquires a real and formal Right with th Liferent; and yet this may be doubted, becau whatsoever is assignable in whole, is also assignab in part. And it is out of Question, that a Life rent is disponable without Sasine, and therefore part thereof may also be disponed by Assignation But in my Judgment the Argument is not good because the Proposition is not universally true, no yet the Ground of Law whereupon it is founded *quod eadem sit ratio totius & partis; quia totum ha bet suam diversam rationem à partibus, & diff runt omnes partes separatæ à toto conjuncto*: An therefore in this Case, where a Liferent may b disponed by Assignation, it is meant of the Life rent, *quatenus est jus totale*; and by the makin thereof, the Liferenter is fully and totally denud ed: Whereas, by Assignation to Terms or part cula

ular Years, the Right ſtill remains, and the iferenter is not denuded. And further, this Aſgnation to particular Years is *actus de jure illicis*; for if the Liferenter die during the Years ſponed, the Aſſignation is null: And to clear at *aliquid totum eſt ceſſibile, ubi partes non ſunt*, appeareth by this Inſtance, that a Reverſion ay be diſponed *in toto*, but not *in parte*, *quia eſt s reale unicum & unitum in ſe*; but the general ropoſition is true in perſonal Bonds, which adit Diviſion, but not in total Rights, *quæ habent itatem juris pro forma*, as is in all Liferent Rights rmally eſtabliſhed; and in the Titles of Beneſes provided *ad vitam*, which are Liferent Rights, d diſponable *in toto* by Dimiſſion or Reſignation, d not by Aſſignation to any particular Years of e Rents thereof: And which is further, not by otal Aſſignation to his Liferent Right of the Beſice, whereof the Reaſon is coincident with the rmer, becauſe the total Aſſignation denudes him t of the Right of the Benefice, but he remains itular notwithſtanding thereof, becauſe the Title the Benefice is not diſponable by Aſſignation.

Of Tailzies.

7. THere is a Difference betwixt a Bond or Contract of Tailzie, and an Infeftment Tailzie paſt without Bond or Contract; for an feftment of Tailzie is *ab initio voluntatis*, and

remains ever arbitrary and changeable at the Wi of the Maker of the Tailzie and his Heirs, excep there be a Clauſe and Proviſion inſert in the bod of the Infeftment or Procuratory of Reſignatio whereupon it proceeds, whereby the Tailzier tie and reſtrains either himſelf or his Heirs. But thef Proviſions are extrinſick, and not of the Nature o Tailzie.

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

359. In Bonds of Tailzie made *ſine ulla cauſa* except that of Affection, the common and receiv ed Opinion is, That they are not obligatory, an in Effect are counted Donations, *mortis cauſa* which are ever revokable. Some think, that *obli gant quoad hoc* to make the Tailzie, and think th making thereof the Implement of the Obligation but grant, that when the Infeftment of Tailzie i perfected, that the Maker thereof may alter o change the ſame when he pleaſes, by reſigning *d novo*, and paſſing an new Infeftment with Chang of Heirs.

360. And if this Opinion holds, it will follow that a Bond of Tailzie will oblige alſo the Heir o the Giver of the ſame *ad hoc*, to perfect the Tail zie; and if this be granted, it will deſtroy the ſe cond Part of their Opinion, which is, That the In feftment of Tailzie may be changed after it is made for none can change an Infeftment of Tailzie afte it is perfected, but they who are *proximi* and firſt

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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 to 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, t the ſaid Mr. *Thomas* his Brother and his Male Thereafter, *Walter* being a facile young Man, an moved to do ſome Deeds in Prejudice thereof and for Prevention thereof, Mr. *Thomas* ſerved In hibition againſt *Walter*: Whereupon *Walter* in tented Summons before the Lords, to hear an ſee the Inhibition reduced, and *ſimpliciter* ſuſpenc ed. In which Cauſe this Point was diſputed, Tha as he might alter the Infeftment, if it were made ſo he might revoke the Obligement itſelf. And o the other Part it was contended, That the Bon behoved to be fulfilled. But the Lords, by thei Interlocutor and definitive Sentence, *Found th Reaſon of Reduction foreſaid relevant, founded up on his Revocation of the Obligement, and reduce the Inhibition, and ſuſpended the ſame* ſimpliciter *and that becauſe the Bond of Tailzie was given* e nulla cauſa oneroſa, *but allenarly of Free-will.*

362. But where the Bond or Contract of Tail zie is made for a true onerous Cauſe, or wher 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 re duceable, where one of the Parties Contractor has in his own Time done one or more Deeds con trary 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 wa 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*,

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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 Debitor; 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.

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.

EDINBURGH,
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A

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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 is poſſible for us to do, by the bare Lights of our natural Reaſon, without the Aid of the Sciences: For, by their Means, we are enabled to range our Thoughts into better Order, and to communicate and explain them, with greater Perſpicuity in all Matters wherein we happen to be converſant.

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

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

It is the Law which regulates the Juſtice that Men owe to one another, in all the various Affairs and Intercourſes of Life; and it comprehends not only the Rules by which theſe Affairs and Intercourſes are governed, but the Rules of the Functions, and Duties of thoſe to whom the Adminiſtration thereof is committed.

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

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 unavoidable to us, especially in Matter of Succession; the other Parts of our Law, are either form'd after the Pattern of the *Roman* Law, or directly borrowed from it, without the least Mixture of Northern Barbarism.

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

And since the Knowledge of our Law is so necessary an Accomplishment, it is a Happiness that the Study of it is rendered so much the more agreeable by its borrowed Lustre from the *Roman* Law.

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

In those Reigns of our ancient Kings, wherein Civil Feuds and Discords made the Use of Arms so well known among us, we are not to expect

to

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, asserо, nihil in eis libris contineri quod ad mores nostros, sive usum nostrum forensem conducat, nequ unquam scriptoris illius fuisse institutum, ut aut nostris hominibus prodesset, aut leges nobis præscriberet; auctor 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, canon verborum, integrorumque capitulorum textu, ade*

inte

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 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 it would have been.

Thus the Civil Law was at firſt introduced, and by theſe Steps it has become ſo conſiderable a Part of our Law, ſo that we not only follow its Rules and Deciſions, chiefly in what relates to Moveables, as Sir *Thomas Craig* ſays; but alſo in Pactions, Tranſactions, Reſtitutions, Arbitrations, Servitudes, Contracts of all Kinds, Evictions, Pledges, Tutories, Actions, Exceptions and Obligations. I ſay, we not only make Uſe of it in all theſe Contracts and Obligations, but by the Help of it we have given a juſt Temperament to many of the Severities and Hardſhips in the other Parts of the Law, and have made them more conformable to right Reaſon and natural Equity. Thus in many of our Deciſions, we find the Severities of Feudal Penalties juſtly mitigated, from Reaſons which the Civil Law had inſpired. *For to tell truly*, ſays Sir *Thomas Craig*, *the Civil Law is ſo diffuſed through all our Affairs, that there hardly occurs a Caſe or Queſtion wherein the great Uſe of the Civil Law does not manifeſtly appear.* Herein, I ſay, was our great Happineſs, that having no written Law of our own, we had naturally Recourſe to the Civil Law; for if, as in other Nations, our own ancient, 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 us by our Anceſtors, we had diſdained to adopt the Laws of another Nation, how much ſoever preferable

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-

riet-

iety of Cases which daily emerge, some Questions will often occur which by no Rule in our Law an well be decided. Our Judges therefore have Recourse to the Civil Law, and are thereby so far overned, as they find the Rule of Decision therein et forth, nowise disconform and inconsistent with ur own Law and Practick: And therein the udges are well justified by several Acts of Parliament, whereby it is declared, *That the Lieges hall be governed by the King's own Laws*, [that is, ur own peculiar Laws and Customs,] *and by the Common Laws of the Realm*, [that is, the Civil aw;] so that we consider the *Roman* Laws, which are not disconform to our own fixed Laws nd Customs, to be our Law. For in the Reign f *James* V. we find the King's Advocate commencing an Action of Forfeiture against an Heir, or the High Treason of his Father, on no other oundation but the Civil Law; which tho' murnured against by the Generality of the Nation as Novelty, was yet justified by the Parliament as egal; 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 he abrogating of some former Laws, thought it ecessary to give a *non obstante* to the Civil Law, s well as to our own particular Laws and Constiutions. From all which it manifestly appears, hat the Civil Law has all along been considered s our Law, and is justly made the Rule of Judgment in all Cases wherein our Law is silent; and

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 remarkably

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

As there is then in every Page almoſt of this ſhort nſtitute, a great deal of Matter compriſed in little oom, my firſt Buſineſs will be ſhortly to give you ur Author's Meaning in other Words, and a little ore copiouſly than it was proper for him to do, ho meant only to deliver the Elements of our aw for others to comment upon. This being one, I retouch the ſame Matters in a more for- al Diſcourſe, and I add to them ſuch other Mat- rs as are coincident with the Subject of the Pa- graph I'm upon, which are to be gathered part- from my Lord *Stair*'s Inſtitutions, partly from e later Deciſions, and ſome of the other Authors pon our Law.

Theſe coincident Matters are ſuppletory to our ext, and I give you References to the moſt ma- rial of them in ſhort Notes which I dictate.

It will therefore be your Care, *Gentlemen*, to ke down theſe Notes as accurately as you can, d to endeavour to make them your own; but I n not to expect that you are, during the firſt ear, to examine the Authorities to which I re- r with any great meaſure of Study.

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

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

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

When you have thus considered the Text a
the Acts of Parliament referred to, the next thi
I recommend to you, is, to recollect these Matte
of Law which I have discoursed of, that are n
in the Text, by the Help of the Notes which
shall dictate to you. You will find for the mo
part in these Notes a Reference to some Acts
Parliament, some Decision or other Authority
Now the Acts of Parliament referred to, I wou
have you in all Cases to peruse; but I cannot a

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

The preſent Uſe I propoſe to you to make of eſe Notes, is to endeavour to underſtand aright hat they contain, and to fix them on the Memo- as well as you can; and to that End you would eep them in Order.

There is yet one thing I would particularly re- ommend to you, and that is to glance over, be- re you come hither, the Text which is to be the bject of Diſcourſe; that will be a Help to you, nd a likely Means to underſtand it the more per- ctly, when you hear it explained to you in this lace: For you muſt needs the more readily fol- w me in diſcourſing upon theſe Matters, after u have firſt taken ſuch a View of them your- ves, as your own reading of the Text can give u.

But you, *Gentlemen*, who are farther advanced the Study of our Law, and who have already ne one Courſe with me, will find Subject Mat- r, from my *Diſcourſe*, to note an Expreſſion metimes which may ſerve either to enlarge or to uſtrate 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

he other is, to furnish you with all the Means I could think of to enable you to retain them, and o 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 omprehended aright the Import of Rules and Principles, if they are not well and distinctly retained, o as to be in a Readiness at all Times for Use and pplication.

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

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

It has for that Reason been always the Metho
of Students, especially those of the Law, to accon
pany their Reading with Writing; and withou
Question, the taking down in Writing the Sub
stance and Heads of what we gather in the Cour
of our Study, is of the greatest Benefit; for th
Action of Writing being slower, and thereby layin
us under a Necessity to dwell upon the Subject
stamps a more lasting Impression: And the abridg
ing and preparing our Notes and Excerpts, enga
ges us in a closs Attention, and proves a sort
Test, by which we discern, if we comprehend
right what we are about; for one can never
bridge, till he comprehends well. For these Re
sons, the Use of Writing in the Course of any St
dy, and especially of the Law, which takes in
large a Field of various Matters and Things,
productive of very real and solid Advantages:
imprints an accurate Memory of the Matters whic
have been the Subject of our Study; and an acc
rate Memory of what we have learn'd, gives
the ready Use of our Knowledge: So that th
best and cleares Survey of the Rules and Pri
ciples of our Law which you can take in th
Place, will be of little Avail, if the same Thin
are not laboured over again by your own priva
Application. You are to consider me only as
useful Assistant and Helper, to pave your Wa
and to conduct you in a regular and constant Trai
but it is your own Care alone that can perfect an
accompli

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 natural Relation to each other, and very often a neceſſary one, yet ſtill as they are diſtinct Matters, they may be ſeparated; and, for the Sake of greater Perſpicuity in the Explanation, it is fit to ſeparate and diſtinguiſh them: Therefore, in the interpreting of our Text, I chuſe to paraphraſe every the ſmalleſt Portion of it, that comprehends a Matter which will ſuffer to be viewed ſeparately from the other Matters to which it is joined, to the End that nothing in the Text may eſcape us. Thus I mark out, and parcel the Contents of every Section in ſuch a Manner, that you cannot fail to take Notice of every Thing that is material in it, and to diſcern and diſtinguiſh the eſſential Characters of every Thing therein treated of. From the Text therefore, with an eaſy Application, you may be able to extract in your own Phraſe and Expreſſion, the eſſential Rules and Principles; and theſe being committed to Writing, I would propoſe, ſhould ſerve for the firſt Materials of your Syſtem.

After having paraphraſed the Text to you, I ſhall have Occaſion to take Notice of ſome few Rules, which are not to be found in the Text; theſe Rules ſometimes extend, and ſometimes limit the Principles in our Text; and, as they occur, I ſhall firſt Diſcourſe of, and then dictate them to you, to ſerve as another Ingredient of your Syſtem.

But becauſe your Time here will not permit much Dictating, and much of it would become tedious

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

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

It may appear perhaps to ſome, to be a needleſs and unneceſſary Trouble to excerp any Thing from the Text.

But

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

I do not mean, that you are to excerp the Matters in the Text in their very Words, but that you should collect them in your own Words, at least give them a different Cast, and mould them into another Shape; for the great Benefit which I propose you are to reap, will arise from the Study, to express what our Author delivers in a Manner different from what he has done, taking Care always to miss nothing that is Material; for in that Case you will find two Advantages, namely, Comprehending fully, and remembring distinctly.

'Tis impossible for me to suggest to you any particular Directions how you may accomplish what I am now proposing. One must be governed therein as his own Fancy and Judgement directs him: For all the Help another can possibly give in a Matter of this Sort, is to point in the General at what may be done, and the Use of it,

but

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

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

Firſt, To obſerve in each Paragraph how far the Subject-Matter thereof can be branched out 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 : And the next is, To form theſe Particulars into ſo many ſeparate and diſtinct Articles. The fewer Words the Articles are conceived in, the better, providing that nothing of the Matter is loſt. When you have thus converted a Portion of the Text into Articles, you are next to ſubjoin the Notes I give you in their proper Places, as additional Articles. Your laſt Care is, to add to all what further Enlargements you ſhall gather from the Authorities which the Notes refer to, or which 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 the Notes which I dictate, with Exactneſs ; and who have them in Order, need not to write them here over again : But you may perhaps make it a Queſtion how you ſhall be uſefully imployed here during thoſe Intervals, wherein others are employed in writing theſe Notes ? And my Anſwer to that is, That you may take the Opportunity of noting

what

vhat occurs to your ſelf from my Diſcourſe, and Explanation of theſe Matters, which may enable ou when you are at home, to make ſome pro- per Enlargements of your Notes, and help to make ut your Syſtem. Your previous Knowledge of he Subject will naturally induce an Attention to hat is any Thing particular and material in my Diſcourſe; and therefore, when I come to the ictating of a Note, you will have Reſpite enough, o take a Note in your own Way, of what you us gather from my Diſcourſe, which, I ſay, may rve to enlarge your Syſtem; and to give you a ore thorough Underſtanding of the Matter than u have yet conceived: For you will find in the rogreſs of this ſecond Courſe of Study, that there e many Things which will now brighten up to u, of which at firſt you conceived but an imper- t Notion. When therefore you happen to hear y Thing which ſerves to clear up the Matter u had formerly noted, you cannot be better im- oyed than in marking it.

This Method of private Study may appear per- ps to you to be ſomewhat laborious; but I can re you, on the other Hand, it is profitable and nitely more agreeable and entertaining than e reading without collecting. The moſt Part thoſe who have ſtudied any Science with Ap- cation, will agree in this, That it is worth the ns to take Notes of our Reading, altho' we uld never look on them afterwards.

affirm then, That this Method of Studying is 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 short Note; we are more interested; we have 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 Mischief that attend it.

In the Pursuit of this Method of Study, you may happen to fall in Arrear with your Task, through 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.

WI

When you happen to fall a little Backward, ne-
er mind what is paſt, ſo as to divert you from
hat is preſent: Be ſure always in the firſt Place
mind the Buſineſs of the Day, and let Arrears
nly be your ſecond Care. If your Blanks are too
umerous for you, let them ſo ſtand till the Courſe
over, and take them up with your Convenien-
; for which I ſhall readily give you my Aſſi-
ance at any Time.

I cannot make an End of this Diſcourſe, with-
t obſerving to you how much both you and I
e indebted to the Man who laid the firſt Foun-
tion of reducing our municipal Law into a Sy-
m, by the Help whereof, its Profeſſors are ren-
red better able to teach, and its Students to
rn, than it was poſſible for either to have done in
e former Age. To the immortal Praiſe therefore
the learned Sir *Thomas Craig* of *Riccarton* be it
corded, That of theſe Syſtems which we now
joy, he laid the firſt Foundations, in his elaborate
d univerſally eſteem'd Treatiſe of Feus.

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

The Difficulties which then attended the Study
our Law, are well ſet forth and deſcribed in the
bliſher's Preface of that admirable Treatiſe;
d it is therein we may ſee how much we are in-
bted 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, und
the utmoſt Uncertainty what Courſe to ſteer, ar
what Method to follow for attaining the Knov
ledge of the Law of their Country, had no Ma
ner of Help whereby to guide them in the Pr
ſecution of their Studies, and to point them t
wards the right End, but what was to be gathe
ed in Scrapes, from an Attendance at the Bar,
upon the Conſultations of Lawyers, who often u
der the ſame Uncertainty, what was the Law, cou
but ill give ſuch Reſponſes, as were fit to be mad
the firſt Elements of a Science for thoſe who wa
ted to be initiated: So that the ſame Knowled
which now with moderate Application may be a
compliſhed in the Courſe of a few Years, w
then hardly to be attained in an Age, and but
an imperfect Manner. In thoſe Days all our M
nicipal Law conſiſted either of Acts of Parliamen
or of the Deciſions of the Lords of Seſſion; f
the Books of *Regiam majeſtatem*, and the oth
Treatiſes joined thereto by Sir *John Skeen*, had n
ver received the Sanction of the Legiſlature; a
if they had even been made Uſe of as our La
were for the moſt Part gone into Deſuetude.

Even our Acts of Parliament lay then buri
among our other antient Records, till they we
publiſhed firſt in a black Character by one *Le*
previck, and afterwards by Sir *John Skeen*,
which even the Copies became ſo rare, that ſo
aft

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 adjungit; 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 it, 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 follow out with your own Application what you have here laid the Foundation of: All that was in my Power, was only to conduct you; but it is your own Endeavours at home that must do the Work and bring it to its proper Bearing.

Such of you, *Gentlemen*, who purpose to take Charge of the Management of other Mens Business, cannot but see the Indispensible Necessity of making your self fit to go through the Affairs which shall be committed to you, with Credit and Reputation. I need no other Argument to recommend Assiduity to you; for sure I am, if that Argument does not of it self speak forcibly enough, all I can say besides will be to little Purpose.

Such of you, *Gentlemen*, on the other Hand who don't mean to study our Law in the View of conducting other Mens Concerns, may yet find good Reason to pursue the Study with Application, for the better Administration of your own. But besides, *Gentlemen*, you will consider what an Ornament it is to know the Law of your Country. Is there any Thing more frequently the Subject of Conversation, or which bears a greater Part in it, than the Cases that daily occur in Law? Does not the Interest often of the Parties, so extensively shed its Influences, as to induce all within the Sphere of their Relation or Acquaintance, and even

ven within the Reach of their Reputation and Name, if they are Parties of Diſtinction, more or eſs 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 ke kind, enhance the Converſation of a particular orner 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 Vorld, embelliſh their Converſation from a Knowdge of Hiſtory, and the *Belles Lettres?* Are not rnaments for Converſation, as uſeful as well as entaining to be gathered from the living Law of Country, and with leſs Hazard of Pedantry? et us but conſider then the Knowledge of our w, as the proper Embelliſhment of a Gentleman, hout Regard to the uſeful Part; and does it even in that abſtracted Light deſerve your Apcation?

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

FINIS.

A N

Alphabetical Index

A N D

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.

A N

Alphabetical Index

A N D

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 *reſpectivè* 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.

Fully 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 Office. 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, reclaimed by himſelf. *Jan.* 1675.

Appearand Heir.

If appearand Heirs grant Bonds whereon Adjudication or Apſing 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 negligent, or ſparing, to pay the ſame themſelves.

Novem. 6. 1690.

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

Feb. 1702.

Side-Bar.

Several Orders concerning the Side-bar, and the Manner of the Lords hearing Cauſes thereat, *November* 4. 1686. *January* 16. 1690, and *June* 10. 1691. But this Bar wholly taken away, and that no Party be obliged to anſwer or attend thereat; and to ſupply the Want of the ſaid Side-bar, that no Acts be called on *Saturday* before Noon, but that the Ordinary put a Period to ſuch Cauſes, the ſaid Forenoon, as have been called the preceeding Days of that Week, by Courſe of the Roll, and nothing done thereintil. Regulations of the Seſſion, Article 13. *Anno* 1695. To prevent all Side-bar Callings, of which there is no previous Advertiſement to the Advocates concerned, by Rolls put upon the Wall the Night before; That the Lords ſhall ſtrictly keep to their Side-bar Hours; and that the Keepers of the Rolls for the Outter houſe, ſhall affix upon the Wall weekly, each *Monday*, the particular Days, Hours, and Names of the Lords that are to be Ordinaries at the Side-bar that Week. This Act, after ſome other Regulations concerning the Side bar, ordains, That any verbal Stop ſhall have no Effect to hinder the Decreet from going out. And ordains all written Stops to be ſubjoined to the Repreſentations craving the ſame; and ſhall not continue in Force above a Fortnight in Seſſion Time; and if granted in Vacance, ſhall not endure after the Eight Day of the next Seſſion, except 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 concluded Cauſes, nor Decreet or Interlocutor thereon, at adviſing thereof, unleſs

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 23. 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 Comperatance, 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

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 reputed 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 Infeftments, *ſee* Infeftments.

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 regiſtate, 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.

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, Parl.* 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 Morning, if the Procurers Procurators be absent, the Lords shall notwithstanding proceed to act or decree, and the Cause is not to be heard thereafter. And if the other Parties Advocates be absent, that Parties Procurators are not thereafter to be heard, till they give in two Dollars to the Poor's Box.

July 11. 1673.

Horning, *see* Registration.

That all Hornings and Inhibitions, which have been omitted 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 for giving Infeftment, That the Warrant by the Lords to the Director of the Chancery bear, That before expeding the Commission, Caution be found to the Lord Treasurer or Treasurer Deput, That the Sheriff in that Part shall be comptable for the retoured Duties; and that the same be attested by one of the Clerks of the Exchequer, and that the Director record the Commission 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 on the Margin, and related thereto, or offer to prove the Aledgeance, 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 Aledgeances 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 in Wadſet or Annualrent, if they make Intimation by Inſtrument to the Perſons having Right of Reverſion, that the Wadſetter or Annualrenter ſtands inhibite at their Inſtance, and produce in Preſence of the Party and Notar, the Inhibition duly regiſtrate: In that Caſe the Lords will not ſuſtain Renunciations and Grants of Redemption, unleſs the ſame proceed by Proceſs, whereto 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 Commiſſars.

1. You are to decide in Cauſes concerning Benefices, Teinds, Scandal, Confirmations of Teſtaments; all Cauſes teſtamentary, and all Cauſes wherein Oath is required, if the ſame exceed not 40 *Lib.* and in all other Cauſes where Parties ſubmit themſelves to your Juriſdiction.

2. In Actions of Declarator of Nullity of Marriage, Divorces, Baſtardy, or Adherence, where the ſame has any Connection with the Lawfulneſs of Marriage or Adultery; all which belong to the Commiſſars of *Edinburgh privativè:* But when the Adherence is purſued on Account of malicious Deſertion only, and when there is no Queſtion of the Nullity or Lawfulneſs of the Marriage, the inferior Commiſſars may decide.

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

ecutor, Intromitter, *&c.* you are to aſſign a Term to qualify, and give in his Defences in Write.

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

5. The Clerk ſhall have one Book for all the ordinary Dyets and Acts; and another for Acts of *Litis-conteſtation*, wherein ſhall be ſummarly ſet down the Subſtance of the Libels, Alledgeances and *Litis-conteſtation* thereon; which Record ſhall be ſufficient, without Neceſſity of either Extract or Regiſter, or extracting an Act of *Litis-conteſtation ad longum*, except the Parties deſire a long Extract of the ſame.

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

7. After *Litis conteſtation* the Party cannot paſs from his Comparance, but all ſuch Acts and Decreets ſhall be *parte comparente*.

8. That your Summons be execute by a ſufficient Man before two Witneſſes, and queſtioning the ſame ſhall not ſtop the principal Cauſe; and if any of your Executions be found falſe and improven, the Contrivers and Abettors thereof, depending on your Court, ſhall be declared uncapable of Truſt hereafter, and further puniſhed, according to their Acceſſion thereto.

9. You may ſummon Witneſſes to compear under ſuch pecunial Fines as you think fit; and on Contempt, your Officers are to uplift theſe Fines and poind therefore, the Half thereof to your own Uſe, and the other to the poor; and to fine them in greater ſums on the ſecond Summons, or to raiſe Letters of Horning, as you ſhall think fit, and that you be ſtill preſent at examining of Witneſſes.

10. Your Procurators ſhall not perſiſt to make frivolous Alledgeances under Pain of Deprivation.

11. At adviſing, you are not to conſult, or ſuffer any Procurator to be preſent.

12. You ſhall decern liberal Expences, and ordain Execution therefore, as for the principal Sum.

13. You may direct your Precepts to your own Officers, Meſſengers, or any other Officers in your Bounds; and, on their Deforcement, you may judge thereon, and inflict the ordinary Puniſhment of Deforcers, excepting Eſcheat, which muſt be ſued for before the Judge competent.

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

15. If

15. You shall give forth Inhibition of great and small Teinds 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 stands unreduceable.

17. You and your Clerk must live within your Commissariots, under Pain of Deprivation, except on grave Occasions you have 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.

Inter-

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 nō 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, or the King's Cuſtoms, Rents and Caſualities, or for Contribu-

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 Fifeteen 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. This 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. See 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.

N.

Notars.

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

July 29. 1680.

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

July 21. 1688.

That none be admitted Notar, but on a Petition given in to he whole Lords in Preſence, with a Certificate ſubſcribed by redible Perſons, That the Petitioner is of good Fame, and has ad good Breeding, for qualifying him to exerce that Truſt: nd that the Ordinary on the Bills, and other Lord Examinar being met together, take exact Trial of the Perſon's Knowdge 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 contained in his Diſpoſition and Inventary in Proceſs; if ſince s Impriſonment he hath made any other Diſpoſition than that roduced, or if he made any before his Impriſonment, and that condeſcend on the ſame, if any be; or if ſince his Impriſonent 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 inrerrogate, 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 infeft, 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

about to apply for Liberation; and if the Week after that Day on which 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 for bringing before them, and deciding Causes concerning Prizes in 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 betwixt

twixt 9 and 12 in the Day Time, at the Croſs, on the Dyvours 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.

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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.

Re-

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 Reemption, as is prescribed by the Act of Parliament 1617, anent Registrating the saids Writs without Burgh; and that the said Clerks 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 the 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 before the Ordinary go off the Bench, and Interlocutors on Debate the 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, and 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 A rithmetical 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 taker 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 th Keeper of the Inner houſe Roll, before they can be called; an that a Liſt of theſe Cauſes be affixed on the Wall weekly.

July. 23. 1696.

Keeper of the Outer-houſe Roll, *ſee* Suſpen ſions.

S.

Sallary, *ſee* Penſion.

Sale, *ſee* Bankrupt.

Saſines, *ſee* Reverſions.

Seal.

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

Seſſion and Parliament-houſe.

All Diſorder the laſt Day of the Seſſion in the Parliament-hou or Cloſs diſcharged, under the Pain of Impriſonment for 3 Mont and the ſaids Perſons being Servants to any Member of the Co lege of Juſtice, to be thereafter for ever debarred the Houſe; an

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 Process comes to be advised, if any of the Lords or others move that the Lords purge themselves of verbal Information or Solicitation, that the same be done, and that Soliciters and verbal Informers be delete and punished. *Decem.* 24. 1679.

That the foresaids two Acts against Solicitation be printed and affixed on the Wall of the Outer-house; and that the said Acts be observed in all Points; likeas, the Lords on their Honour have engaged to observe the same; and ordain this Engagement to be renewed each Session. Subscribed by the Lords at *Sederant.* *Novem.* 11. 1690.

Stop, *see* Decreets.

Subscription, *see* Advocates and Notars.

Summons, *see* Proceſs.

That Summonses be fully libelled before they be executed, and a full Copy of the Libel given with the Citation; and that each of several Defenders shall receive a full Copy of such Part thereof as concerns them *respectivè*, under the Exception of certain Actions mentioned in the Act. That with the Process shall be returned the Defences both dilatory and peremptor in Writing, signed by the Party or his Procurator, which shall comprehend an Acknowledgement or Denial of the Facts libelled, otherwise they shall be held as acknowledged. That after the Return of the Process, other Defences coming to Knowledge, or Writs which the Defender founds upon, and has in his Custody, shall 48 Hours before Calling, be put into the Clerks Hands, for the Pursuer to see and peruse the same; and in the Case of several Defenders, after the Process is returned into the Clerks Hands by the Advocate, principally appointed to see the same, the same may be seen for the Space of Six Days by the Advocates for the other Defenders, who shall 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 several Particulars, by an Act of the 31. *December* 1725.

That all Summonses in Use to abide Continuation, be continued

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 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 *affirmativè*, 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 Reaſons

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 ab ent 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.

****

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 and signed by *Jo. Nisbet. Jo. Baird.*

Transferring.

Summonses of Transferring being seen and returned, may be called before the Ordinary in the Outer-house, and he procced 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 against Persons for the Time within *Edinburgh* or *Leith*, and on Six Days against all other Parties within the Kingdom, and on 15 Days against Persons out of the Kingdom.

June 11. 1661.

All Processes now sleeping by the Surcease of Justice since *November* 1688, and which were not sleeping before that Time, for the Ease of the Leiges, are to be wakened by three blank Summonses of Wakening for each Shire, which by edictal Citations at the Market Crosses of the head Burghs of the Shires are to be execute against all Defenders on Six Days, and the Blanks to be 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 Executions signed by the Executor and Witnesses, with the Summons, are to be transmitted to any Clerk of the Session, who shall give the Executions to the Party, that he having expede a Copy of the said blank Summons under the Signet, may put all in the Process:

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 or hereafter written in that Language.

June 5. 1661.

FINIS.

FINIS.