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THE
INSTITUTES
OF THE
LAW
OF
SCOTLAND.

VOLUME FIRST.

Comprehending the
PRIVATE LAW:

To which is subjoin'd,
The CONSTITUTION of the SESSION, &c.

And of the
COMMISSION for *Plantation* of CHURCHES,
Valuation of TITHES, &c.

With a SCHEME of the
Form of *Process* observ'd in these COURTS.

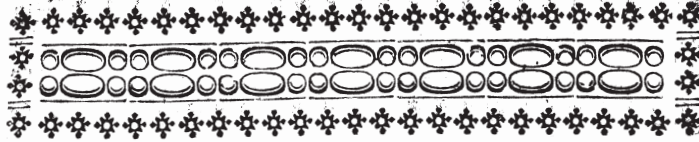
By **WILLIAM FORBES** *Advocate,*
Professour of LAW in the Univerfity of *Glasgow.*



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To the Right Honourable,

A R C H I B A L D

Earl and Viscount of I L A Y,

Lord *Oransay*, *Dunoon* and *Arrose*,

Lord Privy-Seal, Lord Justice-General,

An Extraordinary Lord of Session, and one
of His M A J E S T Y ' S most honourable
Privy-Council.

M Y L O R D,



O whom should the
first Volume of the
Institutes of the pri-
vate and publick
Laws of *Scotland* be
rather offered, for Countenance
and Approbation, than to so

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great

The DEDICATION.

great a Judge of both, as your Lordship has approv'd your self to be, in the due and skilful Application of the Principles thereof to particular Cafes: Not only in the highest Court of the last Resort above, and at the Council Board, where your natural Eloquence, polite Learning, exquisite and comprehensive Knowledge of the Laws Canon, Civil, and Municipal, imployed to the best Purposes, have eminently appeared; But also in the Court of Session, as an extraordinary Lord; and in the prime Criminal Judicature, as Lord chief Justice, or Justice General of *Scotland*? Which last Character of high Authority, was once intail'd as Inheritance on your illustrious and
potent

The DEDICATION.

potent Ancestors, the Earls of *Argyle*; who have always signaliz'd themselves, in protecting the Sacred and Civil Liberties and Interests of their Country.

Permit me therefore (MY LORD) to flatter my self that, as the noble and useful Subject treated of in this Book, has some Claim of Right to such a Patron; who adorns his high Blood, and all Things that come into the List of transcendent Accomplishment, with a hearty Zeal for the present Establishment of Church and State, and an affectionate steady Loyalty to our Gracious Sovereign King *George*, the great Defender thereof: So this Address from a Professor in an University, where your Lordship was

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early

The DEDICATION.

early season'd with the first Part of that Education, now so brightly improv'd, will not be altogether unacceptable. It is what the Members of that little Commonwealth of Learning have justly to boast of, that your Lordship was once some Time in a Course of Study there; And I presume to take this Way, in my private Sphere, to testify how much I am, with all Sincerity, and profound Respect,

M Y L O R D,

Your Lordship's most obedient,

and devoted humble Servant,

W I L L I A M F O R B E S,



P R E F A C E



HAVING made the Study
 of the Laws the Business
 of my whole Life, I did,
 some Years ago, set about
 the Compiling of a *great*
Body of the Law of Scot-
land: Containing its Harmony with, and
Differences from the Civil and Feudal Law;
and shewing how far the Scottish and English
Laws do agree and differ; with incident com-
parative Views of the Modern Constitutions
of other Nations in Europe: Which was
 to consist of Two Volumes. In the first
 I design'd to treat of the *Private Law,*
 which mainly respects private Property;
 the Interests and Differences of particular
 Persons

 ii *The PREFACE.*

Persons among themselves. The second Volume was to set forth the *Publick Law*, which contains all Matters, that have any Relation to the Order of the State: As the Power, Rights and Prerogatives of the Sovereign, Queen Consort, and the Prince; the Functions and Duties of Officers of State and the Crown; Jurisdiction Civil, Ecclesiastical and Military; the Parliament, Privy-Council, Courts of Judicature, Sovereign and Subordinate; the Order of judicial Proceedings therein; the Constitutions, Privileges, Statutes and Rules of Corporations, and Bodies Politick, as Burghs, Universities, &c. And lastly, the Criminal Law. Out of both these Volumes, when finished, I propounded to draw a comprehensive *Institute of the Law of Scotland*, consisting also of Two Volumes, in the same Order and Method with that of the *Great Body*, for the Use of such as shall Study Law under my Care and Direction in the University of *Glasgow*.

The first Volume of the Great Work, wherein the Private Law is handled, being in some Measure finished, and a good Advance made in the other: The first
Volume

The PREFACE. iii

Volume of the *Relative Institute* doth now come forth to publick View, to be followed by the other in its due Time.

In so doing, I not only Copy after the Learn'd *John Voet*, late Professor of Law in the University of *Leyden*, whose *Compendium* of the *Roman Law* was published before his Commentary came to Light: But also have before me the Example of the Great *Justinian*, by whose Order his *Institutes*, composed after the *Pandects*, were promulged before them. I have nothing less in View, than to derogate in the least from the Value of *Sir George Mackenzie's* Book, which is got into most Hands, and hath hitherto been Useful to initiate Persons in the Study of our Law: But several Things notwithstanding, mov'd me to think of such a Composure. 1. Great Alterations have been made in the Law of *Scotland*, since that learn'd Man writ; and several Points controverted in his Time, are now clear'd up, and established by a Tract of Uniform Decisions. 2. Some Matters of the Private Law, and many of the Publick, are not taken Notice of by him at all; and others only in a Word or two *en*
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Passant,

 iv *The PREFACE.*

Passant, so as the Student can reap but little Instruction from thence. 3. Tho' Sir *George's* Authority goes a great Way with me, I cannot help differing from his Opinion in some Points. 4. Seeing every one has a peculiar Method of digesting his Thoughts, as well as a certain Turn of Thought and Notion; I found my self concern'd, in the discharge of my Academical Function, to Reduce and Range the Fundamentals of our Law in such Order, as I conceiv'd most Natural, and adapted to Teaching.

The Method pursued in this Volume, is as follows. I have premised a Preliminary Dissertation concerning Law in General, and the several Kinds of it, as the Laws of Nature, and Nations, and Civil Laws, particularly the Municipal Law of *Scotland*, with the several Grounds and Foundations thereof, how it is raised, founded on, and influenc'd by the Laws aforesaid; the *Civil Law* of the old *Romans*, the Canon, and Feudal Laws, which are succinctly described.

Then the private Law is cast into four Parts. The first Part concerns Persons in their Natural, and in their Relative or
Civil

The PREFACE. V

Civil Capacities; and consists of two Books. The first Book considers Persons in their Natural Capacities, as distinguish'd, 1. By their Sex, into Males and Females. 2. By their different Ages, into Pupils, Minors, and Majors: And with Respect to those under Age, Tutors, Curators, Pro-Tutors and Pro-Curators are discoursed of. 3. Persons are considered as differenced from others, by some Incapacity of Mind or Body, such as Idiots, Furious Persons, &c. and those interdicted. The second Book treats of Persons in their Relative or Civil Capacities. 1. General, of ordinary Subjects, Perpetual and Temporary; the Clergy and Laity. 2. Particular, of Man and Wife, Parents and Children, Masters and Servants.

Estates, and how acquired, extinguish'd, and affected with Burdens, are the Subject of the second Part, which contains three Books. In the First, Possession and Property, the Nature, and several Kinds of them, and the general Ways of acquiring Rights to Things consisting of Property and Possession, are handled. The second explains real and heretable
Rights:

 vi *The PREFACE.*

Rights: How they are constituted by Charter and Seisin; what the Vassal gets thereby, and what remains with, and belongs to the Superior, called the Superiority and Casualties thereof; and the Burdens both private and publick, wherewith real Rights may be affected. The third Book turns upon Obligations, and personal Rights of all Kinds: And is shut up with the Ways how such Obligations, or personal Rights are annull'd and Extinguished.

The third Part handles the Transmissi-
 on, and passing over of Estates from one to
 another, whether a singular, or universal
 Successor, and consists of two Books.
 The first comprehends the Transmission
 of Property to singular Successors. 1. By
 voluntary Deeds of Alienation. 2. By
 the legal Diligence of Creditors. 3. By
 Confiscation. In the penult Chapter of
 which first Book, Trust, a Quality often
 affecting the Conveyance of Rights, is
 handled. And lastly, Prescription, a Way
 of acquiring and losing of both heretable
 and personal Rights, is treated of, after all
 these have been explain'd. The second
 Book clears the Transmission of Property

The PREFACE. vii

to univerfal Successors, as Heirs and Executors, term'd Succession. Which is discoursed of, both in general, and in Particular, 1. With Respect to Heretage. And, 2. In Relation to Moveables.

The fourth Part holds forth the Ways of determining all civil Controversies in Point of Right and Possession: Which is divided into two Books. The first shews, how such Controversies are decided extrajudicially, without going to Law, either by Act of one of the Parties; or where all Parties mutually consent, by Transaction, or Submission: Or, in a judicial Way, by Action in a Court of Justice. The second Book, for Connexion sake, gives an Account of the Session, the Offices relative and subservient to it; and of the Commission for Plantation of Churches, and Valuation of Tithes, &c. with a general Scheme of the Method and Form of Proceeding in these Courts.

I shall no further forestall my Book, by giving a more minute Account of the Contents thereof: But only acquaint the Reader in general, that it hath been my chief Care, neither to overlook, nor too much contract any necessary Part of our
private

viii *The P R E F A C E.*

private Law, according to the Scantling
of my Capacity ; and to advance nothing
but what I can vouch, and make good by
sufficient Authorities.



INSTI-

Advertisement.

The Reader of Mr. Forbes's Institutes of the Law of Scotland, Vol. I. is desired to correct the following Errors of the Press, and any others less material that may have escaped Observation.

Page 76 A. lin. 8. for *natural* read *Nature*. P. 185. A. lin. 23, for *were to be*, r. *were not to be*. P. 226, A. lin. 12, for *Debtor*, r. *a Creditor*. Ibid. lin. 14, for *Debtor*, r. *Creditor*. Ibid. lin. 19, for *tho'* r. *if*. P. 227, A. lin. 12, dele *no*. P. 49, B. lin. 6, dele *of*. P. 50, B. lin. 19, for *for* r. *or*. P. 52, B. lin. 19, for *Heir deceas'd*, r. *deceas'd*. P. 66, B. lin. 20, for *Date*, r. *Term of Payment*. P. 147, B. lin. ante penult, for *is*, r. *of*. P. 156, B. lin. 18, for *legal*, *Reversions*, r. *legal Reversions*. P. 173, B. lin. 11, for *fourteen*, r. *fifteen*. P. 176, B. lin. 15, for *Promises*, r. *Process*.