PART II.

Of Eſtates, and how acquired, extinguiſhed, and affected with Burdens.

An Eſtate is a Right to Things conſiſting of Poſſeſſion or Property.

BOOK I.

Of Poſſeſſion and Property; The natural and ſeveral Kinds of them; and the general Ways of acquiring Right to Things conſiſting of Property and Poſſeſſion.

CHAP. I.

Of Poſſeſſion.

POSSESSION is ſometimes uſed to ſignify Property, as when a Man is ſaid to have great Poſſeſſions. Sometimes, it ſignifies the holding or detaining of a Thing. In which laſt Senſe the Word is here taken, either for ſimple Holding

or

or Detaining, which is the being in Poſſeſſion only without a Right; or for detaining for one's proper Uſe, and debarring others by ſome Title, which is properly term'd Poſſeſſion.

TIT. I.

Of the ſeveral Kinds of Poſſeſſion.

1. POſſeſſion is commonly diſtinguiſhed into natural, and civil Poſſeſſion.

[1.] Natural Poſſeſſion is, the having or uſing a Thing naturally and corporally by our ſelves: As when we poſſeſs Ground by labouring it, and reaping the Fruits, or any moveable Thing, by having it in our Hands or Cuſtody, and doing with it as there is Occaſion.

[2.] Civil Poſſeſſion is one's having or uſing a Thing by his Mind, and the Hands of another, who holds it in his Name, as a Depoſitary, Servant or Factor; which is held and reputed Poſſeſſion in Law. Of this there are ſeveral Sorts and Degrees. As, 1. The obtaining a Decreet of Mails and Duties, or even uſing Citation upon an heretable Bond. 2. Receiving Payment of an Annualrent from the Debtor, in an Infeftment of Annualrent. And where ſuch an Infeftment affects Lands, even in different Shires, Payment of the Annualrent from the Tenants of either of theſe Lands is underſtood Poſſeſſion thereof out of both. 3. Where a Man is ſeiſed in Lands, and

and, for Warrandice of theſe, infeft in other Lands, at one and the ſame Time; Poſſeſſion of the principal Lands, is reputed Poſſeſſion of the Warrandice Lands. But Inveſtment of Relief, is not ſufficiently clothed with Poſſeſſion, by Payment of Annualrent to the Creditor of the Debt, for which the Relief was granted. 4. If a Womanbe infeft by her Huſband in a Liferent, the Husband's Poſſeſſion is accounted her Poſſeſſion. 5. Poſſeſſion of a Liferenter by Reſervation, is reckoned the Fiar's Poſſeſſion. 6. When a Wadſetter ſets to the Granter of the Wadſet a back Tack of the Lands diſponed, for a Tack-duty equivalent to the Annualrent of the Money, for which the Wadſet is granted; he the Wadſetter, by receiving Payment of the back Tack-duty, is ſaid to poſſeſs the Wadſet Lands *per conſtitutum*, and the true Owner of the Land becomes a Tenant, poſſeſſing in the Name of another.

2. Poſſeſſion is either lawful, that is, fair and honeſt, or unlawful.

[1.] A lawful Poſſeſſor, is he who is truly Maſter of the Thing, which he poſſeſſes, or *Poſſeſſor bona Fide*, with a good Conſcience, who has juſt Cauſe to believe that he is ſo, altho' in Effect he is not: As the Buyer of another's Thing from a Perſon he thinks it belongs to.

[2.] An unlawful Poſſeſſor, is he who poſſeſſes *mala Fide*; that is, poſſeſſes a Thing as his own, when he knows very well, either that he

he has no Title at all to it, or that his Title thereto is vitious and defective.

TIT. II.

How Poſſeſſion is attained and loſt.

POſſeſſion is attained, both by, and without Delivery. Delivery is that, which makes a Thing paſs out of the Power of one, into that of another.

Delivery is either real, or ſymbolical, or feign'd.

Real or true Delivery is, when a moveable Thing is given by the Hand to another; or, when one is brought into Poſſeſſion of what is immoveable, by the Owner or his Proxy.

Symbolical Delivery is, either when Poſſeſſion of a Thing preſent is given by the Delivery of ſome Symbol or Token, which is a Part of it, as Land, by Earth and Stone; a Mill, by the Clap thereof; an Annualrent, by a Penny, *&c.* Or, when Poſſeſſion is given by ſome Symbol, which is no Part of the Thing to be poſſeſſed, but only repreſents it, as a Fiſhing, by a Net; an Office, by a Copy or Scroll; and Reſignation, by a Pen.

Feigned or imaginary Delivery is, when, without any corporeal Act, Delivery is ſuppoſed from the Intention and Sufferance of the Owner: As, when Goods in one's Poſſeſſion, as a Pledge or Loan, are given or ſold to him, *Fictione brevis Manus*, the Pledge or Loan is ſuppoſed to have

have been returned to the Owner, and by him redelivered by Gift or Sale

Poſſeſſion is acquired to one, without any Shadow of Delivery, and inferr'd merely from a joint or relative Intereſt betwixt him and another Poſſeſſor: As, when a Liferenter's Poſſeſſion is accounted the Fiars Poſſeſſion; or, a Husband's Poſſeſſion is reckoned the Wife's Poſſeſſion.

Poſſeſſion is loſt to one, when another comes to poſſeſs. For there can be only one true Poſſeſſor of the ſame Thing.

TIT. III.

The Effects of Poſſeſſion.

POſſeſſion hath many Advantagious Effects. 1. Poſſeſſion gives often the Property. It hath in ſome Caſes this Effect, at the ſame Time that one enters upon Poſſeſſion. Thus Things belonging to no Body, are acquired by one's laying Hands upon them, and getting them in his Power, as by Occupancy, or finding. Again, current Money doth ſo far become the Property of the Poſſeſſor, that it paſſeth from Hand to Hand, without any Queſtion about the Haver's Title to it. In other Caſes, Property is acquired by Poſſeſſion, not in *Inſtanti*, but by ſuch as is continued during the Time regulated for preſcribing. 2. In many Caſes Poſſeſſion is a preſumed Title of Property. Property is ſometimes preſumed from preſent

preſent Poſſeſſion. Thus Property in Moveables is preſumed from Poſſeſſion, till the Contrary appear by another's inſtructing a poſitive Title to them, and that they paſs'd from him otherwiſe than by Alienation. Property is alſo often preſumed from Poſſeſſion continued for ſome Years. *V. G. Triennalis Poſſeſſor Beneficii Eccleſiaſtici, eſt inde ſecurus.* An Incumbent's Right to a Benefice, after three Years peaceable and uninterrupted Poſſeſſion, cannot be quarrelled, during his Lifetime, by any other Candidate or competing Church-Man. A Patron, who had been in the uninterrupted Poſſeſſion of preſenting Miniſters *trinâ Vice*, or, the three laſt Vacancies of the Church, hath the only Right of Preſentation *in poſſeſſorio.* Seven Years Poſſeſſion of a Benefice, without a Title, gives a poſſeſſory Judgment. *Decennalis et triennalis Poſſeſſor Beneficii, non tenetur docere de Titulo.* Which 13 Years Poſſeſſion is a preſumed Right, till the Poſſeſſor's true Title be produced. 3. Poſſeſſion may be defended a-gainſt thoſe from whom it flowed not, upon any Right in the Poſſeſſor, or his Author; but can be aſcribed only to that Title by which it did begin, in Prejudice of him it was acquired from, and to whom it muſt be reſtored. In which Caſe the Poſſeſſor cannot change the Cauſe of his Poſſeſſion. 4. A Poſſeſſor with a good Conſcience, while he is ignorant of any better Right to the Thing than his own, enjoys and makes his own the Fruits gathered, and ſpent

by him. A knaviſh Poſſeſſor, who knows that he has no colourable Title to what he Poſſeſſes, is obliged to reſtore, not only the Fruits which he has enjoyed and ſpent, but alſo thoſe which a careful Man might have reaped from the Subject poſſeſſed. 5. In a Competition concerning Poſſeſſion and Property, the Queſtion about Poſſeſſion is judg'd, before Inquiry is made into the Right of Property.

CHAP. II.

Of Property.

PROPERTY is a Right of uſing or claiming any Thing, unleſs the Law or Paction doth hinder. When this Right of diſpoſing of, or claiming any Thing is appropriated to ſingle Perſons, or to Societies or Corporations (who are conſidered as one Body politick) it bears the ſpecial Name of Property. When it belongs equally to ſeveral Perſons, 'tis term'd a *Common*, or *Commonty*. Two Perſons cannot have the whole Property of the ſame Thing; but there is only one who is the true Owner.

Property is divided, 1. Into Civil and Eccleſiaſtical. 2. Into Moveable or Perſonal, and Immoveable or Heritable. 3. Into abſolute and limited Property.

TIT.

TIT. I.

Of Civil and Eccleſiaſticcal Property.

CIVIL Property is that, which belongs to Lay-men, or Lay Corporations.

2. Eccleſiaſtical Property is the Patrimony of the Church, or the Livings of the Clergy, which is called a Benefice: Becauſe it was the Effect of the Bounty and Liberality of ſuch as mortified Rents and Poſſeſſions to pious Uſes.

3. The firſt Year's Rent of Benefices, called Annats, anciently applied to pious and publick Uſes, were claim'd by the Pope, as his Property; but could never be exacted in *Scotland*, without the King's Conſent, who got the firſt Peny; and were ſometimes diſpoſed of by the Parliament (*a*)

4. Benefices were, 1. Either Regular, or Secular. Whereof the former belonged to Monks and Regulars; and the latter were the proper Livings of Church-Men. 2. Benefices were either given in Title, or Commendam. He who had a Benefice in Title, called Titular, had Right thereto as his own, during his Life, with Power to grant Rights of it, and diſpoſe of the Rents. Such as had Benefices in Commendam only, were called *Commendators*. Commendams were either temporary, or perpetual. A temporary Commendam was a void Benefice, commended to the Care of one, till it was

(*a*) Act 4. Par. 3. Q. M.

conveniently ſupply'd of a Titular: For the Rents whereof, the Commendator was liable to hold Compt. A perpetual Commendam was, where the Commendator had Power to diſpoſe of the Benefice in the ſame Manner as a Titular, and to apply the Profits to his own Uſe, during his Lifetime. Theſe perpetual Commendams were diſcharged in the Year 1466 (*a*). But after the Reformation, many Popiſh Benefices were conferr'd by the King upon Laicks, who had been moſt active in the Reformation. Theſe were called Commendators.

5. Benefices conſiſted of a Temporality and Spirituality. The Temporality was in Lands, with other civil Rights and Poſſeſſions: The Spirituality comprehended Churches, Church-Yards, Manſes and Glebes of Church-Men, and Tithes. In the Year 1587, the Temporality of Benefices, with many Exceptions, was annexed to the Crown (*b*). But much of it, and alſo of the Spirituality, was before, and after, erected into Lordſhips and Baronies. Some Benefices were conferr'd for pious Uſes on Burghs Royal, and ſome upon Colleges.

6. Churches are publick Houſes, erected for Divine Worſhip and Service, and for preaching the Word of God. All Churches, except where the King is Patron, and the menſal Churches of Biſhops, are to be repair'd by the Patron, out of the vacant Stipends (*c*). Where theſe

(*a*) Act 3. Par. 1. *Ja.* III. (*b*) Act 29. Par. 11. *Ja.* VI.
(*c*) Act 18. Seſſ. 1. Par. *J.* VII.

theſe fail, the Burden of building and repairing the Church, doth ly upon the Heretors, whether they reſide in the Pariſh, or not; who muſt ſtent themſelves for that Effect. But the Patron, or intrometter with the Parſonage Tithes, is bound to uphold the Quire; and to pay a Third of the Stent impoſed, where the Quire is not diſtinctly known from the reſt of the Body of the Church. If the Heretors refuſe, being requir'd by the Miniſter and Kirk-Seſſion, to meet and ſtent themſelves, for repairing the Church, the Lords of Seſſion will, upon a Bill, grant Warrant to the Miniſter and Kirk-Seſſion, to ſtent them proportionably, according to the Valuation of their Lands in that Pariſh: To the making of which Stent Roll the Heretors muſt be warn'd.

Seats in the Church, built and repaired upon the common Expence of the Pariſh, may be diſpoſed of by the Kirk-Seſſion, in Favour of Pariſhoners, according to their Ranks and Qualities. Seats which particular Heretors have built for their own Uſe, with Conſent of the Kirk Seſſion, or which they have preſcribed a Right to by 40 Years Poſſeſſion, as Part and Pertinent of their Lands, are at the Heretor's own diſpoſal. Where a Seat is poſſeſſed as Part and Pertinent of Lands, it goes to a Purchaſer, by a Diſpoſition of the Lands. But where the Lands and Seat are poſſeſs'd by diſtinct Rights, the Seat requires to be ſpecially diſponed. The Patron is privileged to have

his Seat in the Quire. In Burghs Royal, the Town Council have the Diſpoſal of Seats in the Church.

The Heretors are bound to pay for, and are ſtated in the Property of the Bells and Utenſils of the Church: But the Miniſter and Kirk-Seſſion may purſue for any of theſe that are abſtracted, or taken away.

Every one muſt have ſome Way to the Church; but cannot pretend to any ſpecial Way as the neareſt, without proving immemorial Poſſeſſion of ſuch a Gate or Paſſage.

7. The Miniſter has Right, during his Incumbency, to the Church-Yard, and may ſhear the Graſs on't, for the Uſe of his Horſe, or Cows, and may hinder others: But cannot cut the Trees growing there. Heretors of the Pariſh muſt build and repair the Church Yard-Dykes, with Stone and Mortar, two Elns high, having ſufficient Stiles, or Entries: And the Lords of Seſſion may iſſue out Letters of Horning againſt them for that End (*a*). Church Yards can neither be Feu'd, nor ſet in Tack.

8. A Manſe is a Dwelling-houſe appointed for the Miniſter of the Pariſh. The Parſon or Vicar's Manſe neareſt to the Church, was appropriated to the Miniſter ſerving the Cure (*b*). Where there was no ſuch Manſe formerly, Miniſters provided to Cathedral or Abbay Churches were to have one within the Precinct of the Cathedral or Abbay, unleſs the Prelate or

(*a*) Act 232. Par 15. *J.* VI. (*b*) Act 48. Par. 3. *J.* VI.

or Feuar appoint them with another as good and commodious (*a*). But if there is no Manſe for a Miniſter ſettled elſewhere, the Heretors muſt build him a ſufficient Manſe, not exceeding 1000 *lib. Scots*, or 500 *Merks* of Value (*b*). It is uſual to allow half an Acre of Ground for the Manſe and Yard. Where there is a competent Manſe already built, the Heretors muſt repair it once ſufficiently at the Miniſter's Entry, who is to uphold the ſame, during his Incumbency, and they out of the vacant Stipends, while the Church is vacant (*c*). Liferenters are not liable to contribute for the building of a Manſe, tho' they are bound to pay for repairing it. But neither Building nor Reparation affects ſingular Succeſſors.

9. A Miniſter's Glebe ſhould conſiſt of four Acres of arable Land, or 16 Soums Graſs, where there is no arable, but Paſture Ground; to be deſigned, in the firſt Place, out of the neareſt Lands belonging to Parſons, Vicars, Abbots, or Priors; and if there be none ſuch, out of any other Church Lands within the Pariſh (*d*). Beſides which Glebe, the Miniſter ſhould have a Horſe, and two Cows Graſs, deſign'd as the Glebe, out of Church Lands. And if there be no Church Land, or only arable Land near the Manſe, the Heretors of adjacent Land are to pay the Miniſter 20 *lib. Scots* yearly for his

(*a*) Act 116. Par. 12. *J.* VI. (*b*) Act 21. Par. 1. Seſſ. 3. *Ch.* II. (*c*) *Ibid.* (*d*) Act 161. Par. 13. *J.* VI. junct. Act. 7. Par. 18. *J.* VI.

Graſs (*a*). But no incorporate Acres, where the Heretor hath Houſes and Gardens, are to be deſign'd for Glebe, if he give other Land neareſt to the Church. Miniſters in Royal Burghs have no Right to Glebes (*b*). Unleſs their Pariſhes be partly in the Country, Partly in Town.

10. In Time of Prelacy, Manſes and Glebes, with Graſs for Miniſters, were deſigned by the Biſhop, Or Miniſters appointed by him, with two or three diſcreet Men of the Pariſh (*c*). But now, that is done by the Presbytery, the Moderator whereof gives the Miniſter, or a Procurator in his Name, Infeftment in the Subject deſigned. Upon which he or his Procurator takes Inſtruments in the Hands of a Notary, or of the Clerk of the Presbytery. And the Lords of Seſſion, upon a Petition given in by the Miniſter, with the Act of Deſignation and Inſtrument, grant Warrant for Letters of Horning, to charge the Poſſeſſors of the Lands deſigned, to remove within ten Days. If the Deſignation be of old Glebes or Manſes of Parſons or Vicars, the Poſſeſſors of theſe get no Relief off the Heretors of other Church Lands within the Pariſh. But if other Church Lands be deſign'd for the Miniſter, Relief is competent to the Proprietors thereof *pro rata*, off the reſt of the Heretors of ſuch Lands. When the Deſignation is of temporal Lands, the reſt of the

(*a*) d. Act 21. Par. 1. Seſſ. 3. *Ch.* II. (*b*) *Ibid.* (*c*) *Ibid.* (*d*) *Ibid.*

the Heretors of temporal Lands muſt contribute proportionably, for Relief of thoſe whoſe Lands are deſigned. This Relief is not *debitum fundi*, affecting ſingular Succeſſors, but only the Heretors for the Time. Tho' Manſes and Glebes of Miniſters are more allodial than feudal, being given to them by Acts of Parliament, without any expreſs Holding or *Reddendo*; they are conſidered as held of the King in Mortification.

11. Tithes are a certain Proportion of our Goods and Rents due for maintaining Divine Service, called the Patrimony of the Church (*a*). Which *Quota* hath varied in different Countries: But generally, 'tis conſidered, as the tenth Proportion.

When the Paſtoral Care was divided into Pariſhes, the Tithes of each Pariſh were ſet off for a Proviſion to the *Parochus*, their particular fix'd Miniſter. The Miniſter being either a Parſon or Vicar: Hence ariſe a Diviſion of Tithes, with Reſpect to the Perſons payable to, into *Parſonage* and *Vicarage* Tithes. Parſonage Tithes are the Tithes of Corn, called *Decimæ Garbales*, or, *Teind Sheaves*, or, *the great Teind*. Theſe belong to the Parſon, and are the ſame in all Places, liable to no Alteration or Extinction by Preſcription, or long Cuſtom. Vicarage Tithes are the Tithes of inconſiderable Things, as Lambs, Wool, Cheeſe, Geeſe, Fruit, Lint, *&c.* called *Decimæ Vicariæ*, or the ſmall Tithes. Theſe

(*a*) Act 10. Par. 1. *J.* VI.

Theſe belong to the Vicar, and as they came in by no poſitive Law, but only by Cuſtom, the Subject and Quantity thereof is purely local, differing in different Pariſhes, and ſometimes in different Places of the ſame Pariſh. A Right thereto is acquired, modified, and loſt by Preſcription of 40 Years.

The Pope, as univerſal Biſhop, pretending a Sovereign Right to all the Revenues of the Church, took upon him to alienate Tithes at Random to Monaſteries. He granted alſo Diſpenſations from Payment of them to ſome religious Orders, as the *Ciſtertians*, *Hoſpitalers*, and *Templars*. And tho' our Law made it criminal to take a Right to Tithes from any ſave the Parſons, or Vicars, or their Farmers (*a*), Tithes in this Country were frequently mortified to Cathedral and Collegiate Churches, Chappels, Monaſteries, and Nuneries, by the Founders and Benefactors; and Pariſh Churches, with their Tithes, were often annexed to theſe by the Patrons. Many Rights of Tithes were alſo made in Favour of Laymen. For preventing whereof, a Canon was made (*b*) in the Council of *Lateran*, under Pope *Alexander* III. in the Year 1179, whereby the feuing of Tithes to Laymen was diſcharged. But *Decimæ incluſæ nunquam antea ſeparatæ*, which, for a long Time, beyond the Memory of Man, have always gone along conſolidate with the Stock, were ever been ſuſtained as an Exception, without the Verge of the

(*a* Act 7. Par. 2. *J.* IV. (*b*) c. 19. X. de decimis.

the Canon's Prohibition. A Diſpoſition of Lands from one having Right thereto *cum decimis inclufis*, carries Right to the Tithes, tho' not expreſly mention'd: But this doth not hold, where Lands and Tithes are poſſeſs'd *diverſo Jure*. If a Tackſ-man of Tithes continue to poſſeſs after the Tack is out, he will have the Benefit of tacit Relocation, which is interrupted by Inhibition in Parſonage Tithes ſerv'd at the Church Door, upon a commiſſary Precept; and by either Inhibition, or Citation in Vicarage: After which the Intrometters are liable to a Spuilzie. Tithes are not *debita fundi*, but affect only Intrometters. Nor are Tenants, who pay a joint Duty to their Maſter for Stock and Tithe, liable to the Titular, in ſo far as they have paid to their Maſter: But they are liable, as others, to the Miniſter for his Stipend, when payable out of the Tithes.

Tithes were not annex'd to the Crown, with the Temporality of Benefices in the Year 1587. But ſuch as got Monaſteries, *&c.* erected into Lordſhips and Baronies in their Favour, had thereby Right to Tithes belonging to theſe Societies.

12. King *Charles* I. made a Revocation, and rais'd Reduction of all theſe Erections, as done in Prejudice of the Crown, and otherwiſe null. Which produc'd four Submiſſions to the King, by the Parties concern'd: One by the Lords of Erection, called the *General Surrender*, another by the Biſhops, a third, by ſome particular Titulars

tulars of Tithes, and a fourth, by the Royal Burrows. Upon theſe the King pronounc'd ſo many Decreets arbitral, which were ratified in Parliament. 1. The Superiorities of Eccleſiaſtical Benefices, with the Caſualities thereof, were declared to pertain to the King; reſerving to the Lords and Titulars of Erection, the Feu-Duties, till redeem'd by His Majeſty at ten Years Purchaſe (*a*). But the Reverſion of theſe Feu-duties, is now diſcharg'd in Favour of the Lords of Erection, and their Aſſigns (*b*). The Superiorities belonging to Biſhops, and their Chapters, or depending Offices (*c*), and alſo their Tithes; now, by the aboliſhing of Prelacy, belong to the King. Patrons have Right to Tithes not heretably diſponed, with the natural Burdens affecting them (*d*). 2. The Tithe was determin'd to be a fifth Part of the conſtant Rent, where the ſame is valued jointly with the Stock: And that where theſe are ſet for diſtinct Duties, the Heretor ſhould get Deduction of a fifth Part of the true Rent of his Tithe, thence called the *King's Eaſe*. The heretable Right of Tithes, when valued, was allowed to be bought at nine Years Purchaſe, and temporary or inferior Rights to be proportionably cheaper, according to the Continuance, and Quality of them (*e*). Tithes not heretably diſponed, given by Law to Patrons, are redeem-

(*a*) Act 14. Par. 1. *Ch* I. (*b*) Act 11. Seſſ. 4. Par. Q. *A.* (*c*) Act 29. Seſſ. 2. Par. *W.* & *M.* (*d*) Act 32. *Ibid.* (*e*) Act 17. Par. 1. *Ch.* I.

redeemable by the Heretors at ſix Years Purchaſe (*a*). But no Tithes can be bought, that are either poſſeſs'd by Miniſters for their Stipend (*b*); or belong to the King by the aboliſhing of Prelacy, ſo long as they remain undiſponed; or that are appropriated to Colleges, Hoſpitals, or other pious Uſes; or that once pertained to the Heretor, who diſponed the Lands without, or reſerving the Tithes (*c*). 3. The King got Right to an Annuity out of the Tithes (*d*), which ſince the Year 1674, hath not been inquired after.

TIT. II.

Of moveable, or perſonal, and immoveable or heretable Property.

1. MOveables, or moveable and perſonal Rights, are thoſe that paſs by Succeſſion, to the Owner's Executors, if not diſpoſed of by him in his Life, which are called perſonal, becauſe immediate Action, or Diligence for recovering them, lies againſt one's Perſon.

2. Immoveable, or heretable Rights, or Things, are ſuch as go to Heirs, whence they are term'd heretable. If theſe affect the Subjects thereof, ſo as to defend the Haver, againſt his Author's ſingular Succeſſors, they are called real Rights. Real Rights are divided into *Here-*

(*a*) Act 23. Seſ. 2. Par. *W.* & *M.* (*b*) Act 30. *Ibid.* (*c*) Act 23. Seſſ. 4. *Ibid.* (*d*) Act 15. Par. 1. *Ch.* I.

Heretage and *Conqueſt*. Heretage is an heretable Right, which one enjoys as Heir to his Predeceſſor. Conqueſt is not only that which one acquires by his own Means and Induſtry, but alſo, that which is deriv'd to him by Gift from his Parents, or others, to which he would not have otherwiſe ſucceeded. Upon which Account Conqueſt is called *Feudum novum*.

3. Some Things are ſimply heretable to all Intents and Purpoſes. Such are Lands, Edifices, growing Trees, the Surface, and all the natural Fruits of the Earth, while unſeparated from it, Diſpoſitions, or other Land Rights, with a Precept of Seaſin, or Obligement to infeft, tho' not completed by Infeftment, perſonal Bonds, excluding Executors, Sums appointed to be imployed upon Land, or real Security. Yea, a Deſtination by Way of Tailzie, in a Bond granted to a Man and his Wife, and the longeſt Liver of them two in Liferent, and to the Heirs to be procreated betwixt them in Fee, which failing, to the Wife's Heirs and Aſſigneys, makes it heretable, without either Infeftment, or Obligement to infeft.

4. Some Things are ſimply moveable, as Species of Goods, (Heirſhip excepted) Ships, or Shares thereof, Bags of Money, Bonds or Tickets not bearing Annualrent, bygone Rents of Land, Annualrents of all Bonds, and induſtrial Fruits of the Earth, whether growing or reaped, Clauſes of Relief in heretable Bonds, and the *Jus Mariti*. Again, a Sum may be *ſuâ Naturâ*

Naturâ moveable, and yet heretably ſecured: As bygone Annualrents due by Infeftment of Annualrent, which Executors may recover by an Action of poinding the Ground.

5. Some Rights are heretable and moveable in a different Reſpect. Thus perſonal Bonds bearing Annualrent are moveable as to Executors, unleſs theſe be expreſly excluded, or the Debtor expreſly oblig'd to infeft the Creditor; but heretable as to the Fisk, and the Creditor's Relict (*a*). Other Things, as temporary Rights or Obligements for a Courſe of Time, *viz.* Tacks, Penſions, or other annual Preſtations, are moveable *quoad* the Fisk, and heretable, with Reſpect to Heirs and Executors. Again, Bonds may be heretable as to the Creditor and his Heirs, and moveable as to the Debtor, ſuch as a perſonal Bond, payable to one and his Heirs, excluding Executors.

6. The Sum in a Bond heretable by Infeftment, becomes moveable by the Creditor's obtaining a Decreet for Payment, or requiring Payment by a Charge, or requiſition. But a Charge upon a Bond, wherein executors are expreſly excluded, will not make the Sum moveable. Nor will Requiſition uſed, or a Charge given by a Wife, for an heretable Debt due to her, make it moveable. Nor yet do Sums for which a Wadſet, or heretable Bond was granted, become moveable, by the Debtor's conſigning the ſame, after an Order of Redemption us'd, till

(*a*) Act 32. Par. 1. Seſſ. 1. *Ch.* II.

till there be a Declaration thereon, or till the Creditor accept of the Conſignation, or inſiſt to get up the conſign'd Money. Altho' a Creditor by Requiſition, or Charge for heretable Sums, doth, for the Time, paſs from his heretable Security: Yet, whenever he pleaſes to paſs from the Requiſition, or Charge expreſly, or tacitly, by taking, after the Requiſition, Annualrent for ſubſequent Terms, his heretable Right reviveth, and is not excluded by interveening Rights.

7. Taking an heretable Bond of Corroboration, or adjudging for a Sum originally due by a moveable Bond, makes it heretable. But Sums *ab initio* heretable, may be ſecured by an acceſſory moveable Right, as the Gift of the Debtor's Eſcheat, or a moveable Bond of Corroboration, without altering their Nature.

TIT. III.

Of abſolute and limited Property.

1. ABſolute Property is, when the Property and full Profits are in the ſame Perſon, and enjoyed by him independently, without being liable to pay any Acknowledgement for it to a Superior Lord, called *plenum Dominium*, or allodial Property. Thus are Moveables enjoy'd, and ſome heretable Rights, as Superiorities veſted in the Sovereign, Churches and Church-Yards.

2. Limi-

2. Limited Property is, when one, called *Superior*, has the *Dominium directum* only of Lands, or other Kind of Heretage, without the Profit, called *Superiority*; and another, called *Vaſſal*, hath the Profit only, without the direct Property, called *Dominium utile*, for Payment of ſome Acknowledgement to the Superior, or direct Proprietor. This limited Property is called a Fee. When the Vaſſal makes over his Right to the Fee to another, to be held of himſelf; that other is called a Sub-vaſſal, to whom the firſt Vaſſal is immediate Superior, and the Vaſſal's Superior is call'd the Sub-vaſſal's mediate Superior.

3. Fees are divided, 1. By the Manner of Holding. 2. With Reſpect to the Vaſſal.

TIT. IV.

Fees diſtinguiſh'd by the Manner of Holding.

1. FEES are thus divided. 1. Into Ward, Blench, Feu, Burgage, and Mortification.

[1.] A Ward Fee hath its Denomination from the Ward of the Vaſſal; the chief Caſualty falling to the Superior thereby, *viz.* a Right to the Mails and Duties of his Male Vaſſal's Lands, while he is Minor, and his Female Vaſſal's Lands till her Age of 14. This is the propereſt Feudal Right, called *Servitium Militare*, from the Original of Fees, which, at firſt, were granted for Military Service. Therefore all

Lands are preſum'd to hold Ward, where another Holding doth not appear expreſt in the Charter. If the Superior hath tranſacted for a liquid *Quota*, or Annual-preſtation, in Place of the Mails and Duties that fall to him by the Ward, the Holding is called *Taxt-ward*. When a Sub-vaſſal holds Ward of a Ward-vaſſal, this is called *Black-ward*, or *Ward upon Ward*.

[2.] A Blench Fee is, when the Vaſſal ſtands obliged only to pay an eluſory Duty to the Superior for Acknowledgement, as a Roſe, a Peny, or pair of Gloves, *&c.* *Nomine albæ firmæ*, in Name of Blench-duty; and ordinarily with this Quality, *Si petatur tantum*.

[3.] Feu-holding is, that whereby a Vaſſal is bound to pay to the Superior a yearly Sum of Money, or Quantity of Victual, *&c.* *Nomine Feudi firmæ*, in Name of Feu-duty. This Feu-holding is not derived from the old Feudal Law; but from the Emphyteutical Leaſe, or Leaſe for Perpetuity in the civil and common Laws; whereby barren Ground is given, by the Proprietar, to another, to be poſſeſſed for ever, upon Condition of his cultivating and improving by Planting and Policy, and paying a ſmall yearly Rent or Penſion, called *Canon*. For if no Part of the Feu-duty be paid for two whole Years, the Vaſſal loſeth his Feu, conform to the Civil and Canon Law (*a*). Feus may be granted by any Perſons of their Property,

(*a*) Act 240. Par. 15. *J.* VI.

ty. Feus of the Crown's annexed Property, without a previous Diſſolution in Parliament, are null (*a*). Nor can it be feued out after a Diſſolution, with Diminution of the Rental (*b*), but muſt be done with an Augmentation of it (*c*). Prelates could not feu out any Part of their Benefices, without Conſent of the Majority of the Members of the Chapter or Convent: Nor inferior beneficed Perſons any Part of theirs, without Conſent of their Patrons.

[4.] Burgage-holding is an Obligation upon Burghs Royal, to pay to the King, by their Charters of Erection, the Duty of Watching and Warding, *&c.* not only for their common Lands, or other Rights of the Corporation, but alſo for Tenements holden Burgage by Particular Perſons infeft therein; the Burgh being Vaſſal to the Sovereign, and not the particular Burgeſſes.

[5.] Mortification is that Manner of holding, whereby Colleges, Hoſpitals, or others are bound to pay the Duty of *Præces & Lachrimæ* for Lands, or others mortified to them for a pious Uſe.

2. Fees are diſtinguiſhed by the Manner of Holding, into Publick and Private, or Baſe Fees.

[1.] A publick Fee is that, which is given to be held of the Giver's Superior. 'Tis ſo called from the ſuppoſed Notoriety thereof. It

(*a*) Act 240. Par. 15. *J.* VI. (*b*) Act 6. Par. 9. *J.* VI. (*c*) Act 237. Par. 15. *J.* VI. Act 10. Par. 1. *Ch.* I.

is alſo term'd a Right *a me*, becauſe it is to be held *a me* (the Diſponer) *de ſuperiore meo.*

[2]. A private or baſe Fee is that, which is granted by a Vaſſal to be held of himſelf. 'Tis ſo called, becauſe latent or lower, and at a further Remove from the original Right held of the Sovereign, the higheſt Superior, than a Fee held of the Diſponer's Superior is. It carries alſo the Name of a Right *de me*, becauſe it is to be held *de me* (the Diſponer) *& ſucceſſoribus meis.* Baſe Fees required Poſſeſſion to complete them, for preventing clandeſtine and colluſive Rights, till the Year 1693, when Infeftments, whether Publick or Baſe, cloathed with Poſſeſſion, or not, were declared preferable, according to the Priority of the Regiſtration of the Seaſins (*a*).

TIT. V.

Fees diſtinguiſhed with Reſpect to the Vaſſal.

FEES differenced with Reſpect to the Vaſſal, are 1. Simple and tailzied Fees. 2. Fees granted to one Perſon and his Heirs, and thoſe conceived in Favour of more Perſons and their Heirs.

SECT.

(*a*) Act 13. Seſſ. 4. Par. W. & M.

SECT. I.

Of ſimple and tailzied Fees.

1. A ſimple Fee is that, which is conceived in Favours of one and his Heirs whatſoever, that is, his Heirs of Line, who ſucceed by Law.

2. A tailzied Fee is that, which the Owner, by exerciſing his inherent Right of diſpoſing of his Property, ſettles upon others than thoſe to whom it would have deſcended by Law. The Cuſtom of tailzieing Eſtates was handed down to us from *Normandy*; and the Word *Tailzie*, from the *French Tailler*, imports a cutting off the lineal Heirs. A Tailzie is properly made, by naming ſeveral Perſons to ſucceed one after another; as when Lands are diſponed to one, and the Heirs of his Body, or to his Heirs Male, or his Heirs of ſuch a Marriage, which failing, to another Perſon named, and to his Heirs of ſuch a Kind; and ſo to a Third, or further, according to the Humour of the Diſponer, as he thinks fit to make the Tailzie long or ſhort. The Perſon in Favour of whom Lands are tailzied in the firſt place, is called *The Inſtitute*, or firſt Member of the Tailzie; and thoſe to whom, failing him and his Heirs, they are provided to go, are called *Subſtitutes*, or ſecond, third, *&c.* Members of the Tailzie. Seeing Tailzies divert

Succeſſion from the natural and common Channel, they are ever ſtrictly interpreted.

3. Perſons ſometimes grant Bonds, or enter into Contracts, whereby they oblige themſelves, and their Heirs of Line, to reſign their Eſtates in Favour of ſuch and ſuch Heirs of Tailzie. Which Bond or Contract, if gratuitous, binds the Granter once to Tailzie, tho' not to continue the Tailzie: But if made for an onerous Cauſe, cannot be altered.

4. Where a formal Tailzie is made, if a Proprietar do only Subſtitute the Perſons who are to ſucceed to him one after another, which is called, *A ſimple Tailzie*: This Deſtination may be broke or altered by the Maker, or by any of the ſucceeding Members, even tho' Inhibition were ſerved thereon. If the Maker of the Tailzie oblige himſelf and his Heirs of Intail not to alienate or alter, neither he, nor any of theſe Heirs can do ſo, by any volunrary or gratuitous Deed, which may be reduced upon the Act of Parliament 1621, as done in Defraud of the Heirs Subſtitute, who are Creditors by the Clauſe. But the Maker of a Tailzie and his Heirs may, notwithſtanding of an Obligement therein, not to alter or alienate, diſpone for a neceſſary onerous Cauſe, or the Lands may be adjudged for their Debt: Tho' Inhibition us'd upon the Clauſe makes all ſubſequent Deeds, even for onerous Cauſes, reducible. Sometimes the Clauſes not to alienate or alter, or contract Debt, are backed with Clauſes

Clauſes irritant and reſolutive. A Clauſe Irritant is, a Proviſion that a Right or Deed ſhall be null and reducible for the future, if ſomething be done or omitted by the Receiver. A Clauſe reſolutive is, a Proviſion declaring a Right or Deed to have been null from the Beginning, upon the Receiver's doing, or failing to perform what is expreſs'd, or in ſome other Event. When a Tailzie is made with irritant and reſolutive Clauſes inſerted in the Procuratory of Reſignation, Charter, and Precept of Saſine, that it ſhall not only be unlawful to the Heirs to ſell, anailzie, or diſpone, or contract Debt, or do any other Deed whereby the Lands may be adjudged or evicted from the other Subſtitutes in the Tailzie, or the Succeſſion fruſtrated; but alſo, that the Deeds of Contravention ſhall be null, and that the next Heir of Tailzie may purſue Declarator thereof, paſſing by the Contraveener without repreſenting him, and ſerve Heir to the Perſon who died laſt infeft in the Fee, and did not Contraveen. This Tailzie being judicially authorized of Courſe by the Lords of Seſſion, and recorded in the Regiſter of Tailzies, and the irritant Clauſes repeated in all after Conveyances of the tailzied Eſtate to any of the Heirs of Tailzie, the Tailzie is real and effectual, both againſt the Contraveener and his Heirs, and againſt their Creditors by Appriſing or Adjudication, or other Titles (*a*). Again,

(*a*) Act 22. Seſſ. 1. Par. *J.* VII.

the omitting to repeat the irritant Clauſes in ſubſequent Conveyances to any Member of the Tailzie, imports a Contravention againſt the Omitter and his Heirs, to make the Eſtate fall to the next Heir of Tailzie; but not againſt Creditors and ſingular Succeſſors, contracting *bona Fide* with the Perſons who ſtood inteſt in the Eſtate without any Irritancy or reſolutive Clauſe in the Body of his Right (*a*). A Deed done by a Member of Tailzie, before the Succeſſion fell to him, doth not import an Irritancy.

5. If a contraveening Member of Tailzie is cut off by a Declarator of Irritancy, all the Heirs of his Body are thereby excluded: But, if the Contraveener's Son was *nominatim* ſubſtituted in the Tailzie, the Son would ſucceed, tho' the Father be cut off.

6. When a Tailzie is made with Clauſes irritant to certain Heirs ſucceſſively; All which failing, to return to the Diviſor's Heirs and Aſſigns whatſoever: Theſe Heirs and Aſſigns in the laſt Termination, are not, upon the Return of the Fee to them, failing the Inſtitute and other Subſtitutes, affected with the Irritancies. For then the tailzied Fee becomes ſimple.

7. When a Tailzie doth not terminate in Heirs whatſoever; and all the Heirs therein ſpecified do fail, the Fee ſhould not fall to the King or other Superior, as *ultimus Hæres*, while

(*a*) Act 22. Seſſ. 1. Par. *J.* VII.

while any Perſon can make up a Title thereto, as Heir of Line; tho' it was once otherwiſe decided *(a)*. Which rigorous Deciſion, directly croſſing the Deſign of the Maker of the Tailzie, and forfeiting a Man for the Error and Omiſſion of a Notary or Writer, to inſert the Clauſe; *which failing, to ſuch a Perſon's Heirs whatſoever*, hath been juſtly diſapprov'd as anomolous, by our greateſt Lawyers.

8. A Tailzie is broke, by the Maker's reſerving a Faculty to alter or innovate, at any Time in his Life, *& etiam in articulo mortis*. In which Caſe, if the Tailzie be made in Favour of a Stranger, or one who is not *alioqui Succeſſurus*, the Maker may alter upon Deathbed: But, if one hath conceived a Tailzie in Favour of his Heir at Law, who would ſucceed, tho' it had not been made, he cannot divert the Succeſſion by any Deed on Deathbed, notwithſtanding the Reſervation to alter *in Articulo mortis*. A Power reſerved to alter at any Time in the Life of the Maker of the Tailzie, without the Addition, *& in Articulo mortis*, implies only, that he can do ſo *in Liege Pouſtie*.

9. The Effect that Forfeiture of an Heir of Tailzie, hath, with Reſpect to Subſtitutes claiming after him, is ſet forth in another Place *(b)*.

SECT.

(a) *July* 1688, Tenant *contra* Tenant, and the L. of *Drum*.
(b) *Vid.* Part III. Book I. Ch. 3.

SECT. II.

Of Fees granted to one Perſon and his Heirs, and thoſe conceived in Favour of more Perſons and their Heirs.

WE have in *Scotland*, not only Fees of Lands and Heritage, but alſo Fees of Money or Debts, called *Feoda Pecuniæ vel Nominum:* Of both which, by Reaſon of their Affinity in the general Analogy of Law, I ſhall here diſcourſe.

Fees are granted to more Perſons, either jointly, called conjunct Fees, or ſubordinately.

Conjunct Fees are conceived. either in Favour of Strangers and their Heirs, or to a Man and his Wife, and their Heirs.

1. Where Fees are granted to two or more Brothers, or Strangers jointly and their Heirs, all are Fiars equally, or for their Proportions, and poſſeſs the Fees *pro Indiviſo*, till a Diviſion thereof be made to them, by the Action *Communi dividundo*. If a Bond be conceived ſimply to Perſons in conjunct Fee, and the Heirs of one of them; the Perſon to whoſe Heirs the Sum is provided, is regularly underſtood to be Fiar. But this Rule holds only preſumptively, and may be overballanced by ſtronger Preſumptions: As, when a Father takes Security in Lands to himſelf, and his Son *nominatim*, and the Son's Heirs, the Father is Fiar. Where there are divers Degrees of Subſtitution of the Heirs of ſeveral Perſons, the Perſon

Perſon whoſe Heirs are firſt in the Inſtitution or Subſtitution, is Fiar; and both theſe his own Heirs, and the others ſubſtitute after them in *ſecundis Tabulis*, are Heirs of Proviſion to that Fiar.

2. When Lands are diſponed, or Sums of Money payable to a Man and his Wife in conjunct Fee and Liferent, and their Heirs; or their Heirs in Fee; the Husband is Fiar, and the Wife's conjunct Fee reſolves only in a Liferent: Which Interpretation of Law is founded upon the Husband's Prerogative and Dignity of his Perſon, to whom the Wife is ſubjected, as her Head. Yea, a Clauſe in a Bond bearing a Sum to have been borrowed from a Man and his Wife, and making it payable to the longeſt Liver of them two in conjunct Fee, and to the Heirs gotten between them, or their Aſſigns; which failing, to the Heirs and Aſſigns of the laſt Liver, makes the Husband Fiar, and the Wife Liferenter, albeit ſhe be the laſt Liver. But this Preſumption, of the Man's being Fiar, may be taken off by a ſtronger contrary Preſumption, where it is evident that the Fee was the Wife's, and a Liferent only deſigned for the Husband. As, if an Heireſs ſhould, without any onerous Cauſe, reſign an Eſtate fallen to her after her Marriage, in Favour of herſelf and Husband, the longeſt Liver of them in conjunct Fee, and their Heirs, and thereupon both of them be infeft; the Wife would be ſole Fiar, and the Husband Liferenter only.

Or,

Or, if the Reverſion of Lands belonging heretably to the Wife, were taken to her Husband and her, and their Heirs; the Wife's Heirs would exclude the Husband's. And, where a Sum is provided to a Man and his Wife, and their Heirs of the Marriage, which failing, to the Wife's Heirs and Aſſigns; ſhe is Fiar: Becauſe, none other than the Fiar can aſſign.

3. A Right to Moveables, conceived in Favour of a Man and his Wife, and their Heirs, muſt divide betwixt both their Heirs, who ſucceed equally thereto.

CHAP. III.

The general Ways of acquiring Right to Things, conſiſting of Property and Poſſeſſion.

A Right to Things is acquired to one. 1. By his Fact and Deed called Occupancy. 2. By Acceſſion to what already belongs to him. 3. By the Deed of another.

1. Occupancy is One's taking Poſſeſſion of Things belonging to no private Perſon, by Hunting, Fowling, or Fiſhing in Places where he hath Right to do ſo; or, by finding a Thing loſt, whereof the true Owner doth not appear to claim it, after all Diligence uſed to diſcover him by Proclamation.

2. Acceſſion is the acquiring Right to an acceſſory, by being Proprietar of the principal

pal Thing. Acceſſion is either natural, or artificial. Natural Acceſſion is either Procreation, whereby the Birth of Female Creatures that belong to us, are ours, according to the Rule *Partus ſequitur ventrem*; or Alluvion, which is the inſenſible Accretion of Earth to Ground, bordering on a River, by the Force of the Water. Artificial Acceſſion is the adding one Perſon's Thing to another's. In which Caſe, that which is added for the Sake of the other, as Ornament upon a Garment, or *in Dubio*, that which is of leſs Value, is reputed acceſſory, and follows the Principal: So, as the Owner of the former muſt yield up the Poſſeſſion to the Proprietor of the latter. But he, who thus acquires the Property of other Mens Materials, is liable to the Owner, in ſo far, as he is a Gainer. Again, Buildings belong to thoſe, who are Maſters of the Ground on which they are built. But, a Recompence is allowed to the Builder for his Work, and Materials that accrue to the Ground, in ſo far, as the ſame is profitable to the Heretor of the Ground, by affording him a greater Rent for it.

3. A Right to Things, is acquired to one by the Deed of another, either in Immoveables, or Moveables. Immoveables are acquired by real and heretable Rights, partly veſted in Vaſſals, partly in Superiors. Moveables are acquired by Obligations and perſonal Rights.