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PART I.

Of Persons.

Persons may be considered in their natural, and in their relative or civil Capacities.

B O O K I.

Of Persons in their natural Capacities.

PERSONS in their natural Capacities are distinguish'd. 1. By their Sex. 2. By their Age. 3. By some natural Infirmary, or Incapacity of Mind or Body.

C H A P. I.

Persons distinguished by their Sex.

THE Sex is Male, or Female, or an *Her-maphrodite*, *i. e.* both Male and Female, which is esteemed to be of that Sex, which is most prevailing in the Person.

In

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In some Cases the Condition of Men is in Law better than that of the Women, in so far as the Latter are removed from the publick Offices of Judge, Magistrate, Advocate, &c. and cannot bear Witness in civil Causes, except where they are necessary Witnesses. In other Cases, Women have Advantage by Law, and their Condition is better than that of Men. Thus a Woman can sooner make a Testament, Marry, or go out of Pupillarity, than a Man. She is not obliged to attend the King's Host; When Males betwixt 60 and 16 are called out.

C H A P. II.

Persons distinguished by their Age.

MALE and Female have divers Ages to several Purposes, in which they have more or less Power given them, *viz.* Impuberty, or Pupillarity; Puberty, or Minority; and Majority, or perfect Age.

Those who have the Inspection of Persons under Age, or their Fortunes, are, 1. Tutors and Curators, properly so called. 2. *Quasi* Tutors and Curators.

Pupillarity in Males continues till 14, and in Females till 12 Years of Age: That is, Law subjects them, during that Period of their Life, to the Care of Tutors.

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TIT.

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T I T. I.

Of Tutors, and the several Kinds of them,

1. **A** Tutor, (so called a *Tuendo*) is one, who hath a Power and Faculty to govern the Person and Estate of a Pupil, whom Law supposes incapable to manage himself aright. The Tutor's Office is term'd *Tutory*, or *Tuition*.

2. Tutors are of three Sorts. 1. Nominate or Testamentary Tutors. 2. Tutors of Law. 3. Tutors Dative.

[1.] Tutors Testamentary are those named by the Father in Testament, or some other Writ, in Virtue of the Paternal Power: For tho' a Tutor be named in any other Writ than a Testament, the Nomination is of a Testamentary Nature, and alterable at any Time, during the Father's Life: The Mother, or other Person, who gives any Thing to a Child, may also name Tutors for managing what is disposed, during the Child's Pupillarity.

[2] Tutors of Law, are either extraordinary, who are given to Idiots and furious Persons, &c. of which hereafter (*a*), or ordinary, who are given to Pupils, upon account of their Nonage. If there be no Tutor Testamentary, or, if the Person named accept not, the nearest Agnate or Kinsman by the Father's Side,

(*a*) Vid. infr. Ch. 3. Tit. 1.

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Side, who is 25 Years of Age, and would be Heir to the Pupil, may succeed to the Office by Law (*b*), who is therefore called Tutor of Law. 'Tis the next Male Agnate: For a Woman, tho' she would be Heir to the Pupil, failing his own Children, cannot be serv'd Tutor of Law to him. One may be serv'd Tutor of Law, before any Judge, upon a Brief out of the Chancery, tho' the Pupil live not within his Jurisdiction: And the Service being retoured to the Chancery, a Nomination of the Tutor is given out; which is a sufficient Title of Administration. This Service must be expedited within Year and Day, from the Time such a one is capable to be Tutor.

A Father is Tutor of Law to his own lawful Children, without being authoriz'd by a Service; but is Tutor to his natural Children, only for managing what flowed to them from himself.

[3.] A Tutor Dative is he whom the Sovereign Appoints by a Gift under the quarter Seal, where the Tutor of Law neglects to serve within a Year after he might have done it. One desiring to be Tutor Dative, gives in a Signature to the Exchequer: In passing whereof Regard is had to the Pupil's Interest, in bestowing the Office on a Person supposed to be most careful: For which End the Pupil's nearest Friends by Father and Mother, are to be previously

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viously

(a) Act 52. Par. 7. §. III.

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viously cited, or a Consent under their Hand procured (a).

3. The three Sorts of Tutors aforesaid, differ in the following particulars. 1. A Tutor Testamentary is capable to act, by Virtue of the simple Nomination, tho' the Testament be not confirmed, without being obliged to find Surety, *Rem Pupilli salvam fore*, or to give his Oath *de fidei Administratione*. But Tutors of Law must find Caution before they act: And Tutors Dative should both find Caution, and make Faith *de fidei*, tho' that Oath be never required. 2. A Tutor Testamentary is always preferred to the Tutor of Law, or Tutor Dative, but Differences about Preference to the Office cannot be compromis'd or taken away by Arbitration. 3. A Father may, in his *Liege Poustie*, name Tutors to his Children, with this Quality, That they shall neither be liable for Omissions, nor yet *in solidum* (b). But such a Quality in the Service of the Tutor of Law, or in the Gift of a Tutor Dative, would not profit him. 4. The Custody of a Pupil's Person, after seven Years of Age, belongs to a Tutor Testamentary or Dative; but not to a Tutor of Law.

4. All Tutors act generally themselves for the Pupils, without their Concurrence.

5. After the Years of Pupillarity are run out, those who were formerly under the Conduct of
Tutors

(a) Act 2. Par. 2. Sess. 3. *ch.* II. (b) Act 8. Sess. 6. Par. 1. *W.*

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Tutors, change the Name of Pupils for that of Minors: Tho' the Word *Minor* be also frequently used, to denote any Person under twenty one Years of Age, whether over or under Pupillarity.

6. Minors, after Pupillarity, get the free disposal of their own Persons, can make Wills, Marry, and are punishable for Crimes or Trespasses. But Law allows the Assistance of Curators to Ballance their Levity and want of Experience in Civil Affairs, till they are of Perfect Age, which is twenty one Years complete.

T I T. II:

Of Curators, and the several Kinds of them;

1. **A** Curator, (from *Cura*) is one, who hath a Power or Faculty to manage the Affairs of others, who are held incapable to do for themselves.

2. Curators are either Extraordinary, or Ordinary.

Extraordinary Curators are, 1. Those given by the Sovereign to manage controverted Estates. 2. Curators given to such as cannot order their own Matters upon the Account of some Infirmity of Body or Mind; of which hereafter.

Ordinary Curators, are either Curators *ad Lites*, or Curators *ad Negotia*,

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[1.] A Curator *ad Litem*, is one appointed to authorize some civil Action or Suit, at the Instance of, or against a Pupil or Minor, having or wanting Tutors or Curators, who is given by the Judge before whom the Action is pursued, at the Desire of either Party. This Curator is not bound to find Caution for the Minor's Indemnity: Because, he doth not intromet with any of the Minor's Effects, and his Office extends only to the Process for which he is authorized, the Event whereof mostly depends upon the Justice of the Minor's Claim.

[2.] Curators *ad Negotia*, are so called, because, they're mainly designed for administering the Minors Extrajudicial Affairs; not but that they may, and are obliged to authorize the Minor in civil Actions; Curators *ad Litem* being calculated only to serve a Turn for want of those.

3. Curators *ad Negotia*, are either Curators of Law, or Curators nominated, or Curators elected.

[1.] Fathers are Curators of Law to their Children, and Husbands to their Wives. But in this, a Wife is in a different Case from an ordinary Minor, that his Curator's Office is at an End, when the Child is Twenty One; whereas Curatory over a Wife dissolves only with the Marriage. Again, she cannot oblige her self for Sums, even with her Husband's Consent; but can grant Rights to her Husband

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or to any other for his Behoof ; if ratified in his absence before a Judge.

[2.] Curators nominated, are, Curators named by a Father in *liege Poustie* to his Children, whom he may appoint with this Quality, That they shall not be liable for Omissions. Nor are these Curators bound to find Caution, unless their Condition alter (*a*).

[3.] Curators elected, are those whom the Minor chuses for himself, by Way of Process at his Instance, wherein some two or three of the nearest of the Father's and Mother's Friends being cited upon nine Days warning, and all others having Interest, generally at the Market Cross of the head Burgh of the Jurisdiction, where the Minor's Lands ly, to compear before the Minor's Judge Ordinary, to hear and see Curators decern'd to him. The Minor, at the Day, gives in a List of those he desires, who, if they accept, must subscribe their Acceptance upon the signed Nomination given in by the Minor, make Faith, find Caution *de fidei administratione*, and make Inventories of the Minor's Writs and Estate. Upon all which the Clerk extracts an Act of Curatory (*b*). Curators are not to be chosen before the Tutory expire, and if they be, the Act of Curatory is null.

4. Cura-

^a) Act 8. Sess. 6. Par. K. W. (^b) Act 35. Par. 6. Q. M. junct. Act. 2. Par. 2. Sess. 3. Ch. II.

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4. Curators do not act for their Minors, as Tutors do for their Pupils, but they Act with them, and consent to their Deed,

Having spoke of Tutors and Curators separately, I shall now treat of them jointly.

T I T. III.

What is common both to Tutors and Curators, and peculiar to either.

WHEN several Tutors or Curators are named, so many of them are often appointed a *Quorum*, that is, their joint Concurrence to be necessary to make Deeds subsist in Law, and sometimes one or more of them to be *sine quo*, or *sine quibus non*, that is, whose Consent must be had to all their Deeds.

S E C T. I.

Who may be Tutors or Curators, if any are bound to accept the Office, and what is Acceptance.

1. ANY Person may assume the Office, whom Law hath not debarr'd expressly, or by necessary Consequence. In general, all are excluded from it who are incapable to perform the Duties thereof. Such are Minors, Fools, furious and interdicted Persons, Papists (a), and Rebels at the Horn for civil Debt, are disqualified to be Tutors or Curators. Women may

(a) Act 8. Par. 1. Sess. 1. Ch. II.

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may be Tutors nominate, or Dative, but cannot be served Tutors of Law.

2. Those, who are qualified for the Office, are free to accept or refuse the same. Yea, Persons named by a Father in his *Liege Poustie* to be Tutors and Curators, may accept the Office of Tutor, and decline to be Curators as they please (a). Nor are Tutors or Curators liable as such, but from the Time of their Acceptance. But if a Legacy be left to a Tutor or Curator nominated, he must either accept the Office, or want the Legacy; whether the Bequest was made in Contemplation of his Acceptance, or abstractly without any such View. Acceptance is either express, when the Tutor or Curator compares, and formally embraces the Office; or it is tacit, and presumed from some Act, inferring the same, as subscribing Writs for the Pupil as Tutor. If several Tutors or Curators be named jointly, all must accept; or if so many be appointed a *Quorum*, that *Quorum* must accept, otherwise the Nomination is void. Where they are named without the Word *Jointly*, or any *Quorum* expressed, the major Part must accept to make the Nomination subsist. If more Tutors or Curators be named jointly and severally, the Nomination is good, if any one accept. Where a *sine quo non* is named, and he refuses to accept, the Nomination falls.

S E C T.

(a) Act 8. Sess. 6. Par. K. W.

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S E C T. II.

The Duties of Tutors and Curators, what they, their Factors and Cautioners are liable to.

1. SOME of the Duties of Tutors and Curators are previous to their meddling with the Minor's Fortune; others respect the Administration it self.

2. The Preliminary Duties are, 1. The making Faith, and finding Caution to act to the Minor's Advantage, which Tutors Dative, and Curators not named by the Father in his *Liege Poustie* are liable to. But Tutors Testamentary, and Curators so named by the Father, do neither; and a Tutor of Law only finds Caution. 2. All Tutors and Curators must compile an Inventory of the Writs and Estate, before they enter upon the Administration, and add to the same what afterwards comes to their Knowledge, within two Months after their attaining Possession of the same, otherwise Debtors are not oblig'd to pay to them (a).

3. The Duties of Administration concern, 1. The Custody of the Pupil's Person, his Maintenance and Education. 2. His Fortune and Affairs.

[1.] The Mother, while she continues a Widow, has the keeping of the Pupil till the Age

(a.) Act 2. Par. 2. Sess. 3. Ch. II.

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Age of seven Years, and sometimes longer in special Cases. But ordinarily the Custody of the Pupil, after seven Years of Age, belongs to a Tutor Testamentary or Dative, tho' not to a Tutor of Law; and even of an Infant, if the Mother be dead, or married to a second Husband. Upon the Tutor's Application, an Aliment will be modified to the Pupil suitable to his Fortune, and if that be omitted, the Tutor will be allowed only what he can instruct to have expended upon that Score, not exceeding the Annualrent of the Pupil's free Stock.

[2.] Minors must be authoriz'd by their Tutors and Curators in all Actions of Law, wherein they are either Pursuers or Defenders. When Minors are pursued, it sufficeth to cite them personally, or at their dwelling Place; and their Tutors and Curators, if they any have for their Interest, generally without naming them at the Market-Cross of the Head Burgh, where the Minor dwells. Upon which they may be decerned with the Minors for their Interest, and personal Execution will ly against them during their Office for any Deeds prestable by the Nature thereof, or for making Forthcoming so much of the Minor's Money, as they are decerned to pay.

[3.] Tutors or Curators are not to suffer the Minor to uplift his own Rents, lest he mispend and squander them away. And if any Co-Tutor or Co-Curator act unaccountably, or without Consent of the rest, these should get him

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him remov'd from his Office as suspected and maleverfing.

[4.] For making Debts due to the Minor effectual, a Tutor or Curator is liable to do exact Diligence. He should use Adjudication, Poinding, or Arrestment, according as the Subject of the Debtor's Estate is affectable by Diligence. If there be nothing to adjudge, poind, or arrest, personal Execution by Horning and Caption is to be used. But Tutors or Curators are not bound to do Diligence, except where the Minor may find his Account therein, by recovering the Debt.

[5.] Money due or belonging to the Minor, before the Tutory or Curatory, if then bearing Annualrent, must be kept always employ'd upon Annualrent; if not then bearing Annualrent, must be laid out at Interest, within a Year after the Tutor or Curator's Acceptance of the Office.

[6.] As to Rents falling due to the Minor during the Tutory or Curatory, the Money Rent of Lands should be put out at Interest, within Half a Year after the Term of Payment, and Victual Rent within a Year, in so far as the same are not otherwise necessarily expended. A Year is also allowed to reemploy principal Sums uplifted by Tutors and Curators. But they are oblig'd only to take in the Minor's Annualrents out of secure Hands, and stock them in a principal Sum once during their Office, bearing Interest from the expiring thereof.

Nor

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Nor are they liable sooner for Annualrent of Annualrents yearly uplifted.

[7.] Regularly Tutors and Curators are accountable *in Solidum* to the Minor, both for Intromissions and Omissions: And are bound to relieve one another *pro Rata*. But a Father is impowered to name, in his *Liege Poustie*, Tutors and Curators to his Children, with this Quality, that they shall not be liable for Omissions, or *in Solidum*, but only each for himself (a).

[8.] A Tutor continuing to administer after elapsing of Pupillarity, is liable as a Curator for Omissions. But a Curator, who continues to uplift Rents after Majority, is answerable only for his actual Intromissions, as *Negotiorum Gestor*.

[9.] Factors, having general Factories, are liable to the Minors, in the same Manner, as their Constituents. But Cautioners for Tutors or Curators cannot be sued, till the Principals be discussed.

S E C T. III.

The Powers of Tutors or Curators.

1. F O R clearing and fixing the Boundaries of a Tutor or Curator's Power, I shall first point out what they cannot do, and then what is within their Sphere.

2. Some Things both Tutors and Curators are absolutely prohibited to do; others Tutors cannot

(a) Act. 8. Sess. 6. Parl. K. W.

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cannot do without the Authority of the Lords of Session interposed to the Deed.

3. Neither Tutors, nor Minors with Consent of their Curators, can gift away the Minor's Effects. Nor can any Tutor or Curator be Author *in Rem Juam*, by authorizing the Minor to do any Deed tending directly to the Authorizer's Advantage, as to become bound for him to a Third Party: But he may authorize his Deed tending immediately to the Minor's Advantage, tho' in Consequence it be profitable to the Curator himself. Tutors or Curators cannot set Tacks to run longer than their Office, tho' these were no ways prejudicial to the Minor. Nor should they attempt any Thing that's hazardous, or buy Land with the Minor's Money. Tutors cannot sell or wadset the Pupil's Heretage, or heretable Rights, without the Lords Authority interposed in a Process, wherein his Creditors and nearest of Kin are called to hear and see it found and declared, that there is a Necessity to sell some Part, and to hear the Price determined. But a Tutor wants not such a Sentence to empower him to renounce a Wadset Right belonging to his Pupil, because he may be forced to it; nor to grant Infeftment in his Pupil's Lands in Implement of the Father's Obligement.

4. Tutors and Curators have active Powers to set or labour the Minor's Lands, uplift his Rents or Annualrents, or principal Sums not well secur'd; to carry on any Work left to the
Minor,

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Minor, which cannot be otherwise disposed of; to employ his Money at Interest in good Hands; or upon Land Security; to pay his Debts, and clear his Estate of Burden; to appoint Factors to act in their Room, and give them reasonable Salaries.

5. A Curator may, after expiring of the Tutor, enter, *brevi Manu*, to the Minor's Lands possess'd by the Tutor; and meddle with the growing Corns sown by him. And tho' the Authority of the Lords be necessary to a Tutor's Alienation of his Pupil's Lands; a Minor may, with Consent of his Curators, effectually sell his Lands, without the Warrant of a Judge.

6. Where there are several Tutors or Curators nam'd jointly, all must concur in the Management to make it subsist; or, if so many be appointed a *Quorum*, that whole *Quorum* must act. Where they are named without the Word jointly; or any *Quorum* express'd, the major Part must concur. If more are named jointly and severally, any one by himself can act or authorize. Where one or more are named *sine quo*, or *sine quibus non*, his or their Consent should always be had.

S E C T. IV.

The Effect of a Tutor or Curator's Administration.

1. **W H A T E V E R** Right a Tutor acquires of what belongs to his Pupil, is presumed to be acquired with the Pupil's Means; and so accrue to him, tho' taken in the

C Tutor's

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Tutor's own Name. The Oath of a Tutor is sustained, to prove against his Pupil the Tutor's own Fact, as the Quantity of Rents intromitted with by him in the Pupil's Name. But the Tutor cannot be held as confess thereon, for refusing to depone as a Party, but must be put to it by Horning and Caption, as a Witness.

2. A Tutor or Curator's Administration produceth Action betwixt the Minor and third Parties. It subjects also the Tutors or Curators, and the Minors to mutual Actions of Compt and Reckoning; the one at the Instance of the Minor, called *Actio Tutela directa*, if levelled against Tutors, and *utilis curationis Causa actio directa*, if against Curators; the other at the Instance of Tutors, called, *Actio Tutela contraria*, and at the Suit of Curators, called, *Utilis Curationis Causa Actio contraria*.

3. *Actio Tutela directa*, is a personal Action competent to a Minor and his Heirs after Pupillarity, against his Tutor and his Heirs, that he may account for his Administration, and restore what he hath belonging to the Minor.

4. *Utilis curationis Causa Actio directa*, is competent to Minors, against their Curators, after expiring of their Office, for clearing Acccompts betwixt them, and divesting the Curators of their Minor's Rights and Effects.

5. In which Actions, one of more Tutors or Curators may be convened, without insisting against the rest; all being liable *in solidum*

Ch. 2. Law of Scotland. Tit. 3. § 4. 35

dum to the Minor. But these Actions against their Tutors and Curators are not competent, till after the Ist of their respective Offices.

6. *Actio Tutelæ contraria*, is competent to Tutors, and *Actio utilis Curationis Causa contraria*, to Curators, after expiring of their respective Offices, and clearing their Accompts, against the Minors, to restore and make up to them the profitable Expences laid out by them, in Prosecution of their Trust on the Minor's Accompt. But Tutors or Curators are to expect no Reimbursement of their Expences in the Minor's Affairs, if they have not made Inventaries in the Terms of Law (a), tho' necessarily bestowed in Pursuits, or legal Diligences, but only Allowance of what they expended on the Minor's Entertainment, or upon his House and Estate (b). Tutors or Curators have no Salaries by Virtue of their Office: And if Salaries be appointed to them by the Person who names them, these are understood to be in lieu of incident Charges. But none of these Counteractions can be pursued by Tutors or Curators, till after they have clear'd their Accompts with the Minor. Because, till then, they are presumed *intus habere*, to have sufficient Effects of the Minors, to answer all Demands on their Part. And they but rarely occur: Because, a Tutor, or Curator, when pursued in the direct Action of Compt and Reckoning, may get

C 2 Allow-

(a) Act 2. Par. 2. Sess. 3. Ch. II. (b) Act Seder. 25th. February 1697.

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Allowance of what he could recover by his contrary Action.

S E C T. V.

How Tutorry and Curatory ends.

TUTORS, and Curators, after they have once accepted the Office, cannot renounce it: But it expires either *ipso jure*, or an End is put to it by Sentence of a Judge.

1. The Office expires by the Effect of Law,
 1. When the Minor arrives at such an Age. Tutorry continues no longer than Pupillarity, that is, 14 Years in Men, and 12 in Women. Curatory expires at the Period of 21 Years in both. 2. The Office expires by the Death of the Minor, or of his only Tutor or Curator. if more be in the Office jointly, it falls by the Death of any one; or if a *Quorum* named be broke by the Death of so many, as that such a Number is not left behind, the Nomination becomes null. Where Tutors or Curators are named without the Word *jointly*, or any *Quorum* express'd, the Office falls by the Death of the major Part: But if they be named jointly and severally, tho' all should die, save one, the Office subsisteth in that one surviving. Where a *sine quo non* is named, his Death voids the Nomination. 3. The Office expires by the Marriage of a Female Minor, or the second Marriage of a Mother, who is Tutrix to her own Child.

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tors and Curators (*a*). And in Effect are such *passive*, but not *active*.

As Minors have the Benefit of being under the Care and Conduct of Curators: So they have many Privileges.

T I T. V.

The Privileges competent to Minors.

I. **S**OME Privileges are competent to Minors only in the State of Minority, others even after they become Majors.

2. Privileges competent to Minors while under Minority, are these following, 1. They're exempted from personal Execution by Caption or Warding for Debt, or any civil Cause, during their Pupillarity (*b*). 2. The legal Prescriptions, except three Years Prescriptions of Actions of Removing, and of Debts not founded on Writ (*c*), run not against Minors. 3. The Legal of Apprisings or Adjudications doth not run against them (*d*), and during their Minority they're obliged only for the Annualrent of the Sums in the Apprisings (*e*). 4. *Non tenentur placitare super hereditate paterna* (*f*), they are not obliged to answer any Process that may evict Heritage or Conquest possess'd by them, as succeeding immediately
to

(*a*) Act of Seder. 10 June 1665. (*b*) Act 41. Sess. 6. Par. K. W. (*c*) Act 82. 83. Par. 6. Ja. VI. (*d*) Act 6. junct. Act 7. Par. 23. Ja. VI. (*e*) Act 10. Par. 1. Sess. 3. Ch. II. (*f*) Stat. K. W. c. 39.

Ch. 2. Law of Scotland. Tit. 5. § 5. 39

to any ascendant in the right Line, who died in the peaceable Possession by Virtue of Infeftments, whether the Minor's Right be principally quarrelled, or only consequentially, as depending upon the Right of one who is Major. But then Process will be sustained without delay against the Majors Right, notwithstanding the Contingency with the Minor's Interest. This Privilege is competent to Minors against Minors, as well as others: But doth not hinder a Minor to implement his Father's Obligation to denude of the Estate, or to Answer in possessory Actions concerning Marches or division of Lands, or in a proving the Tenor of a Writ exclusive of the Minor's Right. Neither doth it bar the Superior to pursue for his Casualties, nor avail a Minor, whose Father's Right is quarrelled upon his Fraud, or by Improbation, Forfeiture, or Recognition for his, or his Authors Crimes or Trespases.

3. The Privilege competent to Minors after their Minority, is the Benefit of being restored against what was done to their Prejudice by their Tutors, or by themselves, with or without Consent of Curators. Some of these Deeds against which a Minor is reponed, are *ipso jure* null by Exception, as a Tutor's Alienation of his Pupils Heritage without a Warrant of the Lords; and the self prejudicial Deed of a Minor having Curators without their Consent. Others are quarrelable only in the

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Way of Reduction, as a Deed done by a Minor wanting Curators, to his Hurt. In order to reduce a Minority Deed, the Minor may raise and execute a Reduction before he be twenty five Years of Age. For tho' twenty one Years be the Term of Minority, four after, called *anni Utiles*, or *Quadriennium Utile* are allowed to commence Reduction therein, with, or without a previous Revocation. In which Action the Pursuer must prove Minority at the Time of the Deed, and that he was lesed or wronged thereby, whether in judicial or extrajudicial Affairs. The Benefit of Restitution *in integrum* upon Minority and Lesion, is competent also to the Minor's Heir, who, if he be also Minor, may reduce the Deed of his Predecessor dying in Minority, at any Time before he himself be twenty five Years of Age. But a Person becoming Cautioner for a Minor as such, is nothing profited by the Minor's being restored.

4. This Privilege of Restitution ceaseth, where the Minor deceives the Person who Contracts with him, by calling himself Major: or either expressly ratifies or homologates the Deed after his Majority; or is lesed in the Matter of his own Profession or Employment, as when a Lawyer is over-reached in Point of Law, or a Merchant in a Mercantile Affair. But a Minor's swearing to adhere to the Deed, doth not hinder it to be declared void at the

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Ch. 3. Law of Scotland. Tit. I. 41

Instance of any Person related to the Minor, and the exacter of the Oath infamous (a).

C H A P. III.

Persons differenc'd from others by some Incapacity of Mind or Body.

IDIOTS, Madmen, dumb and deaf Persons, are, for their Safety, put under the Conduct and Management of Tutors and Curators; and prodigals are restrained from squandering away their Fortunes by Interdiction.

T I T. I.

Tutors and Curators of Idiots, furious Persons, &c.

1. **T**HE nearest Agnat or Kinsman on the Father's Side of Idiots or furious Persons (b), or such as are Dumb and Deaf, are Tutors and Curators of Law to them. Who may be serv'd at any Time by an Inquest upon a Brief of Idiocy issued forth of the Chancery. In appointing such Tutors, the full Blood is preferr'd to the half Blood, according as they have Right to succeed to the Idiot's Estate. Reduction of Deeds of Idiots, or furious Persons, is effectual from the Time the Granter is found by the Inquest to have been in such a State of Infirmity (c). The Office

(a) Act 19. Par. 3. Ch. II. (b) Act 19. Par. 10. Ja. VI.
(c) Act 67. Par. 8. Ja. III.

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Office of such Tutors expires not by their Pupil's having lucid Intervals, but when they fully recover their Senses.

2. Where the next Agnats serve themselves Tutors and Curators of Law to Idiots and furious Persons, Tutors Dative may be named by the Exchequer, or Tutors and Curators by the Father. A legal Administrator will exclude the next Agnat: For a Father is Administrator to his Idiot, or furious Child, and a Husband to his Wife who is an Heiress.

T I T. II.

Of Interdiction.

Interdiction is either voluntary or judicial.

1. Voluntary Interdiction is a Writ, whereby a Person, sensible of his own Extravagancy and Mismanagement, obliges himself to do nothing without Consent of some Friend or Friends therein mentioned, called *Interdictors*. Such a Bond of Interdiction made by a Person who wants the Solidity requisite to negotiate his own Affairs, is good, albeit the Granters Incapacity is not flatly narrated: And where it is narrated, the Bond may, without Regard to such a Narrative, if not true, be reduced.

2. Judicial Interdiction is a Sentence of the Lords of Session, discharging a Person known to be of extravagant Profuseness, and obnoxious
to

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to be easily cheated, to act without Advice and Consent of certain Interdictors.

3. In order to put all Persons in *mala fide* to deal with such as are interdicted, the Lords issue forth Letters of Publication, to be executed or serv'd (not against the interdicted Party himself) but only at the Market Cross of the head Burgh of the Jurisdiction where he lives, and to be recorded within 40 Days thereafter, either in the particular Register of that Jurisdiction, and also where his Lands ly, if these and the dwelling Place be within different Districts (*a*), or in the general Register at *Edinburgh* (*b*), otherwise the Interdiction is null. Registration in the general Register affects all his Lands within *Scotland*; but Registration in the particular Register, affects no Lands without that Jurisdiction.

4. Deeds of an interdicted Person alienating Heritage to his Hurt, without Concurrence of the Interdictors, are reducible *ex capite Interdictionis*, at the Instance of himself, his Heirs or Assignees, or Creditors, or even at the Suit of Interdictors without his Consent. But the interdicted Person may grant personal Obligements, or dispose of his Moveables, and make profitable Bargains about his Heritage.

5. Interdictors being appointed only to authorize the Deeds of the interdicted, are not liable to Diligence. They may authorize him
to

(*a*) Act 119. Par. 7. junct. Act 264. Par. 15. *Ja*. VI. (*b*) Act 13. Par. 16. *Ja*. VI.

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to gift away or gratuitously to affect his Heritage; tho' a Curator could not so authorize his Minor. But it sufficeth not to support his Deed without the Interdictors Consent, that they subscribed Witnessses to it.

6. Voluntary Interdiction is dissolv'd, 1. By Consent of the prodigal Person and his Interdictors, if he turn frugal and provident, or was interdicted without just Cause. If in either of these Cases, the Interdictors refuse voluntarily to repone him to the free disposal of his Fortune; the Lords, upon a Bill presented to them, will *causa cognita*, take off the Interdiction. 2. Where a certain Number of Interdictors is declared a *Quorum*, the Interdiction falls, if so many die, as that Number survives not.

7. Judicial Interdiction lasts till the Party is declared by Sentence of the Lords to have been interdicted without a just Cause, or to be no longer subject to that Levity, and Prodigality, which occasioned his being interdicted,



B O O K

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B O O K II.

Of Persons in their relative or civil Capacities.

PERSONS may be considered either in
General, or more Particular relative of
civil Capacities.

C H A P. I.

Of Persons in General relative or civil Ca- pacities.

1. **P**ERSONS in a general relative or
civil Capacity, are the King and his
Subjects.

2. Subjects are either those of the Royal Fa-
mily, as the Queen Consort, the King's eldest
Son; or ordinary Subjects. But the King ha-
ving both a private and publick, or politick
Capacity, and the Queen by the common
Law being a publick Person, and the King's
eldest Son (now styled Prince of *Great Britain*)
having an Appanage or Patrimony in *Scotland*,
erected in a Jurisdiction, called *The Principality*,
with his Chancery and Officers of State; as
Advocate, Justice-General, &c. An Account
shall be given of these in the second Volume
concerning the publick Law.

3. Ordi-

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3. Ordinary Subjects are 1. Perpetual or Temporary. A perpetual Subject is 1. A natural born Subject, that is, one who is born under the Allegiance of the King, or the Child of such a Subject, tho' born out of the Allegiance of his Majesty (*a*). 2. One who hath the Right of a Subject by Denization or Naturalization. Denization is an Infranchisement by the King's Letters Patents. Naturalization is a Right of a Subject given by Act of Parliament. A temporary Subject is an Alien, or one born out of the Allegiance of the King, residing in his Majesty's Dominions, who oweth Allegiance to his Majesty, so long as he is within his Protection. Ordinary Subjects are divided, 2. Into the Clergy and Laity.

T I T. I.

Of the Clergy.

THE Clergy, are those set apart for the Ministry and Service of God. They are so called from the Greek Word Κληρος, a Lot, or Portion; either, because these are the Lot or Portion of the Lord; or, because the Lord is their Lot and Inheritance; or, for that anciently, both among the *Jews* and *Gentiles*, Persons us'd to be chosen into sacred Offices by Lot. The Clergy of *Scotland* have, in different Periods of Time, been of different Denominations and Characters.

SECT.

(*) 7. A. Chap. 5. junct. 10. A. ch. 5.

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S E C T. I.

Of the Clergy in Time of Popery.

WHILE Popery swayed here, there was both a *Regular* and *Secular Clergy*, who all own'd the Pope as their Spiritual Monarch.

1. The *Regular Clergy* were the Monks, who lived in Monasteries, so called, because put under the Ties of Vows, and Rules of Mortification and Devotion, according to their several Orders and Institutions. Their distinguish'd Offices were *Abbots*, *Priors*, and *Sub-priors*. The Abbot was he in whom the chief Care and Management of the Religious House was lodged. The Dignity of an ordinary Abbot, is next to that of a Bishop. Some Abbots were independent of Bishops, and therefore called *Abbates exempti*; others were invested with Episcopal Power, who had the Name of *Sovereign Mitred Abbots*. Priors were either dependent or independent. Dependent Priors were either *Claustal*, or *Conventual*. A *Claustal* Prior held Rank in the Monastery next to the Abbot, and govern'd during his Absence, or a Vacancy of the Office: As a *Sub-prior* supplied the Office of Prior in the like Circumstance. A *Conventual* Prior, was one who presided over a Party of Monks detach'd out of some Monastery, and settled in a distinct Place called *Cella*, or *Grangia*, or *Obedientia*, to look after remote Lands and Rents belonging to the
Mona-

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Monastery. An independent Prior was the Head of a Religious House, call'd a *Priory*, not depending upon any Monastery. Some of which Prioriës had lesser Priories in other Places belonging to them.

2. The Secular Clergy were distinguish'd into *Orders* and *Dignities*, or *Prelacies*. Some of these *Orders* were call'd *Minor*, as Door-keepers, Readers, Acolytes and Exorcists. Others were nam'd greater *Orders*, as *Priests*, *Deacons* and *Subdeacons*.

[1.] The Priests, or Under-Clergy were dispos'd into Parish Churches, or Chappelties, or had their Posts assign'd them at Altars, or in Chappels of Cathedral, or Collegiate Churches. Some Parochial Priests were call'd Parsons, others term'd Vicars. Parsons were Incumbents, who possess the Benefices call'd Parsonages, by Virtue of their own immediate Rights. Some of these Incumbents were proper Parsons, that is, who perform'd the Sacred Function; others were only representative Parsons, who supply'd the Cure by the Help of Vicars, as Parsons not qualified to serve, for being Laymen, or who had Pluralities, or were infirm, or Collegiate or Cathedral Churches who had Right to the Parsonages, and gave a small Salary to their Vicars. Some of these Parsonages belonged to the Prelate as Parson, or Titular, call'd *Mensal Churches*, because allow'd for maintaining his Table, whereof he serv'd the Cure by a Substitute put in by himself

Ch. 1. Law of Scotland Tit. 1. §. 1. 49

self. Others belong'd to the Chapter in Common, in the planting whereof the whole Members had a joint Interest: Whence these were term'd Common Churches. So that Vicars were the Priests of Parishes, whereof the Tithes were appropriated to a Prelate, or religious House, or impropriated to Lay-men. Parish Churches were either free Churches, or those under Patronage. Free Churches were such, as the Incumbent got Right to *plena Jure*, by Collation and Institution. Churches under Patronage, were those to which Persons who had either endowed, or built them, or given the Ground to build on, called Patrons, were impowered to present Ministers for supplying the Cure, and enjoying the Benefice. Which Patrons had also other Privileges, as a splendid Seat, and Burial Place in the Church, Disposal of the Fruits of the vacant Benefice, a Right of Precedency among the Clergy in solemn Processions, and to be alimented by the Church, if reduced to Poverty. Nor could the Benefic'd Person, without Consent of his Patron, do any Thing material, such as the granting of Feus, &c.

[2.] The Dignities we had in *Scotland* were those of Primate or Metropolitan, Arch-Bishop, Bishop, their Subalterns, and Provofts. The Metropolitan, and Arch-Bishop, presided over whole Provinces, differing only in this; that the former was the more honourable Arch-Bishop, having his Seat in a Metropolitan City. Bishops had both a spiritual and civil Jurisdiction with-

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in their own Diocies; and each had his own Official to judge in consistorial Matters, and confirm Testaments. In the Room of these Officials, Queen *Mary* appointed Commissaries. The Bishop's Parish Church was term'd a Cathedral. In every Cathedral there were some collegiate Canons, or Prebendaries, with a Dean over them, who made up the Bishop's Chapter or Council. The dignified Members thereof, were, the Dean, Arch-Deacon, Chanter, Chancellor, and Treasurer. The Dean presided over the Prebendaries, and the Arch-Deacon was in Effect the Bishop's Vicar. The Chanter was Rector of the Choir, who sung the Mass. The Chancellor was Secretary to the Chapter, and kept the Seal thereof. The Treasurer had the Custody of all Things belonging to the Church, and had under him a Sacrist, or Vestry Keeper. Provoests were, either Governours of Colleges instituted for the Education of Youth; or had the Inspection of collegiate Churches, consisting of Prebends, or Canons, instituted for Divine Service, and singing of Mass for Souls.

S E C T. II.

Of the Protestant Clergy.

I. ABOUT the Dawning of the Reformation, after abolishing of the Pope's Jurisdiction, in the Year 1560, we had ordinary Ministers distributed among the Burghs, and Superin-

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perintendants of Shires, ordained for Administration of Church Affairs. In the Year 1592, Presbyterian Parity was established by Law, and all Prelacy, or Superiority of any Office in the Church above that of a Presbyter, abolished (a).

2. In the Year 1606, Arch-Bishops, and Bishops of Cure were restored (b). And in the Year 1612, full Power was given to these Bishops, for Ordination, and Church Rule (c), but no civil Jurisdiction. Prelates were thrust out in the Year 1638, and Presbytery reviv'd. But were restored in the Year 1662 (d), consisting of two Arch-Bishops, and 12 Bishops, who were elected by the Chapter of the See they were design'd for, upon a Writ from the King, called a *Conge d' Estire*; that is, A Power to elect, and an Edict affix'd on the most patent Door of the Cathedral, charging the Chapter to convene for Electing. The Chapter's Election under their Seals being return'd, the King granted a Patent to the Person elected, carrying a Right to the Revenue, which pass'd thro' all the Seals; and a Mandate to three Bishops at least, for his Consecration, which pass'd only the great Seal *per salutem* (e). The Formality of admitting the inferior Episcopal Clergy was, by Presentation to the Bishop, and Collation from him, and

D 2

Institi-

(a) Act 116. Par 12. §. VI. (b) Act 2. Par. 18. §. VI.
 (c) Act 1. Par. 21. §. VI. (d) Act 1. Par. 1. Sess. 2. ch. 11.
 (e) Act 21. Par. 22. §. VI.

§2 Part I. *Institutes of the* Book II.

Institution : Unless where the Bishop, as Patron, conferr'd *pleno jure*. In which Case, the Presentation and Collation were the same.

3. In the Year 1689, Prelacy was again abolished (a). And in the 1690, Presbyterian Government re-established (b.), and the Power of Presentation of Ministers by Patrons discharg'd; for which a valuable Consideration was ordained to be given to the Patrons, besides a Right they got to Tithes not heretably disposed (c). But now, Patrons, who had not formally renounc'd their Power of Presentation, are restor'd to it (d).

4. In Presbyterian Government, there are only three Orders of Ecclesiasticks, *viz.* Ministers, Ruling Elders, and Deacons. The Office of Ministers is to preach, administer the Sacraments, catechise, pronounce Church Censures, ordain ruling Elders and Deacons, assist at the Imposition of Hands upon other Ministers, and moderate or preside in Ecclesiastical Judicatures. They are settled in their Livings thus. Where a vacant Church has no Patron, a Probationer, that is, one licenc'd to preach, may be ordained and admitted Minister thereof by the Presbytery, upon a Call from the Heretors and Elders of the Kirk Session in a Country Parish, or from the Magistrates, Heretors and Elders within a Burgh. Whereupon he extracts an Act of Ordination and

(a) Act 3. Sess. 1. Par. W. & M. (b) Act 5. Sess. 2. Par. W. & M. (c) Act 23. *ibid.* (d) 10. A. C. 12.

Ch. I. Law of Scotland. Tit. I. § 2. 53

and Admission, and has thereby a legal Title to the Benefice. If a vacant Church has a Patron, a Pastor is ordained and admitted therein, upon a Presentation from the Patron. But if those in a Country Parish, who have Power to call, or the Patron, who has Right to present, do it not within six Months after the Vacancy, the Presbytery may plant the Church *Jure devoluto* (a).

5. A Minister has Right to the whole Year's Rent or Stipend, if he enter before *Whitsunday*, and to the Half, if his Entry be after *Whitsunday*, and before *Michaelmas*. But if he enter after *Michaelmas*, he gets no part of that Year's Stipend. When a Minister's Stipend is only modified, it affects the whole Tithes out of which it is modified, and may be exacted from any Intrometter, whose Tithes will go so far; or so much on't, according to their Extent, even from Tenants paying a joint Duty for Stock and Tithe. But then an Heretor distress'd gets a proportionable Relief off the rest in the Parish. When the Tithes of certain Lands are allocated for Payment of the Minister's Stipend, he has no Title to any Tithes without the Bounds of his Locality. General Letters of Horning are allowed for Implement of Decrets of Locality (b). Minister's pouding for their Stipends may comprize the Goods on the Ground (c). No special

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cial

(a) Act 23. Sess. 2. Par. W. & M. 10. A. Ch. 12. (b) Act 13. Sess. 2. Par. W. & M. (c) Act 21. Par. 1. Sess. 3. Ch. II.

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cial Decrets for Minister's Stipends can be suspended, except upon Production of Discharges, or upon Consignation (a). Actions for Ministers Stipends commenc'd in inferior Courts, cannot be advocated; Suspensions of, and Actions for them, before the Session, are discuss'd summarily; and Suspenders, against whom Letters are found orderly proceeded, should be decern'd in a fifth Part more at least, than the Sums charg'd for Expences and Damage (b).

6. A Minister's Relation to his Church, and Interest in the Stipend thereof, is dissolv'd by his being transported to another Church, or deposed, or by his Resignation of his Charge in the Hands of the Presbytery, and their accepting of it; or by his Death.

If his Title was so extinguished before *Whitsunday*, no Part of that Year's Stipend belongs to him; if after that Term, and before *Michaelmas*, he gets the Half; and if after *Michaelmas*, the whole Year's Stipend. In Case of a Minister's Death, his Widow, Children, or nearest of Kin, get Half a Year's Stipend, over and above what was due to the Deceas'd, call'd the *Ann* (c): Which is equally divided betwixt the Relict and the Children; and failing Children, betwixt her and the other nearest of Kin. If there be neither a Widow nor Children, it belongs to the nearest of Kin. This *Ann* needs no Confirmation: Nor can the Minister

(a) Act 6. Par. 2. Sess. 1. Ch. II. (b) Act 27. Sess. 5. Par. W. & M. (c) Act 13. Par. 2. Sess. 3. Ch II.

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nister dispose of it to Strangers, or his Creditors affect it.

7. Elders and Deacons are Men of good Character, chosen by the Kirk Session, approv'd by the Congregation, and ordained by the Minister for Life. Both attend the Minister in visiting and catechising, and serve at the Communion Table; and are Members of the Kirk Session. But their Offices are thus distinguish'd. Ruling Elders have an equal Vote with the Minister, in all Business in the Kirk Session, and may be chosen to assist and vote in any other Church Judicatory. But the proper Business of Deacons, is, to collect the Offerings for the Poor, to inquire into, and acquaint the Session with their Case; and to distribute to them as the Session appoints. They may give their Advice in the Kirk Session, if asked, but have no Vote, except in Matters relating to the Poor.

T I T. II.

Of the Laity.

THE Laity (from the Greek *Λαος*) are the People, distinct from the Clergy. These are either the Nobility, or Commons.

1. The Nobility or Peers are divided into Dukes, Marquesses, Earls, Viscounts, and Lords. Since the Union of the two Kingdoms, all, who were Peers of *Scotland* at that Time, and the Successors to their Honours and Dignities, take Place immediately after the

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then Peers of the like Orders and Degrees in *England*, and before all Peers of *Great Britain* of the same Rank, created after the Union. The Nobility of *England*, before the Union, and Peers of *Great Britain*, since, have many considerable Privileges, which all Peers of *Scotland* before the Union, and the Successors to their Honours and Dignities enjoy, except the Right of sitting in the House of Lords, and the Privileges depending thereon, particularly, the Right of trying Peers in criminal Causes, which are appropriated to sixteen only of the *Scottish* Peers, elected, from Time to Time, by their own Body of Nobility, upon a Proclamation issued out under the great Seal of *Great Britain*. These Elect Members have all the Privileges of any *English* or *British* (a) Peer, and are elected in Manner prescrib'd by Statute (b).

2. The Commons are distinguished into *Barones Minores*, the lower Nobility, and *Burgesses*.

[1.] *Barones Minores*, consist of Knights and Gentlemen. Knights, are those of the Thistle, Baronets, and Batchelors.

Knights of the Thistle are the most Honourable Order of Knights in *Scotland*, first erected by King *Achaim*, in Honour of St. *Andrew*, the Tutelary Saint of *Scotland*.

Baro-

(a) Art. of Union 22, & 23. (b) Act 8. Sess. 4. Q. A. and 8. A. Ch. 23.

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Baronet, is a Degree of hereditary Honour, founded by King *Charles I.* in the Year 1625, for advancing the Plantation of *Nova Scotia* in *America*, and settling a Colony there.

Knight Batchelor, is a Degree of Honour for Life.

Gentleman, is one, whom his Blood and Race doth, without any other Title, distinguish from the Multitude, as being descended from a Family that hath born a Coat of Arms.

Gentry and Arms descend to all Sons alike, only the Eldest beareth the Arms without, and the younger with Difference.

[2.] Burgeses, are those who have the Privilege of Trade and Merchandizing within their respective Burghs, exclusive of all others. Those who exercise this Privilege, are called trafficking Burgeses; and such as do not use it, are stiled honorary Burgeses. Burgeses are divided into those who have Right to themselves only for Life, called simple Burgeses; and such as have it to themselves and their Children, called Burgeses and Gild-Brethren.

C H A P. II.

Of Persons in particular relative or civil Capacities.

PERSONS in particular relative Capacities, are, 1. Man and Wife. 2. Parents and Children. 3. Masters and Servants.

T I T.

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T I T. I.

Of Husband and Wife.

MAN and Wife are made such by Marriage, the first Society of Divine Institution: Which Espoufals do often precede.

Espoufals are, a Contract, or mutual Promise to marry each other hereafter: From which either Party may refile, while Matters are intire; that is, till carnal Copulation follow.

I shall set forth, 1. What is Marriage, and the several Kinds of it. 2. What Persons may not contract Marriage. 3. The Effects and Consequences of Marriage, while it stands. 4. How Marriage may be dissolv'd, and the Effects of the Dissolution,

S E C T. I.

What is Marriage, and the several Kinds of it.

1. **MARRIAGE** is a Conjunction of Man and Woman, by mutual Consent, in a constant Society of living together till Death part them. For mutual Consent makes the Marriage, and founds the conjugal Rights before Consummation: So be the Parties are capable to consummate it; but Affinity doth not arise from Marriage before Consummation.

2. Marriage is, 1. Either formal, by an express Consent; or presum'd, by tacit Consent; imply'd

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imply'd from the Parties cohabiting as Man and Wife, or owning themselves to be married, or from Copulation subsequent to Espoufals, or a Promise of Marriage. For Law doth not require the *Hierologia*, the Sacerdotal Benediction, as essential to Marriage; but considers the Ceremony of the Church, as a Piece of good Order to ascertain so important a Matter.

3. Marriage is either regular and solemn, or clandestine and irregular.

[1.] Regular Marriage in Time of Prelacy, was either after proclaiming the Names and Designations, or Additions of the Parties, three several Times in their Parish Churches, called *Proclamation or Publication of Bans*, or by a Dispensation from the Bishop. But now Marriage is regular, if celebrated by a Minister of the Gospel authoriz'd by the established Church, after Proclamation of Bans. Which Proclamation hath this legal Effect, that Persons are thereby put *in Mala Fide*, to contract or deal with the Bride, to the Bridegroom's Prejudice, even after the first Diet.

[2.] Clandestine and irregular Marriage is that, which is not gone about in the orderly Way aforesaid. For which the Celebrator, Witnesses and Parties are liable to severe Penalties (a), and may be prosecuted at the Instance of those concerned, or of the Procurator Fiscal, where they happen to be questioned (b).

The

(a) Act 34. Par. 1. Sec. 1. Ch. II. Junct. Act 6. Sec. 7. Par. K. W. (b) Act 12. Sec. 5. Par. K. W.

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The inflicting of which Penalties, doth not exempt from Church Censure. Nor can the Parish Minister discharge them, upon the Offenders satisfying the Church. But clandestine Marriage subsists, as to all other Effects.

S E C T. II.

Who may not contract Marriage.

PERSONS cannot marry, 1. Who cannot consent, as those within the Years of Pupillarity, that is Males under 14, and Females under 12 Years of Age. Error in a substantial Point, hinders Consent to Marriage: As, when a Man marries one Woman in Stead of another. But Marriage will subsist, notwithstanding of a circumstantial Mistake: As, when one marries a Strumpet, thinking her a Virgin; or a poor Woman, from an Opinion that she was rich. The Consent of Parents is not necessary to make the Marriage effectual, tho' Decency require it. Nor is the Consent of Curators required to a Minor's Marriage. 2. Marriage is forbidden betwixt those who are too near allied, or related to one another. Alliance or Relation, is either Kindred or Affinity. Kindred or Consanguinity is the Tie of Persons by Blood or Birth, deriving their Original from the same common Parent, called Kinsfolk. Kinsfolk by the Father's Side, are termed *Agnats*; those by the Mother's Side *Cognats*. Affinity is a Relation betwixt one of two married Persons,

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Persons, and the Kindred of the other. Kindred and Affinity are distinguished by Degrees and Lines. A Degree is nothing but the Distance betwixt Relations. A Line is a Series of Persons descending from one common Stock. 'Tis Twofold, the Right, and the Collateral Line. The right Line consists of Parents, or other Ascendants; and Children, or other Descendants. The Collateral Line consists of Brothers and Sisters, and other remote Kindred that are on the Side one of another, every one in his own Line, under the Ascendants common to them. Marriage betwixt Kinsfolk in the right Line of Ascendants or Descendants is altogether unlawful, and is prohibited in the Collateral Line between those, who are in the Place of Parents and Children, as Uncle and Niece, Aunt and Nephew. In short, we sustain no Marriage that is contracted within the *Levitical Degrees* (a); and all Persons may lawfully marry, who are not there prohibited, consequently Cousin-Germans, but no nearer Relations are allowed. The same Degrees in Affinity, as in Consanguinity are forbidden (b).

S E C T. III.

The Effects and Consequences of Marriage while it stands.

I. S O M E of the Effects of Marriage, while it stands, do concern both the Husband and Wife.

(a) Levit. 18. (b) Act 15. PAR. 1. §. VI.

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Wife equally ; others do primarily concern the Husband ; and a third Sort do more immediately respect the Wife.

2. Those concerning the Husband and Wife alike, are, 1. A Kind of Communion of Movables, or common Interest in one another's moveable Goods. But some Things moveable, as to other legal Effects, fall not under this Communion, as moveable Bonds bearing Annual-rent (c), Heirship Moveables. 2. All Donatives betwixt Man and Wife are revocable by the Granter, at any Time during his Life ; even tho' it bear a Renunciation of the Privilege to revoke. This Revocation is either express, or tacit, inferr'd from after inconsistent Deeds of the Granter : As by disposing to another, or by contracting Debt, whereupon the Creditor affects the Subject of the Gift. And tho' the Granter should swear judicially never to revoke it, a promissory Oath of that Kind could not hinder the Effect of such a tacit indirect Revocation by Diligence, at the Instance of the Donor's Creditor, or by a posterior Grant to another for an onerous Cause. There is this Difference betwixt a Man's Gift to his Wife, and her's to him : That the former will be sustained as a remuneratory Gift *propter Nuptias* simply, if there was no Contract of Marriage, and it be moderate, and may be revoked, in so far, as it is exorbitant, or unsuitable to the Quality and Condition of
the

(c) Act 32. Par. I. Sec. 1. Ch. II.

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the married Persons; whereas, a Gift by a Wife to her Husband is revocable, except it bear either in Implement of her Contract of Marriage, or be expressly given in Place of a Tocher, where there was no anterior Contract; or, unless the Husband hath given her the Equivalent. But, if a Man or Wife dispoſe in free Gift principally to a Third Party, a judicial Ratification will render the Deed effectual, tho' the Husband or Wife hath some consequential Advantage thereby. Nor is a Gift betwixt Man and Wife null; for it is confirm'd by the Granter's Death, and cannot be revoked by his Heir.

3. The Effects of the conjugal Society, with Relation to the Husband, are either active or passive.

[1.] The active Effect of it is his *Jus Mariti*, which includes, 1. A Power over the Wife's Person. 2. An Interest in her Goods. 1. He may recover his Wife's Person from any that would with-hold her from him. She must follow and live with him, serve and obey him in Cases within the Limits of reverential Love and Duty. He is a Tutor to her. 2. A Husband's Interest in the Wife's Goods, carries, 1. A Right to manage her whole Fortune heretable and moveable, which is a Faculty so inseparable from his Character, that any Reservation thereof by the Wife, or Renunciation by him before the Marriage, is ineffectual, and accrues and falls back to himself. 2. The Husband

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band hath Right to the Property of all his Wife's Moveables falling under the Communion, that is *Species* of Goods, Sums of Money, moveable Bonds not bearing Annualrent, Rents of Lands, and Annualrents of heretable Bonds, which Marriage is a legal Affignation to. This Right of Property, or some Part thereof, he may, before the Marriage, effectually renounce by Contract, in Favour of his Wife. And alimentary Provisions to a Wife, in case the Husband cannot, or will not entertain her, are so personal to her, that they don't return to the Husband or his Creditors, whether made by the Husband, if not *in Fraudem Creditorum*, or by a Third Party: But the Husband may only partake with her in the Benefit thereof, for their joint Sustenance.

[2.] The passive Effects of Marriage, with Respect to the Husband, are, 1. He is obliged to aliment his Wife, and furnish her with all Things necessary for her Life, Health and Ornament, according to his Means and Quality; but not to give her these to live out of his own House. A Husband, after Inhibition used by him against his Wife, is not liable for any Thing furnished to her, unless it is suitable to her Quality, and he cannot instruct, that he sufficiently provided her other Ways. 2. A Husband, during the Marriage, is liable to moveable Debts contracted by his Wife before the Marriage: That is, Debts of the Nature of those, which, if owing to the Wife, he hath
Right

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Right to *Jure Mariti*. So that he is not liable for the principal Sum in his Wife's moveable Bond bearing Annualrent, but only for the Annualrents thereof, during the Marriage. A Husband is not liable for his Wife's Trespasses.

4. Effects of Marriage, with Relation to the Wife, are, 1. Her Interest in the *Paraphernalia*, which belong to her as absolute Proprietary, exempted from the Communion of Moveables, and from the Husband's Administration, or the Diligence of his Creditors, and may be impignorated by the Wife. Some Things are of their own Nature *Paraphernalia*, as those peculiar to the Wife's Person, and no ways proper to the Husband's Use, unless of greater Value than suits with her Quality. Other Things, which are of common and promiscuous Use to Man and Woman, and so not of their own Nature *Paraphernalia*, may become such, by the Husband's giving and appropriating them to his Wife, before, or on the Marriage Day, or by giving them to her afterwards, and not taking them back from her in her Lifetime. But Things of common Use, so appropriated to a Wife by her Husband, are reckoned *Paraphernalia*, only with Respect to him, who did so appropriate them, and esteem'd common Moveables, as to a second Husband, unless, also appropriated by him to the Wife. 2. A Wife cannot be pursued or cited, without calling her Husband for his Interest; and if she marry, during the Dependence of a Suit against her, it must stop

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III

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till the Husband be cited. 3. She cannot pursue her Husband, except upon very special and urgent Considerations: As, when *vergit ad Inopiam*, or when she pursues an Aliment against him, who hath diverted from her, &c. Nor can a Wife charge or pursue any other Person, without the Concurrence of her Husband; unless he be forfeited, or unreasonably refuse to concur. 4. A Wife's Bond, or personal Obligation for Debt, even with the Husband's Consent, is null, and cannot be made good by her judicially ratifying the same, and swearing not to controvert it. She is free from personal Execution for civil Debt. But in some Cases, a Wife may grant effectual Obligations and Rights, with Consent of her Husband. As, 1. A Wife having an Aliment settled upon her, and exempted from her Husband's *Jus Mariti*, may, with his Consent, grant personal Obligements to affect her, or that Aliment. 2. She may, with his Consent, dispone or wadset her Heritage, or oblige herself, *ad Factum præstandum*: But, in Regard, such Rights may be quarrelled *super Vi & Metu*, Wives granting heretable Rights, or renouncing their Jointures, are usually required to ratify such Deeds judicially upon Oath. 3. A Wife's Bond, or personal Obligation, will, in some Cases, bind her Husband: As her Bond for Money furnished towards her necessary Aliment; or the Bond or Bill of a Wife *Præposita Negotiis*, for Goods she buys.

S E C T.

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S E C T. IV.

How Marriage is dissolved; and the Effects of the Dissolution.

MARRIAGE is dissolved by Death of either Party, or by Divorce.

1. If Husband or Wife die within Year and Day of the Marriage, all Things done in Contemplation thereof on either Side blow up, become void, and return to the same Condition they were in before the Marriage, unless there was a living Child of the Marriage heard cry; or that it was otherwise pactioned. But Marriage is effectual by the Birth of a living Child, tho' both it and the Parents die within the Year. If Marriage, after expiring of the Year, dissolve by Death of either Party, the Survivor hath Right to the contracted and legal Provisions, unless the latter be discharged, or inconsistent with the former.

[1.] The legal Provisions which a Wife hath Right to by her Husband's Death are, *Jus Relictæ* in the Moveables, and a Terce of his Lands, an Aliment to the next Term after his Death, and the Expence of her Mournings, if it become her to have Mournings. And albeit she hath absolute Right to her own *Paraphernalia*, whereof no Part falls under her Husband's Executry, she hath a Share of the Habilements of his Body falling under Executry.

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[2.] By

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[2.] By Dissolution of the Marriage thro' the Wife's Death, the Husband surviving hath Right; 1. To the Tocher, unless it was by Agreement, to return to the Wife's Representatives; and also, to the Moveables that were in Communion, deducing the Wife's legal Share, which goes to her Executor, and the Childrens *Legitime*, if there be Children of the Marriage. 2. If the Wife was an Heirefs, and there was a Child of the Marriage heard cry, her Husband hath Right to the Courtesy of *Scotland*. 3. A Husband is no further liable to pay the Debts of his deceased Wife, than in so far, as he was a Gainer by her Estate, beyond the *Onera Matrimonii*, or a suitable Tocher, which he might have got with another Wife, or in so far, as his Estate was affected by complete Diligence against him, during the Marriage, unless he then gave a Bond of borrowed Money for the Debt. Nor is the Husband accountable for his Wife's Debt as *Lucratus*, if she have left any visible Estate to her Representatives, till these be first discussed.

2. Divorce is the Separation of married Persons in their Lifetime, by the Sentence of the proper Judge; that is, the Commissaries of *Edinburgh*, who have the sole Power to decide in all Causes of Divorce (a). This Sentence is either declaratory, or pronounced for some Cause emergent during the Marriage. A declaratory Sentence is that, which declares the Marriage

(a) Act 6. Parl. 20. J. VI.

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Marriage void from the Beginning : Because, either Party stood married before to another yet living ; or, for that the Parties are within the forbidden Degrees of Consanguinity or Affinity ; or, because of the natural Unfitness of either Party, to concur in the Work of Generation, which is called Frigidity in the Man, or Impotency in the Woman. Causes emergent during the Marriage, for which Parties may be divorc'd, are Adultery, and wilful Desertion. The Law seems to require four Years wilful Desertion, before the Deserter may be cited, and sentenc'd to adhere (b) : But the Commissaries decern to adhere upon a Year's Desertion, or less Time, thinking it sufficient, that four Years precede the Decreet of Divorce. If the Deserter, after being charg'd and denounc'd upon the Decreet of Adherence, continue obstinate, the Church excommunicates him ; and then the Commissaries proceed to Divorce ; the Pursuer whereof is bound to swear, that the Process is not carried on by Collusion. After Decreet of Divorce is obtained, the Person guilty, forfeits all Benefit by the Marriage (c) : But the innocent or injured Party hath the same Benefit, as if the other were naturally dead. Marriage betwixt one divorc'd for his own Adultery, and the Person with whom it was committed, is unlawful and null, and their Issue incapable to succeed to them (d). Nor can the Woman divorc'd

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for

(b) Act 55, Par. 4, §. VI. (c) d. Act 55. (d) Act 20, Par. 16, §. VI.

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for Adultery, marrying the Man with whom she offended, or haunting his Company at Bed and Board, dispone her Lands, or fet Tacks thereof to him, or the spurious Issue betwixt them, or to any other Person in Prejudice of those, who otherwise would have succeeded as Heirs to her (a).

T I T. II.

Of Parents and Children.

Parents and Children according to the Nature of Relatives, may be divided the same Way, *viz.* into lawful and unlawful.

1. Unlawful Children are those begotten by a Man, to whom the Mother is not married at all, or unlawfully married, by their being within the forbidden Degrees, or by either Parties having a lawful Spouse living. These are term'd *Bastards*, and their State and Condition *Bastardy*, which can be only tried before the Commissaries of *Edinburgh*. The Effect of *Bastardy* is, that it disables the Bastard to succeed to his natural Father, or to any Kinsman on the Father's Side, nor can they succeed to him (b).

2. Lawful Children are either born in Wedlock, or legitimated: For the Law of Adoption is not received here.

[I.] Chil-

(a) Act 117. Par. 12. 7. VI. (b) *Vid.* Part III. B. I. Ch. 3. § 3.

Ch. 2. Law of Scotland. Tit. 2. 71

[1.] Children born in Wedlock, are considered by the Law while they are in the Mother's Belly, and after they are born. Law takes notice of Children in the Belly, in so far as they are supposed to be born, if that Allowance will be to their Advantage after they are born. Children, after they are born, are distinguished. 1. By the Time of their Birth. The eldest Son in Right of his Birth, hath the Privilege of Primogeniture, which entitles the eldest Son to the sole Succession in his Parents Heritage, &c. And albeit Daughters, failing Sons, succeed equally, the eldest only gets all indivisible Rights. 2. Children are either of the whole Blood, who have one common Father and Mother, called *German Brothers and Sisters*; or of the half Blood, who have either the same Father, and not the same Mother, called *Consanguinean*, or have one Mother, but different Fathers, called *Uterine Brothers and Sisters*. Children born in Wedlock, are held to be lawful, tho' brought forth immediately after the Marriage, unless the Husband disown upon Oath any antenuptial Copulation with his Wife. *In dubio*, he is presumed to be Father of a Child, who, the Time of Conception, was married to the Mother. But this Presumption of Law may be taken off by contrary Proof, as that the Husband was absent, when the Child behaved to have been gotten.

[2.] Legitimated Children are natural Children made lawful, either by subsequent

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Marriage of the natural Parents, or, by a Letter of Legitimation from the King.

3. A Father has the Custody and Conduct of his Children, and Right to the Fruit of their Labours, till they be Forisfamiliatę by Marriage, or by setting up a separate Employment for their Livelyhood. He is lawful Administrator, both as Tutor and Curator *ipso jure* to them, without being liable for Omissions or misauthorising; and may, *in Liege Poustie*, name others to be Tutors or Curators to them after his Death, with this Quality, *That they shall not be liable for their Omissions (a).*

4. Children are entitled to Entertainment and Education from their Parents, and Parents from their Children, where the one is in Case to do it, and the other wants it. Under which Denomination of Parents and Children, all Ascendants and Descendants are comprehended: But the first in Degree are to be preferred, and the paternal Line to the maternal. Children owe Reverence to their Parents. The beating or cursing Father or Mother is punishable with Death, if the Offender be above the Age of Sixteen, and arbitrarily if he be under that Age, and above Pupillarity (b).

T I T.

(a) Act 8. Sess. 6. Par. K. W. (b) Act 20. Par. 1. Sess. 1. Ch. II.

Ch. 2. Law of Scotland. Tit. 3. 73

T I T. III.

Of Masters and Servants.

HUmane Necessity and Conveniency introduced the Distinction of Masters and Servants.

Servants are either Slaves, or Hirelings, or Apprentices.

1. Slaves are those, who are at the arbitrary Pleasure of their Masters, and may be sold by him as his Goods. We have no vestige of Slavery remaining in *Scotland*, except in Coal-hewers and Salt-makers; who having once been employed to work in Coal-Pits or Salt-Houses by the Coal or Salt-Master, are, by Law, without any exprefs Paction, intrall'd or astricted, during their Life, to perform these Services to him; and may be recovered by him from any unlawful Possessor, to whom they unwarrantably revolt from their Master's Service. These, if challenged within a Year, the Possessor must deliver back to their Master within twenty four Hours, under the pain of 100 *l. Scots* to be paid to him (a). Coal and Salt-Masters are also impowered to apprehend and set to Work Vagabonds and sturdy Beggars (b). But are not allowed to give to Coal-Hewers more than 20 Merks Money foresaid in Fee or Bounty; and these and other Work-men in
Coal-

(a) Act 11. Par. 18. *Ja. VI.* junct. Act 56. Par. 1. Sect. 1. Ch. II. (b) Act 11. Par. 18. *Ja. VI.*

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Coal-Pits and Salt-Houses, must Labour all the six Days of the Week upon pain of 20 *ſb. per diem*, to be paid to their Master, besides corporal Punishment, and making up his Prejudice (a).

2. Hirelings or hired Servants are free Persons, who voluntarily undertake to serve their Masters for a Time, upon Condition of their getting Payment of the Fee or Wages agreed to betwixt them and their Masters. Justices of Peace, in their Quarter-Sessions, ought to determine the Quantity of Servants Fees, and may compel, by Imprisonment and other Punishment, to serve for these Fees; and oblige Masters to pay them (b). A Servant hired from *Martinmas* to *Whitsunday* may be detain'd by his Master, or compelled by a Justice of Peace to stay with him for the same Hire from *Whitsunday* to *Martinmas*, unless the Servant can verify that he is hired to another Master: And a Justice of Peace may compel a Servant running away, to return to his Master (c). Servants may be corrected with Moderation by their Masters. If a hired Servant die within the Term, the Hire is due to his Representative only, according to the Time he served. But if a Servant retained for a Year fall Sick, or be disabled to work for a Time, while there is hope of his Recovery, the Master

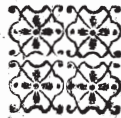
(a) Act 56. Par. 1. Seff. 1. Ch. II. (b) Act 8. Par. 22. *Ja. VI.* Act 38. Par. 1. Seff. 1. Ch. II. (c) Act 21. Par. 23. *Ja. VI.*

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fter cannot put him away, or abate his Wages upon that Score.

3. *Apprentices* are a Kind of Servants, who are bound by *Indentures* (with their own Consent, or by the Agreement of Friends) to serve Men of Trade for certain Years, upon Condition, that the Master shall, in the mean Time, Instru&t them in their Art or Mystery. The general Duties of Master and Apprentice towards one another may be collected from the Style of Indentures enter'd into betwixt them; which varies according to the Nature of the Employment, the Apprentice is to learn, and the Articles stipulated betwixt the Parties. Apprentices, during the Time of their Apprenticeship, are under the Power of their Masters, to whom any Gain they make doth accrue, unless it be otherwise pactioned, and may be corrected moderately by them for Faults and Misdemeanours.

Having thus far spoke of Persons in their natural and civil Capacities; I proceed to treat of their Estates.



P A R T