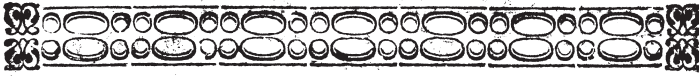

 Part II. *Institutes of the* Book II.



B O O K II.

Of real and heretable Rights.

C H A P. I.

How real and heretable Rights are constituted.



REAL and heretable Rights are constituted by Charter and Seafin, which jointly are called INFÉUDATION, INFÉETMENT, or INVESTITURE.

T I T. I.

Of Charters.

A Charter is in Effect, a Disposition made by a Superior to his Vassal, for some Thing to be performed or paid by him.

Charters are distinguished into original Charters, and Charters by Proffess.

An original Charter is that, whereby a Fee is first constituted.

A Charter by Proffess, is a renewed Disposition of the Fee. Such is either voluntary, as a Charter upon Resignation, and a Charter of

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of Confirmation ; or necessary, which the Superior can be forced to grant, as a Charter in Obedience to a Charge upon an Apprising or Adjudication.

A Charter of Resignation is granted upon the Vassal's resigning his Property, in the Hands of the Superior *ad perpetuam Remanentiam*, or *in Favorem (a)*.

Charters of Confirmation are those, that ratify Rights formerly made to Vassals, by their Superiors, or by the Vassals to some other Persons. Charters confirming Rights granted by Vassals, are either Charters of Confirmation of publick Rights, or Charters confirming base Rights.

In some Charters by Progress, a Clause *de Novodamus*, useth to be inserted, which dispones the Fee, as by an original Right, and hath the Effect thereof. 'Tis extended to the utmost against Subject Superiors : And against the King, to secure the Property from being evicted by Nullities, Forfeiture, Recognition, Purpresture, Disclamation. But it doth not exclude any Casualty burdening only the Property ; as Ward, Marriage, Nonentry, and Liferent Escheat, unless the same be particularly expressed.

A Charter consists ordinarily of six Parts. 1. The Narrative. 2. Dispositive Clause. 3. *Tenendas*. 4. *Reddendo*. 5. Clause of War-randice. 6. Precept of Seasin.

1. The

(a) Part III. B. I. Ch. 1. Sect. 1.

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1. The Narrative contains the special Cause for which it is granted. The Reason moving to grant a Charter, is either Love and Favour, which is called a lucrative Cause; or a Price, or good Deeds, or valuable Consideration, which is term'd an onerous Cause. But, tho' no Cause be express'd; or, tho' the Cause insinuated be not true, the Charter is good.

2. The dispositive Clause mentions what is disposed. Regularly the Charter gives Right to nothing, but what is, at least, implied in this Clause, tho' inserted in other Parts of the Charter. The Parts of Lands disposed, are all express'd in bounding Charters, so called, because they mention the Marches of what is disposed. In other Charters, Lands of a certain Denomination are mentioned, and several particular Parts thereof known, only by the Neighbourhood, or by March-stones, are couched under the Words, *with Parts and Pertinents*.

3. The *Tenendas* in a Charter is, a Clause expressing of what Superior the Lands, &c. are to be held; so called from the first Words thereof. Which, if it contain any Thing not in the dispositive Clause, gives the Vassal no Right to it.

4. The *Reddendo* is, that Clause bearing what the Vassal is to do, or to pay the Superior: So called from the first Word thereof: The various Conception of this Clause, gives Rise to the Difference of Holdings.

5. The

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5. The Clause of Warrantice is that, whereby the Granter of the Charter obligeth himself to warrant or make good the Thing granted to the Receiver. Which is a common Clause both in personal and real Rights.

Warrantice is either personal or real.

[1.] Personal Warrantice is, an Obligation to warrant personally. Of this there are several Kinds, 1. Warrantice from the Guarantee's future Deeds, called simple Warrantice, 2. Warrantice from Fact and Deed, which is, that the Guarantee hath not done, nor shall do any Thing prejudicial to the Right warranted. 3. Absolute Warrantice, that is Warrantice at all Hands, and against all Mortals. Personal Warrantice is either expressed or implied. Warrantice is implied or understood, according as the Deed is onerous or gratuitous. In gratuitous Deeds, simple Warrantice from future voluntary Facts is implied. An adequate onerous Cause infers always absolute Warrantice, tho' no Warrantice be expressed.

[2.] Real Warrantice is, when Infeftment in one Tenement is given in Security of another.

[3.] The Effect of Warrantice is, That if the Thing warranted be evicted, the Person from whom it was evicted, hath Recourse against the Guarantee, by an Action of Warrantice for making up the Loss. To found which Action, when any Suit is moved for evicting the Right warranted, Intimation must

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be made to the Person liable in Warrantice, that he may defend, if he had any relevant Defence against Eviction. Absolute Warrantice is never extended to future Statutory Laws, but incurred only by Eviction for a Cause anterior to it. Such Warrantice in Assignations imports only, that the Debt is truly due, and not that the Debtor is Solvent. No Warrantice takes effect, where Distress and Eviction happen thro' default of the Party warranted. In Charters granted by the King, as supreme Superior *jure coronæ*, (which are gratuitous) Warrantice hath no Effect. But in Charters of Lands, which are no Part of the Crown-Revenue, or annexed Property, His Majesty *utitur jure privato*.

6. The Precept of Seifin is a Command by the Superior to his Baillie, to give Seifin to the Vassal, or to his Acturney. Which may be given not only to the Obtainer of the Precept, but also to his Heir or Assigney, as well after, as before the Death of the Granter of the Precept, or Party to whom it was granted, or both (a).

Charters granted by Subaltern Superiors, may bear a Clause of Registration, to be recorded only in the Books of Session (b).

T I T.

(a) Act 35. Sess. 4. Par. W. & M. (b) *Ibid.*

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T I T. II.

Of Seifins.

1. **S**Eifin is Delivery of Possession of the Subject contained in the Charter, by the Superior, or his Baillie, to the Vassal, or his Attorney, upon the Ground of the Fee. Which is done by delivering the proper Symbols, as a little Earth and Stone, for Land; the Clap and Happer, for a Mill; a Sheaf of Corn, for Tythes; a Net, for a Fishing; a Penny Money, for an Annualrent, &c. in Presence of a publick Notary and two Witnesses, upon which the Vassal takes Instruments in the Notaries Hand, who extends a Writ, called *An Instrument of Seifin*. But Seifin within Burgh should be given by the Baillies and common Clerk of the Burgh (a).

2. When this symbolical Possession is given by the Superior himself, or in his Presence by his Baillie, 'tis called *Seifin propriis manibus*.

3. Instruments of Seifin taken in the Country, must be recorded in the general Register at *Edinburgh*, or in the particular Register of the Shire, Stuartry or Regality where the Lands ly (b), and Seifins, given within Burgh, in the Town-Clerk's Books (c), within 60 Days after the Date thereof; otherwise, they are null, in

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(a) Act 27. Par. 1. §. VI. (b) Act 16. Par. 22. §. VI.
(c) Act 11. Par. 3. ch. II.

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Prejudice of singular Successors acquiring Posterior Rights, and effectual only against the Granter and his Heirs.

4. The Superior, if a Subject, is still infeft, as well as the Vassal, in the Land it self, without mention of the Superiority, which is only a consequence of his granting the Fee. But the King wants not to be infeft. For His Majesty is infeft, *jure Coronæ*, in all Lands, and his being King, is equivalent to Infeftment.

5. Seisin, being only the Assertion of a Notary, proves not, unless the Warrant thereof, mediate, or immediate, be produced, as the Disposition or Precept whereupon it proceeded. But none are obliged to produce Precepts of Seisin after 40 Years Possession (a). Seisin by a Superior to his Vassal, or by a Husband to his Wife, for a suitable Provision, is sustained, without any Warrant under the Granter's Hand, in a Competition with his Representatives. A Seisin is a sufficient Title against Tenants at the Instance of their Master known to possess.

The Fee being thus stated by the Superior in the Person of his Vassal, by Charter and Seisin; It falls next to be considered, what the Vassal gets thereby, and what remains with, and belongs to the Superior, called, *The Superiority, and Casualties thereof*.

C H A P.

(a) Act 214. Par. 14. §. VI.

C H A P. II.

Of the Right established in the Vassal's Person by Charter and Seisin.

REGULARLY the Vassal hath Right to nothing, except what is, at least virtually, included in the dispositive Clause of the Charter. For understanding whereof it is to be observed.

1. That somethings cannot at all be alienated by the King, as the annexed Property, and those publick Rights, called *Regalia Majora*, viz. The Power of making War and Peace, creating Magistrates, naturalizing Strangers, legitimating Bastards, and remitting Crimes.

2. Other Things the Sovereign can dispose only by exprefs Grant; and when so disposed to a Subject, can only be passed over in that Manner by him to another. Such are, 1. Some *Regalia*, as Mines of Gold and Silver, or fine Lead (a), Treasures, the Privilege of killing Swans, and Right to Escheats. 2. Union and Erection.

Union is a Clause in the King's Charter, uniting expressly in one Tenement Lands lying discontigue, or contiguous Tenements of several Kinds, or held of different Superiors, that one Seisin may serve for them all. If a Place

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(a) Act 12. Par. 1. 7. 1.

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For taking Seisin be appointed, that must be observed ; and if no Place be mentioned, Seisin may be given upon any Part of the united Lands.

Erection is the King's erecting Lands and other Things, into the Dignity of a Barony, which implies Union, tho' not express'd.

No Subject can make such Union or Erection, but only the Sovereign, either in an original Charter, or by Confirmation of a Vassal's Charter of the Lands and Tenements ; which doth not alter the Jurisdiction of the Shire, &c. where the Lands united or erected ly. Union or Erection is not dissolv'd by the Vassals alienating part of the Lands to be held of the Superior, but the Part dispoed only is dissolv'd. The Privilege of a Barony is not communicable by any Subaltern base Rights and Infeudments ; tho' the Union implied therein may be so communicated.

3. Some particulars are, tho' not express'd, virtually carried in a Charter. The Clause *with Parts and Pertinents* in the Charter of a Barony, comprehends civil Jurisdiction and Blood-wits, or lesser Crimes, Fortalices, such as the King's Castles in the keeping of Constables, Forrests, Salmond-fishing, Mills, and the Privilege of setting up Hostleries. Such a Clause in ordinary Charters, comprehends every Part of the Lands dispoed *a Cælo ad Centrum*, particularly Wood and Coal, with all Things accustomed to follow the Lands, except

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cept what is reserv'd by Law or Paction: As Mannor Places for Habitation or Conveniency, Barns, Stables, and Lands; or other Things possessed, as Pertinents for the space of 40 Years, tho' not contiguous. One, having a bounding Charter, cannot prescribe a Right to any thing without the Boundary, as Part and Pertinent of Lands contained therein: But Prescription may adject what is within the Bounding, to another Tenement, as Part and Pertinent thereof.

4. The Vassal hath not only Right to what the dispositive Clause entitles him to directly, but also to several Powers inherent by consequence in the Right of Property, as to dispose of the Subject disposed, redeemably or irredeemably, to burden it with Services, set Tacks thereof, put in and remove Tenents, &c. according to Law.

C H A P. III.

Concerning Superiority, and the Casualties thereof.

A Superior may pursue Reduction and Improbation against his Vassals, or others claiming under them, who will be forced to produce their Rights otherwise they will be reduced and improven. He needs not instruct his Right to the Superiority in a Process at his instance, against Vassals who
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derive their Infeftment from him ; But the Vaffals muft either acknowledge it, or disclaim him upon their Peril. He hath for the Duty and Service contain'd in their *Reddendo's*, not only personal Action againft the Vaffals, but alfo real Action of Poinding the Ground againft fingular Succelfors. But he cannot claim annual Services, or any Conlideration for them, unlefs thefe be required yearly in due Time. A Superior is not oblig'd to receive Vaffals upon Refignation, or by Confirmation : But he is bound either to receive Apprifers or Adjugers, as his Vaffals, upon Offer of a Charter with a Year's Rent, or to pay the Debt, and take the Land to himfelf (*a*). No Superior can interpoze another betwixt him and his Vaffal, to make that other his immediate Vaffal.

Some Cafualties of Superiority are common to all Manner of Holdings ; others are common to moft of Holdings ; and a third Sort are appropriated to particular Fees.

T I T. I.

Cafualties of Superiority common to all Holdings.

I. **T**Hefe are fuch as carry the Right of the Fee it felf back to the Superior, and are called *Recognition in general*, viz. Difclamation and Purprefture.

Dif-

(*a*) Act 37. Par. 5. §. III.

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2. **Disclamation**, is a Vassal's wilful and open denying his Superior to be his Superior. This is done either verbally in Judgement, or really out of Judgment, by taking a Charter from another Superior. But any probable Ground of Ignorance will prevent this Forfeiture's taking Effect. A Superior disclaim'd in a Suit at his Instance, against a Person as his Vassal for many Casualties of Superiority, hath it in his Option, either to admit his Disclamation, and take his Advantage thereby, or to instruct his Title and proceed in the Action; but he cannot do both.

3. **Purpresture or Purprusion**, is the Vassal's usurping or encroaching upon the Superior's known uncontroverted Property.

4. Upon either of which two Grounds of Disclamation or Purprusion, the Superior may challenge the Property of the Fee as his own, in a Declarator of general Recognition.

T I T. II.

Casualties common to most of Holdings:

THese are such as entitle the Superior to the Profits of the Fee for a Time, *viz.* Non-Entry, Relief, and Liferent Escheat, which I say are common to most of Holdings, because they don't take place in Burgage or Mortification; in Respect, the Vassal there, being a Society or Corporation, never dies, and
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so can neither be liable to Non-Entry, nor Liferent-Escheat.

S E C T. I.

Non-Entry.

1. **N**Onentry is a Casualty, by which a Superior has Right to the Mails and Duties of the Vassal's Lands, when the Fee is void through his decease, and his Heirs neglect to Enter thereto, when he might, and should do it; or void by Reduction of the enter'd Vassal's Right.

2. The Superior, or his Donatary cannot enter to Possession of the void Fee, till he obtain a general Declarator of Nonentry. But a Superior in Possession by Ward of his Vassal, may continue his Possession, without Declarator, for three Terms subsequent to it, upon the Account of Nonentry, if the Vassal don't enter sooner. Before Citation in the general Declarator, the Superior gets only the retoured Duty (a) in Lands holden Ward or Blench, and the Feu-Duty in a Feu Holding; and the Blench, or other Duty in an Infeftment of Annualrent (b). After Citation, the full Rent of the Lands, or whole Annualrent, in an Infeftment of Annualrent, is due to the Superior, whether the Holding be Ward Blench, or Feu. But this Claim to the full Rents being unfavourable,
any

(a) *Vid.* Part II. B. II, Ch. 5. (b) Act 42. Sess. 2. Par. W. & M.

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any probable Ground for excusing the Vassal from Contumacy, in not entering to the Fee, is sustained to restrict the Nonentry to the retoured Duties after Citation. Nonentry subsequent to Ward, carries only the retoured Duties, till Declarator, if the Superior, or his Donatary, was not in Possession by the Ward; and the full Mails for three Terms subsequent to the Ward, if he was in Possession, and the Heir continue so long unentred. During these three Terms, which comprehend the Year of Relief, Nonentry is of the Nature of the Ward: And after expiring thereof, the Superior hath Right only to the retoured Duty, till Declarator.

3. Nonentry is excluded. 1. If the Fee be full, by a conjunct Fee, reserv'd Liferent, or other real Rights. 2. 'Tis excluded by the Superior's Confirmation of an Infestment to the Vassal, by his Predecessor, to be holden of the Superior. 3. Courtesy and Terce are sufficient Objections against it. 4. Three subsequent Seifins, granted voluntarily to three Heirs successively, import an exoneration from any anterior Claim of Nonentry. 5. The Superior's contumacious Refusal to infest the Vassal's Heir upon Precepts out of the Chancery, is a good Exception against Nonentry.

But Nonentry is not barr'd by Tacks set by the Vassal, nor by a Charter or Precept granted by the Superior, till Infestment follow thereon.

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S E C T. II.

Relief.

RELIEF is that Acknowledgement the Heir pays to the Superior, for entring him as lawful Successor to the last Vassal. Which, in Blench, or Freeholdings, is only the Double of the Blench, or Feu-duty; in Ward Fees, the full Rent of the Lands, when the Superior is in Possession at the Vassal's Entry, and only the retoured Duty, if he be not then in Possession. Relief is not presumed to be remitted by the Superior's entring his Vassal. And when due to the King, cannot be gifted (a): But is still exacted in Exchequer, tho' gifted. It is not only *debitum fundi*, but also affects the Vassal personally, who takes out the Precept for infesting himself, tho' he never take Infestment thereupon.

S E C T. III.

Of Escheat.

ESCHEAT, in general, signifies any Confiscation of one's Property; but our Law restricts it to Moveables and Liferents, whence we have the Terms of single and Liferent Escheat: Of both which (tho' the latter only falls within the design of this Section) I shall here

(a) Act 73. PAR. II. §. VI.

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here treat, because of their Contingency, and arising from the same Foundation.

1. Single Escheat is a Forfeiture of all moveable Goods and Debts belonging, or owing to a Person denounc'd and registred at Horn for Debt, or Performance of a Deed or Promise the Time of the Denunciation, or that he shall acquire within Year and Day thereafter, till he be relaxed. Which fall to the King, unless the Rebel, or Outlaw live, and be denounc'd within a Regality, whereof the Lord is invest with the Privilege of single Escheats falling by Horning; in which Case, the Casualty belongs to the Lord of Regality, who hath Right to the Rebels Goods and Gear that are moveable *quoad Fiscum* (a), wheresoever, both within and without the Regality. The Moveables falling under single Escheat, are Rents of Lands, or heretable Bonds, Clauses of Relief in such Bonds, Tacks not for Life, and Assignations to Liferent Tacks. *Jus Mariti*, and any Liferent vested in a Wife, falls under her Husband's single Escheat. A Superior's single Escheat carries his Vassal's Liferent Escheat fallen to the Superior, before he was Year and Day at the Horn. Liferent Escheat, or any other gifted Casualty, falls under the Donatarie's single Escheat.

2. Liferent Escheat is a Forfeiture to the Superior of all Liferent Rights belonging to a Rebel, or Outlaw, who hath continued Year and

(a) Vid. Sup. B. I. Ch. 2. Tit. 2. § 5.

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and Day at the Horn unrelaxed or loosed, for a civil or criminal Cause, he being reckoned *civili-ter mortuus*. Which takes Effect from the Denunciation. Some of which Liferent Rights fall to the lawful Superior, whether the King, or a Subject; others to the King, *Jure Corona*. Law gives to the Superior, not only the Mails and Profits of all heretable Rights of Property, or Liferent, vested in the Rebel's Person by Infestment, during all the Days of the Outlaw's natural Life (a); but also the Profits of Lands, wherein he might have been infest as apparent Heir, if he enter at any Time thereafter; and some heretable Rights, which by their Nature require no Infestment, as Courtesy and Terce. Albeit where a Superior becomes Outlaw after his Vassal's Liferent Escheat had fallen to him, the Vassal's Liferent would come under the Superior's single Escheat: Yet the Superior's Liferent Escheat carries the Liferent Escheat of his Vassal, accruing to the Superior, after he had been Year and Day at the Horn. The King has Right to, as *bona vacantia*, the Liferent Escheat of Ministers, comprehending the Profits of their Manfes and Glebes, during their Lifetime, or Incumbency; the Liferent Escheat of heretable Rights in the Persons of Purchasers, that require to be completed by Infestment, as Bonds, Contracts, Dispositions, if Infestment hath not past upon them; Liferent Tacks of Lands or Tithes (b), and long Tacks

(a) Act 32. Par. 4. J. V. (b) Act 15. Par. 22. J. VI.

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Tacks for several nineteen Years, exceeding the longest Life of Man. But the Liferent Escheat of one of several Liferenters in a Tack, carries only the Benefit of it for his own Lifetime, without Prejudice to the other Liferenters (a). And albeit in Burgage Lands, the Burgh only is Vassal to the King; yet the Liferent Escheat of private Heretors of the Lands falls to the King.

3. Both single and Liferent Escheats use to be gifted, and the Donatary raises upon his Gift a Summons of general Declarator, wherein Decree being obtained, he may pursue for Recovery of the Escheat Goods and Gear. But any Gift taken simulately to the Benefit of the Rebel, is null (b): Which is presumed from his Wife, Bairns, or Friends remaining in Possession to his Behoof (c), or from the Gifts being granted to his Children *in Familia*, or procured, and pass'd the Seals upon his Expences. In a Competition betwixt Donataries, the last Gift, if first Declared, is preferr'd.

I shall next inquire, How far the Debts and Deeds of the Rebel affect and burden his single and Liferent Escheat.

4. Single Escheat is affected, 1. By the Debt in the Horning upon which the Escheat fell, and the Expence thereof (d), which all Intrometers with the Escheat Goods are liable to pay (e). 2. Creditors doing Diligence before
 Declara-

(a) Act 15. Par. 22. §. VI. (b) Act 145. Par. 12. §. VI.
 (c) *Ibid.* (d) Act 7. Par 4. Q. M. Act 75. Par. 6. §. VI.
 (e) Act 143. Par. 12. §. VI.

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Declarator, for Debts prior to the Outlawry, or Commission of the Crime inferring Escheat, are preferr'd to the Donatary. 3. An Assignation, or Deed granted after Rebellion, and intimated before Declarator, in Implement of an Obligation to grant it before the Rebellion, doth exclude the Donatary. 4. An Assigney constitute after Denunciation, for a Debt anterior thereto, getting, before Declarator, Satisfaction of his Debt, by Payment, or renewed Bonds innovating the Rebel's Bond, is secure, and not oblig'd to restore the same to the Donatary. 5. A Person getting Goods delivered to him by his Debtor at the Horn, before gifting of the Escheat, in Satisfaction of a just Debt, is preferr'd to the Donatary. Against whom also the Buyer of Goods *bona fide* from a Rebel, for a Price given, is secure, and the Price accrueth to the Fisk. But, 6. No legal Diligence, or voluntary Right for Payment of any Debt contracted after Rebellion, or Assignation granted after Rebellion, for a Debt prior thereto, and intimated before Declarator, will be preferr'd to the Donatary; if the Debt due to the Rebel remain unsatisfied, or not extinct.

5. Liferent Escheat, being effectual from the Denunciation, renders all subsequent voluntary Deeds of the Rebel, whether within, or after Year and Day ineffectual against the King, or other Superior, claiming the Liferent, unless Relaxation be obtained in that Time. Thus,

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1. Infeftment for a Debt posterior to the Denunciation, or granted in *curfu Rebellionis*, for fatisfying anterior Debts, doth not exclude Liferent Efcheat; unless the Rebel was fpecially obliged to grant fuch Infeftment before Rebellion. Nor doth a fpecial anterior Obligement fupport a posterior Infeftment conform, to make it exclude the Granter's Liferent Efcheat, unless he be divested by the Infeftment within Year and Day of the Denunciation. Nor yet doth Affignation to a Liferent Infeftment hinder the Liferenter's Efcheat to fall thereafter, unless the Affignation be intimated, or the Affigny in Poffeffion within that Time. 2. Creditors by Apprifing, or Adjudication, are not preferred to one claiming the Liferent Efcheat, unless the Apprifing or Adjudication be completed within Year and Day of the Denunciation, by Infeftment, or a Charge againft the Superior, or a Signature prefented to the Exchequer, which in Lands held of the King, is equivalent to a Charge. But Apprifing, or Adjudication, or other real Right led and completed in *curfu Rebellionis*, in Manner aforefaid, for Debts prior to the Rebellion, or Tacks fet before, and completed by Poffeffion within the Year and Day, bar the Liferent Efcheat. Yea, it doth not exclude Tacks fet during the Rebellion, without Diminution of the Rental.

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T I T. III.

Casualties appropriated to particular Fees.

CAsualties of special Fees arise either from the Nature of the Fee, or from express Paction.

1. The peculiar Casualties of Wardholding, arising from the Nature of the Fee, are, Ward, special Recognition, and Marriage.

[1.] Ward is a Right to the full Rents of the Male Vassal's Lands, till he be 21 Years complete; and of a Female Vassal, till her Age of 14 (a); upon finding Caution not to waste, or destroy the Fee, or any Part or Pertinent thereof. This Casualty may be enjoy'd, either by the Superior himself, or by his Donatary claiming under him. In a Competition of Donataries, he who first intimates, or uses Diligence upon his Gift, is preferred. Ward needs no Declarator; but the Superior enters immediately to Possession of the Fee.

No private Deed of a Ward Vassal, without the Superior's Consent or Appointment of Law, can burden the Fee, while it is in the Hand of the Superior by the Ward. The Vassal's Debts don't affect it in that Interval. Rentals and Tacks set by the Vassal have only this Effect, That the Tenents cannot be remov'd till the next *Whitsunday* after the Ward falls, they paying to the Superior the accustomed Duty:

(a) Act 5. Par 3. Q. M. Act 42. Par 2. J. VI.

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ty: After which Term, they may be dispossess'd, and their Tacks sleep, during the Ward; but revive against the Setter and his Heirs after it is ended, to take Effect for so many Years as were cut off by the Ward (a). But Ward is restrain'd by Terce of the Vassal's Relict, or the Courtesy of a Vassal's Husband.

Lands fall in Ward by the Death of an Appriſer or Adjudger infeſt, and in Poſſeſſion, tho' the Legal be current, and not by the Death of the Debtor, againſt whom ſuch Diligence was us'd. Nor doth the Ward fall by the Death of an Adjudger infeſt, if not alſo in Poſſeſſion.

Law obligeth the Superior, or his Donatary, to Aliment the Heir, according to his Eſtate and Quality, if he hath no other Feu or Bleuch Land to live on, or not ſo much of either as may entertain him; or, if he have no acceſs to them by reaſon of Diligence of Creditors (b). For receiving Aliment, he is not bound to ſtay in the Superior's Houſe.

[2.] Special Recognition, or *Recognition*, properly ſo called, is a Caſualty, that occaſions a Ward-fee, whether ſimple or taxed, to return to the Superior, by the Vassal's diſpoſing it, or the major Part thereof, redeemably or ir-redeemably, without his Conſent.

A ſimple Diſpoſition without Infeſtment, or Infeſtment taken from the Superior upon Reſignation, or taken upon a Death-bed Diſpoſition, or Alienation to the Vassal's apparent

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Heir

(a) Act 26. Par. 3. 7. IV. (b) Act 25. *Ibid.*

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Heir in the right Line, who is *alioqui Successurus*, or Alienation of Tithes, which are not *Fundus*, but *onus fundo inherens*, or Infestment essentially null, as wanting the proper Symbols of Delivery, &c. doth not found Recognition.

But it is incurr'd by the Vassal's Alienation to his Brother, tho' his nearest apparent Heir for the Time, or by Seisin, tho' null for some accidental Defect, as the not being registred, or not confirm'd by the Superior, &c. And albeit the Vassal do at first alienate only a part of his Lands, within the Half, without Consent of the Superior; (which he may do) yet, if he thereafter so alienate as much more, as counting the Part formerly disposed, doth exceed the half of his Fee, the whole falls under Recognition; and the first Purchaser will also lose his Right, which, tho' validly made at the Time, returns to the Superior *ex post facto*, by a retroactive Effect.

Recognition is not incurred by granting base Infestments within half of the Value of the Ward-Fee, tho' the Vassal by granting a posterior publick Infestment, did not retain the major Part. Nor is it incurred by the Deeds of an Apprifer or Adjudger during the Course of the Legal, but by Deeds of the Reverser. Nor yet is it incurr'd by several Infestments, that reckoned jointly, exceed the half, unless these were all standing Deeds at one Time,
that

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that is, none of them purged or extinct before the rest were granted.

Recognition is hindred by the Superior's Consent to the Alienation, either express by a Charter of Confirmation of the Alienation, or a Precept of *Clare Constat* granted to the Vassal whose Lands had fallen in Recognition; or tacit, by requiring the new Vassal to perform Services due out of the Fee, or pursuing him to pay any Casualty of Superiority.

Recognition being incurred, the Fee opens to the Superior, with the Burden of anterior Inhibitions (a), but it excludes all subsequent legal Diligence used for onerous Causes, against the Vassal's Estate, tho' before Declarator, and Tacks set without the Superior's Consent, whether prior or posterior.

Before the Superior take Possession, the Recognition must be declared, either at the Instance of himself, or his Donatary, who in lieu of a Gift, gets a Disposition and Charter, and thereby becomes Vassal to the Superior. In a Competition of Donataries, he who is first inest is preferred to the obtainer of the first Declarator.

[3.] Marriage is a Casualty, due by the Heir of a Ward-Vassal unmarried at his Predecessors Death, to the Superior, who gets from the Heir two Years Rent of his free Estate, whether he offer him a Match, or not; and suppose the Heir never marry, called, *The*

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• *single*

(a) Act 15. Sess. 2. Par. 7. VII.

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single avail of the Marriage; and three Years Rent, if the Heir, notwithstanding of a suitable Match offered to him by the Superior, do marry another, called *The double Avail of the Marriage*. Both which Avails are modified by the Lords of Session, according to the Vassal's Circumstances, with Respect not only to his Ward-Lands, but also to his other Estate, real or personal. The single Avail becomes not due for want of the Superior's Consent to the Vassal's Marriage; nor is it excluded by his being present at, or consenting to the Marriage, but ariseth from the Nature of the Fee. Yet it seems the Superior can ask no more upon this Score, than the Vassal gets of Tocher, if he do marry.

In order to make the double Avail due, a fit Person of a sound Mind, good Fame, and suitable Quality, having nothing in the Feature or Parts of the Body that may give a just Aversion, must be offered as a Match to the Vassal: Tho' a Proportion of Means be not required. And notorial Instruments must be taken upon the Offer, and the Vassals refusal for proving thereof.

Where the Vassal holds Ward-Lands of several Superiors, he is liable but for one Avail of the Marriage, which falls to the eldest Superior, that is, he from whom the Vassal had the first Fee. But if the King be one of the Superiors, his Majesty gets this indivisible Casualty, as presum'd to be the eldest.

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The Avail of Marriage is *debitum fundi*, affecting singular Successors: But tho' modified with Respect to the Vassals whole free Estate, affects really no Part of it save the Ward-Fee. Nor doth it affect him personally.

2. The peculiar Casualty of Feu-holding, arising from the Nature of the Fee, is, That if no Part of the Vassal's Feu-duty be paid for two whole Years, he loses his Feu, as if a Clause irritant were specially ingross'd in the Feu Infestment (a). But the Lords of Session make this Difference betwixt Irritancies arising from the Statute only, and those expressed in the Infestment; by allowing the former, and not the latter, to be purged at the Bar.

3. Casualties in special Fees, arising from express Paction, vary, according as the Parties agree. Thus the Casualty of Marriage may be due by express Paction, or the Tenor of the Investiture, in other than Ward-Fees, as when Lands are holden Feu *cum Maritagio*.

Having cleared up the respective Rights of Vassals and Superiors, I shall in the next place consider the Burdens wherewith real and heritable Rights may be affected, which are either private, or publick.

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C H A P.

(a) Act 46. Par. 15. §. VI.

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C H A P. IV.

Of private Burdens, wherewith real and heritable Rights may be affected.

PRIVATE Burdens are those imposed either by Law, when such are declared real, by Act of Parliament, as the King's Annuity out of Tithes (*a*), or by the Agreement of Parties, as Services, &c.

T I T. I.

Concerning Services in General.

1. **A** Service is a Burden upon one's Property, whereby the Proprietor, for another's Conveniency, is either forced to allow something to be done upon his Land or Tenement, or hindred from doing that, which may be profitable to himself.

2. Services are acquired either tacitly, or expressly.

Real or Predial Services are acquired tacitly, by Prescription, or 40 Years continued and peaceable Possession, without any Title in Writ from the Owner of the Land or Tenement subject to the Service. Which Possession is reckoned either from his constrained and involuntary Deeds; that is, such as are forc'd from him by Process at Law, or other Ways; or from

(*a*) Act 15. Par. 1. Ch. I.

Ch. 4. Law of Scotland. Tit. I. 137.

from Deeds of the Master of the Land or Tenement, to which the Service is due.

Services are acquired expressly by Writ.

3. Real or Predial Services acquired by Writ, with either Possession or Infeftment, is a complete Title. For the Title of such a Service neither perfected by Possession, nor Infeftment, is of no Effect against singular Successors, but only against the Granter and his Heirs. Our personal Services of Liferents, have no Force without Infeftment against singular Successors: But Tacks clothed with Possession will defend the Tacksmen against any Purchaser. Services constituted by Vassals upon their Property, are not effectual against the Superior, who did not consent thereto: But Services acquired by Prescription, are of Force against the Superiors.

4. A Right of Service comprehends the Accessories, without which it cannot be us'd: As the Service of drawing Water out of a Well, implies the Service of a Passage to get to the Well.

5. Services come to cease either expressly, or tacitly.

A Service ceases expressly, by a Discharge, or Renunciation thereof.

Services cease tacitly, 1. By Confusion, or Consolidation, when one Person becomes absolute Proprietor of both the Land or Tenement that serves, and that for which the Service was established. For a Service is a Right upon the Estate of another Person; and the Right which one has over his own Estate, that is intirely at his

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his own Disposal, is not called a Service. 2. A Service expires whenever the Land or Tenement, which is subject to it, happens to perish. 3. A Service is lost by tolerating something to be done in the Land or Tenement subject to it, that is inconsistent with such a Service. 4. Freedom from a Service, may be acquired by Prescription, or 40 Years Forbearance to use it.

6. A possessory Action is competent upon 7 Years peaceable, and uninterrupted Possession of a Service, for continuing the same, till such Time as a Declarator of exemption is obtain'd. And where there hath been no Possession, or not so long Possession, there lies *actio confessoria*, or a Declarator of Service.

The not claiming, or using a Service for the Space of seven Years, is the Foundation of a possessory Judgment to a Proprietor, or Liferenter, for excluding such a Service, till it be declared. And where seven Years immunity cannot be pretended, *Actio negatoria*, or a Declarator of Freedom and Exemption may be rais'd,

T I T. II.

Of the several Kinds of Services.

THere may be as many different Sorts of Services, as there are Ways of abridging any Person of the full and free Use of his Property. But these are commonly divided into Real or Predial, and Personal Services.

A

Ch. 4. Law of Scotland. Tit. 3. § 1. 139

A Real or Predial Service is a Burden affecting one Man's Land or Tenement, for the use of that of another's, directly; and in Consequence, for the Master's Behoof, as having Right to such Land or Tenement.

A Personal Service is a Burden upon one's Land, or Tenement, directly, for the Use and Enjoyment of another Person.

T I T. III.

Real or Predial Services,

R Real Services are distinguish'd into Rural, and City Services.

S E C T. I.

Of Rural Services.

R U R A L Services, or those of Lands in the Country, are of several Kinds.

1. The Right of a Passage from one Place to another, either for a Man on Foot, or on Horseback, or for a Beast loaded, or for a Wagon.

2. Aqueduct, a Right to convey Water from one Ground to another, either in Pipes under Ground, or by a Rivulet above Ground.

3. Common Pasturage, a Right to feed Cattle on another's Ground, either in common with the Proprietor, or in common with others, excluding him. Which is establish'd either for a definite, or indefinite Number of *Soums*, or Yokes of Cattle; and doth not hinder the Proprietor

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prietor to till and open the Ground, for other Ends of Property, unless he be restrain'd by Custom, or Consent, but only so much as remains Grass, may be us'd for Pasture by the Inhabitants of the Land, to which the Service is due. Albeit common Pasturage be established indefinitely, without expressing the Number of Cattle allowed to be graz'd on the Common, it can reach no further, than to a proportionable Number, effecting to the Rent of the Land to which the Service is due, that is, so many as it can hold at Fodder in Winter. The overcharging of a Common is prevented by *Souming* and *Rouming*; that is, by determining how many Soums the Ground Subject to the Service will conveniently pasture, and stinting the Inhabitants of every Roun of the Land, which hath Right to the Service, to a particular Number of these Soums, according to their Proportion.

4. Fuelling is a Right of casting Fail and Divot, *i. e.* of digging of Peats and Turves on, and pulling Heather from another Man's Ground.

5. Thirlage is a Service, whereby the Possessors of Lands are bound to pay a Duty to a certain Mill, for grinding their Grain.

The Duty paid for grinding in any Mill, is called *Multure*. Some come voluntarily to a Mill, where they think they can be best serv'd, and pay the ordinary Duty, called *Outsucken*, or *Out-town Multure*. Others are thirled, *i. e.*
 astricted

Ch. 4. Law of Scotland. Tit. 3. § 1. 141

astricted, or tied to bring their Grain to such a Mill, who mostly pay a Duty higher than ordinary, called *Insucken*, or *In-town Multure*: And sometimes a certain Duty is paid, whether they grind or not, called *dry Multure*. As Lands are disponed with their Pertinents; so Mills are disponed with Matures and Sequels.

Sequels comprehend, 1. That small Quantity of Grain due to the Mill Servants, called Knavehip, Lock and Bannoek. 2. Services of maintaining and upholding the Mill-house, Mill-Dams, or Water-gates, and of bringing home Mill-stones; which those that are thirled are oblig'd to do.

Thirlage is acquired either tacitly, or expressly.

'Tis acquired, 1. Tacitly, by Payment, for the Space of 40 Years of dry Matures. 2. Possessors of Lands within a Barony of the King's Property, are understood to be astricted to the sole Mill of that Barony, after immemorial Use of paying In-town Matures, and doing other Deeds of Thirlage, as repairing the Mill, casting the Mill-Dam, and carrying home Mill-Stones. But neither simple coming to another Mill, not of the King's Property, or coming to the King's Mill by the Possessors of Lands, without his Barony, and paying more than Out-town Multure, doth infer a Thirlage. Thirlage is acquired expressly by Writ, either without infestment, as by a Bond of Thirlage
and

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and Possession; or by a Disposition and Infestment in a Mill, with the Multures of the Disposer's Lands.

The Quantity of astricted Multure, extent of the Subject thirled, and Effect of Thirlage, are regulated by Custom, when the Thirlage is acquired by Custom; and regulated by Writ, when the Service is constitute by Writ. The Extent of Thirlage acquired by Writ varies, according to the different Tenor of the Writ: Disposition of the Mill of a Barony *cum Multuris*, or *cum astrictis Multuris*, brings the whole Barony under Thirlage, tho' formerly free. But by Disposition of the Mill of a Barony, *cum Multuris solitis et consuetis*, no Lands are understood to be thirled, that were not so before.

Thirlage of Lands simply affects *omnia grana crescentia* therein. But in a Thirlage of the whole Growth of the Ground, Tithe, not tholing Fire and Water within the Thirl, that is not steep'd nor kiln'd there, Farm paid to the Master, if not Grinded at another Mill, Seed and Horse Corn are excepted. And Thirlage of *Invecta et Illata*, comprehends only what tholes Fire and Water, upon the Ground subject to the Service.

Contravention of Thirlage by grinding at another Mill, is pursued by Action for abstracted Multures.

SECT.

Ch. 4. Law of Scotland. Tit. 3. § 2. 143

S E C T. II.

Of City Services.

CITY Services, or Services of Houses, and other Buildings, are such as these.

1. That the Wall of one Neighbour's House shall bear the Weight of another's Building, which Wall the Owner must repair for supporting that Building: For the Ground and Roof of a Building of several Stories belonging to different Persons, being common to all, the Owner of the lower Story stands obliged to uphold it as a Foundation to the Higher, and the Proprietor of the latter, to keep it as a Roof and Cover to the Former.

2. A Right to discharge Rain from of one's House upon his Neighbour's, either in Drops from the Eaves, or in Spouts running thro' a jutting Gutter, or thro' a Pipe clap'd on against the Wall.

3. A Service for Lights, whereby one may open his Wall for receiving Light on the Side where his Neighbour's Tenement stands, and hinder his Neighbour from making them useless, by building or erecting Shades against them.

4. A Service against Lights, which gives a Right to hinder one to make Windows in his own Wall, to overlook his Neighbour, and thereby take away his Privacy.

5. A Right to fix the Rafters or Beams of one's House in his Neighbour's Wall.

T I T.

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T I T. IV.*Concerning personal Services.*

Personal Services are Liferents, Infestments of Annualrent, Ground and Top Annuals, Infestments of Relief, Pensions and Tacks.

In treating of Liferents, the first of these Services, I propound to explain. 1. Liferents in general. 2. The several Kinds of Liferents.

S E C T. I.*Of Liferents in general.*

1. A Liferent is a Right to use and enjoy a Thing, which is not our own for Life, without destroying, spoiling, or diminishing it.

2. Liferenters must therefore find Surety not to destroy the Buildings, Orchards, Woods, Stanks, Meadows or Dovecotes, but to hold them in the same Case they receive them (a). A Liferenter is bound to aliment the Heir of the Estate liferented, if he hath not *aliunde* to entertain himself. And where an Estate is affected with several Liferents, all the Liferenters are liable *pro rata* (b).

3. The Fiar of a Sum liferented hath Power to uplift it, upon finding Surety to pay the Annualrent to the Liferenter.

4. Where

(a) Act 25. Parl. 3. 7. IV. Act 15. Par. 4. 7. V. Act 226. Par. 14. 7. VI. (b) *Vid.* Part III. B. II. Chap. 4. Tit. I. Sect. IV.

Ch. 4. Law of Scotland. Tit. 4. § 2. 145

4. Where Liferenters of Land Rent, or Mill Rent, of Property, or Annualrent, survive *Whitsunday*, or die in the Afternoon of that Day, their Executors have Right to the Half of the Liferent Duties for that Year, whether payable in Money or Victual; and where they survive *Martinmas*, or die upon that Term Day in the Afternoon, their Executors have Right to the Liferent Duties of that whole Year; whatever be the conventional Terms: If Liferenters labour the Lands themselves, their Executors have Right to the whole Rent of the Year, wherein their Death happens, whatever Time of the Year they die, if the Ground is laboured, and begun to be sown.

S E C T. II.

Of the several Kinds of Liferents.

LIFERENTS are either legal, or conventional, that is, acquired by Law, or Paction.

1. Liferents by Law are those, which Law creates to the Survivor of married Persons, out of the Estate of the deceased, *viz.* Terce and Courtesy.

[1.] Terce is a Relict's Right to the Liferent of a Third of Lands, Tithes, Wadssets and Annualrents, in Fee, whereof her Husband died infest. But the Relict of a Person, whose Estate stands already affected with a Terce to his Predecessor's Widow, can claim only for her Terce, while the former Tercer lives, a
K. Third

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Third of two Thirds of the Estate, called, upon that Account, *the lesser Terce*. Terce extends not to Lands within Burgh, or holden Burgage, nor to Feu-duties, or other Casualties of Superiority, or to Reversions, or Tacks, or Patronage.

A Terce is established by the Service of an Inquest of Fifteen sworn Men, called by the Judge Ordinary, where the Lands ly, upon a Brief or Precept out of the Chancery directed to him. Who are to try, 1. If the Bearer was lawful Wife to the deceased Person. In which Inquiry, they proceed according to Instruction, that she was held and reputed, or passed for a lawful Wife, without any Quarrel about her Marriage in her Husband's Lifetime (a). 2. If the Husband died infest in such Lands, &c. as Fiar.

A Terce being assigned to the Widow, she may either possess the Lands *pro Indiviso*, with the Proprietor, and uplift her Terce out of the whole Rent; or she may crave her Terce to be *kenn'd*, that is, divided from the rest belonging to him.

The Service entitles her to pursue Mails and Duties: But she cannot remove Tenants, till she be *kenn'd*. She hath a Right to her Terce from the next Term after her Husband's Death, upon which Account, the Time of his Death is specified in the Service.

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(a) Act 77. Par. 6. §. IV.

Ch. 4. *Law of Scotland.* Tit. 4. § 2. 147

Any Provision granted by a Man to his Wife, excludes her from a Terce not expressly reserved (a). Law doth also cut off a Wife from a Terce, for committing Adultery; or wilful Desertion of her Husband. But Terce is not excluded by the Ward or Non-Entry of the Husband's Heir.

[2.] The Courtesy of *Scotland* is a legal Right, which the Husband of an Heirefs has to Liferent Lands and Heritages, she died infest in; if there was a Child of the Marriage heard cry or weep, which is effectual, tho' the Child should die immediately thereafter before the Mother. The Courtesy entitles the Husband, whether he be a first or second, to Liferent all his Wife's Heritage, (Burgage Lands excepted) *ipso jure Mariti*, without Service or Infestment, so as he may possess and remove Tenants. But the Courtesy takes place only in Heritage, to which the Wife did succeed as Heir (whether of Line, Tailzie, or Provision) before, or during the Marriage, and not in that which she acquired by singular Titles. Nor can a second Husband have this Courtesy, where his Wife hath an Heir of the first Marriage surviving. Courtesy, as Terce, is affected with all Burdens that are real by Infestment or Tack. But not by the Ward Non-Entry and Liferent Escheat of the Wife's Heir. It is excluded by the Husband's Adultery, or wilful Desertion of his Wife.

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(a) Act 10. Par. 3. Ch. II.

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2. Conventional Liferents, or Liferents by Paction, are acquired, either by Reservation, when an Heritor dispones to one, reserving his own Liferent ; or by a separate Right, when he dispones to a Person during all the Days of his Life ; or by Way of Conjunct-Fee, when Lands are disponed, or Sums of Money provided to a Man and his Wife in conjunct Fee and Liferent, which imports only a Liferent to the Wife.

A Liferent of Lands by Reservation to one before infest in the Property, needs no Infestment to complete, and make it effectual against singular Successors : But Liferents by conjunct Fee, or by separate Title, are of no Force against singular Successors, without Infestment. Infestments of Liferent may be conveyed by Affignation, voluntary or legal, without Infestment.

Liferenters by Reservation and by conjunct Fee have Right to the Casualties of Superiority ; which a simple Liferenter by a separate Right has no Interest in.

S E C T. III.

Of Infestments of Annualrent, Ground and Top Annuals.

I. ANNUALRENT is a real Right to a Sum of Money, or Quantity of Victual issuing yearly out of Lands or Tenements, at one or different Terms. Whence it got the Name

Ch. 4. *Law of Scotland.* Tit. 4, § 3. 149

Name of Annualrent ; and he or she to whom such a Right belongs, is termed an Annualrenter.

2. Annualrents, tho' effectual Burdens upon the Properties of others, and therefore ranked here in the Class of Services, are acquired by Charters or Dispositions, and Seifins. The Symbol of an Annualrent, if payable in Money, is a Penny, and if payable in Victual, is a parcel of Victual. Annualrents use not to be held Feu or Burgage, but either Ward or Blench, or by Mortification ; and most frequently Blench for the *Reddendo* of a Penny, by publick or base Infestments. Some Annualrents are constituted by Infestment distinct from that of the Property : Others by Reservation in Infestments of Property, where the Proprietor's Seifin serveth both. Some Annualrenters again are Creditors by Infestment, in a principal Sum producing a yearly Annualrent : Others are Creditors only in an Annualrent, without any principal Sum. Annualrents are also either in Fee and Heritage, or in Liferent.

3. Annualrenters have a triple Security for their Payment, 1. One personal against the Debtor. 2. Another real against the Ground, whereof any Part may be poided for this *debitum Fundi*, affecting *unamquamque glebam*. Where one hath an Infestment of Annualrent out of two Tenements promiscuously, the Annualrenter may take his whole Payment out of any one of them, tho' these chance to belong

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to different Heritors at the Time : In which Case, the Heritor of the distressed Tenement must be assigned to the Decreet, for recovering his Relief off the other Tenement *pro rata*. 3. An Annualrenter may pursue Intrometters with the Rents of the Lands personally, for Payment of bygone Annualrents, according to the Extent of their Intromissions.

4. Infestments for Principal Sums and Annualrents thereof are extinguished. 1. By the Deed of the Debtor, such as, 1. A Declarator of Redemption upon an Order used by him, as in Apprisings. 2. The Annualrenter's acquiring from the Debtor a Wadset, or other more noble Right of the Lands, unless that Right were evicted. 3. Such Infestments are annulled by the Deed of the Creditor, as 1. Not only by his Resignation, in the Hands of the Granter, as Superior ; but also by a Renunciation recorded in the Register of Reversions. 2. By Intromission with as much as might pay the principal Sum and preceeding Annualrents. Which Intromission may be proved by Witnesses, whether the Rent be Victual or Money ; and is applied in the first place to extinguish past Annualrents, and then to cut off the principal Sum.

5. Infestments of Annualrent not relative to a Stock, can cease only by the Deeds of the Creditor in Manner aforesaid.

6. Ground

Ch. 4. Law of Scotland. Tit. 4. § 4. 151

6. Ground Annuals, Feu Annuals, and Top Annuals, are mentioned in our Law (a): The true Meaning whereof is controverted by Lawyers. The most probable Notion of these seems to be this: That a Ground Annual is a yearly Duty payable out of the Ground and Property of Land, built or unbuilt, to the Disponer thereof, or to some other Person. A Feu Annual is a Duty paid out of some Land or Tenement by one as Vassal to a Superior. Top Annual is a certain Duty disposed by an Heritor out of his own House, to some other Person.

S E C T. IV.

Of Pensions.

A Pension is a yearly Rent payable to one for a Time. Some Pensions have relation to a particular Subject or Fund of Payment; others are constitute indefinitely, without any such Respect. Some again are Ecclesiastical, and some Secular. An Ecclesiastical Pension is that, which is granted by a Church-man, payable out of his Benefice, whereof the Right being completed by Possession, or a Decree conform in the Granter's Life, is effectual against Successors in Office, without any Decree of Transference. Secular Pensions are granted either by the Sovereign's Gift under the Privy Seal, and payable out of the Treasury

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(a) Act 10. Par. 4. Q. M.

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surety, which are not arrestable: Or they are constituted by Subjects, either in their personal Bonds, or in heritable Bonds, payable out of the Rents of their Lands, Tithes, Coal-pits, &c. which without Infeftment are but of the Nature of Assignations, producing personal Action against the Granter and his Heirs, and ineffectual against singular Successors. And a Decreet conform, obtain'd against the Granter's Tenants and Chamberlains, is effectual against his subsequent Tenants and Chamberlains; but not against the Tenants and Chamberlains of his Heir, without a new Decreet of Transference.

S E C T. V.

Of Infeftments of Relief, or for Security of Sums:

INFESTMENTS for Relief, or for Security of Sums, are real Burdens, whereby Apprisings or Adjudications led for the Money so secured, will be preferred according to the Dates of the Infeftments, but are no Title of Possession. And any Disposition or other Right, for Relief or Security of Debts to be contracted, is of no Force, as to Debts contracted after the Seisin taken on the said Disposition or Right, but only as to Debts contracted before (a).

S E C T.

(a) Act 5. Sess. 6. Par. K. W.

 Ch. 4. *Law of Scotland. Tit. 4. § 6.* 153

S E C T. VI.

Of Tacks.

1. A Tack is a Contract, whereby the Use of any Thing is set or let for Hire, or a reserv'd Rent, call'd the Tack-Duty, from and to a determin'd Time. 'Tis also term'd an *Affedation*. The Granter of the Tack is call'd the *Setter*, and the Receiver is call'd the *Tenant*, or *Tacksman*. A Tack is either tacit, or express.

2. A tacit Tack is inferr'd from a Tacksman's possessing peaceably after his Tack is expired. For so long as he doth so possess, both the Setter and he are presum'd to continue the Tack of Consent upon the former Terms; which is call'd *tacit Relocation*, or Renewal of the Tack. Tacit Relocation upon a Tack set by a Beneficiary, is sustain'd for more Years than the benefic'd Person could set. And a Liferenter's Tenant is liable only for his former Tack-Duty, for Years he quietly possess'd after the Liferenter's Death: Albeit he the Liferenter could not set for these Years. Tacit Relocation in Lands, is taken off by a Warning to remove; and tacit Relocation ceases in Tithes, if Parsonage, by Inhibition; and if Vicarage, by Citation, or Inhibition.

3. Express Tacks are either verbal, or written.

[1.] A verbal Tack is good only for a Year, and if granted for more Years, the Setter, or Tackf-

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Tackfman may refile, and render the Set ineffectual; as to these more. But in Case of either Parties departing from such a Tack, except as to one Year, the Penalty agreed to be paid by the Failer to the Observer may be claim'd.

[2.] Written Tacks are either those properly so called, or Rentals.

Ordinary written Tacks are granted either for Life, or for a certain Number of Years, by the Heretor, or Person having Right to the Subject set, which are called *principal Tacks*, in Contradistinction to Tacks set by Tackfmen, called *Sub-tacks*. Tacks set by Wadsetters to the Reverfers, are term'd *Back-tacks*.

4. All Tacks must express the Terms of Entry, or when they should begin, and of *Ish*, *i. e.* when they should end, and the Tack-Duty, otherwise they are null. Tacks set to a determin'd Time; and that being elaps'd, during the not Payment of a Sum, or not Performance of a Deed, are effectual only during the definite Time express'd. Where a Tack expresseth no Time of Entry, the Entry is understood to be at the Date, or the next Term. Back-tacks in Wadsets, without any other definite *Ish*, than during the not Redemption, are good.

5. Persons may set Tacks of what they have Right to, and a Power of Administration. Tutors, Curators, and Factors, cannot set Tacks for longer Time than their Office continues. But Church-Men, tho' upon the Mat-
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ter naked Administrators, were allowed to set Tacks of their Benefices, under certain Regulations; As Prelates, with Consent of their Chapter, for 19 Years; and the inferior Clergy, with Consent of the Patron, for their Lifetime, and five Years thereafter (*a*), or without such Consent, for three Years (*b*).

6. The Setter of a Tack has Action, not only against the Tenant, but also against the Sub-tenant, for Payment of his Rent. And tho' the Sub-tenants Tack-Duty be less than the principal Tenants, the Heretor may pursue him as Possessor for the Whole; leaving him to recur for Warrantice against the principal Tacksmen.

A Setter of Lands in the Country hath a tacit Hypothec, or legal Pledge for the immediate last Years Rent, on the Fruits and Growth of the Ground; and these not satisfying, on the Goods upon the Ground, the Time when that Years Rent fell due, and will be prefer'd for the same *Actione Hypothecariâ*, either to a personal Creditor of the Tenant, who hath affected them by Diligence, or to a Stranger, who bought them.

Heretors of rented Houses have also a tacit Hypothec for a Year's Rent upon *inveſta et illata*, all the Tenant's Moveables in these Houses, or other Mens Goods found there after the Term of Payment.

7. A

(*a*) Act 4. Par. 22. junct. Act 15. Par. 23. §. VI. (*b*) Act 200. Par. 14. §. VI.

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7. A Tack is a sufficient Title for Mails and Duties; and if set by the Proprietor, affords a possessory Judgment; and tho' set by a Liferenter, defends the Tackfman from being turn'd out of Possession by the Fiar, till he be orderly warn'd, or from paying more than the Liferenter's Tack-Duty. A Tack, cloth'd with Possession, is real and effectual against singular Successors, so as the Tackfman cannot be remov'd before the Ish of his Tack, whether of Lands (a), Tithes, or Houses, or any other Thing affording Rent or Profit. A Tack for Years extends further than is express'd. So that such a Tenant cannot assign his Tack, nor grant a Sub-tack, unless his Tack bear a Power so to do. But a Liferent Tack may be assign'd, tho' it mention not Assignys.

8. In Order to force a Tenant to remove, when his Tack is expired, or when he hath no longer Title to possess, he, if Tenant of Land in the Country, must be warn'd so to do, whether within, or out of *Scotland*, upon 40 Days before *Whitsunday*, that is, the 15th Day of *May* (b), within the Year, tho' the Title of his Possession cease at another Term. Which Warning must be intimated to him, and on the Ground of the Lands, and at the Parish Church Door, immediately after the Forenoon's Sermon, while the Congregation is dissolving, or when it useth to be dissolved, in Case there be no Preaching, and Copies thereof left in both these

(a) Act 17. Par. 6. §. II. (b) Act 30. Sess. 2. Par. W. & M.

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these Places (a). Tenants of Houses within Burgh are warn'd according to the Custom of the Burgh, by a Town Officer, who, in Evidence thereof, chalketh their Doors 40 Days before the Term at which they should remove.

The Tenant being duly warn'd, may be pursued, even before the Term, to remove at the Term, upon a Citation of six Days, if within *Scotland*, and 60 Days, if forth thereof. In which Process he will not be allowed to propose any Defence, requiring a Term to prove it, till he find Caution for the violent Profits, in case he succumb; that is, the double of the Rent of a Tenement within Burgh, and the greatest Profits the Pursuer could have made of Lands in the Country. If the Warning was orderly, and the Tenant had no colourable Title to maintain his Possession longer; the Lords decern him to remove, and to pay the Pursuer violent Profits of the Land from the Warning, till he give Obedience. But otherwise, where the Defender had a probable Ground to keep Possession, he is decerned to remove only, without being liable to violent Profits.

9. If, after warning, any Person come in Possession, by Consent of the Party warned, or thro' his Default, in not offering the void Possession to the Warner, such an Invader is called *Successor in the Vice*, and is liable to a summary Process of Removing: And violent Profits, after

(a) Act 39. Par. Q. M.

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ter Decreet of Removing, are obtain'd against the Tenant Warn'd.

10. Tenants of Lands in the Country are tacitly oblig'd, to leave the Ground in the same Condition as at their Entry, and the Houses as good as they found them, without getting any Allowance of Expences, in repairing and upholding the Houses, unless it be so expressly provided in the Tack. But the Expence of repairing and upholding Houses within Burgh, lies upon the Proprietor, and not upon the Tenant.

11. A Tack may be declared void. 1. For the Tenants not offering to pay the Tack-Duty for the Space of two Years; or for not finding Caution, when cited to do it, for a Year's Tack-Duty resting, and in Time coming. 2. By the Tenant's Renunciation, either express in Writ, under Form of Instrument; or tacit, implied from taking a posterior Tack of fewer Years, or paying a greater Tack-Duty.

12. A Rental is a Kind of Tack or Set for paying a Grassum, or some Acknowledgement at the Entry, and an easie yearly Duty thereafter, set down in the Master's Rental Book. One who enjoys a Rental, is call'd a Rentaller, and hath the Privilege of a kindly Tenant, either by the Master's Indulgence, or, because his Predecessors have been ancient Possessors, or kindly Tenants.

No Set is accounted a Rental, except it be in Writ, and the Writ bear the same to be a Rental.

The

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The Heretor of the Ground only can set Rentals: But Tutors may renew them for the accustomed Grassums.

A Rentaller cannot, without exprefs Power given him, introduce Sub-tenants, or assign the Rental. And by so doing, he loses his Rental, if the whole, or most of the Land therein be Assigned; and by a partial Assignment of less than the Half, the Rental falls as to the Part assigned.

A Rental is not, as a Tack, null for not mentioning an Ish: For when set to an indefinite Time, it lasts for the Receiver's Lifetime. A Rental conceiv'd in Favour of a Man and his Heirs, extends only to the first Heir.

Having explain'd the private Burdens upon real Rights; I proceed to touch briefly the publick Burdens they are subjected to.

C H A P. V.

Of publick Burdens, to which real Rights are liable.

PUBLICK Burdens are those Taxations imposed by the Parliament, or a Convention of Estates, to answer the publick Exigences for supporting the Government, and Security of the Nation: Which Subjects are bound in Duty to contribute to, by opening their Purses, as Occasion requires.

Anciently, in Order to raise Taxations more equally off particular Lands, there was a general

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ral Valuation made of all the temporal Lands in *Scotland*, when the *Scots* were at Peace with *England*, called *the Extent* or *Retour*. Long thereafter, another higher Valuation was made, while these Nations were at War. Whereupon the former came to be term'd *the old Retour*, or *old Extent*, or *the Valuation tempore Pacis*; and the latter, *the new Retour*, or *Extent*, or *the Valuation nunc, et tempore Belli*. Taxations were, at first, rais'd conform to the tax'd Roll of the old *Retour*, or *Extent*; and thereafter, according to that of the new *Retour*, or *Extent*; and Church-men were tax'd conform to *Bagimont's Roll*. But in the Year 1666, a new Valuation of the whole Land Rent of *Scotland*, as then possess'd, was made: According to which all Subsidies are now rais'd by Way of Cess, imposed by a voluntar Offer made by the Subjects to the Sovereign, and declared in the particular Acts imposing them, to be *debita fundi*, upon all Lands not exempted from Payment. They bear Annualrent after six Months from their falling due (a). Irredeemable Annualrents by Infertment, not relative to a Stock, and Liferent Infertments of Annualrent are liable to publick Burdens, proportionably with the Lands affected therewith.

Thus far of real and heretable Rights: Obligations, and personal Rights come next under our View.

BOOK

(a) Act 2. Sess. 2. Par. 7. VII.