



## PART III.

How Estates may be transmitted  
and passed over by Progress from  
one to another, whether a sin-  
gular or universal Successor.

### BOOK I.

*Of the Transmission of Property to  
singular Successors.*

**A** Singular Successor, is he, who ac-  
quires any Right or Thing, by a  
particular Title, for some Cause.  
If for Value given, or for valuable  
Consideration, the Acquirer is termed a singu-  
lar Successor, for an onerous Cause; and if for  
Love, or on the Score of Affection and Libera-  
lity, he is stiled a lucrative Successor. The  
Person who conveys the Right or Thing in fa-  
vour of another, carries the Name of *Author*.

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Property is conveyed to singular Successors, either by voluntary Deeds of Alienation, or by the legal Diligence of Creditors, or confiscated.

## C H A P. I.

### *Of voluntary Deeds of Alienation.*

**V**OLUNTARY Deeds of Alienation are Disposition and Affignation. In both which, there is ordinarily a Clause of Warrandice (*a*). Whatever Right concerning a Thing conveyed falleth afterward to the Author, it accrueth to his singular Successor, as if it had been expressly conveyed to him : And Conveyance of the Property, doth virtually carry any lesser or inferior Right thereto, if no more was in the Author's Person.

## T I T L E I.

### *Of Dispositions.*

**D**ISPOSITIONS are either irredeemable and absolute, or redeemable.

An absolute Disposition is either a single Disposition of real Rights of Lands, or others, made by one to another, for a certain Price, or for Love and Favour, which is properly term'd *a Disposition*; or, a mutual Disposition

(*a*) Vid. Part 2. B. 2. Chap. 1. Tit. 1.

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Ch. I. *Law of Scotland.* Tit. I. § I. 3

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on of Lands for Lands, which goes by the Name of a *Contract of Excambion.*

S E C T. I.

*Of Dispositions properly so called.*

1. A Disposition is a written Deed, by which real Rights of Lands and the like, completed by Infestment, are conveyed from one, called the *Disponer*, to another.

2. Such Rights are disposed, to be held either of the Disponer's Superior, by Resignation or Confirmation, called a *publick Right*, or a *Right a me*, or they are disposed to be held of the Disponer, called a *base Holding*, or a *Right de me (a)*.

3. Resignation is either made by the Vassal himself, called Resignation *propriis manibus*, or by one having a Procuratory from him, by the symbolical Delivery of a Pen (called *Staff and Bastoun*) to the Superior, or one commissioned by him for that effect. If the King be Superior, Resignation is made to the Barons of Exchequer. Resignation is made either *in favorem*, upon a Disposition to the Vassal himself, and his Heirs therein mentioned, or to some Third Party and his Heirs, to whom the Superior or his Commissioner, in Token of Acceptance, redelivers the Pen; or *ad perpetuam remanentiam*, upon a Disposition to the Superior

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(a) Vid. supra Part 2. B. 1. Chap. 2. Tit. 4.

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to remain with him. Upon this the Party, in whose favour Resignation is made, takes Instruments (called *an Instrument of Resignation*) in the Hands of a Notary. Instruments *in favorem* want not to be recorded, but an Instrument of Resignation *ad remanentiam*, must be recorded as Seifines, within 60 Days (a). Procuratories of Resignations are sufficient Warrants, for making Resignation after, as before the Death of the Granters, or Parties to whom they are granted, or both; provided that Instruments of Resignation, taken after the Death of either Party, express the Titles of those in whose favour Resignation is made, otherwise they are null (b).

4. A Resignation *ad remanentiam*, accepted by the Superior, and duly registred, doth, without more ado, fully denude the Vassal, and consolidate the Property with the Superiority, as it stood the Time of the Resignation, affected with all its real Burdens, tho' constituted without the Superior's Consent. But a simple Resignation *in favorem*, doth not denude the Resigner, without Infeftment following in the Person of the Resignatory. Hence the first Infeftment upon a second Resignation, will be preferred to the second Infeftment upon the first Resignation. But so soon as Infeftment hath followed in the Person of the Resignatory, the Resigner is fully denuded, and so cannot  
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(a) Act 3. Parl. 2. Sess. 1. Ch. II. (b) Act 35. Sess. 4. Parl. W. and M.



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 Ch. I. *Law of Scotland.* Tit. I. § I. 5
 

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transfer any Right. And till Infestment be taken, the Superior gets his Casualties, not by him in whose favour Resignation is made, but by the Resigner, who continues Vassal till the other be infest.

5. Upon an Instrument of Resignation, made in Exchequer, a Signature of Resignation drawn and marked by a Writer to the Signet, is enter'd in a Roll affixed to the Exchequer Wall, by the Presenter of Signatures; which, after it hath stood there some Days, he presents to the Barons, and they finding it agreeable to the former Charters, do pass. Then a Composition being paid by the Party, the Signature is casheted, and recorded in the Books of Exchequer; and a Precept under the Signet (for the Warrant whereof the Signature is left) directed to the Keeper of the privy Seal. The Writer to the privy Seal, upon Sight of this Precept, writes another Precept, directed to the Keeper of the great Seal, and records the same in the Register of the privy Seal. On the Back of which Precept he attests it to be written and recorded by him. To this last Precept the Keeper of the privy Seal appends the same, and keeps the Precept under the Signet for his Warrant. Then the Director of the Chancery writes a Charter containing a Precept of Seifine, and records the same in the Register of the great Seal, and indorses it with an Attestation of its being written and recorded by him. To which Charter the great Seal is ap-

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pended by the Keeper thereof, who retains the Precept under the privy Seal as his Warrant. But Signatures and Charters of the Vassals of Bishops, and their Chapters, whose Valuation is but 100 *Lib.* or under, pass the great Seal *per saltum, gratis*, without Payment of any Composition in Exchequer, or other Dues (a). And the Vassals of Church Lands in *Orkney* and *Zetland*, not exceeding 20 *Lib.* of Valuation, bruik by the Udal Law (b).

6. When Infestment is taken upon a Disposition *a me*, without Resignation, it is null, till it be confirmed by the Superior's Charter of Confirmation, and the last Right first confirmed, is preferred *ceteris paribus* (c). In a Competition of such as have Confirmations from the Sovereign, he who gets his Charter first past the Seals, is preferred. A Confirmation obtained, makes the Infestment confirm'd effectual *retro*, from the Date of the Infestment; unless some Impediment intervene, which hinders the Right to take Effect by Confirmation.

7. A Subject Superior is not obliged, except he please, to accept of Resignation in *favorem*, or grant Confirmation to a singular Successor upon a voluntary Disposition made by his Vassal. But in case of the Superior's Refusal to do so, the singular Successor may, by getting from his Author a Bond for a Sum equi-

(a) Act 32. Sess. 2. Parl. W. and M. junct. Act 11. Sess. 7. Parl. K. W. (b) D & Act 32. (c) Act 66. Parl. 4. Jam. VI.

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Ch. I. *Law of Scotland.* Tit. I. § 2. 7

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equivalent to the Price of the Lands, and adjudging the same for Payment, force the Superior to enter him upon a Charge. The Barons of Exchequer do not refuse Resignations made by the King's Vassals, or Confirmations to them.

8. When a Superior receives a singular Successor, he may claim a Year's Rent of the Lands, as an Acknowledgment for changing his Vassal.

9. Confirmation of Rights *de me*, or base Rights by the Superior, doth not render them publick Rights, or make the Person whose Right is confirm'd, immediate Vassal to the Superior confirming, but only hinders the Superior from claiming any Casualty arising to him, through Deeds of the Vassal, wanting his Consent. Yet Confirmation of Seisine, taken upon a Precept in a Disposition, obliging to infest *de me* and *a me* by Confirmation, to neither of which the Precept or Intettment hath special Relation, makes it a publick Right.

S E C T. II.

*Concerning Contracts of Excambion:*

A Contract of Excambion is a mutual Deed, by which two Parties exchange Lands for Lands, they, on both Sides, dispone to one another. If either of the Lands exchanged, before Delivery of Possession, appear to belong to a Third

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Party, the Owner of the other, may refuse to quite Possession thereof, and if evicted after Delivery of Possession in the other, the Contract becomes void, and he from whom the Lands taken in Exchange is evicted, hath Regress or Recourse to what he gave in Exchange. In which Case he would be preferred even to singular Successors infest in such Lands, upon Rights from him who got it in Exchange, tho' preceding the Eviction.

T I T. II.

*Of redeemable Dispositions.*

**A** Redeemable Disposition is the Conveyance of a real Right for a Time, so as it may be redeemed or recovered, and the Disposer may enter again into his Right, upon certain Conditions, as the Repayment of Money, for which the Conveyance was made, &c.

Under redeemable Dispositions I comprehend Reversions, or Powers of Redemption, Dispositions containing a reserved Faculty to alter, and Wadsets.

S E C T. I.

*Of Reversions, or Powers of Redemption.*

I. A Reversion, or Power of Redemption in general, is a Right to recover what is alienat-

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## Ch. 1. *Law of Scotland.* Tit. 2. § 1. 9

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nated for Value received, or carried away by the Diligence of Creditors, in Satisfaction of Debt. He to whom this Power of Redemption belongs, is called the *Reverser*.

2. Reversions are either of Moveables, which are touched in another Place (*a*), or of Lands.

3. Reversions of Lands are either legal, which arise from the Provision of Law, or conventional.

4. Legal Reversions are those competent, by the Effect of Law, to Superiors of Lands apprised or adjudged from their Vassals, or to the Persons from whom these are apprised or adjudged; of which I have spoke in the proper Place.

5. A conventional Reversion is a Paction, by which it is agreed, that a Seller may redeem or get back a Thing sold, he restoring the Price to the Buyer, either simply or indefinitely, without expressing the Time, or within a fixed Time. If this Power is granted indefinitely, it lasts as long as the Time limited for Prescription. When it is restrained to a certain Time, it must be exercised within that Time.

6. Conventional Reversions with us are *strictissimi juris*, most strictly observed in the precise Terms thereof. For, 1. They are not extended to Heirs or voluntary Assignies, unless conceived expressly in their favour: But for Commerce sake, may be apprised or adjudged,

(*a*) Vid. Part 2. B. 3. Tit. 7. Sect. 1. N. 8.



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judged, tho' Heirs or Assignies were expressly excluded from the Benefit thereof ; and after an Order of Redemption used by the Reverser, he may assign the Reversion. 2. Conditions of Reversion cannot be fulfilled in equi-possible Terms.

7. Such Reversions are, 1. Either ingrossed in the redeemable Right, or granted in a Paper apart. 2. They are simple or conditional. 3. They are either solemn and perfected, or only inchoated, as Promises and Bonds to grant Reversions. 4. Reversions are either principal or accessory. A principal Reversion is that, whereby a Right is declared redeemable, upon Payment of the principal Sum for which it was granted, and the Annualrents thereof. An accessory Reversion is that, by which the Reverser ( who, after granting of the redeemable Right, borrowed more Money from the Receiver thereof ) declares, that he shall not use an Order of Redemption, till the Money last borrowed as well as the first be paid. This we call an *Eik to Reversion*.

8. Reversions of Land-rights, stand good against singular Successors (a). But such Reversions not incorporated, Assignations, Discharges, and Eiks to Reversion, are to be registered as Seisines, within sixty Days of the Date ; and Bonds for making Reversions, within the like Time, after Seisine taken by the Makers thereof ; otherwise they are effectual on<sup>m</sup>

(a) Act 28. Parl. 4. Jam. III.

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**Ch. I. Law of Scotland. Tit. 2. § 2. II**


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only against the Granter and his Heirs, and not against singular Successors; whether the Right under Reversion be of Country-land (a), or of Tenements within Burgh (b).

**S E C T. II.**

*Of Dispositions containing a reserved Faculty to alter.*

WHERE Dispositions of Lands contain a reserved Faculty to alter in favour of the Disponer, without Mention of his Heirs, he may exercise the Faculty, even after the Lands are fallen in Nonentry, or Ward, by the Death of him to whom they were disposed, and thereby determine and put an End to such Casualties: The Faculty may also be adjudged by the Disponer's Creditors; but it dies with himself, if not exercised before his Death. A reserved Faculty to alter at any Time during the Disponer's Life, without the Words, *etiam in articulo mortis*, or upon Death-bed, in a Disposition made by the Disponer to a Stranger, or any who is not apparent Heir, may be exercised by the Disponer on Death-bed. But such a reserved Faculty, or even a Faculty to alter upon Death-bed, in a Disposition to the Disponer's apparent Heir, can be exercised by the Disponer only in *liege poustie*.

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(a) Act 16. Parl. 22. Jam. VI. (b) Act 11. Parl. 3. Ch. II.

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## S E C T. III.

*Of Wadsetts.*

1. A Wadset is a Disposition, whereby any real Right of Lands or others passing by Infestment, is transmitted from one to another, in Security of a special Sum, and redeemable upon Payment of the Money in the Way and Manner therein expressed. Which Disposition is perfected by Infestment, to be held either of the Disponer, or of the Disponer's Superior. The Person to whom a wadset Right is granted, is called the *Wadsetter*.

2. Where a Wadset is given to be held of the Disponer's Superior, the Disponer sometimes takes Letters of Regress from the Superior, obliging him to receive back his Vassal, when he shall redeem his Lands. Which the Superior would not otherwise be obliged to do, except he please, if the Reversion be not incorporated in the wadset Right. Regresses, Affignations and Discharges thereof must be registered as Seisines, within sixty Days of the Date, and Bonds for making Regresses, within the like Space, after Seisin taken by the Wadsetter (a).

3. A Wadset is either proper, or improper.

4. A proper Wadset is, where the Wadsetter takes his Hazard of the Rents of the Lands,  
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(a) Act 16. Parl. 22. Jam. VI. junct. Act. 11. Parl. 3. Ch. II.

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Ch. I. *Law of Scotland.* Tit. 2. § 3. 13

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or others wadset, in Satisfaction of his Annualrent of the Sum for which the Wadset was given, and pays all publick Burdens. A proper Wadsetter is not accountable for his Intromissions with the Rents, till the Wadset be redeemed, tho' far exceeding his Annualrents.

5. An improper Wadset is, where the Granter of it pays all publick Burdens, and upholds the Rents, and the Wadsetter runs no Hazard, but hath his Annualrent secured to him in all Events. Sometimes an improper Wadsetter, not desirous to enter to the natural Possession of the wadset Lands, sets the same in Tack to the Granter of the Wadset, or to his Trustee, for Payment of the Annualrent of his Money, as the Tack-duty, which is called a *Back-tack*.

6. It is Usury to take a proper Wadset of Lands, exceeding in Rent the Annualrent of the Money lent, with a Provision that the Creditor shall not be liable for the Hazard of the Fruits and Rents (a), or for any Wadsetter to set a Tack to the Heritor, or other Person to his behoof, for Payment of a Duty in Money or Victual, exceeding the Annualrent of the Sum for which the Wadset was granted (b).

7. The Reversion may be affected with a Tack in favour of the Wadsetter, to commence after Redemption of the Wadset, for the true Mail, or near thereto, (c) that is, for more than

(a) Act 62. Parl. 1. Sess. 1. Ch. II. in fin. (b) Act 247. Parl. 15. Jam VI. (c) Act 18. Parl. 6. Jam II.

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than the Half of the real Duty, which is good against singular Successors, to be reckoned according to the Worth of the Lands at the granting of the Wadset. But such Tacks for half Mail, or less, are null (a) and usurious. A Clause irritant in the Reversion of a Wadset, that the Money not being repaid at a precise Day, the Reversion should expire, and the Lands become irredeemable, called *pactum legis commissariae* in Wadsets, is disallowed as usurious and unjust. Notwithstanding whereof, the Money may be offered at the Bar, any Time before Dispute in a Process, for declaring the Irritancy incurred.

8. A Wadset is extinguished either by Law, or Consent.

9. Law takes off a Wadset, by a Declarator of Redemption, proceeding upon Premonition, or Requisition and Consignation, which is called *an Order of Redemption*. The Ufer of this Order, must premonish the Wadsetter to compare at the Time and Place appointed in the Reversion, to receive Payment of the Sums due to him, and take Instruments thereupon, called *an Instrument of Premonition*. If the Wadsetter appear not, or refuse to accept, when duly offered at the Time and Place prefixed; it may be consigned under Form of Instrument in the Hands of the Person named for that effect in the Reversion, for whose Sufficiency the Consigner is not liable. If no Consigna-  
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(a) Act 18. Parl. 6. Jam. II.



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**Ch. 1. Law of Scotland. Tit. 2. § 3. 15**


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tary be named, the Money may be consigned in the Hands of the Clerk of the Bills, upon the Wadsetter's Peril, or in the Hands of any other Person, on the Reverser's Peril. Which Consignation exempts the Reverser from being liable for Annualrent of the Sums consigned. The Reverser, after an Order used by himself or his Author, raises a Declarator of Redemption against the Wadsetter, wherein the Superior, if the Wadsetter was publicly infest, should be cited, and if the Reversion be contained in the Wadset, may be decerned to infest the Redeemer.

After Decreet of Declarator, the Lands redeemed belong to the Obtainer without new Infestment, if the Wadset was held of himself: But he must be infest *de novo* if the Wadsetter was publicly infest. The Wadsetter will get Letters of Horning upon the Instrument of Consignation and Reversion against the Consignatory for getting up his Money.

The User of the Order of Redemption may pass from it any Time before Declarator, or before the Wadsetter hath owned the Consignation by Renunciation or Grant of Redemption of the Wadset, or by pursuing for the consigned Money: But after Declarator, or the Wadsetter's accepting the Consignation in Manner aforesaid, the User of the Order cannot pass from it.

The Sum for which a Wadset was granted is still heritable before Declarator, or before the  
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Wadsetter hath owned the Consignation, and goes to his Heirs ; but becomes moveable either by the Wadsetter's declaring his Acceptance of the Consignation, or by Declarator in his Lifetime. For Declarator obtained after his Death, doth not render the Sum moveable as to Executors of the Wadsetter, tho' it be moveable as to the Representatives of his Heir, against whom the Declarator was obtained, and would pass to his Executors.

10. A Wadset is extinguish'd by Consent, either of both Parties, or of the Wadsetter only.

[1.] 'Tis voided by mutual Consent, when the Wadsetter renounceth it voluntarily upon receiving Payment from the Reverser. Which Renunciation is term'd *a voluntary Redemption*, and must be recorded as Seifines within sixty Days after Date (*a*). A Wadset, upon which no Infestment followed, is taken away by a simple Discharge or Renunciation. But if the Reverser be not infest, nor Heir to a Person infest in the Lands wadsetted, the Wadset must be conveyed to him by the Wadsetter. Where the Wadsetter is infest base, he must resign *ad remanentiam* in the Disponer's Hands, as his Superior. But if the Wadsetter publicly infest, he must resign *in favorem*, in the Superior's Hands. Which Resignation, if the Reversion be ingrossed in the wadset Infestment granted by the Superior, doth reinstate the Granter of the  
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(\*) Act 16. Parl. 22. Jam VI. junct. Act 11. Parl. 3. Ch. II.

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the Wadset in his own Place as Vassal. But if the Reversion be not incorporated, the Granter of the Wadset may charge the Superior upon his Letter of Regress, to infest him for re-establishing the Right in his Person: Or the Superior may, if he will, without a Charge re-infest the Granter of the Wadset.

[2.] A Wadset is extinguished by Consent of the Wadsetter only, when he requires Payment of his Money for which the Wadset was granted. In this Requisition the same Solemnities are used, as in Premonition by the Reverser to the Wadsetter to take his Money. A Wadsetter may pass from his Requisition either directly by an express Declaration; or indirectly by meddling with the Rents of the wadset Lands for Terms subsequent, so be the Money is neither paid nor offered, and consigned, conform to the Requisition: But cannot pass from it, after an Offer and Consignation by the Reverser.

T I T. II.

*Of Assignations.*

**A**SSIGNATION in general, is a Conveyance of some Thing personal or moveable from one to another.

Assignations are either ordinary or privileged.

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## S E C T. I.

*Of ordinary Assignations.*

1. A N ordinary Assignation is, a written Deed, whereby Moveables, or some personal Right, or Right whereupon no Infestment followed, or needs to follow, is transmitted from one called *the Cedent*, to another called *the Assigny* or *Cessionary*.

2. No Right whereupon Infestment hath followed, can be conveyed by Assignation, except a Liferent Infestment, which resolves only in a temporary Right during the Cedent's Lifetime. And some personal Rights or Obligations are incommunicable by Assignation: As most Part of Reversions, temporary Tacks for Years, not set to one and his Assigns, &c.

But all Moveables or Rights, whether heritable or moveable, not completed by Infestment, or which are perfect without Infestment, the current Profits of heritable Rights completed by Infestment, Actions, Bonds conceived in favour of one, and his Heirs, without expressing Assignies, may be assigned. Yea, a Bond excluding Assignies, is assignable for one-rous and necessary Causes.

3. Assignation to a Debt, is an incomplete Right, till it be intimated to the Debtor, that he may know whom to pay to.

Intimation may be made, 1. By the Assigny, or his Procurators, shewing the Assignation  
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to the Debtor, and taking Instruments thereupon in the Hands of a Notary. 2. By a Pursuit at the Instance of the Assigny against him for Payment, wherein the Assignation is judicially produced, or by a Charge of Horning or Arrestment : But not by using Inhibition against the Cedent. 3. The Debtor's paying Annualrent, or any Part of the principal Sum, or acknowledging the Assignation, and promising Payment to the Assigny, by any Writ under his Hand, is sustained as Intimation : But his private Knowledge of the Assignation is not sufficient.

4. An Assignation and Disposition to Moveables, or Assignation to Liferent Rights, Tacks, Rents, &c. are perfected by Possession, without other Intimation ; and Assignation to Reversions, by Registration.

5. When an Assigny transfers or passes over his Right to a Third Party, that is call'd a *Translation* : And the restoring the Cedent to his former Right, is term'd a *Retrocession*, or *Repossession*. These Translations and Retrocessions are perfected in the same Manner as Assignations.

6. An Assignation to a Debt, carries all Diligence used for Payment or Security thereof, tho' not express'd. An unintimated Assignation is of sufficient Force against the Cedent and his Representatives, and special Assignations not intimated in the Cedent's Life, are Titles of Action or Defence, without confirm-



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ing the Subject, if no more complete Right stand in Competition (a). But an Assignation is effectual against singular Successors, only from the Date of the Intimation. And in a Competition, a second Assigny making first Intimation, is preferred to one whose Assignation is of a prior Date (b).

7. All Exceptions upon Payment, Compensation, &c. that lay against the Cedent before Intimation, are competent against the Assigny. And the Cedent's Oath doth, after Intimation, prove against a gratuitous Assigny; but not against an Assigny for an onerous Cause, unless the Matter was litigious by a depending Process, before the Assignation be intimated.

S E C T. II.

*Of privileged Assignations.*

I. PRIVILEGED Assignations are those, which require not to their Constitution and Perfection, the Solemnities essential to ordinary Assignations.

2. Such are divided into conventional and legal Assignations.

3. Privileged conventional Assignations, are the Indorsements of Bills of Exchange, and the Notes of any trading Company, which require not the Solemnities of ordinary Assignations or other

(a) Act 26. Sess. 2. Parl. W. and M. (b) Vid. infr. Ch. II. Tit. 3. § 7.

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other Writs, and may be drawn blank in the Indorsee's Name, and Trusts in Relation thereto, may be proved otherwise than by Writ or Oath of Party (a). Nor is Intimation necessary to complete them.

4. A legal Assignment is a tacite Conveyance by Law, established upon Equity, Expediency and presumed Intention of Parties. Such is a Husband's *jus mariti*, the Courtesy of Scotland, a Widow's Terce, an Executor's Interest in the Goods and Gear of one deceased, an Arrestment with a Decreet of Forthcoming, &c.

## C H A P. II.

*How Property may be affected, and carried away by the legal Diligence of Creditors.*

**W**HEN a Debtor is unwilling to pay or perform what he stands obliged to, his Person may be attacked and incarcerated by raising of Horning and Caption; his Moveables may be affected and carried off, either by Denunciation on the Horning, or by Arrestment and a Decreet of Forthcoming, or by Poining; the free Disposal of his Heritage may be hindered by Inhibition, and the Heritage it self may be evicted by Apprisings and Adjudications.

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(a) Act 25, Sess. 6, Parl. K. W.

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## T I T. I.

*Of Horning and Denunciation.*

1. **H**ORNING or Letters of Horning, is a Warrant in the King's Name, issued out under the Signet, to charge Persons to pay, or perform Deeds, within a prefixed Time, upon pain of being declared Outlaw, and having his Goods poynded, &c. in case of Disobedience.

2. Letters of Horning are either general, or special.

3. General Letters of Horning are those obtained upon a Bill to the Lords of Session, against Persons without a previous Citation; which are now allowed only for His Majesty's Revenue, for Ministers Stipends upon Decrees of Locality, and for making Decrees of poynding the Ground effectual (*a*); or where such Letters are warranted by particular Acts of Parliament.

4. Special or particular Letters of Horning are raised upon Decrees or Obligations registered in order to Execution, in the Books of Session or other competent Jurisdiction, *that is*, where the Debtor lives, which are Decrees in the Construction of Law. Some Obligations are registered in Virtue of a Consent to Register

(*a*) Act 13. Sess 2. Parl., W. and M.

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stration in the Body thereof; others are registrable by Statute, as protested Bills of Exchange.

5. A Messenger executes the Horning, by charging the Party within the Kingdom personally, or at his dwelling Place, to pay or perform within 15 Days, if the Horning proceed on a Decreet, except a Decreet of Removing; or upon six Days, if upon a protested Bill of Exchange, or Decreet of Removing; or within the Days contained in the Clause of Registration, where the Horning is founded on a registered Writ.

6. After elapsing of the Days of the Charge, the Party may for his Disobedience be denounced Rebel, *i. e.* Outlaw, by three Blasts of a Horn. Which Denunciation must be executed or served at the Market-crofs of the Head Burgh of the Shire, Stewartry or Bailiary where the Party dwells (*a*).

7. Persons out of *Scotland* must be charged upon sixty Days, and denounced at the Market-crofs of *Edinburgh*, Pier and Shore of *Leith*.

8. Horning and Executions must, within fifteen Days after Denunciation, be registred in the Books of the Jurisdiction where the Party dwells (*b*), or in the general Register of *Edinburgh* (*c*). Which disables the Party to sue or defend in Judgment, makes his single Escheat to fall from the Denunciation, and his

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(*a*) Act 264. Parl. 15. Jam. VI. (*b*) *Ibid.* junct. Act 75. Parl. 6. Jam. VI. (*c*) Act 13. Parl. 16. Jam. VI.

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Liferent after continuing Year and Day at the Horn.

9. The Effect of Denunciation is taken off by Letters of Relaxation under the Signet. Which require the same Solemnities of Publication and Registration, as Denunciation: While the Party continues unrelaxed at the Horn, the next Step of personal Diligence, is to raise Letters of Caption.

T I T. II.

*Of Caption.*

1. **C**APTION or Letters of Caption, is a Warrant in the King's Name, under the Signet, for feizing the Debtor's Person, and committing him to prison. In this Execution of the Body, the Messenger having his Blazon on his Breast, toucheth the Party with his Rod or Wand, and reads to him the King's Letters, whereof he gives him a Copy signed by himself.

2. Caption may be put to Execution at any Time, whether in the Night or Day; and the Messenger may in Virtue thereof force open Doors. The Magistrates of the Bounds, when desired by the Messenger, are obliged to assist him in putting the Person attached in Prison: Against whom, for refusing their Concurrence, the Lords will, upon Sight of the Caption and the Messenger's Execution, issue forth Horn-  
ing,



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ing, vulgarly termed *Letters of second Caption*. Thereupon, after expiring of the Days of the Charge, they may be denounced and registred at the Horn, and Caption obtained against them.

3. Subsidiary Action or Diligence for the Debt, lies against those who fail in dutifully executing Captions: As against the Messenger, who wilfully suffers the Prisoner to escape out of his Custody; or those who made Way for his Escape, by deforcing the Messenger; or Magistrates refusing due Concurrence, when required to incarcerate the Prisoner, or letting him out of Prison without a just Cause (a). Nor will it exculpate Magistrates from answering for a Prisoner's Escape, that they apprehend and recommit him in as good Condition as before his getting off.

4. Besides such solemn Caption by the King's Letters proceeding upon registred Horning, there are other summary Attachments or Arrests of Persons allowed in Law, as, 1. Caption against Witnesses or Havers of Writs, called a second Diligence, which is granted upon the Sight of the first Diligence executed, without its being registred. 2. Caption is granted by the Lords of Session, upon special Occasions, as, 1. Against Debtors *in meditatione fuga*, justly suspected of a sudden fraudulent Design to run the Country with their Effects. 2. Against Contemners of their Authority, or Committers of  
some

(a) Act of Sederunt, 14 June 1671.

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some Disorder in Business before the Session. 3. Against Advocates Servants, for keeping up Processes. 4. The Admiral has a Privilege to arrest or seize Persons summarily, till they find Caution *judicio fisti*, or *judicatum solvi*, or both. 5. By the Border Law, Inhabitants on either Side of the Border, are, upon Application to any Magistrate of the Bounds, arrested and incarcerated for any Debt till they find Caution to answer and pay. 6. Magistrates of Burghs Royal may arrest Strangers living without the Burgh, and found therein, at the Instance of a Burgefs or other Inhabitant, for Horse or Man's Meat, Abuilziments or other Merchandize due to himself originally, without Bond or other Security (a). They are also privileged to issue forth Acts of Warding:

5. Caption or Execution of the Body for civil Debt, is stopped, 1. By the Debtor's retiring to, and keeping within the Abbay of *Holyrood-house*, which is a Sanctuary. 2. By his procuring Protection from the Parliament; his Creditors being cited to the granting thereof, and their Names and Designations therein set down (b): Or from the Lords of Session, Exchequer or Justiciary for compearing before them, upon Citation or Charge as a Witness; the Party citing him, first making Faith that he is a material Witness, and the Protection bearing the Cause for which it is granted (c).

3. By

(a) Act. 8. Parl. 2. Sess. 3. Ch. II. (b) Act 22. Sess. 7. Parl. K. W. (c) Act 9. Parl. 3. Ch. II.

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 Ch. 2. *Law of Scotland.* Tit. 2. 27
 

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3. By a *cessio bonorum*, which is a Debtor's yielding up by Disposition and Assignation, all his Estate real and personal to his Creditors, for getting his Body discharged of Imprisonment, which with us is done by an Action called *actio bonorum*; in this Action the Debtor cites all his Creditors upon six Days, to accept from him upon Oath, a Right to his whole Means and Estate. If no Defence be made by the Creditors, or their Objections be repelled, the Pursuer's Oath is taken in the Terms of the Acts of *Sederunt* (a), upon the Disposition and Inventory of his Estate and Effects produced. Then a Decree of *bonorum* is pronounced, containing a Warrant for a Charge to set at Liberty. Which Decree commonly ordains the Person who obtains it, to take on and wear the Dyvour Habit: And 'tis lawful to any Creditor to imprison him afterwards, if found wanting the Habit (b). Nor can the Bankrupt's wearing the Habit be dispensed with, unless in the Summons and Process of *bonorum*, his failing thro' Misfortune, be libelled, sustained and proven (c). 4. Where a Prisoner for civil Debt makes Faith before the Magistrate, that he is not able to maintain himself, if the Creditor at whose Instance the Debtor was committed or is detained Prisoner, refuse or delay within the Space of ten Days, to provide or give Security for Aliment to him, not under  
three

(a) 8 Feb. 1688, and 18 July 1691. (b) Act of Sederunt, 23 January 1673. (c) Act 5. Sess. 6. Parl. K. W.

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three Shillings *per diem* after Intimation to the Creditor for that effect, the Magistrate may set the poor Prisoner at Liberty without Hazard ( *a* ), which is commonly called *the Act of Grace*. 5. Personal Attachment is hindered by a Suspension of the Charge ( *b* ).

T I T. III.

*Of Arrestment.*

**A**RRESTMENT is an authoritative Order given to a Person in whose Hands another's moveable Goods are, discharging him to deliver or pay the same to the Owner, till some personal Debt, or Claim due by him to his Creditor Obtainer of the Arrestment ( who is called the Arrester ) be paid or satisfied.

2. Arrestment may be used upon a depending Action, *that is*, upon an executed Summons, called Arrestment upon a Dependence, or upon unregistred Bonds by virtue of Letters of Arrestment, or upon any Decreet or registred Bond by virtue of Letters of Horning containing Arrestment; and upon DECREETS of inferior Courts, or Bonds registred in their Books by virtue of a Precept from the inferior Judge within whose Territory the Goods arrested are. Yea, within Burgh it is held sufficient for a common Town-officer to arrest by the

( *a* ) Act 32. Sess. 6. Parl. K. W. ( *b* ) Vid. Part 4. B. 2. Ch. 2. Tit. 1. Sect. 3.



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Ch. 2. *Law of Scotland.* Tit. 3. 29

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the immediate verbal Warrant of a Magistrate, the Officer verifying his Execution upon Oath.

3. Arrestment doth affect not only Moveables, and moveable Bonds, which pass to Executors, but also heritable Sums due by Bond, whereupon no Infeftment followed; which last may be either arrested or adjudged, as the Creditor thinks fit (a). Arrestment of Annualrents, or Mails and Duties *currente termino* is effectual, if the Debtor they belong to be not denuded of his heritable Right by infefting another before the Term, and is preferable to a posterior Assignation to that Term's Rent. Which Arrestment while the Term is current, affects the whole Year's Rent, if payable but once in the Year, and only a Term's Rent if payable termly. Conditional Debts may also be arrested. Gratuitous or proper Aliments, Fees of a Commissioner to the Parliament, Pensions granted by the King, or the Salaries of his publick Ministers and Servants, are not arrestable, nor can a common Servant's Fee be arrested, except in so far as it exceeds what is necessary for his Aliment, according to the Quality of the Service he is in.

4. Arrestment hinders only the Person in whose Hand it is laid on, (and not his Representative unless renewed in his Hand) to pay or perform voluntarily to the Creditor whose Effects are arrested. For another of his Creditors may poid them, notwithstanding of a pri-

(a) Act 51. Parl: 1. Sess. 1. Ch. II.



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prior Arrestment. And it affects only present Debts or Goods owing or belonging to the Arrester's Debtor, but is not extinguished by the Death of the Arrester, or of the Owner of the Debts or Goods arrested. A Person in whose Hand Debts or Sums of Money are arrested, cannot afterwards, unless the Arrestment be loosed, pay to his Creditor, or to his Heir or Executor, without being liable to repay to the Arrester. And if Goods arrested be delivered to the Owner, he against whom the Arrestment was served, is not only bound to make the Value forthcoming to the Arrester, but also liable to the Pain of Breach of Arrestment; nor can he safely pay or perform to one of the Owner's Creditors, without calling them all in an Action of Multiple-pounding to dispute their Interests.

5. Arrestment by the verbal Order of a Magistrate, is of Force only for the Space of 24 Hours. Arrestment upon a Dependence or unregistred Bond, may be loosed by Letters of Loosing Arrestment, which pass the Signet upon a common Bill and a Bond of Cautionry, obliging the Cautioner to pay the Debt arrested for, if found due by Law upon Trial (a). But Arrestment upon a Decreet or registred Bond, can be loosed or purged only by Payment, or Consignation of the Ground of the Arrestment.

6. The Arrester to complete his Diligence,  
raif-

(a) Act 17. Parl 22. Jam. VI.

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Ch. 2. *Law of Scotland.* Tit. 3. 31

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raiseth an Action of Forthcoming against the Person in whose Hands he had arrested, to pay and perform to him the Subject arrested, atleast so much thereof as will satisfy the Debt owing to him by the Owner, who must be cited for his Interest. If the Forthcoming be pursued before an inferior Judge, and the Arrester's Debtor live within another Jurisdiction, or is out of *Scotland*, he must be cited by virtue of Letters of Supplement.

7. In a Competition of several Arresters among themselves, or with Assignies pretending Right to the Subject arrested, they are *ceteris paribus* preferred according to the Dates of the Arrestments, and Intimations of the Assignations, tho' all in one Day, if one be three Hours prior to another. If all be upon one Day and some express the Hour, and others not, that which wants the Hour is presumed to have been done the last Hour of such a Day; but if none of them mention the Hour, they are brought in *pari passu*. Yea, Arrestment of a Debt before the Term of Payment, or of a conditional Debt before the Condition exist, is preferred to a posterior Arrestment thereof after the Term, or after the Condition is come to pass. Where two Arresters, whose Grounds of Debt are of the same Kind, are not equal in Diligence, the Obtainer of the first Decreet of Forthcomming, as having the first complete Diligence, is preferred: But where several Persons arrest upon Claims of different Kinds, he who

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who arrests upon a Decreet, is preferred to a prior Arrester upon a depending Action, whose Debt is not constituted by a Decreet against the common Debtor at the Time of the Competition: And an Arrester for a Debt, whereof the Term of Payment is come, is preferred to one who before arrested *currente termino*.

T I T. IV.

*Of Poinding.*

1. **P**OINDING is the distraining of one's moveable Goods, by Authority of Law, for his Debts.

2. Poinding is of three Kinds, *viz.* personal, real, and poinding *brevi manu*.

3. Personal Poinding is distraining for personal Debt, by virtue of Letters of Poinding, or Horning and Poinding, rais'd upon a Decreet or registrated Bond, and executed by Messengers at Arms, or by virtue of the Decreet or Precept of an inferior Judge, executed by the Officers of Court, the Days of the Charge to pay being first expired (*a*).

4. Poinding must be executed with Upsun.

5. When a Messenger or other going to poid, is hindred by the Doors being shut against him, the Creditor, upon Application to the Lords, and producing the Warrant of Poid-

(*a*) Act 4. Parl. 2. Sess. 1. Ch. 11.

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Ch. 2. *Law of Scotland.* Tit. 4. 33

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Poinding, with the Messenger or Officer's Execution, bearing that Access was denied, will get *Letters of open Doors*.

6. *Labouring Beasts in Time of Labouring*, ( tho' not actually at Work at the Time ) *when there are other Goods on the Ground*, ( sufficient to pay the Debt ) *cannot be poided* ( a ). By Labouring, is understood the ordinary Season of cultivating and sowing the Ground, in Expectation of Increase in such a Place of the Country; or when one is actually labouring his Ground, tho' the Labouring be then over in the rest of the Neighbourhood: But such Beasts belonging to a Debtor, may be poided after his Labouring is over, tho' most of the Labouring in that Place be not ended.

7. If Persons compear, and offer to make Faith before a Poinding is completed, that such Goods belong to them, and what way they belong, the Executor cannot proceed. But when no Person pretends to the Goods, they are apprifed upon the Ground, to the Value of the Debt and the Sheriff-fee, or so far as they will extend, if of less Value than the Debt, and offered to the Debtor for the Sum they are valued at: If he don't appear, or don't offer to redeem them, they are apprifed again, at the Market-crofs of the head Burgh of the Jurisdiction, where the Poinding is executed, and offered to the Debtor upon Payment

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(a) Act 98. Parl. 6. Jam. IV.



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ment of the Debt and Sheriff-fee ; and if neither he nor any in his Name accept the Offer, are delivered to the Poinder, in Satisfaction of his Debt, in Whole or in Part.

8. Real Poinding is the distraining of Moveables upon the Ground of the Debtor's Lands, by a Messenger, for Payment of some real Debt, as bygone Feu-duties, non-entry Duties, or the Avail of Marriage declared, or the Bygones of an Infestment of Annualrent, &c. by virtue of Letters of poinding the Ground, issued forth upon a Decreet of poinding the Ground. In which Decreet the Lords use, where there is a Competition of Creditors, for the Benefit and Ease of poor Labourers of the Ground, either to assign to each Creditor a particular Locality, conform to his Sum and Preference, out of which he may seek Payment termly, or to allow some Time to every one of them, according to his Preference, for poinding the Moveables upon the Ground.

9. This Poinding for real Debts, differs from personal Poinding, in that, 1. The Debtor's Tenants cannot be distressed by the latter, but may be distressed by the former, *currente termino*, for the Value of a Year's Rent, when they pay their Master once in the Year, or for a Term's Rent, when they pay termly. 2. Personal Poinding requires a preceeding Charge to pay, which is not necessary to a Poinding of the Ground, tho' it cannot proceed



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Ch. 2. *Law of Scotland.* Tit. 5. 35

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ceed till Fifteen Days after the Decreet. 3. Labouring Beasts, in labouring Time, may be carried off in a personal Poining, if there be no other Goods on the Ground, but not in a real Poining, whether there be other Goods or not. 4. A Decreet of Poining for personal Debt, must be transferred against the Debtor's Representatives; whereas a Decreet of poining the Ground, needs no such Transference, and is effectual against all Successors and Possessors, without any new Constitution against them.

10. Poining *brevi manu*, is that which may be executed without a previous Sentence of a Judge; which is thus far allowed, that a Person who finds another Man's Beasts doing Hurt or Damage upon his Ground, may detain them till he get Satisfaction from the Owner, of Half a Merk *toties quoties*, for each Beast found in the Skaith, besides the Damages, and his Expences in keeping it (a).

T I T L E V.

*Of Inhibition.*

1. **I**NHIBITION is either of Lands and other heritable Rights, or of Tithes;

2. Inhibition of Lands and other heritable Rights, is a personal Prohibition, by virtue of

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Let.

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Letters under the Signet, obtained upon a common Bill, by any Creditor real or personal discharging his Debtor to sell or dispose of, or any ways burden his Lands or heritable Rights completed by Infeftment, to the Prejudice of the Creditor's Claim or Debt due to him, till the same be satisfied.

3. Inhibition may be obtained upon any obligatory Writ, or upon a depending Action, or upon a general Charge to enter Heir, in so far as concerns Debts particularly libelled in the general Charge.

4. It must be published and served by a Messenger, 1. Against the Person inhibited, if within *Scotland*, personally or at his dwelling Place; and if out of the Country, at the Market-cross of *Edinburgh*, Pier and Shore of *Leith*. 2. It must be executed at the Market-cross of the head Burgh of the Shire, Stewartry or Regality where he dwells (a), by crying of Three several Oyesses, publick Reading of the Letters, and leaving or affixing a Copy of the same at the Market-cross. The Letters and Executions thereof, must, within Forty Days after Publication at the head Burgh of the Jurisdiction where the inhibited Party dwells, be entered either in the particular Register of that District, and also where his Lands ly, (if these and his dwelling Place be within different Jurisdictions,) or in the general Register at *Edinburgh* (b), otherwise it is null. Registration in  
the

(a) Act 264. Parl. 15. Jam. VI. (b) Act 119. Parl. 7. junct. Act 264. Parl. 15. and Act 13. Parl. 16. Jam. VI.

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 Ch. 2. *Law of Scotland.* Tit. 5. 37
 

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the general Register affects all his Lands within *Scotland*: But Registration in the particular Register, affects no Lands without that Jurisdiction.

5. Inhibition takes Effect only against Lands, or heritable Rights by Infeftment, or Rights equivalent, as Liferents by Courtesy, Terce, or Reservation in Infeftments granted to others, and the Casualties of Superiority; but affects not only such belonging to the inhibited Person at the Time, but also those to be acquired by him, any where within *Scotland*, if the Inhibition be recorded in the general Register, or within the Jurisdiction where it is recorded, if it be entred only in a particular Register. It extends not only to posterior voluntary Infeftments of these, but even to Infeftments upon Apprising or Adjudication, if the Debts which are the Foundation thereof, be posterior to Publication of the Inhibition; but is not effectual against posterior voluntary Rights, which the Person inhibited stood obliged to grant, before Inhibition was served, nor against posterior legal Diligence of Apprising or Adjudication, for Debts anterior to the Inhibition. If a Creditor of the Liferenter or Wadsetter, intimate, by way of Instrument, to the Reverfer, that the Wadsetter or Liferenter stands inhibited at his Instance, the Wadset or Annualrent can only be redeemed by way of Action of Declarator, to which the Inhibiter is cited, or by Suspension of double

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Poinding, upon Confignation of the Money for which the redeemable Right was made (a). Inhibition hath no Effect against Rights granted by the inhibited Person's Heir.

6. The Action arising upon Inhibition, is called Reduction *ex capite inhibitionis*, whereby Deeds contrary thereto may be rescinded and annulled, in so far as prejudicial to the Ground of the Inhibition, and till that be satisfied.

7. Inhibition of Tithes, is a Prohibition given at the Instance of a Titular of Tithes, to a Person formerly in Use to intromit therewith, not to do so in Time coming, under the Pain of being liable in a Spulie, which may be executed upon a common Precept from the Commissary, by any Person as Sheriff in that Part, and needs not to be registred.

I proceed to shew how Heritage may be evicted by Apprising or Adjudication.

### T I T. VI.

#### *Of Apprisings and Adjudications.*

**T.** APPRISING is a Decreet or Sentence of a Messenger at Arms, adjudging a Person's Lands, Hereditaments, or any heritable Right, to belong to his Creditor, who is called *Appriser*, in Payment of a liquid and clear Debt, moveable or heritable by Destination, if payable without Requisition,

(a) Act of Sed. 19 Feb. 1680.

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Ch. 2. *Law of Scotland.* Tit. 6. § 1. 39

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on, and constituted by a Decreet without Infestment, or constituted by Infestment, and rendered moveable by a Charge, which the Debtor obstinately refuses to pay, or cannot pay. Which Messenger is made Judge, as Sheriff in that Part, in place of the Sheriff of the Shire, whose Office it was in old Time to apprise Lands (a).

2. Adjudication is a Decreet of the Lords of Session, adjudging and appropriating a Person's Lands, Hereditaments, or any heritable Right, to belong to his Creditor, who is called *the Adjudger*, for Payment or Performance. Of which there are several Sorts, as 1. Adjudication of the Estate of a living Person, reputed solvent, for Payment of a clear and liquid Debt, which is now come in place of Apprising. 2. Adjudication of the Estate of a Person deceased. 3. Adjudication in Implement. 4. Adjudication and Sale of a Bankrupt's Estate.

SECT. I,

*Of Apprising, and Adjudication come in place thereof.*

SEEING Creditors for liquid Debts must now, instead of Apprising, get the Estates of their Debtors adjudged to them by Decreets of the Lords of Session, unless they have formerly apprifed them, in which Case they may

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either

1 (a) Act 27. Parl. 4. Jam. III.



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either again apprise or adjudge, as they think fit (a). I propose to treat of Apprising and Adjudication now come in place thereof, first separately, in so far as they differ; and then joyntly, in what Things they agree.

*Of Apprising.*

I. For preventing needless Expence by many Apprisings, where the Debtor's Lands ly scattered in many Jurisdictions, the Lords direct Letters of Apprising under the Signet, to Messengers, as Sheriffs in that Part, containing ordinarily a Dispensation to sit at *Edinburgh*, whether in Session or Vacation Time. The Messenger, after Search first for Moveables in the Debtor's House, and upon the Ground of the Lands, and none, or not so many found as would satisfie the Debt, denounceth the Lands to be apprifed such a Day upon the Ground, and at the Market-crofs of the head Burgh of the Shire, Stewartry or Regality where they ly, and cites the Debtor personally, or at his dwelling Place upon 15 Days, if within *Scotland*, or at the Crofs of *Edinburgh*, and Pier of *Leith*, upon 60 Days, if he be abroad, to compare before him that Day. Upon the Day appointed, the Messenger, as Judge, creates and swears the Members of Court, the Debtor is thrice called, and not appearing, the Matter is referr'd to an Inquest of 15 sworn Men. Who,  
having

(a) Act 19. Parl. 2. Sess. 3. Ch. II.

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Ch. 2. *Law of Scotland.* Tit. 6. § 1. 41

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having chosen one of their Number to be their Chancellor, if the Plurality of them find the Pursuer's Claim instructed, do, by their Verdict, apprise the Lands, &c. and ordain him, his Heirs or Assignies, to be infest for Payment to them of the accumulate Sum of Principal, Annualrent and Expences owing, and of a Sum corresponding thereto for the Messenger's Pains, called *the Sheriff-fee*. Whereupon the Pursuer or his Procurator takes Instruments. Then the Lands are thrice offered at the Door to the Debtor for the Money; and upon his not appearing to pay, the Messenger interposes his Authority to the Verdict of the Inquest, which is called a Decreet of Apprising.

2. The Lords of Session must allow this Decreet, by signing an Abbreviate thereof, which ordains Horning to pass, for charging the Superior to enter and infest the Appriser: And the Allowance must be recorded in the Bill Chamber, within 60 Days after Date of the Decreet of Apprising, otherwise another Apprising, tho' of a posterior Date, allowed and recorded before it, will be preferr'd (a), unless Infestment follow upon it, before the First allowed Apprising become effectual by Infestment, or charging the Superior.

3. An Apprising is redeemable by the Debtor, or a posterior Appriser, or by the Superior within Ten Years (b), from the Date of the

(a) Act 31. Parl. 1. Sess. 1. Ch. II. (b) Act 62. Parl. 1. Sess. 1. Ch. II.

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the Decreet. And expired Apprisings acquired by the Debtor's apparent Heirs or Confidants to their behoof, are redeemable by any posterior Appriser, within Ten Years from the Time of the Infestment, or Publication of the Right by Process (a).

*Of Adjudication come in place of Apprising.*

1. Upon a Summons of Adjudication, according to Circumstances, either a special or a general Decreet of Adjudication may be pronounced.

2. A special Adjudication is, when the Debtor appears upon the Summons, and takes a Day to produce a clear Proffess of Rights to a Part of his Estate, equal in Value to the principal Sum and Annualrents resting, and a Fifth Part more, because the Creditor is forc'd to take Land for his Money, besides the Composition due to the Superior, and the Expence of the Process and Infestment, without any Consideration of the Penalty in the Debtor's Bond, or other Writ, which is the Ground of the Process; and to deliver the same, or Transsumpts thereof to the Creditor pursuing, and renounce the Possession of the said Proportion of the Estate in his favour. Upon which an Act is extracted; and if at the Calling thereof, after expiring of the Term taken, a Proffess be produced, the Value of the Subject

(a) Act'62. Parl. 1. Sess. 1. Ch. II.

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Ch. 2. *Law of Scotland.* Tit. 6. § 1. 43

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ject to be adjudg'd, must be prov'd, and what Warrantice of it the Debtor shall give to the Creditor, determined. Which Subject the Lords adjudge to the Creditor by their Sentence, called a *Decreet of Adjudication*. By virtue of this Decreet, the Adjudger may immediately enter to Possession, and enjoy the Rents for his Annualrent during the not Redemption, without being liable to Count and Reckoning. But he cannot, after he hath attained Possession, use personal Execution against his Debtor by Horning, Caption, Arrestment, or otherwise (a).

3. A general Adjudication is, when upon the Debtor's not appearing in the Process of Adjudication, or upon his failing to produce a Progress, and renounce, after his taking a Day for that Effect, the Pursuer gets the Debtor's whole Estate adjudged to him, as it might have formerly been apprifed (b), for Payment of the accumulate Sum of Principal, Annualrent and conventional Penalty, if any be, without any Fifth Part more. For if, in such a Case, a Fifth more be adjudged for, the Adjudication is void and null (c).

4. A Factor upon a bankrupt Estate may raise Summons, and obtain Decreet of Adjudication at the Expence of the Estate in his own Name, to the behoof of all Creditors giving their Instructions of Debt to the Clerk of the Pro-

(a) Act 19. Parl. 2. Sess. 3. Ch. II. (b) Ibid. (c) Act of Sed. 26 Feb. 1684.



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Process, within 40 Days after Sequestration, with this Declaration signed by each of them, that he gives his Documents of Debt, to the end the Factor may adjudge for him ; and may, at the Desire of Creditors failing to give in their Instructions within the 40 Days, or at least before raising the Summons for adjudging, adjudge a second Time in his own Name for their behoof, upon their own Expences. And all Creditors may adjudge from Time to Time in their own, or in the Factor's Name, as they think fit, till the Ranking be concluded. These Creditors, for whom Adjudication is so obtained in the Factor's Name, have the same Benefit thereof, as if they had adjudged by themselves, upon their respective Grounds of Debt ; or were retrocessed by the Factor (a).

5. The Lords allow all imaginable Dispatch to the Pursuers of Adjudication. Where Comparance is made for the Debtor, and there is no former Adjudication of his Estate, the Process is to be seen and returned, and must go to the long Roll of ordinary Actions for the Outer-house. At the Calling whereof before the Ordinary, if no Objection be made against the Debt, and the Defender offer to produce a Progress, a Day is assigned to him for that End. And if no such Offer be made, Decreet of Adjudication is instantly pronounced, adjudging the Defender's whole heritable Estate libelled, to belong to the Pursuers. But if it  
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(a) Act of Sederunt, 23 November, 1711. § 2.



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 Ch. 2. *Law of Scotland.* Tit. 6. § 1. 45
 

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be notourly known or instructed, that there is a former Adjudication, already past against the Defender's Estate, all posterior Adjudications come in summarly by the Regulation Roll, and pass of Course, reserving all Defences *contra executionem*, that they may be within Year and Day thereof, and come in *pari passu* with the first Adjudger. Decreet of Adjudication being pronounced, one, two, or more Abbreviates, or short Abstracts of the Decreet of Adjudication, as the Adjudger desires, are made and signed by the Judge at the same Time that he signs the Decreet. One of which Abbreviates must be recorded in the Bill-chamber within sixty Days of the Date, and be retained by the Clerk of the Bills, as a Warrant for any posterior Extract thereof (a). One Abbreviate may, if the Party desire, be written and signed on the Back of the Decreet at any Time within twice sixty Days after pronouncing thereof (b).

6. Special Adjudications may be redeemed by the Debtor or a posterior Adjudger, or by the Superior, within five Years from the Date; and general Adjudications within ten. And expired Adjudications acquired by the Debtor's apparent Heirs, or Confidants to their behoof, are redeemable by any posterior Adjudger, within so many Years from the Infestment, or the Time that such Acquisition became publick.

*In*

(a) Act of Regul. 1695. § 24. junct. Act of Seder. 18 January, 1715. (b) Act of Regul. 1696. § 4

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*In what Things such Apprisings and Adjudications agree.*

1. Denunciation of Apprising, and Citation upon a Summons of Adjudication, render the Subject to be apprifed or adjudged, litigious, and hinders the Debtor to grant voluntary Rights thereof, to the Prejudice of the Apprifiser or Adjudger, and the Superior or Adjudger is in the same Case after Citation in the Procefs of Adjudication, as if Apprifing were led, and a Charge given thereon (a).

2. A Decreet of Apprifing or Adjudication, carries all Right to the Lands or others apprifed or adjudged, that a voluntary Difpofition would import, and hath the Effect of an Affignation to any Right thereof, not requiring Infestment to complete it, as liferent Tacks, Reversions, &c. without Necessity of Intimation. It intitles to the Mails and Duties of all subsequent Terms, and excludes prior Affignations or posterior Arrestments thereof, for personal Debts.

3. Some Apprifings or Adjudications are complete Rights without Infestment, as, 1. Apprifings or Adjudications of heritable Bonds, heritable Offices, Contracts of Wadset, and the like, whereupon no Infestment had followed, or needed to be taken. 2. Posterior Apprifings or Adjudications, within Year and Day  
of

(a) Act 19. Parl. 2. Sess. 3. Ch. II.

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Ch. 2. *Law of Scotland.* Tit. 6. § 1. 47

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of former, completed by Infestment, or a Charge against the Superior. 3. An Apprising or Adjudication at the Instance of a Superior of his Vassal's Lands, is complete by a Declarator of Consolidation, in which Case his old Infestment sufficeth : Tho' a Superior may, for the more Security, infest himself upon the Apprising or Adjudication, or procure Precepts out of the Chancery to infest him. Other Apprisings on Adjudications require to be perfected by Infestment. Upon which, if the Lands hold of the Sovereign, Charter and Seisine under the great Seal, is obtained in the same Manner as upon a Disposition, by passing and compounding a Signature of Apprising or Adjudication in the Exchequer, and getting Precepts thereon, under the Signet and privy Seal. But if the Superior be a Subject, the Appriser or Adjudger uses to charge him with Horning to infest him : And is thereby preferable to posterior voluntary Infestments, obtained thro' Collusion with the Superior or common Debtor. No Composition is due by Appriser or Adjudger of burgage Lands, to the Magistrates of the Burgh. But an Appriser or Adjudger of country Lands, must offer to the Superior charged, a Charter to be signed, and a full Year's Rent of the Subject apprifed (a) or adjudged (b), whom the Superior ought to receive, without obliging him to instruct his Author's

(a) Act 37. Parl. 5. Jam. III. Act 6. Parl. 23. Jam. VI. (b) Act 19. Parl. 2. Sess. 3. Ch. II.

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thor's Right: Albeit the Superior have a Preference to the Property, or an Interest to point the Ground for bygone Feu-duties resting to him. A Superior is obliged to receive all Apprisers or Adjudgers who charge him: But gets only one Year's Rent for all of them. The Superior, after he is charged, and has got a Year's Rent offered to him, can no longer reap any Casualty thro' the Death or Deed of the Vassal apprised ~~or adjudged from~~. The Superior who is charged, may redeem the Apprising or Adjudication, and retain the Land to himself, if content to pay the Debt apprised for (a), not exceeding the Worth of the Lands, and where it doth exceed, to pay the Value of the Lands. In which Case the Apprifer or Adjudger, must transfer his Right and Debt to the Superior, with absolute Warrantice for the Sum received; reserving to himself, Action against the common Debtor, in so far as the Debt is not satisfied by the Superior. But the Superior is cut off from this Option, to take the Land to himself, after he hath accepted Payment of a Year's Rent.

4. In a Competition of Apprisers and Adjudgers, he who first chargeth the Superior to enter and infest him, is preferred to a posterior Charger first infest by the Superior's Partiality. And Apprisings or Adjudications, within Year and Day of the Decreet of Apprising or Adjudication first effectual by Infestment,

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(a) Act 37 • Parl. 5. Jam. III.



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or a Charge against the Superior, come in *pari passu*, equally, as if all were but one Apprising or Adjudication. Which posterior Apprisers or Adjudgers, in that Case, must pay to the first effectual one, all Expences of his Diligence and Infestment, or Charge (a). But of Apprisings or Adjudications for real Debts, as by-gone Annualrents, due by Infestment, Feuduties, &c. are carried back *ad suam causam*, and preferred according to the Date of the real Right (b).

5. Apprisings or Adjudications once effectual, may be extinguished by the Debtor, or by posterior Apprisers or Adjudgers, or the Superior using an Order of Redemption, within the respective Terms of Years allowed for that End, upon Payment of the Sums therein, and of a Year's Rent, in Name of Composition due to the Superior, tho' he out of personal respect entred the Appriser or Adjudger *gratis*, and the Annualrent of the accumulate Sums from the Dates of the Decrees (c), or a posterior Appriser redeeming expired Apprisings or Adjudications, acquired by the Debtor's apparent Heir or his Confident, within so many Years from the Date of the Infestment, or Time when the Acquisition was published, by some legal Demand, upon Payment of the Sums truly paid out for the same, or the Sums in the Apprising or Adjudication, if acquired

D d *gratis*

(a) Act 62. Parl. 1. Sess. 1. Ch. II. (b) *Ibid.* (c) Act 64. Parl. 23. Jam. VI.



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*gratis* (a), at least what is resting thereof. But there is less Occasion for such Redemption from apparent Heirs now, when the purchasing any Right to their Predecessors Estate, otherwise than fairly at a publick Roup, makes them liable as Heirs served (b). This temporary Power of Redemption, is called a *legal Reversion*; and the Person to whom it is competent, is called the *Reverser*. Which Legal doth not run against Minors: For a Minor against whom an Apprising or Adjudication is obtained, or having Right to the Reversion of it, may redeem at any Time before he is 25 Years of Age. A Major succeeding to a Minor, against whom the Legal of an Apprising is expired, hath Year and Day to redeem; and succeeding to a Minor, while the Legal is current, may redeem at any Time before Expiration thereof (c). 2. Apprisings for Adjudications, are extinguished within the Legal, by the Creditor's Intromission with the Rents. For tho' special Adjudgers enjoy these in lieu of their Annualrents; yet Apprisings and general Adjudications, are extinguished by the Creditor's uplifting Mails and Duties to the Extent of all that is due to him.

6. But if no Order of Redemption be used by the Reverser within the Legal, or against the Debtor's apparent Heir, acquiring an expired Apprising or Adjudication, within the li-

(a) Act 62. Parl. 1. Sess. 1. Ch. II. (b) Act 24. Sess. 5. Parl. W. and M. (c) Act 6. Parl. 23. Jam. VI.

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limited Time after his Right became publick, which may be term'd the second Legal; or if any Part of the Sums apprifed or adjudged for, remain unpaid, after expiring of these Legals, after the Minor Reverser's passing the Age of 25 Years, the whole Subject apprifed or adjudged, belongs irredeemably to the Apprifiser or Adjudger, without Consideration of what he intromitted with.

S E C T. II.

*Concerning Adjudication of the Estate of one deceased.*

1. HERITAGE of a Person deceased, remaining without a Master, by his apparent Heir's being in Doubt, whether to accept or renounce it, called *hereditas jacens*, may be adjudged, upon the apparent Heir's renouncing the Inheritance, when charged to enter upon it, either for the Debt of the deceased, or for the apparent Heir's proper Debt (a).

2. If the Pursuer's Debt against the deceased be not constituted, and want to be proved, the apparent Heir renouncing, is called, for Form's sake, to supply the Place of a Defender, and a Decreet *cognitionis causa*, for constituting the Debt, passeth without any Effect against him. Thereupon the Obtainer raiseth Adjudication, wherein the said apparent Heir

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(a) Act 7. Parl. 23. Jam. VI.

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is also called to personate a Defender, but can make no Defence; and the Lords adjudge the whole Heritage of the deceased Debtor, and all Benefit the apparent Heir might have had by entring to him. Where one pursues against an apparent Heir, Constitution of a liquid Debt instantly verified by Writ, and the Defender renounceth, the Pursuer may in the same Process, crave Adjudication *hereditatis jacentis*, without any other Decreet *cognitionis causa*.

3. Adjudication on the apparent Heir's Renunciation, may be pursued, not only before the Session, but also before inferior Courts: And all within Year and Day of the First effectual Adjudication, come in *pari passu*.

4. Such Adjudications may be redeemed within Ten Years by a Creditor, either of the Heir deceased, or of the apparent Heir adjudging afterwards (a).

5. If an apparent Heir, charg'd to enter Heir, don't renounce, he must be charged to enter Heir in special, before the Estate of the deceased can be adjudged for his Debt.

S E C T. III:

*Of Adjudication in Implement.*

1. FOR making Dispositions or Obligements to infest, effectual, the Receiver may get the

(a) *Ibid.* junct. Act 62. Parl. 1. Sess. 1. Ch. II.

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the Subject disponed, adjudged to him, by the Lords of Session, and the Superior decerned to receive him, Which is called an Adjudication in Implement.

2. This differs from an Adjudication for Debt in several Things. 1. An Adjudger in Implement, comes not in *pari passu* with other Adjudgers, of that or any other Kind. 2. The Superior is not obliged to receive him, till he instruct the Title of the Person adjudged from. 3. Adjudication in Implement passeth against an apparent Heir, without a Charge to enter, or Renunciation. 4. It extends only to the Thing disponed, and hath no legal Reversion. 5. It becomes not effectual by a Charge against the Superior: Tho' such a Charge would exclude posterior voluntary Rights.

S E C T. IV.

*Adjudication and Sale of a Bankrupt's Estate.*

1. WHEN a Debtor is bankrupt or insolvent, and his Estate possess'd by Creditors, any Creditor having a real Right, may raise a Summons of Sale, either relative to a Ranking of the Creditors, or containing a Ranking with a Reduction and Improbation, to oblige all the Creditors to produce their Interests. But a Ranking and Sale are commonly now rais'd in one Summons. Upon which the Debtor and all his real Creditors, in the actual Possession

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of his Estate, are cited in the common Form of Law, and his other Creditors, and all pretending Interest, edictally, ( conform to a Warrant in the Summons ) upon Sixty and Fifteen Days, for the first and second Diets, at the Market-cross of *Edinburgh*, and Pier of *Leith*; and also upon Twenty one and Six Days, before the said Days of Compearance, at the Parish Church-door where the Lands ly, after divine Service, The Executions of which edictal Citations, are to be recorded in a particular Register at *Edinburgh*, the last Day to which the Citations are given, otherwise they make no Faith in Judgment (a).

2. At the first Calling of such Summons, the Ordinary assigns a Day for the Creditors to produce their Rights and Interests, and names the Lord who falls to be Ordinary, to rank them (b), and assigns the same Day to the Pursuer, for proving the Right to the Tithes, and for proving the ordinary Rate or Price of Lands of such Holding, and Casualties in the Shire where they ly. A Commission, if desired, will be granted, for proving the Rental, by Tenants in the Country, but not for proving the Value of the Lands, which can be proved only by neighbouring Heritors and Gentlemen, before the Lords.

3. The Ordinary of the Ranking proceeds, advises, and determines therein, as is set forth  
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(a) Act of Sederunt, 23 November 1711, § 1. (b) *Ibid.* § 6.



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**Ch. 2. *Law of Scotland.* Tit. 6. § 4. 55**


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in another Place (*a*). Mean time, Proof of the Bankruptcy, Rental, Value, and other Points of the Sale goes on. When that is concluded, and *Avisandum* made therewith, upon a Bill to the Lords, a Day is appointed for advising it, and a Remit made to the Ordinary on concluded Causes, for preparing a State thereof. A prepared State, and a separate Scheme on a Paper apart, for pointing at the Proof briefly, being approved, and marked by the said Ordinary, the Cause is called at the appointed Day, or by the President's Hand-roll, and advised.

4. The Creditors being ranked, and the common Debtor found to be bankrupt, the Lords ordain the Estate to be exposed to Sale by publick Roup, on a precise Day, at such an Hour, within the Session-house, at such a Price as the lowest; and appoint Two of their own Number, or either of them, to oversee the Roup, with Power to adjourn the same, as it is thought convenient, and to prefer the highest Offerer. They direct also Letters of Publication to be issued out under the Signet, (which are signed by one of the principal Clerks) for Intimation of the Lands and others to be exposed to Sale, the Lords Price, the Time and Place of the Roup, to the real Creditors in Possession, personally or at their dwelling Place, upon Twenty one Days, if within *Scotland*, and at the Market-cross of

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*Edin-*

(\*) Vid. infr. Part 4. B. 2. Chap. 2. Tit. 1. § 8.

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*Edinburgh*, Pier and Shore of *Leith*, upon Sixty Days, if forth thereof; and against all other Persons concerned, at the Market-cross of the Shire, Stewartry or Regality, and at the Doors of the Parish-church where the Lands ly, and at Six other adjacent Parish-churches, named by the Lords, on *Sunday*, at the dissolving of the Congregation, after the Forenoon's Sermon, and at the Market-cross of *Edinburgh*, and Pier of *Leith*, upon Sixty Days, Copies of which Letters of Intimation, are to be affixed on all the Places aforesaid (a).

5. At the Time appointed for the Roup, it must be instructed that the Decreet of Ranking is extracted: Then the Conditions of the Roup are concerted. The highest Bidder, not under the Lords Price, is preferred, signs his Offer immediately, and finds Caution within a Fortnight, for Payment of the Price to the Creditors, as ranked. The Roup being reported to the Lords in Presence, they interpose their Authority, and pronounce their Decreet of Sale, adjudging the Estate sold to the Purchaser for the Price. Upon which Decreet Infestment passeth, as upon other Adjudications.

6. Where no Buyer is found, Law (b) allows the Lords to divide the Estate among the Creditors, according to their several Rights and Diligences, and to determine the Value of Liferent-escheats affecting the same; but such a Division among Creditors being very diffi-

(a) Act 17. Parl. 7. Ch. II. (b) Act 30. Sect. 2. Parl. W. & M.

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difficult, the Lords do sometimes, upon their Application, lower the Price set upon the Estate, for encouraging Persons to buy, and appoint a second Roup.

C H A P. III.

*Of Confiscation.*

**C**ONFISCATION is a Right which the King acquires to the Estate or Goods of his Subject.

Property comes to be confiscated upon several Grounds, as 1. For high Treason. 2. For lesser Crimes, and by Outlawry. 3. For Want of a lawful Successor to the Owner. 4. Because occupied and claim'd by no Body.

1. Confiscation for high Treason is called Forfeiture, which deprives those who have incurred it, of all their real and personal Estate, Goods and Gear whatsoever. This, by Laws before the Year 1690. did not only carry away Rights and Interests vested in the Traitor, but also those of his or her Wife or Husband, Vassals, Creditors, and Heirs of Entail; but by a milder Law then made (a), such Rights and Interests of the Traitor's Wife or Husband, Vassals, Creditors, and Heirs of Entail, fairly and justly acquired, were salv'd. And now since the Union, where any Person married  
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(a) Act 33. Sess. 2. Parl. W. & M.

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and seised before the First of July 1709. of any Messuages, Lands, Seignories, Rents, Tenements, or Hereditaments in *Scotland*, of an Estate, Tail or Tailie, affected with irritant and resolute or prohibitory Clauses, committing high Treason, while he hath Issue of that Marriage living, or a Possibility of such Issue, forfeits, upon his Attainder, the said Messuages, Lands, Seignories, Tenements, and Hereditaments, during his own Life only, without Prejudice to the Issue and Heirs of Intail of the said Marriage to inherit the same. And after Decease of the Pretender, no Attainder for high Treason shall disinherit any Heir, nor prejudice the Right or Title of any other Person, than the Offender during his natural Life (a).

2. Confiscation for lesser Crimes, or by Outlawry, is called single Escheat, which is spoke of already (b).

3. Confiscation of Property, for want of a lawful Successor to the Owner, is of Two Sorts, viz. *ultimus heres*, and Bastardy.

[1.] *Ultimus heres*, is a Right by which the King succeeds as last Heir, or rather for want of an Heir, to any whose Stock of Kindred is spent; so as no Person can claim Contingency of Blood to him. Which is effectual by Declarator of *ultimus heres*, at the Instance of the King, or one claiming under his Majesty by Gift

(a) 7 A. Ch. 21. vid. 1 G. Ch. 20. (b) Supra Part 2. B. 2. Ch. 3. Tit. 2. Sect. 3.



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Gift, proceeding upon a Citation of all and fundry, at the Market-cross of the Shire where the Person deceased dwelt. But if he hath a Widow surviving him, she must be particularly cited; and any pretending to be of his Kindred, will be allowed to defend in this Process for his Interest.

[2.] Bastardy is a Right the King hath to succeed to the Estate, real and personal, of a Bastard dying without Issue of his own Body. Which is also effectual by a Declarator at the Instance of the King or his Donatary, upon a general Citation at the Market-cross, in the same Way as *ultimus heres*: Wherein any Person concern'd may appear and defend. The proper Exception against this Process is, That the Person pretended to be a Bastard, was begotten of Parents lawfully married, at least who lived as Man and Wife; or at least were held and reputed such at the Dissolution of the Marriage; or that he was legitimated by the King before the Gift of Bastardy.

[3.] Both these Casualties of *ultimus heres*, and Bastardy, are excluded by a Disposition made by the deceased, of his Estate, in favour of any Person; and when due, are burden'd with his Debts so far as the Estate goes. Which Estate the Creditors may affect and carry away by proper Diligence; and the Bastard's Husband or Wife surviving, may claim their legal Interest in it: Provided the Officers of State and Donatary, if any be, is cited



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ted for their Interest. When Lands holden of a Subject, fall to the King by Forfeiture, Bastardy, or *ultimus heres*, his Majesty, who cannot hold of another Superior, doth, by a Letter of Presentation, nominate a Donatary to that Superior, to be his Vassal in place of the former.

4. Goods confiscated, because occupied or claim'd by no Body, are *Waifs*, *Strays* and *Wreck*.

[1.] *Waifs* are vacant Goods, which no Person owns.

[2.] *Strays* are wandring Cattle, or tame Beasts which have strayed from their Masters. *Waifs* and *Strays* must be proclaim'd, in order to find out the Owners, who, upon instructing such Things to be theirs, recover them, they paying the Expence of keeping, and other incident Charges. But such *Waifs* and *Strays*, if no Person appear, after a certain Time, to challenge and claim them, belong as Escheat to the King, or to others by Grant from his Majesty.

[3.] *Wreck* are Things lost by Shipwreck at Sea, and cast on the Shore, concerning which our Law provided, That Ships broken in *Scotland*, should be confiscated, if they belong'd to a Country that used such hard Law to our distress'd Vessels, and such Ships of other Places should meet with the same Favour here, as is shewed to ours with them (a). But now  
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(a) Act 124. Parl. 9. Jam. I.

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the Law is, that Goods lost in this calamitous Manner out of Ships fore'd on Shore, or stranded upon the Coasts of *Britain*, or any other of his Majesty's Dominions, may be recovered by the rightful Owners within a Year, upon Payment of Salvage. Publick Sale of perishable Goods is forthwith to be made, unless immediately claim'd by some Body, and of other Goods not claim'd within a Twelve Month : And after all Charges deducted, the Residue of the Money arising from such Sale, is to be transmitted to the Exchequer, for the Benefit of the Owner, who upon Proof of his Property before one of the Barons, shall, upon his Order, receive the same. Which is without Prejudice to the Right of the Sovereign, or his Grantee to *Jetſam*, *Flotſam*, and *Lagan* (a).

5. Thus far how Property, real and personal, may be transmitted by Progress to singular Successors, by voluntary Deeds of Alienation, or by the legal Diligence of Creditors, or may be confiscated. But because it frequently happens, that the Author is not true and absolute Proprietor of what he so alienates, or what his Creditors affect, or the Fisk challenges ; but hath only a Right in Trust for the Behoof of some other, or hath qualified his own Right by a Backbond, or personal Declaration : It is proper here to treat concerning Trust.

## C H A P.

(a) 12 A. Scff. 2. Ch. 18. junct. 4 G. Ch. 12. Sect. 1.

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## C H A P. IV.

*Of Trust.*

**T**RUST is the stating a Thing or Right for some End, in the Person of one so far, as that it can hardly be recovered from him, unless he be faithful, and answer the Confidence reposed in him, by restoring what is committed to him, or disposing thereof as the Truster desires.

A Trustee is understood, in Law, to act for the behoof of his Constituent, in relation to the Subject of the Trust. The Way for recovering Rights given in Trust, or getting them apply'd according to the Truster's Design, is by a Declarator of Trust. Trust can be proved against the Trustee, only by his Writ or Oath, except in Bills of Exchange, where it may be cleared other ways (a). But as to a singular Successor, who being ignorant of the Trust, acquires honestly for an onerous Cause from the Trustee, he is secure, unless the Trust be instructed by Writ of the Trustee. Backbonds, or personal Declarations, even not intimated, affect personal Rights, such as Bonds or Contracts, and real Rights not completed by Seisin in the Persons of singular Successors: But such Bonds, or personal Declara-  
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(\*) Act 25. Sess 6. Parl. K. W.

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tions, don't affect or burden real Rights whereon Seisin hath followed, so as to oblige singular Successors to take notice of them. Nor can a Trustee's Declaration on Death-bed affect his Heir. The proper Exception in a Declarator of Trust, is founded on the necessary and profitable Expences, wared by the Defender, in Pursuance of the Trust; which affect the Subject given in Trust, and ought to be restored to the Trustee, before he be compelled to divest himself thereof.

Prescription being a Way of acquiring and losing, of both heritable and moveable Rights, it falls naturally to be handled now, after all these have been explained.

## C H A P. V.

### *Of Prescription.*

1. **P**RESCRIPTION is a Manner of acquiring and losing a Right or Pretension by the Effect of Time.

2. 'Tis either positive or negative.

[1.] Positive Prescription, is the Way of acquiring a Thing or Right, fairly and honestly, by peaceable and continued Possession, during the Time regulated by Law, sometimes with, and sometimes without a Title.

[2.] Negative Prescription, is the Way of losing a Thing, Right or Action, by omitting

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to demand, use, or exercise it within the Time limited by Law.

3. Some Things prescribe simply ; others as to some certain Effect only, *viz.* the Manner of Proof, or the Import of a presumptive Right. Again some Things prescribe in 40. some in 20. some in 13. some in 10. some in 5. some in 4. and others in 3 Years. We have also an annual, and a Six Months Prescription.

### *Prescription of Forty Years.*

[1]. Moveables are acquired by 40 Years Possession, without a Title.

A singular Successor in Lands, Annualrents or other Heritages, hath good Right by a Charter (*i. e.* any Warrant for Infeftment) and Seisin, with 40 Years peaceable and continued Possession thereon, from the Date of the Infeftment, by himself or his Author, or their Tenants, or others having their Right (as Liferenters and Wadsetters). An Heir hath good Right to such by Instruments of Seisin, one or more (without any Warrant or Adminicle) continued and standing together (*i. e.* either continued by 40 Years Possession in the Person of the Heir first infeft, or by Renovation in the Persons of subsequent Heirs) on Retours or Precepts of clare constat, and clothed with 40 Years uninterrupted Possession. Which Right of a singular Successor or Heir, cannot  
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be questioned upon any Ground, except Fals-  
hood (a).

No Person is obliged after 40 Years, to pro-  
duce Procuratories or Instruments of Resigna-  
tion, Precepts of *clare constat*, or other Precepts  
of Seisin ; nor is the Want thereof any Cause  
of Reduction, after he and his Authors have  
possessed 40 Years, by Virtue of their Infeft-  
ments, where the Charters mentioning Resig-  
nation to have been made, and the Instruments  
of Seisin expressing the Precepts, by Virtue  
whereof Seisines were given are extant (b).  
By the positive Prescription of 40 Years, not  
only Lands and Annualrents are acquired ; but  
also Wadsets, where Reversions are neither in-  
corporated in the Right nor registred (c), he-  
ritable Offices, Patronages constituted by In-  
feftment, parsonage and vicarage Tithes, &c.

By the negative Prescription, *all personal  
Obligations* (comprehending personal Actions  
and Decrees) vicarage Tithes, *are extinguished  
and of no avail, if the Parties, to whom they are  
made, having Interest therein, do not within 40  
Years follow them, and take Document thereon* (d).  
Vicarage Tithes also so prescribe, both as to a  
total Immunity, and as to the Manner of ti-  
thing in Kind and Quantity. This Prescrip-  
tion doth cut off bygone parsonage Tithe-du-  
ties, and all annual Prestations, not sued with-

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(a) Act 12. Parl. 22. Jam. VI. (b) Act 214. Parl. 14.  
Jam. VI. (c) Act 12. Parl. 22. Jam. VI. (d) Act 29. Parl.  
5. Act 55. Parl. 7. Jam. III.

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in the Term of Law. Personal Bonds, Actions upon heritable Bonds, Contracts, Reversions, neither *in gremio* of the Infeftment, nor regiftred, prescribe ; but Actions upon Reversions, ingrossed in the Body of Infeftments, used and produced by the Possessor of the Lands for his Title, or regiftred in the Terms of Law, are perpetual (a). There is no negative Prescription of Parsonage Tithes, or of Things *meræ facultatis*, or of Exceptions. Nor doth a Vassal prescribe against his Superior, by not paying the Feu or other Duty in his Charter, or a Tenant against his Master, by not paying his Tack-duty, except as to Bygones, not claimed within Forty Years. Minors are privileged from this Prescription, that it doth not run against them : But it runs against the Church, and Mortifications to pious Uses.

Personal Bonds and Obligations prescribe from the Date, Actions of Warrantice from the Time of Distress, and a Wife's Provision in her Contract of Marriage, from the Husband's Death.

*Prescription of Twenty Years.*

[2.] Retours wrongfully serv'd cannot be quarrelled after Twenty Years (b). Holograph Writs, or Subscriptions in Account-books, prescribe after Twenty Years, unless the Truth there-

(a) Act 12. Parl. 22. Jam. VI. (b) Act 13 *ibid.*

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thereof be proved by Oath of Party (*a*). Which is not to be understood of the Verity of the Debt, which may be proved by the Party's Oath, at any Time within Forty Years, but only of the Verity of the Writ and Subscription.

*Prescription of Thirteen Years.*

[3.] Thirteen Years Possession, called *decennialis & triennialis possessio*, is a presumptive Title, sufficient to maintain a Churchman in Possession of his Benefice, till a better be shown in another Competitor.

*Prescription of Ten Years.*

[4.] The legal Reversion of Apprisings (*b*), and general Adjudications, where the Debtor doth not produce a Progress (*c*), prescribe in favour of the Appriser or Adjudger, in Ten Years after Date of the Decreet, and in favour of the Debtor's apparent Heir, acquiring Right to the expired Apprisings or Adjudications in Ten Years, from the Acquisitions being made publick by Infestment or Procefs. And Actions of Count and Reckoning, direct and contrary, betwixt Minors and their Tutors or Curators, prescribe, if not insisted in, within Ten Years after the Minor's Majority, or Death in Minority (*d*). But none of these Pre-

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(*a*). Act 9. Parl. 2. Sess. 1. Ch. II. (*b*) Act 62. Parl. 1. Sess. 1. Ch. II. (*c*) Act 19. Parl. 2. Sess. 3. Ch. II. (*d*) Act 9. Sess. 6. Parl. K. W.

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scriptions of Ten Years run against Minors (a).

*Prescription of Five Years.*

[5.] Arrestments us'd on Decrets, registred Bonds, or Contracts, not pursued and insisted in within Five Years after laying on thereof, and Arrestments on depending Actions, not pursued within Five Years after Sentence, do fall by Prescription (b).

Ministers Stipends, Multures, not pursued within Five Years after the same are due, Mails and Duties of Tenants who labour the Ground, by themselves or Subtenants, not claim'd within Five Years after the Tenant's Removal from the Ground, Bargains concerning Moveables, or Sums of Money probable by Witnesses, not sued within Five Years after making the Bargain, prescribe as to the Manner of Proof by Witnesses (c), that is, can be proved afterwards only by Writ, or Oath of Party. And Actions proceeding upon Warnings, Spulzies, Ejections, Arrestments, or for Ministers Stipends, Multures, Mails, and Bargains about Moveables, prescribe in Five, if not wakened, that is, if a new Summons be not rais'd and executed within that Time (d). But none of these quinquennial Prescriptions run against Minors.

*Pre-*

(a) Ibid. junct. Act 6. Parl. 23. Jam. VI. (b) Act 9. Parl. 2. Sess. 1. Cl. II. (c) Ibid. (d) Ibid. junct. Act 14. Sess. 1. Parl. Jam. VII

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*Prescription of Four Years.*

[6.] The Privilege competent to Minors, of reducing Deeds done by them upon Minority and Lefion, prescribe in Four Years, after their Age of 21 Years complete.

*Prescription of Three Years.*

[7.] Affizers serving and returning a wrong Person Heir, cannot be quarrelled for Error, in order to Punishment, after Three Years. But this Prescription runs not against Minors, or Persons out of *Scotland* (a). Actions of Spulie, Ejection, and others of that Nature, not pursued within Three Years after committing the Deeds, prescribe, except against Minors (b), as to the Privilege of a short Citation, violent Profits, and taxing the Damage, by the injured Party's Oath *in litem*. Actions for wrongous Imprisonment prescribe, if not pursued within Three Years after the last Day of the wrongous Imprisonment; and, tho' rais'd within that Time, prescribe, if not insisted in yearly thereafter (c). Actions of Removing prescribe against all, whether Minors or Majors, if not pursued within Three Years after the Warning (d), that is, after the Time to which the

E e 3                      Warn-

(a) Act 57. Parl. 5. Jam. IV. junct. Act 13. Parl. 23. Jam. VI. (b) Act 81. Parl. 6. Act 119. Parl. 7. Jam. VI. (c) Act 6. Se. I. 9. Parl. K. W. (d) Act 82. Parl. 6. Jam. VI.



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Warning to remove was made. Actions of Debt for House Mails, ordinary Servants Fees, Merchant-accounts (under which other Accounts are comprehended) and the like Debts not founded on Writ, prescribe against all Persons, whether Minors or Majors, as to the Manner of Proof by Witnesses, if not pursued within Three Years after they fall due; which being elapsed, such Claims can be proved only by Writ, or Oath of Party (a). Prescription of a current Account runs only from the Date of the last Article therein: But a Servant can instruct only Three Years Fees by Witnesses, albeit his Service was current for these and former Years. The Preference of the Creditors of one deceased, as to his Estate, to the Creditors of his apparent Heir, prescribes, if the former do not complete Diligence against the same, within Three Years after their Debtor's Decease (b).

*Prescription of one Year:*

[8.] The Privilege an apparent Heir hath to deliberate whether he will enter Heir, prescribes, after elapsing of Year and Day, from his Predecessor's Death (c), or from his own Birth, if he be a posthume Child. The legal Privilege of Apprisers or Adjudgers for personal Debts to come in *pari passu*, is competent to such

(a) Act 83. Parl. 6. Jam. VI. (b) Act 24. Parl. 1. Seff. 1. Ch. 11. (c) Act 106. Parl. 7. Jam. V. Act 27. Parl. 23. Jam. VI.

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 Ch. 5. *Law of Scotland.* 71
 

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such only as apprise or adjudge within Year and Day of the Decreet of Apprising or Adjudication, first effectual by Infestment or Charge against the Superior (a).

*Prescription of Six Months.*

[9.] A Bill of Exchange is not registrable after Six Months from the Date, in case of non Acceptance, or from the falling due thereof in case of Nonpayment (b). The Privilege competent to Executors Creditors, or Creditors doing Diligence against Executors, or Intromitters with the deceast Debtor's Goods, of coming in *pari passu*, expires, if not used within Six Months of the common Debtor's Death (c):

4. Prescription is acquired only at the last Moment of the Time regulated for prescribing; and the continual Time without Interruption is computed, and not the profitable Time only in which a judicial Demand could be made, while Courts of Justice are patent. But Prescription is acquired to an Heir or singular Successor, after the Possession of his Predecessor or Author, and his own joyned together, have lasted the Time regulated for prescribing.

5. Prescription is excluded by Interruption, which is the Proprietor or Creditor's owning his Right within the Time allowed.

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(a) Act 62 Parl. 1. Sess. 1. Act 19. Parl. 2. Sess. 3. Ch. II.  
 (b) Act 20, Parl. 3, Ch. II. (c) Act of Sed. 28 Feb. 1662.

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Interruption is either natural or civil.

[1.] Natural Interruption is when a Proprietor or Pretender owns his Right by some Fact, and takes Instruments in the Hands of a Notary upon it, which Instrument must be recorded in a particular Register at *Edinburgh*, within Sixty Days after the Date, otherwise it doth not militate against singular Successors, but only against the Person instrumented. Nor is natural Interruption effectual against any, save the Heritor and Possessor of the Ground (a).

[2.] Civil Interruption is made by Citation, or making a Demand in a Court of Justice, or by a Charge of Horning. A Summons for interrupting the Prescription of real Rights must pass upon a Bill, and contain the Ground and Warrant it proceeds on (b). It should be executed by a Messenger at Arms, against the Defender, personally, or at his Dwelling-place, and at the Parish-church, at or immediately after divine Service, on the most patent Door whereof Copies must be affixed. And if the Defender be out of *Scotland*, he must be cited at the Market-cross of *Edinburgh*, and Pier of *Leith*, upon Sixty Days (c). The Execution is to be recorded in a particular Register at *Edinburgh*, within Sixty Days after Date, otherwise it is of Force only against the Persons cited, and not against singular Successors (a).

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(a) Act 19. Sess. 6. Parl. K. Will. (b) Ibid. (c) Act 10. Parl. 3. Sess. 1. Ch. II. junct. Act 14. Sess. 1. Parl. Jam. VII.

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 Ch. 5.      *Law of Scotland.*      73
 

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Prescription of an Action must be interrupted by Process of the same Kind, containing the same Conclusion. All Citations for Interruptions, whether of real or personal Rights, prescribe, if not renewed every Seven Years, except the Parties be Minors (*b*). Where several Persons have Interest in the same Thing, or Right, as Proprietors or Creditors, or are liable to deliver, or pay as Debtors, whether Principal or Cautioners; a Demand made by any one, or against any one of them, interrupts Prescription with respect to them all. Suing or charging for Part of a Debt, interrupts Prescription of the whole; and a Right of Annuallent, due out of Two distinct Tenements, is preserved intire as to both, by uplifting the same out of either.

## B O O K II.

*How Property is transmitted to  
universal Successors.*



THE Transmission of Property to universal Successors, is termed Succession.

### C H A P.

(a) Act 19. Sess. 6. Parl. K. W. (b) Act 10. Parl. 2. Sess. 1. Ch. II.

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## C H A P. I.

*Of Succession and the several Kinds of it.*

**S** U C C E S S I O N is a Right to enter upon that Estate, real or personal, which one deceased had at the Time of his Death.

1. Succession is, 1. Either provisional or legal.

[1.] Provisional Succession is, that which transmits the Estate of one who dies, to the Person or Persons whom the Deceased has called to the Succession, whether related to him or not, by an express Deed under his Hand.

[2.] Legal Succession is, that which transmits the Estate of one who dies, without having disposed of it, in the Event of his Death, to the Person or Persons whom the Law calls to the Succession, by virtue of their Proximity of Blood. Legal Succession passeth over Estates to Kindred, according to the Lines and Degrees of Consanguinity; for no Person succeeds by Affinity (a). This Succession is either by the Head, or by the Stocks. Succession by the Head is, when the Estate is divided into equal Portions, according to the Number of the Persons who succeed. Succession by the Stocks is, when, by a Fiction of Law, Persons,

(a) Vid. Part 1. Book 2. Chap. 2. Tit. 1. § 2.



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sons, in a remoter Degree, come, by Representation, into the Place of one in a nearer Degree to the Deceased, and divide that Share among themselves, which he would have received had he been living.

2. Succession is distinguished, 2. Into Succession to Heritage, or a real Estate; and Succession to Moveables, or a personal Estate.

## C H A P. II.

### *Of Succession to Heritage, and the several Kinds of Heirs.*

**T**HE Person who succeeds to the Heritage, or heritable Rights of one deceased, is called his Heir. Heirs are either Heirs institute, or Heirs at Law.

1. An Heir institute is one to whom the Right of Succession is ascertained by Disposition, or express Deed of the Deceased. Such are Heirs of Tailie in general, under whom I comprehend Heirs male, Heirs of Tailzie properly so called, Heirs of Provision, and Heirs substitute in Bonds, who may be called special Heirs.

[1.] An Heir of Tailzie in general, is he on whom an Estate is settled, that would not have fallen to him by legal Succession.

[2.] An

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[2.] An Heir male is an institute Heir, who, tho' not next in Blood to the Deceased, is his nearest male Relation that can succeed to him.

[3.] An Heir of Tailzie, in a proper Sense, is one, who, having no Right of Blood, is intitled to Succession by a Deed containing several Substitutions of Heirs or Lines, failing others by Decease, without leaving those of the Denomination therein specified. As when an Estate is provided to the Fiar, and the Heirs of his Body, or the Heirs male of his Body, or his Heirs of a certain Marriage, or to his eldest Heir female; which failing, to another Person named, and his Heirs of such a Kind, which failing, to a Third Person, &c. (a).

[4.] An Heir of Provision is one, who, wanting the preferable Right of Blood, succeeds by virtue of a particular Provision in a Second or Third Contract of Marriage, or other Disposition, as Heir to his Parent, in which there are not divers Persons or Lines substitute.

[5.] An Heir substitute in a Bond, is he to whom the Bond is payable expressly, in case of the Creditor's Decease, or after his Death.

2. An Heir at Law, is one to whom the Law gives the Inheritance, on account of his Proximity of Blood. He is also termed Heir of Line, because he succeeds lineally by Right of Blood; and *Heir general*, because he generally represents the Deceased, and succeeds to every

(a) Vid. sup. Part 2. B. 1. Chap. 2. Tit. 5. § 1.

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every Thing not specially provided to other Heirs, whence he is understood by the Denomination of *Heir whatsoever*.

*Heirs of Line* are divided into those properly so called, and *Heirs of Conquest*.

[1.] An Heir of Line, in a proper Sense, is one who succeeds to the Deceased in his Heritage, *i. e.* Lands, and other heritable Rights derived to him by Succession, as Heir to his Predecessor.

[2.] An Heir of Conquest is one who succeeds to the Deceased in Conquest, *i. e.* Lands or other heritable Rights, to which the Deceased neither did, nor could succeed as Heir to his Predecessor.

3. The legal or lineal Succession is regulated thus.

[1.] Descendents succeed. Among whom the eldest Son, by Right of Primogeniture, is preferred to all his Brothers, and all the Sons to the Daughters. If there be only Daughters, they succeed all equally to the Estate, in so far as it is divisible, who therefore are called *Heirs Portioners*. If the Person to be succeeded to have Sons, and Grandchildren by his eldest Son deceased, these Grandchildren will, by Right of Representation, as come in place of their Father, exclude his Brothers; and among such Grandchildren, the eldest Male is preferred, and all the Males to the Females. If there be only Females, they succeed equally, save only that indivisible Rights go to the eldest,

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deft, as in the Cafe of female Children. The fame Rule is observed in Descendents of remoter Degrees, when they fall to fucceed.

[2.] If the descendent Line be spent, Succeffion goes to the collateral Line. In which the whole Blood excludes the half Blood. For, 1. If there be only one Brother german, he and his Descendents fucceed to both Heritage and Conqueft. 2. The Sifter or Sifters german, as Heirs Portioners, and their Descendents. 3. Failing Brothers and Sifters german, a fole Brother by the Father's Side, and his Descendents, have Access to the Succeffion. 4. A Sifter or Sifters by the Father's Side, and their Descendents. If there be feveral Brothers, and the middle of three Brothers die, leaving both Heritage and Conqueft, Law creates two Heirs to him, *viz.* makes his immediate elder Brother Heir of Conqueft, and the immediate younger Brother, his Heir of Line. If a Son of a fecond Marriage die without Ifsue, leaving two or three Brothers of a former Marriage, the youngeft is both Heir of Line and of Conqueft. Heritage descends, but Conqueft ascends.

[3.] If there be no Brothers or Sifters german or confanguinean, the Succeffion ascends, 1. To the Father of the Deceased. 2. Failing the Father, the Father's Brothers and Sifters fucceed in their Order. 3. Failing the Father's Collaterals, the Succeffion mounts to the Grandfather. After whom, it goes aside  
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to his Collaterals. Which failing, it reacheth to the great Grandfather, &c. so long as any Propinquity of Blood can be instructed.

[4.] If the Defunct's Blood be spent, so as no Person can justly claim to be of Kin to him, the King succeeds as last Heir (a).

4. Agnats only, and not Cognats succeed, even tho' the Heritage came by the Mother.

### C H A P. III.

*How Heirs make up and perfect their active Titles; and how such Titles are extinguished.*

**H**E who should be Heir of whatever Kind, is term'd *apparent Heir*, till he enter upon the Estate generally, or specially.

1. An Heir enters generally, by taking a general Brief out of the Chancery of course, directed to any Judge he desires, for trying by an Inquest of 15 sworn Men, if such a Person died at the King's Peace; and *if the Raiser of the Brief be his nearest and lawful Heir*. If the Inquest find the Claim proven, they declare by a Writ, called a *general Service*, that the Predecessor mentioned in the Brief, died at the King's Peace, and that the Bearer thereof is his nearest lawful Heir. Upon returning where-

(a) Vid. *supr.* B. 1. Ch. 3. N. 3.



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whereof to the Chancery, the Heir gets an Extract of it, subscribed by the Director of the Chancery, or his Deputy, called a *general Retour*. Which intitles him to all heritable Rights, whereupon the Deceas'd was not, nor needed to be infeft. An Heir may be infeft in Tenements within Burgh, upon a general Service, and Production of his Predecessor's Infeftment; or by *Hasp* and *Staple*, when the Bailie of a Burgh Royal delivers to him the Hasp and Staple of the Door, as Symbols of Seifin, after he hath cognosced his Proximity of Blood to the Deceas'd, by an Inquest of the Neighbourhood, to which the Clerk of the Burgh must be Notary (a).

2. In order to infeft an Heir in Lands in the Country, or other heritable Rights, wherein the Predecessor died infeft, he must enter specially. An Heir enters specially, either in the ordinary Course of Law, or by the Superior's voluntary Deed.

[1.] Entry in the ordinary Course of Law is, by taking a special Brief out of the Chancery, directed to the Judge ordinary, where the Lands, &c. ly, to enquire by an Inquest, 1. If such a Person died last vest and seifed in such Lands, at the Peace of the Sovereign. 2. If the Raifer of the Brief, be next lawful Heir to him therein. 3. Of whom the Fie is held *in capite*. 4. What is the Manner of holding. 5. What is the old and new Extent of the Fie.

(a) Act 27. Parl. 1. Jam. VI.

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Fic. 6. If the Heir be of lawful Age. 7. Of whom the Fic is now held, from what Time, how and by what Service, and through what Cause. This Brief is proclaim'd by Order of the Judge, upon 15 Days warning, at the Market-crofs where the Lands, &c. ly, that all Persons having Interest, may appear at the Day and Place appointed, to hear and see the Brief serv'd and retour'd, and an Inquest is summoned at the Day appointed for the Service; the Inquest, if they find the Points of the Brief clear instructed, they serve the claimant Heir in special, in the Lands, &c. Which special Service being returned to the Chancery, he gets an Extract thereof from the Director, called a *special Retour*, which includes a general Service, as a Part thereof. The Heir specially serv'd and retoured, if the Lands hold immediately of the King, obtains a Precept out of the Chancery of Course to the Sheriff, or other Judge ordinary, where they ly, to infest him, *capiendo securitatem* for a Sum equivalent to the nonentry Duties resting, and for the Relief. Upon which, if Seisin be not taken before the next Term after, the Heir must take out a new Precept, before he can be infest. The Sheriff, or other Judge ordinary must give Seisin, and the Clerk of the Jurisdiction be Notary to it; tho' Seisin upon other Precepts out of the Chancery may

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be given by others, as Bailies or Notaries (a). A Seifin Ox is due to the Sheriff or Judge ordinary, for giving Infeftment. But the Heirs of Vassals of Church-lands, whose Valuation is but 100 *L. Scots* or under, are free of paying a Seifin Ox, and their Dues to the Judge ordinary, exceed not the twentieth Part of their feu Duties (b). If the Judge ordinary refuse to infeft the Heir, the Lords of Session will, upon Application, and Instruments taken against him of his Disobedience, grant Warrant to the Director of the Chancery, to issue forth a Precept to any other Person, as Sheriff or Bailie in that Part, to grant Infeftment. Vassals of Church-lands in *Orkney* and *Zetland*, not exceeding 20 *L. Scots* of Valuation, bruik by the Udal Right, without Renovation of their Infeftments (c).

When Lands are retoured to be held of a Subject Superior, he sometimes, upon Sight of the special Retour, grants willingly to the Heir a Precept of Seifin, called a Precept of *clare constat*, upon a special Retour. But if he, being infeft in the Superiority, refuse to grant such a Precept, he may be charged by three consecutive Precepts, issued forth of the Chancery, to infeft the Heir, and upon Report to the Chancery, of his persevering in Disobedience, after he was required by the last

(a) Act 77. Parl. 6. Jam. V. junct. Act 15. Parl. 18. Jan. VI. (b) Act 11. Sess. 7. Parl. W. and M. (c) Act 32. Sess. 2. Parl. W. and M.

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last Precept, the Director of the Chancery issueth a fourth Precept to the Sheriff or other Judge where the Lands ly, if the contumacious Superior be the King's immediate Vassal, or to his immediate Superior, where he holds of another Superior interjected betwixt him and the King, and upon that Superior's Disobedience, to the Judge of the proper Jurisdiction, commanding him to give Infeftment to the Heir. If the contumacious Superior is not infeft in the Superiority, the Heir may, after the three consecutive Precepts aforesaid, charge him personally, or at his dwelling Place, to enter Heir in special to his Predecessor last infeft, within 40 Days, if within *Scotland*, and at *Edinburgh Cross* and Pier of *Leith* on 60 Days, if forth thereof; and, the Days of the Charge being elapsed, may pursue a Declarator of *Tinsel of Superiority*. Upon Declarator obtained against the apparent Superior, his immediate Superior may be pursued summarly to supply his Place, under the Pain of *Tinsel* of his Right of Superiority.

Retours are ordinarily reduced by a grand Inquest of 45 Members, upon a Latin Summons of Error. In which Procels of Error, the Pursuer craves, that the Service may be reduced, because he is a nearer Relation to the Deceas'd, than the Defender; and that the Inquest who serv'd such a one Heir, have erred, and ought to be punished in their Persons,

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sons and Goods, *tanquam temere jurantes super affisa*, that is, by escheating of their Moveables, a Year's Imprisonment, and Infamy, (a). The Retour may be reduced, without declaring the Inquest guilty of wilful Error: As when the Error was not evident and gross, nor inferred upon Grounds represented to the Inquest, at the Time of their Verdict, or not pursued within three Years. And a Retour may be reduced at any Time within twenty Years (b), even upon other Grounds than those offered to the Inquest.

[2.] One enters Heir by the Superior's voluntary Deed, when, without serving himself Heir, he gets from the Superior a Precept of *clare constat*. In which the Superior acknowledges, that such a one died last vest and seised in the Lands or others to be entred to, holden of him by such a Tenure; and that the Person mentioned in the Precept is next lawful Heir to him therein, and of lawful Age to enter, and therefore commands his Bailie to invest him. Seisin cannot be taken upon a Precept of *clare constat*, after Death of the Granter, or Receiver of the Precept (c).

3. An Heir may enter any of the ways aforesaid, either with, or without the Benefit of Inventory. The Manner and Time of giving up, recording, extracting such Inventory, and eiking

(a) Act 48. Parl. 6. Jam. III. junct. Reg. Maj. Lib. I. Cap. 14. *Skene*, Not. 161. (b) Act 57. Parl. 5. Jam. IV. junct. Act 13. Parl. 22. Jam. VI. (c) Act 35. Sess. 4. Parl. Will. and Mary.



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eiking to it, is prescribed by Law (a). Seifines in favour of Heirs, must be registred in the same Manner as Seifines granted to singular Successors.

4. Heirs in some Things, as Tacks, Pensions, Reversions, Obligements in favour of Heirs of a Marriage, to be performed before the Father's Death, and some Heirs, as those substituted in Bonds immediately to the original Creditor, want not to be served for making up their active Titles.

Having thus set forth how the active Titles of Heirs are made up and extinguished, I shall now consider what Interest they have, by being Heirs, which is either active or passive.

## C H A P. IV.

### *The active Interest of Heirs.*

**T**HE active Interest of Heirs is the Benefit they are intitled to: Which is partly competent to them before they enter Heirs, or own the Right in their favour, partly after they are entred, or have owned the Right. The Benefit accruing to Heirs before their Entry, is common to all apparent Heirs: The Advantages belonging to Heirs entred are appropriated to them respectively.

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(a) Act 24. Sess. 5. Parl. K. Will.

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## T I T. I.

*The Advantages and Privileges competent to an  
apparent Heirs.*

**A**N apparent Heir, of whatever Kind, has, during his Apparency, several valuable Rights and Privileges belonging to him, as 1. The Law of Death-bed, 2. The Year of Deliberation. 3. Exhibition *ad deliberandum*. 4. Aliment out of the Predecessor's Lands, &c.

## S E C T. I.

*The Law of Death-bed;*

I. **THE** Law of Death-bed is an ancient Privilege, introduced in favour of Heirs by immemorial Custom, that they cannot suffer Prejudice by their Predecessor's disposing of, or affecting gratuitously his real Estate directly; by Disposition, or making Infeftments of Annualrent or heritable Bonds, &c. or indirectly, by granting personal Bonds, whereupon the same may be adjudged. But such Deeds, if consented to by the Heir, are good: And a Person may on Death-bed, without Consent of his Heir, perfect an old Right, or do a Deed, to which he might have been otherwise compelled, as for Payment of his Debt; or  
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may grant a new Right for an equivalent one-  
rous Cause.

2. A Deed is understood to be in Death-  
bed, if before signing and Delivery thereof,  
the Granter was sick, and never convalesced  
thereafter. Which may be annulled or over-  
turned by Reduction *ex capite lecti*, at the In-  
stance of the apparent Heir, or of his Creditors,  
or of the Creditors of the Deceast.

3. The common Defences in this Action are,  
1. That the Author of the Deed quarrelled,  
was at the Time in *liege poustie*, that is, in per-  
fect Health. 2. That tho' he was sick at the  
making of the Deed, yet he recovered perfect  
Health thereafter. Which Defences are allow-  
ed to be proved two ways, 1. By his going  
free and unsupported to, and returning from  
Kirk or Market in Day-time, when People are  
there gathered together, after the Deed quar-  
relled (a). 2. By his living Sixty Days after  
the Deed, tho' during that Time he went not  
to Kirk or Market (b).

4. The ordinary Reply to the first Qualifica-  
tion of *liege poustie* is, that the Deceast did not  
walk to Kirk or Market freely, but was sup-  
ported, and appeared to have strained Nature.  
Before Answer to the Relevancy of which con-  
trary Alledgances, the Lords allow Witnesses  
to be produced by either Party, as to the Con-  
dition of the Health or Sickness of the Deceast,

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(a) Act of Seder. 29 Feb. 1692. (b) Act 4. Sess. 6. Parl.  
K. Will.

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as to his going to Kirk or Market, and the Manner of it, and the Symptoms of Sickness that appeared on him.

It is relevant to reply to the Second Qualification of *liege poustie*, founded on the Granter of the Deed's surviving it Sixty Days, that his Sickness so affected him at the Time of doing the Deed quarrelled, that he was not of sound Judgment and Understanding (a).

5. Some Deeds are presumed to have been granted on Death-bed, as holograph Writs wanting Witnesses, until the contrary be proved.

## S E C T. II.

### *The Year of Deliberation.*

A N apparent Heir hath Year and Day to deliberate, whether he will enter or renounce, Which runs from the Predecessor's Death, unless the apparent Heir be a posthume Child, whose Tutor has a Year after his Birth, allowed to deliberate what is proper to be done for the Pupil in that Matter. He cannot be pursued within the Year of Deliberation (b): But Citation upon a Summons given within the Year, to appear on a Day without the Year, is sustained. This Privilege of a Year to deliberate, is past from by the apparent Heir's renouncing within the Year.

## S E C T.

(a) Ibid. (b) Act 76. Parl. 6. Jam. IV.

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S E C T. III.

*Exhibition ad deliberandum.*

A N apparent Heir may ( without instructing any Title, or proving his Proximity of Blood, unless he be a Foreigner ) pursue Exhibition *ad deliberandum*, at any Time before he enter Heir, either within the Year of Deliberation, or after it is expired. In which Process he may call for a Sight of all Rights or Writs granted to or by his Predecessor, or that were in his Possession *quovis modo* at his Death: That he may see whether he will find his Account in entering upon the Estate. But he cannot insist for Delivery of the Writs exhibited, or to have them transfused upon his own Charges: Nor yet can he oblige such as had Dealing with his Predecessor, to count and reckon *ad deliberandum*.

S E C T. IV.

*Aliment out of the Predecessor's Lands, &c.*

1. A N apparent Heir in Ward-lands, is intitled to Aliment out of them during the Ward, according to his Quality, if he hath no other Feu or Blench Lands to live upon, or to what is wanting of a sufficient Aliment out of his other



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other Lands (a). And any other apparent Heir, whose Predecessor's Estate is liferented, if he cannot *aliunde* entertain himself, gets Alimment off the Liferenter, not being a Liferenter by Reservation (b).

2. An apparent Heir may defend his Predecessor's Right, whether he be cited, or compare for his Interest; and may continue his Predecessor's Possession, and pursue Mails and Duties against the Tenants. He is allowed to bring the Predecessor's Estate to a Roup, whether Bankrupt or not. Again, an apparent Heir to the apparent Heir who died, after he had been Three Years in Possession of the Predecessor's Estate, passing him by, and serving Heir to a remoter Predecessor last infest, is liable to the Debts and Obligements of the interjected Predecessor, to the Value of the Estate, deducing Debts already paid, with Preference of his own Debts already contracted, and the Debts of the Predecessor to whom he is served (c). Apparent Heirs are also intitled to such heritable Rights as require no Service of an Heir.

**TIT.**

(a) Vid. Part 2. B. 2. Chap. 3. Tit. 3. N. 1. (b) Ibid. Chap. 4. Tit. 4. Sect. 1. (c) Act 24. Sess. 5. Parl. K. Will.

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 Ch. 4. *Law of Scotland.* Tit. 2. 91
 

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## T I T. II.

*Active Interest competent to the several Kinds of Heirs after they are entred.*

1. **H**EIRS male, and Heirs of Tailzie and Provision are intitled to no more than the Subject provided to them, or what is accessory thereto. Obligements, in favour of Heirs of Tailzie or Provision, are always effectual against the Heir of Line, in relation to whom, the Heirs of Tailzie or Provision are considered as Strangers or Creditors. Where Infeftment is granted to a Man and his Wife, and to the Heirs or Bairns of the Marriage, male and female succeed equally, and Daughters exclude Sons of another Marriage: But the Father may, if he please, exercise his Power of Division thereof. A Provision of the Conquest, during a Marriage, to the Heirs or Bairns thereof, reacheth only to what more the Father had at his Death, than when the Contract was entred into, with the Burden of all his Debts contracted upon the account of such Acquisition. Heirs of Provision, whether in a particular Subject, or by Clauses of Conquest, cannot suffer Prejudice by any posterior arbitrary, or merely gratuitous Deed of the Person whom they represent.

2. If there be no Heir institute, a sole Heir of Line enjoys the whole Estate, where there is  
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no Conquest, and an Heir of Conquest. If there be several Heirs of Line, as when Heirs Portioners succeed, the Estate is divided amongst them equally, so far as it may admit of Division: But Rights indivisible, as Titles of Honour, Superiorities with the Casualties thereof, and the principal Messuage, or Country-dwelling-house go to the eldest Heir Portioner, without giving Compensation, or any Thing in lieu thereof to the other Co-heirs. She is also preferred to the Custody of the Writs.

3. When there are both an Heir of Line and an Heir of Conquest, the Heir of Line has Right, 1. To all heritable Rights, derived to the Deceased from his Predecessors, requiring Infeftment to their Accomplishment, whether perfected by Infeftment or not, and to all Reversions of such Rights. 2. To all Tacks, Pensions, or annual Prestations, and other Rights requiring no Infeftment, and not competent to Executors, by their including *tractum futuri temporis*. 3. To Bonds wherein Executors are excluded. 4. To heirship Moveables, which are the best of every Kind of Moveables belonging to the Deceased, *that is*, Bodies, or Things in Kinds, and not Quantities or Fungibles. This heirship Moveable is sometimes a single Thing, sometimes a Pair, or Dozen of Things of one Sort, according as they are used by Pairs or Dozens. Heirship Moveables belong only to the Heirs of Prelates,

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lates, Barons and Burgesſes. Under Prelates Law comprehends all benefited Perſons, *in beneficio* at their Death. By Barons are ſignified all Perſons dying, infeſt in Lands or Annualrents; and thoſe, once infeſt, are preſumed to continue ſo till Death, unleſs the contrary be proved. But no Perſon, of any of the Characters aforeſaid, hath heirſhip Moveables, if he died at the Horn, and his Eſcheat was giſted and declared. 5. The Heir of Line falls to be Tutor of Law, as neareſt Agnate to a Pupil or Ideot.

The Heir of Conqueſt ſucceeds to Lands, or heritable Rights acquired by his immediate Predeceſſor, whereupon Infeſtment did, or might follow, and to Reverſions of ſuch, who is not bound to relieve the Heir of Line of Debts contracted for making the Acquisition: But after an Heir of Conqueſt hath once ſucceeded, that, which before was conqueſt, becomes Heritage, and deſcends to his Heirs of Line.

4. When an Heir of Line concurs with an Heir inſtitute, the former has Right to every Thing not ſpecially provided to the latter.

5. Tho' ſome of the Heirs aforeſaid got the whole Heritage, others only particular Lands or Rights, ſome fall to the Succeſſion alone and ſolidly, others only by equal Parts, or proportionably; all of them ſucceed *in univerſum jus defuncti*, that is, to the whole Right of ſuch a Kind, but not to the Whole of each Right,

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Right. No Heir can dispoſe his Predeceſſor's Eſtate, to the Prejudice of his Predeceſſor's Creditors, till a full Year after the Predeceſſor's Death (a).

C H A P. V.

*The paſſive Interest of Heirs.*

**T**HE paſſive Interest of Heirs, is the Engagements and Burdens they are ſubject to, after or before their Entry, called *paſſive Titles*.

T I T L E I.

*The paſſive Title to which Heirs are liable by being entred.*

1. **I**F an Heir enter with the Benefit of an Inventory made, given up, recorded and extracted in due Form, he is anſwerable no further than to the Value of the Heritage contained in the Inventory: But if he hath meddled before unneceſſarily, *that is*, not ſimply for Cuſtody and Preſervation, or thereafter with any Thing fraudulently omitted out of the Inventory, he is liable univerſally (b).

2. Heirs

(a) Act 24. Seſſ. 1. Parl. 1. Ch. II. (b) Act 24. Seſſ. 5. Parl. K. W.



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 Ch. 5. *Law of Scotland.* Tit. 1. 95
 

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2. Heirs entring simply, without the Benefit of an Inventory, stand engaged solidly to all the Debts owing by the Deceased, and to all the Kinds of Obligations to which he was a Party, and which might affect his Estate, tho' the Inheritance will not satisfy these. Because such an Heir is reputed, in Law, one Person with his Predecessor, and their Condition is the same. Under Heirs entring simply, I don't comprehend Heirs *nominatim* substitute in Bonds, who are liable only to the Value of the Sums they got by the Substitution. Albeit an Heir entring simply succeeds only to heritable Debts owing to the Defunct, he may be sued for moveable Debts owing by him, if the Creditor think fit: But the Heir paying, may get Relief off the Executor, so far as the free Moveables will extend.

3. Tho' Heirs be liable for their Predecessors Debts, all Heirs are not liable the same Way. For, 1. Heirs Portioners, tho' jointly bound for the whole Debt, are severally answerable only *pro rata*, every one for her own Share, until the rest of the Co-heirs be discussed: But if one of them should turn insolvent, the solvent Heirs should be liable for the Whole. 2. One serving himself Heir to a remoter Predecessor, last intest, passing by his immediate Predecessor, who died unentred, after he had possessed the Estate Three Years, is liable to the Debts and Obligements of the said interjected Predecessor, only to the Value of the Estate, deduc-

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deducting Debts already paid: Whose own Debts, and those of the Predecessor to whom he enters, are preferred to the Debts of the interjected Predecessor<sup>(a)</sup>. 3. Heirs of Tailzie do not represent the Deceas'd, in Obligations contrary to the Terms of the Tailzie; nor yet do Heirs of Provision represent him simply; For they are not bound to relieve the Father's Cautioner, for Implement of the Provisions made to them, tho' he be Creditor to the Father for his Relief. Nor are they liable to stand to the Father's posterior, voluntary gratuitous Deeds, to their Prejudice, but only to his Obligations for onerous Causes, or just and rational Considerations, as the providing a competent Joynture to another Wife, or giving suitable Portions to Children of another Marriage. 4. All other Heirs, not having the Benefit of Inventory, are liable to their Predecessor's Debts *in solidum*.

4. Heirs have a Privilege, that they can be sued only in a certain Order, one after another is discuss'd, called *the Benefit of Order or Discussion*. Thus general Obligations, not relating to particular Lands, affect 1. The Heirs of Line. 2. Heirs of Conquest. 3. Heirs of Tailzie, who are Blood-relations to the Deceas'd, as 1. Heirs male. 2. Heirs of Marriages. 4. Heirs of Tailzie or Provision, who have no Right of Blood. 5. Heirs substitute by Name in Bonds. But the Order aforesaid of discussing

<sup>(a)</sup> *Ibid.*

Ch. 5. Law of Scotland. Tit. 2. § 1. 97

ing is not observed. 1. Where the Heir In-  
stitute is expressly obliged to relieve the Heir of  
Line. 2. For fulfilling Deeds relating only  
to particular Lands, or heritable Rights, the  
Heir who succeeds to these Lands or Rights,  
must be pursued before the Heir of Line. 3.  
Where the Predecessor hath, in his Obligati-  
on, expressly renounced the Privilege of discus-  
sing his Heirs, any Heir may be sued at the  
Creditor's Option.

T I T. II.

*Passive Titles to which apparent Heirs may be li-  
able, before they enter.*

**T**HES E are, 1. Their being lawfully  
charged to enter Heir, and not re-  
nouncing. 2. *Gestio pro herede*, or behaving  
as Heir. 3. Lucrative Succession, *post contractum  
debitum*.

S E C T. I.

*The passive Title of lawfully charged to enter Heirs  
and not renouncing.*

1. AN apparent Heir declining to enter Heir,  
to the end his Predecessors Creditors may affect  
their Debtor's Estate for their Payment, may,  
if within *Scotland*, be charged to enter Heir  
to him within 40 Days, at the Instance of a

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Creditor of the Deceas'd, with Certification, if he enter not, such Procefs will be granted against him, as if he were actually entred. This is called *a general Charge to enter Heir*; which is given by virtue of Letters of general Charge, passing the Signet,\* and may be executed against the apparent Heir, within the Year of Deliberation (*a*). After elapsing of which Year, and of the Days of the Charge, the apparent Heir may be pursued for Payment: For a general Charge to enter Heir, supplies the Place of a general Service; and thereupon the Creditor of the Deceas'd, reacheth both the Person of the apparent Heir of his Debtor, and any Estate established therein, unless he renounce.

2. But in order to affect Heritage not established in the Person of the apparent Heir, he must be specially charged to enter Heir to his Predecessor, within 40 Days (*b*), by virtue of Letters of special Charge, under the Signet, obtained upon a Decreet, for Payment, against the apparent Heir. Which special Charge is in place of a special Service, and is used in Two Cases. 1. When the apparent Heir's Predecessor is Debtor to the Charger; in which Case, the Debt must be constituted against him *passive*, by a Decreet upon the general Charge, before the special Charge is given. 2. A special Charge is serv'd against the apparent Heir, for Debt contracted by himself: In which Case  
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(*a*) Act 106. Parl. 7. Jam. V. (*b*) Act 27. Parl. 23. Jam. VI.

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**Ch. 5. Law of Scotland. Tit. 2. § 1. 99**


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the Creditor may, without any previous general Charge, charge his Debtor to enter Heir specially to his Predecessor's Lands and Heritages, with Certification, if he enter not, he, the Creditor, shall have such Process and Execution against these, as if he were entred. Such a special Charge may be given, and Process, after elapsing of the Days in the Charge, may follow at any Time after the Predecessor's Death.

3. Both general and special Charges to enter Heir, are allowed against Minors as well as Majors (*a*), even against such as cannot enter, were they willing, *viz.* minor apparent Heirs in Ward-lands.

4. There is no Necessity of a general or special Charge to enter Heir, in order to pursue Reductions, Declarators, or real Actions, which are competent against apparent Heirs, without a previous Charge.

5. The apparent Heir may free his Person and proper Estate, from Distress by Process, upon a general or special Charge for his Predecessor's Debt, by renouncing the Inheritance in due Form and Time, while Things are still entire, *that is*, before he has done any Act, which implies his Acceptance of the Succession.

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(*a*) Act 6. Parl. 23. Jam. VI.



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## S E C T. II.

*Gestio pro herede, or behaving as Heir.*

1. BEHAVING as Heir, is a passive Title, whereby an apparent Heir receiving what he has no Right to, but in the Quality of Heir, or doing that which he could not do but as Heir, or which denotes his Willingness to be Heir, is liable to all his Predecessor's Debts.

2. This passive Title is inferred, 1. By Intromission with either the moveable Heirship, formally drawn and separated as such from the other Moveables, or any Kind of Moveables out of which Heirship could be drawn. Against which this Defence lies, that the Deceast could have no Heirship Moveable, because, 1. He was neither Prelate, nor Baron, or Burges. 2. He died at the Horn, and his Escheat was gifted and declared before the Creditor's Pursuit. 2. 'Tis Behaviour as Heir, to enter to possess or meddle with any heritable Estate belonging to the Deceast, to which the Intromitter would succeed as Heir, as to cultivate or farm out the Ground, or reap the Fruits of it.

3. This passive Title is incurred, by the apparent Heir's possessing his Predecessor's Estate, by virtue of a Right to Apprising or Adjudication, for the apparent Heir's own Debt, real or feigned, acquired by him before or after

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 Ch. 5. *Law of Scotland.* Tit. 2. § 2. 101
 

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expiring of the legal Reversion, as if no such Right were in his Person (*a*). 4. It is reputed Behaviour in an apparent Heir, to purchase by himself, or other Person to his behoof, any Right to his Predecessor's Estate, redeemable or irredeemable, other ways than as highest Offerer at a publick Roup without Collusion, or to possess the said Estate by Rights or Diligences, established in the Person of a near Relation, to whom he may also succeed as Heir, not lawfully purchased at a publick Roup (*b*).

3. One is not *passive* liable as having acted as Heir, by raising Brieves to serve Heir, whereon no Service followed, or by a Decreet passing against him, upon his failing to prove Payment of a Debt owing by the Deceast, which he, being sued for the same, undertook to do; or by his paying some of the Predecessor's Debts; or by an Heir of Line's renouncing the Inheritance in favour of an Heir male, to whom the Deceast had dispoed it, tho' he receive a Gratuity for letting it go, seeing no Creditor sustains Harm thereby, and the Heir male might have forced him to renounce.

4. No acting apparent Heir is liable to this passive Title, but he who has Right to succeed to the Subject meddled with: Nor can it be pursued against the Behaver's Heir, unless there was, at least, an extracted Act of Litiscontestation upon it against himself.

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(*a*) Act of Seder. 28 Feb. 1662. (*b*) Act 24. Sess. 5. Parl. K. Will.

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5. Behaviour as Heir doth make the Actors liable no further, than if they were served Heirs. But they have no Benefit of Discussion competent to Heirs lawfully entred, nor direct Relief when distressed, from the Heirs liable before them.

## S E C T. III:

*Lucrative Succession post contractum debitum.*

1. LUCRATIVE Succession *post contractum debitum*, is a passive Title, by which one accepting from another, without any onerous Cause, a Disposition of any Part of his Heritage, to which the Receiver would have succeeded as Heir to the Disposer, is liable to all the Granter's Debts contracted before the said Disposition; which is accounted *præceptio hereditatis*, Anticipation of the Inheritance.

2. This passive Title is incurred by the Acceptor of a gratuitous Disposition of Lands, Annualrents, or other Heritage, to which he might have succeeded as Heir of Line or Conquest, or as Heir male, or of Tailzie or Provision; whether he be, for the Time, immediate, or mediate apparent Heir, if otherwise, necessarily to succeed by Course of Law, as the Disposer's eldest Son, or that Son's eldest Son. But taking a Bond of Provision, or a Right to moveable Heirship or Tacks, or a Disposition to Things which the Receiver might not have otherwise succeed-

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 Ch. 5 *Law of Scotland.* Tit. 2. § 3. 103
 

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ceeded to, as an apparent of Tailzie's getting a Disposition of what would have fallen to the Heir of Line, or the Heir of Line's accepting a Disposition of tailzied Lands, doth not infer this passive Title. Nor is it incurred by a Father's Disposition to his second Son, while the eldest is alive; or by a Disposition from one Brother to another, tho' the Disponer had no Child for the Time; or by Disposition to a third Person, for the behoof of the apparent Heir.

3. To found this passive Title, 1. Both the Disposition and Infestment thereon must be after the Disponer's contracting Debt; for an Infestment posterior to the Debt, upon a Disposition anterior thereto, doth not infer it. And the Debt is understood to be contracted, when taken on, and not only when it is constituted by Bond given for it, or Decreet against the Debtor. 2. The Disposition must be either without any onerous Cause, or for a Cause within'nalsr the value of the Thing disposed. For if the Cause be adequate, or near to the Worth of what is disposed, this passive Title is not incurred.

4. This passive Title doth ( as the former of Behaviour as Heir ) make the lucrative Successor liable in the same Manner, as if he was entred Heir, and no further.

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## C H A P. VI.

*Of Succession to Moveables and personal Rights.*

**S**UCCESSION to Moveables is either authorized by Law, or unwarrantable.

## TIT. I.

*Of Succession to Moveables and personal Rights, authorized by Law.*

1. **S**UCCESSION to Moveables and personal Rights authorized by Law, is that which is regulated by the express, or presumed Will of the Deceased.

2. His express Will is declared by a Testament, or Codicil made by himself,

3. A Testament is a deliberate and just Disposition, of what one would have done, concerning his moveable or personal Estate after his Death, with or without the Appointment of an Executor. Which is called a *Testament Testamentary*.

4. A Codicil is a less solemn Will of one that dies testate or intestate, by which, if testate he burdens the Executor in his Testament



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Ch. 6. *Law of Scotland.* Tit. I. § I. 105

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ment, and if intestate, his Executor at Law, or nearest of Kin, to pay some Legacies, or do some other thing after his Decease: Or whereby one alters, retracts, or explains something in a Testament made by him.

5. One's presumed Will is declared by a Testament made after his Death by the Commissary or consistorial Judge, according to the Direction of Law, called a *Testament Dative*. The Reason why it is so called, will afterwards appear.

SECT. I.

*Of Testaments Testamentary.*

1. TESTAMENTS testamentary, are either written, or nuncupative.

2. A written Testament is, that which, at the Time of making thereof, is committed to Writing. Which must be either holograph, all written with the Testator's own Hand, or subscribed by him, before two Witnesses, if he can write, or by a Notary and two Witnesses, if he cannot write. And a Minister is authoriz'd by his Character, to officiate as Notary in Testaments (a).

3. The like Solemnity is required in Codicils and Legacies above 100. L. as in Testaments. A Testament made in *England* or in any other Nation, according to the Solemnity

(a) Act 133. Parl. 8. Jam. VI.

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lemnity of the Place ( tho' different from what our Law prescribes ) is sustained to transmit Moveables in *Scotland*.

4. A nuncupative Testament is, when the Testator doth by Word of Mouth only declare his Will. Such a Testament is of no Force in *Scotland*, for appointing an Executor.

5. All Persons may make Testaments who have the Use of their Reason, even Minors having Curators without their Consent, Persons interdicted, without Consent of the Interdictors, and married Women, without Consent of their Husbands. But Pupils, or Idiots, or furious Persons, during their Distemper, or Bastards not legitimated, nor having lawful Issue, or Power to make a Testament from the King, cannot make Testaments.

6. The Testator ordinarily names Tutors to his Children under Age, if he any has, and appoints one or more Persons called *Executor* or *Executors Nominate*, or *Testamentary*, for executing or performing his Will, by Payment of Debts and Legacies, &c. But a Testament is good, tho' an Executor be not named by the Testator.

7. Moveables are the only Subject which can be conveyed by Testament, and the whole of them are term'd Executry, because they come under the Executor's Management. But all cannot be disposed of by the Testator. For  
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the best of every Kind of Moveables belongs to the Heir of Line as Heirship, if the Testator be one who by Law may have Heirship. Nor are always the rest of the Moveables wholly at his Disposal. A Woman, whether Maid or Widow, may indeed intirely dispose of all her Moveables, without allowing any Part to her Children: And may, if she be married, freely dispose of her Share of her Husband's Moveables, without any Claim upon the same by her Husband or Children. But when a Man makes a Testament, his Power is greater or lesser according to his Circumstances, at the Time of his Death. If he be married and have Children, Law provides to the Wife a Third of his Moveables, called *jus relicta*; to the Children *in familia*, another Third, called their *Legitim*, or *Bairns Part of Gear*, or *Portion natural*: And the Remainder of the Moveables is all the Testator can dispose of, thence term'd *the Dead's Part*. If there be either a Wife or Children, and not both, the Testament receives a bipartite Division, *that is*, the Wife or Children in Being, get one Half of the Moveables for their legal Share; and the other is reckoned the Dead's Part. If there be neither Wife nor Children, all the Moveables fall under the Denomination of Dead's Part. Mean time, it is to be noticed, that the Wife's Share of the Husband's Moveables, is not always so large, as the Children's Legitim, or the Dead's Part.

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For personal Bonds bearing Annualrent, for Sums owing to the Testator, are esteemed heritable as to her, who has no Right to any Share of these, and moveable as to the Children, who may claim their natural Portion thereof, and as to the Legataries, and other nearest of Kin, who have Interest in the Dead's Part (a), unless the Testator die before the Term of Payment of Annualrent, or after a Charge, or Pursuit thereon for Payment, in either of which Cases personal Bonds, bearing Annualrent, are simply moveable. But then, as she hath no Benefit by such Bonds granted to her Husband, neither is her Share of the Moveables affected with Debts of that Nature owing by him, while the Dead's Part and Legitim are sufficient to satisfy the same.

8. No Person can, by his Testament, or any Death-bed Deed, defraud the Heir of his Moveables, nor the Relict of her legal Share, or his Children of their Legitim. A Legacy left by the Testator to his Wife, is not imputed in Satisfaction of her legal Share, but is wholly due out of the Dead's Part. Nor is she excluded from this legal Provision, by a conventional Provision in her Contract of Marriage, not bearing expressly to be in Satisfaction of the Legal. A Legitim is not due to Grandchildren, but only to immediate lawful Children in their Father's Family at his Death, whether of the same, or of different Marriages. But Children are excluded from a Portion natural,  
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(a) Act 32. Parl. 1. Sess. 1. Ch. II.



**Ch. 6. Law of Scotland. Tit. I. § I. 109**

by Forisfiliation; which is understood, in this Case, either of an exprefs Discharge of the Portion natural, or of Acceptance of a Provision in Satisfaction thereof. If some of the Children be so forisfiliate, and others not, or provided to be Bairns in the House, the latter will get the whole Legitim, and fall to the Parts of the former *jure accrescendi* (a).

9. Tho' a Testator may dispose of personal Bonds, bearing Annualrent, as well as of his other Moveables, such Bonds including Executors (which are heritable as to the Creditor, tho' moveable as to the Debtor) do not fall under the Dead's Part.

10. The Executors Interest in the Testament is set forth elsewhere (b).

11. The Dead's Part is ordinarily disposed of by way of Legacy. A Legacy is a Bequest or Gift, which the Testator orders to be given, or paid after his Decease, to the Person gratified therewith, called *Legatary* or *Legatee*.

A Legacy is either universal or particular. An universal Legacy is a Gift of the whole Dead's Part, either in favour of the Executor, or some other Person. A particular Legacy, is a Gift of some Part thereof.

A particular Legacy is, 1. Either general, *i. e.* conceiv'd in general Terms, as a Legacy of a certain Sum of Money, without specifying the Person by whom it is owing; or special, *i. e.* a particular Thing given in  
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(a) Vid. infr. Sect. 2. (b) Vid. infr. Tit. 1.



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Specie, as a certain Horse, or Piece of Plate, &c. or a certain Sum owing to the Testator by such a Man. If the Testator bequeath any specifick Thing, which he knows to belong to another Man, or an heritable Sum belonging to himself, which he knew to be heritable; the Executor is bound to purchase it for the Legatary, or give him the Value of it. But if the Testator bequeath what belongs to another, supposing it to be his own, or an heritable Sum belonging to himself, thinking it moveable, his Executor is not obliged to make good the Legacy. 2. A particular Legacy, is either written, or nuncupative. A written Legacy may be left either in a Testament or Codicil, or in any other Writ, as a Contract, Ticket or Letter. And tho' none make effectually two Testaments, he may leave several Codicils. And Legacies may be given, either in one, or in different Writs, of the same, or of different Dates. A nuncupative Legacy, left by Word of Mouth, within an hundred Pounds, or a greater, if restricted to that Sum, is sustained, and may be proved by Witnesses.

12. Testaments and Codicils being made in the View that the Person who so disposes of his Goods, has of his own Death, and with a Design that they shall have no Effect till after his Death; the Testator is always at Liberty to destroy and suppress them, or to revoke and alter them, by making

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Ch. 6. *Law of Scotland.* Tit. I. § I. III

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ing another: In which Case, the last only is effectual; and thence term'd a Latter-will. Some things in a Testament, as Legacies, may be revoked or altered, without Prejudice to the Testament in other things. Legacies may become void, either totally, or in Part.

13. Legacies cease totally, 1. By the Testator's revoking them, either expressly or tacitely. They may be revoked expressly in a separate Codicil. Legacies are revoked tacitely, by some Act of the Testator, from which his Intention to deprive the Legataries of them, is gathered. Thus a special Legacy of any corporeal Thing, is understood to be revoked, by the Testator's selling, or otherwise alienating it, and such a Legacy of a moveable Bond, is annull'd, by his taking a subsequent heritable Security for the Sum therein. 2. A specifick Legacy is lost to the Legatee, when the thing perisheth without the Fault of the Executor. 3. A Legacy becomes null, if the Legatary die before the Testator.

14. Legacies cease in Part only, when they exceed the Dead's Part of the free Gear: In which Case they regularly suffer a proportionable Defalcation, without Distinction even of Legacies to pious Uses. But a special Legacy will not be so abated, in a Competition with general Legacies.

15. Tho' a latter Will may commonly be

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revoked ; yet if one, by Contract or other Deed, oblige himself to dispose of his Means so and so, or not to alter his Testament ; in such a Case, his Will is irrevocable and unalterable. And an Obligation to leave a Legacy, is sustained as an irrevocable Legacy out of the Dead's Part of the Granter's free Gear.

## S E C T. II.

*Of Testaments dative.*

1. A Testament dative regulates Succession to the Moveables of one deceas'd without making a Testament, by his presumed Will, according to the Rules of legal Succession to Heritage, except as to the Particulars following.

2. Where the Intestate left no Heritage but only Moveables, the distinguishing Rules are,  
 1. All the nearest of Kin of one Degree, Males and Females, elder and younger, without any Distinction of Sex or Age, succeed equally to the moveable Estate. 2. There is no Right of Representation in this Succession. 3. A Woman's nearest of Kin succeed to her whole moveable Estate But a Man's nearest of Kin do not always succeed to all his Moveables, but only to the Dead's Part thereof, which falls to be more or less according to the Condition of his Family at his Death. For if he leave both a  
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 Ch. 6. *Law of Scotland.* Tit. I. § 2. 113
 

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Wife and Children in his Family, she will have Right *jure relictæ* to a Third of all except personal Bonds bearing Annualrent; and they are intitled to the rest, including such Bonds, *viz.* to the one Half thereof as Children, for the Legitim, and to the other Half by Succession, as nearest of Kin, for the Dead's Part. Where the Deceas'd leaves a Wife and no Children, she gets a Half of the Moveables, excepting as aforesaid, for her legal Share, and the nearest of Kin the rest, without Exception, as the Dead's Part. If Children and no Wife survive the Deceas'd, these Children will enjoy the whole Estate, *viz.* one Half as their Portion natural, and the other, *viz.* the Dead's Part, as nearest of Kin.

An Aliment is due to the Relict, for maintaining her and the Family of her Husband, till the next Term after his Death, when her Joynture commenceth: Albeit she have a separate Estate of her own sufficient for their Maintenance, which is modified, without respect to her Joynture, according to the Quality of the Person, and Condition of the Family left by him. The Relict gets also the Expence of her Mournings for her Husband, if it was proper for one of her Quality to have Mournings. The Expence of which Aliment and Mournings affects not the Dead's Part only, but comes off the whole Head of the Executry. If a Wife die before her Husband, her Executors claim the like Share of the Husband's

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Moveables at the Time of her Death, as she could have had, if she surviv'd him, *viz.* a Third or Half, according as there were Children, or not Children, at the Time: And her Children by a former, will succeed equally with those born to the last Husband. But the Heirship moveable is excepted, wherein the Wife had no Interest; tho' there could be no Heir for the Time, the Husband being alive.

3. If the Defunct left both Heritage and Moveables, the Rule of Succession to the Moveables differs in this, from the legal Succession to Heritage, that the Heir of Line may draw the Heirship Moveables, and the other nearest of Kin will succeed to the Dead's Part of the rest. But if the Heir be willing to collate, and let the other nearest of Kin share equally with him in all he can succeed to as Heir; he comes in *pari passu* with the rest. And if there be but one Child, who is both Heir and Executor, that Child is intitled, not only to the Heritage, but also to the whole Legitim, without Collation of the Heritage, for increasing the Relict's Share.

4. Having opened up the two Kinds of Succession to Moveables, and the several Shares thereof, belonging, by the Disposition of Law, to Heirs, Widows, Children, nearest of Kin, Executors and Legataries; natural Order leads me to shew what are effectual and complete Titles to the Moveables of one deceas'd.

T I T.



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 Ch. 6. *Law of Scotland.* Tit. 2. 115
 

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## T I T. II.

*What are effectual and complete Titles to the Moveables of one deceas'd ?*

1. **T**ITLES to the Moveables of one deceas'd, are either effectual *ipso jure*, by the Owner's Death, or must be made up and completed by Confirmation.

2. An Heir hath Right to the moveable Heirship, a Widow to her legal Share, and Children to their Legitim; *ipso jure*, by Decease of the Predecessor, Husband, and Father; and transmit their respective Interests, by their Death, to their own nearest of Kin, without Confirmation.

3. Titles to the Moveables of Persons deceas'd, who made their own Wills, are perfected by Confirmation, at the Instance of their Executors testamentary. Testaments of those who die intestate, or whose Executor nominate declines to confirm, are made up and completed by Confirmation, either, 1. at the Instance of their Relicts and Children, or other nearest of Kin. Or, 2. at the Instance of the Creditors of the Deceas'd. Or, 3. At the Suit of Creditors of his nearest of Kin.

4. Confirmation is the Sentence of a Commissary, authorizing and empowering an Executor testamentary, or an Executor appointed by himself to an Intestate, upon giving up

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Inventory of the Goods, Gear, Debts, and Sums of Money, belonging or owing to the Testator, or Intestate, to intromit with the said Goods and Gear, uplift, receive, dispose, and grant Discharges thereof, and to pursue for the same.

5. Testaments are to be confirmed in that Commissariot, *i. e.* Commissary-court, where the Deceas'd dwelt at his Death, as his ordinary Abode; and if he had Houses in several Commissariots, before the Commissary of the Bounds where the chief dwelling Place lay. Testaments of *Scottish* Men, residing and dying Abroad in a foreign Country, ought to be confirm'd by the Commissaries of *Edinburgh*: Testaments of Mountebanks, Strollers, and common Soldiers, fall to be confirmed in the Place where they die, if they had resided there 40 Days before: But otherwise are to be confirmed by the Commissaries of *Edinburgh*:

## S E C T. I.

*Confirmation at the Instance of Executors testamentary.*

THE Executor nominate; gives up the Testament, with an Inventory of the Goods and Gear of the Deceas'd, to the proper Commissary, with a Bond of Cautionry to make the same forthcoming to all Parties having Interest, as Law will. Which Testament and In-

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Ch.6. *Law of Scotland.* Tit. 2. § 2. 117

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Inventory the Commissary, without more ado, ratifies, approves, and confirms, and impowers the Executor to intromit with, uplift, receive, dispose of, pursue for the Goods and Gear therein set down, and to grant Discharges upon Receipt or Payment. This is what we call a confirm'd *Testament Testamentary*.

S E C T. II.

*Of Confirmation of the Moveables of an Intestate, at the Instance of his Relict or Children, or other nearest of Kin.*

1. THE Relict, or Children, or other nearest of Kin of an Intestate cannot now (as before the Year 1690.) be charged, pursued, or required at the Instance of the Commissary or his Fiscal, to give up Inventory of the Moveables of the Deceased, in order to Confirmation (a). It is often necessary for Children, or other nearest of Kin, to confirm, because the Dead's Part falling to them, is not established in their Persons, by their surviving the Deceased without Confirmation, and only such nearest of Kin have Interest therein, as were alive the Time of the Confirmation, there being no Right of Representation in this Case.

2. When the nearest of Kin desire to confirm, upon their Application to the Commissary,

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(a) Act 26. Sess. 2. Parl. W. and M.

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fary, an-Edict will be emitted, served, and affixed on the Church-door, where the Intestate died, upon Nine Days Warning to all Parties having Interest to confirm. Upon the Ninth Day, if no Person appear having a just Objection against the Applier's Interest, they will be decerned Executors. Which Decreet is called a *Dative*, and the Persons decerned are stiled *Executors Dative qua nearest of Kin*. To the end they may the better know the Extent of the Effects of the Deceased, in order to confirm, they may sue the Intromitters therewith, or others supposed to know the same, before the Commissary-court, to give up Inventory thereof upon Oath. After such Expiscation, if the Executor, or Executors *Dative* think it expedient to confirm, they give up Inventory, and swear the same, and find Caution to make Forthcoming to all concerned. Which Inventory now, since Quotes of Testaments were discharged (*a*), consists only of Two Parts, *viz.*

1. Goods and Gear, or specifick Things.
2. Sums of Money lying by the Deceased, and Debts owing to him.

The Total is then drawn up, and either divided, or left undivided, according to the Condition and Estate of the Intestate at his Death. For if the Debts, owing by him, exceed his Goods and Gear, there is no Place for a Division. If there be an Overplus, that is divided into one, three, or two Parts, according as the Deceased had not,  
or

(*a*) Act 14. Sess. 9. Parl. K. W.

**Ch. 6. Law of Scotland. Tit. 2. § 3. 119**

or had a Wife and Children, or wanted either of these. To which the Commissary interposes his Authority, and authorizeth the Executor to act as such; this is called *a confirmed Testament Dative*. But if, after the Lights got from the preliminary Process for Trial aforesaid, the Executor decerned expect not to find his Account in confirming, he may renounce and pass from the Office, and thereby make Way for Creditors to apply for it.

**SECT. III.**

*Of Confirmation at the Instance of Creditors of the Deceased.*

**CREDITORS** of Persons deceased have Two Ways of making up Titles to their Debtors Effects, and recovering Payment.

1. A Party, having a depending Cause, or Claim against one deceased, may, if he please, charge his nearest of Kin, to confirm within Twenty Days, in which Case he must either renounce, or be liable as a vitious Intromitter: And if he renounce, the Charger may proceed to have his Debt constitute, and the *hereditas jacens* of Moveables declared liable by a Decree *cognitionis causa*. Upon which the Obtainer may be decerned Executor Dative to the Deceased, and so affect his Moveables in the common Form (a).

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(a) Act 41. Sess. 5. Parl. K. W.



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2. Creditors of the Deceased, whose Debts are instructed by Writ, may directly, upon an Edict served, get themselves decerned *Executors qua Creditors*; and those, whose Debts are not so instructed, may, by pursuing a Constitution thereof, and obtaining a Decree *cognitionis causa* against the nearest of Kin, be decerned Executors Creditors. Upon which these Executors Dative may pursue all Persons supposed to have, or know of their Debtor's Effects, to give up Inventory thereof upon Oath, and then, according as they see convenient, confirm either the whole Goods and Gear of their Debtor, or only so much thereof as may pay themselves (a).

3. All who confirm themselves Executors Creditors, within Six Months of the Debtor's Decease, come in *pari passu*, without Respect to the Priority, or Posteriority of their Diligence: And a Creditor, posterior in Diligence, may, within that Time, get himself joyned to the Executor Creditor first decerned and confirmed, upon bearing a proportionable Part of the Charges wared out by the said Executor Creditor (b). But where Two Persons successively confirm the same Subject, as principal Executors *qua Creditors*, the Second Confirmation is null.

## S E C T.

(a) Act of Seder. 14 Nov. 1672. (b) Act of Seder. 28 Feb. 1662.

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Ch. 6. *Law of Scotland.* Tit. 2. § 4. 121

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S E C T. IV.

*Of Confirmation at the Instance of Creditors of the nearest of Kin of one deceas'd.*

W H E R E Moveables fall to a nearest of Kin, lying by without Confirming, his Creditors may either require the Procurator Fiscal to confirm and assign to them, under the Pain of being liable to them for the Debt ; or may obtain themselves decerned Executors to the Deceas'd, as if they were his Creditors ; with Preference always to the Creditors of the Deceas'd, doing Diligence to affect the said moveable Estate, within Year and Day of the Debtor's Decease (a).

Having spoke of the several Kinds of Confirmation of the Goods and Gear of Persons deceas'd, at the Suit of their Executors testamentary, Executors *qua* nearest of Kin, Executors *qua* Creditors, and of Creditors to their nearest of Kin ; I propound in the next Place to set forth some things accessory to all these Confirmations.

S E C T.

(a) Act 41. Sess. 5. Parl. K. W.

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## S E C T. V.

*Some Things accessory to all the Kinds of Confirmation aforeſaid.*

1. EXECUTORS uſe at the Time of the Confirmation, to proteſt, that they may be allowed to eik or add to the Inventory, what more comes thereafter to their Knowledge. Which Additions the Commiſſaries will admit, without a new Confirmation, provided it be done before ſerving an Edict *ad omiſſa*.

2. If the Executor omit to give up any Thing in the Inventory, or do not give up the Moveables at the true Rates, the Commiſſary may appoint another Executor dative *ad omiſſa & male appretiata*. Who regularly ought to cite the principal Executor, if on Life, or his neareſt of Kin, if deceas'd, upon Nine Days warning, to hear and ſee him ſo decerned Executor: Otherwiſe the Decree dative and Confirmation in his favour are null. A Teſtament *ad omiſſa, &c.* is confirmed in the ſame Manner as the Principal; except that the former receives no Diviſion, and carries the whole Goods and Gear omitted to the Executor dative *ad omiſſa*, excluding the Relict or Children of the Deceas'd from their legal Shares, unleſs they be able to purge and clear themſelves of a fraudulent Omiſſion.

3. Because

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 Ch. 6. *Law of Scotland.* Tit. 3. 123
 

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3. Because sometimes Debts owing to the Deceast are controverted, and the Executor is uncertain whether they will be effectual, a Licence to pursue is commonly granted to him by the Commissary, for trying, before he be at the Expence of Confirmation, what can be made of them, but not till once he is decerned Executor. Such a Licence may be granted not only to principal Executors, testamentary or dative, but also to Executors dative *ad omiffa*. But it is indulged only *ad diem*, that the Executor may sue within a certain Time, or *usque ad sententiam*, or *excludendo sententiam*, that he may insist and carry on the Suit, till it is ripe for a Sentence. If a Licence be given *includendo sententiam*, or if the Sentence happen to be pronounced before outrunning of the Day, to which the Licence was allowed, the Lords ordain Decreet, not to be extracted, till the Pursuer produce a Confirmation, or find Caution to confirm. A Decreet extracted on a Licence, bearing the Quality of *excludendo sententiam*, before the Subject pursued for is confirmed, is null. But an Executor may pursue without a Licence, for a Debt unconfirmed, before the Commissary who decerned him Executor.

Having explained how the active Titles of Executors are made, I shall in the next Place consider the Effect of their being Executors, and the Interest they have thereby, which is either active or passive.

T I T.

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## T I T. III.

*Of the active Interest of Executors confirmed.*

1. **I**F an Heritor or Liferenter of Country Land-rent, or Mill-rent, of Property or Annualrent, do survive *Whitsunday*, or die in the Afternoon of the Term-day, their Executors have the Half of that Year's Rent, whether it consist of Money or Victual; and if they survive *Martinmas*, or die in the Afternoon of that Term-day, their Executors have Right to that whole Year's Rent, without regard to the conventional Terms of Payment.

2. An Executor who is a Stranger (*that is*, one who has no legal Interest in the Moveables of the Testator) has by his Office a Third of the Dead's Part, after Deduction of Debts and Legacies, for his Pains in executing the Testament (*a*). So that if the Testator hath made an universal Legacy of all the Dead's Part to another, or exhausted it with particular Legacies, such an Executor hath nothing but an unprofitable Office. And even where so much of the Dead's Part is left free as would satisfy the Executor's Third, any Legacy left to himself, is imputed in Payment thereof, *pro tanto*, without Prejudice to him of his Legacy, if it exceed the said Third (*b*). The Heir, if named Executor, retains

(*a*) Act 14. Parl. 22. James VI. (*b*) *Ibid*.



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Ch. 6. *Law of Scotland.* 125

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tains his Third as a Stranger. But the Testator's Wife or Children, or nearest of Kin when named Executors, have nothing for their Administration, but their Expences, unless their legal Interest be less than a Third.

3. The Executor only has the Power of Administration, and Right to pursue Debtors of the Deceas'd, and Intromitters with his Goods, against whom Legataries have no immediate Action; but only against the Executor: Except one to whom a special Legacy is left, who may pursue the Haver of the Thing or Sum specially bequeathed, provided he cite the Executor for his Interest in the Suit. If there be several Executors, whom we call Co-executors, one cannot pursue without the rest concurring, nor discharge a Debt wholly. But if any one of the rest decline to concur, he may be got excluded from the Office, in a Process before the Commissaries, and then Process will be sustained without him. A Discharge from one of several Executors is good, if the other Executors have got as much as their Share will extend to.

4. Executors may receive Payment of, or discharge Debts owing to the Deceas'd; but cannot dispose or assign, till they obtain Decrets, or new Security in their own Names. Nor doth a Sentence against the Debtors of the Deceas'd, or Bonds obtained from them, state the Executors in the absolute Right to the Moveables, otherwise than that they may af-

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assign to the respective Persons having Interest; nor yet do the Goods of the Deceas'd established in the Executor's Person by a Sentence, fall under his Escheat, except as to his own Interest therein.

5. A Testament is understood to be executed, when the Executor has obtained Payment or Decrets, or new Security in his own Name for the Debts.

6. If one of several Executors die before the Testament is executed, the Office accrues to the Survivors. And if all the Co-executors, or a sole Executor die, while any Part of the Testament remains unexecuted, there is Place for a new Executor to be decerned for executing the Remainder, called Executor *quoad non executata*, who is accountable to these who were nearest of Kin at the first Confirmation. But in so far as the Testament was executed before the Executor's Death, his Share passeth to his Executor, with a Burden of a Proportion of the Debts of the first deceast.

### TIT. IV.

#### *Of the passive Interest of Executors confirmed.*

1. **A**N Executor, who has only an unprofitable Office, and his Labour for his Pains, is liable only to assign the Subject of the Executry to those having Interest, that they

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 Ch. 6. *Law of Scotland.* Tit. 4. 127
 

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they may pursue, and is accountable only for supine Negligence: But an Executor, who has Benefit by his Office, is liable for exact Diligence; and Executors Creditors are obliged to Diligence for what they confirm.

2. Executors are liable to Creditors, the Relict, Children or other nearest of Kin, and Legataries, only *secundum vires inventarii*, so far as the Moveables confirmed will go, and may be distressed by Creditors, both for heritable and moveable Debts, but get Relief from the Heir of all heritable Debts paid by them. Co-executors are accountable only *pro virili parte*, and cannot be singly pursued, unless one of them hath intromitted, or might have intromitted with as much as will satisfy the Debt in question.

3. An Executor cannot *regulariter* make voluntary Payment, without a Sentence for his Warrant, and all Creditors doing Diligence against him, within Six Months of the Debtor's Death, come in *pari passu* (a). But those pursuing after the Six Months, are preferred according to the Priority of their Diligence.

4. Some Debts may be paid without a Sentence. Of which some can only be voluntarily so paid, before any Suit commenced, or Diligence used against the Executor by other Creditors. Such are Debts acknowledged by the Deceased in his Testament. Other Debts may be paid at any Time, even after Process against the

(a) Act of Seder, 28. Feb. 1662:

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the Executor, at the Instance of other Creditors: Such are those called *privileged Debts*, viz. Medicaments afforded to the Deceased on Death-bed, his funeral Charges, a Term's Rent of the House wherein he died, and Servants Fees for a Year or Term, according as they were hired. But Aliment of the Family of the Deceased, till the next Term after his Death, is no such privileged Debt, but only a common Debt, without any Preference to others.

5. Creditors of the Deceased cannot, in a Pursuit against Executors, prove their Debts by the Oaths of the Executors, or by holding them as confessed to the Prejudice of other Creditors or Legataries, or of the Relict, Children, or other nearest of Kin. But such an Oath given by the Executor, or holding him as confessed, is effectual only against himself, in so far as he may have Benefit by the Testament.

6. It is relevant for the Executor to prove, by Exception, that the Inventory is exhausted. For instructing whereof he may found. 1. Upon Debts due to himself before Confirmation, but not such as were assigned to him after Confirmation. 2. Upon privileged Debts paid at any Time, and testamentary Debts paid before Citation at the Instance of other Creditors. 3. Upon other common Debts paid by virtue of Sentences, according to the Order of Diligence done for them. 4. Upon Decrees and registred Hornings against Debtors  
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 Ch. 6. *Law of Scotland.* Tit. 4. 129
 

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of the Deceased, and upon Sentences absolvitory obtained by Debtors pursued by the Executor, 5. Upon the Expence of confirming the Testament of the Deceased, which is allowed out of the whole Head of the Executry. 6. Upon the necessary Expence of Process and Execution against the Debtors of the Deceased. But then, if the Executor has got any Eases of the Debts of the Deceased from some Creditors, he is bound to communicate the Benefit thereof to the rest.

7. An Executor's Defence, that the Inventory is exhausted by lawful Payments, is taken off by the Pursuer's Reply, that the Executor has super-intromitted, *that is*, intromitted with as much more of the Effects of the Deceased, than those contained in the Inventory, as would pay the Pursuer.

8. If, after all just Allowances made to the Executor, he be found chargeable with nothing save Debts unrecovered, for which he hath done competent Diligence; he will be exonerated, upon assigning over these Debts to the Creditors, according to their Preference.



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## T I T. V.

*Of illegal and unwarrantable Succession to the Moveables of Persons deceased, called vitious Intromission.*

1. **V**ITIOUS Intromission is, any Person's taking into his Hands, and using the Goods of one dying intestate, without any Title thereto. Which is a passive Title subjecting the Meddler, called *vitious Intromitter*, to all the Debts of the Deceased.

2. In one Case vitious Intromission is presumed, as if the Persons, related to one dying in his own House, present at his Death, or the Master or Mistress of another House where he dies, does not, after he becomes insensible, lock up the Places where his Writs, Evidents, Money, and other precious Moveables are contained, seal, and deliver the Keys to the next Judge ordinary, to be kept, till opened, at his Sight, by those having best Right; they will be held and reputed as Embeyllers, or Abstracters of his Writs, Evidents, Money, or precious Moveables. But, in case of Necessity, the Relict, or Children of the Deceased, may, at the Sight of the Judge ordinary, or Two Justices of Peace, take out so much of the Money, lying by the Deceased, upon their Receipt, as may defray the Expences

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Ch. 6. *Law of Scotland.* Tit. 5. 131

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ces of the Burial (*a*). In other Cases vitious Intromission must be proved.

3. This passive Title is not inferred by necessary Intromission, for preserving the Goods; nor by a Stranger's buying them from one he thought the Owner, for a just Price. Neither can any Person be a vitious Intromitter, where there is an universal Executor confirmed to the Deceased, whether it be the Intromitter, or some other from whom he derives no Right. But an Exception founded upon the Intromitter's being Executor confirmed, is taken off by this Reply, that the Executor intromitted with some Part of the Goods of the Deceased, which he concealed, and kept out of the Inventory of the Testament. And the Confirmation of an Executor Creditor, in a particular Debt or Subject, doth not hinder vitious Intromission, unless the Intromitter have Right from him before his Intromission (*b*). Again, a Declarator of the Escheat of the Deceased excludes vitious Intromission, whether the Intromitter, or another from whom he had no Warrant, be Donatary of the Escheat. In short, any colourable Title, tho' not effectual, sufficeth to exclude vitious Intromission.

4. Vitious Intromission once incurred by Relicts or Children, may be purged by confirming themselves Executors to their Husbands or Parents, within Year and Day of their

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Death;

(*a*) Act of Seder. 23 February, 1692. (*b*) Act 20. Sess. 6. Parl. K. W.

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Death, tho' after these Reli&ts or Children were pursued as vitious Intromitters by Creditors of the Deceased. But Super-intromission with Goods not given up in the Inventory, after Citation at a Creditor's Instance, is relevant to make the Super-intromitter universally liable. A Stranger who vitiously intromits, is exempted from this passive Title, by a subsequent Confirmation before ( but not after ) Action is moved against him by a Creditor of the Deceased. Vitious Intromission is also purged, by the Intromitter's obtaining afterwards a Gift of the Defunct's Escheat, or a Right from the Donatary before he is pursued as vitious Intromitter.

5. Creditors only can pursue this passive Title. If there be several vitious Intromitters, each of them are liable *in solidum*. But the Intromitter's Heirs or Executors cannot be pursued upon it, unless it was established against the vitious Intromitter himself, or, at least, Litiscontestation made in a Process against him compearing. In which Case his Representatives may be sued for Payment, or the Action may be transferred, and the passive Title proved against them.

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