



PART IV.

The Ways of determining civil Controversies in Point of Right, or Possession, about Estates.

BOOK I.

CIVIL Controversies are decided, either extrajudicially, without going to Law, or in a judicial Way, by Action in a Court of Justice. I shall first treat of extrajudicial Ways of ending civil Differences, and then set forth the judicial Remedy by Action.

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C H A P. I.

How Controversies are determined without Suit, or going to Law.

I. **C**ONTROVERSIES are so determined, either by Act of one of the Parties, or by the Act of all Parties.

2. By Act of one of the Parties, sometimes without, and sometimes upon the Precept of a Judge. A Person does himself Justice without Order of a Judge. 1. By exercising his Right of Hypothek, or Retention of another's Goods, till somewhat due to him, by the Owner, is paid. 2. By poinding *brevi manu* (a). Persons right themselves summarily by order of a Judge, before a Cause is tried at Law, in several Cases mentioned in another Place (b).

3. Debateable Rights, or Law Suits are settled, or prevented by mutual Consent of all Parties in an amicable Manner, either by Transaction, or Submission.

T I T L E

(a) Act 11. Sess. 2. Parl. Jam. VII. (b) Part 3. B. 1. Ch. 2. Tit. 27.

 Ch. I. *Law of Scotland.* 'Tit. I. 135

TITLE I.

Of Transactions.

1. **T**RANSACTION is, an Agreement betwixt Two, or more Persons at Variance, who adjust their Differences, by yielding up Part of their Pretences on each Side, for preventing or ending a Law Suit.

2. To found a Transaction, 1. The Subject transacted must be a doubtful Right or Suit. For when Persons come to an Agreement, by clearing the Point *hinc inde*, without any Uncertainty about the legal Import thereof, *that is*, no Transaction, tho' either Party abridge their Claim, and the Trouble of a Process be thereby evited. Nor is a Decree *in foro* the proper Subject of a Transaction, unless it be liable to Reduction upon the account of Informality, or Nullity, or other ways. 2. Something must be abated by the Parties on both Sides.

3. Transaction is of that Force, that it cannot be annulled upon any Pretence of Damage, which one of the contracting Parties suffers thereby, or that he was drawn into it by fraudulent Motives, unless he was deceived in the Substantials commun'd upon. Nor is it to be loosed, because of Error or Mistake, not sub-

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stantial, but only circumstantial, or upon the account of new Evidents or Writs discovered. But if a Transaction has been entred into upon forged Writings, which passed for true ones, it may be annulled, when the Forgery is discovered.

TIT. II.

Of Submissions.

1. **SUBMISSION** is, a mutual Obligement of Two or more Persons having a Difference with one another, to refer the ending thereof to the Determination of some certain Person or Persons without publick Authority, and to stand to such Decision, under the Pain of a Penalty to be paid by the Contravener, to the other who is willing to observe it.

2. The Person or Persons authorized to decide betwixt the Parties, are called *Arbiters* or *Arbitrators*. According to the Humour of Parties, one, two or more are so authorized. Sometimes an Oversman or Umpire, in case of their Variance, is named by the Submitters; and sometimes the Arbitrators are expressly empowered to chuse him.

3. A Submission is, 1. Either general of all Demands whatsoever, or special of some certain Matters in Controversy. 2. It is either verbal, or written.

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 Ch. 1. *Law of Scotland.* Tit. 2. 137

4. In the Case of a verbal Submission, it may be proved by either Party's Oath that he did submit, and by the Oaths of the Arbitrator or Arbitrators, that he or they did determine.

5. A Submission in Writ should authorize the Arbitrators to do all Things necessary, as to appoint Time and Place of Meeting, examine Witnesses, take Oaths of Parties, and decide in the Matters submitted. It frequently expresses a Day betwixt and which final Sentence is to be given, bears a Consent to Registration, not only of the Submission, but also of the Decree to follow thereon: For otherwise summary Diligence by Horning cannot be raised on such a Decree, to force the Parties to give Obedience. The Parties must sign the Submission, and also do ordinarily subscribe a Blank on the Back thereof, to be filled up by the Sentence of the Arbitrators: But their signing such a Blank, is not necessary. The Arbitrators do also sign the Submission with the Parties, in Token of their Acceptance, but ought not to subscribe the Blank indorsed, till their Sentence be filled up therein.

6. A Submission *sine die*, lasts only Year and Day, after the Date thereof.

7. Albeit it is free to Arbitrators, to accept or refuse a Submission made them; yet after they have once accepted, they may be forced to decide by Letters of Horning, issued forth by the Lords upon a Bill. Such Letters are

also

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also granted against Witnesses refusing voluntarily to appear before the Arbiters:

8. The Sentence of the Arbiters is called a Decreet arbitral. Which may be either indorsed on the Submission in the Blank signed by the Parties, or be writ in a Paper apart. It must be subscribed by the Arbiters before Witnesses, and the Writer and Witnesses must be named and designed. A Decreet arbitral must be in the very Terms of the Submission, in respect of the Persons and Things submitted, and put a final End to the Controversy; and must be pronounced before the Time expressed, or presumed in the Submission, be expired, otherwise it is null, and reducible as *ultra vires compromissi*. But a Decreet arbitral proceeding upon a subscribed Submission, pronounced in the Terms thereof in due Time, cannot be reduced for any Cause or Reason whatsoever, except upon Corruption, Bribery, or Falshood in the Arbiters (a).

CHAP.

(a) Act of Reg. 1696. Art. 24.

Ch. 2. *Law of Scotland.* Tit. I. 139

C H A P. II.

Of Actions.

T I T. I.

Of Actions in general.

1. **ACTION** is taken either for a Faculty, or an Exercise of that Faculty. In the first Sense it is defined, a Right of prosecuting in a Court of Justice, for what is one's Due. In the last Sense it is, a Prosecution or legal Demand of one's Right, in order to a judicial Trial or Determination thereof. He who brings the Action is called the *Pursuer*, and he against whom it is brought called the *Defender*.

2. Action proceeds on a Summons issued forth under the Signet: Which Summons is either common, or privileged. A common Summons is, that which is raised without a Warrant from the Lords. A privileged Summons is, that which requires a previous Bill to the Lords to warrant the raising of it.

3. A Summons is raised in the King's Name, directed to Sheriffs in that Part, and Messengers. It sets forth the Pursuer's Title, and the Ground whereupon the Defenders are liable

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able to pay or perform what is craved. That which is commanded to be done, (called the Will of the Summons) is to cite the Defender to compear before the Lords of Session. The Defender in a common Summons, not instantly verified by Writ, mult, if within *Scotland*, be cited personally, or at his Dwelling-place, upon Twenty one Days Warning, except the Inhabitants of *Orkney*, who are to be cited upon Forty Days (a), for the first Diet, and upon Six Days for the Second, except the Inhabitants of *Edinburgh*, who may be cited upon Twenty four Hours, for the Second Diet (b). Those out of *Scotland* are to be cited at the Market-crofs of *Edinburgh*, Pier and Shore of *Leith*, upon Sixty Days for the first Diet, and Fifteen for the Second. Which Citation to both Diets is allowed to be given at the same Time (c). But one Diet of Six Days sufficeth in Summonses to be instantly verified by Writ. Privileged Summonses contain also but one Diet. In some whereof Citation mult be given to that Diet upon Twenty one Days, in others upon Fifteen, and in others upon Six (d). Such Citation is ordained to be given with Certification, *that is*, an Insinuation of what the Lords will do, if the Defender fail to appear. Which Certification is either general, that the Lords will proceed to do Justice, as if he

(a) Act 43. Sess. 1. Parl. Jam. VII. (b) Act of Seder. 21 July 1672. (c) Act 12. Sess. 4. Parl. Will and Mary. (d) Act of Sed. 21 July 1672.

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he did appear; or special, which varies according to the Nature of several Kinds of Summonses. Tho' ordinarily the Matter of Fact be set forth before the Will of a Summons; some Summonses, as those of Reduction, of Spulzie, of Ejection, of Declarator, of Nonentry, &c. begin at the Will, and then proceed to the Pursuer's Interest.

4. A Summons must be executed or serv'd against the Defender, by a Messenger at Arms; who gives to him, if personally apprehended, or leaves for him, if absent, at his Dwelling-house with his Wife, Child, or Servant, if he get Entry, a short Copy of the Summons subscribed by the Messenger (a), or affixes it on the Gate after Six Knocks, if he get no Access (b). Which Copy is called a Citation. The Attestation given by the Summoner to his Employer, of what he hath done in serving the Summons, is term'd his *Execution*. Which must be subscribed by the Messenger and Witnesses thereto (c), and express the Names and Designations of Pursuer and Defender (d), otherwise 'tis null.

5. If a Summons be not executed within Year and Day after its Date, it prescribes, and nothing can be done thereon. When duly executed, and called in Judgment, the Pursuer repetes his Libel, and the Defender makes his Answers, called *Defences*. Whereof some
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(a) Act 139. Parl. 12. Jam. VI. (b) Act 75. Parl. 6 Jam. V. (c) Act 4. Sess. 2. Parl. Jam. VII. (d) Act 6. Parl. 2. Sess. 3. Ch. II.

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are properly term'd *Objections*, and some *Exceptions*: Tho' commonly any Answer to the Libel is called an Exception; and any Answer to that Answer is term'd a Reply, &c.

A Defence is either dilatory or peremptory. A dilatory Defence bars the Action for a Time. Dilatory Defences are divided into Declinators and Dilators, specially so called.

A Declinator is an Alledgance, that the Judge is either incompetent to determine in such a Cause; or ought not to do it, because he is justly suspected of Partiality. Incompetency of a Judge is founded, 1. Upon the Matter's not being under his Cognizance, because of the Nature of the Action (*a*). 2. For that the Defender dwells not within the District of such a Judge, or is exempted from his Jurisdiction, by special Privilege. But this Ground of Declinator doth not ly against the Lords of Session, who have Jurisdiction over all *Scotland*. 2. A Judge is incompetent upon just Suspicion of his Partiality, arising 1. From his Relation to either Party. The Lords of Session may be declined in the Causes of their Father, Brother, or Son (*b*), or of their Father's Brother, or Son in Law, or of their Uncle or Nephew (*c*). A Judge cannot be declined, upon the account of Consanguinity or Affinity, whose Relation is the same to both Parties. Nor can he be declined, because of his Relation to
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(*a*) Vid. infr. B. 2. Chap. 1. Tit. 1. Sect. 1. (*b*) Act 212. Parl. 14. Jam. VI. (*c*) Act 13. Parl. 3. Charles II.

 Ch. 2. *Law of Scotland.* Tit. I. 143

the Member of a Society, College or Corporation, in a Cause at the Instance of, or against such a Society. 2. A Judge is suspected of Partiality, when he is interested in the Cause, either directly, when in the Event thereof, he will lose or gain; or indirectly, *si forteat consimilem causam*, if he hath a Cause in the same Circumstances depending, or hath taken a Bribe by himself, his Wife, or Servants, or given partial Counsel in the Cause; or being a Lord of Session, hath suffered himself to be solicited in favour of either Party, without shewing the same to the Lords in Presence (a).

Dilators specially so called, may be founded, 1. Upon wrong Steps in the Form of proceeding, or upon Informality in the Summons. 2. Upon the Pursuer's not having *personam standi in judicio*, because he is a Minor wanting the Concurrence of his Tutor or Curator; or for that he lies registred at the Horn.

A peremptory Defence excludes the Action for ever. Such Defence is made against the Validity of the Pursuer's Title, or the Instructions thereof; or against the Relevancy or Verity of the Libel. A Libel is said to be relevant, when the Fact therein set forth, if proved, will in Law infer the Conclusion libelled.

The Pursuer replies to the Defences and Exceptions. To whom the Defender duplies. The Pursuer again triplies, and the Defender quadruples, &c. So long as the one hath
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(a) Act of Sed. 6. Nov. 1677.

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any thing to advance for supporting his Libel, and the other his Defence, which is called *the pleading of a Cause.*

Seeing the Matters of Dispute and Trial in Actions, are the Relevancy and Proof of what is alledged, or founded on by the Parties on both Sides; I shall first touch the relevant Allegdances common to all or many Actions (those peculiar to particular Actions being considered in their proper Places) and then treat of Proof; and lastly of Sentences of the Judges.

S E C T. I.

Exceptions common to all, or many Actions.

1. Exceptions common to all Actions are, 1. *Exceptio rei judicata*, that is, that the Controversy is already decided by Decree of a competent Judge, betwixt the same Parties, alsoilzieing from the Conclusion libelled, upon the same *media concludendi*. 2. *Exceptio litis contestata*, in the same or any other Court. 3. Prescription (a). 4. The Pursuer's acknowledging or approving the Defender's Right, either directly and expressly by Consent thereto, or Ratification thereof; or indirectly and tacitely, by Deeds of Homologation. 5. *Exceptio falsi*, which is the last, after which no other Exception lies.

2. The common Exceptions in Actions upon

(a) Vid. Part 3 B. 1. Chap 5.

Ch. 2. *Law of Scotland.* Tit. I. § 2. 145

on personal Rights, are 1. *Pactum de non petendo simpliciter*, or a Promise never to insist for Payment. 2. Payment or Performance made to him who had Right to discharge, or *bona fide* to him, whom the Defender had Reason to think to be the Creditor, tho' he was divested in favour of another, which the Defender did not know (a). 3. *Exceptio doli mali*. 4. Exception of Error in the Substantials of a Bargain. 5. A Discharge of the Debt pursued for. 6. Confusion. 7. Compensation.

S E C T. II.

Of Proof, or legal Evidence.

P R O O F in general is, an Act which persuades the Mind, and creates a Belief in the Judge, that such a Fact is true or false. Fact is the only subject Matter of Proof; for the Law is not to be proved, but only to be alleged. Proof is either particular and ordinary, or general and extraordinary.

Ordinary Proof.

1. T H E ordinary Means of Proof, with us, are Writ, Witnesses, Oath of Party, and Confession, called *inarrificial Proof*. Which are sometimes joynly, and sometimes separately
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(a) See Part 2. B. 3. Chap. 3. Tit. 4

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made use of, for proving one Point. Some Points can be proved only *scripto* or *juramento*, by Writ or Oath of Party; others are allowed to be proved *prout de jure*, as accords of the Law, *that is*, by all the Means that Law allows, *viz.* Writ, Witnesses, or Oath of Party, as the Pursuer shall be served.

2. Proof by Writ, is either by publick, or private Writ.

3. Publick Writs are those under the Hands of Persons in some Office of publick Trust, as Acts and Deeds under the Hands of Clerks, which prove what was done by the Judge, or alledged by the Party, but not that the Allegations were true, except in so far as they mention the Instructions; Instruments of Notaries, which are the only Proof of the Performance of some Solemnities of Law; and a Messenger's Execution in civil Matters, which is always believed till it is improved as false.

4. Private Writs are those under the Hands of private Men, whether holograph, or only subscribed by them. But unsubscribed Writs are reckoned only as incomplete Deeds departed from by the Party; except Account-books, which prove against the Owner, if they contain a long Tract of his Affairs.

5. The common Objections arising from the Inspection thereof, are 1. That the Body of the Writ, and Subscription of the Party and Witnesses, appear to be one and the same Hand of Writ. 2. That it wants some of the
Essen-

Ch. 2. *Law of Scotland.* Tit. 1. § 2. 147

Essentials of such a Writ (*a*). 3. That it is vitiated in *substantialibus*, by Deletion, scoring, razing, cancelling or Super-induction. 4. That it is false and forged.

6. A Witness is a Person called in to a Court of Justice to declare upon Oath, to the Judge, what he knows of the Fact under Examination. His Declaration is called his Testimony, to distinguish from extrajudicial Oaths, which, tho' written, are reckoned only as Testificates, and serve to instruct Matters of small Consequence, as for procuring an Advocation, or Commission to depone in the Country, or to adminiculate and support other Evidence in Matters of Antiquity. Our Law doth not regard Proof by Witnesses in Cases where Writ useth to be adhibited; as the borrowing of Money, or in a Bargain agreed to be reduced in Writ, or where Writ is an essential Solemnity. Nor doth it allow Promises, tho' of small Value, to be proved by Witnesses; nor Legacies exceeding 100 *L.* to depend upon their Testimonies. Sometimes Four, sometimes Three, and in all Cases Two Witnesses, at least, are required to make Faith in *Scotland*. An affirmative Witness proves more strongly, than a negative Witness. Instrumentary Witnesses are more pregnant than common Witnesses, and great Weight is laid upon the *causa scientiæ*, the Reason is a Witness's Knowledge.

7. Oath of Party is distinguished, 1. Into an Oath of Verity, and an Oath of Credulity.

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(*a*) Vid Part 2. B. 3. Ch. 1. Tit. 6. N. 6. & seqq.

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8. An Oath of Verity is that which positively affirms what is sworn to be true. An Oath of Verity is either necessary and supplementary, or voluntary and decisive. A necessary Oath of Verity is, that which is given by the Judge to either Party, upon half Proof already made, even in favour of himself, to supply the same. A voluntary Oath is given by the one Party to the other, when the former, being unable to prove his Charge or Exception, offers to stand or fall by the Oath of his Adversary. But sometimes the Adversary refers the Matter back to the other's Oath. In which Case the Judge determines, which of the Two should depone, and generally puts the Oath to him, who probably had most Occasion to be clear in the Matter. An Oath of Verity is,

2. Either simple, or qualified. A qualified Oath is that, which acknowledges what is referred thereto, but contains Circumstances and Conditions, or other Qualities adjected to the Matter of Fact offered to be proved by Oath. Some of these Qualities are intrinsick, *i. e.* necessarily implied in the Bargain, or a Part of it. Other Qualities are extrinsick, having no necessary Connection with the Bargain, but extraneous thereto. The Oath is sustained to prove an intrinsick Quality: But an extrinsick Quality resolves into a Defence, which must be other ways instructed by the Deponent. An Oath of Verity cannot be required upon a Fact, which, if proved, would infer a Crime,

or

Ch. 2. Law of Scotland. Tit. 1. § 2. 149

or Infamy against the Deponent, except in the Case of Usury. A Sentence proceeding upon an Oath of Verity cannot be reversed, even when the Swearer is, in a criminal Action, found to have perjured himself, tho' the Swearer may be punished.

9. An Oath of Credulity is, when the Swearer doth not assert the Verity of the Matter of Fact, but only the Verity of his Belief that the same is true. Which Oath, tho' it may so far terminate the Plea, as to bar him who hath sworn to insist contrary to his Belief and Perswasion, doth not hinder the other Party to use afterwards, the other habile Proof by Writ or Witnesses, for instructing his Alledgance. Under Oaths of Credulity I comprehend, 1. An Oath given *to the best of one's Memory*, or to the best of his Knowledge. 2. Oaths *in litem* allowed to Pursuers in some Actions for estimating their Damages. 3. Oath of Expences or Cofts, whereby the Party, who gains a Cause, is allowed to swear upon the Charges necessarily expended by him in the Prosecution of his Suit. 4. Oaths of Calumny, which may be proposed in these Terms, whether or not the Deponent believes, that there is more Probability for the Truth of the Point alledged, than against the same (*a*). A Party's Oath of Calumny cannot be required upon his own recent Facts, but only upon his ancient Facts, where the Actor might have forgot

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(*a*) Act 125. Parl. 9. James I.

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got (a). Peers are not bound to swear *de calumnia*, but only to answer upon their Honour.

10. An Oath of Party, 2. Is either real or presumptive. A real Oath is a Party's actual or real Affirmation, or Denial of something, calling God to witness the Truth thereof. A presumptive Oath is, when a Person cited personally, refusing to depone upon what is referred to his Oath, is held as confest upon the Verity thereof. In which Case, Law presumes he will not depone, because he is conscious of the Truth thereof.

11. Confession is either judicial, or extrajudicial. Judicial Confession, or that made in Judgment, accepted by any having Interest, makes sufficient Faith against the Confessor in all Things. Such Confession before the Lords of Session, needs not to be subscribed: But if made before an inferior Court, must be signed by the Party, or, if he cannot write, by the Judge. This Confession is, either express, or tacite. Tacite Confession is, when a Party, refusing to confes or deny, is held as confest (b). Extrajudicial Confession, made industriously to discover the Verity of what is confesed, is sustained in civil, tho' not in criminal Courts, if proved by Writ, or Oath of Party. But such Confession emitted upon some other Design, than to prove the Truth of what is
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(a) Act of Seder. 13 January, 1692. (b) Act of Seder. 1 February, 1714.

Ch. 2. *Law of Scotland.* Tit. 1. § 2. 151

acknowledged, is commonly held not probative.

Extraordinary Proof.

EXTRAORDINARY Proofs are these following.

1. Where the Truth of one Point of Fact is inferred from another, called *artificial Proof*.

2. Proof by Notoriety of the Fact, when the Judge knows that such a Thing is publicly known, or acknowledged to be true by the whole Vicinity, tho' not by all the Nation; or sees and hears it done presently before him in Judgment. For tho' a Judge ought not to determine upon his own private Knowledge, his Knowledge of the Notoriety sufficeth.

3. Presumptions are conjectural Evidence upon a doubtful Matter, from probable Arguments. A Presumption is either of Man, *i. e.* the Judge, or of Law. A Presumption of Man ariseth wholly from the Discretion and Penetration of the Judge, who draws it from probable Circumstances of the Fact, without any express Law to direct him. Presumptions of Law are either *juris*, of Law simply, or *juris & de jure*, of and by Law. A Presumption of Law is, what the Law or Custom holds to be true, till the contrary appear by positive Proof. Such are the Presumption of Property in Moveables from Possession; that a Debtor doth not gift, &c. A Presumption

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of and by Law is, what Law vehemently pre-
sumes done or not done, and founds it self
upon, as a Rule of Truth. Such are the Pre-
sumptions that a Gift of Escheat is simulate,
because the Rebel's Wife, Bairns or Friends,
are suffered to possess the Escheat Goods to
his behoof; that a Person held as confest for
not deponing upon a Point referred to his
Oath, declined to do it, because he could not
deny the same, &c.

4. A Presumption differs from a Fiction, in
so far as those Things are presumed, which are
thought to be true. Whereas a Fiction is a
Supposition of Law, that something really is,
which certainly is not; as when an Heir is
feigned to be the same Person with his decess
Predecessor, &c.

S E C T. III.

Of Sentences.

1. A Sentence is the Determination of a
Controversy between Litigants. And it is ei-
ther interlocutory, or definitive.

2. An interlocutory Sentence is, properly
where the Judge decides some incident Questi-
on arising upon the principal Cause: Of which
Nature are Acts of Process.

3. A Sentence definitive is, that whereby the
principal Cause it self is determined as to that
Instance or Action, or as to the Ground of
Suit,

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Suit, called a *Decreet* or *Decerniture*. Such a Sentence is either condemnatory, when the Defender is condemned, or absolviory, when he is assolizied or acquitted wholly, or in Part, simply or with a Quality. A Decreet, at pronouncing whereof either Party is absent, is called a *Decreet in absence*; and one pronounced where both Parties compear, is term'd a *Decreet in foro*.

4. When any Sentence, whether interlocutory or definitive, is pronounced, the Clerk puts the same in his Minute-book, and also causes enter it in the general Minute-book. The Sentence may, Twenty four Hours being elapsed after it is read publickly in that general Minute-book, be extracted, if no Stop be put thereto, and no Scroll or Copy thereof be demanded by the other Party. But if he demand from the Extracter a Scroll of the Decreet, and give him Money for writing the Scroll, the Decreet cannot be given out till Twenty four Hours after Delivery of the Scroll. During which Time he may apply to get any Thing amiss in the Scroll rectified; and if the Decreet be unwarrantably extracted, may, upon a summary Complaint to the Lords, get it recalled and returned to the Clerk's Hands.

5. A Decreet orderly extracted, if it be for Payment of Money, or Performance of any Deed, contains a Warrant for Letters of Horning, and other legal Diligence to be raised. A Decreet *in foro* in the Session, being once fairly

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fairly extracted, becomes *res judicata*, not to be overturned upon Iniquity, or upon Grounds proponed and repelled, or competent to have been proponed, and omitted in the Plea.

T I T. II.

Of the several Kinds of Actions.

ACTIONS are several ways divided, and subdivided. They are distinguished into civil and criminal Actions. Civil Actions are those, whereby Men pursue their civil Rights. Criminal Actions are those, by which Offenders are brought to publick Punishment, which are to be treated in the Second Volume of this Institute: My Design here being confined to civil Actions before the Session.

Civil Actions are brought before the Court of Session, either in the first or second Instance. Actions in the Second Instance are Advocations of Causes from inferior Courts, Suspensions, and Reductions of Decrets (a).

Actions in the first Instance are either ordinary, or extraordinary. Ordinary Actions are those which are entred in the long Rolls, and come in to be called according to the Course thereof. Extraordinary Actions are those which proceed summarly, without going to the long Roll: Such as Actions of Sale of bankrupt

(a) Vid. infr. B. 2. Chap. 2. Tit. 2. Sect. 2, 3 and 4.

Ch. 2. *Law of Scotland.* Tit. 3. § 1. 155

rupt Estates (a), Actions at the King's Instance, &c.

Ordinary Actions in the first Instance are either principal, or accessory.

T I T. III.

Of principal ordinary Actions in the first Instance.

PRINCIPAL Actions are independent Actions, pursued without Regard to others.

Such principal Actions may be considered, 1. Either as personal, or real, or declaratory. Personal Actions are those, which are raised upon a personal Obligation, and competent only against the Grantor, and his Heirs or Executors. Real Actions are such as spring from heritable Rights of Lands or Tithes, or whereby such Rights are sought to be affected, and ly against all singular Successors.

Principal ordinary Actions may be distinguished, 2. Into declaratory, rescissory, petitory, and possessory Actions.

S E C T. I.

Of declaratory Actions.

DECLARATORY Actions, ordinarily term'd *Declarators*, are those wherein (with-

(a) Vid. Sup. Part 3. B. 1. Chap. 2: Tit. 6. Sect. 4.

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(without any personal Conclusion against the Defenders) the Pursuers Rights are only declared; upon which Declarators they may raise petitory Actions;

A Declarator may be raised upon any Point of Right or Possession. In which the Pursuer does call any Person he thinks may probably quarrel his Right; and may cite apparent Heirs, without charging them to enter Heirs, to hear and see it found and declared, that he hath such a Right.

The common declaratory Actions being handled in their proper Places, I shall here only name them, which are these following.

1. Declarators of Property which are, 1. Declarators of irredeemable Property, under which I comprehend Declarators of Expiration of the Legal, Reversions of Apprisings, or Adjudications. But in place of other Declarators of irredeemable Property, Reductions and Improbations, as more effectual Actions are commonly raised. 2. Declarators of redeemable Property, which are, 1. A Declarator of Redemption of a Wadset, or of an Apprising, or of an Infestment of Annualrent. 2. A Declarator of Trust.

2. Declarators of Superiority, as 1. A Declarator of the Superior's Tinsel of Superiority, by failing to enter his Vassal. 2. A Declarator of Nonentry. 3. A Declarator of liferent Escheat. 4. A Declarator of the Avail of Marriage. 5. A Declarator of Recognition.

3. De-

Ch. 2. *Law of Scotland.* Tit. 3. § 1. 157

3. Declarators of Things caducuary, such as Declarators of single Escheat, of *ultimus heres*, and of Bastardy.

4. Declarators of Services, and of Exemption from Services, such as those come in place of the Actions *confessoria* & *negatoria* in the civil Law, and Declarators of Astriction, or of Exemption from Thirlage.

5. Declarators of Clauses irritant in Rights: Which Irritances may be also pursued in Reductions containing declaratory Conclusions.

6. Some Actions are called general Declarators, others special Declarators, *v. g.* When a Person is found to have been lawfully denounced to the Horn, and his escheatable Goods declared to belong to the Donatary by Decree of the Lords, this is called a general Declarator of Escheat. Afterwards the Donatary may pursue for Exhibition and Delivery of these Goods, or Payment of Sums owing to the Rebel, which is term'd a special Declarator of Escheat, tho' very improperly, seeing it is simply a petitory Action. The like may be observed of general and special Declarators of Nonentry. Sometimes both such Actions of general and special Declarator are, for the more Expedition and Dispatch, rais'd in one Summons. Again, there are Actions which, tho' they don't bear the Name of Declarators, are yet of a declaratory Nature: As Actions to insist, with Certifi-

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tification not to be heard hereafter ; Actions of double or multiple poinding; and Actions *cognitionis causa*, against apparent Heirs.

S E C T. II.

Of rescissory Actions.

RESCISSORY Actions (which we call Reductions) are those whereby Persons, aggrieved by some Acts or Deeds, to which they were Parties, crave Rescission of such Deeds, or Restitution of Things to their first Estate, for a just Cause, that they may be in the same Condition they were in before such Acts or Deeds. The particular Grounds of Rescission, or Reasons of Reduction, are multifarious, but the most ordinary are Reduction *ex capite inhibitionis*, *ex capite interdictionis*, *ex capite lecti*, *ex capite metus*, *ex capite doli* ; upon the Act 1621. anent Bankrupts, and Action of Error ; all which are explained in their proper Places. I proceed therefore to set forth the Nature, Steps, and Formalities of an Action of Reduction.

Reduction is pursued, either in the first Instance, when Bonds, Contracts, Dispositions, or other extrajudicial Deeds are sought to be reduced ; or in the Second Instance, for reducing and annulling Decrees, or other judicial Deeds. I propound here to treat of Reduction in the first Instance, and afterwards (a), to take

(a) Vid. Inf. B. 2. Ch. II. Tit. 2. Sect. 4.

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take Notice of the Specialities of Reduction in the Second Instance.

Sometimes a simple Reduction only is raised, sometimes a Reduction and Improbation, and sometimes a Declarator is annex'd to either.

A simple Reduction.

1. A single Reduction contains, 1. An Order to cite the Persons concerned in the Writs to be reduced, to compare at the Instance of the Pursuer, as having Right so and so, and bring with them such Writs to be reduced for such and such Reasons, with Certification, that if the Writs called for be not produced, they shall be held as null, till they be produced.

2. The Pursuer may call for any particular Rights granted by him, or his Predecessors or Authors, to the Defender, or to his Predecessors or Authors. At the calling of the Cause, the Pursuer craves, that the Defender may take a Term to produce the Writs called for. It is a relevant Defence, that such Writs are *in publica custodia*, that is, in the Registers of the Session or Chancery, and the Defender condescends on the Dates of the Registration. But such a Condescence upon Writs recorded in inferior Court Books, will not relieve the Defender of the Necessity of producing the Extracts. There is only one Term

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allowed for producing, for which an Act, called *an Act for Production*, is extracted.

3. At calling of which Act after elapsing of the Term, if none of the Writs called for, or only some of them be produc'd, Certification is granted *contra non producta*. But Certification can be granted only against Writs, of which there is a relevant Reason of Reduction libelled. Therefore general Reasons against all the Writs called for, as their being vitiated *in substantialibus*, wanting Writer and Witnesses, &c. are at first libelled, and after the Production is satisfied, the Pursuer is allowed to add special Reasons against the Writs produced.

* 4. It is a relevant Defence against Certification *contra non producta*, that the Defender hath produced Rights sufficient to exclude the Pursuer's Title. And if, after hearing of Parties, it be found, that the Defender hath not produced sufficiently, he may make a farther Production, and dispute upon it. But he will not be heard thereafter, to dispute upon any farther Production, till the Production be closed, either by the Pursuer's holding it satisfied, or by a Decreet of Certification *contra non producta*.

5. When that is done, the Ordinary before whom the Act is called, makes *great avisandum* with the Reasons of Reduction, according to the Date whereof, the Cause is put in the inner-house Roll of ordinary Actions, to be discuss'd

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cufs'd in Prefence: Unless the Lords, upon a Bill, remit to the Ordinary in the outer House, to discuss the Reasons *extra*, which is commonly done.

Reduction and Improbation.

1. A Reduction of land Rights is seldom raised, without an Improbation joyn'd with it.

2. A Summons of Reduction and Improbation is, expedie upon a Bill, having the King's Advocate's Concurrence.

The Pursuer in this Process may call, not only for particular Rights, but for all Writs in general granted by him, or his Predecessors or Authors, to the Defender, or his Predecessors or Authors. Two Terms are allowed to the Defender for producing: And Acts of Production may be extracted for either of these Terms.

3. The Act for the second Term is to be call'd judicially among other Acts, in order to intimate to the Defender's Procurators, to satisfy the Desire thereof; betwixt and a certain Day to be appointed by the Ordinary, not exceeding ten Days, which Intimation is marked on the Act, and subscrib'd by the Ordinary (a). An Extract out of the Books of Session or Chancery, will satisfy the Production, but an Extract out of the Register

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(a) Act of Seder, 1 January, 1709.

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of any inferior Court will not, without producing the Principal.

4. The Certification in an Improbation is, that the Writs call'd for, shall not only be declared null, but also be held and reputed false and forg'd, and make no Faith in or out of Judgment. Nor is it necessary to libel any other general Reason before Production. A Decree of Certification, tho' in Absence, once fairly extracted, if not recently quarrelled, will hardly be reduced. But then it is of Force only to secure the Rights and Titles, the Process was founded on: For the Writs, against which it is granted, may be still made Use of against any other Party than the Obtainer of the Certification, or against other Rights belonging to the Obtainer.

5. If the Writs call'd for be produc'd, and the Pursuer incline to improve them, he must previously consign 40 L. as a Penalty, in case he succumb. And the Defender must subscribe, that he abides by the Verity of them, upon Pain of Falshood, otherwise they will be held as forg'd, from a Presumption that he dares not own them as true Deeds.

6. There are two Ways of improving a Writ, *viz.* the direct and indirect Manner. The direct Manner of Improbation is, by the Testimony of the Writer and instrumentary Witnesses. The indirect Manner is, by strong Presumptions and Conjectures arising *a comparatione literarum*; or from the Circumstances
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Ch. 2. *Law of Scotland.* Tit. 3. § 3. 163

of the pretended Subscriber or Witnesses, as that they could not write their own Names, or were *alibi* at the Date of the quarrelled Writ. Which indirect Manner of Improbation is not allowed, unless the direct Manner hath failed, by the Death of the Writer and instrumentary Witnesses. In such a Case, the Pursuer gives in his Articles of Improbation, which the Defender is allowed to see and answer, and to found upon his Articles of Approbation, and both Parties allowed to prove their respective Articles. Any Evidence may be received at any Time before the extracting of the Decree: Because, *nunquam concluditur in falso.*

S E C T. III.

Of petitory Actions.

PETITORY Actions are those, where in the Pursuer claims something as due or belonging to him, by the Defender. Such are,
 1. Actions founded upon personal Obligations, arising from Contracts, *quasi* Contracts and Trespases, of which I have spoken in their proper Places. 2. Those founded on Rights of Property, Superiority, Annualrent, or Liferent in Lands by Infeftment, or the legal Equivalent, as a Charge against the Superior upon an Adjudication, Terce, Courtesie, &c. In which Actions, any Person compar-

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ing for his Interest, and producing an Infestment or equivalent Right, will be admitted. Such petitory Actions are, 1. Action of Mails and Duties : In which the Pursuer must cite not only Tenants and natural Possessors, but also Heritors, Liferenters or others in the civil Possession, by uplifting Mails and Duties. The proper Defence here is, that the Defender hath a better Right, or that he hath the Benefit of a possessory Judgment, by seven Years Possession, upon a Title by Infestment, or other Right requiring no Infestment, as Tacks, &c. 2. Action of pointing the Ground. 3. Action at the Instance of a Titular of Tithes, for bygone Tithe-duties. 4. Action of Aliment, at the Instance of an apparent Heir of simple Ward-lands, against the Superior &c.

S E C T. I V.

Of possessory Actions.

POSSESSORY Actions are those, where in an absolute Right is not infilted on, but Possession only claim'd to be attained, retained, or recovered, till the Point of Right be determined in a Reduction or Declarator. Some possessory Actions require a special Title in Writ to be libelled and instructed, as Action of Removing (a), Action of Molestation (b),
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(a) Vid. Part 2. B. 2. Chap. 4. Tit. 4. Sect. 6. N. 8.
(b) Ibid. B. 3. Chap. 1. Tit. 10. N. 8.

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Action of Mails and Duties founded on a Seisin against Tenants, or on seven Years peaceable Possession, by virtue of Infeftment, vested in the Pursuer, or his Predecessors or Authors immediately before, at least within Seven of the Years whereof Mails and Duties are claim'd, which is call'd the Benefit of a *possessory Judgment*. Other possessory Actions require no Title, but only Possession to be libelled, And such relate either to Moveables, as Actions of Spuilzie, Actions of wrongous Intromission; or to Lands, as Actions of Ejection, Actions of Intrusion, and of succeeding in the vice: Of all which I have spoken in their proper Places,

T I T. IV.

Of accessory Actions.

ACCESSORY Actions are those, which are subservient to, and pave the Way for commencing other Actions. Such are Action of Transumpt, Action for proving the Tenor, Action of Exhibition, Action of Transference, and Action of Wakening.

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S E C T. I.

Of Actions of Transumpt.

ACTION of Transumpt is that, wherein the Pursuer seeks to get an authorized authentick Transcript or Copy of Writs, which are the common Evidents of Lands or Rights personal or real, wherein he and others have Interest. In this Action, not only the Havers of the Writs craved to be transumed, must be cited specially, but also the Granter of the Writs, or his Representatives, must be cited at the head Burgh of the Jurisdiction, where they reside. A Decreet of Transumpt, when duly obtained, hath all the Effect of a registred Writ, save that it doth not satisfy Production in a Reduction and Improbation, as an Extract out of the Books of Session or Chancery doth.

S E C T. II.

Of Actions for proving the Tenor.

1. **ACTION** of proving the Tenor is, that whereby the Pursuer seeks the Tenor and Contents of a Writ lost to him, to be made up and proved.

2. At the first Calling of this Action, before the Ordinary in the outer House, if the Pursuer hath produced all the Adminicles, he intends

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tends to make Use of, the Ordinary, at his Desire, makes *Avisandum* therewith to the Lords. And, upon a Petition representing that the Adminicles are clear, it will be remitted to the Ordinary on concluded Causes, to mark them clear, if he finds them to be so, in order to summary advising.

3. The Tenor of a Writ may be proved, 1. By Oath of the Granter. 2. By Witnesses who knew by what Accident it was lost, and can depone that they saw that it was fairly subscribed, noways vitiated, and remember that the principal Articles therein were to the same Purpose, as the Tenor libelled, tho' they be not positive as to the precise Words. 3. By Adminicles in Writ, *that is*, Writs subscribed by the Granter, or his Heirs or Assigns, either relating the Writ lost, or presupposing it.

4. In all Actions of proving the Tenor, *casus amissionis* must be libelled. If a special *casus amissionis* be proved, there is no Necessity of Adminicles in Writ: But where that is not done, the Tenor cannot be proved without such Adminicles. Where there are written Adminicles, it sufficeth to libel, that the Writ is lost without proving the Way it came to be lost. In proving the Tenor of Writs, which cannot be extinguished by the Granter's simple retiring of them, as Dispositions of Lands or heritable Bonds, whereupon Infestment followed; the Pursuer needs only to libel in general, that they were lost, without being tied

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to instruct the special Way or Manner how they were lost. But the Tenor of Writs, which may be extinguished by simple retiring, as personal unregistered Bonds, can only be made up by Oath of the Debtor, or by clearly proving specially, how they were lost.

5. The Tenor of Letters of Horning, and Executions thereof, not extant, and judicially produced, are not admitted to be proved by Witnesses (a). But Pursuits for making up the Tenor of Decrets, are sustained. A Decreet proving the Tenor of a Writ, bears, that it shall be of as great Force and Effect in all Cases, as the principal Writ itself, were it extant; and therefore will satisfy the Production in an Improbation.

S E C T III.

Of Exhibitions.

EXHIBITIONS are either principal, petitory, or possessory Actions, concluding to exhibit and deliver the Writ or Thing required, which are treated of in another Place (b): Or are accessory Actions, concluding only to exhibit some Writ or Thing for a particular End, such as Exhibition *ad deliberandum*, competent to apparent Heirs (c); and Exhibition for
Proof,

(a) Act 94. Parl. 6. Jam. VI. (b) Vid. Part 2. B. 3. Chap. 1. Tit. 9. N. 4. (c) Vid. Part 3. B. 2. Chap. 4. Tit. 1. Sect. 3.

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Proof, competent *incidenter* in a Cause, to any of the Parties who wants to have some Point cleared by another Man's Writ, in place whereof incident Diligence by Horning and Caption are now allowed as a more expedite Remedy (a).

S E C T. IV.

Actions of Transference.

ACTIONS of Transference are either active, or passive. Action of Transference active is, when the Pursuer craves, that a Suit commenced by his Predecessor, who died *pendente lite*, may be transferred *active* in his Person, and go on in his Name. But now such transferring *active* is not required. For an Heir, or Executor, or Assigny, producing their Titles, as a Service, Confirmation, or special Assignation, tho' not intimated, may insist and carry on any Cause depending at his Predecessor or Author's Instance (b).

Action of Transference passive is, when the Pursuer of an Action, upon the Defender's dying during the Dependence, craves, that it may be transferred *passive* against his Representative, and go on in the same Manner, as it would have done against the Party deceased. This Action will be sustained against an apparent

(a) Vid. infr. B. 2. Chap. 2. Tit. 2. Sect. 1. N. 14, 20, 22, 27. (b) Act 15, Sess. 4. Parl. Will. and Mary.

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rent Heir; and when the Day of Compearance therein is elapsed, the principal Cause may be called, as it stood in the Roll.

S E C T. V.

Of Actions of Wakening.

ACTION of Wakening is, that whereby a Process once called and fallen asleep, *that is*, suffered to ly over Year and Day uncalled again, is roused and set a going. This Action concludes against all the Persons cited in the principal Cause, to hear and see the same called, wakened, and begun where it left, insisted in, and Justice administered therein till a final Decision. Upon elapsing of the Day of Compearance, the principal Cause may be called, as if it had never slept. A Decree pronounced in a Cause, tho' not extracted, hinders it to sleep; nor do concluded Causes want to be wakened.

Having explained Estates, and the Ways of determining civil Controversies, in Point of Right and Possession about them: I propound in the next Place, for Connexion's sake, to give an Account of the Session, the Offices relative and subservient to it, and of the Commission for Plantation of Churches and Valuation of Tithes, &c. with a general Scheme of the Method and Form of proceeding in these Courts.

Book

B O O K II.

C H A P. I.

Of the Court of Session.



THIS Court (called *the College of Justice*) sits in a House, called *the Session-house*, consisting of an inner and outer House. The inner House is a large square Room, to which the Lords enter through a Waiting-room on the north Side, where they, the Advocates and principal Clerks, put on their Gowns. Every Lord hath a locked Box standing upon a Table in this Waiting-room, from Two till Four in the Afternoon, and upon the penult Day of the Session, from Two till Six ; wherein all, who have Informations, Petitions, or Answers to Petitions, to offer, may put them in by a Slit in the Cover. Each of the inner House Clerks has also such a Box set out there at the same Time, wherein are put the Papers relating to Causes he is Clerk to. The Lords sit in the inner House in a Body, at a semicircular Bench, in the Fashion of an Amphitheatre, and are served by Six principal Clerks

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Clerks sitting at a Table before them, where also the Clerk Register sits, when he thinks fit to attend, in his Gown. The Bar, at which the Advocates stand and plead, is opposite to the Bench. At the East Corner of the inner House a Lord sits upon the Bills, at a Table, attended by the Clerk of the Bills. Two Doors, on the West Side of this House, open to the outer House. By the Southern Door of Communication, the Ordinaries and the Clerks do pass and repass; and, by the other Communication Door, Advocates and Parties concerned go to and from the inner House Bar, as they have Occasion. In the Middle of the South Side of the outer House, at a little Distance from the Wall, there is an high Bench erected, where the Lord Ordinary of that House sits, and is served by six Under-clerks, called *the Clerks of the outer House*, seated at a long Table before him. In a Desk adjoining to the Bench, on the left Hand, the Clerk, or Keeper of the Minute-book sits. Opposite to the Bench there is a Bar, called *the Fore-bar*, where the Advocates plead. Betwixt the Bar and the Clerks Table, there is a void Passage, where Parties and Witnesses come in to make Faith. Behind the Fore-bar there is a large square *Area*, where the Advocates attend till they are called to plead. But his Majesty's Advocate has a Chair within the Bars where he sits.

T I T.

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T I T. I.

Concerning the Persons of whom this Court is immediately composed.

THE Persons, directly constituting the Session, are the Judges, Advocates, Clerks, Macers, and Keepers of the Rolls.

S E C T. I.

Of Judges in the Session.

1. **T**HE Judges of the Session, stiled *Senators of the College of Justice, or Lords of Council and Session*, consist of Fourteen ordinary Lords (whereof one is constant President) and Four extraordinary Lords, who enjoy their Places for Life, and are named by Letters from the Sovereign:

2. The ordinary Lords are admitted by the rest, upon passing a Trial (a). And the Person, presented to be such a Lord, must be,
 1. Twenty five Years of Age, a Man fearing God, learned and conversant in the Laws, having, of yearly Rent, at least, 1000 Merks, or Twenty Chalders of Victual (b). 2. He must be

(a) Act of Seder. 31 July, 1674. (b) Act 132. Parl. 12. James VI.

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be one who hath served Five Years as an Advocate, or principal Clerk of the Session; or Ten Years as a Writer to the Signet, found qualified for the Station of an Advocate, by the Faculty of Advocates, in a publick and private Trial upon the civil Law, Two Years before he set up to be a Lord (a).

3. The extraordinary Lords are received upon the King's Letter, without Examination, or Trial.

4. The Lords of Session are vested with a *duplex officium*, viz. *ordinarium*, and *extraordinarium*.

Their *officium ordinarium* is exercised always at the Request of Parties, according to the Nature of the Action. *Officium extraordinarium*, called *officium nobile*, is exercised sometimes at the Suit of Parties, and sometimes of their own accord, in new and singular Cases, for qualifying strict Law and Form with Equity.

5. The Lords of Session are sovereign Judges of civil Matters, in the first Instance, except,

1. Business concerning his Majesty's Rents and Casualties, which are appropriated to the Barons of Exchequer.
2. Causes maritim, which belong to the Judge of Admiralty.
3. Causes consistorial, which fall under the peculiar Jurisdiction of Commissaries.
4. Causes within 200 Merks, which must be pursued before inferior Judges, except where the Defenders are Members of the College of Justice, or live in several Juris-

dicti-

(a) Art. 19 of the Union

Ch. I. Law of Scotland. Tit. I. § I. 175

ditions ; or where Sums due to Merchants, Cooks, Vintners, and others within Burgh, for Furniture taken off from them by Persons living without the Shire, are pursued (a). But tho', in the Cases abovementioned, the Lords be not Judges competent in the First Instance, they may judge them in the Second, by Advocation, Suspension, or Reduction. They were once Judges of civil Causes in the last Resort : But the Claim of Right 1689 allows to protest, for Remedy of Law, against their Sentences, to King and Parliament ; and now, since the Union, Appeals ly from them, to the House of Peers in Parliament assembled.

6. If the Lords of Session, in Causes before them, give partial Counsel (b), or directly, or indirectly take Bribes (c), they are punishable by Infamy, Deprivation, and Confiscation of Moveables. Where any Lord is unduly sollicitated, or informed, by Word, or Letter in a depending Cause, in favour of one of the Parties to the other's Prejudice, the Solliciter is fined according to his Quality ; and unless the Lord, addressed by verbal Sollicitation, stop, or withdraw from the Speaker, or sollicitated by an Epistle, present the same to the Lords in presence, he may be declined (d).

SECT.

(a) Act of Regul. concern. the Seff. Art. 16. (b) Act 104. Parl. 7. James V. (c) Act 93. Parl. 6. James VI. (d) Act of Seder. 24 December, 1679.

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S E C T. II.

Of Advocates.

1. A D V O C A T E S are a Society of Persons, learned in the Laws, called *the Faculty of Advocates*. The Members whereof are privileged to plead before all Courts. They are admitted by the Lords of Session, when found qualified by the Faculty, ordinarily after a private and publick Trial of their Knowledge in the Civil Law; and sometimes, tho' rarely, after they are examined upon the municipal Law of *Scotland*.

2. Advocates subscribe all Informations, Bills, and Answers given in to the Lords, Outgivings and Returns of Promises; and are subject to the Authority of the Lords, who set Rules to them in the Conduct of their Business, and may censure, fine, or debar them from their Employment, for Disobedience, or malverfing in their Office.

3. The King names, out of the Body of Advocates, an eminent Person, called *Lord Advocate*, who gives Advice in making and executing Laws, defends the King's Right and Interest, concurs in all Suits before sovereign Courts, for Breaches of the Peace, and also in all Matters civil, wherein the Sovereign, or any claiming under his Majesty, has Interest. The King names also a Lawier or Two, for his

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his *Solicitors*, who take care of the dispatching, and transmitting the King or Council's Orders through *Scotland*, and are assistant to the Lord Advocate in the King's Concerns, Processes and Affairs.

S E C T. III.

Clerks of the Session.

1. THE highest Clerk in *Scotland*, is the Clerk Register, or Lord Register, who keeps all the publick Records, and grants Deputations for Life, tho' he has his own Office only during the King's Pleasure. His Deputy-clerks in the Session, whom he names, are 1. The principal Clerks, called *Clerks of the inner House.* 2. The principal Clerks of the Bills. 3. A Clerk, or Keeper of the Minute-book. 4. Clerks to the Admission of Notaries.

2. There are Six principal Clerks in the inner House, who have their Commission from the Clerk Register for Life, with Power to appoint Under-clerks, or Clerks for the outer House, and Extracters in their several Offices. No Person can be a Clerk of the inner House, who hath not served Three Years as an Advocate, or Writer to the Signet. And the Clerk must, at his Admission, purge himself by Oath, that he hath not given, or promised, for the procuring his Office, more than 4000

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Merks,

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Merks, or a Year's Salary (*a*). They are admitted by the Lords, upon a Trial before them. 'Tis incumbent upon these Clerks, to minute the Heads of Causes and Debates, write the Deliverance of Bills, interlocutory and definitive Sentences by the Lords in the inner House, and to get them duly signed by the President, and to prepare all concluded Causes.

3. Clerks of the outer House are named by the principal Clerks, and received by the Lords. Each of them must, at his Admission, swear, that he has not given, or promised, for obtaining his Place, more than 1000 *L. Scots*, or a Year's Salary (*b*). These Clerks minute likewise, in their Course, all Debates before the Ordinary in the outer House, or at the side Bar, and write his Sentences. 'Tis their Work also to see all Acts, and Decrees pronounced, duly put in the Minute-book, to write the Depositions of Parties and Witnesses; and each Session Day, at Twelve of the Clock, to intimate, in the outer House, Deliverances *in praesentia* upon Bills, and to make the other usual and necessary Intimations there.

4. Clerks of the Session are Notaries, by virtue of their Office, and Instruments under their Hands, in judicial Acts, make the like Faith, as the Instrument of any Notary. They cannot be declined, in Processes before the Lords, upon Suspicion of Partiality to either Party.

S E C T.

(*a*) Act of Regul. 1695. Art. 10. (*b*) Ibid.

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S E C T. I V.

Clerks of the Bills.

1. T H E principal Clerk, or Clerks of the Bills, and Three Deputy-clerks put in by him or them, serve all in an Office, called *the Bill-chamber*. Where they attend from Nine till Ten in the Morning, and from Two till Six in the Afternoon, for receiving such Bills as shall be offered to them; and carry the same to the Ordinary upon the Bills, in order to passing or refusing. There are, at present, Two principal Clerks, who attend monthly in their Turns. Their Business is to present Bills to the Ordinary, and sign, with his Lordship, such Bills as pass of Course.

2. 'Tis incumbent upon one of the Under-clerks, to receive Bonds of Cautionry, in all Suspensions of civil Debt, and to enquire into the Condition of the Cautioners. The other Two receive Cautioners in loosing Arrestments, and in Suspensions of Lawborrows, and the Registers of Allowance of Decrets of Apprising, and of Abbreviates of Decrets of Adjudication.

3. A Roll of the Deliverances upon Bills of Advocation and Suspension, is affixed, when given, and continues for a Week patent in the Bill-chamber. And such Deliverances are in Time of Session, intimated the next Session Day, in the outer House, at the ordinary

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Time

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Time and Place of Intimation (*a*). Minute-books of past and refused Bills of Suspension (*b*) and Advocation, according to the alphabetick Order, is also patent in the Bill-chamber to any Charger *gratis*.

S E C T. V.

Clerk, or Keeper of the Minute-book.

THE Clerk, or Keeper of the Minute-book, notes, or inserts therein, all Acts, Decrees, Protestations, and every judicial Act that may be extracted, marking the Day when pronounced, the Names of the Judge, Pursuer and Defender, and Advocate for the Pursuer, with the initial Letters of the Names of the principal and Under-clerks.

S E C T. VI.

Clerk to the Notaries.

1. NOTARIES are now admitted by the Lords of Session, upon a Petition given in for them by the Clerk to the Notaries, with a Certificate of the Petitioner's good Fame and Education, after Trial of their Knowledge

(*a*) Act of Seder. 20 November 1711. § 3. (*b*) Act of Seder. 9 November 1680.

Ch. I. *Law of Scotland.* Tit. I. § 6. 181

ledge and Qualifications (a). The intrant Notary's Sign and Subscription manual to be used by him, is recorded. The Clerk of the Notaries writes the Act of Admission, causes the Intrant find Caution *de fidei*; and for bringing unto him (b) the prothocal Book, which the Notary gets from the Clerk, mark'd and sign'd to insert his Instruments in.

2. Instruments of Notaries are the only Mean of proving the Performance of some Solemnities of Law, as the giving of Seisin, making Resignation, Intimation, Premonition, Requisition, Consignation, &c. Notaries subscribe Writs for Persons known, and declaring to them they cannot write, and allowing the Notaries to sign for them; in Token whereof, they touch the Notary's Pen. When the Prothocal delivered to a Notary at his Entry is filled up, he gets a new one from the Clerk. The Clerk of Notaries keeps filled up Prothocals, and exhibits the same to the Lieges, for extending and transuming Instruments on all Occasions.

3. Prothocals of deceas'd Notaries are to be brought in to the Clerk, within Fifteen Days after the Notary's Death, under the Pain of 100 L. (c). But Prothocals of Clerks of Burghs Royal deceas'd, are to be delivered up to the Magistrates (d).

4. No-

M m 3

(a) Act of Seder. 30 July 1691. (b) Act 45 Parl. 11. junct. Act 22. Parl. 2. Jam. VI. (c) Ibid. (d) dict. Act 22.

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4. Notaries are exauſtorated and depriv'd only by the Lords of Seſſion.

S E C T. VII.

Macers.

M A C E R S are Four in Number, whereof Three are named by the King, and the Fourth by *Moncrief* of *Reidie*, who is hereditary Macer. One Macer attends constantly on the the Lord Ordinary in the outer Houſe, another attends the Ordinary at the Side-bar, and the other Two wait the Motions of the Lords in the inner Houſe. Theſe Macers call or proclaim Cauſes, uſher the Lords, and execute their immediate Orders. They are ſupreme Judges in the Service of all Brieves iſſued forth of the Chancery, to whom the Lords advocate Services from inferior Judges ; and appoint uſually ſome of their own Number Aſſeſſors to direct the Macers.

S E C T. VIII.

Keeper of the Rolls.

1. **B Y** the Act of Regulation 1672. concerning the Seſſion, four Books of Inrolment are made, Two for the outer Houſe, and Two for the inner Houſe. The Firſt for the outer Houſe contains Cauſes that require moſt Diſpatch, as
Suf-

Ch. I. *Law of Scotland.* Tit. I. § 8. 183

Suspensions, Advocations, Removings, Ejections, and recent Spuilzies ; and the Second, ordinary Actions, or all other Causes proper to the outer House. The First for the inner House contains ordinary Actions appropriated to that House, *viz.* Reductions, wherein the Production is satisfied, Declarators of Rights, proving of Tenors, *cessiones bonorum*, with which, after discussing of dilatory Defences and preliminary Points, great *avisandum* is made, and Causes which the Lords upon Report ordain to be heard in Presence ; and the other Book is made up of concluded Causes.

2. Causes are inrolled in Term time, betwixt Two and Four a Clock on *Saturday* Afternoon, by the Keeper or Keepers of the Books of Inrolment, according to a Note mentioning the Name of the Cause, and the Names of the Parties in Order as they are presented. Causes are entred in the respective Books of Inrolment for the outer House, according to the Date of the Return from the Advocate who saw the Process. Ordinary Actions are inserted in the first Book of Inrolment for the inner House, according to the Dates of the *Avisandums*, or Interlocutors appointing a Hearing in Presence, and concluded Causes in the other Book, according to the Dates of the Acts concluding the Causes.

3. Out of each of the two Books for the outer House, the Keeper doth excerpt a Roll of so many Causes, in the Order they were entred

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tred, as he thinks will be sufficient for the ensuing Week ; and prefixeth to that of ordinary Actions, a Roll of Causes wherein no Compearance was made for the Defender, at the first Calling by the Clerk in the outer House, called the Regulation Roll, because appointed by the Act of Regulation 1695 (a). Which Rolls he affixeth each *Munday* Morning upon the Wall of the outer House ; and any of these which are not then reached or discuss'd, by Act, Decreet or Protestation, must be inserted in the Beginning of the subsequent weekly Roll of that Kind. Again, one Roll for the inner House is drawn out of the Book of ordinary Actions ; and two Rolls out of that of concluded Causes, viz. one of concluded Causes to be prepared, and another of such Causes prepared for advising. Which Rolls the Keeper of the Books affixes every *Munday* Morning, or oftner, if need be, on the Wall of the outer House. The Keeper of the Books of Inrolment doth also put up weekly Rolls of Causes to be heard summarly in Prefence, called the President's Hand-roll, and that of Causes wherein Proof adduced by Oath or Writ is marked clear : The former of which Rolls is affixed to the Wall of the outer House upon *Munday* Morning ; and the latter upon *Friday* Afternoon (b).

TIT.

(a) Art. 21. (b) Act of Regul. 1695. Art. 27. Act of Sed. 20 November, 1711. § 11.

Ch. I. *Law of Scotland.* Tit. 2. § I. 185

T I T. II.

Concerning the Offices and Officers relative and subservient to the Session.

TH E S E are the Chancery, the Offices of the Seals, of the Registrars, and the Lyon.

S E C T. I.

Of the Chancery or Chancery.

1. **T**H E Chancery is an Office, managed by the Director thereof, who derives his Commission from the King, and by his Deputies.

2. These cause to be writ and recorded all Charters, Patents of Dignities, Gifts of Offices, Remissions, Legitimations, Birth-brieves, Presentations, Commissions, Brieves, Retours, Precepts thereon, and all other Writs appointed to pass the Great Seal, or the Quarter Seal, which is kept by the Director of the Chancery.

3. The Director and his Deputies observe, in all Writs extended in the Chancery, a certain *Formula* kept in Record by them, called *the Order of the Chancery*. And Writs passing this Office are to be recorded, before they are given out to be sealed (a).

4. The

(a) Act 17. Parl. 2. Sess. 3. Ch. II.

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4. The Brieves of Chancery are the King's Precepts, commanding something to be done. Which are directed to, and served or executed by Sheriffs, Stewarts, and Bailies of Royalty or Regality respectively. These are of Two Sorts, *viz.* Brieves retoured to the Chancery, and Brieves not retoured. Retoured Brieves are those which are executed, without citing particular Parties, at the Market-cross of the head Burgh of the Jurisdiction, upon Fifteen Days Warning, thence called Brieves not pleadable: Such are *Brieves of Mortancestry* for serving Heirs, *Brieves of Pupillarity*, and *Brieves of Idiocy and Furiosity*. Whereupon Services expedite by the Judge Ordinary, are returned to the Chancery, where they are recorded, and Extracts thereof given out, called *Retours*. Brieves not retoured are directed to Sheriffs, &c. to hear and determine upon citing of Parties specially, thence called *pleadable Brieves*: Such are *Brieves of Terce*, *Brieves of Division*, *Brieves of Lying*, and *Brieves of Perambulation*.

S E C T. II.

Offices of the Seals.

THE publick Seals in *Scotland* are the Signet, the Great Seal, the Quarter Seal, and the Privy Seal.

1. Summons for citing Persons before the Lords of Session, Letters of Horning, Caption, In-

 Ch. 1. *Law of Scotland.* Tit. 2. § 2. 187

Inhibition, Arrestment, and other personal or real Diligence, Signatures and Precepts pass the King's Signet, kept by the Secretary of State for *Scotland*, in virtue of his Office, who commits the Custody and Care thereof to his Deputies. All that ordinarily passeth the Signet is written and subscribed by Persons, thence called *Writers or Clerks to the Signet*. Out of whom some are appointed by the Secretary at Pleasure, to be of his Council, called *Commissioners of the Signet*. Their Business is to manage Affairs of the Society, direct Writers in their Duty, and answer Doubts relating to Form and Stile. The deputy Keepers of the Signet, in Absence of the Secretary, preside in all Meetings of the Writers, and interpose their Authority to what is done. Intraut Writers to the Signet, obtain first a Commission from the Secretary, and then after Trial of their Knowledge in Stile, are admitted by the Keeper and Commissioners. The Signet Office, in a House belonging to the Society of the Writers to the Signet, is kept patent in Session Time from Nine to Twelve in the Forenoon, and from Two to Six in the Afternoon: And in the Vacation from Ten till Twelve, and from Two till Four, except on *Munday*, when it opens not, either in Session or Vacation till Two, and shuts at Four in the Afternoon, and *Saturday*, when it is patent only in the Forenoon.

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2. Charters of heritable Rights, and all Commissions not allowed by Statute to pass otherwise, did before the Union pass under the Great Seal, kept by the Lord Chancellor of *Scotland*; and now since the Union, pass under a Seal used in place of the Great Seal: The Custody whereof is committed to some honourable Person, appointed by the King during Pleasure, who has a Deputy under him, who gives constant Attendance.

3. The Quarter Seal, which is a Fourth Part of the Great Seal, is appended to Writs subservient to heritable Rights that have passed the Great Seal, and is therefore called *the Testimonial of the Great Seal*. The Director of the Chancery has the Custody of this Quarter Seal, and appends it to such Writs as pass under it.

4. The Privy Seal is appended to all Precepts for Charters to be expedite under the Great Seal, and to Writs which pass no other Seals. The Custody thereof belongs to the Lord Privy Seal, who has a Deputy, who always attends for setting this Seal to Writs passing under it. There is also a Writer or Clerk to the Privy Seal, deriving his Commission from the King, who writes and records all Writs passing the same, before they are given out to be sealed, and keeps a Minute-book (a).

S E C T.

(a) Act 7. Parl. 2. Sess. 3. Ch. II.

Ch. I. *Law of Scotland.* Tit. 2. § 3. 189

S E C T. III.

The Register Offices:

1. SOME Writs must be registred within a certain Time, otherwise they are null, as Letters of Horning and Inhibition, &c. with the Executions thereof; or not so effectual as they would have been, if recorded in due Time, as Seifins, &c. Others must be registred in order to Diligence, or some legal Effect, and the Time of Registration left to the Parties themselves, as Bonds, &c.

2. Register Offices are either particular, or general.

3. Particular Registers are those, that are restricted to a particular Jurisdiction. Some whereof depend upon the Clerk Register, as the particular Registers of Shires, Stewartries, Regalities, or Bailliaries: Others are independent of him, as the Registers of Burghs Royal, which depend only upon the Magistrates.

4. The general Registers have Effect over all *Scotland*, are kept at *Edinburgh*, where the Clerk Register has Deputies, for keeping them in distinct Offices, one for the Register of Seifins, Reversions, &c. another for the Registers of Hornings, Inhibitions and Interdicti-
ons.

The Clerk Register has also Deputies at *Edinburgh* for recording in one particular Register

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gister all Tailzies, and in another all Summonses for interrupting Prescription of real Rights, with their Executions, and Instruments of Interruption. There are also Registers kept in the Offices of the Chancery, and Privy Seal. In the Office of each Clerk of the Session, there is one Register of Decrees, another of Bonds in order to Execution, and a third of Writs for Conservation, in which also probative Writs are recorded. There is also a particular Register of Executions of edictal Citations in a Process of Sale and Ranking in the Case of Bankrupcy, kept by the Collector of the Clerks Dues. And the Clerk Register should visit the Registers in every Chamber once in the Year (a).

5. The Clerk Register, from Time to Time, calls in the Records with the Warrants thereof, and puts them in a Room below the Session-house, where his Lordship hath a Servant daily attending, to furnish a View, and give Extracts to such as want them. And the Keepers of Registers, in use to be transmitted to the Clerk Register, should keep only ten Years Records in their Hands, for the Use of the Lieges (b).

6. Registration of Writs incompetently without the Jurisdiction, and all Execution thereon is null ; and the Clerk of an inferior Court, who registrates any Writ without his Jurisdiction, is liable to Deprivation, and 500 Merks
of

(a) Act 38. Sess. 1. Parl. Jam. VII. (b) Act 32. *ibid.*

Ch. I. *Law of Scotland.* Tit. 2. § 4. 191

of Penalty, Half to the King, and Half to the Pursuer (a). Where a Writ or Diligence given in to be registred, is returned to the Presenter, bearing an Attestation under the Keeper's Hand, that it is registred, such a Writ, if not found booked and inserted in the Record, is of no Force or Effect against any save the Granter and his Heirs. But the Keeper of the Register omitting to insert therein such a Writ, is punishable as a Forger of the publick Records, and liable for Damages to the Person lesed through his Omission, who has Action against the Heirs and Representatives of the negligent Keeper, tho' not commenced in his Lifetime (b).

S E C T. IV.

The Lyon Office.

1. THE Lyon King of Arms, or King at Arms, who holds his Office by Patent under the Great Seal, attests Genealogies, admits Officers at Arms, viz. Heralds, Pursuivants, and Messengers, with Injunctions, upon finding Caution at their Entry for their good Behaviour, under Pain of 500 Merks, besides the Cost and Damage sustained by Parties (c); and holds two solemn peremptory Head Courts in the Year, at *Edinburgh* 6 May, and 6 November,

(a) Dict. Act 38. (b) Act 19. Sess. 2. Parl. Jam. VII. junct. Act 18. Sess. 6. Parl. K. W. (c) Act 46. Parl. II. Jam. VI.

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member, when all Officers at Arms are obliged to appear before him; and at other Times as he has Occasion to call one. He may deprive such Officers for Misbehaviour, and decern their Cautioners to pay the Pain aforesaid of 500 Merks contained in their Bonds, whereof a Third goes to himself (a). The Lyon, who is principal Herald of the Order of St. Andrew, or the *Thistle*, has six Heralds, six Pursevants, and a great Number of Messengers under him.

2. To the Lyon and his Brethren Heralds and Pursevants, belongs the publishing the King's Proclamations; and the reversing of Arms after Sentence of Forfeiture. The Lyon and his Brethren the Heralds have Power to give and difference Coats of Arms, to visit the Arms of Noblemen and Gentlemen, and to inhibit such to bear Arms, as by the Law of Arms ought not to bear them, under the Pain of escheating the Thing to the King whereon the Arms are found, and of 100 L. to the Lyon and his Brethren, or of Imprisonment during the Lyon's Pleasure (b).

3. The Business of Messengers is, to execute Summonses and Letters of Diligence, real or personal, for civil Debt. The Badges of a Messenger are a Blazon, and a Rod or Wand, called the *Wand of Peace*, whereby his Authority is discovered, in discharging the Duty of his Office;

(a) Ibid. Act 125. Parl. 12. Jam. VI. Act 21. Parl. 2. Sess. 3: Ch. II. (b) Ibid.

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fice; and the affronting or resisting him therein is a Crime called *Deforcement* (a).

Having thus treated of the several Persons of whom the Court of Session immediately consists, and of the contingent and subservient Offices and Officers: I shall in the *next* Place explain the Method of doing Business before the Session, called the Form of Process.

C H A P. II.

The Form of Process before the Session.

THE Session sits twice a Year, *viz.* from the first Day of *June* till the last of *July inclusive*, called the *Summer Session*; and from the first of *November* till the last of *February inclusive*, without regard to the *Christmas Vacation*, called the *Winter Session*.

For clearing up the Order of judicial proceeding in this Court, I shall *first* set forth the several Provinces assign'd to particular Lords, and to a *Quorum* of the collegiate Body separately; and then the Method of commencing, carrying on, and *finally* determining Causes.

N n

T I T.

(a) Vid. Part 2. B. 3. Tit. 10. N. 3.

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T I T. I.

Of the Provinces assigned to particular Lords, and to a Quorum of the collegiate Body separately; and how Business is expedited by them respectively in the Session:

1. **T**HE Lords meet five Days of the Week, viz. Tuesday, Wednesday, Thursday, Friday and Saturday at Nine a Clock in the Morning, when the Session-bell is rung, and sit judging Causes till 12. of which they are advertised by one of the Keepers of the Session House, who proclaims it. Then a little Bell is rung to signify to those in the outer House to rise. But the first Week of a Session, the Court useth not to sit down till 10 a Clock.

2. The ordinary Lords are all employed on the Session Days in different Capacities, according to the Nature and Import of Business assigned to them. Every Lord, except the President, takes his Turn weekly of sitting in the outer House, upon the Bills, upon Oaths of Parties and Witnesses, and upon concluded Causes. Each of these Lords has also an Hour of judging, according to the Order aforesaid, at the Side-bar, except the Ordinary in the outer House, and of judging at the Fore-bar, before the outer House Lord possess the Bench. Particular Lords are also *pro re nata* detached out

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out of the main Body *per vices*, to rank Creditors, and discuss Compt and Reckonings. In which Capacities they are always attended by a Macer, who reads audibly the Names of Parties, and calls their Advocates to the Bar. The Lords have also their Turns of a Day, for reporting to the whole Body Points of Difficulty that occur'd to them in these respective Capacities, and of being privileg'd Reporter a whole Week. Each Lord is called *the Ordinary*, with respect to Affairs that come in before him. And upon *Saturday* there are three Copies of a Roll affix'd to the Wall, in so many several Parts of the Session House, intimating the Names of the Ordinaries, who, for the Week ensuing, are to officiate in the several Provinces aforesaid. In the Forenoon there is an Ordinary at the Fore-bar, another at the Side-bar, and a third upon the Bills, at the same Time that the rest of the Lords sit with the President in the inner House.

3. All Writs, whereof the Ingivers of Bills, or Representations, or Answers to such, found any Allegdance on, must be produced therewith: And 24 Hours, before calling any Cause, all Writs to be founded on by either Party, not formerly seen by his Adversary, must be put in the Clerk's Hands, otherwise the Allegdante will not be admitted, without paying in a concluded Cause 14 *shil.* 2 *pence*, and in other Cafes 20 *sh.* *Sterl.* nor will the Passages in such Writs pleaded on be regarded, if not marked,

N n 2

with

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without paying a Mulct to the other Party, as the Lords shall modify (a).

A Decree pronounc'd by an ordinary Lord, is of as great Force and Authority, as a Decree in the inner House.

S E C T. I.

The Ordinary betwixt 9 and 10 at the Fore-bar.

U P O N *Tuesday, Wednesday and Thursday*, one Lord in Course after another, and upon *Saturday* the last Week's Ordinary in the outer House, hath an Hour betwixt 9 and 10 of judging on the Fore-bench Causes in his Hand-roll depending before him, or remitted to him. But upon any *Friday*, that happens among the five last *Sederunt* Days of the Session, the Lords come to the Fore-bar in their Turns as on the three preceeding Days (b).

S E C T. II.

The Ordinary in the outer House.

I. *TUESDAY* at 10 a Clock the President delivers, to the Ordinary for the outer House that Week, the Roll of Suspensions, Advocations, &c. and that of ordinary Actions, whereupon he goes immediately and takes his
Seat

(a) Act of Sed. 20 Novem. 1711. §. 6. (b) Act of Sed. 1 Feb. 1715.

Ch. 2. *Law of Scotland.* Tit. 1. § 2. 197

Seat on the Fore-bench, where he judges Causes in the Suspension and Advocation Roll till Twelve : But frequently for Reasons given, delays some Causes till the next, or some other Day in that Week.

2. When he comes out to this Bench on *Wednesday* at 10 a Clock, Acts are first called, conform to particular Rolls thereof, handed up to the Macer attending, by the particular Clerks in Order : Which Rolls had been affix'd the Night before upon the Wall of the Side-bar. When these are over, the Ordinary falls to the Roll of Suspensions and Advocations, wherein he first calls any Causes that had the Day before been continued till *Wednesday* ; and judges such till 12 a Clock, unless he hath gone through his Roll sooner, in which Case he returns to the inner House when it is finished. But if the said Roll appointed for *Tuesday* and *Wednesday* was finished upon *Tuesday*, or the Ordinary, at his leaving the Bench that Day, foresaw that the Causes reserv'd for *Wednesday* would be discuss'd before Twelve a Clock, he intimates to the Advocates, that upon *Wednesday*, after calling of the Acts, and finishing his Suspension, &c. Roll, he will hear the Causes in the Regulation Roll of ordinary Actions.

3. *Thursday* from Ten to Twelve Causes in the ordinary Action Roll are heard and determined, any Causes in the former Roll delayed till that Day, being first called.

N n 3

4. *Friday*

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4. *Friday* at Ten, the Clerks call Acts as upon *Wednesday*, and then the Ordinary, after discussing continued Causes, goes to his Roll of ordinary Actions, which employs him till Twelve, if it last so long. *Friday's* Night the Ordinary's Servant puts upon the Wall of the Side-bar, a Hand-roll' of Causes already fixed before his Lordship by Act, Decreet, or Protestation, wherein one of the Parties seeks to be further heard, or to have some Interlocutor rectified or altered, consisting in the first Place of Causes in the outer House Rolls of that Week.

5. *Saturday* at Ten a Clock, the Ordinary calls out of the said outer House Rolls, Causes continued till that Day, if any be, then goes to his Hand-roll, and sits judging Causes therein till Twelve, unless these be sooner discuss'd.

6. Upon the last Eight Days of the Session, there is no Lord Ordinary in the outer House, nor Rolls of Suspensions, &c. or ordinary Actions put up to be called, except the Regulation Roll. But every Session Day, except *Friday*, the Lords come to the Fore-bar in their Turn, to judge Causes in their Hand-rolls, for the Space of an Hour, viz. one from Nine till Ten, another from Ten till Eleven, and a Third from Eleven to Twelve in the Forenoon.

S E C T.

 Ch. 2. *Law of Scotland.* Tit. I. § 3. 161

S E C T. III.

The Ordinary upon the Bills.

1. T H E Ordinary upon the Bills, sits both in Session and Vacation, from *Tuesday* till *Tuesday*. In Term Time, or the Time of Session, he advises Bills every Session Day in the Forenoon, except on *Friday*, on which Day he considers them in the Afternoon, at Three a Clock in the Session House. But upon any *Friday* happening among the Five last Sederunt Days of the Session, he may sit upon them in the Forenoon (a).

2. These Bills in the Vacation, are presented and considered each *Tuesday* and *Thursday*, betwixt Ten and Twelve in the Forenoon, when the Ordinary must attend. The Ordinary of the preceeding and subsequent Weeks, must attend with the Ordinary for the Time every *Thursday*, for dispatching such Bills as require Three Lords; but during the Time that the Lords of Justiciary are in Circuit, the next Lords in Course officiate in their Weeks (b).

3. For understanding what is incumbent upon this Ordinary, it may be noticed, that when a Person finds himself aggrieved by any inferior Judge, the Cause may be called up to the Session by *Advocation* before, or *Suspension* and

N n 4

Re-

(a) Act of Seder. 1 Feb. 1715. (b) Act of Seder. 25 December 1708.

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Reduction after the Sentence, in order to get it reviewed, or a Stop put to the Execution of it. Which Advocations and Suspensions are procured or refused, by Deliverance or Interlocutor of the Ordinary, upon Bills or Petitions offered to him for that end. This Ordinary passeth of Course common Bills of Horning, Caption, Arrestment, loosing Arrestment, Inhibition, Lawborrows, &c. and Bills of Summonses, upon the Faith of the Clerk of the Bills. But Bills of Advocation and Suspension are particularly considered by the Lords. I shall therefore first observe what is common to both, and then set forth their Specialities.

I.

Rules common to Bills of Advocation and Suspension.

THE Bill drawn and signed by a Writer to the Signet, being presented to the Clerk of the Bills, he writes on the Back thereof the Day of presenting, and carries it to the Ordinary, who, if the Reasons be irrelevant, or not instructed, refuses the Bill. When the Reasons in a Bill are doubtful, and not clear, the Ordinary appoints the Bill to be seen and answered, betwixt and a certain Day, and in the mean Time sits Procedure in the principal Cause, if it be an Advocation, or stops Execution, if a Suspension, either expressly for a limited

Ch. 2. Law of Scotland. Tit. I. § 3. 201

mitted Time not exceeding a Month (*a*), or indefinitely expressing no Day, which is understood a Stop for a Fortnight from the Date of the Deliverance (*b*). When Procefs or Execution is fifted to a certain Day, falling within another Ordinary's Week, the Bill and Answers come to be considered by that Ordinary. But in Time of Session, whatever Ordinary a Bill is presented to, the same, with the Answers, remain still before him till the Letters be expedite. Where the Reasons are clear and relevant, the Ordinary passeth the Bill immediately; whereupon the Writer to the Signet raiseth Letters, and sends them to the Signet Office. In Time of Session, sometimes the Party against whom a Bill is offered, gives in a Petition to the whole Lords, for a Warrant to discuss the Reasons summarly upon the Bill; the Desire whereof is ordinarily granted. A Warrant for summary discussing being obtained, is given in to, and intimated by one of the Underclerks of Session, to the Suspender or Raifer of the Advocation. And the Ordinary, to whom the Bill was presented, may, upon calling the Parties to the Side-bar, at any Time except on *Friday* Forenoon, discuss, or in case of Difficulty, report the Reasons to the whole Lords, without waiting for his Turn of judging at the Side-bar, or Day of reporting.

II. Spe-

(*a*) Act of Seder. 9 Feb. 1675. (*b*) Act of Seder. 3 July 1677.

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II.

Specialities in a Bill of Advocation.

1. **SOME** Causes cannot at all be advocated, as Causes maritim from the High Court of Admiralty (*a*). Others cannot be advocated except upon Iniquity ; such are those expressly appointed to be determined by the inferior Judge (*b*), *viz.* Confirmations and Divorces from the Commissaries, or Causes within 200 Merks. But Causes within 200 Merks may in some Instances be advocated, tho' the Judge hath committed no Iniquity : As where the Defenders are Members of the College of Justice ; or live in several Jurisdictions ; or where Sums due to Merchants, Cooks, Vintners, and others within Burgh, for Furniture taken off from them by Persons dwelling without the Shire, are pursued (*c*).

2. As to Causes that may be advocated, if the Reason of Advocation be clear and relevant, the Ordinary passeth the Bill, and thereupon Letters of Advocation are expedite at the Signet. Which are then intimated judicially to the Judge and Clerk of the Court, from which the Cause is advocated, admitted by the Judge, marked and signed by the Clerk on the Margin of the principal Letters, whereof a
Copy

(*a*) Act 16. Parl. 3. Ch. II. (*b*) Act 9. Sess. 3. Parl. 1. Ch. II.
(*c*) Act of Regul. 1672. concerning the Session, Article 16.

Ch. 2. *Law of Scotland.* Tit. 1. § 3. 203

Copy is left in the Court. This puts an effectual Stop to all further Procedure in the principal Cause.

I I I.

Specialities in a Bill of Suspension.

1. THE Ordinary on the Bills may suspend all Decrees of inferior Courts, excepting that of the High Admiralty; and even suspend Decrees of Session pronounced in Absence of the Defender. But Bills of Importance, as these for suspending Decrees *in foro* before the Lords, second, third or posterior Protestations (a), Decrees of the high Court of Admiralty (b), or Bills of Suspension refused by a former Ordinary in his Week, or new Bills on the same Grounds (c), can be past only by a *Quorum* of the Lords in Term Time, or by three Lords met together during the Vacation.

2. Some Bills of Suspension may be past upon the Suspender's finding Caution. Others can be past only upon his consigning the Sums charged for. A Suspension against a Bishop, Minister, or Master of University, College, School, or Hospital, of any Charge for their Dues in special Decrees, cannot pass, except upon Production of Discharges, or upon Consignation

(a) *Ibid.* Art. 19. (b) Act 16 Parl. 3. Ch. II. (c) Acts of Seder. 9 February 1675. and 9 February 1680

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signation of the Sums charged for, or 100 Merks for each Chalder of Victual charged for, and proportionably if the Charge be for less; without Prejudice of a higher Charge, or lower Modification at discussing (a). At the passing of Suspension of a Decree of Exhibition, the Suspenders Oath is taken concerning his having any of the Writs called for, and he is ordained to consign, in the Hands of the Clerk of the Bills, such as he acknowledges the having of.

3. A Bill of Suspension at the Instance of a Person incarcerated, craving a Charge to be set at Liberty, cannot pass, unless he instruct previous Intimation of the Time of presenting the Bill, within the Latitude of eight Days, to the Creditor at whose Instance the Suspenders is in Prison, if within the Kingdom (b).

4. To prevent Multiplicity of Suspensions, the Ordinary may pass Bills in Part, as the Reasons appear to him instructed, and refuse them as to the Remainder, upon which Letters will be expedite as to that Part only (c).

5. When a Bill of Suspension is passed, the Suspenders is allowed a Fortnight for finding Caution, or consigning in the Terms of the Ordinary's Deliverance thereon. And if Caution be not found, or Consignation made within such a Time, a Prorogation of the Sift to a longer

(a) Act 6. Parl. 2. Sess. 1. Ch. II. junct. Act 14. Sess. 6. Parl. K. W. (b) Act of Sed. 21 July 1675. (c) Act of Seder. 20 November 1711. § 1.

Ch. 2. *Law of Scotland.* Tit. I. § 3. 205

longer Day, not exceeding a Month from th^e Date of the first presenting of the Bill, may be obtained upon Application to the Ordinary (a), which must be intimated. The Clerk of the Bills is liable for Damages to the Charger, if he receive an insufficient Cautioner, and to the Suspender, if he refuse one that is sufficient (b). When the Condition of the Cautioner is doubted, or unknown to the Clerk, some Person more responsible and unexceptionable must attest, and declare him to be sufficient. Which Attester must bind as Cautioner for the Cautioner, and be liable *subsidiarie* in his Order as fully as the Cautioner (c). If a Suspender, who has got his Bill past upon finding Caution, is unable to find Caution in the Terms thereof, he may give in a new Bill, bearing an Offer of juratory Caution, *that is*, such Caution as he can get, with an Offer to swear, that he can find no better, after previous Intimation to the Charger of the particular Day when the Bill is to be presented. Upon which Caution the Bill can be past only by the whole Lords in Time of Session, and by three Lords in the Vacation; and the Charger must be called to the passing thereof. The Suspender upon such Caution, must also, before expeding the Bill, swear upon and consign in the Clerk's Hands in favour of the Charger, in so far as the Letters shall be found

(a) Act of Sed. 3 July 1677. (b) Act of Sed. 18 February 1686. (c) Act of Sed. 27 December 1709.

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found orderly proceeded, a sufficient Disposition or Assignation to any Estate or Effects belonging to him the Suspendor. But when the Suspendor is in Prison, no juratory Caution can be received in a Suspension and Charge to set at Liberty (a): And in such a Case the Suspendor must find Caution, not only for the Charger's Security, but also for the escheat Goods belonging to him before the Relaxation.

6. When, upon a past Bill, the Cautioner is received, or Consignation made in the Terms of the Ordinary's Deliverance, Letters of Suspension, suspending the Charge till a certain Day, are expedite at the Signet. And, after Delivery of a Copy thereof to the Charger, all personal Diligence, and pointing of Moveables, must stop till the Suspension be discussed.

7. In the Letters of Suspension there is a Day assigned to cite the Charger, which ought to be such as, according to the Distance betwixt the Parties, there may be sufficient Time to use Citation. But if a longer Day be appointed, the Charger may raise a Summons for shortning the same, thence called *Summons praevento termino*.

S E C T.

(a) Act of Seder. 8 Nov. 1682.

Ch. 2. *Law of Scotland*. Tit. 11. § 4. 207

S E C T. I V.

Ordinaries at the Side-bar.

EVERY Session Day (except *Friday*) one of the Lords comes, at Ten a Clock, to the Side-bar, to judge Causes depending before him, conform to his Hand-roll, and may continue judging there till Eleven, when he is succeeded by another Lord, who may sit judging Causes in his Hand-roll, till Twelve a Clock: And Two Lords only, in one Forenoon, should come to this By-bar *successive* (a). When any Lord happens not to go through all the Causes in his By-bar Roll, he, at his next Side-bar calling, begins with the Cause he formerly left at, and so proceeds to call all the Causes in his precedent Roll, before calling any Causes in his subsequent Roll (b). There are no Ordinaries, for the Side-bar, the last Eight Days of a Session.

S E C T. V.

Lords Reporters.

1. FOR getting the Opinion of the whole Lords in any Cause, or Point of Difficulty, taken to *avisandum* by particular Ordinaries in their respective Provinces, in the outer House,

(*) Act of Seder. 11 Nov. 1708. (b) *Ibid.*

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House, at the Side-bar, &c. Two Lords are allowed by Turns to make their Reports each Session Day, except *Friday* and *Saturday*, and upon *Friday* Forenoon Causes may be reported only by particular Appointment of the inner House, except that *Friday* which shall happen to be among the Five last *Sederunt* Days of a Session (*a*). Besides which ordinary Reporters, one of the Lords, in Course, is weekly appointed privileged Reporter, who may report Causes any Day.

2. When any Ordinary agrees to report a Cause, or some Point therein, to the whole Lords, the Clerk writes, under the Minutes of Debate, *avisandum* to the Lords. Causes are reported, either with, or without Informations, according as the Point is more or less intricate. In case of a Report upon Informations, the Ordinary acquaints the Parties what Day he will do it. The Clerk brings the whole Process to the Ordinary a Day before reporting (*b*), that he may have Time to peruse it; and, the Night preceeding, both Parties put their Informations in every Lord's Box, and in the Clerk of the Process his Box.

S E C T.

(*a*) Act of Seder. 1 February 1715. (*b*) Act of Seder. 13 December 1690.

Ch. 2. *Law of Scotland.* Tit. 1. § 6. 209

S E C T. VI.

Ordinaries upon Oaths of Parties and Witnesses.

1. O A T H S are taken, either in the Sef-
 sion, or by Commission in the Country.

2. In the Seflion, for examining Parties and
 Witnesses upon Oath, Two Lords are appoin-
 ted weekly in their Course, who, for that end,
 come to the Seflion-house, at Three a Clock in
 the Afternoon, and attend till Five, if there
 be Occasion, every Seflion Day except *Satur-*
day. In which Capacity they serve for Two
 Weeks, one of them being changed every
 Week. In ordinary Cafes, any one of the Ordi-
 naries may fwear Witnesses. But, in Cafes of
 great Moment, as Improbations, and proving
 the Tenor of Writs their Oaths are to be
 taken before the whole Lords, or both the
 Ordinaries, or before one of them, and some
 other Lord appointed to concur with him.

3. A Party is not bound to give his Oath,
 till he, who requies it, not only renounce
 all further Proof, but also depone that he hath
 no Writ to prove the Alledgance, When both
 Purfuer and Defender are present, and the
 Act, upon which the Oath is to be taken, in
 the Clerk's Hands, the Party is fworn, and
 the Oath signed by the Deponent, if he can
 write, and by the Ordinary. But if the De-
 ponent cannot subscribe his own Name, it is

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marked in the Oath, that he depones he cannot write, and the Judge's Subscription serves for all.

4. If an Oath be clear, the Ordinary may write thereupon, *this is a clear Oath*, and sign the Writing, which doth warrant a summary Advising thereof.

5. Witnesses will be received on the very Day, to which they were cited to compear, or any Day thereafter. Mean Men called as Witnesses, by Diligence, compearing upon the first Citation, get Expences modified to them by the Ordinary; but if they don't compear, till they are brought in by a Second Diligence, no Expences are allowed to them. Each of the Witnesses compearing ought to be examined separately, out of the Prefence and Hearing of the rest. And if the other Party hath Objections why the Witness, to be examined, cannot be received, he will be heard thereupon before they are sworn. Some Persons are simply inhable Witnesses, and cannot be received in any Case; as Minors under Fourteen Years of Age, Fools, or fatuous Persons, or mad Men, Persons infamous, Women, except in some circumstantiated Cases for proving occult Crimes, or where only Women use to be present, Persons not worth the King's Unlaw, *i. e.* Ten Pounds *Scots*, Persons who come at the Desire of a Party, without lawful Citation against them; those who gave partial Counsel in the Cause, or who were prompted, or
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Ch. 2. *Law of Scotland.* Tit. I. § 6. 211

instructed in what Terms to depone, and engaged to depone so. Other Witnesses are inhabile only as to some particular Persons, *viz.* those within the Degrees defendant, by Blood, or Affinity, as Husband or Wife, Father or Son, Brother or Sister, Uncle or Aunt, Nephew or Niece, who cannot bear Witness for the Party to whom they stand so related; Servants, and moveable Tenants, labouring Land for their Subsistence, who are not competent Witnesses for their Masters; and Persons cannot be received to witness against those they bear Grudge or Malice to. Again, Witnesses are rejected because of the Cause to be tried, if they have Interest therein, or Gain by the Event thereof.

6. Witnesses, who are not *regulariter* allowed to testify, are admitted sometimes when Truth cannot be discovered in any other manner, saving a Liberty of making Exceptions to the adverse Party, and leaving the Consideration of their Credit or Interest to the Judge: Which we call receiving Witnesses *cum nota*.

7. Objections against Witnesses being Dilators, must be instantly verified. If that cannot be done, the Objector may, at the same Time that the Witness is received, protest for Action of Reprobature, and prove his Alledgance in the second Instance, as accords of the Law. The Intendment of which Action of Reprobature is not, to quarrel the con-

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curing Testimonies of Witnesses upon Falshood, which cannot be done, but only to prove Incapacity or Corruption in a Witness, or to improve the Truth of the Preliminaries of the Deposition, concerning the Witness's Age, his being married or not, the free Goods he hath, &c. and his *causa scientiæ*, as to which he is but *testis singularis*.

8. If no Objection be made against a Witness, or the Objection made, repelled, the Judge swears the Witness to be examined (a). Then asks him about his Age, and whether he be married or not, and purges him, *that is*, makes him swear, that he gave no partial Counsel in the Cause, that he bears no ill Will to either Party, that he hath received no good Deed, or Promise of good Deed to depone in the Cause; that no Person taught or instructed him how to depone; that he is not to be a Gainer or Loser by the Cause. The Witness being thus purged, the Judge proceeds to interrogate him upon the Points to be proven.

9. Oaths are taken by Commission, upon the Compearance of Parties before the Commissioner, within the Time prefix'd, in the same manner as before the Lords, with this Speciality, that these and any Writs laid before the Commissioner, are instantly seal'd up by him, and directed to the Clerk of the Procefs.

S E C T.

(a) Part 2. B. 3. Chap. 2. Tit. 6.

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in the Book of Inrolment of concluded Causes for the inner House, in order to be there advised. Which prepared State is to ly in the Hands of the Clerk of the Procefs, patent to all Parties a Week before advising.

2. When the Ordinary finds the Proof by Oath (*a*), or by Writ or Wicneffes (*b*) to be clear, he may mark it to be fo, in order to summary advising thereof, without Order of the Roll.

SECT. VIII.

Ordinaries in Count and Reckonings, and Rankings.

1. THE Ordinary, before whom any Action of Count and Reckoning is called by the Regulation Roll, or a Procefs of another Kind, resolves into A Count and Reckoning, doth, at the same Time that he affigns a Day to the Defender or Accountant, if compearing, to produce to the Clerk of the Procefs, a Charge againft himself, and his Discharge, name the Lord who falls to be Auditor in the Count and Reckoning (*c*); and the Ordinary, who in a Procefs of Sale and Ranking affigns a Day for the Creditors to produce their Rights and Interests, doth at the same
Time

(*) Act 17. Seff. 4. Parl. W. and M. (*b*) Act of Regul. 1695. Art. 22. (*c*) Act of Seder. 22 November, 1711. § 4.

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Time name the Lord who falls to be Ordinary for ranking them (a).

2. If the Defender or Accountant in a Process of Count and Reckoning, neglect or refuse to charge himself, he will be held as confess'd upon the Charge given in by the Pursuer, after his deponing *de calumnia* thereupon. And where any Part of the Charge given in by the Defender is deceitfully omitted, or he, being principally liable to count, conceals any Part of his actual Intrusions, he is liable in the Double of what is so omitted (b). The Defender should with his Charge against the Day appointed give in a Copy of his Discharge, both sign'd by him if present, or by his Procurator if absent, with the Vouchers and whole Instructions he is Master of: Otherwise he will not thereafter be heard upon any new Article, unless made appear to be recently come to his Knowledge, and that then, if *in culpa*, he pay a Mulct to the other Party for his Expence of the Delay, to be modified by the Ordinary (c). But it is always free to the other Party to make up and add to the Charge, or to object against the Discharge, as accords.

3. If any of the Creditors in a Process of Sale and Ranking, fail to produce their Rights

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(a) Act of Seder. 23. November, 1711. § 6. (b) Act of Seder. 22 November, 1711. § 2. (c) Ibid. § 3.

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and Interests, within eight Days of the Day assigned for that Effect, they are not allowed to produce thereafter, without paying a pecuniary Mulct, to be modified by the Ordinary, and applied for defraying the Charge of the Process. The Ordinary prefixes a Time for the Creditors producing their Interests, to depone upon the Verity of their Debts: Who, if they fail to do it at the Day appointed, are not allowed thereafter, but upon Payment of a Mulct to be modified and applied as above (a). If they depone before the Ordinary himself, he advises their Oaths. But if they depone upon a Commission, or before another Ordinary (as when the Ordinary of the Ranking is sick, or out of the House) the Ordinary in the Ranking cannot advise their Oaths without a Remit to him for that Effect, upon a Bill given in to the Lords.

4. The Ordinary in a Count and Reckoning, after the Charge and Discharge is produced (b), is authorized to appoint one or more Advocates not employed in the Cause, or other proper Persons, to consider the whole Accounts with the Writs and Instructions, and thereupon to state the Points in Controversy. And the Ordinary in a Ranking, after the Rights and Interests of the Creditors are produced (c), is empowered to appoint one or more such Advocates, to consider the whole Production, and
make

(a) Act of Seder. 23 Nov. 1711. § 6. (b) Act of Seder. 22 Nov. 1711. § 5. (c) Act of Seder. 23 Nov. 1711. § 7.

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make a State of the Interests produced, and Points of Controversy. These Delegates in both Processes *respective* must adjust the Minutes for the Ordinary, to give his Interlocutors upon the whole. The State when prepared is to be marked, and the marking dated by the Delegates, and then to be lodg'd in the Clerk's Hands. These Delegates have, for their Pains and Attendance, such Allowance in a Count and Reckoning, from both or either of the Parties, and in a Sale and Ranking out of the Bankrupt's Estate, as the Lord Ordinary doth modify.

5. Where several Creditors are competing for the same Subject, as having affected it by personal or real Diligence, according to the Nature thereof, they are ranked and preferred according to the Rules of Law.

S E C T. IX.

Business of the Lords in the inner House.

1. NINE ordinary Lords, *that is*, Eight with the President, are a *Quorum* (a). Matters are determined by the Plurality, the President having only the casting Vote, where the rest of the Lords are equally divided in their Opinions.

2. The extraordinary Lords sit only here, when they are pleased to come, and vote with
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(a) Act 44. Parl. 11. Jam. VI.

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the collegiate Body. But as they are not of the *Quorum*, so they never go to the outer House, nor judge in any separate Capacity by themselves, as the ordinary Lords do.

3. All Matters are advised and voted with open Doors, except some special Cases, wherein all are removed save the Parties and their Procurators: And none may presume to speak after the Lords begin to advise, unless by them desired (a). What the Lords do here is said to be done *in presentia*, in Presence, *that is*, in Presence of the whole Lords, or a *Quorum* of them.

4. Every Session Day, except *Friday* (b) and *Saturday*, immediately after Nine a Clock, when the Lords have taken their Seats on the Bench, the Lord Reporter first in Course takes his Chair, at the End of the Clerks Table, and reports the Causes one or more he has made *Avifandum* with. When the Cause or Point reported is sufficiently understood, the Lords determine the same. But if it be intricate or new, they sometimes ordain the Cause to be inrolled in the inner House Roll of ordinary Actions, sometimes in the Roll of Causes to be summarily heard in Presence, called *the President's Hand-roll*. The first Lord having finished what he had to report, the other Ordinary takes his Place at the Table, and reports his Causes. When a Cause or Point is report-
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(a) Act 26. Sess 4. Parl. Will and Mary. (b) Act of Seder-
1 Feb. 1715.

Ch. 2. *Law of Scotland.* Tit. 1. § 9. 219

ed upon an Amand, if the Lords repel the Alledgance of the Party who fought the Report, the Amand is put immediately in the Poors Box ; but if they alter the Ordinary's Interlocutor any way, or think the Point doubtful, the Amand is restored to him who consigned it. These Ordinaries having reported their Causes, come to the By-bar in the outer House, and report to the Procurators of the Parties the Interlocutors of the Lords, and apply the same by assigning Days, or decerning, without hearing any new Point (a). After advising Reports of the Ordinaries, the President sometimes reports Causes formerly heard in Prefence, concerning which, Informations by Appointment of the Lords were given in to the Boxes.

5. All Reports being over, the Lords advise Bills or Petitions concerning Causes depending, either before themselves, or before single Ordinaries in their respective Capacities in the outer House, which had been given in to the Boxes the Night preceeding to be perused. Each inner House Clerk, in his Turn, moves such Bills as he has in his Hand. Upon advising Bills, to which Answers are made, the Lords adhere to, or alter the Interlocutors reclaimed against, as they see just; or in Cases of Difficulty allow the Parties to be heard in Prefence. The Desire of new Bills is granted, if manifestly reasonable, refused, if groundless,
and

(a) Act of Seder. 20 Nov. 1711. § 9.

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and the Bill is ordered to be seen and answered, if the Matter appear doubtful. Bills reclaiming against any Ordinary's Interlocutor, must be presented within Eight Sederunt Days, after subscribing the Interlocutor, and Bills reclaiming against Interlocutors in Presence, must be offered within Six Days of the pronouncing (a). The Clerks are not to receive more as Two reclaiming Bills from the same Party, against one Interlocutor in Presence; nor are they to receive the Second, but upon the Petitioner's consigning Twenty Shillings *Sterling* to be delivered to the other Party in case of Refusal, and to be given back to the Consigner, if the Bill be not refused. Further, the Lords will not receive or hear any Third reclaiming Bill, unless upon new Matter of Fact, and sufficient Evidence given to verify that it is recently come to the Party's Knowledge (b). Against an Interlocutor decerning, or assailing from Expences, pronounced by an Ordinary, only one reclaiming Bill is allowed; and against such an Interlocutor pronounced by the Lords in Presence, no reclaiming Bill is indulged (c). Only Bills without Answers are put in the Boxes on *Thursday* Afternoon, and advised on *Friday* Forenoon, except Bills and Answers specially appointed to be then advised, or such as remain unadvised of Bills and Answers given in that same Week. Bills only that pass of Course,
or

(a) Act of Seder. 8 July 1709. (b) Act of Seder. 20 Nov. 1711. § 15. (c) Act of Seder. 1 Feb. 1715.

Ch. 2. *Law of Scotland*. Tit. I. § 9. 221

or those upon extraordinary Emergencies, are put in the Boxes on *Friday*, and advised on *Saturday*. But this Regulation is not observed on any *Friday* or *Saturday*, among the Five last Sederunt Days of the Term (*a*).

6. After the Bills are considered, Causes peculiar to the inner House are called, beginning with particular Causes, if any be, appointed to be heard on that Day. These being discussed, Causes are called, according to the Order they stand in the respective Rolls. The Roll of ordinary Actions, or the President's Hand-roll, (as his Lordship pleases) are called upon any Day of the Week, except *Saturday*. The Causes in the Hand-roll appointed to be heard on a certain Day, should be peremptorily called and discussed that Day, according to the Order and Date of the Deliverance, before any other Cause be called (*b*).

7. *Saturday* is set apart for discussing Causes, wherein Proof is given by Oath of Parties and Witnesses, or by Writ. The summary Roll of Causes, wherein the Evidence is marked clear, is first discussed. Then the Lords proceed to the ordinary Roll of concluded Causes. At calling of a concluded Cause, the Pursuer's Advocate may bar the Defender's Advocate, if he has not paid his Half of the Dues, for preparing and inrolling (*c*), till he pay the whole (*d*). When both Parties are allowed to be

^(a) Ibid. ^(b) Act of Regul. 1695. Art. 15. ^(c) Act of Regul. 1696. Art. 7. ^(d) Act of Sed. 20 Nov. 1711. § 12.

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be heard, the Clerk reads the prepared State, against which any Party may object. If the Party, against whom Witnesses are produced, hath concluded a Summons of Reprobature against them, the Reprobature must be advised, before the Testimonies of the Witnesses quarrelled are considered.

Both Parties having pleaded what they had to say upon the Evidence, in the prepared State, the Lords advise the State, Objections and Answers, and give Sentence.

8. If the Pursuer be not ready at the calling of any Cause, in the inner House Rolls, the Lords, as the Defender desires, and they see just, either score out the same to be inrolled *de novo*, in common Form, or proceed to the Cause as accords; against the Determination in which Proceeding, the Pursuer will not be heard, without paying Twenty Shillings *Sterling* to the other Party: If the Defender be not ready, an Act, or Decreet, or other Interlocutor, as the Pursuer craves, and the Lords see just, will be pronounced, and not recalled but upon Payment of the like Sum of Twenty Shillings to the adverse Party (a). When the Lords, at the Conclusion of any Cause, find the conquered Party to have been calumnious or litigious, they take in an Account, upon Oath, from the Party prevailing, of the Costs of Suit, and decern for the same, if moderate and probable, or tax and modify these

(a) *Ibid.* § 4.

Ch. 2. *Law of Scotland.* Tit. I. § 9. 223

these Expences, if extravagant (*a*). But modify large Expences to Parties lesed by calumnious Alledgances (*b*).

9. When any Interlocutor is voted, it must be writ upon the Procefs, and signed by the President, before a *Quorum* of the Lords sitting in Judgment (*c*). Deliverances on Bills being signed, are intimated in the outer House, by the Under-clerks, to all Parties concerned.

10. Not only are the Lords employed in the Forenoon, but also they do meet often, in a Body, in the Afternoon, to advise complex and perplexed Causes, that cannot be conveniently extricated in a Forenoon; or to advise Bills and Answers, when so multiplied in the latter Days of Session, that they cannot be overtaken at the ordinary Time.

11. Having thus explained the several Provinces assigned to particular Lords, and to a *Quorum* of the collegiate Body separately, and how Business is expedite by them respectively in the Session, I shall now lead the Reader shortly through all the Steps of Procedure in Causes, from their Commencement, till the same are finally determined, that he may have the Chain of Form in his View.

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(*a*) Act of Regul. 1695. Art. 23. (*b*) Act of Seder. 20 Nov. 1711. § 14. (*c*) Act 18. Sess. 4. Parl. W. and M.

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T I T. I I.

The Method of commencing, carrying on, and finally determining Causes.

CA U S E S are brought before the Lords, either in the first Instance, as ordinary Actions; or in the second Instance, as Advocations, Suspensions, and Reductions of Decrets.

S E C T. I.

Of ordinary Actions.

1. **O R D I N A R Y** Actions proceed upon Summonses duly executed, at the Instance of the Pursuer against the Defender.

2. After elapsing of the last Day of Appearance in the Summons, the Defender, if he find the Pursuer backward to insist in his Cause, may deliver the principal Copy, given him, to an Under-clerk, and cause him put up a *Protestation for not insisting*. After extracting whereof, the Defender is not bound to answer till he be cited again, and the Protestation Money, which is Fifteen Pounds *Scots*, paid him, with all his Expences.

3. When the Pursuer intends to insist, he causes an Under-clerk call his Summons in the outer House, after the Session Bell is rung.
Upon

Ch. 2. *Law of Scotland.* Tit. 2. § 1. 225

Upon which Calling, if no Advocate's Servant desire his Master to be marked for the Defender, the Summons goes to the Regulation Roll: And if, at calling the Cause by Course of that Roll, none do yet appear for the Defender, the Lord Ordinary, in the outer House, pronounces Act, or Decreet in Absence, as the Pursuer desires (a). But if then Appearance be made for the Defender, his Advocate will be allowed to see the Process in the Clerk's Hands, and to be ready to debate at the next Calling.

4. If, at the first calling of a Summons by the Clerk, an Advocate's Servant crave to have his Master marked for the Defender, the Process is given out to him to be seen, with a dated Indorsement on the Summons, mentioning what Writs are given out, sign'd by the Pursuer's Advocate, called an *Outgiving*. Which Process, must, after six Days, be returned by the Defender's Advocate, with his signed Writing thereon, *such a Day seen and returned by me*, which is called a Return. And if Process be kept up longer by the Defender's Advocate, upon a Complaint thereof by the Pursuer's Advocate to the Ordinary upon the Bills, his Lordship will sign a Caption against the Advocate's Servant who got out the Process (b).

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5. The

(a) Act of Regul. 1695, Article 21. (b) Act of Seder. 14 November 1691.

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5. The *Process*, when duly returned, may upon the next *Saturday* be got inrolled in the Book of Inrolment of ordinary *Actions* for the outer House, by applying to the Keeper thereof at any Time betwixt Two and Four in the Afternoon. After which Inrolment, it comes to be heard in the outer House by Course of the Roll put upon the Wall, the *Process* being lodged in the Clerk's Hands before the calling. But some Causes are privileged to be called after seeing and returning, without Entry in the Book of Inrolment, as the King's Causes, *Process* of Count and Reckoning, *Actions* of Sale, *Actions* of Aliment, *Actions* for Ministers Stipends, College Rents, and Schoolmasters Fees, second or posterior Adjudications, and *Actions* of *Bonorum*; which go to the Regulation Roll, after they are seen and returned. *Actions* of Transference of *Processes*, upon the Death of the Defender, are also called summarly; and *Actions* against absent Persons, cited for Contempt of the Lords Authority, or for invading or attacking their Adversaries with whom they have *Process* depending, or *Actions* continued against Persons called *incidenter*, are summarly discussed.

6. When the Cause comes to be called before the Ordinary, according to the Course of the Roll, the Pursuer compearing, if the Defender be absent, may get a Decreet for the craving. But when he cannot instantly prove his Libel, he chuses rather to take a Term to
 prove

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ACTIONS *Bonorum*, when dilatory Defences are discussed, the Ordinary in the outer House proceeds no farther therein, but makes great *Avifandum* with them to the Lords in Presence. Upon which these Causes must be entred in the Books of Inrolment of ordinary Actions for the inner House, where they are to be determined in their Course (*a*). But in other ordinary Causes, Dilators being overruled, the Defender makes his peremptory Defences. Which must all be propounded; at least before an Application or Report to the Lords in Presence; otherwise they will not be received, unless recently come to Knowledge, and the Proposer pay a Mulct to the other Party for his Expences (*b*). The Pursuer replies to the Defences respectively in their Order, and the Defender duplies, &c.

9. Persons interested may compear for their Interest, without being cited, and oppose the Pursuer's Claim; so be they instantly verifie their Interest, and produce their Rights over the Bar, at the Calling of the Cause. When an Interest is produced, the Pursuer is allowed to see it, and the Producer to see the Process, and both Parties ordained to be ready at the next Calling. This is term'd Compearance *incidenter*, or Compearance for one's Interest.

10. The

(*a*) Act of Regu^l. 1672. concerning the Sess. Article 5.
 (*b*) Act of Seder. 20 Novem. 1711. § 16.

 Ch. 2. *Law of Scotland.* Tit. 2. § 1. 229

10. The Relevancy of Alledgances *hinc inde* is commonly determined, before admitting any Point to Proof. If clear, the Ordinary determines it presently, and in case of Difficulty makes *Avisandum* therewith to himself, or to the whole Lords. If the Ordinary pronounce an Interlocutor to the Dissatisfaction of either Party, he who thinks himself lesed, may crave the Lords Answer, *i. e.* that the Ordinary would report the Cause to the whole Lords, and get their Opinion in it; if that be refused, he, the Party, may crave it again, upon offering an *Amand*, *i. e.* a Dollar to be forfeited to the Poores Use, if the Lords adhere to the Ordinary's Opinion. When the Ordinary refuses, notwithstanding such Offer, to report the Point, the Lords Answer may be got upon a Bill given in by the Party. If the Ordinary accept of the *Amand*, the Cause goes to Report.

11. After the Dispute of the Relevancy is concluded, Proof of the Matters of Fact alledged by the Parties, fall under Consideration. Some Facts want not to be prov'd as Negatives, *notoria*, and Things justly presum'd. Others are instantly verified by Writs produced: As to which the Defender should dispute, both the Relevancy and Proof at the same Time, otherwise he will be presumed to acknowledge either of these, against which he doth not object. A Third Sort of Facts require a Term for proving them. As to which, either Party may

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require the Oath of Calumny of the other, or his Advocate. If the Party, whose Oath of Calumny is crav'd, be present at the Bar, he may be commanded instantly to give it. If he be not present, the other Party will get a Diligence to cite him to compear, which, in order to hold as confest, must be executed against him personally apprehended. Where the Proposer of an Alledgance (whose Oath of Calumny is crav'd) swears *affirmative*, that he believes such a Fact to be true, or the other Party passeth from his Oath, he is free to insist therein, as if his Oath had not been required. If he depone *negative*, that he doth not believe it to be true, or be held as confest for refusing to swear; he cannot thereafter insist on such a Point. But an Oath of Calumny given by one Party, to the prejudice of the other, doth not determine the Matter so, as to hinder that other to prove otherwise. But now Oaths of Calumny are of less Use. Because the Party, against whom any Fact requiring a Term for proving, is alledged, or his Advocate is obliged, before Interlocutor, to confess or deny it, and upon Refusal to do so, will be held as confest (a).

12. Where Facts pleaded are not instantly verified, the Lord Ordinary admits the same to Proof; and determines the Manner of Proof. If either Party have in his Hands Writs to be us'd by the other for proving an Alledgance, and

(a) Act of Seder. 1 Feb. 1715.

Ch. 2. *Law of Scotland.* Tit. 2. § 1. 231

and don't instantly produce them, but occasion the assigning of Terms, or taking out Diligence to recover them, while he himself hath them, he is liable to a Mulct not under 40 *sh. Sterl.* to the other Party (a). If the Defender, to whose Oath a Point is referr'd, was cited personally, his Procurator must take a Day to produce him, otherwise he will be held as confest. But if the Citation was not given to him personally, and he hath not compeared to propone Defences, he cannot be held as confest. Where the Libel or Reply is to be prov'd by the Defender's Oath, his Procurator should protest for a qualified Oath, if the Circumstance of the Case require it; and the other protests the contrary.

13. Ordinarily one Term or Day is assigned either to the Pursuer or to the Defender, or to both joyntly for proving the Libel or their respective Alledgances, according to the Nature and Relevancy thereof.

14. When the Pursuer offers to prove his Libel or Reply, the Oath of Verity of the Defender who was not cited personally, or when either Party is to prove his Alledgance by Witnesses, a Diligence is crav'd and granted for citing the Party, or Witnesses *respective* to depone. If they cannot come to *Edinburgh* to depone, a Commission is crav'd, to some Person or Persons, to take their Oaths in the Place where they live. Which, if the other Party consent to, may be granted by the Ordinary :

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(a) Act of Seder. 20 Novem. 1711.

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But if he dissent, Application must be made for it to the whole Lords ; who, if the Reasons be vouched by Testificates from Persons of Credit, or consist with the Knowledge of any of the Lords, will grant Commission. But in extraordinary Cases, and some particular Actions, as Improbations and proving of Tenors, the Lords refuse to grant Commissions for taking Oaths. If either Party offer to prove by Writs not in his own Hands, he seeks and gets a Diligence against Havers of these Writs : And the other Party craves that his Objections *contra producenda* may be reserv'd, which is always done.

15. When the Ordinary pronounces his Interlocutor, determining the Relevancy and Manner of Proof on both Sides, and assigns Terms for proving thereof, this is called *Litif-contestation parte comparente*.

16. Sometimes, as in dark and intricate Cases, the Ordinary, after hearing of the Debate, doth *ex nobili officio*, without determining the Relevancy, allow both Parties before Answer to prove such Points as his Lordship thinks fit. And upon such an Interlocutor, an Act may be extracted, called *an Act before Answer*.

17. If the Pursuer's Libel be found relevant, and instantly instructed, and no Defence or Exception is sustained relevant to be proven, or the Exceptions are repelled in respect of the Replies instantly verified ; or the Replies are repelled

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pelled in respect of a Duply instructed: The Ordinary may decern, which is called a Decreet without *Litiscontestation*. For the Ordinary may advise and determine upon Writs produced for Interest or Proof, and the Oaths of Parties compearing, which require no Act of *Litiscontestation*. But whatever is produced after *Litiscontestation ad modum probationis*, can only be advised and determined in Presence.

18. All Interlocutors, Decreets or Protestations upon Debate, must be signed by the Ordinary at farthest within six Days, after pronouncing, otherwise they're null: Except Interlocutors upon Debate the two last Days of the Session, which are to be subscribed within 48 Hours of the pronouncing. Interlocutors signed after the Session is up are also null. Where Interlocutors are not subscribed of the Date of pronouncing, the Clerk should prefix to the Minute, the true Date of the pleading and pronouncing, and subjoyn to the Interlocutor the Day it was signed. Acts, Decreets and Protestations are put up in the Minute-book, of the Date when they are signed (a).

19. When either Party is dissatisfied with the Interlocutor in Act or Decreet pronounced, he applies to the Ordinary, for a further Hearing; and if that cannot be had before the Time that the Act or Decreet may be extracted, it is necessary to procure from his Lordship a Stop to the extracting, which Stop must be subjoyn-
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(a) Act Seder. 8 July 1709.

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ed to a Representation of some relevant Ground, whereupon he who craves it ought to be heard : For verbal Stops are ineffectual (a). Where extracting is stopp'd indefinitely without Mention of a particular Day, the Stop continues not above a Fortnight in Time of Session, or if granted during the Vacation, expires after the Eighth Day from the downfitting of the next Session, except it be renewed (b). If a Stop be not sought from the Ordinary in due Time, Application must be made for it, by a Petition to the whole Lords, within Eight Days after subscribing the Interlocutor (c). After the Cause goes to the inner House, the Ordinary is exauctorated, as to Points determined by, or depending before the Lords in Presence ; and can hear only new and separate Allegances. If the Party grieved seek no Stop, or the Stop sought be refused, the Act or Decreet may be extracted, when 24 Hours, after reading thereof in the Minute-book, are elapsed (d).

20. Upon the extracted Act Letters of Diligence (if there be a Warrant for them) may be issued forth, authorizing Messengers at Arms to charge the respective Parties, Witnesses or Havers of Writs, according as the User of Diligence has Occasion, to compear before the Lords, or before the Commissioners, where they

(a) Act of Seder. 11 Novem. 1708. (b) *Ibid.* (c) Act of Seder. 8 July 1709. (d) *Vid. supra* B, 1. Ch. 2. Tit. 1. 3. N. 6.

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they are to be examined by Commission, on the Day assign'd for Proof to give their Oaths, or to produce Writs. Which Diligence is sign'd by one of the inner House Clerks, and passeth the Signet (a).

21. The Term in the Act being pass'd, when the Defender's Oath is only required, the Pursuer calls his Act, and craves that the Defender may be held as confess'd, and the Term circumduc'd against him for not deponing. If the Defender compear not at Calling of the Act, Decreet of Circumduction holding him as confess'd, will be given. But if he compear and be ready to depone, the Ordinary causes him to make Faith, *that is*, swear with his right Hand uplifted, that he shall declare the Truth: And then bids him wait on in the Afternoon. *viz.* to give his Oath before the proper Ordinary. In which Case the Pursuer is oblig'd to furnish the Defender with an Act to depone upon; otherwise the latter may be dismiss'd (b).

22. If a Term was assign'd to one of the Parties to prove his Allegiance, he, if he hath recovered the Writs he wanted, will probably call the Act after elapsing of the Term: But if he be not Master of these, the other Party may call the Act, and crave the Term to be circumduc'd against him for not proving. In which Case the Party, on whom the Proof lies,

(a) Act 40. Sess. 5. Parl. K. W. 2 (b) Act 10. Sess. 2. Parl. Jam. VII.

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lies, may, upon his reporting an executed first Diligence, in order to stop Circumduction, crave and get a second Diligence, which hath the Effect of a Caption. But, without Production of a first executed Diligence, he will not get a Second.

23. When Persons charged upon a first Diligence, or brought in upon a Second, offer to give their Oaths, the User of the Diligence delivers the Act to the Clerk, who, upon seeing these to depone, standing at the Witnesses Bar, causes a Macer any Time in the Forenoon, call both Parties and their Advocates to the Bar, before the Ordinary in the outer House, to whom he intimates the Design of calling the Act, and the Ordinary causes the Persons cited to make Faith, and bids them wait on in the Afternoon, before the Ordinary to Oaths and Witnesses.

24. If the User of the Diligence, delay to dispatch those charg'd thereby, thro' his not calling the Act in order to their deponing, they require him to do it, and protest that otherwise they may be free from the Effect of the Diligence, by taking Instruments in the Hands of a Notary, before Witnesses.

25. A competent Time being allowed for taking the Depositions of Persons cited by Diligence, the other Party doth, on the next Act-day, cause call his Act again; and if no Writ be then produced, gets Decreet of Circumduction, for not proving by Writ in the Terms
of

Ch. 2. *Law of Scotland.* Tit. 2. § I. 237

of the Act. But the Ordinary sometimes circumduces conditionally, and superfedes extracting, allowing the other Party to produce betwixt and a certain Day, and those who have not yet given their Oaths to depone in the *interim*. When Writs are produc'd, *avisandum* is made therewith to the Lords in the inner House; and the other Party protests to be heard upon his Objections, at advising the Cause, and craves Circumduction of the Term *quoad ultra*. Upon which the Ordinary makes *avisandum*, and circumduces *quoad ultra*.

26. Diligences against Witnesses are executed in the same manner, as against Havers of Writs, and the Witnesses are brought in to make Faith, in order to depone afterwards before the Ordinary, and *avisandum* is made with their Oaths after deponing, in the same Way.

27. Where Witnesses and Havers of Writs are under Caption, and dare not compear, the Lords, upon Application, will stop Execution of the Caption for some Time, that they may freely come and give their Oaths.

28. Where Oaths were appointed to be taken by Commission, the other Party, at calling of the Act, craves that the Term may be circumduced, for not reporting the Commission. If the Commission be reported, duly executed, and delivered at the Bar to the Clerk, *avisandum* is made with the Deposi-

tions,

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tions, in the same Manner as if they had been taken in the Session.

29. Where a Point was allowed to be proved *prout de jure*, the Party undertaking to prove, tho' he hath serv'd Diligence against Witnesses or Havers of Writs, will be allowed at calling the Act *in termino*, to refer the same to the other Party's Oath of Verity: Which hinders Circumduction of the Term, or granting of Certification, till that other Party depone. And where the Pursuer or Defender hath brought in Witnesses, or Havers of Writs, for proving a Point admitted to his Proof; the other Party may, upon a Petition to the Lords referring the Matter to the Pursuer or Defender's Oath, hinder such Witnesses or Havers of Writs to be examined. But after any Mean of Proof hath been given, this Rule is to be observed. If Writ be first produc'd in Evidence, the Defect of that Proof may be supply'd by the Party's Oath. Where Witnesses depone only that they *know not*, or *remember not*, Writ may be us'd to prove the Point, and Oath of Party, in so far as the Writ doth not prove. But if Witnesses have once deponed positively, Parties are not allowed to alter their Mean of Proof; and after a Party's Oath of Verity is taken, there's no Place for Evidence by Writ or Witnesses. But if a Party be not positive, another Kind of Proof may be admitted *ex officio nobili*.

30. Proof

Ch. 2. *Law of Scotland.* Tit. 2. § 1. 239

30. Proof is led upon Acts before Answer, in the same way as upon ordinary Acts of Litiscontestation. And if, at calling such Acts before Answer, nothing in Evidence be produced by either Party, the Term will be circumduc'd for not proving: But the Decreet of Circumduction cannot be extracted, for the Relevancy wants to be determined. In order to the deciding whereof by the Lords in Prefence, *avisandum* is made with the Relevancy and Proof.

31. *Avisandum* made with Proof in a Cause, is called a *great avisandum*: Because, thereby the Cause is concluded, and regularly is no more judg'd or tried by a single Ordinary. Upon this *avisandum*, a Warrant is given by the Clerk, for entring thereof in the respective inner House Roll it belongs to. When Proof is adduced upon ordinary Acts of Litiscontestation, wherein the Relevancy is already determined, if it be not marked clear, the Cause must be inroll'd in the Roll of Causes to be prepared. Then a State thereof is prepared by the Ordinary on these Causes (a): Who, if he find the Proof by Writ or Witnesses to be clear, marks it to be so, in order to be summarly advised. But if the Proof be not clear, the Cause must be inroll'd in the Roll of concluded Causes. When *great avisandum* is made with Proof by Oath of Party, marked to be clear by the Ordinary

(a) Vid. supr. Tit. 1. § 7.

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nary to Oaths and Witnesses, or with Proof by Writ or Witnesses, marked clear by the Ordinary to preparing concluded Causes, or with Proof marked to be clear by an Ordinary, to whose Consideration it was remitted by the Lords, upon a Petition presented to them for that effect by the Party; the Process is inroll'd in the Roll of Causes to be summarily advised. But when Proof is produced upon Acts before Answer, and *great avisandum* made with both Relevancy and Proof, the Cause is entred in the Roll of ordinary Actions for the inner House. However in such a Case, the Lords, upon Application by Bill, remit the Cause to be discuss'd by the former, or any other Ordinary.

32. The Manner of hearing and determining Causes in the inner House hath been explained in another Place (a).

S E C T. II.

Of Advocations.

1. CAUSES are advocated from inferior Courts, either by the Pursuer, or Defender.

2. When the Defender hath raised Advocation, the Pursuer, after elapsing of the first Diet of Compearance therein, causes one of the outer House Clerks put up a Protestation and

(a) *Ibid.* § 9.

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Process, being seen and returned, is, upon the next, or any subsequent *Saturday*, entred in the Book of Inrolment of Advocations and Suspensions, conform to the Date of the Return.

4. At calling of the Cause, in the Course of the Roll, before the Ordinary in the outer House, if the principal Process be not produced, the Advocater producing his Advocation, may get the Cause to be advocated, till the principal Process be produced, or crave the Advocation to be scored out of the Roll. If, at Calling, the Pursuer produce his Process, and the Advocation be not produced, the Pursuer may get a Protestation and Remit: Which is a Kind of a Decreet of Absolviture, and is called a *judicial Protestation*. After which Protestation, (which may be extracted within Twenty Four Hours after reading thereof in the Minute-book) unless the Cause be again called by the Ordinary, and the Advocation produced the same Week, it cannot be taken in by the Clerk, or the Party *in mora* reponed, without paying to the adverse Party, or to the Clerk for his behoof, Ten Shillings *Sterling* (a).

5. When both Parties produce, the Pursuer of the principal Cause repeats his Libel, and all the Steps of his Process before the inferior Court, and then craves that the Ordinary would remit the Cause. The Advocater resumes his Reasons of Advocation, and offers in-

(a) Act of Seder: 1 January, 1709.

Ch. 2. *Law of Scotland.* Tit. 2. § 2. 243

instantly to verify and prove the same. The other Party answers thereto, by either impugning the Relevancy, or alledging, that, tho' the Reasons were relevant, yet the same are not instantly verified. For all Reasons of Advocation must be either a Point of common Law, or a Matter of Fact notourly known, or must be instructed by Writs instantly produced, or by Oath of Party: And no Term will be assigned to prove by Witnesses, or to recover Writs for proving by a Diligence, unless Matters of Fact be alledged, and offered to be proven upon the Peril of the principal Cause.

6. Reasons of Advocation are founded, either upon the Incompetency of the Judge, or upon just Suspicion of Prejudice from him by Partiality, or Iniquity committed by him.

A Judge is incompetent, 1. Because the Defender is exempted from his Jurisdiction. A Person may be exempted from the Jurisdiction of an inferior Judge, either because he lives not within his Territory, or upon the account of some special Privilege, as, because he is a Member of the College of Justice (a). 2. A Judge is incompetent, in respect of the Cause, when it falls not under his Cognizance.

Prejudice may be suspected from a Judge, through Partiality, 1. When he is within the prohibited Degrees of Consanguinity, or Affinity to the Pursuer. Which are the same in

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(a) Act 39. Parl. 6. Q. M. Act of Regul. 1672. concern-
the Sell. Art. 16 and 17.

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inferior Judges, as in the Lords of Session (*a*).
 2. When he hath Interest in the Cause (*b*).

Iniquity may be committed, either in determining the Relevancy of Alledgances, or, in the Form of Process, or in respect of the Proof.

7. If Reasons of Advocation be repelled, either because not relevant, or not instantly verified, the Cause is sent back to the Judge from whom it was advocated by an Interlocutor, called an *Act and Remit*; and the Raifer of the Advocation, ordained to pay 15 *L.* of Expences, called *Remit Money*, which is the ordinary Expences. Where the Advocater hath been very litigious, the Lords sometimes add further Expences to be paid by him. But where he had probable Ground for advocating, the Ordinary remits the Cause without Expences.

8. Causes are advocated, either by Consent of Parties, or *in jure*. When a Cause is advocated of Consent, either both Parties agree instantly to plead the principal Cause, as if the same had been originally commenced before the Lords; or, if the Cause be intricate, the Defender is allowed to see the Process in the Clerk's Hands, and appointed to debate at the next Calling.

A Cause is said to be advocated *in jure*, when the Reasons are sustained relevant and proven, and the Action found competent to be judged only by the Lords of Session.

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(*) Vid. *supr.* B. I. Chap. 2. Tit. 1. (*b*). *Ibid.*

Ch. 2. *Law of Scotland.* Tit. 2. § 2. 245

Whereupon, if the Party, against whom Advocation is raised, consent at discussing the Reasons, the principal Cause is to be discussed summarily, without an Act, against the Time appointed by the Lord Ordinary (a).

9. In some Cases, tho' the Reasons of Advocation be relevant and proven, the Cause is not advocated to the Lords, but remitted to the inferior Judge, from whom it was called up to the Session, with Instructions how to proceed: As when the Matter is inconsiderable, or properly belongs to the Cognizance of that inferior Judge in the first Instance. Sometimes again a Cause may be advocated *in jure*, and yet neither insisted in before the Lords, nor remitted to the Court from which it was removed, but will be sent to another inferior Judge, who only is competent in the first Instance.

10. When the Pursuer before an inferior Court doth advocate the Cause, he must call his Advocation as a Summons, and give it out with the Process to the Defender's Advocate to see. If he fail so to do, within Fifteen Session Days after admitting of the Advocation in the inferior Court, the Defender may call for the Advocation, by putting up a protest Action in the Minute-book. Whereupon, if the Pursuer produce not his Advocation with the principal Process, and an Outgiving thereon, the Protestation and Remit will be given out to be extracted. When the Advocation is so produ-

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(a) Act of Seder. 20 Nov. 1711. § 4

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ced with the Procefs and Outgiving to the Defender's Advocate to be feen, he is allowed, before he return the fame, to inrol it in the Roll of Advocations, upon his own Return. In order whereunto, he may keep up the Procefs Six Days for feeing, and till the first *Saturday* thereafter for inrolling (*a*).

At difcuffing the Reasons of Advocation, the Purfuer craves the Cause to be advocated; but cannot inlift upon a Reason of Incompetency of the Judge, except fuch as did not take Place at the raifing of his Procefs. The Defender pleads that the Cause ought to be remitted.

S E C T. III.

Of Suspensions.

I. LETTERS of Suspension are called for, by putting up a Proteftation in the Minute-book, and the Proteftation for not producing the Suspension may be extracted; and the Suspension, when produced, is given out to be feen, returned, inrolled, and called before the Ordinary, in the fame way as an Advocation. But in a Suspension of Multiple-poiding, it fufficeth to flop Proteftation at the Instance of one of the Chargers, wanting the Concurrence of the reft, that the Suspender produce a Copy of the Suspension. When Proteftation for not producing the Suspension is extracted, the
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(*a*) Act of Seder. 1 January. 1709.

Ch. 2. *Law of Scotland.* Tit. 2. § 3. 247

Charger may proceed in Diligence, as if no Suspension had been past.

2. The Charger needs not to give out to the Suspender's Advocate to be seen the Letters of Horning, by virtue whereof the Charge was given, but it sufficeth to give out the Decreet, registred Bond, or other Deed whereon the Letters were raised. Where there is any Thing general in the Charge, a Condescence in Writ is given out with it, called *the special Charge*.

3. If at calling the Suspension before the Ordinary, the Charger be absent, or produce not his Charge, the Letters will be suspended till the Charge be produced. Yea, if the Suspender extract and produce the Charge, and refer his Reasons of Suspension to the Ordinary, the same will be advised, and, if relevant and proven, the Letters will be suspended *simpliciter*. But if the Charger insist when the Suspender is absent, or produceth not his Suspension, the Charger gets a Protestation. After which, unless the Cause be again called, and the Suspension produced the same Week, it cannot be taken in by the Clerk, or the Suspender reponed without paying to the adverse Party Ten Shillings *Sterling* (a).

4. When both Parties compear, the Charger's Advocate repetes the Ground of his Charge, and craves the Letters may be found orderly proceeded: The Suspender resumes

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(a) Ibid.

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his Reasons of Suspension, not only such as are contained in the Letters, but also eiked or added Reasons, if he any has, that were given out to be seen by the Charger's Advocate; for he cannot plead upon any other Reasons, unless he consign Twelve Pounds *Scots*, whereof Two Parts to be paid to the Charger, and a Third to the Poor (*a*). But he may produce *incidenter* Writs to verify the Reasons; and propose other Reasons neither libelled nor eiked, provided these and the Instructions thereof be lodged in the Clerk's Hands, Twenty four Hours before calling of the Cause.

5. Reasons of Suspension must not only be relevant and instantly instructed, or referred to the Charger's Oath, but also competent by way of Suspension: Otherwise they will be repelled, and reserved to be founded on by way of Reduction. But when Reasons of Suspension consist in Fact, which can be instructed only by extraneous Persons, or by Writs not supposed to be in the Suspender's Hand, a Day will be in some Cases assigned for proving thereof, and Diligence granted against Witnesses and Havers of Writs. The Suspender, that he may be allowed to prove such Reasons, doth at the same Time with the Suspension, raise and execute a Summons of Reduction against the Charger, upon the same Reasons contained in the Suspension, and others; and founds his Suspension

(*a*) Act of Reg. concern. the Sess. 1672. Art. 24. Act of Seder. 20 Nov. 1711. § 8.

Ch. 2. *Law of Scotland.* Tit. 2. § 3. 249

pension upon the Reduction, which, with the Suspension, is given out to be seen. At the Calling of which Suspension, if he hold the Production satisfied by the Charge, he will upon repeting his Reasons of Suspension and Reduction as co-incident, get the same Term to prove in both Processes. But if the Suspend-er will not hold the Production satisfied by the Charge, he must content himself to debate his proper Reasons of Suspension only; and the Action of Reduction will be reserved to him as accords.

6. There are two Kinds of Decrets of Suspension, *viz.* condemnatory and absolvitory.

A Decret condemnatory is, when the Letters are found orderly proceeded. Which is done either *simpliciter*, or with a Limitation; as when the Lords find the Letters orderly proceeded in part, and suspend them for the rest; or orderly proceeded conditionally, *that is*, if something be performed by the Charger.

A Decret absolvitory is, when the Letters are suspended either simply or conditionally, *that is*, if something be done by the Suspend-er.

7. When the Letters are found orderly proceeded *simpliciter*, and it appears that the Reasons of Suspension have been calumnious, the Charger offers a Bill to the Lords in Prefence, craving his Expences, conform to an Account thereof given in with the Petition. Upon advising whereof, the Lords either consider the Account,

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count, and decern Cofts conform, without Abatement, or modifie the fame, or remit the Consideration thereof to the Ordinary in the Cause, to modifie Expences. And generally the Lords modifie large Expences to Persons lefed by calumnious Alledgances (a).

8. A Decreet finding the Letters orderly proceeded fimply, being extracted, Horning and other Diligence formerly raifed may be put to further Execution. When Letters are found orderly proceeded only for a part of the Charge, or conditionally, new Letters of Horning or Diligence muft be raifed upon the Decreet of Suspension. And always new Letters muft be raifed for Payment of Expences, if any be decerned. The Charger may alfo extract out of the Bill-chamber the Bond of Cautionry, given at expeding the Suspension, and charge the Cautioner, by virtue of Letters of Horning raifed thereon, for Payment of the Sums decerned, which he will be liable for, tho' the Charge had been turn'd into a Libel (b). The Cautioner being difcus'd, his Attefter may be purfued fubfidiarily, and will be liable as fully in his Order, as the Cautioner himfelf (c). If an infufficient Cautioner or Attefter hath been received, fubfidiary Action is competent againft the Clerk of the Bills, who received fuch a Cautioner, or againft the principal Clerks, or even

againft

(a) Act of Seder. 20 Nov. 1711. § 14. (b) Act of Seder. 27 Nov. 1709. (c) *Ibid.*

Ch. 2. *Laws of Scotland.* Tit. 2. § 4. 251

against the Clerk Register, who is answerable for his Deputies.

S E C T. IV.

Of Reduction of Decrets.

H A V I N G treated of Reductions in general, as Actions in the first Instance, elsewhere (a); I take notice here only of Reduction of Decrets in the second Instance.

1. The Lords of Session may not only reduce the Decrets of all inferior Courts, but also may reduce their own Decrets. Whereas no inferior Judge, except the high Admiral (b), can review his own extracted Decret. The Lords easily reduce their own Decrets in Absence, where either the Defender never compar'd, or pass'd from his Comparance before proponing Peremptors. They may also reduce their own Decrets *in foro* upon Nullities: But not upon Allegances competent and omitted to be propon'd before Sentence, or propon'd and repel'd.

2. Certification will not be granted against Warnings, Executions, or Minutes of Procefs, which are minute Papers that cannot be long preserv'd; unless the Decrets be recently quarrell'd by Reduction. But if such small

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(a) Vid. supra B. 1. Ch. 2. Tit. 2 § 2. (b) Act 16. Parl. 3. Ch. II.

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Warrants be extant, the Clerks must produce them.

3. When Parties conceive themselves lesed by any Sentence of the Lords of Session, whether in ordinary Actions, or Suspensions, or other Causes discuss'd by them, and do not incline to seek Redress from the Lords themselves, by the Means of petitioning, or have fought it in vain, they have now Recourse, as their last Shift, to protest for Remedy of Law, and appeal to the Lords in Parliament assembled.

S E C T. V.

Of Protests for Remedy of Law, and Appeals.

1. W H E N a Person designs to protest for Remedy of Law, and appeal, he, or his Attorney by a Writing under his Hand impow'ed to protest, compears at the inner House Bar, while the Lords are sitting, and produces a Writing signed by himself or his Constituent, mentioning the Interlocutors one or more, whereby he thinks himself injured, with the Reasons for which he conceives these Interlocutors should be revers'd: And for Remedy of a Law against the same, the Party or Attorney in his Name protests and appeals to the Lords in Parliament, and thereupon craves Instruments of Court. This written Protestation, with a Piece of Money in Name of Instrument Money, is delivered to the Clerk of the Process, or to
any

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any other of the inner House Clerks. The Party protesting doth also commonly bring with him a Notary, in whose Hands he also takes Instruments, before Witnesses present.

2. Then the Appellant presents a Petition to the House of Peers, setting forth his Appeal, and praying that such Decree or Interlocutors may be revers'd, and such other Order and Decree made for his Relief in the said Matter, as to their great Wisdom should seem meet; and in order thereunto, that their Lordships would be pleas'd to award the usual Order or Summons, requiring the Person, in whose favour Judgment was given in the Court of Session, by a short Day to give his Answer thereto. Upon reading this Petition and Appeal, the Lords order the said Person to have a Copy of the said Appeal, and to put in his Answer on or before a certain Day. Any Body may serve the Party with, or deliver to him, a Copy of the said Appeal; who before a Judge makes *affidavit*, that he hath done so. After an Appeal is received by the House of Peers, and an Order by them for the Respondent to answer, and Notice of such Order duly served on the Respondent, the Sentence or Decree appealed against from such Time ought not to be carried on into Execution by any Process whatsoever.

3. In order to have the Matter of the Appeal fully understood, when it comes in to be determined, the Appellant and Respondent give
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to the Lords printed Cases or Informations signed by their respective Council at Law.

4. Upon the Day appointed by the House, the Petition and Answer thereto is read, and the Lords, after hearing the Council of the Parties at the Bar of the House, proceed to Judgment, by reversing or affirming the Decree.

C H A P. III.

Of the Commission for Plantation of Churches, Valuation of Tithes, &c. and the Form of proceeding before that Court.

I. **F**OR modifying, localling and augmenting Stipends to Ministers, out of the Tithes, valuing and selling of Tithes; erecting or transporting Churches; uniting, annexing, dividing and dismembring Parishes; Commissioners have, from Time to Time, been appointed by the Parliament of *Scotland*. But in the Year 1707. the Lords of Session were authoriz'd to judge in all the Affairs and Causes aforesaid, as fully and freely as they do in other civil Causes (a). For supplying the Registers of the Commission,
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(a) Act 9. Sess. 4. Parl. Q. A.

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burnt in the Fire that happened in *Edinburgh* in the Year 1700. any authentick Extracts from the said Records are ordained, upon being presented to the Lords, *viz.* by a Petition, to be recorded in a particular Register, and to be kept by the Clerk Register and his Deputies, which are now as good as the principal Warrants, if extant: The Ingiver gets a new Extract *gratis*, in lieu of the old; and Extracts from these new Records, make the like Faith, as Extracts from the old Records were wont to do. Farther, the said Lords are impowered to make up the Tenor of such Decrees, whereof Extracts are a missing, and the Registers burnt in the said Fire, upon such Evidents and Adminicles as they see Cause (a).

2. The Lords are serv'd here by Clerks and Macers, distinct from those of the Session.

3. Summonses before this Court, which are raised by the Clerk Register and his Deputies, and pass the King's Signet (b), have but one Diet, and are executed by a Messenger at Arms upon six Days, against Persons living in *Scotland*, and upon Sixty Days against one out of *Scotland*.

4. This Court sits each *Wednesday*, during the Session. Between two and three in the Afternoon, before the Lords meet, the Clerk calls Summonses, whereof the Days of Appearance are come, and the Process, being given out, seen and returned, is entred in a
Book

(a) *Ibid.* (b) *Ibid.*

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Book of Inrolment kept by the Clerk of the Court. This Clerk every *Munday* affixes upon the Walls of the inner and outer House a Roll of Causes to be called that Week, according to the Order in the Book, containing, 1. Ordinary Actions. 2. Acts. 3. Causes to be prepared. 4. Concluded Causes. The Lords sit down at three a Clock in the inner House, for there is no Occasion for an Ordinary in the outer House, and continue ordinarily till five, if the Roll be not discussed sooner. They advise and vote with shut Doors. Petitions and Answers are first advised, then ordinary Actions are called: Wherein an Act of Litiscontestation may be extracted immediately after pronouncing, unless the President sign a written Stop, or a reclaiming Petition be lodged in the Clerk's Hands, before the Extract is given out, which Bill must be offered to the Lords the next *Sederunt* Day after. When ordinary Actions are over, Acts are called, and Parties and Witnesses thereupon make Faith; who are examined, after rising of the Court, by an Ordinary appointed for that end. *Avisandum* is made with Proof produced, and remitted to an Ordinary to prepare a State thereof: In order to which, the Cause is put in a Roll of concluded Causes to be prepared. When the State is prepared, it is entred into a Roll of concluded Causes to be advised. Which Roll is called after the Acts are over. Decrets in this Court cannot be extracted till the next *Sederunt*, after that

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that in which they were pronounced is elapsed. If within that Time any reclaiming Bill be given in, that must be advised before Decreet is given out. But if no Petition be offered betwixt and the next Court Day after Date of the Sentence, the Clerk cannot refuse an Extract. These aforefaid are mostly the Specialities in the general Form of proceeding in this Court: For in other Things Processes are managed as before the Session.

5. The Commission modifies for a Stipend to a Minister in a Country Parish at least 800 Merks, or 8 Chalders of Victual, except there be particular Reasons for going below that Proportion (*a*). In allocating a Stipend on the Tithes of his Parish, the free Tithes in the Titular's Hand, and any Tack-duty paid to him, are destined for that End, before any Heritor as Tacksman of his own Tithes is burdened. When a Minister pursues a Modification, or Locality, or Augmentation, the Titular of the Tithes must be cited. Sometimes a Minister, for the more Dispatch, gives in a Rental of the Stock, and Tithes of the Parish, and offers to prove it by the Oaths of the Defenders: Conform to which the Stipend is modified and localled upon them, if holden as confest.

6. Valuations of Tithes are sustained, not only at the Instance of Heritors, but also of Ministers, or Titulars, or Tacksman, who

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(*a*) Act 8. Parl, 1, Ch. 1,

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must call the Heritor and Adjudgers in Possession, in a Process at their Instance, and must be cited when the Heritor pursues. If the Church be vacant, the Heritor must cite the Moderator of the Presbytery, and Agent of the Church. All Tithes may be valued (a), except *decimæ inclusæ*, feued with the Stock. There must be separate Valuations of Parsonage and Vicarage belonging to distinct Titulars. The Vicarage Tithes, which are local and variable, must be rated according to Use of Payment; and the Parsonage, according to the Sowing and Increase of the Lands, and the several Grains. A Calcule is made of these, for Seven Years preceeding, and the Seventh Part of the Total of the Rents for these Years, is reckoned the true Rent *communibus annis*, of which the Fifth is established as the Value of the Tithes; but then some Deduction is given to the Heritor upon the account of Cote-houses, and other industrial, or costly Improvements. In all Cases a joint Proof is allowed to the Heritor (b). An Heritor, or Liferenter by Infeftment, during the Dependence of a Process at his Instance, valuing his Tithes, may get the leading of them, if he apply for it, upon finding Caution to pay, in the Event, conform to the Valuation to be made; but such a Warrant for leading, falls by the Defender's taking out a Protestation for not insisting (c). The Titular
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(a) Act 30. Sess. 2. Parl. W. and M. (b) *Ibid.* (c) Act 24. Sess. 4. *ibid.*

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of the Tithes, after a Valuation, may claim a real Security by Infeftment for the valued Duty.

7. Ordinary Tithes, being valued, may be bought at the Price allowed by Law (*a*). The Method taken with Tacksmen, in a Sale of Tithes, is to value the Tithes, and stock the valued Duty in a principal Sum, answering to so many Years Purchase, as the Tithes are sold for.

The Heritor is obliged to give Security to the Tacksmen, for the Annualrent thereof, during the Course of his Tack, and to the Titular, for the principal Sum, after expiring of the temporary Right. After a Decreet of Sale, the Heritor is infeft in the Tithes, upon a Disposition from the Titular, reserving to himself Relief of the King's Annuity, and of all Impositions laid, or to be laid on these Tithes, and warranting only from his own, and his Predecessors Facts and Deeds.

8. The Smalness of Parishes, and their Stipends, is the Reason for turning two into one. By the Union of Two whole Parishes, sometimes one of the Churches is suppressed, and the other declared to be the common Church, for all the Parishioners within the united Bounds; and if neither of the united Churches be in a Place, where the Generality of the Parishioners may repair to, then both are demolished; and a new one erected, about the Cen-

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

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ter of the common Parish. Sometimes Two Parishes are so united, that both Churches are kept up to be served by one Minister alternatively. Sometimes a large Parish is dismembred of some Lands, to make up another. Where a Parish is so wide, and far extended, that the Inhabitants, in the remoter Parts, by their Distance from the Church, or the Interjection of Waters, cannot have Access, upon all Occasions, to partake in the Administration of the divine Ordinances; the common Remedy is, to make of one two Parishes, and build another Church in a convenient Place, for the new Erection. But the transporting of Churches, disjoyning too large Parishes, and erecting new Churches, must be, with Consent of the Heritors of Three Parts of Four of the Valuation of the Parish, whereof the Church is craved to be transported, or the Parish to be disjoyned, and new Church to be erected (a).

(a) Act 9. Sess. 4. Parl. Q. Anne.

F I N I S.

