after the expiration of three years, but before the Engliſh limitation of ſix years has taken place, the creditor ought not to be cut off from his claim upon our triennial preſcription, unleſs he ſhall have delayed to commence a ſuit for three years after the debtor's return home; *firſt*, becauſe our ſtatute eſtabliſhing that preſcription, though expreſſed in general terms, cannot by a juſt interpretation be extended to foreign contracts, (for England is in this queſtion a foreign country to us), unleſs the debtor has afterwards reſided in Scotland for that whole term of three years; *2dly*, becauſe it is inconſiſtent with equity, that a debtor's fraudulent device to diſappoint his creditor by changing domicils, ſhould have the ſame effect as a diſcharge of his obligation, without any negligence that can reaſonably be imputed to the creditor. If in the caſe of an Engliſh debt, which is in their law limited to a ſhort preſcription, but not in ours, an action ſhall be brought in Scotland by the creditor for payment, after the years of the Engliſh limitation ſhall have elapſed, the Engliſh ſtatute, which is of no proper authority in the courts of Scotland, cannot be regarded as an extinction of the claim: nevertheleſs, it ought in equity to be received as a preſumption that the debt is paid, if the creditor ſhall not elide it, either by direct evidence, or by ſtronger contrary preſumptions. It is hard to quote any deciſions of our ſupreme court, in ſupport of what has been obſerved on this head, to which contrary deciſions may not be oppoſed: but theſe and other rules relating to it are laid down with great preciſion, and the contrary judgements cenſured by the author of Principles of Equity, *p.* 125. 283. By the lateſt deciſion on this point, *New Coll.* i. 156. the court of ſeſſion have made the law of Scotland the rule of their judgement *.

49. Queſtions concerning the preſcription of heritage, muſt be governed by the law of the place where the heritage lies, and from which it cannot be removed.

TIT. VIII.

Of Succeſſion in Heritable Rights.

PERSONS who have right to a ſpecial ſubject in virtue of a conveyance *inter vivos*, are called *ſingular ſucceſſors*, *b.* 2. *t.* 7. § 1. That ſort of ſucceſſion having been already handled, it ſtill remains to conſider how eſtates, whether heritable or moveable, deſcend on the death of the proprietor to thoſe who ſucceed in his place. This kind of ſucceſſion is called *univerſal*; and may be defined, the right of an heir or executor to enter upon the eſtate which belonged to a perſon deceaſed at the time of his death.

2. Succeſſion may be divided into proviſional, or by deſtination, and legal. The firſt reſts on this foundation, that if one hath, in conſequence of his property, a power to transfer his eſtate to another by a preſent deed of alienation, he muſt alſo have the leſſer power of ſettling it upon whom he will, by a deed which is not to take effect till his death. If the proprietor ſhall not exerciſe this power during his life, the law confers the right of ſucceſſion upon him whom it is preſumed the deceaſed would have appointed his heir in reſpect of the proximity of blood, had he made a deſtination; which is called the legal ſucceſſion. Hence, the heir appointed by the deſtination, or expreſs will of the deceaſed, muſt be preferred to the legal heir, who derives right only from his preſumed will; for conjecture or

* The ſame has been found in ſeveral later caſes; *Randale contra Innes*, *July* 13. 1768; *Jean Ker contra E. Home*, *February* 20. 1771; *Barret contra E. Home*, *February* 1772.

preſumption

preſumption muſt yield to truth. This ſucceſſion to one who dies without a will or ſettlement, is frequently called, after the civilians, ſucceſſion *ab inteſtato*.

3. Succeſſion, in regard to its ſubject, is either of heritage or of moveables. The doctrine of both is the ſame by the Roman ſyſtem; but there is a wide difference between them by the law of all the nations of Europe which have adopted the feudal plan. The firſt ſort is to be explained in this title; the other in the next.——Heritable rights deſcend by ſucceſſion to the heir: for though the executors, to whom the moveable ſucceſſion falls, are ſometimes called the heirs in moveables; yet he only is heir in the moſt proper ſenſe, who repreſents the deceaſed in his heritable rights.

4. Thoſe who are marked out for heirs, where there is no limitation in the inveſtiture, and where, conſequently, the ſucceſſion is left to the diſpoſition of law, are ſometimes ſtyled the *heirs at law*; ſometimes *heirs of line*, becauſe they ſucceed according to certain known lines of propinquity; ſometimes *heirs general*, both becauſe they may enter by a general ſervice, and not barely to this or the other ſpecial ſubject, as heirs by deſtination muſt do, and becauſe they repreſent the deceaſed generally; and ſometimes *heirs whomſoever*; that is, heirs of whatever ſort, who have a right by the proximity of blood to ſucceed as heirs, in oppoſition to the ſpecial heirs who are called by deſtination, without any reſpect to blood.

5. The heirs thus pointed out by law ſucceed to the deceaſed in the following order. *Firſt*, Deſcendents in the firſt degree. The three lines of propinquity, viz. of aſcendents, deſcendents, and collaterals, have been already deſcribed, and the nature of degrees of propinquity explained, *b.* 1. *t.* 6. § 8. The preference given to the line of deſcendents in the article of legal ſucceſſion, is eſtabliſhed by nature itſelf, and confirmed by the univerſal conſent of nations, as well as by the authority of the ſacred text, which makes the right of ſucceſſion to be conſequent upon the relation of a child, *Rom.* viii. 17. It is not ſo clear, whether, in a competition among deſcendents themſelves, ſons ought, by the natural rule of preference, to have a larger ſhare than daughters, or whether the eldeſt ſon ſhould be regarded above the reſt. By the Roman law, the ſucceſſion of the father's whole eſtate was divided equally among all the immediate deſcendents of the deceaſed, whether ſons or daughters: but it may be ſafely affirmed, that the preference of the ſons before daughters, in heritage, is, at leaſt, not adverſary to the law of nature, ſince the judgement given by God himſelf, in the caſe of the daughters of Zelophehad, *Numb.* xxvii. 6. 7. 8. is grounded on the ſuppoſition, that daughters have no claim to the inheritance of the father while ſons exiſt. By the law of Scotland alſo, ſons are preferred to daughters in the ſucceſſion of heritage; one reaſon of which may be deduced from the firſt feudal maxims, which ſubjected all proprietors of land to military ſervice. This rule had at firſt the effect of excluding females, in every caſe where there was no ſpecial deſtination in their favour, *lib.* 1. *Feud. t.* 8. § 1. *verſ. Filia*; and though daughters ſucceed by our later cuſtoms in feudal rights, where there are no ſons, yet the original rule continues to have this effect, that where ſons exiſt they are preferred before daughters. In the caſe of daughters only, they ſucceed equally, and are called *heirs-portioners*.

6. Though by the law of Moſes the eldeſt ſon's right of primogeniture over the reſt was but partial, extending only to a double portion, *Deut.* xxi. 17. it has been from our moſt early times conſidered as total by the uſage of Scotland, ſo as to exclude the younger ſons from the leaſt ſhare of the heritable ſucceſſion. This was originally made part of the feudal plan, out of favour to ſuperiors, that they might not be in danger of loſing their

their vaſſal's ſervices, by the fee's being divided into ſmall parcels; and was ſoon after adopted into our law, with univerſal approbation, as the moſt effectual expedient for perpetuating the dignity and influence of great families, and for the ſecurity and defence of our country in the times of public trouble. All heirs *ab inteſtato* ſucceed according to the proximity of their ſeveral degrees, under the exceptions to be hereafter mentioned; ſo that a grandſon cannot ſucceed to a grandfather while his immediate father is alive. In default of immediate deſcendents, grandchildren ſucceed, and upon their failure great-grandchildren, and ſo *in infinitum*; ſtill preferring males before females, and the eldeſt male before the younger.

7. If the law of nature be conſidered abſtractly, aſcendents ought to have the next place in the legal ſucceſſion after deſcendents; for though it is not conformable to the order of nature that parents ſhould outlive their children, yet when that caſe happens, they ought not to be deprived of the ſorrowful comfort, as it is expreſſed in the Roman law, of ſucceeding to their own iſſue, *l. ult. C. Comm. de ſucc.* nor to ſuffer at the ſame time the loſs both of their childrens perſon and of their goods, *l.* 15. *pr. De inoff. teſt.* The firſt Feudal law did however in no caſe admit aſcendents to the ſucceſſion, *lib.* 2. *Feud. t.* 50. and *lib.* 4. *t.* 84. For which Cujacius, *ad lib.* 1. *Feud. t.* 1. aſſigns this reaſon, That feus were originally granted only *poſteris*, to deſcendents; and therefore, in their default, returned to the granter. This was alſo agreeable to the ancient uſage of Scotland, *Reg. Maj. l.* 2. *c.* 34. § 1.—5. And Craig aſſures us, *lib.* 2. *dieg.* 13. § 47. that the firſt inſtance in which a ſervice was attempted by a father as heir to his ſon, was towards the middle of the 16th century, in the caſe of the Earl of Angus, who had put his ſon in the fee of his eſtate, and after the ſon's death wanted that it ſhould return to himſelf. Yet this is certain, that by our later cuſtoms, which ſeem more agreeable to the natural law, fathers are every day ſerved heirs to their children without oppoſition, *St. b.* 3. *t.* 4. § 35. Aſcendents, though they be capable of ſucceeding by our preſent practice, yet come not in immediately after deſcendents; for, in default of children of the deceaſed, his brothers and ſiſters are preferred to the father: for which Stair gives this reaſon, *ibid.* That as ſuch fees proceed for the moſt part from the father, and as theſe brothers and ſiſters are the father's own iſſue equally with the deceaſed himſelf, the paternal affection is preſumed to operate as ſtrongly for them as for the deceaſed.

8. Theſe brothers and ſiſters ſucceed in the following order. Brothers-german have the firſt place; that is, brothers both by the father and mother. But as, by the law of Scotland, the legal ſucceſſion of heritage is not divided, except in the ſpecial caſes to be ſoon explained, the brother-german next youngeſt to the deceaſed ſucceeds to him as heir at law, according to the natural rule, *Heritage deſcends*. Where the deceaſed is himſelf the youngeſt brother of three or more, the ſucceſſion goes to the immediate elder brother, and not to the eldeſt of all; becauſe where there is no room for heritage to deſcend, which is its natural courſe, it is the leaſt deviation from the rule, that it aſcend, not *per ſaltum*, but by the ſloweſt degrees, *New Coll.* ii. 137. If there are no brothers-german, the ſiſters-german ſucceed equally as heirs-portioners, though there ſhould be brothers-conſanguinean, *i. e.* by the father only; for even a ſiſter by the full blood excludes a brother by the half blood. In default of ſiſters-german, brothers-conſanguinean ſucceed, one after another, in the ſame order as brothers-german; and in default of theſe alſo, the ſiſters-conſanguinean take the ſucceſſion equally as heirs-portioners. Brothers or ſiſters of the deceaſed by the mother only, who are called *uterine*, are, by the law of Scotland, incapable of ſucceſſion, either in heritage or in moveables; which is indeed

the caſe of all cognates, *i. e.* relations of the deceaſed by the mother, *Fount. Feb.* 20. 1696, *Alexander*. This doctrine, at leaſt as to ſucceſſion in heritage, may be deduced from the choice or *delectus* of a ſpecial family made by the ſuperior in his feudal grant, which would be elided if the fee were deſcendible to the kinſmen of the mother, whom the law conſiders as of a different family from the vaſſal.

9. If the deceaſed leave neither child, brother, nor ſiſter, the ſucceſſion mounts upwards to the father, as the only aſcendent in the firſt degree capable to ſucceed; for the mother, though an aſcendent in the ſame degree, is as incapable of ſucceeding to her child, as any of the child's relations by the mother are. If the father be already dead, the ſucceſſion goes to the father's brothers; and in default of them, to his ſiſters, in the ſame order in that it would have gone to the brothers and ſiſters of the deceaſed, if he had had any. On the failure of theſe, it aſcends to the father's father; and if he be not alive, to his brothers and ſiſters; and ſo upwards, the brothers and ſiſters of the neareſt aſcendent ſtill excluding the more remote, and his collaterals. Where there is no agnate or kinſman to the deceaſed by the father, the King ſucceeds as *ultimus heres*; *vid. infr. tit.* 10.

10. Upon the rules above ſet forth, it may be obſerved, *firſt*, That tho' a mother cannot ſucceed to her child, yet a child is as truly heir to the mother as to the father. *2dly*, The rule, That the full blood excludes the half blood, holds only in the ſame line of ſucceſſion. Thus, though a brother-german excludes a brother-conſanguinean, becauſe both are in the collateral line; yet a brother-conſanguinean is preferred to the father's full brother, becauſe theſe two are in different lines. *3dly*, No regard is had to the queſtion, From what quarter the eſtate of the deceaſed has come? If the right appears to be once veſted in the deceaſed, the only remaining queſtion is, Who is his heir at law? without conſidering, whether ſuch heir ſtands related to him from whom the eſtate deſcended to the deceaſed. The contrary rule, *Paterna paternis et materna maternis*, obtains in England; and in the opinion of Craig, *lib.* 2. *dieg.* 17. § 9. ought alſo to obtain univerſally, on account of its equity, where the eſtate proceeds from an heireſs: yet he admits, that our ſupreme court rejected it, in the caſe of one Gilbert; and a ſimilar deciſion has been pronounced ſince Craig's death, by which a father was preferred to the ſucceſſion of his ſon, in lands in which the ſon was infeft as heir to his mother, to the excluſion of the brother-uterine of the deceaſed from that very eſtate which belonged to his own mother.——Before going farther, we may mention, as an univerſal rule in every country, That the ſucceſſion to land-eſtates, and all heritable ſubjects, muſt be governed by the law of the kingdom or ſtate where they are ſituated, and not according to the *lex domicilii* of the proprietor, though he ſhould happen to die abroad, and have his ſettled reſidence there at his death.

11. There is a right of repreſentation peculiar to heritage, by which one ſucceeds in heritable ſubjects, not from any title in his own perſon, but in the place of, and as repreſenting ſome of his deceaſed aſcendents. Thus where one dies, leaving a younger ſon, and a grandchild, whether male or female, by an elder ſon predeceaſed; the grandchild, though farther removed in degree from the deceaſed than his uncle, excludes him from the legal ſucceſſion; becauſe he ſucceeds, not in his own right, but in that of his father, who was the eldeſt ſon of the deceaſed, and as ſuch would have excluded the younger ſon had he been alive when the ſucceſſion opened to him upon his father's death. The word *repreſentation*, when applied to this right, muſt not be underſtood in that ſenſe in which it is commonly taken by lawyers, as if the grandchild, in the caſe now ſtated, were liable for the debts of his immediate father whom he repreſents; he repreſents him barely in his propinquity, and not in his debts. This right obtains in the ſucceſſion

ceſſion of collaterals, as well as in that of deſcendents: and therefore, where it is ſaid that brothers ſucceed next after deſcendents, then ſiſters, &c. not only the perſons themſelves are meant, but all their deſcendents, *jure repræſentationis*. Thus if one die without iſſue, leaving a nephew by his immediate younger brother deceaſed, and alſo two elder brothers, the ſurviving brothers will be excluded from the ſucceſſion, though next in degree, and the nephew preferred, as coming in the place of his deceaſed father, *July* 2. 1629, *Cuningham*. Thus alſo, as a ſiſter-german excludes a brother-conſanguinean, ſo does a child of that ſiſter exclude him *jure repræſentationis*, *Harc.* 62. By the ſame rule, though no heritable right falls in any caſe to the mother of the deceaſed, nor to his relations by her; yet as children take by ſucceſſion the heritage belonging to their deceaſed mother, they alſo ſucceed as repreſenting her, in every caſe where the mother herſelf would have been intitled to the ſucceſſion had ſhe been alive at the death of her anceſtor.

12. From this doctrine ariſes a diviſion of ſucceſſion, well known in the Roman law, into ſucceſſion *in capita*, and *in ſtirpes*. The ſucceſſion *in capita*, is that which divides the inheritance into as many equal parts as there are *capita* or heirs; as in the caſe of daughters only, who are all of them intitled to equal parts of the father's ſucceſſion. Succeſſion *in ſtirpes*, or by the ſtock, makes the partition, not according to the number of heirs to whom the eſtate deſcends, but according to the number of the ſtocks or *ſtirpes* from whom theſe heirs derive right. Thus, if a father die, leaving one daughter behind him, and two daughters by a daughter predeceaſed, the ſurviving daughter is intitled by herſelf to the half of the whole heritage, as one of two daughters co-heireſſes, while each of the two grand-daughters take only a half of their mother's half, or a fourth of the whole.

13. In the ſucceſſion of heritage *ab inteſtato*, the law in ſpecial caſes does not confer the whole heritable ſubjects belonging to the deceaſed upon a ſole heir, but divides the ſucceſſion into parts among two or more. Thus, *firſt*, where females ſucceed, it has been ſaid, *ſupr.* § 5. 8. that the eldeſt does not, by any right of primogeniture, exclude her younger ſiſters, but that they ſucceed equally as heirs-portioners. In female ſucceſſion by the line of deſcendents, all the daughters of the deceaſed ſucceed in this manner, though they ſhould be procreated of different marriages, if there be no ſpecial deſtination by the father to the contrary. But though each heir-portioner has an equal intereſt in the ſucceſſion, in ſo far as it is diviſible; yet the eldeſt daughter enjoys this privilege from neceſſity, that rights which are indiviſible *ex ſua natura* fall to her alone, *ex. gr.* titles of dignity. It is a queſtion rather of curioſity than uſe, now that heritable juriſdictions are aboliſhed, whether juriſdictions fell by our former law, as indiviſible, to the eldeſt heir-portioner. Where the deceaſed happened to be veſted with one ſingle ſuperiority, the right of it goes to the eldeſt; not ſo much becauſe a right of ſuperiority is hardly capable of diviſion, as becauſe the condition of a vaſſal is not to be made worſe by ſplitting the ſuperiority into parts; for no vaſſal can be compelled to hold his lands of two or more ſuperiors in the place of one, *Cr. lib.* 2. *dieg.* 14. § 7.; *July* 30. 1678, *La. Luſs.* Where different ſuperiorities were veſted in the deceaſed, the eldeſt would probably have the option or election of what ſhe judges beſt, then the ſecond, and ſo in their order, till all the ſuperiorities be exhauſted. Craig is of opinion, *ibid.* that in the ſuperiority of lands holden feu, the feu-duties, being a conſtant yearly rent, ought to be deemed part of the property, rather than of the ſuperiority; and conſequently to be divided among the heirs-portioners, even in the caſe of a ſingle ſuperiority: but in truth, feu-duties are proper parts of the ſuperiority, and the only title for poinding

poinding the ground for the arrears is the right of ſuperiority; ſo that if the yearly feu-duty were divided among the ſiſters, as Craig would have it, it is only that part of it which remains with the eldeſt that would be *debitum fundi*, ſince ſhe only, as ſuperior, could poind the ground for its payment, *St. b.* 3. *t.* 5. § 11. But though feu-duties cannot for this reaſon ſuffer a ſeparation from the right of ſuperiority; yet becauſe they are a fixed yearly rent, and ſo of a different nature from the caſualties of ſuperiority, which depend upon accidents, the younger ſiſters have compenſation for their ſhares of them out of the other eſtate of the deceaſed, in ſo far as the diviſion of the ſeveral ſuperiorities hath been unequal, *St. ibid.*; *Kames, Rem. Dec.* 57. The principal manſion-houſe of the lands is accounted an indiviſible right; but becauſe that ſubject admitted of valuation, our old law directed, that the younger ſiſters ſhould be recompenſed out of the deceaſed's other eſtate to the amount of its value, *Reg. Maj. l.* 2. *c.* 27. § 4. & *c.* 28. But by our later cuſtoms, the eldeſt is intitled to it, even without recompence to the other ſiſters, *March* 5. 1707, *Cowie*; *Home*, 226.; as ſhe is alſo to the garden and orchard belonging to it, ſince the one ought not to be ſeparated from the other, *June* 24. 1708, *Cowie* *. Upon this ground, the heirſhip-moveables fall alſo to the eldeſt alone; for the right of theſe ought to accompany that of the manſion-houſe, *Jan.* 16. 1725, *Executors of Lady Garnkirk* †. Houſes within borough, eſpecially if they lie diſcontiguous from the other eſtate of the deceaſed, and all country-houſes, except the principal manſion-houſe, are accounted common pertinents of the ground on which they ſtand, and are therefore equally capable of diviſion with the lands themſelves, *New Coll.* ii. 90. Patronage is a diviſible right; for our ſtatutes admit, that the patronage of the ſame church may be veſted in two different perſons, 1617, *c.* 3. It carries alſo a patrimonial intereſt to the patron, 1690, *c.* 23. and upon both accounts it divides equally among the ſiſters, who may preſent to the benefice, and levy the vacant ſtipend by turns, the firſt vice or turn falling to the eldeſt. As the title-deeds of an eſtate cannot be in the cuſtody of two different perſons, the eldeſt ſiſter is preferred to the keeping of them; who may be compelled to give tranſumpts to any of the other ſiſters that may have occaſion for them, ſhe herſelf bearing an equal ſhare of the expence, *July* 23. 1680, *La. Marg. Cuningham*; *June* 24. 1708, *Cowies*.

14. The legal ſucceſſion of heritage is alſo broken into parts, in the caſe of an heir of conqueſt. For underſtanding this, it may be premiſed, that feus are by the *Conſuetudines Feudorum* divided into *antiqua* and *nova*. An old fee is that to which one ſucceeds as heir to his father, grandfather, or other anceſtor. A new fee does not come by ſucceſſion, but has its place only in the firſt acquirer, as a fee acquired by purchaſe, donation, excambion, or other ſingular title. The terms by which this diviſion is expreſſed in our law, are fees *of heritage*, and fees *of conqueſt*; ſo that heritage thus limited, includes not all heritable ſubjects without exception, but is confined to thoſe to which the deceaſed himſelf ſucceeded as heir. Beſides other differences between the two branches of this diviſion, their rules of legal ſucceſſion are different. The law confers the *antiqua feuda*, or proper heritage of the deceaſed, upon one heir, and his conqueſt upon another. This diſtinction obtains only where two or more brothers or uncles, or their iſſue, are next in ſucceſſion. Rights that are heritable in the moſt ſtrict and limited ſenſe, deſcend in this caſe to the next younger brother of the deceaſed, or to the next younger brother of the father of the deceaſed, where there are no nearer heirs, as to the proper heir of line, conformably to the

* The ſame was found both as to the manſion-houſe and garden, *November* 1765, *Givan contra Ireland*.

† This deciſion is marked differently in *Dict.* i. *p.* 363.

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above-mentioned rule, *Heritage deſcends:* but the ſucceſſion of conqueſt, *i.e.* of ſuch heritable rights as had been acquired by the deceaſed himſelf, aſcends to the immediate elder brother or uncle, who is therefore called *the heir of conqueſt*, becauſe his right of ſucceſſion is confined to the ſubjects which the anceſtor himſelf had thus acquired, or, as we long expreſſed it, *conquiſhed*, by ſome ſingular title. This doctrine has been probably introduced with a view of enriching elder brothers, who have been always more favoured by our law than the younger. Where the deceaſed is the youngeſt brother, and leaves two elder, whether they be procreated of the ſame or of a former marriage, the youngeſt of the ſurviving brothers is not only heir of line to the deceaſed, *vid. ſupr.* § 8. but his heir of conqueſt, becauſe he is his immediate elder brother, *July* 20. 1664, *La. Clerkington*; *Mack.* § 11. *h. t.*; contrary to the opinion of Craig, *lib.* 2. *dieg.* 15. § 19. who affirms, that if the ſurviving brothers are only conſanguinean, procreated of a former marriage, the eldeſt of them is heir of conqueſt to the deceaſed.—Without all doubt, where the deceaſed leaves but one brother, whether elder or younger than himſelf, he is heir both of line and of conqueſt.

15. There is no place for this diſtinction between heritage and conqueſt, where the ſucceſſion divides among ſiſters; for ſeeing ſiſters do not ſucceed in heritage, as brothers, one after another, but as heirs-portioners, conqueſt goes in the ſame way, without any preference in favour of the immediate elder ſiſter, *Kames*, 3. Conqueſt can aſcend but once; or, in other words, where one who has himſelf acquired an eſtate, dies, ſuch eſtate, though it muſt go to the immediate elder brother, as heir of conqueſt, does not continue conqueſt in the perſon of that brother; becauſe it was no acquiſition of his; he ſucceeded to it as heir: and therefore if, upon his death, he ſhould leave an elder and a younger brother, the eſtate does not, as conqueſt, aſcend to the elder, but muſt deſcend to the younger as heir of line. An heritable ſubject made over by a father to his eldeſt ſon, who is at the date of the right *alioqui ſucceſſurus*, is not conqueſt in the perſon of the ſon, becauſe he would have ſucceeded to it as heir, though there had been no diſpoſition; and conſequently, if the ſon die after his father, leaving two uncles, one elder than the father, and the other younger, the ſubject will deſcend to the younger as heir of line. But an heritable grant by one who has no lawful iſſue, in favour of a brother, ought to be accounted conqueſt in the grantee, unleſs the grant has been expreſsly made over to him as the granter's ſucceſſor, *Cr. lib.* 2. *dieg.* 15. § 17.: for though the diſponee was at the date of the right the diſponer's preſumptive heir, the diſponer might have afterwards had iſſue of his own body, who would have been nearer in blood to him than the diſponee.

16. Not only lands and other heritable rights on which ſeiſin has been actually taken, but thoſe alſo to which ſeiſin is required as a ſolemnity, even heritable bonds, though theſe are not in ſtrict ſpeech rights of property, fall under conqueſt. This doctrine appears not quite conformable to our ancient law of *Q. Attach. c.* 88. which mentions lands as the proper ſubject of conqueſt; nor to *c.* 97. which ſuppoſes ſeiſin to be neceſſary to conqueſt; but it has been generally received by our lawyers, *Hop. Min. Pr.* § 110.; *St. b.* 3. *t.* 5. § 10.; and is approved by two late judgements, *Home*, 106.; and *Jan.* 8. 1740, *D. Hamilton*, cited in *Dict.* i. *p.* 376. upon this medium, That queſtions of ſucceſſion ought to be determined by the nature of the right, and not by its being clothed, or not clothed with ſeiſin; and that the only reaſon why heritable bonds were not mentioned in our old law-books as ſubjects falling under conqueſt, was becauſe the Canon law, which was then of authority in Scotland, prohibited the taking of intereſt; and that the expedient of evading that prohibition by purchaſing annualrents forth of lands,

was not ſo early thought of. No heritable right which does not affect land, falls under conqueſt, and conſequently no right of tithes; for tithes are a burden, not on the ground, but merely on the fruits or crop. Neither are rights which require no ſeiſin to perfect them, accounted conqueſt; for the rule is by Sir Thomas Hope, and our other writers, confined to rights on which ſeiſin has followed, or may follow. Leaſes therefore, penſions, and other rights of that kind, though they bear a tract of future time, fall to the heir of line, *June* 23. 1663, *Ferguſon*. Upon this principle, perſonal bonds ſecluding executors go alſo to the heir of line: and indeed as theſe bonds are only heritable by the force of deſtination, and as by the deſtination the ſum is provided in general terms *to heirs*, thoſe heirs muſt be underſtood who come under that appellation in the moſt proper ſenſe, *i. e.* the heirs of line, ſaid *Jan.* 8. 1740, *D. Hamilton*. Where a wadſet is granted, which holds not of the granter, but of his ſuperior, the reverſer is by the right entirely diveſted; and upon redemption of the right, he muſt be reinſtated in the lands by a new ſeiſin from the ſuperior: nevertheleſs, as he has made no real purchaſe, but barely returns to his former ſtate, the lands, if they were heritage in the reverſer before the date of the wadſet, continue heritage after the reverſer has redeemed the wadſet, and got himſelf reinſtated in the lands, *Cr. lib.* 2. *dieg.* 6. § 25.; *St. b.* 2. *t.* 10. § 12.

17. The heir of line is intitled, not only to the ſucceſſion of ſubjects properly heritable, but to that ſort of moveables called *heirſhip*. By heirſhip-moveables are underſtood the beſt of certain kinds of moveable goods, from which the executor, though he be the heir in moveables, is excluded, and which the law accounts heritage in reſpect of ſucceſſion, from the preſumed intention of the deceaſed, that his principal dwelling-houſe, and the farm which he kept in his own natural poſſeſſion for the uſe of his family, might go to the heir not quite diſmantled by the executors. In order to intitle an heir to heirſhip-moveables, the deceaſed muſt have been either a prelate, a baron, or a burgeſs. One who is ſeiſed in lands, though they be not erected into a barony, or even in an annualrent forth of lands, is accounted a baron as to this queſtion; for an annualrenter has as juſt a claim to the privileges of a baron, as a petty feuer, *July* 19. 1664, *Scrimgeour*: but if his title be a naked diſpoſition, or an heritable bond, and if he die without perfecting it by ſeiſin, the heir has no privilege, *Dirl.* 209.; *Fount. Dec.* 25. 1695, *Cochrane*. It is ſaid by lawyers, that one who has been once infeft, is preſumed to continue infeft, according to the rule, *Semel baro ſemper baro*: but as the fact, whether he was actually diveſted before his death, muſt admit of a clear proof upon one ſide or the other, little room is left for preſumption; ſee *Jan.* 27. 1636, *Straiton*. Where a right does not carry the full property, but reſolves into a liferent, the heir can draw no heirſhip; hence the heir of a widow who had been ſeiſed in lands in conjunct fee with her huſband, was excluded from it, tho' a right of conjunct fee be more ample and extenſive than a common liferent, *Feb.* 1730, *Munro*, cited in *Dict.* i. *p.* 365. By a burgeſs is underſtood the burgeſs of a royal borough, not barely an honorary one, *July* 8. 1628, *Dunbar*, but either an actual trading burgeſs, or one at leaſt intitled to enter burgeſs in the right of an anceſtor, *Fount. Nov.* 22. 1698, *Cumin*. As this is a right annexed to ſucceſſion in heritage, the heir cannot be deprived of it by any deed of the anceſtor, either teſtamentary or on deathbed: but it is the heir of line who alone can claim it; and therefore, though the whole eſtate of the deceaſed ſhould be conqueſt, or entailed to heirs-male, the heirſhip does not accompany ſuch eſtate, but belongs ſolely to the heir of line. Where the legal ſucceſſion deſcends to two or more females, who are heirs-portioners of line, the eldeſt only is intitled to the heirſhip; for if each of the co-heireſſes were allowed to make a full draught of it, one after another, the right of the

the executor might be too much incroached upon, *Jan.* 16. 1725, *Exec. of La. Garnkirk* *.

18. The act eſtabliſhing heirſhip-moveables is 1474, *c.* 54.; and it refers to the borough-laws for the catalogue of the particulars included under that appellation, *L. Burg. c.* 125.; but all liſts of heirſhip-moveables muſt, in the nature of things, be imperfect, and increaſe with every new piece of furniture which the vanity or taſte of a proprietor may add to an houſe or farm. This however may be obſerved after Stair, that by the words of the ſtatute, *the beſt of every thing*, we muſt not underſtand fungibles, which are eſtimated by quantity, as coin, wine, uncut cloth, bullion, *&c.*; for heirſhip conſiſts only of ſubjects *quæ non recipiunt functionem*, as beds, grates, tables, chairs, mirror, plate, bed and table linen, or other ſuch houſehold-ſtuff. And in like manner, in what is called *outſight pleniſhing* or moveables without doors, the heirſhip may be drawn of horſes, cows, oxen; and of all the implements of agriculture, as ploughs, harrows, carts, *&c.*; but not of corn or hay, becauſe theſe laſt are fungibles. In moveable ſubjects which go by pairs or dozens, as in table-plate, bed and table linen, *&c.* the beſt pair or dozen is the heirſhip: and for the ſame reaſon, where the deceaſed had any number of cattle proper for tillage, the heirſhip is the beſt yoke; that is, as many as make a plough. There are ſome particular kinds of moveables which fall under heirſhip, though there ſhould be but one individual of that kind belonging to the deceaſed; as the family's ſeal of arms, the carpet or cuſhion belonging to the ſeat in the church, and, by our ancient practice, the whole furniture of the hall, *Balf. p.* 235. *c.* 1.

19. Hitherto of heritable ſucceſſion when it is left by the proprietor to the diſpoſition of law; it remains to conſider it, as it may be regulated by the expreſs will of the owner: and this power conſequent on property is ſo unlimited, that every owner of a land-eſtate, or other heritable ſubject, if he be not reſtrained by a former entail or deſtination, may ſettle his lands on extraneous heirs, to the excluſion even of his own iſſue.

20. There can be no deſtination of heritage in the form of a proper teſtament by the uſage of Scotland. Nay ſubjects, though they ſhould be moveable *ex ſua natura*, if they paſs by ſervice, are, in the general opinion of lawyers, accounted heritable as to this queſtion; and conſequently are not deviſable by teſtament. More particularly, bonds ſecluding executors, becauſe they deſcend to the heir, and ſo paſs by ſervice, cannot be diſpoſed of by the creditor, either on deathbed, or by any teſtamentary deed, *Harc.* 661.; *Kames*, 53. Upon this principle, bonds alſo which are heritable by deſtination, *ex. gr.* deviſed to ſpecial heirs, have been adjudged not confirmable by an executor-creditor, *Kames*, 103.: and ſurely they can as little be confirmed by an executor-nominate; for it is abſurd to affirm, that any ſubject which excludes executors indefinitely without exception, may be carried by the confirmation of executors of any kind. The ſame doctrine is applicable to bonds granted under ſubſtitution; for theſe alſo import a virtual excluſion of executors, and therefore cannot be bequeathed by the creditor to the prejudice of the ſubſtitute. The reaſons aſſigned by our writers why heritable ſubjects cannot be deviſed by teſtament, are, *firſt*, That by the genuine feudal rules, the inveſtiture of lands ought not to be altered without the ſuperior's conſent; which conſent of the ſuperior the law has not required as eſſential to a vaſſal's teſtament, *Cr. lib.* 2. *dieg.* 1. § 25. *2dly*, That heritable rights require ſeiſin to perfect them; and teſtaments do not admit of ſeiſin. But theſe reaſons do not ſtrike againſt moveable ſubjects which paſs by ſervice; and therefore cannot be the grounds upon which our law declares them not to be teſtible; beſides that they are

* This deciſion is collected differently in *Dict.* i. *p.* 363.

equally

equally applicable to all countries that have adopted the feudal plan. Notwithſtanding which, lands in fee-ſimple may, by the law of England, be deviſed by laſt-will, 32° *Hen. VIII. c.* 1.; 34° & 35° *Hen. VIII. c.* 5.: and by the cuſtoms of Normandy, *art.* 422. one may, under ſpecial limitations, diſpoſe by teſtament of a certain part of his conqueſt, or *feuda nova*. A *third* reaſon is alſo aſſigned by our writers why heritage cannot be diſpoſed of by teſtament, namely, that it is dangerous to intruſt perſons under bodily ſickneſs or diſtreſs with the power of alienating their heritage to the prejudice of the heirs at law, *Cr. lib.* 2. *dieg.* 1. § 28.; *St. b.* 3. *t.* 8. § 29.: and indeed this reſtraint ſeems to have been originally impoſed for ſecuring heirs at law from being hurt by deathbed-deeds granted by their anceſtors; but it is by our practice extended, beyond this original reaſon of it, to all teſtaments, even thoſe executed by the teſtator in a ſtate of perfect health, *St. b.* 3. *t.* 4. § 31. This rule of our law was never conſidered as a bar againſt ſettling heritage by a writing, though it ſhould have contained a nomination of executors, if that part of it which conveyed the heritage was made out in the form of a diſpoſition, or deed *inter vivos*, *July* 11. 1733, *Douglas*, obſerved in *Dict.* ii. *p.* 459. If, on the contrary, the writing appeared by its ſtrain to be of a teſtamentary nature, the clauſe ſettling the heritage was diſregarded as inept or improper, *Dec.* 4. 1735, *Brand*, cited *ibid.* But indeed it appears to be conformable to the preſent practice, that a man may effectually ſettle his heritage in a teſtamentary deed, reſerving to himſelf the liferent, and a power of revocation, provided he makes uſe, in the conveying clauſe, of the words *give*, *grant*, or *diſpone*, in place of *legate* or *bequeath*; ſee *New Coll.* ii. 200. And it is uſual enough, not only to make a ſettlement of ſpecial heritable ſubjects to take effect at the granter's death, but to execute general diſpoſitions of all ſubjects, heritable or moveable, which ſhall belong to him at that time. As to which it may be obſerved, that though ſuch a deed does not convey the feudal right of any heritage to the diſponee, nor transfer the property of the moveables to him ſo directly as a ſpecial aſſignation would have done; yet it gives him a legal right in the ſubjects, which he can complete by actions againſt the heir at law, or by confirmation or other proper diligence.

21. The uſual forms whereby a proprietor thus limits the ſucceſſion of heritage in ſpecial ſubjects, are by diſpoſition, marriage-contract, or even by a ſimple procuratory of reſignation, in favour of himſelf and the ſpecial heirs intended to be gratified. A diſpoſition of this kind, though it ſhould have neither procuratory of reſignation nor precept of ſeiſin, founds the diſponee or heir of entail in an action againſt the heir at law, for making up titles to the ſubject diſponed, and afterwards diveſting himſelf in his favour: and if the heir at law ſhall renounce to be heir, the diſponee may carry the ſubject to himſelf by an adjudication in implement. How far the ſuperior may be compelled to accept a reſignation, or to grant confirmation to heirs, different from thoſe expreſſed in the inveſtiture firſt granted by himſelf, may be collected from what has been ſaid *ſupr. b.* 2. *t.* 7. § 7. Theſe ſpecial deſtinations generally exclude females; for which reaſon, Craig, *lib.* 2. *dieg.* 16. § 3. makes a male fee and a tailzie the ſame; though it is certain, that the firſt is but a ſpecies of the laſt, ſince female heirs may be, and are ſometimes, called in tailzies. A tailzied fee therefore, from the French *tailler*, to cut, is a general term, comprehending all deſtinations in which the legal courſe of ſucceſſion is altered, or cut off, and one or other of the heirs at law excluded or poſtponed: And a male fee is a ſpecial kind of entail, by which females are excluded, and the heir-male called to the ſucceſſion in place of the heir of line. The definition given by Mackenzie of an heir-male, § 13. *h. t.* that he is the neareſt male who can ſucceed, is both obſcure

ſcure and imperfect; for it is alſo eſſential to an heir-male, that the whole chain of propinquity between the anceſtor and himſelf be connected by males, without the interpoſition of one female. Thus, though a grandſon by a daughter be capable of ſucceeding as heir of line to his grandfather, and though he be at the ſame time a male in the terms of that definition, he cannot poſſibly be his grandfather's heir-male. Though all heirs by deſtination may, without impropriety, be ſtyled either *heirs of entail*, or *of proviſion*; yet the firſt expreſſion of heirs of entail is chiefly made uſe of, in the caſe of a land-eſtate which is ſettled in a long ſeries of heirs, ſubſtituted one after another; whereas heirs pointed out in marriage-contracts, or in bonds containing clauſes of ſubſtitution, are more commonly called *heirs of proviſion*. The perſon firſt called by the entail is the inſtitute; and thus the maker, when by the deed he ſettles the lands firſt on himſelf, is truly the inſtitute; the reſt get the name of *the heirs of entail*, or *ſubſtitutes*.

22. Entails, when they are conſidered with regard to their ſeveral degrees of force, may be divided into three kinds: *firſt*, Simple deſtinations; *2dly*, Entails with prohibitory clauſes; and, *3dly*, Thoſe that are guarded with irritant and reſolutive clauſes. That ſort is called *a ſimple deſtination*, where the perſons called to the ſucceſſion are in the deed ſubſtituted, one after another, but without any reſtraint laid upon the members or heirs of entail as they come to ſucceed, that they ſhall not alter the courſe of ſucceſſion ſettled by the maker. They have therefore this only legal effect, that the order of ſucceſſion contained in the entail is to be obſerved, ſo long as no alteration is made by any of the heirs ſucceeding to the lands. But as thoſe heirs are laid under no reſtraint in the exerciſe of their property, they are unlimited fiars; and conſequently may either bring back the ſucceſſion to the heirs at law, or carry it to any other order of heirs at pleaſure, in the ſame manner that the maker himſelf could have done. And this rule, That a bare ſubſtitution does not diſable any of the heirs from altering the order of ſucceſſion gratuitouſly, holds, though the maker ſhould reſerve a power to himſelf to alter, without conferring a like power upon the heirs ſucceeding to him, *Fount. Jan.* 25. 1705, *Dalgarno*. From this it is conſequent, that the next ſubſtitutes have truly no more than the hope of ſucceſſion, entirely pendent on the will of the heirs firſt ſucceeding; and that, of courſe, they cannot, by inhibition, incroach upon or weaken the right in thoſe heirs, or diſable them from altering. Inhibition ſuppoſes an antecedent obligation upon the debtor, which is intended to be ſecured by that diligence; and as no obligation is by a ſimple deſtination laid upon the heirs of entail, there can be no ground for an inhibition againſt them at the ſuit of the next ſubſtitute.

23. Entails containing prohibitory clauſes have a ſtronger force than ſimple deſtinations. Theſe prohibitions are all calculated for preſerving the ſucceſſion to that order of heirs which was deviſed by the maker. Sometimes the clauſe is expreſſed in general terms, that the heirs of entail ſucceeding to the lands ſhall do no deed by which that courſe of ſucceſſion may be innovated; and ſometimes it is more particular, that it ſhall not be lawful to any of thoſe heirs to contract debt, or alienate the lands. By entails of this kind, the heirs ſucceeding are effectually barred from granting gratuitous deeds to the prejudice of the ſubſtitutes who are to ſucceed after them; for a proper right of credit is by thoſe prohibitions created to the ſubſtitutes; who conſequently may, in the character of creditors, ſet aſide ſuch gratuitous deeds on the ſtatute 1621, to be hereafter explained, *Fount. Jan.* 27. & 28. 1687, *E. Callender*. But as the proper fee of the eſtate continues, notwithſtanding thoſe reſtraints, in the ſeveral members of entail as they ſucceed, they may, as fiars, burden the lands with debt, or alien them for onerous cauſes; by which they may be evicted from themſelves and all the poſterior ſubſtitutes, *Dec.* 7. 1705, *Young*: for the obligation

upon them not to alien, or to contract debt, when it is not ſtrengthened by irritant and reſolutive clauſes, is only perſonal againſt them and their heirs, but does not affect creditors or purchaſers. Hope, *Min. Pr.* § 364. 365. and Mackenzie, § 16. *h. t.* affirm, that the next ſubſtitute in this kind of entails may, on the prohibitory clauſe, uſe inhibition againſt the preſent heir, which will be effectual even againſt onerous debts contracted after inhibition. Suppoſing this doctrine to be well founded, where the prohibition lays a ſpecial reſtraint on the heirs not to contract debt; yet where the clauſe goes no farther than to prohibit the ſiar to alienate, or to do any deed that may hurt the ſucceſſion, he continues at liberty to contract debt; for reſtraints are not to be multiplied by implication; and inhibition is ineffectual where the perſon inhibited is not laid under ſome prior obligation which may be the foundation of that diligence *.

24. It is ſaid by ſome writers, that one who hath bound himſelf to another gratuitouſly to tailzie his lands in favour of a particular order of heirs, fulfils his obligation by making a ſimple deſtination, which he has the ſame power of altering, when he thinks fit, as if he had made it without being compelled by any anterior obligation, *Mack.* § 18. *h. t.* And this ſeems to have been agreeable to our more ancient practice, even where the obligation proceeded upon an onerous cauſe, if it was not adequate to the value of the ſucceſſion, *July* 15. 1636, *Drummond.* But as the obligation is thus rendered quite eluſory, without having the leaſt ſupport from the preſumed intention of the parties, it ſeems more conſonant to reaſon, that in ſuch caſe he who made the entail in conſequence of the prior obligation, is not at liberty to alter it; ſince no perſon can be truly ſaid to lie under an obligation, who has the power of rendering it ineffectual. It is agreed on all hands, that where the obligation to entail has been granted for an adequate valuable conſideration, a reſtraint upon the maker from altering is implied, though it ſhould not be expreſſed, in the ſame manner that one who ſells a ſubject for a juſt price is naturally bound in warrandice, that the right ſhall be effectual to the grantee. Hence if two perſons ſhould enter into mutual obligations to execute entails in favour of each other, neither of them is revocable without the conſent of both parties, *Jan.* 14. 1631, *Sharp*; and if either party ſhould ſell his entailed lands, in conſequence of the right of fee which he ſtill retained in them, with a fraudulent view to diſappoint the ſucceſſion, an action lies againſt him for damages, *March* 4. 1634, *Home.* Though an entail executed by one who had laid himſelf under no previous obligation, may be altered at the pleaſure of the maker, even where it contains prohibitory clauſes, reſtraining the heirs of entail from altering the ſucceſſion; yet if he has directed the prohibitions not only againſt the ſubſequent heirs, but himſelf, he is as effectually reſtrained as they, even though he ſhould have got no valuable conſideration for fettering himſelf; becauſe it is implied in the nature of property, that the proprietor can diſpoſe of it at pleaſure: and if he can gift it abſolutely to another, he may *a fortiori* reſtrict himſelf in the manner of uſing it †. It is upon this principle, that all donations by a proprietor are effectual, which, though they be at firſt voluntary, may be ſo conſtituted by the donor as not to be ſubject to revocation, *Br.* 119.

25. Entails which have irritant and reſolutive clauſes annexed to the prohibitory, bind the heirs ſucceeding to the lands ſtill more ſtrongly than either of the other two. As to which it may be premiſed, that though ſuch entails appear to have been firſt brought into uſe as far back as Hope's time, *Min. Pr.* § 367. yet they were generally accounted not only contrary to good conſcience, as they cut off the right of the lineal heir, (which is a character applied even to ſimple deſtinations where the legal ſuc-

* See *New Coll.* ii. 211.

† This debated, but not decided, *New Coll.* iii. 101. § 6.

ceſſion

ceſſion is not obſerved, ſee 1493, *c.* 50.), but inconſiſtent with the genius of our law, as they ſunk the property of land-eſtates, and created a perpetuity of liferents. It was therefore made a queſtion, whether ſuch entails were effectual, even where the ſuperior had conſented to them: and tho' they were by a ſingle deciſion ſuſtained even againſt onerous creditors, *Feb.* 26. 1662, *V. Stormont*, yet to remove the doubts which ſtill remained as to their validity and legal effects, it was, by 1685, *c.* 22. declared lawful to his Majeſty's ſubjects to ſettle their eſtates by entail, under ſuch conditions and proviſions as they ſhould think proper, and to affect theſe entails with reſolutive and irritant clauſes, which might put it out of the power of the heirs ſucceeding to contract debt, or do any deed by which the lands could be evicted from the ſubſtitutes who were to come after them: and that if any heir ſhould contravene, that is, counteract the proviſions or injunctions of the entail, the next ſubſtitute might bring a declarator of irritancy againſt the contravener. If a diſtinction is to be made between irritant and reſolutive clauſes in entails, it ſeems to be this, that an irritant clauſe is that which irritates or avoids the right granted in contravention of the entail; and a reſolutive, that by which the right of the heir contravening is declared to reſolve; ſo that the one reſpects the right itſelf, and the other the granter of it; but both terms are uſed by writers promiſcuouſly *. With regard to entails authoriſed by the foreſaid act 1685, it may be conſidered, *firſt*, What is neceſſary to conſtitute them, or make them effectual; 2*dly*, What is by the law deemed a contravention.

26. As to the forms and ſolemnities eſſential to thoſe entails, the ſtatute requires, *firſt*, That the entail be produced before the court of ſeſſion, who are to interpoſe their authority to it; and that it be afterwards recorded in a ſpecial regiſter to be kept for that purpoſe. Subſtitutes, even remote ones, may apply ſummarily to the court of ſeſſion to have the entail recorded, *New Coll.* ii. 24. 2*dly*, That the irritant clauſes be inſerted in the procuratories of reſignation, and precepts and inſtruments of ſeiſin, which proceed on the entail. 3*dly*, That they be alſo repeated in all the ſubſequent conveyances of the entailed lands in favour of any of the heirs of entail; without which, creditors cannot diſcover from the face of the right any quality or burden affecting the fee in their debtor's perſon, and ſo are *in bona fide* to contract or deal with him, and may carry off the lands by proper diligence. Neither is it ſufficient for interpelling creditors, that a general clauſe be inſerted in thoſe ſubſequent conveyances, referring to the particular irritancies as ſpecified in the entail; they muſt be repeated *verbatim* in the retours and infeftments of each heir, *Kames*, 60. No entail, where any one ſtatutory requiſite is wanting, is effectual againſt ſingular ſucceſſors, though the creditor's ſecurity ſhould appear ſufficient without it; for creditors ought not to be deprived of any ſecurity which the law has thought proper for them. Though therefore the irritant clauſes ſhould be repeated in the conveyances of the entailed eſtate, by which creditors are enabled, upon a proper inquiry, to diſcover the limitations on the fiar, ſtill the entail can have no effect againſt them if it be not regiſtered, *Kames*, 52.

27. A diſtinction muſt be made in this queſtion between the heir of entail and his creditors; for entails may be in many caſes effectual againſt the heir of the granter, or againſt the inſtitute who accepts of it, which cannot operate againſt ſingular ſucceſſors. Thus, when the act declares, that no unregiſtered entail ſhall be good, the meaning is not, that they ſhall be ineffectual againſt the inſtitute, or other heirs of entail who have accepted of it with all its qualities, but that they ſhall have no force againſt ſingular ſucceſſors, for whoſe ſpecial ſecurity the regiſtration of entails was directed.

* The diſtinction was eſtabliſhed by *New Coll.* ii. 94. by which it was found, that an entail containing prohibitory and irritant clauſes againſt contracting debt, but no reſolutive clauſe, *i. e.* no clauſe voiding the right of the contravening heir, was not effectual againſt the onerous deeds and debts of the heir in poſſeſſion; and the judgement was affirmed upon appeal.

For

For as the act was made to authoriſe entails, no general expreſſion in it ought to be ſo explained, as to deſtroy the effect of ſuch entails as by the common rules of law were effectual antecedently to the enactment. On this ground, the contracting of debt by an heir of entail contrary to the condition of the right accepted of by himſelf, makes way for the next ſubſtitute, though the entail ſhould not be regiſtered, *Kames*, 47. And in like manner, the omiſſion by the heir to repeat the irritant clauſes in his retour and ſeiſin, renders the entail of no force againſt ſingular ſucceſſors, ſee *Home*, 269.; notwithſtanding which, the act declares, that ſuch omiſſion ſhall import a contravention againſt the heir. See other inſtances of this kind, *Goſf. July* 26. 1677, *Stevenſon; Feb.* 5. 1713, *Sir Al. Don.*

28. It has been doubted, whether the clauſe in the aforeſaid act, requiring the regiſtration of entails, has a retroſpective quality, ſo as to include ſuch as had been made before the act. It is obvious, that the rule, That laws, becauſe they cannot regulate our paſt conduct, ought to have no retroſpect, is not applicable to this caſe; for nothing hinders an entail, tho' it ſhould bear a date prior to the act, from being regiſtered after it, as well as an entail of a date poſterior to it. The ſecurity of creditors calls equally for both; and a poſterior ſtatute, 1690, *c.* 33. which enacts without diſtinction, That no heir of entail ſhall be hurt by his anceſtor's forfeiture, provided the entail has been recorded in the terms of the act 1685, implies ſtrongly, that no entail is to be deemed effectual againſt creditors, whatever its date may be, unleſs the regulation in that act be complied with. It was nevertheleſs decided, *Kames*, 89. that entails dated before the act, needed not be recorded, in reſpect of the expreſſions in it, that it ſhall be lawful to make deeds of entail, and that ſuch only ſhall be allowed, *i. e.* ſuch as ſhould be made afterwards. By a later deciſion, it was found, that entails completed by ſeiſin before the ſtatute 1685, needed not be recorded, *New Coll.* ii. 94.; and by the lateſt that has been pronounced upon this point, entails, though dated previouſly to the ſtatute, if they have not been confirmed by ſeiſin till after it, muſt be recorded, *New Coll.* ii. 145. becauſe ſuch entails were not entails, but barely incomplete deeds before the paſſing of that act, and therefore to be conſidered as entails made poſterior to it, which it is agreed by all require regiſtration. Againſt this laſt deciſion, an appeal having been brought, the interlocutor of the ſeſſion was affirmed: but it may be obſerved, that in the judgement of the Houſe of Lords affirming it, it is declared in general, that all entails created of lands in Scotland before making the act 1685, ought to be recorded in the regiſter of tailzies *. This is uncontroverted, that even in deeds of tailzie dated before the act, it behoves the heir to repeat the irritant clauſes in all the conveyances made after it; for admitting that ſuch entails required no regiſtration, yet when they come now to be tranſmitted from one heir to another, the act ought to regulate their tranſmiſſion, as well as the tranſmiſſion of thoſe that were of a date poſterior to it, *Kames*, 60.

29. Entails of this rigorous kind, as they impoſe an unfavourable reſtraint upon property, and become frequently a ſnare to trading people, are *ſtrictiſſimi juris*. An heir of entail has therefore full power as fiar over the entailed lands to which he ſucceeds, in every particular where he is not fettered: he may, *ex. gr.* cut down the whole growing timber on the eſtate, *New Coll.* ii. 13. or he may grant leaſes of the lands, not only for nineteen years, but for the life of the tackſman, if there be no clauſe limiting him. Upon this principle, no reſtraint, though evidently intended by the maker,

* In the caſe of *Creditors of Viſcount Primroſe againſt the Earl of Roſeberry*, it was found, that an entail, tho' completed by infeftment before 1685, was ineffectual, becauſe not recorded; and the judgemeat was affirmed upon appeal, *April* 3. 1767; and in the caſe, *Lord Kinnaid contra Hunter*, *New Coll.* iii. 63. it was found, that an entail, though completed by infeftment before 1685, and though the charter proceeding upon the entail was regiſtered in the regiſter of tailzies, was not effectual againſt ſingular ſucceſſors, becauſe the entail itſelf was not recorded in terms of the act.

nor

nor any prohibition or irritancy, is to be raiſed againſt an heir of entail from implication or inference; ſo that if any clauſe ſhould be omitted, perhaps *per incuriam*, which by the eſtabliſhed form is made uſe of in creating a limitation, the court does not interpoſe for ſupplying the defect. Thus, where all alienations to be made by the heir, or debts to be contracted by him, are by the maker of the entail declared null, which one might conclude is in the preciſe terms of the act 1685; yet if he have not alſo adjected a clauſe, reſolving the right of the contravener, ſuch heir may, as fiar, contract debts to which the entailed eſtate ſhall be ſubjected, *Dalr.* 77.; *July* 22. 1712, *Cred. of Riccartoun.* This clauſe reſolving the contravener's right, though it is not required by the ſtatute, has been thought neceſſary, in the conſtitution of ſtrict entails, from the general rules of our law, by which every landholder, while he continues proprietor, may affect or burden his own property: unleſs therefore he be diveſted of his right by a reſolutive clauſe, depriving him of the power of alienation, his debts and deeds muſt ſtand good againſt the eſtate, notwithſtanding the ſtrongeſt prohibitory clauſes, *New Coll.* ii. 94.: and though inhibition be uſed upon an entail executed under the ſtricteſt irritant clauſes; yet if there be none reſolving the contravener's right, the entail is ineffectual againſt ſingular ſucceſſors, and purchaſers are ſecure in buying the entailed ſubject; becauſe inhibitions cannot ſupply the defects in a right, but ſerve merely to ſecure it ſuch as it ſtood formerly, *New Coll.* ii. 211. On the other hand, where there is a clauſe irritating the right of the contravener, but none declaring the debts to be contracted null, the limitation is not to be extended to ſuch nullity, notwithſtanding the preſumed intention of the entailer, *July* 11. 1734, *Baillie.* Hence alſo, a prohibition to innovate or alter the ſucceſſion, with an irritancy adjected to it, reſtrains the heir only from granting gratuitous deeds in prejudice of the ſucceſſion, but not from contracting onerous debts, *Falc.* i. 116. And though the entail ſhould prohibit the heirs to contract debt under an irritancy, the heir has power to ſell, if there be not alſo an irritant clauſe *de non alienando*, 1732, *E. Hopetoun againſt Hepburn*, which judgement was affirmed by the Houſe of Lords; *Falc.* ii. 92.

30. As to the *ſecond* head, What is deemed an act of contravention againſt the heir, (by which is underſtood any ſtep taken by him, counteracting the directions of the entail, whereby he falls from his right), the act is expreſs, That if he do not repeat the irritant clauſes in the conveyances under which he enjoys the eſtate, he forfeits his right, which accrues to the next ſubſtitute. This enactment appears to relate only to retours on ſpecial ſervices: for a general ſervice is not properly the conveyance of an eſtate; it carries to the heir only unexecuted procuratories of reſignation or precepts of ſeiſin, which are rights merely perſonal, in order that charters and ſeiſins, which are the only proper conveyances, may proceed thereupon; and for this reaſon, the irritant clauſes were ſeldom or never repeated in retours upon general ſervices. It was, however, adjudged, *Kames*, 79. that the omitting of the irritant clauſes in a retour even on a general ſervice, imported a contravention againſt the heir: but this was reverſed upon appeal, and will not probably be hereafter drawn into a precedent. A general reference made by the heir in his conveyance to the irritant clauſes of the entail, as it is equivalent to an entire neglect of the injunctions of the act, muſt of courſe be deemed a contravention againſt the heir, *Kames*, 60. The act alſo declares, that the contracting of debt, or the doing of any deed by which creditors may adjudge or evict the lands entailed, ſhall irritate the right of the heir: yet it is not the bare contraction which makes the irritancy, but the allowing the debt contracted to affect the property; for the words, "whereby the ſame *may* be adjudged," are favourably explained

plained to mean, " whereby they *ſhall* be adjudged." This ſenſe is ſupported, not only from the unfavourableneſs of entails, but from the reaſon of the thing; for if the ſimple contraction were to infer contravention, the heir durſt enter into no bargain, even for the neceſſaries of life, without being brought under an irritancy, *Kames*, 34.; 1738, *Stewart againſt Denholm*. An heir of entail, though he ſhould be reſtrained under the ſtricteſt irritancy from the contracting of debt, may nevertheleſs ſettle a jointure on his widow, not exceeding the legal terce, if he be not ſpecially limited in his powers of providing for her; becauſe the proviſions of law are not underſtood to be excluded in entails, *Kames*, 90. But the granting of proviſions to younger children, even moderate ones ſuitable to the condition of the granter, has been adjudged a contravention, *Feb.* 1730, *Borthwick*, upon this medium, That the providing of theſe is to be accounted the voluntary deed of the granter, ſeeing younger children are not ſecured in any legal proviſion out of the father's eſtate, as widows are out of that of the huſband. Yet it ought to be obſerved, that this laſt judgement was reverſed upon appeal.

31. It is maintained by ſome writers, *Mack.* § 17. *h. t.* that an heir of entail contravening, forfeits, not only for himſelf, but for all the heirs ſucceeding in and through him, where there is no expreſs clauſe in the deed of entail reſtricting it: and though this doctrine ſeems to receive ſome ſupport from the words of the act 1685, which declares, that entails executed according to the directions of it, ſhall be effectual, not only againſt the contravener and his heirs, but againſt creditors; yet as it is hardly to be reconciled either to the rule of equity, That the innocent ought not to ſuffer for the guilty, or to that ſtrictneſs of interpretation which ought to be obſerved in entails, the more favourable opinion, which confines the penalty to the contravener himſelf, has been approved by a deciſion, *Fount. Jan.* 6. 1697, *Simpſon*. Yet where the entailer does not intend that the penalty ſhall reach to the heirs of the contravener's body, a clauſe is generally inſerted in the deed, *in majorem cautelam*, that the contravener ſhall forfeit only for himſelf, but not for his deſcendents. The reſtraints upon the heirs of entail do not affect the firſt inſtitute in the deed, to whom the granter transfers his right directly, if he be not expreſsly fettered; for he is not an heir, all of whom enter by ſervice, but a ſimple diſponee, who takes as ſingular ſucceſſor to the maker, and muſt make up his titles by expeding infeftment on the procuratory contained in the grant. In conſequence of this, the ſubſtitutes cannot take up the ſucceſſion as heirs to the diſponer, but muſt ſucceed as heirs to the diſponee, and therefore are liable to perform his deeds, *New Coll.* ii. 100.

32. No ſubſtitute in an entail can enter into the poſſeſſion of the entailed eſtate, upon the contravention of the former heir, without firſt declaring the irritancy againſt him. After which he might, before the act 1685, have ſerved himſelf heir, either to him who had contravened, or to the maker of the entail; (*Mack.* § 17. *h. t.* edition 1684, which has been continued by miſtake in the later editions). But the ſpecial method preſcribed to the ſubſtitute in that caſe by the act 1685, is, that, after having obtained declarator of irritancy againſt the contravener, he paſs him by, though he had been laſt ſeiſed in the fee, and ſerve heir to the perſon who died laſt ſeiſed, and did not contravene. This is doubtleſs a deviation from the rule, That one ought to ſerve to the anceſtor laſt infeft, who is in this caſe the contravener; but the law conſiders the contravener, after the irritancy is declared againſt him, as having never had a right, and conſequently as having never been infeft. And the plain reaſon why this anomalous method of ſervice is preſcribed is, that if ſome expedient had not been fallen upon,

upon, for the next heir to enter without being made liable for the debts of the perſon laſt infeft, he could have reaped no benefit from the reſolutive and irritant clauſes conceived in his favour. As all the heirs of entail have an intereſt to preſerve the ſettlement which is made in their favour, it is competent to a remoter ſubſtitute to bring a declarator of irritancy againſt the heir contravening, if the more immediate ſubſtitute ſhall decline it, *Fount. Jan.* 6. 1697, *Simpſon*; *Jan.* 1723, *Irvine*. The contractions of debt by which an irritancy is begun, and the diligences which are directed thereupon againſt the entailed eſtate, are not ſimply null, though the next heir may get a nullity declared by a proper action: for irritant clauſes, being intended merely in behalf of the next heir, can have no operation but in his favour; and if that perſon who alone has an intereſt to take the benefit of ſuch irritancy, ſhall neglect to uſe his right, the irritancy is ineffectual. If therefore the next heir ſhould not, within the years of preſcription, bring his challenge againſt the contravener's right, the diligences led againſt the eſtate would carry it off, and put an end to the entail. As the irritancies in an entail are impoſed ſolely for the benefit of the more remote ſubſtitutes, the laſt ſubſtitute called by the entail, on whoſe failure the eſtate is to deſcend to *heirs whatſoever*, or to *heirs and aſſignees*, lies under none of the limitations that fettered the former heirs, but is at liberty, as abſolute and unlimited fiar, to carry on the repreſentation of the family by a new entail; for entails, being *ſtricti juris*, admit of no limitation by inference upon any of the heirs, though truly intended by the maker. Now thoſe who ſucceed by the laſt termination of *heirs whatſoever*, or to *heirs and aſſignees*, fall not under the deſcription of *heirs of entail*, that expreſſion being merely of ſtyle, originally calculated to exclude the fiſk; and the laying reſtraints on the proper ſubſtitutes in favour of the *heirs whatſoever*, is evidently contrary to the intention of the entailer, whoſe chief view in making the entail is preſumed to be, the continuing the repreſentation of his family in one perſon; which is in itſelf impoſſible, if the heirs whatſoever, who ſucceed after all the ſubſtitutions are exhauſted, ſhould happen to be heirs-portioners, *New Coll.* ii. 217.

33. By the late act for aboliſhing ward-holdings, 20° *Geo. II. c.* 50. it is declared lawful for the King to purchaſe any lands in Scotland, for erecting buildings or making ſettlements, notwithſtanding the ſtricteſt entail: and by the act immediately following, *c.* 51. of the ſame year, where the lands to be purchaſed belong to minors or fatuous perſons, who cannot covenant for themſelves, his Majeſty may purchaſe them from the tutors, curators, or guardians of the proprietor. Theſe acts appear, by the preamble to both of them, to be limited to lands lying in the highlands of Scotland; but the enacting words of both, comprehend all lands in Scotland without exception. By the firſt of the above-cited ſtatutes, every heir of entail may ſell to his vaſſals the ſuperiorities belonging to the entailed eſtate; but where either lands or ſuperiorities are thus ſold, the purchaſe-money is to be ſettled on the ſame ſeries of heirs, and under the ſame limitations and irritancies, that the lands or ſuperiorities ſold were ſettled before the ſale.

34. Rights are frequently granted to or ſettled upon two or more perſons jointly, who, as conjunct fiars, enjoy the ſubject during their joint lives *pro indiviſo*. The rules which govern the ſucceſſion of ſuch rights, fall properly to be explained here.——It may be premiſed, that not feudal ſubjects only, but bonds, may be granted in conjunct fee: for though there is no proper *feudum* of money or of bonds, yet as a yearly profit ariſes from money as well as land, lawyers have admitted a *quaſi feudum* in bonds, which gets the name of *feudum nominis*; a term borrowed from the Romans, who gave the appellation of *nomina* to all money-debts bearing intereſt,

intereſt, *l.* 11. *C. De pact. conv.* The ſame general rules are common to both, and they all ariſe from the will of the granter, either expreſs or preſumed.

35. Conjunct rights are granted, either to ſtrangers, to father and ſon, or to huſband and wife. Where an entail is made, or any right conceived, in favour of two ſtrangers, in conjunct fee and liferent, and their heirs, the two are equal fiars during their joint lives, as if they had contributed equally to the purchaſe: but after the death of the firſt, the ſurvivor has the liferent of the whole; and after the ſurvivor's death, the fee divides equally between the heirs of both. If the right be taken to two jointly, and their heirs, without any mention of liferent, the conjunct fiars enjoy the ſubject equally while both are alive, as in the former caſe: but on the death of the firſt, neither the fee, nor even the liferent of his half, accrues to the ſurvivor, but deſcends to his own heir. In a right taken to two jointly, and the longeſt liver, and their heirs, the words *their heirs* are underſtood to denote the heirs of the longeſt liver; and conſequently, though the ſeveral ſhares belonging to the conjunct fiars are affectable by their ſeveral creditors while both are alive, yet upon the death of any one of them, the ſurvivor has the fee of the whole, excluſive of the heirs of the predeceaſed; not only the fee of his own original ſhare, but that of the ſhare belonging to the predeceaſed, in ſo far as it is not exhauſted by his debts, *Falc.* i. 206. If the right be taken to two ſtrangers, and to the heirs of one of them, he to whoſe heirs the fee is taken is the only fiar; the right of the other reſolves into a naked liferent. All theſe rules ariſe naturally from the import of the ſeveral expreſſions. But notwithſtanding the laſt-mentioned rule, a father who takes a right to himſelf, and his ſon *nominatim*, and to his ſon's heirs, continues the only fiar; and the ſon is barely an heir ſubſtitute to him, though he ſhould be infeft by his father on the right; for rights from fathers to children being gratuitous, and granted merely in conſequence of the natural obligation annexed to the relation of a parent, are interpreted favourably for the granter, ſo as not to deprive him of the fee during his own life, unleſs it appear from the tenor of the grant, that his intention was to ſtate it in the ſon, *July* 23. 1675, *L. Lamington.*

36. Where a right is taken to a huſband and wife in conjunct fee and liferent, and the heirs of their body, or their heirs indefinitely, the general rule is, that the huſband is, from the prerogative of his ſex, the ſole fiar, as the *perſona dignior*; and the right of the wife reſolves into a liferent; for which reaſon, the words *their heirs* are interpreted to be the heirs of the huſband, *Dirl.* 85. But this rule ſuffers ſeveral limitations, all founded on the intention of the parties, preſumed from the different circumſtances of caſes. *Firſt*, The perſon from whom the ſubject originally flowed is accounted fiar, *Hope, Maj. Pr. Liferent, Kincaid*, unleſs where it appears from the ſtrain and contexture of the conjunct right, that the fee was intended to be given to the other, *Nov.* 21. 1705, *Cred. of Paterſon.* But though the right have flowed from the wife, yet if it was given her in name of tocher, the fee is in the huſband; ſince whatever is given in tocher is the property of the huſband. *2dly*, Where the right is taken to the wife's aſſignees, the law conſiders her as fiar; for it is of the eſſence of a fee to diſpoſe of the ſubject at pleaſure, *Feb.* 4. 1709, *Fead.* *3dly*, The wife is fiar where her heirs are more favoured in the ſubſtitution than thoſe of the huſband, according to the maxim, That he is fiar, *cujus heredibus maxime proſpicitur.* This character is, by Craig, *lib.* 2. *dieg.* 22. § 6. and Stair, *b.* 3. *t.* 5. § 51. *verſ. The next difficulty is*, applied to that ſpouſe on whoſe heirs the laſt termination falls: and no doubt the ſpouſe on whoſe heirs the ſucceſſion is ſettled in the laſt place, muſt be fiar, in conſequence of this rule, where there

there are no intermediate ſubſtitutions between the heirs of the marriage and them. Thus a ſum of money aſſigned by the wife in tocher, to her huſband in conjunct fee and liferent, and the bairns of the marriage, whom failing, to the wife's heirs, was adjudged to belong to the wife, *June* 1733, *Angus*. But where there are intermediate ſubſtitutions, that ſpouſe is deemed fiar whoſe heirs are firſt called after the heirs of the marriage, tho' the ſucceſſion ſhould be ſettled ultimately upon the heirs of the other; becauſe the heirs firſt called are undoubtedly favoured above thoſe who are only ſubſtituted in default of the firſt, *Feb.* 20. 1667, *Cranſton*; *July* 1720, *Cred. of Elliot*. Where the right is taken to the huſband and wife, and to the longeſt liver and their heirs, the fee is, in the event of the wife's ſurviverſhip, adjudged by our later deciſions to belong ſolely to the wife, to the entire excluſion of the huſband's heirs, as if the right had been granted in the ſame terms to two ſtrangers, *June* 22. 1739, *Ferguſon*; contrary to the older practice, *Jan.* 23. 1668, *Juſtice*. Though the huſband is thus preferred to the fee in feudal rights, and in the *quaſi feuda* of bonds taken jointly to him and his wife; yet in the rights of moveable goods, the words of ſtyle are more ſtrictly obſerved, ſo as the heirs of the huſband and wife ſucceed equally, in regard that moveables ſuffer a diviſion more eaſily than heritage, *Feb.* 2. 1632, *Bartholomew*. For the origin of conjunct rights between huſband and wife, ſee *Cr. lib.* 2. *dieg.* 22. § 8.

37. Rights to corporate bodies are not conjunct fees: for the ſeveral members of the corporation are not conjunct fiars; and the corporate body itſelf has no right to the fee, but to the fruits only, according to the limitations of the grant or patent. Neither are ſuch rights conceived to heirs, as conjunct infeftments are.

38. Though all who ſucceed in a certain ſubject by the deſtination or appointment of the proprietor, without impropriety may be, and ſometimes are, called *heirs of proviſion*; in which ſenſe, thoſe who ſucceed to an entailed eſtate are ſtyled *heirs of tailzie and proviſion*; yet that appellation is moſt commonly given to thoſe who ſucceed by a proviſion in a marriage-contract, or in a bond, or other right, containing a clauſe of ſubſtitution. By the ordinary ſtyle of proviſions in a marriage-contract, the father ſettles the lands or other ſubjects expreſſed in it, upon himſelf and his wife in conjunct fee and liferent, and on the heirs of the marriage in fee. If there are ſons of the marriage, the eldeſt is the ſole heir of proviſion, or of the marriage, where the ſubject provided is heritage. In the caſe of daughters only, all of them are heirs-portioners of proviſion. If in a marriage-contract, providing an heritable ſubject to the heirs-male of the marriage, a ſpecial proviſion is granted to a daughter, in default of, or failing ſuch heirs-male, the daughter is intitled to it, though a ſon ſhould exiſt of the marriage, unleſs he ſhall alſo ſurvive the father: for one cannot with any propriety be called heir while the anceſtor to whom he ought to be heir is alive; and the plain intention of parties by ſuch a ſtipulation is, that the daughter ſhall have the right, unleſs the ſucceſſion of the ſubject provided ſhall actually devolve upon the ſon as heir-male, on his father's predeceaſe. Heirs of a marriage are more favourably regarded than heirs ſubſtituted in a ſimple deſtination; which laſt, being gratuitous, gives only the hope of ſucceſſion, and may be altered by the maker, or any of the members who ſucceed before the ſubſtitute: whereas marriage-contracts are onerous deeds, by which the bride and her friends ſtipulate, that ſpecial proviſions therein mentioned ſhall be made good by the father to the heir or other iſſue of the marriage, in conſideration of the tocher or fortune brought with her. The heir of a marriage has therefore a mixture of two diſtinct characters in him: He is not only heir, but *quodammodo* creditor to his father: for, by the marriage-articles, the father is laid under an implied obliga-

tion not to defeat thoſe proviſions by any gratuitous deed; conſequently the heirs in whoſe favour the obligation is granted, have an action competent to them; or they may uſe diligence againſt the father, if the ſubject provided has been carried off by onerous creditors, or if he hath done any deed to the prejudice of his obligation, to purge incumbrances, or to make their proviſions effectual in the event of his death, *Feb.* 13. 1677, *Fraſer*; *Dec.* 5. 1734, *Fotheringham*; or they may ſet aſide gratuitous deeds ſigned by him to their prejudice, upon the ſtatute 1621, to be hereafter explained, even though they ſhould be granted in favour of the heir's own mother, *July* 10. 1677, *Carnegy*; or of a ſecond ſon of the ſame marriage, *Feb.* 1718, *Fea*. And this the heir of a marriage hath a right to do, without ſerving heir to his father, the granter of the deeds under challenge: for he is truly creditor to his father; and it is not only unneceſſary, but improper, for a creditor to ſerve heir to his debtor, in order to make his payment effectual, *Dict.* ii. *p.* 279. 280.; *New Coll.* ii. 202.

39. Though ſettlements in marriage-contracts conceived in the general terms above expreſſed, reſtrain the father from gratuitous deeds to the prejudice of the heir of the marriage; yet the heir's right is not a right of proper credit, but of ſucceſſion: and the caſe is the ſame in proviſions of money as of land. If therefore a father ſhould become bound to pay a particular ſum to the children of the marriage at the firſt term after the deceaſe of him and his wife, the children have barely a right of ſucceſſion. The term of payment is in that caſe a plain indication, that the children had no proper right of credit againſt the father during his life, *New Coll.* i. 109. And ſince they are only heirs of proviſion, it follows, that they cannot come in competition with their father's onerous creditors, though he had been inconteſtably ſolvent at the time of ſigning the contract, or granting the proviſion, *Fount. July* 24. 1696, and *June* 17. 1697, *Napier*. Nor does it import, in that caſe, whether the ſum be or be not actually lent according to the father's obligation of proviſion, *Jan.* 24. 1677, *Graham*; *New Coll.* i. 109. Hence the father is underſtood to reſerve to himſelf the fee, notwithſtanding ſuch proviſions; and, of courſe, continues to have a power of charging the ſubject with juſt debts, and even to alienate it for onerous cauſes. And from this he cannot be debarred by inhibition; for, as has been already obſerved, diligences are barely fences to ſecure obligations to the creditor ſuch as they are, but cannot make them broader than they were originally *. Hence alſo the father, notwithſtanding his ſettlements upon the heir of the marriage, continues to have a power of adminiſtration, ſo as to lay him under reaſonable reſtrictions for the preſervation of the family, *Dec.* 7. 1728, *Craik*; *Jan.* 7. 1737, *Trail*. And though the deciſion, *Kames*, 50. which entirely excluded the heir of a marriage from the eſtate provided to him, in reſpect of his weakneſs and extravagance, is not perhaps to be made a precedent; yet it might ſeem to incroach too much upon the right inherent in fathers, if they had it not in their power to ſave their family from deſtruction, by limiting in the uſe of his property an heir who had plainly diſcovered a riotous and diſſipating temper, with irritant and reſolutive clauſes, provided theſe clauſes were pointed againſt him alone, and that the order of ſucceſſion ſettled on the other heirs of the marriage was not altered or innovated in that new deed †. The father lies under no degree of reſtraint in favour of the ſubſtitutes who are called by the marriage-contract after the iſſue of the marriage, and who acquire no right by ſuch ſubſtitution,

* See *Kames*, *Rem. Dec.* 91.

† One bound by his contract of marriage to diſpone certain lands, and what other lands ſhould be acquired during the marriage, to the heirs of the marriage; the ſon, being prodigal and bankrupt, conveyed the lands to the ſon's children, burdened only with a ſmall annuity to him.—In a reduction, at the inſtance of the ſon and his creditors, the Lords ſuſtained the deed, and aſſoilzied, *Thomſon and his Creditors contra Thomſons*, 1762.

St.

St. Anſ. p. 145.: for no contract can have effect beyond the intereſt of the parties contracting; and the wife and her relations, who are the only contracters with the huſband, are not intereſted in the ſucceſſion, except in ſo far as it is provided to the wife's iſſue. As to the remoter ſubſtitutes, if the huſband contracted, it was with himſelf alone; and therefore the ſubſtitution muſt be accounted a ſimple deſtination as to them, which may be altered by him at his pleaſure; ſee *Jan.* 29. 1735, *Craik.*

40. Though ſuch marriage-ſettlements, when executed in the ordinary form, are poſtponed to every onerous debt of the granter, even thoſe contracted after, and ſo cannot come in competition with his extraneous creditors; they are nevertheleſs effectual againſt a cautioner who has engaged himſelf in the marriage-contract for the father's performance of his obligation: for the plain language of that engagement is, that he ſhall make the proviſion effectual to the heir, in caſe the father himſelf ſhall fail; ſo that the claim competent to the heir of the marriage in ſuch caſe, is not as heir to his father, but as creditor to the cautioner, *Fount. Dec.* 19. 1707, *Dickſon*; *Dec.* 5. 1734, *Fotheringham.* It may alſo be obſerved, that marriage-ſettlements may be ſo drawn as to give to the heir a proper right of fee in the land-eſtate, or a proper right of credit in the ſpecial ſum provided to him. When this is the intention of parties, it is commonly executed by the father's obligation in the marriage-articles, not to contract debt; or to infeft the heir in the lands againſt a determinate day, or when he ſhall have attained a determinate age; or by a clauſe reſtricting his own right to a liferent: and ſuch obligations, though granted *liberis naſcituris*, if ſecured by proper diligence, or perfected by ſeiſin, found a preference to the heir againſt all the poſterior deeds of the father, even onerous, *Kames*, 51.; ſee the *ratio decidendi* in a deciſion, *Pr. Falc.* 30. Thus alſo in a money-proviſion, where the father is bound not barely to provide the heir or children of the marriage in a ſum, but to make payment of it to them at a term which may happen to exiſt before the father's death, a proper *jus crediti* is conſtituted to them, in virtue of which they are intitled to come in competition with the father's onerous creditors; and the preference will be determined according to the nature of their rights, and the priority of the diligences uſed upon them, *Edg. Jan.* 24. 1724, *Cred. of Eaſter Ogle*; *Kames*, 45.; *New Coll.* ii. 160. From theſe obſervations it follows, that though the rights which thus create a proper credit be granted to *the heir* of the marriage, that appellation is to be underſtood only *deſignativè*, for marking out that the perſon to whom the right is granted ſtands in ſuch a relation to the deceaſed as gives him a right to ſerve to him if he ſhould think fit: but there is no neceſſity that he be *heres actu* to his father; for he is his proper creditor; ſee *New Coll.* i. 177. Yet, as it is not to be preſumed that a father intends to diveſt himſelf of the fee during his life, the expreſſions muſt be very explicit to take his obligation of proviſion to the heir out of the common caſe.

41. Though a father cannot gratuitouſly diſappoint any of his wife's iſſue, whether they be called by the marriage-contract as inſtitutes or as ſubſtitutes; yet the heir, when he comes to ſucceed, lies under no ſuch reſtraint; for ſo ſoon as the heir firſt called is, upon the father's deceaſe, ſerved heir of the marriage, the proviſion in the contract is fulfilled; and therefore, if he be not limited in his right of fee by the marriage-articles, he may, as abſolute fiar, alter the order of ſucceſſion at pleaſure. If, for example, lands be deviſed by the father in fee-ſimple to the heir-male of the marriage, whom failing, to his eldeſt daughter; the heir-male may, after completing his titles to that eſtate as heir of proviſion, make a new gratuitous ſettlement of it upon his own heir-female, to the excluſion of the next ſubſtitute in the marriage-contract, though a daughter of the ſame marriage with himſelf.

42. A father may, notwithſtanding a firſt marriage-contract, ſettle by a ſecond a jointure upon the ſecond wife, or proviſions on the iſſue of the ſecond marriage; which will be effectual againſt the heir of the firſt, tho' ſuch ſettlements or proviſions ſhould incroach on the ſubject provided to him by his mother's prior contract, if the father had no other fund out of which he could provide the ſaid wife and children. This ariſes from the favour of marriage, and becauſe ſuch ſettlements are rational, and in truth onerous deeds, which the father cannot be barred from executing by any prior contract. Yet he cannot, without controul, make ſuch exorbitant ſettlements upon a ſecond marriage, as would too much incroach upon the prior *jus crediti* acquired by the children of the firſt; he can only provide them ſuitably to his circumſtances. If a proviſion be not exorbitant, the heirs of the firſt marriage are liable, as heirs, to fulfil that rational ſettlement made by the father upon the wife and iſſue of the ſecond marriage: but if it exceed the juſt meaſure of his circumſtances, they are, *qua* creditors to their father, intitled to challenge it, as a fraudulent or gratuitous deed. The quantum of ſuch proviſion is therefore entirely arbitrary, and muſt be judged of by the extent of the father's free eſtate. It is not only the heir of the firſt marriage who can bring a reduction of a ſettlement in favour of a ſecond marriage *quoad exceſſum*; the action is alſo competent to the heirs of the wife of the firſt marriage, in caſe any ſum or ſubject ſhould be left to them by a ſubſtitution in the firſt marriage-contract, *Fount. Jan.* 19. 1697, *Laws*. Where onerous or rational deeds are thus granted by a father, by which the proviſions to the heir of a marriage are diminiſhed, an action of recourſe lies at the heir's inſtance againſt the father, in caſe he ſhall afterwards acquire a ſeparate fund which may enable him to fulfil both obligations, *Jan.* 27. 1730, *Henderſon*.

43. In proviſions by marriage-contract, the conqueſt during the marriage, or a certain proportion of it, is frequently ſettled, either on the heir, or on the iſſue of the marriage. By conqueſt is underſtood the eſtate which the father ſhall acquire during the marriage; concerning which the following general rules are obſerved in practice. *Firſt*, What the father ſucceeds to, as heir to an anceſtor, or as executor to a perſon deceaſed, is not conqueſt; nothing is comprehended under that term, but what is acquired by the father's own induſtry, or by ſingular titles, *St. b.* 3. *t.* 5. § 52. *2dly*, All conqueſt muſt be free, after the deduction of debts; and therefore if the father ſhall have ſold one eſtate, and with the price purchaſed another, the price of the eſtate ſold muſt be diſcounted from the purchaſe: for the plain meaning of a clauſe of conqueſt is, that whatever real addition has been made to the eſtate during the marriage, that, and that only, ſhall deſcend to the heir or iſſue of the marriage, *June* 27. 1676, *E. Dunfermline*. *3dly*, An obligation of conqueſt does not bind the father ſo ſtrongly as a ſpecial proviſion: for both our judges and lawyers have looked upon it as little better than a ſimple deſtination; ſo that the ſubject may be affected, not only by the father's onerous or rational deeds, but even gratuitous, provided they be granted for ſmall ſums, perhaps to a child of another marriage, *Feb.* 9. 1669, *Cowan*; *June* 19. 1677, *Murray*; *Dalr.* 10. But any deed merely gratuitous, alienating the whole or a conſiderable part of the conqueſt to the prejudice of the heir to whom it was provided, which has no rational conſideration to ſupport it, is to be regarded as granted *in fraudem* of the proviſion of the contract, and is therefore ſubject to reduction. This ample right of fee as to the conqueſt, remains with the father in full force, notwithſtanding the diſſolution of the marriage to the iſſue of which the conqueſt was provided; no action therefore lies at the ſuit of the child intitled to the conqueſt againſt the father himſelf, to obtain a liquidation thereof; and conſequently the conqueſt is computed *quoad* the father,

as

as at the time, not of the diſſolution of that marriage, but of the father's death, *Fount. Nov.* 27. 1684, *Anderſon*; *Fount. Feb.* 24. 1685, *Cruikſhanks.*

44. Thoſe who ſucceed in virtue of clauſes of ſubſtitution, are all heirs of proviſion in a proper ſenſe. A clauſe of ſubſtitution is that by which the ſucceſſion of any ſubject is declared by the granter to devolve on the ſubſtitute, in default of the inſtitute; and ſuch clauſes are frequent, not only in entails and marriage-contracts, but in bonds of proviſion to children, bonds of borrowed money, teſtaments, &c. The Romans had the name of *ſubſtitution*, without the thing. By their law, no man could name an heir or a ſubſtitute, to the perſon who was to ſucceed to himſelf, unleſs that perſon was an infant, and only in caſe he ſhould die before puberty. Hence, all their ſubſtitutions, in every other caſe, reſolved into conditional inſtitutions; and meant no more, than that if the inſtitute either died before the granter, or declined to accept of the right, the ſubſtitute might take the ſucceſſion: but where the inſtitute took up the ſucceſſion, the ſubſtitution evaniſhed; and the ſucceſſion, after the death of the inſtitute, devolved, not on the ſubſtitute, but on the heir of the inſtitute. Our old practice in the ſubſtitution of bonds was conformable to the Roman law; for the ſubſtitution took place only in the event of the inſtitute's death before the term of payment of the bond, or of his not accepting of the right, *Feb.* 22. 1623, *Leitch.* But by later deciſions, the ſubſtitute in a bond has ſucceeded, at what time ſoever the inſtitute died, *quandocunque defecerit*, though he had actually taken the ſucceſſion before his death, *June* 26. 1634, *Keith*; which is quite repugnant to the Roman notion of ſubſtitution. In entails, clauſes of ſubſtitution have been always underſtood in this laſt ſenſe: and by our preſent practice, the ſame doctrine holds in teſtaments, *July* 13. 1681, *Chriſtie*; in marriage-contracts, *Harc.* 370. laſt part; *Fount. Jan.* 19. 1697, *Laws*; and generally in all deeds containing ſubſtitutions, *Kames, Rem. Dec.* 14.; except where from the ſpecial nature of the right, or conception of the clauſe, it is preſumable that the parties intended no more than a conditional inſtitution, *Fount. Feb.* 23. 1697, *Dickſon:* yet ſee *Dirl. Doubts, v. Subſtit. in legacies.* It ſeems to be a general rule of our law, That ſubſtitutes ſucceed, though the inſtitute ſhould at his death have left iſſue of his own, unleſs where the deed ſpecially provides, that the ſubject ſhall go to the inſtitute and the heirs of his body; whom failing, to the ſubſtitute. A ſubſtitute in a bond has in the common caſe no ſtronger right than the ſubſtitute in a ſimple deſtination of a land-eſtate; for the inſtitute can, in the character of abſolute fiar, evacuate the ſubſtitution by a deed merely gratuitous, *Dec.* 19. 1735, *Stewarts.* But where a clauſe is adjected to the ſubſtitution, prohibiting the inſtitute to grant any deed to the prejudice of it, he cannot incroach on the ſubject, except for neceſſary, or at leaſt onerous cauſes, *July* 8. 1673, *Graham.* A prohibition is implied in a bond of proviſion by a father, ſubſtituting his children mutually to one another, by which the ſhare of the child deceaſing is appointed to go to the ſurvivors, *Dec.* 14. 1710, *Smith*; ſee alſo *New Coll.* i. 34. and *Edg. Feb.* 6. 1724, *Meffats.* The ſecluſion of aſſignees in a bond granted to two ſiſters, muſt bar any of the ſiſters from aſſigning her part to a ſtranger, to the prejudice of the other ſiſter, as effectually as a mutual ſubſtitution of children to one another; for the prohibition to aſſign, is only implied in the laſt caſe, whereas in the firſt it is expreſs, *New Coll.* ii. 162. But where the deed veſting the ſubject in the ſiſters, inſtead of ſecluding aſſignees, barely prohibits any of them to alter the ſucceſſion, an aſſignation by one ſiſter to her huſband, though in a poſtnuptial contract, is ſufficient to carry the right to him: for the reſtraint in ſuch caſe does not extend againſt alienations *inter vivos*, *New Coll.* i. 37.

45. A clauſe of return, is that by which a ſum in a bond or other right,

or any part of it, is provided in a particular event to return to the granter and his heirs: it is therefore truly a ſpecies of ſubſtitution, by which the granter provides, that the right ſhall, in default of the grantee, go, not to a third perſon, as in a common ſubſtitution, but to himſelf. And the known rule of ſimple ſubſtitutions, That the inſtitute can defeat the ſubſtitution, even by a gratuitous deed, hath been applied to clauſes of return. Hence a legatee, whoſe legacy contained a proviſion of return to the granter's own executor, has been found to have the ſame power of aſſigning it gratuitouſly, as if the ſubſtitution had been in favour of a ſtranger, *Home*, 13. But a diſtinction has been lately attempted to be made between the two. It has been ſaid, that where there is a proper clauſe of ſubſtitution, the fee of the ſubject is fully veſted in the diſponee; which implies a power of diſpoſing of it; whereas a clauſe of return makes a conditional right, by which it is to return in a certain event to the granter himſelf, and ſo diſables the diſponee from diſappointing the proviſion, at leaſt gratuitouſly: but this point has not yet received a deciſion *. Where the right bears a clauſe, not of return to the granter himſelf, but barely of ſubſtitution in favour of his heir, it ſeems to be agreed, that there is no prohibition to alter, *New Coll.* i. 51. Where a bond is granted for an onerous cauſe, tho' it ſhould contain a proviſion of return, the creditor is not barred from altering the deſtination, even gratuitouſly; becauſe ſuch clauſe is conſidered as proceeding from the will of the creditor alone, and ſo is of the nature of a ſimple deſtination. Thus a creditor who in a bond adjects a clauſe of return, failing heirs of his own body, to the debtor himſelf, may evacuate the return at his pleaſure, *Nov.* 18. 1680, *Murray*; *Home*, 51. But where the ſum contained in the obligation flows from the granter, as in bonds of proviſion, donations, &c. or where there is any other good cauſe for the proviſion of return in his favour, the creditor's right of fee is limited, ſo that he cannot fruſtrate the return gratuitouſly, *Jan.* 31. 1679, *Drummond*; *Pr. Falc.* 97.: yet he can, in the character of fiar, aſſign the ſum for an onerous cauſe, or it may be affected for his debt; and he may even demand the contents of the bond, without giving ſecurity that the return ſhall be effectual, becauſe his credit was truſted to at granting the right; but if he be *vergens ad inopiam*, he muſt give ſecurity before payment be made to him, *June* 10. 1747, *Beatſon*.

46. It would appear, that by the Roman law, *l.* 102. *De cond. et demonſtr.*; *l.* 6. *C. De inſt. et ſubſt.*; *l.* 30. *C. De fideic.* (though theſe texts are by ſome applied to ſpecial caſes), this condition, *Si ſine liberis deceſſerit*, was implied in all ſettlements by teſtament, made by one who had at the time no lawful iſſue; ſo that if the teſtator came afterwards to have deſcendents of his own body, the ſettlement loſt its force. This rule ariſes from a preſumption founded in nature itſelf, that the granter would have preferred his own iſſue if he had had their exiſtence in view; and it ſeems to be approved in our practice, *Home*, 104. N° 1. But if the teſtator had afterwards children, and, notwithſtanding their exiſtence for ſome competent time before his death, made no alteration of the ſettlement in their favour, it is preſumed that he neglected them from deſign, eſpecially if the ſettlement was not of the whole or the greateſt part of his eſtate, *New Coll.* ii. 150.——The import of other conditions adjected to teſtaments will be conſidered under the next title.

47. Doubts frequently ariſe, who the heir is that is truly intended by the maker of a ſettlement or entail. Upon this head, it may be premiſed, that though by the word *heir* in the moſt proper ſignification, the heir at

* It was found, that a clauſe of return might be defeated by a gratuitous deed, in the ſame way as a ſimple ſubſtitution, *New Coll.* iii. 101. § 1.

law

law is underſtood, it is certain that that general term has not always one fixed ſignification, but varies according to the nature of the ſubject, or of the ſecurity, or other circumſtances; ſignifying ſometimes heir at law, ſometimes heir of conqueſt, ſometimes heir *in mobilibus*, or executor. Thus, in perſonal bonds, or other moveable rights, it ſignifies executors. In an heritable bond, with a clauſe of infeftment, that general term carries the ſubject to the heir at law; but if the creditor charges the debtor to pay, that very term in the ſame bond is afterwards explained to ſignify executors. In bonds of corroboration, where principal ſums ſecured by heritable bonds are accumulated with intereſts, the term receives two different meanings, according to the two ſubjects contained in the bond: the principal ſum deſcends in the ſame manner as if there had been no accumulation, and the intereſt ariſing therefrom goes to executors. In a *feudum novum*, or heritable right acquired by a perſon himſelf, it is made uſe of to denote the heir of conqueſt. Thus alſo, in every caſe where there has been an antecedent deſtination of a ſubject, limiting the ſucceſſion to a particular order of heirs, the general word *heir*, or *heir whatſoever*, in all poſterior ſettlements of that ſubject, muſt be underſtood, not of the heir at law, but of the heir of the former inveſtiture, *Dalr.* 4.; *Jan.* 1727, *M. Clydeſdale*; unleſs it ſhall appear from pregnant circumſtances that that term was intended to be uſed in its proper ſenſe; which ariſes from this rule, That a deſtination once made, is not eaſily preſumed to be altered or innovated *. In like manner, if one who has taken the right of lands to himſelf, and to heirs of a certain character, ſhall afterwards acquire adjudications, reverſions, tacks, or any other collateral ſecurity affecting thoſe lands, taking the conveyance to himſelf and his heirs indefinitely, the general expreſſion of *heirs* in the laſt deed does not point out the heirs at law, but thoſe to whom the lands themſelves were before provided; for the deceaſed, when he acquired a new right affecting thoſe very lands which he had before ſettled on a ſpecial order of heirs, could not mean to ſet his heirs at law and them by the ears to diſpute on their ſeveral intereſts in the ſubject, *St. b.* 3. *t.* 5. § 12. On a ſimilar ground, if one veſted with an heritable ſubject, deſcendible to his heirs at law, ſhall acquire right to another ſubject intimately connected with the former; if, for inſtance, a ſuperior of lands ſhall afterwards acquire their property, ſuch poſterior acquiſition does not aſcend to his heir of conqueſt, though it was truly purchaſed by himſelf upon a ſingular title, but deſcends to the heir to whom the firſt right was provided, *Jan.* 8. 1740, *D. Hamilton*, obſerved in *Dict.* ii. *p.* 401.

48. As proper entails, with a long ſubſtitution of heirs, are intended to fix the ſucceſſion in a variety of future poſſible events, it is no wonder tho' expreſſions ſhould ſometimes be uſed by the entailer, in the deſcription of the heirs, which may raiſe a doubt what perſons he meant to favour. As to which, this general rule may be laid down, That words which have a fixed legal meaning ought, when made uſe of in ſettlements or ſecurities, to be underſtood in that meaning. Thus where lands are provided in a marriage-contract to the heir-male, and in default of him to the heirs-female, to be procreated of the marriage, the appellation of *heirs-female*, which is a known legal term, denoting the heirs at law after the failure of the lineal male iſſue, muſt be ſo underſtood as to prefer the daughter of a ſon of the marriage to the eldeſt immediate daughter, becauſe the immediate daughter is not in ſuch caſe the heir at law. Yet as all entails ought to be governed by the will of the maker, when clearly expreſſed, therefore if it ſhall appear plain from other expreſſions in the deed, that he did not

* It was found, that by heirs whatſoever in a total ſettlement, were to be underſtood the heirs at law, or heirs-general, not the heirs of the former inveſtiture, *New Coll.* iii. 101. § 5.

by

by that deſcription mean an heir-female in the proper ſenſe, the certain intention of the maker ought to prevail over the legal meaning of the term. Upon this ground, lands provided to the bairns of a marriage do not deſcend to the heir in heritage, though the ſubject provided be heritable, but divide equally among all the children, if no diviſion be made by the father; becauſe the appellation of *bairns* is a known term, uſed to denote one's whole iſſue, and is therefore ſo interpreted as to cut off the excluſive right of the eldeſt ſon, *Fount. Jan.* 11. 1678, *Kinloch*, obſerved in *Dict.* ii. *p.* 275. Nor is it inconſiſtent with this rule, that in the proviſion of money to the heirs of a marriage the whole iſſue ſucceed equally, *Kames*, 95.; becauſe the word *heir*, being a general term, is there applied to the ſpecial moveable ſubject provided, as it is in the common caſe of bonds taken to heirs, and ſo includes the whole iſſue, who are truly the executors, or the heirs in moveables; ſee above, § 47. Where the ſum thus provided is ſo conſiderable as to raiſe a preſumption, that the father might have a view of eſtabliſhing a family, the intention collected from that circumſtance may perhaps turn the ſcale in favour of the heir in heritage, *arg. Kames*, 95. And, the contrary, where preſumptions ariſe, either from other clauſes in the ſettlement, or from the circumſtances of the granter, that he truly intended to comprehend under the word *heir* or *heir-whatſoever*, his whole iſſue, that term is explained accordingly, *New Coll.* ii. 220.

49. Proviſions granted to the children or iſſue of a marriage give no right of credit to each child in particular till the death of the father, before which period, the right does not become ſpecial to every one of them: for the right is given *familiæ*, to the whole iſſue taken together; and therefore, though the father is, by his obligation, reſtrained from executing gratuitous deeds in favour of ſtrangers, *extra familiam*, he has a power inherent in fatherſhip of diſtributing the ſubject provided among his own iſſue in ſuch proportions as he ſhall judge proper, *July* 19. 1706, *Edmonſton*, and from motives known only to himſelf, and which it may be improper to expoſe to public view; or he may convert the ſubject, if it be moveable, into a land-eſtate, deſcendible to the eldeſt ſon alone, provided he burden it with proviſions to the other children, *Dec.* 16. 1738, *Campbell*, obſerved in *Dict.* ii. *p.* 289. Yet the father cannot exerciſe this power to the entire excluſion of any one child, *ibid.* Our ſupreme court did indeed ſuſtain a ſettlement by a father upon a younger ſon of the marriage, to the utter excluſion of the eldeſt, to whom the ſucceſſion was provided by the father's marriage-contract, in reſpect of his weakneſs and extravagance, *Kames*, 50.: but this judgement has been generally cenſured, as proceeding upon principles adverſary to thoſe that are received in our law; ſee *ſupr.* § 39. A diſpoſition by a father after marriage, to which he was not bound by the marriage-articles, if it be granted to children yet unborn, is no better than a ſimple deſtination; which therefore can neither oblige the father himſelf, nor ſtand good in a competition with creditors; for ſuch diſpoſition is not only gratuitous, not being grounded on a marriage-contract, but is given without any ſpecial regard to the diſponees, who were at the date of the right ſo many *non entia*.——The import of a proviſion by a father to children already exiſting, ſhall be conſidered *infr. b.* 4. *t.* 1.

50. An heir is, in the judgement of law, *eadem perſona cum defuncto*; and therefore, after he has acknowledged the ſucceſſion by ſervice, he repreſents the deceaſed, not only in his rights, but in his debts and burdens, agreeably to the rule, *Cujus eſt commodum, ejus debet eſſe incommodum.* In the firſt view, he is ſaid to be heir *activè*, or to have an active title; becauſe he is intitled to enjoy all heritable rights belonging to the anceſtor, and to proſecute all actions for making them effectual. In the laſt view, he is ſaid to be heir *paſſivè*, or to incur a paſſive title; becauſe, by repreſenting the deceaſed, he is ſubjected to all his debts and deeds, and muſt ſuffer or ſuſtain actions

actions brought againſt him for paying or performing them. But as this paſſive title to pay the anceſtor's debts is not equally ſtrong and extenſive againſt all kinds of heirs, it cannot be improper to explain, at ſome length, the different degrees of obligation by which the different kinds of heirs become liable for the debts or deeds of their anceſtors.——Thoſe who enter heirs *titulo univerſali*, not to any ſpecial ſubject, but to an inheritance conſidered as an *univerſitas*, as heirs of line or of conqueſt, repreſent the anceſtor univerſally, both *activè* and *paſſivè*. As their right is univerſal, ſo is their burden. This is alſo the caſe of thoſe who are ſerved general heirs-male, without relation to any ſpecial ſubject; for as that manner of ſervice carries to the heir every right in the anceſtor, which by the former inveſtitures was deſcendible to heirs-male, it muſt alſo make him liable univerſally to that anceſtor's debts. All the before-mentioned heirs are therefore liable, not only to the value of that ſucceſſion which has opened to them, but *in ſolidum* for the whole of the debts, though they ſhould far exceed that value.—As in the legal ſucceſſion of females the anceſtor's rights deſcend *ipſo jure* to the heirs-portioners, *portionibus hereditariis*, ſo do his debts. One of three heirs-portioners is, *ex. gr.* ſubjected to the payment only of a third of every debt due by the deceaſed, becauſe ſhe is intitled to no more than a third of every right; yet becauſe they ſucceed *titulo univerſali*, each of them is liable for that third, though it ſhould exceed what ſhe has got, or may get, by the whole ſucceſſion: and, on the other hand, ſhe is liable for no more than her own third, though the value of her part of the ſucceſſion ſhould far exceed the whole debt purſued for, *Feb.* 7. 1632, *Home*. As to the queſtion, Whether an heir-portioner may not be liable for more than her own ſhare, in caſe of the bankruptcy of any of the other co-heireſſes? *vid. infr.* § 53.

51. Some of our writers ſeem to have maintained, that heirs who enter in conſequence of the proprietor's deſtination, *ex. gr.* heirs of entail, or of a marriage, or heirs ſubſtituted in a bond, have truly no univerſal title; that their ſervice is only intended to tranſmit a ſpecial ſubject provided by the deceaſed in their favour; and that ſuch tranſmiſſion, as it can confer upon them no farther active title than to that ſubject, ought not in equity to ſubject them to any paſſive title beyond its value: nor, ſay they, can any danger ariſe of ſuch heir's intermeddling with more, the ſpecial eſtate or ſubject entailed or provided being its own inventory. But though this doctrine is favoured, from the appearance of its equity, by Dirleton and Steuart, *v. Heirs of Proviſ.* and *Heirs of Tailzie*; and Bankton, *b.* 3. *t.* 5. § 62. 63.; yet theſe lawyers are forced to acknowledge, that, in practice, heirs of tailzie and proviſion are liable univerſally *in ſuo ordine* for the debts of the deceaſed, and not barely to the extent of the ſucceſſion. This practice, which ſeems to be approved of by Lord Stair, *b.* 3. *t.* 5. § 13. is founded on the known principle, That the heir, being *eadem perſona cum defuncto*, is bound in the ſame manner, and to as great extent, as he was. The argument for the contrary opinion, drawn from equity, proceeds on a miſtake. A ſervice as heir of tailzie or of a marriage, carries not only the ſpecial ſubject contained in the entail or marriage-contract, but every obligation or perſonal right deſtined to ſuch heir; who, if he be once ſerved in the ſpecial lands, is under no neceſſity to ſerve a ſecond time in order to carry the perſonal right ſo deſtined; *vid. ſupra*, § 50. *& infr.* § 75. It is true, that an heir *nominatim* ſubſtituted in a bond is liable only *in valorem*; but that proceeds on two grounds: *firſt*, Such a one is under no neceſſity to ſerve heir in order to take the bond, but is conſidered merely as a conditional inſtitute in the event of the creditor's death; and, *2dly*, The ſame plea of equity which was miſapplied in the caſe of heirs of entail, may be properly uſed in ſuch ſubſtitutions, That they

can carry no right to the ſubſtitute beyond the ſubjects contained in the bond. Heirs therefore ſubſtituted in a bond, whether moveable, *July* 3. 1666, *Fleming*, or even heritable, *Tinw. June* 5. 1745, *Mercer*, ought not to be ſubjected to an univerſal paſſive repreſentation, being on the matter ſingular ſucceſſors. As their whole right is limited to the ſum contained in the bond, they are liable for the debts of the deceaſed ſimply *in valorem* of that ſum, *Harc.* 189. And this doctrine extends to grantees in a diſpoſition *omnium bonorum*, to take effect at the death of the granter, though ſuch diſpoſition be burdened with his debts; for it is conſidered as an univerſal legacy, which does not ſubject the legatee, even after acceptance, *ultra valorem:* and indeed it differs from a legacy but in the name, ſaid *June* 5. 1745; *Jan.* 1731, *Purdie*. To what has been ſaid upon the repreſentation of heirs, and in what caſe it ſuffers limitations, it may be added, that an heir of entail, though the deed ſhould contain a prohibitory clauſe againſt the contracting of debt, is liable in payment of all the onerous debts contracted by the former heir, unleſs he has uſed inhibition againſt him upon that clauſe, which will ſecure him againſt ſuch of thoſe debts as have been contracted poſterior to the diligence; *ſupr.* § 23. Heirs by an entail, fenced with irritant and reſolutive clauſes, are liable for no debt contracted by the former heir contrary to the directions of the entail, § 25.; and heirs of a marriage are ſubjected to the payment only of the onerous, but not of the gratuitous debts contracted by the father, § 38. Heirs muſt fulfil all the deeds of their anceſtors, under whatever title they may take the eſtate. Thus, by the Roman law, an heir who, by the teſtator's will, was burdened with certain legacies, could not get free from them, by repudiating the will, and entering heir *ab inteſtato*, *l.* 1. *pr. Si quis om. cauſ. teſt.*: and thus alſo, by our law, if one ſhould, in an univerſal ſettlement of his eſtate to his heir at law, burden him with proviſions to his younger children, or with certain legacies payable to ſtrangers, the heir, though he ſhould ſerve himſelf heir of line, neglecting the deſtination, will be liable for thoſe ſpecial proviſions.

52. Though proper heirs are all at laſt liable univerſally for the debts of their anceſtor, yet they muſt be ſued in a certain order. Some heirs are liable in the firſt place, and others not till thoſe who are primarily liable have been diſcuſſed. Thus, in the caſe of obligations relative to a particular ſubject, the heir who ſucceeds in that ſubject may be ſued, without diſcuſſing any other heir; for whoever ſucceeds in a right, muſt be the proper debtor in any burden chargeable on that right, *St. b.* 3. *t.* 5. § 17. Thus alſo, in debts which the debtor's heir-male, or any ſpecial heir, is burdened with, the creditor may ſue ſuch heir, without taking notice of the heir at law; nay, he cannot inſiſt againſt the heir at law till the ſpecial heir be firſt diſcuſſed, *Feb.* 18. 1663, *Blair*. But in general obligations, in which the debtor expreſſes no intention of charging any ſpecial heir or eſtate, the heir of line is accounted the principal or proper debtor, as he is the heir-general by the moſt univerſal repreſentation, and ſo muſt be firſt diſcuſſed. Next to him the heir of conqueſt, and then the heir-male; becauſe each of theſe ſucceeds in a leſſer *univerſitas*; the firſt, by an act of the law, in all the heritable rights which his anceſtor had acquired by ſingular titles; the other, by the proprietor's deſtination, in every right which by the inveſtitures deſcends to heirs-male. After theſe, Stair affirms, *b.* 3. *t.* 5. § 17. that heirs by marriage-contract are liable, whoſe propinquity of blood is a ground for ſubjecting them more directly and immediately than any other heir of proviſion or tailzie, who may poſſibly be a ſtranger to the deceaſed: but Bankton's opinion, *b.* 3. *t.* 5. § 69. that the heir of entail ought to be firſt diſcuſſed, appears better founded; not only for the reaſon given

given by that author, that the heir of a marriage is not only heir, but in ſome degree creditor to the deceaſed, but becauſe an heir of entail ſeems to be ſubjected by a more univerſal repreſentation of the deceaſed than the heir of a marriage.

53. Though heirs-portioners cannot be condemned in more than the payment of their own ſhares of the anceſtor's debt, while they are all reſponſible, *Harc.* 68.; yet on the bankruptcy of any one of them, the creditor may, after diſcuſſing her, inſiſt for her ſhare againſt the reſt, *Dirl.* 10. But as they are not the proper debtors in that ſhare, and as the only medium upon which they can be reached is, that they are gainers by the ſucceſſion, the heirs who continue ſolvent, even after diſcuſſing the bankrupt, are not liable for her ſhare *in ſolidum*, but barely in ſo far as they appear to be gainers by the ſucceſſion, *St. b.* 3. *t.* 5. § 14.; *Fount. June* 21. 1698, *White*. Where heirs liable only *ſubſidiariè* are decreed to pay a debt due by the deceaſed, an action of relief lies at their inſtance againſt the heirs principally liable; becauſe the ſubſidiary heirs are, in reſpect of them, regarded not as co-heirs, but creditors. And this rule would probably hold, though there ſhould be a clauſe in the obligation, ſubjecting all the heirs of the debtor in payment, without the benefit of diſcuſſion: for ſuch clauſes are inſerted merely for the farther ſecurity of anxious creditors, that their payment may not be put off by a variety of ſuits; and not with a view to hurt the recourſe competent by law to one order of heirs againſt another. By a creditor's diſcuſſing of an heir, is underſtood his charging him to enter; and if the heir do not on that charge renounce the ſucceſſion, his obtaining decree againſt him, and uſing perſonal diligence upon it, and alſo adjudging from him every heritable right, either belonging properly to himſelf, or competent to him as heir to his anceſtor. If the heir at law, or other heir, who otherwiſe would be liable, renounce to be heir, his renunciation protects him from all diligence againſt either his perſon or eſtate; ſo that there is no room to diſcuſs him, unleſs the ſubſidiary heir ſhall point out ſome viſible eſtate veſted in him, which muſt in that caſe be adjudged in payment of the debt, *Fount. Jan.* 11. 1698, *Colquhoun*; *Br.* 40.; ſee *July* 23. 1708, *Straiton*; after which the creditor may ſue the other heirs in their proper order. But he muſt aſſign all the diligences and decrees in his perſon affecting the ſubjects belonging to his debtor in favour of the ſubſidiary heir, before he be intitled to a decree againſt him, *June* 22. 1678, *Crawfurd*. The ſubſidiary heir continues intitled to the benefit of diſcuſſion, though he ſhould incur the paſſive title of behaviour; becauſe that paſſive title cannot be farther extended againſt an heir than his actual ſervice; which yet is no bar to the benefit of diſcuſſion, *Dalr.* 145.

54. Before an heir can have an active title to his anceſtor's rights, he muſt be entered by ſervice and retour. He who is intitled to enter heir to a deceaſed anceſtor, is, before his actual entry, ſtyled, both in our ſtatutes and by writers, *apparent heir*, though that appellation is uſed ſometimes in vulgar ſpeech to denote an eldeſt ſon, even before the father's deceaſe. The bare right of apparency carries certain privileges with it. One of the moſt conſiderable, viz. the benefit of deliberating, we have borrowed from the Roman law, *tit. C. De jure delib.*; which thought it reaſonable, that as the heir, by his entry, ſubjects himſelf univerſally to his anceſtor's debts, he ought to be allowed a competent time to deliberate, whether the ſucceſſion to which he has a right to enter, be profitable or not. Apparent heirs have, by our law, a year and day indulged to them for that purpoſe; which is computed, in the common caſe, from the death of the anceſtor; and where it is pleaded by a poſthumous heir, from the birth of that heir, *Spottiſ. p.* 137. *Feb.* 28. 1627, *Livingſton*. During that period, apparent heirs could neither

neither be ſued in any action, nor, by the ſtrict letter of the law, be even charged to enter: and when, after the expiration of the year, the creditor had charged an apparent heir to enter, he was allowed forty days longer from the date of the charge, to conſider with himſelf, whether he ſhould enter or not, 1540, *c.* 106; 1621, *c.* 27. But as thoſe ſtatutes have been explained by practice, heirs may be charged by creditors to enter within the year, though the law protects them from any ſuit founded on ſuch charge, till the year be elapſed. Action is, however, ſuſtained againſt the heir, though the ſummons be executed within the year of deliberating, if the day of compearance ſhall fall without it, *Fount. Dec.* 15. 1709, *Lockhart.*

55. It was long a common opinion, that though an apparent heir might have defended himſelf, while the *annus deliberandi* was current, againſt ſuits where he muſt be charged to enter, and conſequently muſt either enter or renounce; yet he could not againſt declaratory or real actions, which may proceed without a previous charge: but now it is an agreed point, that an apparent heir can be ſued in no action relating to the eſtate of his anceſtor, within the year, though it ſhould not by its nature require a previous charge to him to enter, or though it ſhould contain no perſonal concluſion againſt him, if at the ſame time he cannot plead the proper defences, without founding on his anceſtor's right, and ſo incurring a paſſive title; for otherwiſe his right of deliberating would be fruitleſs, *June* 26. 1667, *Dewar*; *Harc.* 40. 46.; *July* 29. 1710, *Baillie*; *Forbes*, *MS. Nov.* 19. 1713, *E. Dalhouſy.* A poinding of the ground was however ſuſtained at the ſuit of a widow for her jointure, within the year, in reſpect it had no perſonal concluſion againſt the heir, *Fount. Dec.* 4. 1702, *Pitcairn*; though the term's annuity poinded for, might poſſibly have been already paid, the pleading of which defence by the heir would have inferred a paſſive title. Favour to widows, whoſe jointures or annuities ought to be regularly paid, as they are frequently the only means of their ſuſtenance, may have led the bench to make that exception from the general rule. A proceſs for ſale of a bankrupt eſtate brought againſt the proprietor, may, after his death, be continued upon a citation of the heir, without waiting for the running out of the *annus deliberandi*, by ſpecial act of ſederunt, *Nov.* 23. 1711, § 5. The privilege of deliberating may be pleaded, not only by the heirs at law, but by heirs of proviſion, *Harc.* 488. But an apparent heir who has behaved as heir, cannot plead it againſt a creditor who ſues him within the year upon a debt due by the anceſtor; becauſe the heir, by immixing with his anceſtor's eſtate, is as properly ſubjected in payment to that creditor, as if he had entered; and ſo cannot afterwards poſtpone or elude the purſuer's juſt action, under a pretence of deliberating whether he is to enter or not, *Dirl.* 450. The objection, That diligence was uſed within the year of deliberating, is not perſonal to the heir, though it was introduced for his benefit alone; but may, if he ſhall not found on it, be pleaded by any competing creditor. This is alſo the caſe of objections on the head of minority and leſion, interdiction, deathbed, *&c.*: and if it were otherwiſe, the heir might have it frequently in his power, by his ſilence, to create preferences where the law never intended them, *New Coll.* ii. 76.

56. In conſequence of this right of apparency, the heir has alſo a privilege to purſue for exhibition *ad deliberandum*, againſt all poſſeſſors, or havers, of writings, whether granted in favour of the anceſtor, *Dec.* 6. 1661, *Tailfer*, or by him in favour of others; that ſo, upon balancing the debts with the eſtate, he may be able to form a judgement, whether the ſucceſſion be *damnoſa* or *lucroſa*: and this right is competent to the heir before his entry, though after elapſing of the *annus deliberandi*, *July* 1. 1626, *Nisbet.*

It

It was never doubted, that the heir had a right to ſue for exhibition of all obligations granted by the anceſtor to thoſe of his own family, his wife or children; but exhibition of writings in favour of ſtrangers, was by ſeveral older deciſions refuſed to the heir, on account of the danger of expoſing the title-deeds and writings of ſingular ſucceſſors to the inſpection of apparent heirs, and perhaps becauſe it was thought the heir had no intereſt in the inſpection of writings that had been granted by the anceſtor to ſtrangers, unleſs they had been in the anceſtor's cuſtody cancelled at the time of his death, *Dec.* 6. 1661, *Tailfer*; *Dec.* 22. 1675, *Maxwell*; *Jan.* 16. 1706, *Buchanan.* But as an heir cannot reſolve with judgement, whether to accept of or abandon the ſucceſſion, till he be appriſed of every obligation granted by the deceaſed; and as the objections againſt exhibiting the anceſtor's obligations appear equally ſtrong, whether they be granted to thoſe *intra* or *extra familiam*, our later practice has extended this privilege, ſo as to include deeds granted to ſtrangers, *Br.* 112. Stair affirms, *b.* 3. *t.* 5. § 1. that the heir cannot, in this action, call for rights affecting the anceſtor's eſtate which have been perfected by ſeiſin, becauſe theſe may be known by the records, without the neceſſity of an exhibition: but the contrary was decided, *Br.* 112. And in the caſe of ſeiſins not regiſtered, which are without doubt effectual againſt the granter's heirs, the apparent heir intitled to ſue for an exhibition, who cannot diſcover the exiſtence of ſuch ſeiſins by any record, has no other method of coming at the knowledge of them, but by an action of exhibition. See more on this head, *b.* 4. *t.* 1. § 51. *prope fin.* Where the anceſtor is diveſted of any ſpecial eſtate or ſubject by an entail or irredeemable diſpoſition, the diſpoſition, though no ſeiſin ſhould have proceeded on it, plainly excludes the heir's title of action as to that ſubject; and ſo is a good defence to the diſponee, againſt exhibiting to him the writings relative to it, *Harc.* 482.

57. This right of inſiſting in an action for exhibiting *ad deliberandum*, is competent, not only to the heir of line, but in general to every heir who may be charged to enter, *Harc.* 490.; even to him who has behaved as heir, *St. b.* 4. *t.* 33. § 5.; *Br.* 112.: for though an heir loſes by the paſſive title of behaviour his right of deliberating, in a queſtion with creditors who have purſued on their grounds of debt, *jupr.* § 55.; yet as behaviour cannot be objected againſt an heir but by a creditor, a ſtranger, if he be purſued by an heir in an exhibition, cannot defend himſelf by the plea, that the purſuer has behaved himſelf as heir; becauſe not being himſelf a creditor, he has no intereſt to object that paſſive title againſt him. An apparent heir who has renounced the ſucceſſion cannot ſue for exhibition againſt the ſpecial creditor at whoſe ſuit he was charged to enter, becauſe his renunciation upon the charge given him by that creditor, imports an approbation of his right, *Jan.* 1721, *Richardſon.* But the heir's renunciation upon the charge of one creditor, does not exclude his right to ſue for exhibition againſt another creditor; becauſe the effect of ſuch renunciation is by its nature reſtricted to the ſpecial debt which was the foundation of the charge, *Jan.* 8. 1675, *Ward.* The appellation of *apparent heir-male*, neceſſarily preſuppoſes a proviſion made by the anceſtor preferring the heir-male to the heir of line in certain lands or ſubjects; for without ſome poſitive proviſion in his favour, he muſt be excluded by the legal heir. But where ſuch proviſion appears, action *ad deliberandum* is competent to him for exhibiting all debts or diligences affecting the ſubjects thus ſpecially deviſed in his favour. The heir's right to ſue for exhibition, is intended merely that he may have inſpection of the writings exhibited, in order to deliberate: he cannot therefore inſiſt for the delivery to himſelf of ſuch of them as have been granted in favour of the anceſtor; for to ſuch demand no heir is intitled till

his entry, *July* 1. 1626, *Nisbet:* neither can he in this action compel the defender to make payment, or even to ſettle accounts with him, in the terms of the writings exhibited; for no heir unentered can diſcharge any obligation granted to his anceſtor, and no debtor can be laid under the neceſſity of fitting accounts with one who cannot grant him an acquittance, *June* 22. 1671, *Leſlie*.

58. An apparent heir hath alſo a right to defend tenants or others who poſſeſs under titles derived from his anceſtor, againſt any third perſon who ſhall bring theſe titles under challenge, *Jan.* 19. 1627, *L. Roſlin*; and he is intitled by his apparency to continue his anceſtor's poſſeſſion, and to ſue, not only thoſe tenants for their rent, who have once acknowledged him by payment, *arg. Gilm.* 94. but all of them, *St. b.* 3. *t.* 5. §2. This is analogous to the Roman law, which granted the interdict *Quorum bonorum* to heirs before their *aditio*, for attaining the poſſeſſion of their anceſtor's inheritance, § 3. *Inſt. De interd.* but contrary to our own ancient law of *Rob. III. c.* 19. & 38. which authoriſed the ſuperior to hold the anceſtor's lands till the entry of the heir. Notwithſtanding the above-recited poſſeſſory privileges competent to apparent heirs by our preſent law, it has been adjudged by repeated deciſions, that they cannot ſue tenants in an action of removing, even ſuch of them as do not pretend to derive any right from the deceaſed anceſtor, *New Coll.* ii. 69. 195.: but if an action for rent lie againſt them, the apparent heir may in that way continue in the full poſſeſſion of the rents. By the former practice, it was held to be the law of Scotland, that the apparent heir who abſtained from the poſſeſſion, had not the property, upon his anceſtor's death, of the rents of land or intereſt of money belonging to him; but that from the period of his entering into poſſeſſion, they became, in conſequence thereof, part of his moveable eſtate, and ſo might be carried off from him by the arreſtment and forthcoming of his creditors, *Gilm.* 94. But as the heir's right to them aroſe merely as a conſequence of poſſeſſion, and as his poſſeſſion ceaſed by his death, ſuch of the rents or intereſt as were neither levied by himſelf, nor attached by his creditors during his life, and to which he had made up no active title, were *ex neceſſitate juris* conſidered, after his death, not as his property, ſo as to be confirmed by his executors, or affected by the diligence of creditors, but as *in hereditate jacente* of the perſon laſt infeft in the lands, whoſe heir therefore might carry them upon making up his titles by ſervice and retour, *Harc.* 44. 71. But this doctrine has been of late diſputed by writers, who affirm, that the rents and intereſt unuplifted by the apparent heir himſelf, belong to his executors, upon this principle, That the heir's right to them was not, as had been formerly imagined, founded on his actual poſſeſſion, but in conſequence of his title to poſſeſs, which aroſe to him *ipſo jure*, without the neceſſity of any act upon his part; and that as the apparent heir himſelf was intitled to them, that right, like all other moveable rights, paſſed upon his death to his executors. The later deciſions upon this head run directly croſs to one another. The queſtion in the caſe of Nicolſon of Carnock, *New Coll.* i. 181. was given for the apparent heir's executor. By a later deciſion, *New Coll.* ii. 254. in the caſe of Hamilton of Dalziel, the heir of the anceſtor laſt infeft was preferred. And by the lateſt, *July* 24. 1765, *Lo. Banff contra Joaſs*, the court preferred the executor *. This right of poſſeſſion continues with the apparent heir, though the anceſtor ſhould have made over the lands to a third party; becauſe that grant, if it be not

* In conſequence of this deciſion, the caſe of Hamilton of Dalziel was appealed, and the judgement was reverſed, *April* 8. 1767; ſo that the point ſeems now to be eſtabliſhed in favour of the executor of the apparent heir.

completed

completed by ſeiſin, imports only a perſonal obligation on the heir to diveſt himſelf; which is quite conſiſtent with his poſſeſſing the ſubject, till he be compelled to make up his titles, and convey to the diſponee, *Fount. June* 24. 1698, *Home*; *July* 18. 1727, *Ogilvie*. The privilege competent to apparent heirs, of bringing their anceſtor's eſtates to a ſale, has been already conſidered, *b.* 2. *t.* 12. § 61.; and their right to ſue liferenters for an alimony, *b.* 2. *t.* 9. § 62. Their right to leaſes, and other ſuch ſubjects as require no ſervice, which veſts in them by poſſeſſion alone, is to be explained *infr.* § 77. and their right to reduce deathbed-deeds, § 100. The exerciſe of ſuch of thoſe privileges as cannot be uſed without immixing with part of the anceſtor's eſtate, which is attended with ſome pecuniary advantage, infers the paſſive title of behaviour againſt the heir, *infr.* § 84. 86. *&c.*

59. As different competitors frequently claim to be heirs to the deceaſed, it ought to be proved judicially, who has the beſt right to that character; and therefore, he who is truly heir, before he can have an active title to the eſtate which was in his anceſtor, muſt be ſerved and retoured heir by an inqueſt. Though all our brieves are executed by the intervention of juries or inqueſts, yet the brief for ſerving heirs has got the ſpecial name of the *brief of inqueſt*, as far back as the reign of *Rob. III. c.* 1. This brief proceeded either from the King's chancery, or from a juriſdiction having a right of chancery, *ex. gr.* a regality, while that juriſdiction ſubſiſted. It contains a command to the judge to whom it is directed, to try the validity of the claimant's title by an inqueſt; and that inqueſt cannot proceed on the trial, till fifteen days after the brief is proclaimed in the manner deſcribed below, § 64.; ſee 1503, *c.* 94. The inqueſt was alſo to be ſummoned fifteen days before the ſervice, by *Stat. Rob. III. c.* 1. § 2.; but by the aforeſaid act 1503, they may now be called on the ſhorteſt warning; nay, they may, if preſent in the court-houſe, be compelled, without any ſummons, to paſs upon the inqueſt, if no diſqualification be objected to them. The inqueſt hath always conſiſted of an odd number, that an equality of voices might not make the verdict doubtful, ſometimes ſeventeen, ſometimes thirteen; but it appears, that, by the later practice, the number has been fixed to fifteen, as far back as Craig's time, *lib.* 2. *dieg.* 17. § 27. At firſt, it behoved all of them to be co-vaſſals of the ſame rank as the claimant, as every perſon was intitled to the judgement of his peers or equals; but in the courſe of time, every one poſſeſſed of 40 l. Scots yearly rent was admitted; and even that is not now accounted a neceſſary qualification.

60. No defender need be cited as a party to the ſervice of an heir, ſince the publication of the brief ſuperſedes the neceſſity of perſonal citation; yet if one having intereſt ſhall apply to the court of ſeſſion, praying, that no brief may iſſue without calling him as a party, warrant will be directed accordingly to the director of the chancery, *Fount. Nov.* 10. 1696, *Meldrum*. And even after iſſuing of the brief, advocation of it will be granted on any probable ground that the competitor may plead, by the court of ſeſſion; who, after diſcuſſing the ſufficiency of the reaſon of advocation, remit the brief, either to the judge advocated from, or to delegates, generally to their own macers, and appoint one or two of their number to ſit with them as aſſeſſors. But no objection offered to the inqueſt, which is not inſtantly verified, can bar the ſervice; for the brief of inqueſt is not a pleadable brief, or a brief of plea, 1503, *c.* 94. and ſo cannot admit of terms to prove exceptions. The inqueſt being ſet, the apparent heir produces to them his claim as heir, together with the brief obtained by him, and the executions of it; and in judging of the points of the brief, the inqueſt may proceed, not only on the evidence offered by the claimant, but on the proper knowledge of any two of themſelves; for they are conſidered both as judges

judges and witneſſes. If it appear to the inqueſt, that the claim is proved or verified, they ſerve the claimant, *i. e.* they declare him heir to the deceaſed by a ſentence or ſervice, which muſt be atteſted by the judge.

61. The brief of inqueſt has been from the beginning a retourable brief; that is, it behoved the judge to return it, with the ſervice of the inqueſt, to the chancery; for which reaſon, the ſervice, after it was thus returned and recorded in the chancery-books, got the name of a retour, *St. Rob. III. c.* 1. § 3. But it would appear by the general practice from the time of Robert III. to the year 1550, that the obtainer or purchaſer of the brief got the principal ſervice delivered to him, either by the judge or the chancery; for many of our oldeſt families have at this day in their keeping the authentic ſervices of their anceſtors, with the ſeals of the inqueſt appended to them; and hence a principal or original ſervice, of a date prior to 1550, was ſuſtained, though there had been no evidence of any retour proceeding upon it to the chancery, *Feb.* 17. 1624, *Lo. Elphingſton.* But from that time no ſervice has been reckoned complete, ſo as to confer an active title, till it be retoured, *Fount. Feb.* 2. 1698, *Macintoſh*; after which, the heir ſerved may, upon application to the chancery, get an extract of it, or a *vera copia*, as a voucher of his ſervice: but ſuch extract is not eſſential to the completing of it, *Jan.* 1738, *Buchan.* Where a ſervice proceeded on a brief iſſuing from a regality-juriſdiction, it was returned, not to the King's chancery, becauſe the brief came not from thence, but to the regality-chancery from whence the brief iſſued, *Dec.* 8. 1631, *L. Cleiſh.*

62. Though the brief of inqueſt ſometimes gets the name of the brief of *mortanceſtry*, *De morte anteceſſoris*, *Cr. lib.* 2. *dieg.* 17. § 25. theſe two were originally diſtinct. By the brief of inqueſt, one is ſerved or declared heir to his anceſtor; and though it may meet with oppoſition, where there are different competitors for the ſucceſſion, it generally paſſes of courſe, and always without the citation of any ſpecial defender. But a brief of mortanceſtry was purchaſed by the undoubted heir, even though he had been already ſerved, againſt the ſuperior of the lands, or againſt others who had been ſeiſed in them upon a title preferable to that of the heir. This laſt was therefore the ground of a proper action, in which it behoved the heir to cite the perſon who with-held the poſſeſſion from him, as a party to the ſuit, *Reg. Maj. lib.* 3. *c.* 28. *et ſeqq.*; *Q. Att. c.* 52. See, on this head, the act 1429, *c.* 127. as it is explained by Craig, *lib.* 2. *dieg.* 7. § 24.

63. The ſervice of heirs, whether of heirs *ab inteſtato*, or thoſe of proviſion, is uſually divided into general and ſpecial. A general ſervice, in its moſt proper ſignification, is competent only to the heir at law, and has no relation to any ſpecial ſubject; for it is not intended to carry any proper feudal right of lands, but merely to eſtabliſh a title in him who ſerves, to every heritable ſubject belonging to the deceaſed which requires no ſeiſin, as reverſions, ſervitudes, &c. and to every perſonal right which had not been perfected by ſeiſin in favour of the anceſtor, as heritable bonds, diſpoſitions, &c. and conſequently to procuratories of reſignation and precepts of ſeiſin which had never been executed. A public right, though followed by ſeiſin, has no legal effects till it be confirmed by the ſuperior; and conſequently muſt, as a perſonal right, be carried by a general ſervice, *July* 10. 1713, *Douglas.* A general ſervice carries right alſo to bonds ſecluding executors, which are heritable merely from the deſtination of the creditor, and to heirſhip-moveables, which, though not heritable *ex ſua natura*, belong, by the cuſtom of Scotland, to the heir of line. And it is ſo true, that a general ſervice extends to no ſubjects perfected by ſeiſin, that in the caſe of a right of annualrent on which ſeiſin has followed, the heir cannot, by a general ſervice, carry even the perſonal obligation contained in

in the right, ſo as to be the ground of diligence againſt the debtor's perſon and moveable eſtate, *Jan.* 1729, *Lo. Halkerton*, cited in *Dict.* ii. *p.* 371. It is indeed competent to the heir ſerved in general, to adjudge on the perſonal obligation in the heritable bond, by which the ſum will be the better ſecured, and the intereſt accumulated; but when the heir comes to demand payment, the debtor has this good defence, That the heir's right to the debt is barely perſonal; and therefore that he cannot effectually renounce it upon payment till he has eſtabliſhed a feudal right to it in himſelf. A ſpecial ſervice is, on the contrary, calculated for perfecting the heir's title to ſpecial ſubjects in which the anceſtor died veſt and ſeiſed. Where one deviſes his land-eſtate, or a certain part of it, to himſelf and his heirs-male, without completing the right by ſeiſin, the heir-male may poſſibly not be the entailer's heir-general; notwithſtanding which, he muſt, on the entailer's death, ſerve heir in general to him, becauſe the ſubject to which he is to complete a title was not veſted in the anceſtor by ſeiſin. Some lawyers have therefore diſtinguiſhed between a general ſervice, and a ſervice in general, *St. Anſ. v. Bond heritable.* Where one is ſerved heir-general, or heir of line, they call it a *general ſervice*; but by a *ſervice in general*, they underſtand that which carries to an heir of entail or proviſion the right of a ſpecial ſubject, which either requires no ſeiſin, or upon which none has proceeded. This diſtinction of names is however but little obſerved in practice.

64. Where a general ſervice is intended, the brief may, at the option of the purchaſer, be directed to any judge-ordinary, even to one who neither had juriſdiction over the anceſtor, nor has over the heir, *March* 6. 1630, *L. Caſkieben*; and it muſt be proclaimed or publiſhed at the head borough of that juriſdiction where the heir is to be ſerved: but brieves in order to ſerve to a ſpecial ſubject, muſt be directed, either to the ſheriff of the county where the ſubject lies, with the exception of the ſtewartry of Kirkcudbright, which is ſet forth in 1587, *c.* 60.; or to the bailies of the borough, if it be a burgage-tenement; or to the macers of the court of ſeſſion, as ſheriffs in that part, by the ſpecial warrant of that court, which is granted of courſe upon the application of the heir. And this laſt courſe is generally purſued, either where the lands lie in different counties, or where the heir to be ſerved repreſents a conſiderable family. The proclamation of this brief muſt, in all caſes, be made at the head borough of the juriſdiction where the lands lie.

65. So long as the feudal inveſtiture was comprehended in one writing, there could not poſſibly be an imperfect perſonal right of lands, becauſe the proper feudal right was completed at once by a ſingle act, *b.* 2. *t.* 3. § 17. and conſequently the points or heads of the brief into which it was the inqueſt's buſineſs to inquire, were entirely adapted to a ſpecial ſervice. And even long after ſeiſins were in uſe to be granted in writings diſtinct from the charters or diſpoſitions, and of dates perhaps long poſterior to them, it would appear that no brieves of inqueſt paſſed, unleſs where the deceaſed died ſeiſed in heritable ſubjects. There is ſtill extant, in the charter-cheſt of the family of Stirling of Keir, a decree of the ſheriff of Dumbarton, dated November 29. 1532, whereby the ſheriff cognoſces a perſon to be next heir of the deceaſed, without an inqueſt, in purſuance of the King's letter directed to him, proceeding on the heir's complaint, that he could not purchaſe a brief, in regard his anceſtor had alienated all his heritage, and ſo was diſſeiſed when he died. Soon after this, brieves were allowed in order to general ſervices; but, in place of ſettling a new form of a brief, that might be adapted to that kind of ſervice, the old form or ſtyle continued without alteration, even where a general ſervice was intended; ſo that it is the nature of the claim offered by the heir to the inqueſt in conſequence of

the brief, which alone makes the difference between the two ſervices. If the heir claim to be ſerved in ſpecial to certain ſubjects in which his anceſtor died laſt veſt, the inqueſt muſt anſwer the whole heads of the brief; but if he want a general ſervice, their inquiry is confined to the heads proper to that kind of ſervice, without regard to the condition of any particular lands, becauſe a general ſervice conveys no proper right to lands.

66. The brief of inqueſt contains ſeven diſtinct heads; into the two firſt of which the inqueſt in a general ſervice only inquire, viz. Whether the deceaſed died at the faith of the King? and, Whether the claimant be his next and lawful heir?—The death of the anceſtor is generally ſo notorious that it requires no particular proof. If he died in foreign parts, it muſt be vouched by the declarations or teſtimonies of the magiſtrates, or other perſons of character reſiding where he died. It muſt alſo be proved, that the anceſtor died at the faith of the King; for if he died a rebel, his eſtate, which by his rebellion is forfeited to the crown, cannot be taken by his heir. This fact is preſumed unleſs the contrary be proved; and it cannot be traverſed by a proof that the deceaſed died rebel at the horn on a civil debt, or on being convicted of any crime other than treaſon; ſee *Nov.* 21. 1626, *Seton*; for nothing leſs than actual rebellion can be oppoſed to one's dying at the King's faith and peace.—As to the ſecond head of the brief, That the claimant is next and lawful heir to the deceaſed, his legitimacy is preſumed, unleſs evidence be brought, that either himſelf, or ſome of thoſe through whom he claims, are reputed baſtards. As for his propinquity, the degrees by which it is connected ought to be ſpecified in his claim; and if an inqueſt ſhould ſerve one without particularly ſpecifying every link in the chain of propinquity, it is a good ground for ſetting aſide the ſervice, *St. b.* 3. *t.* 5. § 35.; *July* 22. 1629, *E. Caſſilis.* When any degree of propinquity is proved, it is preſumed to be the neareſt, unleſs a nearer be either proved, or notoriouſly known; for it reſolves into this negative, That there is no nearer degree, which, like all other negatives, proves itſelf. And even the remoteſt degree ſupports the ſervice, and excludes the crown's right as *ultimus heres.* Where the propinquity is recent, it may be proved by witneſſes ſwearing that the claimant was reputed to ſtand in ſuch a degree of propinquity to the deceaſed; but when it runs farther back than the memory of man, it would be dangerous to reſt the proof on the uncertain evidence of common report; and therefore the fact ought to be vouched by retours, marriage-contracts, or other proper writings, which will be ſuſtained as proof, though they ſhould be granted, not by any of the intermediate fiars themſelves, but by ſtrangers, *St. b.* 3. *t.* 5. § 35.——Hitherto of general ſervices. The remaining heads of the brief are adapted to ſpecial ſervices, and ought all of them to be inſerted in the ſervice, for behoof of the crown, or other ſuperior.

67. The claimant in a ſpecial ſervice muſt prove, upon the above-mentioned firſt head of the brief, not only that the anceſtor is dead, but that he died ſeiſed in the lands ſpecified in the claim; which is uſually proved by the anceſtor's charter and ſeiſin, or by conſecutive ſeiſins, having a courſe of forty years, even without the production of the relative charters: and it is preſumed, that he continued ſeiſed till his death, if it do not appear to the inqueſt that he was diveſted.—The claimant muſt alſo prove the preciſe time of the anceſtor's death, When he died; which ſerves to ſhew how long the lands have been in nonentry.—The third head of the brief is, Of whom the fee of the lands is holden *in capite*, or who is the immediate ſuperior of them? which is vouched by the anceſtor's infeftment.—The fourth head, By what tenure the fee is held? is likewiſe proved by that infeftment: and this is

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neceſſary to be known, becauſe in different holdings the caſualties of ſuperiority are different. Before the ſtatute for taking away tenures by ward, the tenure was, *in dubio*, preſumed to be ward, as the moſt proper holding; but now, when any doubt ariſes from the words of the inveſtiture, it is preſumed blanch if the lands hold of the crown, and feu if of a ſubject-ſuperior.—The fifth head of the brief, What is the extent of the lands, both old and new? ſerves to aſcertain the rate of the ſuperior's caſualties of nonentry and relief; becauſe theſe are, in particular events, adjuſted by the retoured duties, or the new extent: and perhaps the old extent of the lands was inſerted in the brief, that the proportion of public ſubſidies payable forth of them might be known, which till the year 1649 was regulated by that extent. Now that nonentry-duties payable out of the lands which formerly held ward of the crown, are, by the act aboliſhing ward holding, proportioned according to the valued rent of our lands, which was begun to be ſettled in the foreſaid 1649, that valuation muſt alſo be expreſſed in the retours of ſuch lands. This head of the brief is uſually proved by the former retour; and where there is no retour, the nonentry is fixed by the rule of exchequer in 1732 formerly recited, *b.* 2. *t.* 5. § 3. The ceſs-books of the county are ſufficient evidence of the valued rent or new valuation of the lands.—The ſixth head is, Whether the uſer of the brief be of lawful age? This was neceſſary to be known in tenures by ward, becauſe no ward ſuperior could be compelled, without a diſpenſation in the charter for that purpoſe, to receive an heir as his vaſſal, while he was minor, as being incapable of military ſervice; but ſince the aboliſhing of that feudal tenure, this head of the brief muſt be anſwered in the affirmative by the inqueſt, by whatever other tenure the lands may be held, or whatever the age of the claimant may be.—By the ſeventh or laſt head of the brief, the inqueſt is directed to examine, In whoſe hands the fee is now, and has been, ſince the death of the anceſtor? that is, who they are that have enjoyed the lands during that time, and under what title, whether they have been poſſeſſed by the immediate ſuperior on account of nonentry, or by the next higheſt ſuperior through the immediate ſuperior's forfeiture of his caſualties, or by a tercer or liferenter? in which laſt caſe nonentry is excluded, *vid. ſupr.* *b.* 2. *t.* 5. § 44. though it can be no bar to the entry of the heir. But the inqueſt ſeldom anſwers this point of the brief, farther than as it concerns him in whoſe hands the fee is veſted at the time of the ſervice, *St.* *b.* 3. *t.* 5. § 40.

63. By our old law, the entry of all heirs was ſimple, whether they entered by a general or a ſpecial ſervice, under the exceptions mentioned *ſupr.* § 51.; ſo that the heir ſubjected himſelf univerſally, by his entry, to all the debts of his anceſtor, though no ſubject ſhould have been carried by the ſervice. But we have now borrowed from the Roman law, *l.* 22. § 2. 3. 4. *C. De jure delib.* an expedient, by which an heir, who is doubtful whether his anceſtor's eſtate be ſufficient for ſatisfying his debts, may enter upon inventory, *cum beneficio inventarii*, without the riſk of ſubjecting himſelf to the debts, farther than the value of the eſtate amounts to, 1695, *c.* 24. In order to give the heir this benefit, the ſtatute requires that he exhibit upon oath, within the *annus deliberandi*, a full inventory of all the heritable rights to which he may ſucceed, which is to be given to the clerk of the ſhire where the lands lie; and if there be no heritage requiring ſeiſin, to the clerk of the ſhire where the anceſtor died. This inventory is to be ſigned by the heir, the judge, and the clerk of court, and regiſtered in the county-books within year and day from the death of the anceſtor; and within forty days after expiration of the year, the extract muſt be recorded in the books of ſeſſion, in the ſpecial regiſter appointed for that purpoſe. If

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theſe forms be not obſerved, or if the heir have immixed with any part of the heritage before giving up the inventory, otherwiſe than for cuſtody or preſervation; or if he omit any ſubject out of the principal inventory, or at leaſt not add it within forty days after his knowledge of it, he is declared liable *in ſolidum:* and thoſe eiks or additions muſt be made and recorded in the ſame manner as the principal inventory. The act does not require the heir to ſerve within the year: if the inventory be given up and regiſtered within that time, he may complete his titles by ſervice *quandocunque*, *Fount. Feb.* 11. 1708, *Mackay*.

69. An heir *cum beneficio*, if no creditor oppoſe it, may get the value of the inventory judicially aſcertained, and thereupon ſell the ſubjects voluntarily, and apply the price, ſo far as it will go, to the ſeveral creditors as they apply to him, *primo venienti*, provided he do it without colluſion, or partial favour or prejudice towards any of them, *June* 1733, *Veitch*. But after the heir is interpelled by citation, at the inſtance of any one creditor, he muſt call them all into the field by an action of multiple-poinding, that the price may be divided among them; not *pari paſſu*, as is directed by *Act of ſederunt*, *Feb.* 28. 1662, in the caſe of creditors upon executry, but according to the priority of their ſeveral diligences affecting the ſubject, *Kames*, 49. A decree, however, obtained by one creditor in general terms, ſuſtaining his claim, and finding the heir liable to the extent of the inventory, without condemning him in payment of the particular ſum acclaimed, gives to ſuch creditor no preference over the others, while the ſubject continues *in medio*, *Home*, 104, N° 2.

70. By the firſt principles of equity, heirs are intitled to no part of their anceſtor's eſtate, till full ſatisfaction be made to all the creditors, who have a natural right to make the moſt of their debtor's eſtate towards their own payment; and it is obvious, both from the rubric and the tenor of the aforeſaid act 1695, that that ſtatute, which was calculated for obviating the frauds of apparent heirs, cannot be ſo interpreted as to overthrow this rule of equity; and that the ſpecial clauſe, introducing the privilege of inventory, was deſigned merely to ſave the heir from an univerſal repreſentation. No creditor, therefore, whoſe right is perfected by ſeiſin, or made real on the anceſtor's eſtate by adjudication, if he be not ſatisfied with the value of the inventory as eſtimated by witneſſes, is bound to acquieſce in it, ſince no more than the preſumed value can ariſe from that manner of eſtimation; but he may, by analogy with 1681, *c.* 17. while the eſtate is yet unſold, inſiſt that it may be put up to public ſale, which is the only way of diſcovering its true value, *July* 12. 1738, *Heirs of L. Glenkindy*, ſince an eſtate muſt be always worth what can be got for it *. Hence it appears, that an heir who enters by inventory is indeed a truſtee for the creditors. Upon this ground, if he enter into the poſſeſſion of his anceſtor's eſtate, without having firſt got a judicial value put on it, he is liable for the value, not barely as it ſtood at the time that the lands were given up in inventory, but as it has been ſince raiſed by their improvement, *July* 6. 1727, *Aikenhead*; and in like manner, an heir *cum beneficio* was decreed to communicate to all the other creditors the eaſes which he had got in tranſacting any debt due by the deceaſed with one particular creditor, *Kames*, 65.

71. One may enter heir to heritable ſubjects in which the anceſtor died ſeiſed, not only by the legal method of ſpecial ſervice, but alſo by private conſent; for it happens frequently in lands holden of a ſubject-ſuperior, that upon the vaſſal's death, his heir, in place of being ſerved by an inqueſt, obtains a precept of ſeiſin from the ſuperior, called *of Clare conſtat*, from the firſt words of its narrative, in which the ſuperior acknowledges, that the obtainer of the precept is next lawful heir to him who died laſt veſt and

* See *Kames*, *Rem. Dec.* 7.

ſeiſed

ſeiſed in the particular lands therein ſpecified, holden of himſelf the granter, and therefore commands his bailie to infeft him in them. The heir, by taking ſeiſin on this precept, becomes *paſſivè* liable to all the debts of his anceſtor; and, on the other hand, acquires an active title, as to the ſubject contained in the precept, in queſtions with the ſuperior, who has thus acknowledged his right, or with the ſuperior's heirs, who are bound to fulfil his deeds. It is alſo a title of preſcription; ſo that the heir, if he has poſſeſſed the ſubject for forty years, is ſecure againſt all challenge. But it gives him no active title as to any other ſubject which might have belonged to the deceaſed: and the right that he acquires to the ſpecial ſubject in the precept is by no means a ſecure one; for the true heir may ſet aſide that right, and obtain himſelf regularly ſerved, at any time within the years of preſcription; whereas had his party been entered by a proper ſervice, that ſervice could not have been brought under challenge, even by the true heir, after twenty years. If we were to judge by principles, that anomalous manner of entry ought, by the genius of our law, to have conferred no active title whatſoever; for it is not any private authority, but the law alone, that can declare the right of any claimant to the character of heir.

72. Though a ſuperior's bailie muſt have as little authority to declare an heir as the ſuperior himſelf, yet in royal boroughs, and in ſeveral boroughs of regality, the bailies have, by inveterate cuſtom, cognoſced and entered perſons as heirs in tenements within borough, by haſp and ſtaple, without the intervention of an inqueſt, in the following form. The bailie of the borough, with the common clerk, being met at the tenement, the claimant repreſents, that his anceſtor died ſeiſed in it, and that he himſelf is his next lawful heir, which he offers to prove by witneſſes, and therefore requires the bailie to infeft him. If the witneſſes ſwear to the claimant's propinquity, the bailie cognoſces or declares him heir upon that evidence; and, in conſequence thereof, ordains him to take hold of the haſp and ſtaple of the door, which is the ſymbol uſed in tenements within borough, and to enter the houſe, and bolt the door. The heir, after he comes out, takes inſtruments in the hands of the common clerk, as notary; and this inſtrument of ſeiſin, when extended, muſt be recorded in the borough-regiſter, 1681, *c.* 11. and completes the entry. All theſe ſeiſins muſt, in conſequence of 1567, *c.* 27. be given by the bailie of the borough, and extended by the borough-clerk. This kind of entry has the ſame nature and effects as that by precept of *Clare conſtat:* but though it be the moſt uſual method of entry in burgage-lands, bailies ſometimes alſo enter burgeſſes heirs by precept of *Clare conſtat*, *Gilm.* 51.——It was uſual for heirs, where they apprehended danger from their entering, to grant bond to a truſtee, amounting to the full value of the eſtate, in order that adjudication might be deduced upon it againſt themſelves as charged to enter in ſpecial to their anceſtors, the conveyance of which adjudication in favour of the heir gave him an active title to the eſtate adjudged. How far it ſubjects him to a paſſive title, will ſoon appear.——It has been explained, *ſupr. b.* 2. *t.* 12. § 12. *et ſeqq.* in what caſes charges given by creditors to apparent heirs to enter, ſtand in the place of an actual entry, ſo as to ſupport the creditor's diligence.

73. A ſervice as heir to one who was not at his death in the right of the ſubject intended to be carried, is improper and ineffectual: a ſettlement therefore, or diſpoſition, in which the granter does not firſt inſtitute himſelf, but makes over the ſubject from himſelf to his ſon, whom failing, to a ſtranger, can be no foundation for a ſervice by the ſubſtitute as heir of proviſion to the granter: for though the feudal right, or the fee of the eſtate, remained with the granter, notwithſtanding the diſpoſition; yet the

perſonal right of the ſubject, which is the only thing conveyed by the diſpoſition, did not continue in the granter, and ſo cannot be carried by a ſervice as heir to him, *arg. Falc.* i. *June* 5. 1745, *Mercer*; the ſubſtitute muſt make up titles to ſuch a right, by a ſervice as heir of proviſion, not to the granter, but to the firſt inſtitute, who ſtood in the perſonal right of the ſubject. Where a father is bound by a marriage-contract to provide a ſum to the heir of the marriage, the heir may, in the character of creditor, without the neceſſity of a ſervice, ſue the father for ſecuring it to him in the terms of his obligation, *Feb.* 13. 1677, *Fraſer*; and if the father has granted any deeds inconſiſtent with or contrary to the ſtipulations in the marriage-contract, the heir may bring thoſe deeds under challenge, in an action either againſt him or his repreſentatives, *New Coll.* ii. 202.; and he may ſue them for payment, if the father has not, in terms of his obligation, ſecured the ſum ſpecified in the contract to him. But it is unneceſſary, and indeed would be incongruous, for him to ſerve to the father as heir of proviſion, in order to carry the father's obligation; for he is creditor, not heir, in that obligation; and if this *jus crediti* is veſted in the heir of the marriage without ſervice, he muſt, in like manner, tranſmit it to his heirs or ſingular ſucceſſors, though they ſhould not be ſerved, *Feb.* 3. 1732, *Campbell*, obſerved in *Dict.* ii. *p.* 279.; *New Coll.* ii. 255. But if the father has actually fulfilled his obligation, by lending out the ſum, and ſecuring it in the terms of the contract, the right of credit that was in the heir of the marriage is converted into a ſpecific proviſion actually ſecured to him, to which he may ſucceed, and which therefore cannot be taken up without a ſervice. A ſubſtitute who is named in a bond immediately after the creditor, has full right to ſue for payment, without the neceſſity of a ſervice for proving the creditor's death, *Feb.* 4. 1680, *Robertſon*; and this holds even in an heritable bond, provided it has not been perfected by ſeiſin: but if the *nominatim* ſubſtitute be only called in the ſecond place, a ſervice is neceſſary, for proving, that all the heirs called before him have failed, *St. b.* 3. *t.* 5. § 6. As bonds taken to the creditor and his heirs indefinitely, deſcend to executors, the title to them muſt be made up, upon the death of the creditor, not by ſervice, but confirmation, which is the form of conveyance proper to executry; but if a bond be taken, either to heirs ſecluding executors, or to a ſpecial order of heirs, *ex. gr.* to heirs-male, which implies an excluſion of executors, it cannot be carried but by ſervice. No right clothed with infeftment can, in any caſe, be tranſmitted to ſubſtitutes without a ſervice.

74. A ſervice which has proceeded upon a claim as next and lawful heir to the deceaſed, carries all the ſubjects deſcendible to the heir of line which have not been limited by any entail. But this rule fails in ſubjects not left by the deceaſed to the diſpoſition of law, but deviſed by him to a certain order of heirs, even though the claimant ſhould, by the failure of the prior members of entail, happen to be alſo heir of proviſion at the time of the ſervice. Put the caſe that an eſtate was entailed by the deceaſed to A; whom failing, to B; whom failing, to the heirs of line; a ſervice by the heir of line ſimply *qua* ſuch, can carry no right to the eſtate which was firſt provided to A and B, though, by their failure, the ſucceſſion has devolved on him before the ſervice. The reaſon is, he is not intitled to the ſubject as heir of line, but as ſubſtitute in a proviſion to ſpecial heirs: he ought therefore to have claimed as heir of proviſion. The ſervice, being a ſentence, ought to be reſtricted to the claim offered to the inqueſt, and the evidence brought by the heir in ſupport of it. But a proof that the claimant is truly the heir of line, is no evidence that the prior ſubſtitutes have failed, which however is eſſentially neceſſary in a ſervice by an heir-ſubſtitute, *July* 21. 1738, *Edgar*. It ſeems to be a conſequent of this doctrine, that

that in all ſervices as heir of tailzie or proviſion, the claim and retour ought not only to deſcribe the claimant barely by the character of heir of tailzie and proviſion, but to expreſs the ſpecial deed under which he claims, and the ſpecial lands to the ſucceſſion of which he is intitled by that deed, and that all the heirs called before him are extinct. Yet this is not preciſely neceſſary for ſupporting thoſe ſervices. Though a retour be conſidered as a decree proceeding on the verdict of an inqueſt, there is no neceſſity that every decree ſhould expreſs the evidence on which it is founded: it is enough if it be laid before the judge before he paſſes ſentence. This the law preſumes to be done in ſervices, and in fact is never omitted; which has probably been the reaſon of the almoſt conſtant practice obſerved till the beginning of this century, as appears from a ſearch into the chancery-records, that all ſervices as heirs of proviſion paſſed in general terms, without any ſuch reference in the retour; all which have nevertheleſs been uniformly ſuſtained, *New Coll.* i. 90.; *ibid.* ii. 114.

75. A general ſervice cannot include under it a ſpecial; becauſe it has no relation to any ſpecial ſubject, unleſs where an heir of proviſion is ſerved in general; and even then it carries only that claſs of rights upon which ſeiſin has not proceeded. But a ſpecial ſervice neceſſarily implies in it a general one of the ſame kind and character. Thus a ſervice as heir of line in ſpecial to a particular eſtate, includes a general ſervice as heir of line to the ſame anceſtor; and, of conſequence, carries all perſonal rights deſcendible to the heirs of line; and, *vice verſa*, ſubjects the heir to all the burdens to which he would have been liable, had he been ſerved heir-general of line, *Dirl.* 323. Thus alſo a ſervice as heir-male in ſpecial, carries all the anceſtor's perſonal rights provided to the heir-male; for if the inqueſt's returning an anſwer *affirmativè* to the two firſt heads of the brief by themſelves, veſts all thoſe perſonal rights in the heir, the inqueſt's anſwering them with the other five heads muſt have the ſame effect. Where therefore the heads neceſſary to be proved in a general ſervice have been already fixed and proved in the ſpecial, there can be no occaſion for having them again tried by another inqueſt.

76. It is a good objection againſt a ſervice, That there is a poſſibility of a nearer heir *in utero*; for *qui in utero eſt, pro jam nato habetur, quoties de ejus commodis quæritur, l.* 7. *De ſtat. hom.*: and therefore no ſervice can proceed, upon brieves purchaſed by a collateral heir to a perſon deceaſed, who has left a widow ſuſpected to be with child, while there is hope of her delivery. But where no nearer heir is either born or begotten at the time of the ſervice, the heir who is then next in blood to the deceaſed, is admitted to ſerve, though it be poſſible that a nearer heir may afterwards exiſt. This is uncontroverted in the ſucceſſion *ab inteſtato*; for we have already ſeen, that where there is no deſtination, the father ſucceeds, upon the failure of ſons, brothers, and ſiſters, *ſupr.* § 9. Now if the father could not ſerve heir while there is a nearer heir *in ſpe*, he could not be ſaid to ſucceed; becauſe ſo long as he is alive, there is a poſſibility that he may have children who would exclude himſelf from the ſucceſſion of the deceaſed. Becauſe this and all other rules relative to ſucceſſion are founded in the will of the deceaſed, either actual or preſumed, therefore in tailzied ſucceſſion alſo, the ſervice of the next heir at the time, cannot be ſuſpended upon the hope that a nearer may exiſt, unleſs it ſhould evidently appear from the tenor of the entail, or other ſpecial circumſtances, that the deceaſed intended the contrary, *Fount. Jan.* 2. 1708, *Mackenzie*. But in this laſt caſe, the heir ſerved is, in virtue of a fideicommiſs implied in the entail, conſidered as a fiduciary heir, who muſt, on the exiſtence of a nearer, diveſt himſelf in his favour, *Fount. Dec.* 13. 1709, *Mackenzie*; *New Coll.* i. 204. Whether a *bona fide* purchaſer

chaſer from an heir ſo ſerved be ſecure, in a competition with a nearer heir upon his exiſtence, is a queſtion which ſeems not to have been yet decided upon the abſtract point of law *.

77. The right of ſundry ſubjects is eſtabliſhed in the heir without a ſervice. *Firſt*, Neither titles of honour, nor offices of the higheſt dignity, require ſervice; for they deſcend *jure ſanguinis* to the heir limited in the grant. *2dly*, In heirſhip-moveables, poſſeſſion is a complete title without ſervice; but if the heir die without attaining poſſeſſion, theſe moveables do not deſcend to that heir's executor, but paſs to the heir of the firſt deceaſed. *3dly*, An heir is, by his right of apparency, intitled after his anceſtor's death to tacks, penſions, and ſuch other heritable ſubjects which had belonged to him, as have a tract of future time, not only to the effect of recovering or continuing his anceſtor's poſſeſſion, but alſo with reſpect to the right to the tack itſelf, which the law deems to be in the heir, without the neceſſity of a ſervice, *June* 17. 1671, *Boyd*; for in all caſes where the right of the deceaſed was temporary, running out by a certain courſe of time, that courſe is not ſtopped, though the heir ſhould not be entered heir to the deceaſed, *St. b.* 3. *t.* 5. § 6. And this holds, in ſo much that a creditor adjudging the right to a tack that belonged to his debtor, from the debtor's heir, needed not charge the heir to enter in ſpecial, *June* 19. 1635, *Rule*. It obtained indeed by the more ancient practice, that though the apparent heir could enjoy the tack, he could not aſſign it; becauſe a tack is an heritable ſubject, which remains *in hereditate jacente*, as much as a land-eſtate, till the entry of an heir, *Feb.* 14. 1623, *Rattray:* but by the lateſt deciſions, the apparent heir is, in the judgement of law, full proprietor of his anceſtor's tacks, in which character he may, by voluntary aſſignation, make them over to another, *Feb.* 16. 1739, *Campbell*, cited in *Dict.* ii. *p.* 366. An apparent heir of a tackſman, even where the anceſtor was not at his death in the poſſeſſion, may inſiſt in an action of removing againſt ſuch tenants of the lands contained in the tack, as derive no right from that anceſtor; and if any tenant ſhall found his poſſeſſion upon an aſſignation from him, the heir has a good title to ſet aſide ſuch aſſignation upon any legal ground, without the neceſſity of a ſervice, *Tinw. June* 28. 1754, *Scot.* *4thly*, A right of reverſion is ſaid by Stair to require no ſervice, *b.* 3. *t.* 5. § 6. But it has been already remarked, *b.* 2. *t.* 8. § 21. that the apparent heir of a reverſer cannot take ſo much as the firſt ſtep that is neceſſary for making good his reverſion, *viz.* his uſing an order of redemption, till he be entered. *Laſtly*, The fee of a land-eſtate cannot be eſtabliſhed without a ſervice, even in one

* This point was determined in the caſe *Mackinnon contra Sir James Macdonald.*—— The eſtate of Mackinnon ſtood deviſed to John Mackinnon younger, and the heirs-male of his body; whom failing, to any other ſon or ſons of John Mackinnon elder, (father of John the younger), according to their ſeniorities; whom failing, to John Mackinnon, leſſee of Miſſiniſh, and the heirs-male of his body, *&c.*— John Mackinnon younger having died without male iſſue, and John Mackinnon elder having no other male iſſue at the time, Mackinnon of Miſſiniſh was ſerved heir male and of proviſion to John the younger, took poſſeſſion, and ſold part of the eſtate to Sir James Macdonald.— John Mackinnon elder having afterwards had ſons, the guardians of Charles the eldeſt brought an action againſt Mackinnon of Miſſiniſh, for ſetting aſide his retour and infeftment, and to have it declared, that their ward had right to the eſtate in virtue of the ſaid ſettlement.—The court found, "That Miſſiniſh's right reſolved and fell upon "the purſuer's birth; and therefore that it was competent for the purſuer, by ſervice to his "predeceſſors, to enter to the poſſeſſion as effectually as if Miſſiniſh had never been ſerved heir "to Mackinnon the younger."—— Charles Mackinnon having accordingly been ſerved heir to John Mackinnon younger, brought two actions for ſetting aſide the ſale by Miſſiniſh to Sir James Macdonald; the firſt on this ground, That the ſale was made by Miſſiniſh under a reſolvable and defeaſible title; the ſecond on this ground, That the ſervice of Miſſiniſh was illegal and erroneous while John Mackinnon elder was alive; and that therefore the ſale was null, as made *a non habente poteſtatem.*—— The court ſuſtained the defences, and abſoilzied, *Feb.* 27. 1765; and the judgement was affirmed upon appeal, *Feb.* 25. 1771.

who

who is *nominatim* ſubſtituted in an entail: for though, in bonds, a perſon named immediately after the creditor, is not under a neceſſity to confirm, *ſupr.* § 73.; yet in land-rights ſuch *nominatim* ſubſtitute cannot be veſted in the fee *ipſo jure*, but muſt firſt be ſerved; becauſe property of lands once veſted, cannot be tranſmitted but by writing; the rule which obtains in ſome other countries, *Mortuus ſaſit vivum*, being quite repugnant to the genius of our law. And this holds in the ſubſtitution, not only of proper feudal rights completed by ſeiſin, but of perſonal rights of land; for a general ſervice is as neceſſary to eſtabliſh a title to the laſt, as a ſpecial ſervice to the firſt, *New Coll.* ii. 23. & 114.

78. A general ſervice carries to the heir the complete right of all the heritable ſubjects on which the anceſtor had not taken ſeiſin, though he has not eſtabliſhed a right to them in his own perſon by ſeiſin: for ſeeing all perſonal rights are *ex ſua natura* tranſmiſſible *inter vivos*, by the owner to the grantee, by ſimple aſſignation without ſeiſin, they muſt alſo be effectually tranſmitted from the deceaſed to his heir by a ſervice, which is the legal method of conveyance from the dead to the living. From hence it follows, that if the heir thus ſerved ſhould die before he had infeft himſelf on theſe rights, his heir, if he wants to carry them, muſt ſerve heir to the laſt deceaſed, becauſe they were laſt veſted in him. But a ſpecial ſervice to ſubjects on which ſeiſin had followed, evaniſhes, if the heir ſhall die before completing his ſervice by ſeiſin; becauſe the proper feudal right, which was in the anceſtor, cannot be carried out of his *hereditas jacens* to the heir, but by ſeiſin; and therefore the next heir muſt ſerve in theſe ſubjects, not to the laſt deceaſed, whoſe ſervice became void by his death, in ſo far as it was ſpecial, but to the firſt deceaſed, in whoſe *hereditas jacens* the feudal right ſtill continued.

79. Where the lands hold of the crown, the heir ſerved in ſpecial applies to the chancery for iſſuing a precept, which is granted of courſe, for infefting him in the lands to which he is ſerved; which, when the lands do not hold burgage, can be directed to no other than the ſheriff of the county, who is charged with the care of the crown's caſualties, and who is required by the precept to take ſecurity from the heir for the payment of them, before he be infeft. If the ſheriff ſhall refuſe to give ſeiſin on the precept, a new precept will, upon application to the court of ſeſſion, be directed to another as ſheriff in that part, *Act of ſederunt*, *Feb* 15. 1678. The ſheriff who thus gives ſeiſin, was by our old cuſtoms intitled to a ſeiſin-ox as his fee; but this perquiſite is now generally paid in a ſum of money, more or leſs, according to the value of the lands. The vaſſals of church-lands who hold of the crown, as coming in place of the biſhop, in conſequence of 1690, *c.* 29. are exempted from paying this fee, where the valuation of their lands does not exceed L. 200 Scots, 1690, *c.* 32. If a ſubject-ſuperior refuſed to infeft the heir upon his ſervice, three conſecutive precepts iſſued by the former practice from the chancery, commanding the ſuperior in different ſtyles, and under different certifications, to infeft him, in the ſame manner and form as an appriſer or adjudger might have done; as to which, ſee *Hop. Min. Pr.* § 133. *et ſeqq.*; and if he ſtill refuſed, a precept iſſued againſt the next higheſt or mediate ſuperior, as coming in place (*ſupplendo vices*) of the immediate one; and in this manner, the heir proceeded from ſuperior to ſuperior, till he came to the ſovereign; againſt whom a charge is not only improper, but unneceſſary; for the crown refuſes no vaſſal; ſee *Dallas's Styles*, *p.* 234. But the heir may now, by 20 *Geo. II. c.* 50. obtain a warrant from the court of ſeſſion, upon production of his ſpecial retour, to charge the ſuperior to receive him on fifteen days notice. This ſtatute provides, that the heir muſt at the ſame time offer to the ſuperior

the caſualties due to him by law, *i. e.* the nonentry-duties and the relief; which indeed ariſes from the nature of the right; for all ſuch precepts, whether directed to the immediate or mediate ſuperior, are conditional, *vaſſallo faciendo ſuperiori quod de jure facere oportet*, *Hop. Min. Pr. ibid.*; *July* 29. 1624, *L. Caprington.* The ſuperior may alſo decline giving obedience to the charge, till the ancient title-deeds of the eſtate be ſhewed to him, that he may make out the precept for infeftment in the preciſe terms of the proviſions and limitations therein contained; for ſince the vaſſal lies under an obligation to exhibit to the ſuperior the ancient writings of the lands when demanded, no time can be more proper for it than when the vaſſal enters to theſe lands.

80. Where the ſuperior himſelf has no more than a perſonal right to the ſuperiority, and conſequently cannot give a valid and effectual ſeiſin to another, a charge againſt him to infeft the heir would be fruitleſs; the heir therefore in ſuch caſe muſt charge the ſuperior, agreeably to the directions of 1474, *c.* 58. to obtain himſelf infeft in the ſuperiority within forty days, that he may be in a capacity to enter the heir, under certification, that if he fail, he ſhall, as the act expreſſes it, loſe the tenant for his lifetime, *i. e.* loſe the caſualties that may fall to him through the act or delinquency of his vaſſal, beſide making up the damage that may be ſuſtained by him through that failure. But the ſuperior forfeits none of the fixed yearly duties payable by the vaſſal, as part of the penalty; theſe not being properly caſualties. Mackenzie in *Obſ. on* ſaid *act* 1474, mentions an act of ſederunt *anno* 1634, which declares the meaning of the ſtatute to be, that the ſuperior ſhall forfeit for his own life, and not for his vaſſal's only: but that act of ſederunt is neither to be found in the collection lately publiſhed, nor in the books of ſederunt. Where the immediate ſuperior neglects to complete his titles, notwithſtanding the charge againſt him, the heir may, as in the former caſe, proceed againſt all the intermediate ſuperiors between him and the ſovereign: but the mediate ſuperior, who upon a charge given him enters the heir of his ſubvaſſal, loſes none of the caſualties falling by his immediate vaſſal; becauſe what he does is barely an act of obedience.

81. When a vaſſal who ſucceeds as heir to the ſuperior, has, according to the rules explained in this title, completed his right to the ſuperiority, or a ſuperior to the property of the lands veſted in the anceſtor, the two rights, though they both meet in the heir, are indeed two diſtinct eſtates, and muſt continue to be enjoyed under different titles, and to deſcend to the different heirs to whom they were originally provided, till the property be conſolidated with the ſuperiority; which is effected by the heir's granting procuratory of reſignation for ſurrendering the lands to himſelf, in the manner deſcribed *b.* 2. *t.* 7. § 19. But though this be the proper feudal method, it is the general opinion of lawyers and conveyancers, that where a ſuperior ſucceeds to the vaſſal, a precept of *Clare conſtat* granted by the heir as ſuperior, for infefting himſelf in the lands, expreſsly purporting to be granted for conſolidating the property with the ſuperiority, joined with the inſtrument of ſeiſin proceeding upon it, and duly regiſtered, is equivalent to a reſignation *ad remanentiam.*

82. Though an heir can have no active title to his anceſtor's eſtate, without ſubjecting himſelf to his debts; yet he may become liable for the anceſtor's debts, without having a right to his eſtate, by doing certain acts which the law has declared to infer a paſſive title. The two moſt conſiderable paſſive titles proper to heritage are, *geſtio pro herede*, which is an univerſal one, and *præceptio hereditatis*, which is limited. *Geſtio pro herede*, or behaviour as heir, is a paſſive title, by which an apparent heir becomes liable for the whole of his anceſtor's debts, ariſing from his ſo behaving himſelf with regard to the heritage of the deceaſed, as none other than an heir

heir legally ſerved hath a right to do, *l.* 20. *pr. De adq. vel amit. hered.* This has been eſtabliſhed by a cuſtom as ancient as the inſtitution of the college of juſtice, and was introduced to prevent or diſcourage the frequent frauds practiſed by heirs, who, though they continued their anceſtor's poſſeſſion, were, by our ancient uſage, liable only *in valorem* of their intromiſſions, *Balf. p.* 231. *c.* 29.; *Nov.* 14. 1546, *La. Dirleton*, quoted by Stair, *b.* 3. *t.* 6. § 2.

83. *Geſtio pro herede* is inferred, *firſt*, and moſt commonly, by the heir's immixing, after the death of the anceſtor, either by himſelf, his tenants, ſtewards, or others in his behalf, with any part of the lands, or other heritable ſubjects to which he himſelf might have completed an active title by ſervice, *ex. gr.* with the rents of the anceſtor's lands. This holds though the lands had been adjudged from the anceſtor during his life, if either the legal of the adjudication was yet current at the time of the heir's immixtion, *Feb.* 21. 1663, *Hamilton*, or if the anceſtor died ſeiſed, and in the poſſeſſion of the lands. But if the adjudger was infeft, and in poſſeſſion, when the anceſtor died, the paſſive title is excluded, *July* 11. 1671, *Maxwell.* The heir's granting a leaſe of the anceſtor's eſtate, or his poſſeſſion of lands of which the anceſtor had a leaſe not expired at his deceaſe, infers behaviour. The huſband's intermeddling with the rents of an eſtate in which the wife was apparent heir, ought in equity to ſubject him to this paſſive title: for tho' he himſelf is not the heir, yet as the law gives him the ſole management of his wife's eſtate, all poſſeſſion had by him in her name, ought to bring him under the like penalties with herſelf, had ſhe been the poſſeſſor; ſee *Fount. Dec.* 17. 1703, *L. Linthill.* Behaviour is inferred, *2dly*, by the heir's immixing with the anceſtor's heirſhip-moveables; for theſe are, in queſtions of ſucceſſion, accounted heritage; not only when he ſeparates the heirſhip-moveables from the reſt, in which caſe he acts directly as heir; but when he takes the poſſeſſion of any moveable ſubject, out of which part of the heirſhip may be drawn, without the warrant of a judge, *Feb.* 21. 1663, *Stirling.* But this paſſive title may be elided by the defence, That the deceaſed was neither prelate, baron, nor burgeſs, and conſequently could have no heirſhip. *3dly*, It is inferred by the heir's intermeddling with the writings or title-deeds of his anceſtor's eſtate: and the extending it to this caſe was neceſſary, that apparent heirs might not have it in their power to cut off lawful creditors from their payment, by rearing up debts againſt them, the diſcharges or acquittances of which lay in the anceſtor's charter-cheſt. It may perhaps be hard to reconcile the different deciſions on this point; but in all of them, great weight ſeems to be laid on the good or bad intention of the heir: and, in general, it may be obſerved, that paſſive titles are not now ſo ſtrictly attended to as they were formerly. Where the heir poſſeſſed himſelf of the charter-cheſt, which is *nomen univerſitatis*, his *animus gerendi* was preſumed, and therefore he was ſubjected to the paſſive title, *Goſf. June* 28. 1670, *Elies; Fount. Feb.* 26. 1698, *Murray:* but if he carried off from the deceaſed's repoſitories only particular deeds granted in his own favour, or where, from his making no uſe of the writings, or from other favourable circumſtances, there appeared no intention of behaving, he was abſolved, *July* 8. 1628, *Dunbar*; *Fount. Jan.* 28. 1698, *E. Airly; Fount. June* 15. 1706, *Diggles.*

84. Behaviour is inferred, even without intromiſſion, barely by the heir's making over to a third party, any ſubject belonging to his anceſtor, to which he himſelf might have ſucceeded as heir, or by his conſenting to the conveyance thereof made by another; for ſuch deeds have a direct tendency to carry off from creditors part of their payment, *Feb.* 10. 1642, *Johnſton*; *July* 30. 1672, *Foulis.* Granting diſcharges of rents, or of debts due to the anceſtor, has the ſame effect; for the extinction of ſuch debts in favour of the

the debtor, is as hurtful to the creditors of the anceſtor, as the aſſigning them over to others: but the ſimple renunciation by the heir of all claim to the ſucceſſion, in favour of the heir-male, or of proviſion, infers no paſſive title, though he ſhould have got a valuable conſideration for granting it; becauſe no right which might have been otherwiſe competent to creditors, is either tranſmitted or extinguiſhed by ſuch renunciation; and the creditors of the deceaſed are in no worſe condition than before, *July* 5. 1666, *Scot*; *July* 19. 1676, *Nevay*.

85. The paſſive title of behaviour or *geſtio* is excluded, if the ſubject intermeddled with was truly no part of the eſtate left by the deceaſed. Thus an heir immixing with the heirſhip-moveables of his anceſtor who died at the horn, after his ſingle eſcheat was gifted, and the gift declared, infers no paſſive title; becauſe theſe moveables belonged, after declarator, not to the deceaſed, but to the donatary, to whom alone the heir was accountable, and not to the creditors, *Dec.* 22. 1674, *Seton*. By ſtronger reaſon, it muſt be excluded, if the poſſeſſion by the heir can be aſcribed to a diſpoſition, gift, or other ſingular title in himſelf; *ex. gr.* if he has immixed with the anceſtor's heirſhip-moveables as donatary to his eſcheat, *Feb.* 10. 1676, *Grant*. Under the colour of this rule, it became a common practice for apparent heirs to grant ſimulate bonds to truſtees, that adjudications might be deduced upon them againſt the anceſtor's eſtate; after which they got the adjudication made over to themſelves, and poſſeſſed the lands under that ſingular title, without repreſenting the deceaſed. Againſt ſuch fraudulent practices, firſt, the court of ſeſſion interpoſed, by act of ſederunt, *Feb.* 28. 1662, ſubjecting the heirs, who ſhould poſſeſs upon adjudications that had been led on their own bond, to a paſſive title; and afterwards the legiſlature, by 1695, *c.* 24. By this ſtatute it is enacted, that if an heir, without being ſerved, ſhall poſſeſs any part of his anceſtor's eſtate, or purchaſe any right affecting it, otherwiſe than as higheſt offerer at a judicial ſale, ſuch poſſeſſion or purchaſe ſhall be deemed behaviour as heir. This enactment was extended by former deciſions to the caſe of a purchaſe made by the heir in the anceſtor's lifetime, provided he poſſeſſed under that title after the anceſtor's death, *Fount. June* 7. 1710, *Watſon*; *Dalr.* 117. But by a later deciſion, *New Coll.* ii. 192. it was found, that a purchaſe made by an apparent heir while the anceſtor lived, and poſſeſſion aſſumed thereupon before his death, excluded all ground of challenge upon this ſtatute, though the purchaſer continued in the poſſeſſion after his death: *firſt*, Becauſe ſundry expreſſions are uſed in that clauſe which diſcover the legiſlature's intention to confine the enactment to proper apparent heirs, whoſe anceſtors are dead; and, *2dly*, Becauſe a variety of hardſhips, contrary to the received rules of law, muſt follow upon a contrary interpretation: one ſtrong inſtance of which occurs in the caſe of a ſon who is creditor to his father, and enters into the poſſeſſion of his lands upon proper diligence, and who, if the clauſe reached to purchaſers while the anceſtor was yet alive, would be ſubjected to an univerſal paſſive title, merely for uſing the legal diligence competent to all creditors. This is undeniable, that if the anceſtor was dead before the heir made the purchaſe, the purchaſing alone, without the leaſt poſſeſſion following upon it, ſubjects him *paſſivè*, both by the words and the intendment of the ſtatute. If the heir ſhall, before the anceſtor's death, acquire a right to the property of his eſtate from himſelf, there can be no room for the paſſive title of *geſtio*, (though perhaps there may for that of *præceptio hereditatis*, ſoon to be explained): for after the anceſtor is diveſted, the eſtate is no longer his, but the purchaſer's; and the paſſive title of behaviour is limited to ſuch heritable ſubjects as belonged to the anceſtor at the time of his death.

86. Behaviour

86. Behaviour is alſo excluded, where the ſubject intermeddled with by the heir is inconſiderable, if there be no circumſtances from which his intention or *animus* can be preſumed to defraud the creditors of the deceaſed, *Nov.* 6. 1622, *L. Dundas*; for behaviour as heir is not *tam facti quam animi*, *l.* 20. *pr. De adq. vel amit. her.*: and therefore, upon the other hand, intromiſſions, however ſmall, ſubject the heir *paſſivè*, where an *animus* of immixing appears, *Hadd. March* 8. 1610, *Baillie*. The heir's voluntary payment of his anceſtor's debt is not to be conſtrued againſt him into behaviour: for a ſtranger as well as an heir may lawfully pay what is due by another; and ſuch payment, in place of being hurtful to creditors, is profitable to them, as it diſburdens, and ſo enlarges the fund of their payment, *Jan.* 26. 1628, *Comm. of Dunkeld*. Nor does the purchaſing of brieves by the heir to enter, infer behaviour, though it ſignifies a preſent purpoſe or intention to ſerve heir, becauſe any man may alter his reſolution before it be put in execution, *June* 28. 1670, *Eleis*: nor an apparent heir's aſſuming his anceſtor's titles of honour, nor the exerciſing any office of high dignity hereditary to the family, which carries with it no pecuniary intereſt; becauſe theſe being grants annexed by the crown to the blood of the grantee, from a *delectus familiæ*, are *extra commercium*, and ſo may be enjoyed by the heir without repreſentation, *Harc.* 31. Yet the exerciſing any hereditary office of profit, which may be bought and ſold, and is conſequently adjudgeable, may be juſtly deemed to infer this paſſive title. Laſtly, As paſſive titles have been received into our law, merely for the ſecurity of creditors; therefore, where queſtions ariſe concerning behaviour, among the different order of heirs, in which creditors have no concern, the heirs are not liable to one another *in ſolidum*, but are only accountable *in valorem* of their ſeveral intromiſſions, *Nov.* 20. 1630, *Pride*.

87. That apparent heirs might not, upon gratuitous diſpoſitions from their anceſtors, enjoy their eſtates without being liable for their debts, the paſſive title of *præceptio* was introduced, by which an heir, if he accepts of a grant from his anceſtor, of any part, however ſmall, of that eſtate to which he would have ſucceeded as heir, is ſubjected to the payment of all ſuch debts due by the anceſtor as were contracted previouſly to the grant. It is called *præceptio hereditatis*, becauſe the heir, by ſuch acceptance, takes the ſucceſſion before it opens to him by the death of the anceſtor; ſo that this paſſive title, as well as *geſtio pro herede*, is founded on the heir's immixing with the anceſtor's heritage. But the two differ ſomewhat in point of time. In behaviour, the whole immixtion is after the anceſtor's death; but in *præceptio*, the immixing is begun by the heir's acceptance of the right in the anceſtor's lifetime, and is only continued after his death. This paſſive title has been ſuſtained againſt the heir, by his acceptance of the gratuitous right from the anceſtor, and poſſeſſing upon it in his lifetime, without the leaſt act of poſſeſſion ſubſequent to his death, *July* 8. 1625, *Gray*; and even by the heir's bare acceptance, though he had made no uſe of the right at any period of time, *Dirl.* 377. But theſe judgements appear contrary to the common notions of a paſſive title, which is a legal penalty inflicted on the heir for ſome irregular act done by him after the death of the anceſtor. Though therefore the heir ſhould have poſſeſſed upon the right while the anceſtor was alive; yet if he repudiate it immediately after his death, or abandon the ſubject to the creditors of the deceaſed, he ought to be ſecure againſt the paſſive title: but he is doubtleſs liable in that caſe to account to thoſe creditors for all the profits of that right which he had received during the life of his anceſtor.

88. The ground of this paſſive title is, that the heir, by taking a gratuitous right to ſubjects in which he is to ſucceed to the granter, is conſidered

as acknowledging himſelf his heir, and ſo is liable in payment of all the debts contracted by the granter before his own acceptance of ſuch right; and he is on that account called *ſucceſſor titulo lucrativo poſt contractum debitum:* but he lies under no obligation to pay ſuch debts as the granter may contract afterwards, not even thoſe that may have been contracted in the intermediate time between the heir's acceptance of the right, and the perfecting of it by ſeiſin, *Feb.* 1721, *L. Aldie:* for, as Stair obſerves, *b.* 3. *t.* 7. § 6. the paſſive title is directed againſt ſucceſſors *titulo lucrativo, qui titulus eſt poſt contractum debitum*; and therefore has no place as to debts contracted after the right or title is accepted of by the heir. And though, by this doctrine, creditors may be deceived, who have no means of knowing but by the records, whether he whoſe credit they are to truſt, has granted any right of his eſtate to his apparent heir; the granting rights to ſtrangers is liable to the ſame inconveniency; and if it ſhall appear that ſuch rights are kept latent, without ſeiſin, on purpoſe to defraud creditors, they may be ſet aſide *ex capite fraudis*, *St. ibid.* Where the original ground of the obligation againſt the anceſtor is prior in date to the right granted to the heir, the heir is liable in payment of the debt, though its conſtitution by bond or decree ſhould be poſterior to it, *Spottiſ. p.* 315. *Jan.* 14. 1634, *Ogilvie*; *Forb. MS. July* 22. 1714, *Douglas.* According to this view of preception, it may without impropriety be accounted a limited ſpecies of behaviour as heir. The heir, where his poſſeſſion or immixtion is not founded on any right granted to him by his anceſtor, is ſubjected univerſally by the paſſive title of proper behaviour; but where he poſſeſſes under a grant from his anceſtor, the effect of the paſſive title becomes reſtricted, as if the anceſtor had died immediately after executing the right, and ſo extends to no debts contracted by him afterwards.

89. The heir who incurs this paſſive title muſt be ſucceſſor *titulo lucrativo*; and, of courſe, is not liable, if the right has been granted to him for an onerous cauſe. But it is not enough that the recital expreſſes an onerous cauſe; for in rights granted *inter conjunctas perſonas*, creditors cannot be hurt by the bare aſſertion of the granter in the recital, which may have been inſerted with a particular view to defend the grantee againſt the paſſive title, *Feb.* 15. 1676, *Hadden*; *Nov.* 29. 1678, *Higgins.* If the heir ſhall prove *aliunde*, that he has paid money for the right, it muſt be conſidered, whether the ſum paid bears any proportion in value to the ſubject diſponed. If it do not, the heir is preſumed to have paid that trifle *dicis cauſa*, on purpoſe to get quit of a paſſive title. If the ſum comes near the value, though it ſhould not be fully adequate to it, he is ſecure from the penal conſequences of preception: but the anterior creditors may ſet aſide the right, in ſo far as it appears to be gratuitous, upon the ſtatute 1621, ſo that the heir ſhall be liable only *in quantum lucratus eſt*, ſaid *Nov.* 29. 1678.

90. The paſſive title of *præceptio* is inferred againſt an heir, though the right accepted of by him ſhould have been granted for the fulfilling of a marriage-contract; becauſe ſettlements, or obligations to ſettle, in a marriage-contract, in favour of the heir of the marriage, are barely rights of ſucceſſion, taking place only after the father's death, and granted with the implied burden of his debts; and therefore the heir's acceptance of a preſent right to the ſubject provided, during the life of the father, makes him conſidered as ſucceſſor *titulo lucrativo*, *Feb.* 22. 1681, *More.* But if, by any clauſe in the contract, a proper right of credit be given to the heir, *ex. gr.* if the father binds himſelf to infeft him againſt a day ſpecified; the heir, who thereby becomes the father's creditor in the ſtricteſt ſenſe, incurs no paſſive title by accepting of a right from him to the ſubject provided, more than he would do by taking ſeiſin on the obligation, *Nov.* 29. 1678, *Higgins.*

Higgins. This paſſive title is extended to the caſe of rights granted to the mediate apparent heir. A right, for inſtance, granted by one to the eldeſt ſon of his eldeſt ſon, makes his grandchild who accepts of it liable *præceptione*, *Jan.* 29. 1639, *La. Smeton*; becauſe, though he be not himſelf the granter's immediate apparent heir while his father is alive, yet he is, by the neceſſary courſe of law, *alioqui ſucceſſurus* to the granter. But if one who has no iſſue ſhall grant a right of lands to his only brother, the brother, though he be at the date of the right next in ſucceſſion to the granter, is not liable *præceptione*, though the ſucceſſion ſhould actually open at laſt to him; becauſe the granter might have afterwards had heirs of his body who would have ſucceeded preferably to the grantee, *Dec.* 22. 1674, *Seton.* According to this rule, a right accepted by a daughter ought not to ſubject her *paſſivè*, becauſe the granter might have afterwards had male iſſue: yet a daughter who had thus accepted of a right from her father, was made liable *præceptione*, *Feb.* 15. 1634, *Orr*; becauſe perhaps a fraudulent intention is more eaſily preſumed in favour of one's own iſſue than in favour of collaterals. A diſpoſition in favour of a ſtranger, which the grantee by a perſonal obligation declared to have been granted for the behoof of the granter's apparent heir, has been adjudged not to infer preception, *Jan.* 14. 1662, *Harper:* but this judgement appears inconſiſtent with the rule, *Plus valet quod agitur quam quod ſimulate concipitur*, ſince the interpoſition of a third party is in ſuch caſe merely nominal. Preception may take place in all heritage, even in heritable bonds, though theſe are not properly *feuda*, *Dec.* 2. 1665, *Edgar*; *Feb.* 7. 1679, *Hamilton*; and, on the ſame ground, it ought to be inferred, from the heir's accepting a right of leaſe from his anceſtor: but it is not inferred by his accepting a right to moveables, becauſe the heir is not *alioqui ſucceſſurus* in moveables, ſaid *Feb.* 7. 1679. Mackenzie, § 38. *h. t.* puts the caſe of a right granted by the anceſtor of heirſhip-moveables, which, he ſays, does not ſubject the heir *paſſivè:* but ſuch caſe can hardly be figured; for no right infers preception which does not afford to the heir a preſent title of poſſeſſion during the anceſtor's life; whereas heirſhip is the beſt of certain kinds of moveables, of which one is proprietor at the time of his death, and ſo cannot be poſſeſſed, or even exiſt, till that period.

91. The great particular in which theſe two paſſive titles in heritage differ, is this, that behaviour is a wrongous and unjuſtifiable intermeddling by the heir with the eſtate of his anceſtor, without the order of law; and conſequently ariſes *ex delicto:* and as no action grounded upon a delinquency is tranſmitted againſt heirs, which has not been litiſcontеſted while the delinquent himſelf was alive, *infr. b.* 4. *t.* 1. § 14. that paſſive title is not tranſmitted againſt the heir of him who has incurred it. But the ſucceſſor *titulo lucrativo* is not deemed to have done wrong; his acceptance is truly equivalent to an entry as heir, by which he is underſtood to have entered into a *quaſi* contract with the anceſtor's creditors, and undertakes the burden of his whole debts as they ſtood at that time; and all actions ariſing from contract are tranſmiſſible againſt heirs, *Harc.* 65.

92. On the other hand, the two paſſive titles above mentioned agree in the following particulars. Firſt, Neither of them can affect the heir, unleſs the ſubjects made over to or intermeddled with by him be ſuch as he would ſucceed to; for it is his behaviour as heir, or his acceptance of rights in which he is *alioqui ſucceſſurus*, that founds theſe paſſive titles. Hence an heir of entail, though he ſhould accept of a right of lands not contained in the entail, is not liable in a paſſive title; becauſe not he, but the heir of line, is to ſucceed to theſe lands: neither does an heir male or of entail incur the paſſive title of behaviour, though he ſhould immix with heirſhip-moveables,

moveables, becauſe it is the heir of line who ſucceeds to heirſhip. On the ſame ground, if the purchaſer of an heritable ſubject ſhall take the right, not to himſelf, but to his eldeſt ſon, the ſon's acceptance of the right in his father's lifetime, or even his immixing with the rents after his death, cannot fix a repreſentation againſt him; becauſe, as the father was at no period veſted with the right, the ſon could not be his heir in it. In this particular alſo the two paſſive titles agree, that neither of them ought to be farther extended againſt the heir than if he had been actually ſerved; for, as Mackenzie expreſſes it, a copy ought to go no farther than the original: the only reaſon for introducing paſſive titles was, that creditors might not ſuffer by the devices of heirs who wilfully ſtood off from entering; and therefore, if the heir who incurs a paſſive title be made liable as if he had entered, the creditors of the deceaſed can demand no more. This is acknowledged by all in the caſe of an heir liable *præceptione*, who, becauſe his obligation is conſidered to ariſe *ex contractu*, has an active title in virtue of the right granted to him by his anceſtor; by which, not only the benefit of diſcuſſing, but an action of relief, is competent to him againſt the executors of the deceaſed, or any other order of heirs who are primarily liable for ſuch of the anceſtor's debts as have been paid by him, in the ſame manner as if they had entered. But as to behaviour, which is a paſſive title properly vitious, Stair affirms, *b.* 3. *t.* 6. § 19. that the heir who incurs it is even in a worſe caſe than if he had entered, ſince heirs liable *paſſivè ex delicto* have no active title to purſue. But though this ſhould be admitted as a good reaſon why ſuch heirs are not intitled to an action of relief, as to which, *vid. infr. t.* 9. § 55. it cannot bar them from the benefit of diſcuſſion; for that being merely an exception pleadable againſt a purſuer who has not firſt diſcuſſed the heirs more directly liable, requires no active title: and even as to the right of relief, it is admitted, *loc. cit.* that the creditor who has received payment from ſuch heir, may be compelled by the judge to aſſign over the debt in his favour, by which he may obtain that relief indirectly, by ſuing the executors in the name of the cedent, which the law denies to him directly, unleſs it be preſumed from circumſtances, that the heir's *geſtio* was attended with fraud, or in other reſpects unfavourable. It has been obſerved *ſupr.* § 87. that behaviour and preception agree alſo in this, that in both, ſome intromiſſion or immixtion muſt appear after the death of the anceſtor.

93. There are yet two or three other paſſive titles in heritage which deſerve ſome notice. Firſt, Where an heir is cited in an action for payment, as repreſenting his anceſtor, he incurs a paſſive title, if he ſhall offer any peremptory defence againſt the debt; *ex. gr.* of payment or preſcription: for he has no intereſt to object againſt the validity or ſubſiſtence of the debt, unleſs he be liable in payment of it as heir; and therefore the bare pleading of ſuch defence is an acknowledgement that he repreſents the deceaſed, *Dalr.* 98. 147. But a defence which is offered merely to exclude the purſuer's title, or to prove an allegation, without founding on any right that was in the anceſtor, infers no paſſive title, *Kames*, 7. In like manner, an heir who is charged by his anceſtor's creditor to enter, if he neither enter, nor renounce the ſucceſſion, is liable in a paſſive title, and may be ſued perſonally for the debt. But neither of theſe paſſive titles reaches farther than to the ſpecial debt upon which the action or charge is founded; for the only deed from which the repreſentation is inferred is private, and done in conſequence of a proceſs or ſtep of diligence at the ſuit of a particular creditor, *Dirl.* 223. The paſſive title which is incurred by the heir's neglecting to renounce, does not operate till decree paſs againſt him; and a renunciation offered even after decree, if the decree be in abſence, intitles

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the heir to a ſuſpenſion of all diligence, either againſt his perſon or his proper eſtate, that may proceed on the debts due by his anceſtor: but the heir's renunciation will not be received, if he have already behaved as heir, or have, by incurring any other paſſive title, done ſomething inconſiſtent with renunciation, or if the anceſtor's eſtate is adjudged for the heir's proper debt; in which laſt caſe, the heir muſt clear off that debt before his renunciation be admitted; for his allowing adjudication to be led on his own debt, againſt his anceſtor's eſtate, is juſtly deemed immixtion, as it diminiſhes the creditor's fund of payment, by applying part of it to extinguiſh an obligation properly due by himſelf.

94. Two paſſive titles in heritage have been introduced by ſpecial ſtatute, 1695, *c.* 24.: the one univerſal, againſt apparent heirs who ſhall poſſeſs any part of the anceſtor's eſtate, under a title veſted in the perſon of any ſuch near relation as theſe apparent heirs may alſo ſucceed to as heirs; and this ſort requires no illuſtration: the other is limited, by which an heir paſſing by his immediate anceſtor who had been three years in poſſeſſion, and ſerving himſelf heir, or ſucceeding by adjudication on his own bond to one more remote, *ex. gr.* paſſing by his father, and entering to his grandfather, is declared liable for the debts and deeds of the interjected perſon, to the value of the eſtate to which he enters. For underſtanding this, it may be obſerved, that by the principles of the Feudal law, it behoved an heir who was to enter by a ſpecial ſervice, to paſs by ſuch of his anceſtors as had poſſeſſed in the bare right of apparency, and to ſerve to that anceſtor, however remote, in whom the property was laſt veſted, and in whoſe *hereditas jacens* it muſt have remained till titles were made up to it from him; and conſequently ſuch entry could not ſubject the heir to any penalty or paſſive title. As this bore hard on the creditors of the interjected perſon, who might think themſelves ſecure in contracting with one whom they ſaw for years together in the poſſeſſion of an eſtate, and from thence conclude, that it was legally veſted in him, this paſſive title was introduced, contrary to the genius of the feudal ſyſtem, for the relief of thoſe creditors who were by that manner of entry frequently deprived of the fund from which they propoſed to recover payment. As this ſtatute is correctory of our feudal maxims, it has received a ſtrict interpretation. The heir is indeed ſubjected, in conſequence of it, to the rational deeds of the perſon interjected, *ex. gr.* to proviſions by marriage-contract, becauſe theſe are in moſt reſpects put on a footing with onerous deeds, *Kames*, 44.; but he is laid under no obligation to fulfil his gratuitous deeds, though the enacting words are general, *debts and deeds*, *Kames*, 74. Hence alſo, where the interjected perſon was a naked fiar, and had poſſeſſed only civilly through the liferenter, ſuch poſſeſſion was not accounted ſufficient to ſubject the heir who paſſed him by to this paſſive title, *Falc.* i. *June* 25. 1745, *Bogle*. Laſtly, Becauſe the only two caſes guarded againſt by the ſtatute are, the heir's entering to his remoter anceſtor, and completing his titles by adjudication upon his own bond; therefore where the heir, in place of doing any of theſe, chuſes to poſſeſs the lands in the right of apparency, he has been, by repeated deciſions, abſolved from the paſſive title of the ſtatute, *Home*, 6.; *Kames*, *Rem. Dec.* 23.; *New Coll.* i. 121. N° 1. If theſe judgements are to be obſerved as a rule, the heir may enjoy the rents to perpetuity, without hazard of a paſſive title, provided he takes care not to ſerve heir; and this device, as it is in the power of every heir, muſt render the ſtatute, which was ſo well intended, of little uſe. On the ſame ground, if the interjected perſon has not poſſeſſed as apparent heir, nor as heritable proprietor, but in virtue of a ſingular title derived from a third perſon, and preferable to, and excluſive of the right of apparency, and has at the ſame time openly a-

ſcribed his poſſeſſion to that ſingular title, the heir next ſucceeding falls not within the ſtatute: but if the creditors are kept from the knowledge of ſuch title, or if the title be of a private nature, and latent, the onerous debts of the interjected perſon are effectual againſt the ſucceeding heir paſſing by, *New Coll.* ii. 224. The heir who by thus paſſing by is ſubjected to a paſſive title, has the benefit of diſcuſſion; ſo that the creditors of the interjected perſon muſt diſcuſs all the debtor's repreſentatives, before the heir can be condemned, *Nov.* 13. 1712, *Vint*; and if the heir ſhall have made payment, without pleading that exception, action of relief is competent to him againſt theſe repreſentatives, *Kames*, 75.

95. Our moſt ancient law, from a jealouſy of the weakneſs of mankind while under ſickneſs, and of the importunity of friends in that conjuncture, has declared, that all deeds affecting heritage, if they be granted to the prejudice of the heir by a perſon upon deathbed, *i. e.* after contracting that ſickneſs which ends in death, are ineffectual, *Reg. Maj. lib.* 2. *c.* 18. § 7. *et ſeqq.* unleſs where the debts due by the granter have laid him under a neceſſity to alienate his lands, *St. Gul. c.* 13. § 2. The term properly oppoſed to deathbed is *liege pouſtie*, by which is underſtood a ſtate of health; and it gets that name, becauſe perſons in health have the *legitima poteſtas*, or lawful power, of diſpoſing of their property at pleaſure.——In handling this ſubject, it ſhall be *firſt* explained, what conſtitutes a deathbed-deed; *2dly*, what deeds are ſtruck at or affected by the law of deathbed; and, *3dly*, to whom the reduction of deathbed-deeds is competent.

96. As to the *firſt*, It is ſufficient to conſtitute a deathbed-deed, that the granter laboured under the diſtemper of which he afterwards died, immediately before ſigning it; for if the two extremes be proved, of ſickneſs going before, and of death following, the reſt is inferred, by what lawyers commonly call a *præſumptio juris*, which may doubtleſs be elided by a poſitive proof to the contrary: but poſitive evidence brought, that the granter was not confined to his bed at the time of ſigning the deed, does not elide it, nor exclude reduction *ex capite lecti*, *St. b.* 3. *t.* 4. § 28. *verſ. To come then*; and, *As to the third*; nor is it ſufficient, on the other hand, to conſtitute a deathbed-deed, that the granter died in a few days after ſigning it, unleſs the purſuer bring proof that he was on his deathbed at that preciſe time, or at leaſt immediately before, *Nov.* 12. 1751, for it is very poſſible that he might have been *in liege pouſtie* when he granted the bond, and the moment after ſeized with an illneſs, which cut him off ſuddenly. Any diſeaſe which may bring death after it, though it ſhould not be a *morbus ſonticus*, which affects the judgement or the whole body, falls under the law of deathbed, *Jan.* 7. 1624, *Shaw*; *ex. gr.* broken bones, *Feb.* 25. 1668, *Dun*; a running ſore, *Fount. Feb.* 20. 1694, *La. Scotſtoun*; or a paralytic illneſs, *July* 30. 1635, *Richardſon* *. The legal proof of convaleſcence or recovery of the granter's health is, by law, confined to one particular character, the going to, or coming from kirk or market unſupported; ſo that though the granter, after ſigning the deed, had tranſacted his buſineſs at home, or walked about as formerly, or even made viſits at ſome diſtance, none of thoſe acts are deemed ſufficient to give force to the deed, *Feb.* 7. 1671, *Laurie*; *Fount. Nov.* 25. 1687, *Keiry*; *Harc.* 648. The granter's going either to kirk or market, is a good defence againſt reduction, *June* 28. 1671, *Cred. of Balmerino*, even tho' he ſhould go on horſeback; but if he go on foot, he muſt not be ſupported, or lean on any perſon by the way, unleſs he has been accuſtomed, when in

* See *Kames, Rem. Dec.* 22.

health,

health, to make uſe of ſuch aſſiſtance: and if his going thither appear to be done with a ſpecial view to give validity to the deed, a more ſlender proof of ſupportation will be received as evidence of it; for which reaſon Lord Stair, *ibid.* adviſes thoſe ladies who are to go to church, with a view of ſecuring a deed from challenge *ex capite lecti*, to lay aſide ſuch prerogatives of quality as may afford any preſumption of bodily weakneſs. The going to kirk or market muſt be performed at the ſtated days and hours appointed for divine ſervice, or for public market, that ſo the granter may be expoſed to the view of a ſufficient number of unbiaſſed witneſſes, *Act of ſederunt*, *Feb.* 29. 1692. This legal preſumption of convaleſcence is ſo ſtrong, as not to be defeated but by a pregnant proof that the granter was labouring under the weight of his diſtemper when he went thither, *Feb.* 26. 1669, *Pargillies*; *Fount. Dec.* 5. 1711, *Crawfurd*; *Feb.* 1692, *Graham*, cited by Stair, *b.* 3. *t.* 4. § 28. *verſ. As to the ſixth.* By our former practice, the deed was eſteemed to be granted *in lecto*, if the granter was ſick at ſigning it, though he had ſurvived that ſickneſs ever ſo long, if he had not afterwards gone to kirk or market. This confined the proof of convaleſcence within too narrow bounds: it is therefore declared, by 1696, *c.* 4. that the granter's living ſixty days after the date of the deed, ſhall be ſufficient to exclude the exception of deathbed, though, during all that time, he ſhall not have gone either to kirk or market. Deeds done to the heir's prejudice, by one under ſentence of death, are equally ſubject to reduction, as if the granter had been on deathbed; and as holograph deeds not atteſted by witneſſes, bills of exchange excepted, prove not their own dates in a queſtion with the heir, *ſupr. t.* 2. § 22. they are conſequently preſumed to have been granted *in lecto*.

97. As to the *ſecond* point, What rights may be ſet aſide *ex capite lecti*, the general rule is, That all gratuitous deeds, making over or burdening ſubjects to which the heir would have ſucceeded, had they not been ſo conveyed, or from which the heir would have received any benefit, or which tend in any degree to the heir's prejudice, whether deeds of alienation, conveyances, or diſcharges, *Feb.* 24. 1624, *Donaldſon*, may be reduced on the head of deathbed. And though the granting of leaſes, when limited to a moderate endurance, may be conſidered merely as an ordinary act of adminiſtration; yet a leaſe granted *in lecto* for three nineteen years, was ſet aſide at the ſuit of the heir, as a prohibited alienation, *Dec.* 1733, *Chryſtieſon*. It is not, however, a ſufficient defence againſt reduction in all caſes, that the deed *in lecto* is onerous; for if it be alſo voluntary, *i. e.* ſuch as the granter lay under no antecedent legal obligation to perform, the deed will be ſet aſide. Thus, a ſale of lands executed by the proprietor *in lecto*, is ſubject to reduction, though the purchaſer ſhould have paid full value for it, if the heir be hurt either by the bargain itſelf, or by the anceſtor's diſſipating the price gratuitouſly to ſtrangers: but where the anceſtor has validly obliged himſelf *in liege pouſtie* to grant a deed, the deed granted *in lecto*, in conſequence thereof, is ſecure againſt reduction; becauſe the granter by that prior obligation became a proper debtor to him in whoſe favour the deathbed-deed is afterwards granted. Nor is it contrary to this rule, that a deed granted *in lecto*, in corroboration or ſecurity of a lawful and proper debt, falls not under this law, though the granter ſhould have been under no prior obligation to grant it; becauſe ſuch ſecurity is not prejudicial to the heir who is bound in the payment of all his anceſtor's debts, independent of any poſterior ſecurity corroborating them; for it is an eſtabliſhed rule, That the deed, if it be onerous, and not hurtful to the heir, is not reducible. Where the deed *in lecto* is granted only in part for the payment of ſuch debts, it is indeed ſecure againſt reduction as to that part, but may be reduced *ex*

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capite lecti as to the remainder, *Jan.* 7. 1624, *Shaw*. Theſe ſecurities, though they are effectual to the creditors in them, cannot hurt the heir's intereſt in a queſtion with the executor; for the executor muſt relieve the heir, by repayment to him of the moveable debts that were extinguiſhed by ſuch alienations or conveyances, in ſo far as the free executry ſhall extend. The rationality of a deed does not exclude the heir's right of reduction; for though it ſhould be ſo far grounded in equity, as even to create an obligation againſt the anceſtor to grant it, yet that obligation, if it be merely natural, and ſo not productive of an action, is conſidered as gratuitous, and conſequently the poſterior deed lies open to reduction. Thus a father cannot *in lecto* provide his younger children in reaſonable portions, becauſe that is a debt which, however equitable, he could not have been forced to acquit himſelf of, by any action at law, *Kames*, 27.; *New Coll.* ii. 55.: but he can effectually ſettle a ſum for their alimony during their minority, even on deathbed; becauſe a father's obligation to maintain his minor children is not merely equitable, but may be likewiſe the foundation of an action. Hence alſo a huſband may *in lecto* ſettle a jointure on his wife, if it do not exceed the legal terce, becauſe ſuch proviſion is conſidered as the deed of the law, *Jan.* 21. 1668, *Shaw:* ſee *Home*, 30.; *New Coll.* ii. 147.

98. Though the law of deathbed does not ſtrike in the general caſe againſt the alienation of moveables, that rule ſuffers ſeveral exceptions. *Firſt*, A diſpoſition of moveables in which heirſhip is included, is ſubject to reduction, as hurtful to the heir; for heirſhip-moveables deſcend to the heir. *2dly*, A moveable bond ſecluding executors cannot be aſſigned upon deathbed, becauſe ſuch bonds alſo deſcend to the heir; *vid. ſupr.* § 20. *3dly*, The alienation *in lecto* of any part of the conqueſt during the marriage, which is provided to the heir, though the ſubject of it ſhould be moveable, may be ſet aſide by the heir who would have ſucceeded to it had there been no alienation, *Kames*, 32. *4thly*, Since moveable debts may be the foundation of legal diligence, by which the heritage may be affected; therefore a moveable bond, or an aſſignation to a moveable debt granted *in lecto*, where the moveable eſtate of the granter is not ſufficient for ſatisfying his perſonal debts, may be reduced by the heir, that ſo the moveable eſtate may be enlarged, and the heritage protected againſt the diligence of perſonal creditors, *July* 22. 1707, *Cowie*. As an anceſtor can neither alienate, nor aſſign *in lecto* to the heir's prejudice, neither can he, by a deed merely voluntary, alter the nature of any ſubject on deathbed to the prejudice of the heir, ſo as from heritable to make it moveable. But if the heir ſhall be excluded from the ſucceſſion by an irrevocable deed *in liege pouſtie*, he cannot be heard to complain againſt any ſubſequent deed that may be granted on deathbed, in the exerciſe of ſpecial powers reſerved by the granter in the firſt deed; for by the irrevocable deed *in liege pouſtie* in favour of a ſtranger, the heir of the granter loſes the character of heir, and ſo has no intereſt to ſet aſide any poſterior deed. But the diſpoſition of an eſtate, though granted *in liege pouſtie*, if it be revocable, neither conveys any right to the grantee, nor diveſts the granter's heir of the character of heir: its effect is ſuſpended till the granter's death; and therefore, where it is actually revoked, the heir's right is the ſame as if the deed had never exiſted; conſequently, he may purſue reduction of any ſubſequent deed done *in lecto* to his prejudice, *Dalr.* 86.; *Falc.* i. 257. Where one *in liege pouſtie* makes over his eſtate to his heir, with a reſerved faculty to revoke or burden it at any time of his life, and afterwards exerciſes that faculty on deathbed, the heir, if he has not accepted of the diſpoſition, may bring a reduction of the deed by which the faculty was exerciſed, as being granted *in lecto* to his prejudice;

prejudice: but if he has done any act importing an acceptance of the deed in which the faculty was reſerved, he cannot challenge the exerciſe of it upon deathbed; for his acceptance of the diſpoſition, with its reſervations and conditions, makes him a diſponee; and diſponees have not the privilege of heirs, and, of courſe, have no right to bring reductions *ex capite lecti*. Such reſerved powers, to revoke or burden at any time of the granter's life, may be exerciſed on deathbed, though the words *etiam in articulo mortis* ſhould be omitted, *June* 22. 1670, *Douglas*; ſee the above-cited deciſion, *Dalr.* 86. Nay, though a power ſhould not be expreſſed in the faculty, of exerciſing it at any time; yet if there be no limitation of time ſpecified in it, the granter may exerciſe it properly *in lecto*, *New Coll.* ii. 134. See upon this point *New Coll.* i. 136.

99. As to the heirs who are intitled to this right of reduction, it is not only competent, *firſt*, to the immediate heir, who would have ſucceeded to the ſubject diſponed, and in whoſe favour the law of deathbed was chiefly introduced; but, *2dly*, to a remoter heir, as ſoon as the immediate heir dies, if, in a deathbed-ſettlement, he ſhould be excluded from the ſucceſſion, by the ſubſtitution of a ſtranger next after the immediate heir: for as ſick perſons may be more eaſily prevailed upon to diſappoint a remoter heir than the immediate, the ſanction of the law ought alſo to guard againſt that miſchief which is likelieſt to take effect, *Kames*, 33. § *ult.* * But where the immediate heir conſents to or ratifies the deed, it not only excludes the conſenter himſelf from bringing it under challenge, but every remoter heir, *Reg. Maj. lib.* 2. *c.* 18. § 10.; either becauſe the concurrence of the immediate heir removes all ſuſpicion of the deed having been extorted by importunity; or becauſe the ſame effect is given *fictione juris* to his conſent or ratification, as if the dying perſon had made over the ſubject abſolutely to the immediate heir, and he, after the anceſtor's death, had conveyed it to the ſtranger who was ſubſtituted in the deathbed-ſettlement. But the heir's ſigning witneſs to the granter's ſubſcription of a deed *in lecto* does not imply his conſent: for though, in the general caſe, the atteſtation of a ſubſcription by a near relation of the granter, is regarded as preſumptive proof of the atteſter's knowledge of the contents of the deed, and therefore infers his approbation, *t.* 3. § 48.; yet the granter's authority over the heir, and the heir's dependence on him, create a preſumption that the heir atteſted the deed *in lecto*, even admitting that he knew the contents, from the fear of incurring the anceſtor's diſpleaſure, *Dalr.* 47. The heir can, by no antecedent general writing, renounce his right of reduction, and thereby give validity to all diſpoſitions that may be afterwards granted *in lecto* to his hurt, *Dec.* 4. 1733, *Inglis*; for few heirs, for fear of being diſinherited, would dare refuſe to ſign ſuch renunciations; ſo that the ſuſtaining them would utterly defeat the law of deathbed, and no private renunciation or conſent can authoriſe perſons to act againſt a public law.

100. The right of reduction *ex capite lecti* is introduced in favour of that heir who was *alioqui ſucceſſurus* in the ſubject alienated by the deathbed-deed. As therefore the heir of line ſucceeds where no deſtination excludes him, the right is in ſuch caſe competent to him alone. By the ſame principle, if the deed ſhould relate to lands that had been formerly ſettled on heirs of entail, or of a marriage, reduction is competent, not to the heir of line, but to the heir of entail or proviſion: and ſuch deed is ſubject to reduction, though the ſucceſſion had been formerly ſettled in a way that was truly hurtful to the granter's family, *Kames*, 32. or though the inveſtiture ſhould be altered by the deathbed-deed in favour of the heir of line; for in the caſe of ſubjects provided to ſpecial heirs, the heir of line is accounted a

* See *Home*, 158.

ſtranger. Though this privilege be competent to heirs of proviſion, yet the heir, where his right reſts on an obligation by the father not fulfilled, cannot bring an action for ſetting aſide any deed granted by him counteracting it; ſince unleſs there be a ſpecial ſubject actually ſettled on him, to which he may ſucceed as heir, his ſervice muſt be inept or incongruous. The only proper method, therefore, to make ſuch right of credit effectual, is by an action againſt the father's repreſentatives for fulfilling his obligation, *Dec.* 16. 1738, *Campbell.* Reduction *ex capite lecti* is competent, not only to the heir himſelf, but to his creditors, who may transfer it to themſelves by adjudication; or even without adjudication may, in the opinion of moſt lawyers, bring directly an action of reduction, libelling upon their intereſt as creditors to the heir. One might reaſonably conclude, from the genius of our law, that if reduction be competent to the anceſtor's heir, it muſt be competent to the anceſtor's creditors alſo, as our law even favours creditors before the heir. It hath been adjudged however, *Dalr.* 110. that the anceſtor's creditors are not intitled to an action for ſetting aſide ſuch deeds as had been either conſented to or corroborated by the heir; probably upon this ground, that the law of deathbed was intended for the benefit of the heir only, not of the granter himſelf: but the court in that caſe reſerved to the creditors their right of reduction upon the act 1621, if the granter was inſolvent when he ſubſcribed the deed. By the older practice, the heir had no right before his entry to bring either a reduction *ex capite lecti*, or any action whatever which was not barely poſſeſſory, *March* 16. 1637, *L. Edmonſton.* But it has been long the general opinion, that that privilege is one of thoſe which are competent to heirs in the right of apparency, at leaſt in thoſe caſes where the deathbed-deed is an effectual bar to the heir's entry, *Feb.* 23. 1676, *Appar. heir of Heriot.*

101. The proper method for affecting the heritable eſtate of a perſon deceaſed, either for his own debt, or for that of his heir, has been explained *ſupr. b.* 2. *t.* 1. Though, by our former law, the heir's creditors who uſed the proper ſteps of diligence, were intitled to the ſame degree of preference upon the anceſtor's eſtate as if they had been the anceſtor's creditors; yet equity teacheth, that every man's eſtate ſhould be ſubject in the firſt place to the payment of his own debts. Upon this ground, the Romans admitted of a ſeparation of the eſtate of the deceaſed from that of the heir, with a preference to the creditors of the deceaſed as to his proper eſtate, provided they demanded ſuch ſeparation within five years from his death, *l.* 1. § 1. *De ſeparat.* After their example, our legiſlature, by 1661, *c.* 24. preferred the creditors of the deceaſed before thoſe of the heir, on their debtor's eſtate, if they uſed diligence againſt it within three years after his death. This diligence muſt be not only begun but perfected within the three years, *Harc.* 773. otherwiſe the creditors of the heir might be for ever excluded from their right of attaching that eſtate, by the imperfect diligence of the creditors of the deceaſed, *St. b.* 2. *t.* 12. § 29.; and therefore the heir's creditors may, after that period, attach their deceaſed debtor's eſtate for their own payment. This limitation of three years is not a proper preſcription, by which the right of action, that would of its own nature have been competent for a longer courſe of years, is confined to a ſhorter period. It is a ſtatutory privilege conferred on the creditors of a perſon deceaſed, who had no ſuch privilege before, under condition that they ſhall uſe due diligence within the time expreſſed in the act. The three years therefore are not to be computed according to the rule of preſcription, *Contra non valentem agere non currit præſcriptio*, but they muſt,

muſt, in every caſe, be reckoned down from the death of the anceſtor, in the preciſe terms of the ſtatute, *Dec.* 19. 1678, *Paterſon* *.

102. By a poſterior clauſe of the ſame act, no diſpoſition of any part of the anceſtor's eſtate, granted by the heir within a year after the anceſtor's death, is valid, in ſo far as it may be hurtful to the creditors of the anceſtor. This is declared in general terms, without diſtinguiſhing whether the anceſtor's creditors have or have not uſed diligence within the three years, and ſeems to have been inſerted in the laſt clauſe of the act, purpoſely to ſave it from falling under the triennial limitation eſtabliſhed by the firſt part of it, *Falc.* i. 219. Such diſpoſitions, even when they are granted after the year, ſeem by the firſt part of the ſtatute to carry this implied burden with them, that they ſhall have no force in competition with diligences uſed by the anceſtor's creditors within the three years; and if it were otherwiſe, the creditors of the heir would have more benefit by a voluntary diſpoſition from him, than by legal diligence; ſee *Harc.* 144. The only view of the legiſlature in this enactment, was to favour the creditors of the anceſtor before thoſe of the heir; and therefore the act ought not to be ſo interpreted, as either to make the condition of the anceſtor's creditors worſe, or that of the heir's creditors better than before. Hence it does not bar the heir from diſponing, even within the year, any part of the anceſtor's eſtate to a creditor of that anceſtor; nor has any creditor of the heir an intereſt to object againſt a right granted by that heir, to another of his creditors, though it ſhould be within the year, *Harc.* 773. It is evident from the ſtyle of this act, that it relates only to heritable rights; for the words made uſe of in it are, *apparent heirs, retours, infeftments, real eſtates*, without the leaſt mention of executors, confirmation, or moveable ſubjects; and the preference in moveables is ſettled by different rules, *Act of ſederunt, Feb.* 28. 1662; 1695, *c.* 41. This opinion, that the ſtatute 1661 enacts nothing concerning moveables, is confirmed by a deciſion, *June* 17. 1712, *Ker:* and though Mr Forbes makes our ſupreme court to extend that act to moveable rights, in a caſe, *Feb.* 9. 1711, *Graham*, the only point there determined, viz. that the creditors of the fiar or inſtitute in a bond are preferable to thoſe of the ſubſtitute, would have received the ſame judgement, though that act had not been made; *vid. Bankt. b.* 4. *t.* 43. § 3.

TIT. IX.

Of Succeſſion in Moveables.

MOVEABLE ſubjects are, upon the death of the owner, whether dying teſtate or inteſtate, put under the adminiſtration of perſons authoriſed by law to execute either the actual or the preſumed will of the deceaſed, who are therefore ſtyled *executors*; and hence the ſubject of moveable ſucceſſion is called *executry:* but the appellation of *executors* is ſometimes applied *deſignativè*, to thoſe who are barely intitled to the moveable ſucceſſion of the deceaſed *ab inteſtato*, and have a right to claim the office of executors, if they ſhall think proper. Thus bonds are commonly taken payable to the creditor, his heirs and executors.

2. The order of ſucceſſion in moveables *ab inteſtato*, is the ſame as in he-

* By a later deciſion it was found, That the defunct's creditors ought to do exact and complete diligence, unleſs they could make it appear, that their diligence was retarded *without any fault of theirs*, *Harc.* 773.

ritage,

ritage, with the following limitations or exceptions. *Firſt*, It is an univerſal rule in the legal ſucceſſion of moveables, that the next in degree of blood to the deceaſed, or the next of kin, ſucceeds to the whole; and if there be two or more equally near, all of them ſucceed by equal parts, without the prerogative which males enjoy above females in the ſucceſſion of heritage, or any right of primogeniture in the eldeſt male above the younger. *2dly*, The right of repreſentation in heritage, by which remoter heirs repreſent their aſcendents, explained *ſupr. t.* 8. § 11. has no place in the ſucceſſion of moveables. Thus, where one dies without iſſue, leaving two ſiſters, and a nephew or niece by a third ſiſter deceaſed, the two ſurviving ſiſters ſucceed to the whole moveable eſtate, excluding the child of the ſiſter predeceaſed: and in the ſame manner, immediate children ſurviving, exclude the grandchildren by a child predeceaſed. Yet in queſtions between the full and the half blood, repreſentation is admitted even in moveables. Thus, where one deceaſed leaves a ſiſter conſanguinean, or by the father only, and a nephew by a ſiſter-german, or full ſiſter predeceaſed, the nephew, though more removed by one degree from his uncle than the ſiſter by the half-blood, ſhall take the whole moveable ſucceſſion, as repreſenting his mother, who was ſiſter to the deceaſed by the full-blood, *July* 4. 1729, *Gemmil*, obſerved in *Dict.* ii. *p.* 398.

3. Where the eſtate of the deceaſed conſiſts partly in heritage, and partly in moveables, the proper heir in heritage has no ſhare of the moveable eſtate, if there be others as near in degree to the deceaſed as himſelf. Thus, in the line of deſcendents, the eldeſt ſon gets the whole heritage; and all the other children, whether ſons or daughters, divide the moveable eſtate among them *in capita*. Thus alſo, in the collateral line, that brother, who, as heir at law, is intitled to the whole heritage, is excluded by his other brothers and ſiſters from any ſhare of the moveable ſucceſſion. But where the heritable eſtate of the deceaſed is ſo inconſiderable in proportion to the moveable, that the heir finds it his intereſt to renounce his excluſive claim to the heritage, and betake himſelf to his right as one of the next of kin, the law allows him to collate or communicate the heritage with the other next of kin, who in their turn muſt collate the executry with him; ſo that the whole eſtate belonging to the deceaſed is thrown into one maſs, and diſtributed by equal parts among all of them. And even though the heir be not one of the next of kin, *ex. gr.* if he be a grandſon by the eldeſt ſon of the deceaſed, he ſeems intitled to the privilege of collating with the deceaſed's immediate children; for ſince he ſucceeds to the heritage, as repreſenting his father, who was one of the next of kin to the deceaſed, he ought to enjoy all the privileges which would have been competent to his father as heir, had he ſurvived the grandfather. Where the deceaſed leaves only one child, he is both heir and executor without collation; for where the right of the whole eſtate, heritable and moveable, deſcends to the ſame perſon, there is no room for collating the one with the other. This kind of collation is admitted, not only in the ſucceſſion of deſcendents, but of collaterals: ſo that a brother who ſucceeds as heir to the deceaſed, if he judges the moveable ſucceſſion the moſt profitable of the two, may collate with his younger brothers and his ſiſters, and ſo come in as equal ſharers with them to the whole ſucceſſion, 1743, *Chancellour*; for as collation was admitted into our law, that the heir might, in no event, be in a worſe condition than the other next of kin, that reaſon has equal force in the ſucceſſion of collaterals, and of deſcendents. It is only the legal heir, or the heir *ab inteſtato*, who is thus obliged to collate the heritage with the other next of kin, in order to have the benefit of the moveable ſucceſſion. Where, therefore, in the caſe of daughters only, the heritable eſtate is ſettled on the

the eldeſt by an entail or deſtination, ſhe is intitled upon her father's death to her juſt ſhare of the moveables with the other daughters, without collating that eſtate, *Kames*, 20.; for ſhe ſucceeds to the heritage by the proviſion of the father, who had full power over it; and that proviſion can in no degree affect the moveable eſtate, which by the legal ſucceſſion deſcends equally to her and her younger ſiſters.

4. Where a Scotſman dies abroad *ſine animo remanendi*, the legal ſucceſſion of his moveable eſtate in Scotland muſt deſcend to his next of kin, according to the law of Scotland; and where a foreigner dies in this country *ſine animo remanendi*, the moveables which he brought with him hither ought to be regulated, not by the law of the territory in which they locally were, but by that of the proprietor's *patria* or domicil whence he came, and whither he intends again to return. This rule is founded in the law of nations; and the reaſon of it is the ſame in both caſes, That ſince all ſucceſſion *ab inteſtato* is grounded on the preſumed will of the deceaſed, his eſtate ought to deſcend to him whom the law of his own country calls to the ſucceſſion, as the perſon whom it preſumes to be moſt favoured by the deceaſed; ſee *Princ. of Equity*, *p.* 279. and the deciſion there quoted, *Falc.* i. *Nov.* 28. 1744, *Brown*; which however is contrary to ſome former deciſions, tho' conformable to the opinion of the moſt celebrated civilians *. As *nomina debitorum*, or perſonal debts, are moveable in the ſtricteſt ſenſe, their ſucceſſion is therefore deſcendible according to the *lex patria* or *domicilii*, whereever they may be locally ſituated, or be due. Yet we muſt except from this general rule, as civilians have done, certain moveables, which, by the deſtination of the deceaſed, are conſidered as immoveable. Among theſe may be reckoned the ſhares of the trading companies, or of the public ſtocks of any country, *ex. gr.* the banks of Scotland, England, Holland, Southſea Company, &c. which are without doubt deſcendible according to the law of the ſtate where ſuch ſtocks are fixed. But the bonds or notes of ſuch companies make no exception from the general rule. Theſe are accounted part of the moveable eſtate of the deceaſed, in the ſame manner as if the obligation were due by a ſingle perſon. A queſtion having been moved, Whether debentures granted for money lent to the public in Ireland, and ſecured to the creditors by an act of the Iriſh parliament, were to be held *loco rerum immobilium?* it was adjudged that they were not, but that they deſcended as proper moveables *ſecundum legem domicilii*, ſaid *Nov.* 28. 1744, *Brown*.

5. A teſtament is, in the Roman law, defined, A declaration of what a perſon wills to be done with his eſtate after his death. By that law, which acknowledged no difference between heritable and moveable ſucceſſion as to the power of teſting, a teſtament included the whole eſtate which belonged to the deceaſed; but by the law of Scotland, nothing can be deviſed by teſtament but what is moveable; and even ſubjects that are *ſua natura* moveable, if they require a ſervice to carry them to the repreſentatives of the deceaſed, cannot be teſted upon, *t.* 8. § 20. A teſtament may be made in the laſt moments of life, and under the heavieſt ſickneſs or bodily diſtreſs, provided the maker be *ſanæ mentis*, of ſound judgement, when he ſigns it. It is ineffectual till the death of the teſtator; and conſequently he retains a power of revoking it at pleaſure, and ſubſtituting another in its place, by which the firſt becomes of no force. In the caſe, therefore, of ſeveral teſtaments of different dates, the laſt only is effectual; and hence teſtaments have got the name of laſt or latter wills. By the Roman law,

* In a queſtion about the ſucceſſion of William Lorimer, a Scotſman, who had paſſed the greateſt part of his life in Scotland, but for ſome years before his death had reſided chiefly in England, though ſometimes in Scotland, and died at ſea in a voyage to Italy, whither he was going for his health, the Lords found, That his ſucceſſion muſt be regulated by the law of Scotland, *Feb.* 1770, *Mortimers againſt Lorimer*.

the bare nomination of an heir, made a complete teſtament, in theſe three words, *Titius heres eſto*; but by ours, *a teſtament*, in the ſtrict interpretation of that term, cannot be conſtituted without the nomination of an executor, or a perſon to execute the will of the deceaſed, and to adminiſter the moveable eſtate for the benefit of all concerned. And where the teſtator thus names an executor, it is a proper teſtament, though he ſhould not mention him who is to have the real intereſt in the ſucceſſion; for the law conſiders the executor appointed by the deceaſed as an *heres fiduciarius*, or truſtee, who is to be accountable to the next of kin, creditors, and others having intereſt in the ſucceſſion; of which more *infr.* § 26. On the other hand, nothing hinders one from making a ſettlement of his whole moveable eſtate in favour of an univerſal legatee or ſucceſſor, though he ſhould not in that ſettlement appoint any executor; for ſuch bequeſt, though it is not in proper ſpeech a teſtament, is effectual to the legatee for making good to him the ſubjects bequeathed; and the omiſſion of the deceaſed in not appointing an executor, is ſupplied by the commiſſaries, according to the rules of preference to be explained below, § 32. The Roman law admitted nuncupative teſtaments, *i. e.* teſtaments not reduced into writing; but by the uſage of Scotland, no perſon can appoint verbally, or without writing, an executor of his will, who, in virtue of ſuch nomination, ſhall, after the death of the teſtator, be legally intitled to the office, let the ſubject of the ſucceſſion be ever ſo inconſiderable.

6. A legacy may be defined in our law, with a ſmall variation from the Roman definition, The donation of a ſum or ſubject to be paid or delivered by the executor out of the moveable eſtate of the deceaſed to a third perſon. He who bequeaths gets generally the name of the teſtator, or the deceaſed; and the perſon gratified is, both in the Roman law and ours, ſtyled the legatary, or legatee. Where a ſettlement is made by the deceaſed of the whole or the *univerſitas* of his moveable eſtate, the perſon gratified is called *univerſal legatee*; and he frequently gets the name of reſiduary, if his univerſal right be granted with the burden of paying particular legacies to others. Though theſe donatives to the near kinſmen or acquaintance of the deceaſed are moſt uſually bequeathed in teſtaments, yet a legacy may be granted in a ſeparate writing, and then its proper appellation is a codicil. Legacies have no neceſſary dependence on teſtaments; and therefore are effectual, though the granter has not previouſly named an executor, or made any general ſettlement of his moveable eſtate, or though the executor named by the deceaſed ſhould have died before him. Legacies are, like teſtaments, ambulatory, and may be revoked by the teſtator, even in his laſt moments, either expreſsly, or by poſterior derogatory deeds. But if one becomes bound by an irrevocable deed *inter vivos*, to grant a legacy, or not to alter one formerly bequeathed, the grant changes its nature to a proper obligation, and becomes as effectual as a deed of gift delivered *in liege pouſtie*, *St. b.* 3. *t.* 8. § 28. In an univerſal or reſiduary legacy, bequeathed by one *to his neareſt relations*, or *neareſt in blood*, in which certain effects belonging to the teſtator in a foreign country are included, the deſcription in the teſtament, which points out the legatee, is to be underſtood according to the meaning that the words bear in the teſtator's own country, ſo as to carry even the effects ſituated in a ſtate where that expreſſion would be explained in a different ſenſe. Thus the teſtator's brothers and ſiſters, and other next of kin, having been named as reſiduary legatees by a Scotſman's teſtament executed in Scotland, the words *next of kin* were found not to include the teſtator's nephews and nieces, as long as he had brothers or ſiſters alive, even as to certain Antigua effects contained in the teſtament, though, by the laws of that iſland, the right of repreſentation obtains in the ſucceſſion of moveables, *New Coll.* ii. 238.

7. Though

7. Though nuncupative teſtaments are not effectual by the law of Scotland to ſupport the nomination of executors, yet nuncupative or verbal legacies are valid to the extent of L. 100 Scots; and the reaſon why they are not ſuſtained for greater ſums, may be drawn from the rule of our law, That no obligation for a ſum exceeding L. 100 is proveable by witneſſes. Where the verbal legacy is granted for more, the legatee is intitled to the L. 100, if he be willing to reſtrict his claim to that ſum, and the legacy is ineffectual as to the remainder, *July* 7. 1629, *Wallace*. This doctrine, authoriſing verbal legacies to a determinate extent, may reaſonably comprehend univerſal legacies of one's whole moveable eſtate when conſtituted verbally: for tho' no ſuch ſettlement can have the effect of conferring on the grantee the office of executor; yet, in ſo far as it partakes of the nature of a legacy or bequeſt of moveables, it ought to be governed by the general rule, which includes all legacies indiſcriminately, without excluding univerſal ones. Though a verbal legacy, when it exceeds L. 100, cannot be ſupported by the teſtimony of witneſſes, yet the teſtator's verbal declaration of his will to the executor, that the reſidue of his moveable eſtate, after ſatisfying the debts and legacies, ſhould be diſtributed according to his ſpecial direction, is obligatory on the executor who acknowledges it to the higheſt extent; becauſe, in ſuch caſe, the proof of the legacy reſts not on parole-evidence, but of the party himſelf who is debtor in it, *Home*, 96.

8. A legacy is valid though there ſhould be an error in the name of the legatee, *dummodo conſtet de perſona*, provided his deſcription diſtinguiſhes him ſufficiently from all others, § 29. *Inſt. De legat.* or though a falſe cauſe ſhould be aſſigned as inductive of the legacy, § 31. *eod. tit.*: for inſtance, if the deceaſed bequeaths a ſum to Titius, becauſe he had taken care of his affairs, when in truth he had never meddled in them, or had perhaps neglected them; for the cauſe or reaſon for granting a legacy is not eſſential to the legacy; and therefore the unneceſſary mention of a cauſe ought to be no obſtruction to its validity, *l.* 72. § 6. *De cond. et demonſtr.* But legacies granted in conſideration of future ſervices are accounted conditional, and conſequently ineffectual till thoſe ſervices be performed, § 31. *Inſt. De legat.* Hence a legatee forfeits his right to a legacy, in which he is named tutor to the teſtator's children, if he ſhall, without ſufficient ground, decline to accept of the tutory; becauſe the legacy is preſumed to have been granted in the view of the legatee's undertaking that office, *Falc.* ii. 19.

9. When a legatee dies before the teſtator, the legacy is not tranſmitted to the legatee's executors; both becauſe legacies are granted from the teſtator's ſpecial regard to the legatee himſelf, and becauſe they do not become due, *dies non cedit*, till the death of the teſtator; and nothing can paſs from one to his heir or executor till it be due to himſelf, *l.* 5. § 1. *Quand. dies leg.* On this ground, a conditional legacy falls, if the legatee die before the condition be fulfilled, *l.* 25. *pr. eod. tit.* It is otherwiſe in conditional obligations, in which the creditor, though he ſhould die before the exiſtence of the condition, tranſmits the *ſpes obligationis* to the heir, § 4. *Inſt. De verb. obl.*; becauſe in obligations the creditor ſtipulates not only for himſelf, but for his heirs, *l.* 9. *De prob.*; whereas in legacies the perſon of the legatee is alone regarded, and not his heir: but in legacies where the legatee is hindered from fulfilling the condition by the executor himſelf, the legacy is tranſmitted after the legatee's death to his own executors, becauſe the law ſuffers no man to avail himſelf of his own fraud, *l.* 161. *De reg. jur.* A legacy, where it is deviſed to a legatee and his executors, is not evacuated by the predeceaſe of the legatee, but paſſes, after the teſtator's deceaſe, to the legatee's executors, not by any right which theſe executors derive from the legatee, to whom that legacy never belonged, he having died before it could have effect by the teſtator's death, but in their own right, as conditional

conditional inſtitutes in the legacy. As a conſequence of its being due to the legatee's executor, it muſt paſs upon his death, though he ſhould die without making up a title to it, to his own executor, excluding thoſe who may have confirmed themſelves improperly to the firſt legatee, *New Coll.* ii. 234. Bonds of proviſion, like legacies, are perſonal to the child to whom they are granted, and conſequently fall if he die before the granter; for as the proviſion never belonged to the grantee, in whom it was not veſted, it cannot be tranſmitted upon his death to his executors, *New Coll.* ii. 60. Upon this ground, in the caſe of an additional proviſion ſettled upon a daughter, in default of heirs-male of the granter; as the failure of heirs-male is the condition of the proviſion, there can be no obligation till that condition exiſt, *t.* 1. § 7.; and conſequently, if ſhe die before heirs-male fail, the proviſion cannot paſs from her to her executor, *New Coll.* ii. 263.

10. By the Roman law, if one bequeathed a ſubject which he knew did not belong to himſelf, the legacy had this effect, that the heir muſt have either purchaſed it for the legatee, or paid its value to him if it could not be purchaſed, § 4. *Inſt. de legat.:* for all teſtamentary deeds ought to be ſo explained *ut ſortiantur effectum*; and unleſs the legacy had been interpreted in this manner it could have had no effect. Where the teſtator *rei alienæ* believed the ſubject to be his own, which, *in dubio*, is to be inferred from his act of bequeathing, neither the thing itſelf, nor its value, could have been claimed from the heir; becauſe it was not to be preſumed he would have burdened the heir, if he had known that the ſubject bequeathed was the property of another, *ibid.* Theſe rules relating to *legata rei alienæ* hold alſo by the uſage of Scotland, *June* 16. 1664, *Murray*; *June* 24. 1664, *Falconar*; and they are juſtly extended to legacies, even of ſubjects which truly belonged to the deceaſed, but are not tranſmiſſible by teſtament. Thus the legacy of an heritable bond due to the teſtator himſelf, which he could not but know was heritable, and conſequently not deviſable by teſtament, falls by our practice under the rule of a legacy, *rei alienæ ſcienter legatæ*, and ſo may be demanded, either itſelf or its value, by the legatee, though the ſubject of the legacy was *res ſua*, *Dec.* 2. 1674, *Cranſton*; *Falc.* i. *July* 19. 1745, *Paterſon*; for the reaſon of the rule is equally applicable to both. There is this ſeparate ground why the legacy of an heritable bond deviſed in a teſtament, in which the teſtator's heir is appointed executor and univerſal legatary, cannot be queſtioned by the executor, namely, becauſe he muſt not be ſuffered to approbate and reprobate the ſame deed; he muſt not, in the character of heir, decline payment of the legacy with which the teſtament is charged, and at the ſame time take the benefit of the teſtament as executor; ſee *New Coll.* ii. 88. Where the teſtator appears from the circumſtances of the caſe to have been in a miſtake, and to have apprehended the ſubject bequeathed to be moveable, when it was in truth heritable, he is preſumed to bequeath it, *tantum et tale*, as it ſtands, without warrandice againſt the executor, who therefore lies under no obligation to make good the legacy, *Feb.* 21. 1663, *Wardlaw*. Where one, after having bequeathed a moveable bond, has taken an heritable ſecurity for the ſum, neither the bond, nor its value, is due to the legatee; for the alteration of the nature of the debt from moveable to heritable is conſidered as a tacit revocation of the legacy, *July* 8. 1673, *Edmonſton*.

11. Legacies, when they are univerſal, *vid. ſupr.* §6. include caſh lying in the deceaſed's repoſitories, moveable bonds, and all other moveable ſubjects whatever, excepting only heirſhip-moveables, which in teſtamentary deeds are reſerved to the heir; ſee *Fount. Nov.* 12. 1680, *Stevenſon*, compared with *July* 12. 1734, *La. Kinfawns*, both obſerved in *Dict.* ii. *p.* 133. 134.; and *Home*, 76. But where the ſubject of the legacy is ſpecially limited in the teſtament to the whole furniture and moveables contained in the houſe of the deceaſed, there

there is no *univerſitas* of *moveables* bequeathed: that term is underſtood to be merely exegetical of the term *furniture*; and conſequently comprehends neither moveable bonds, which are *jura incorporalia*, having no proper ſituation, nor even caſh in the repoſitories of the deceaſed, which cannot fall under the appellation of *furniture*, *Home* 53. Neither does a legacy of the teſtator's whole moveable goods and gear, of whatever ſpecies they may be, comprehend caſh in the teſtator's cuſtody when he died, *New Coll.* ii. 135. Particular legacies may be divided into indeterminate, which are by our writers frequently ſtyled *general*, and determinate or ſpecial. A general legacy, called by the Romans *legatum quantitatis*, is where a certain ſum of money is bequeathed, without mentioning any ſpecial debt due to the teſtator, or any particular fund out of which the legacy is to be paid. This kind gives to the legatee no *jus in re*, no real right in any ſpecial debt or ſubject for making the legacy effectual; for that is veſted in the executor, and the legatee can only inſiſt for payment by a perſonal action againſt the executor, who is liable for the ſum, if he has a ſufficient fund of free executry in his hands for ſatisfying it. A ſpecial legacy, on the other part, where a determinate ſubject which belonged to the deceaſed, or a particular debt due to him, is deviſed, is of the nature of a conveyance, by which the property of that ſubject, or the right of that debt, is veſted, on the death of the teſtator, directly in the legatee, to whom therefore an action is competent, for the recovery of it, againſt the poſſeſſor of the ſubject, or the debtor in the bond. Yet a ſpecial legatee cannot ſue the debtor, without making the executor a party to the ſuit, that if there be not a ſufficient fund for ſatisfying all the creditors, the executor may inſiſt, that that debt be reſerved for their payment, *March* 10. 1627, *Forreſter*; for onerous creditors are, by the nature of their rights, preferable to legatees, ſince no perſon can grant legacies effectually but out of the free executry; that is, after full payment made to every creditor of the deceaſed. A ſpecial legacy is not underſtood to be revoked by a poſterior general diſpoſition; for the law preſumes that the general diſpoſition is granted with the burden of the legacy, unleſs it contain an expreſs revocation of it. The ſame doctrine holds in bonds of proviſion; ſo that the diſpoſition, tho' it ſhould bear to be of the granter's whole moveable goods and gear, is ſo interpreted as to carry only ſuch goods or moveable ſubjects as had not been before made over or bequeathed to others, *March* 8. 1626, *Traquair*; *Dec.* 16. 1712, *Monro*; *July* 7. 1732, *Strachan*, obſerved in *Dict.* ii. *p.* 133.

12. Where legacies are general of ſums of money, each legatee muſt, if the deceaſed do not declare the contrary, ſuffer a proportional abatement, if, after payment of the creditors, there ſhall remain ſome free executry, but not enough to ſatisfy all the legacies; for ſince they have all an equal right to the fund of payment, all ought to ſuffer proportionally when that fund falls ſhort. This holds even in a competition with a legacy granted for pious uſes: for though that kind was ſpecially favoured by the Roman law, yet, by our uſage, it ſuffers an abatement in the ſame proportion with common legacies, *July* 6. 1630, *Monro*. But in the legacy of a ſum or ſubject particularly deſcribed, the legatee has right to the whole of that ſum or ſubject, if what remains ſhall be ſufficient for the payment of the debts due by the deceaſed, though there ſhould be no overplus towards ſatisfying other legacies; becauſe the deceaſed, by bequeathing a ſpecial ſum or ſubject, diſcovers an intention, that the ſubject bequeathed ſhould go to the legatee in all events: and, on the other hand, ſeeing ſuch bequeſt is limited to a ſpecial ſubject, nothing is due to the legatee if that ſubject ſhall periſh, whatever the extent of the free executry may be, unleſs it has periſhed through the fault or negligence of the executor, § 16. *Inſt. De legat.*; *l.* 47.

l. 47. § 4. 5. *De legat.* 1.; ſee *July* 21. 1665, *Spreul.* It may however be obſerved, that a legacy, though in the form of words general of a ſum of money, has the effect of a ſpecial legacy, where the deceaſed declares it to be granted for purchaſing a ſpecial ſubject, the bequeſt of which would have been preferable to other legacies. Thus a legacy of L. 20 to an executor for mournings was preferred to other legacies, in ſo far as extended to the ſum at which a decent ſuit of mournings might be purchaſed, *Home*, 25.

13. In the legacy of a ſubject bequeathed indefinitely, without any character diſtinguiſhing it from others of the ſame kind belonging to the deceaſed, which the Romans called *legatum generis*, as a yoke of oxen, a horſe, a piece of tapeſtry, &c. the legatee can have no *jus in re*; for there is no ſpecial thing bequeathed which admits of being the ſubject of a real right, and his title is no ſtronger to any one individual thing, than to every individual of the ſame kind which belonged to the deceaſed. In this kind of legacy, the Roman law appears to have given the election, ſometimes to the heir, and ſometimes to the legatee, according to the nature of the thing bequeathed, § 22. *Inſt. De legat.*; *l.* 71. *pr. De legat.* 1.; *l.* 4. *De trit. vin.*; but the general rule laid down in *l.* 37. *pr. De legat.* 1. is equitable, That the heir ſhall not be compelled to give the beſt, nor the legatee to accept of the worſt.

14. Deeds of a teſtamentary nature are more favoured, and therefore receive a more liberal interpretation, than obligations *inter vivos*, *l.* 12. *De reg. jur.* Hence a teſtament to which an impoſſible condition is adjected, is as effectual as a pure teſtament, the law conſidering the condition as not adjected, *l.* 3. *De cond. et dem.* Hence alſo unintelligible expreſſions in a teſtament or legacy are held *pro non ſcriptis*, and what remains plain has full effect, *l.* 2. *De his quæ pro non.* And in general, though the words ſhould be ambiguous, or even improper, they ought to be interpreted according to the preſumed will of the teſtator, if by any conſtruction they can be brought to it, *l.* 24. *De reb. dub.*; *l.* 69. § 1. *De legat.* 3. From this rule it alſo follows, that in any donation by the teſtator of a ſum left to the management of truſtees, to be applied to ſpecial uſes, the ſettlement does not loſe its force, though the truſtees ſhould either by death or renunciation be reduced to leſs than a quorum; in which caſe the ſurvivor who accepts may by himſelf execute the truſt: and even though all of them ſhould die or renounce, the court of ſeſſion may ſubſtitute one in their place, with powers to carry the will of the deceaſed into execution; *ut voluntas teſtatoris ſortiatur effectum*, *New Coll.* i. 32. In queſtions ariſing upon legacies between the executor and the legatee, the executor, as the debtor, is more favoured than the legatee who is the creditor, *l.* 47. *De legat.* 2.

15. All who are capable of conſent, may make a teſtament, or grant legacies, if they are not diſabled by ſpecial ſtatute or cuſtom; even minors, without the conſent of their curators; wives, without the conſent of their huſbands; and perſons interdicted, without the authority of their interdictors. But there are few who have ſo abſolute a power over their eſtate, that they can teſt upon the whole of it. Where a perſon has either wife or child, a certain portion of his moveable eſtate hath, from our earlieſt times, fallen upon his death to the widow, and a certain portion to the bairns or younger children, of which therefore he cannot diſpoſe by will, *Reg. Maj. lib.* 2. *c.* 37. The ſhare belonging to the widow is called *jus relictæ*; and that which falls to the children, is ſometimes, from the Roman law, ſtyled the legitim, or the portion given them by the law; and ſometimes their portion-natural, or bairns part of gear. It may be thought not reconcileable to the communion of goods, which is by our law conſequent upon marriage,

marriage, that the moveable eſtate which was, ſtanding the marriage, common to man and wife, ſhould upon its diſſolution be divided, not entirely between the two *ſocii*, to whom it belonged, but that a third party, the children, ſhould alſo be intitled to a ſhare of it. But it muſt be attended to, that by the law of nature itſelf, children have a right, upon their firſt exiſtence, to ſome ſhare at leaſt of the goods which formerly belonged in common to their two parents, of whom they may, without impropriety, be reckoned a part; though indeed the power of adminiſtration inherent in the father ſmothers the effects of the childrens right during his life. Where therefore there is iſſue of the marriage, the ſhare which, on its diſſolution, falls to the children, deſcends to them in conſequence of that natural right, without deſtroying the notion of a communion of goods.

16. From hence it appears, that the rights thus ariſing to the wife and children, are truly rights of diviſion of a common ſubject; for ſo ſoon as the communion which is formed by the marriage, ceaſeth by its diſſolution, the ſociety-goods fall to be divided. It is true, that the intereſt of the wife in thoſe goods, as well as that of the children, lies dormant during the huſband's life; who therefore, in conſequence of his ſuperiority over the wife, and of his right of adminiſtering for his children, can not only alienate them for a valuable conſideration, but make a preſent of them to whom he will, provided the deed be not granted *in fraudem* of thoſe legal rights, *Dec.* 8. 1675, *Thomſon*. But this unlimited right in the huſband ceaſeth before his actual death. So ſoon as he begins to die, as Dirleton expreſſeth it, *v. Legitima liberorum, i. e.* from the moment that he is firſt ſeized with that diſeaſe which ends in death, he is in the judgement of law already dead, and loſes the *legitima poteſtas* of diſpoſing of the ſociety-goods, or, as the words are commonly tranſlated by our lawyers, his *liege pouſtie*. All gratuitous deeds, therefore, executed by him after that period, tending to diminiſh the right of the widow or children, are void, though they ſhould not be fraudulent: nay the huſband, though he ſhould be in *liege pouſtie*, cannot diſpoſe of his moveables to the prejudice of the *jus relictæ*, or right of legitim, by way of teſtament, or indeed by any revocable deed; for revocable grants create no debt till the death of the granter, and at that period the right of the ſociety-goods is fully veſted in the widow and children, *Kames*, 107. Nevertheleſs rational deeds granted by the father in relation to his moveable eſtate, if they be executed in the form of a diſpoſition *inter vivos*, are ſuſtained, though their effect ſhould be ſuſpended till his death, *Fount. Jan.* 12. 1697, *Johnſton*; *Jan.* 18. 1721, *La. Balmain*. A wife who has accepted of a conventional proviſion from her huſband, is not underſtood by that acceptance to have renounced her *jus relictæ*, or her legal intereſt in the moveables under communion: ſhe is indeed in ſuch caſe excluded from her terce by ſpecial ſtatute, unleſs it be expreſsly ſtipulated in the deed of proviſion, that ſhe ſhall have right to both, 1681, *c.* 10.; but as that act mentions nothing of the *jus relictæ*, when there was the faireſt opportunity, if the legiſlature had truly ſuch intention to exclude it, a preſumption ariſes, that it was omitted purpoſely, and that conſequently the widow is intitled, both to the ſpecial proviſion, and to the *jus relictæ*, unleſs ſhe has accepted that proviſion in full, not of her terce only, but of all her other legal rights.

17. No legitim can be claimed by children, but out of the moveable eſtate belonging to their father at the time of his death; ſo that there is no room for it, upon a mother's death, though ſhe ſhould ſurvive her huſband; not even out of that part of the goods in communion, which ſhe had received *jure relictæ* upon her huſband's death; for her ſhare of theſe became, upon the diviſion, her own abſolute property. *2dly*, Children who

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are forisfamiliated, (a term explained *infr.* § 23.), are not intitled to a legitim. 3*dly*, It is due to immediate children only, and not to grandchildren or remoter deſcendents; either becauſe the law conſiders the legitim as a right ſo perſonal to the child himſelf, that unleſs he claim it during his lifetime, it falls by his death; or becauſe a *præſumptio juris et de jure* ariſes from the immediate father not claiming it, that he had renounced it before his death, upon receiving his juſt ſhare of the effects of his father. All the huſband's children, of whatever marriage they may have been procreated, are equally intitled to a legitim on their father's death; for as children have no ſuch claim on the death of their mother, the children of former marriages would be entirely cut off, if they were not intitled to a legitim equally with the children of that marriage which was diſſolved by the father's death.

18. What remains over the *jus relictæ*, and the childrens legitim, is the abſolute property of the deceaſed, of which he has the free diſpoſal, even to a ſtranger, not only in *liege pouſtie*, but by teſtament *etiam in articulo mortis*; and it is called the *dead's part*, becauſe the deceaſed had full power over it. Where a perſon has neither wife nor child, all his moveable eſtate is dead's part, and conſequently may be deviſed by teſtament. This dead's part, if it was not diſpoſed of by will, was, by our ancient law, *St. Gul. c.* 22. committed to the care of the biſhop of the dioceſe, or ordinary, who began about that time to be looked upon as the legal truſtee of the moveables of deceaſed perſons. The biſhop, in the exerciſe of that truſt, ſometimes applied them to pious uſes, and ſometimes retained them to himſelf, to the excluſion of the next of kin, even when the deceaſed died in pupillarity, and ſo was incapable of making a will, or of diſcovering any purpoſe concerning his ſucceſſion. To put a ſtop to ſuch illegal and oppreſſive practices, it was enacted by 1540, *c.* 120. That where one died ſo young that he was not capable of teſting, his moveable eſtate ſhould go to his next a-kin; and this act was ſoon extended by cuſtom, with univerſal approbation, to the caſe of perſons of full age dying inteſtate.

19. If one, upon his death, leave a widow and no children, the goods in communion divide into two equal parts; of which one goes to the widow, the other is dead's part. The words uſed in the language of our law for expreſſing this, are, that the teſtament of the deceaſed divides in two: which however is improper; becauſe nothing ought to be denominated a teſtament, but what may at leaſt be the ſubject of a teſtament; in which ſenſe it is the dead's part only which deſerves that name, as that alone can be teſted upon. If the deceaſed has left children, one or more, but no widow, the teſtament is alſo bipartite; for the children get one half as legitim, the other half is dead's part, which if it be not actually teſted upon, goes alſo to the children in the character of next of kin. If he leave both widow and children, though all his children ſhould have been of a former marriage, the diviſion is tripartite; the widow takes one third by herſelf, another third goes to the children equally among them as legitim, and the remaining third is the dead's part. Nay, if he leave a widow, and but one child, who ſucceeds to his heritage, ſtill the ſociety-goods divide in three, becauſe ſuch only child is intitled to a legitim. Though the proper ſubject which falls to the heir is the heritage, the moveables being the fund intended by the law for providing the younger children; yet the heir's right of legal ſucceſſion to his father's heritage, cannot preclude him from his natural right, as the only child, to his father's moveable eſtate, *Jan.* 12. 1681, *Trotter*. Neither is the circumſtance of his being an only child a reaſon for enlarging the widow's ſhare from a third to a half.

20. When a wife in her marriage-contract renounces her *jus relictæ*, by the

the acceptation of a ſpecial proviſion in ſatisfaction or in full of it, ſuch renunciation is conſidered, not as a conveyance of her third to her huſband, ſo as to increaſe the dead's part from one third to two thirds. It has the ſame effect as her death, ſo as to make the huſband's teſtament divide in two, the one half legitim, and the other the dead's part. The reaſon is, the wife's right is not of the nature of a debt, which may be transferred by the wife to the huſband; it is a right of diviſion, which takes no place till the diſſolution of the marriage; and as this right is extinguiſhed by the predeceaſe of the wife, becauſe after her death ſhe cannot be reckoned in the diviſion, it muſt be alſo extinguiſhed by her renunciation. A widow who has renounced, cannot concur in the diviſion; and in every caſe where the widow cannot concur, the legitim is the half of the executry, *Kames*, 66.

21. Upon the diſſolution of a marriage by the predeceaſe of the wife without iſſue, the goods falling under communion divide in two; the one half is retained by the ſurviving huſband, who was one of the *ſocii*, and who, ſtanding the marriage, had the abſolute management of the whole; the other half, being the ſhare falling to the wife, the other partner, upon the diviſion of the ſociety-goods, deſcends, as her abſolute property, to her next of kin. A bipartite diviſion ought alſo to be made in a teſtament, where the predeceaſing wife leaves iſſue of the marriage; for it is certain there is no room for a proper tripartite diviſion, except in the caſe of a legitim, and that is neither due to children out of the mother's effects, nor out of thoſe of the father ſo long as he is alive. Even in that caſe, however, the ſociety-goods are, by our practice, divided in three, in the ſame way as on the predeceaſe of the father leaving iſſue, *Haddinton*, *Dec.* 18. 1606, *Home*. Two thirds therefore remain with the ſurviving father, as if one of the thirds were due to him *proprio nomine*, and another as legitim, to the adminiſtration of which he is intitled for the behoof of his children; the remaining third, being the wife's ſhare, divides *in capita* among her children, whether of that or any former marriage; for all her children are equally her next of kin, *St. b.* 3. *t.* 8. § 43. The children of the laſt marriage appear intitled, if they are of perfect age, to inſiſt againſt the ſurviving father for the preſent payment of their ſeveral proportions of the ſhare falling to their deceaſed mother; for it falls to them, not as legitim, which is due only out of their father's moveables, and which they cannot demand till his death, but as their mother's ſhare of the ſociety-goods, that, upon the diſſolution of the marriage by her death, deſcends to her children in the way of ſucceſſion. Where the huſband predeceaſes, neither widow nor children can claim a right in any part of the heirſhip moveables, as goods falling under the communion, becauſe thoſe are truly appurtenances of the heritable rights which belong to the heir. But where the wife happens to die before the huſband, her next of kin are intitled to a ſhare of the whole moveables, without deducting any part as heirſhip, *Jan.* 1727, *Lindſay*; becauſe heirſhip is a certain ſhare of the moveable eſtate at the preciſe time of the death of the huſband; and therefore while he is alive, he can have no heirſhip.

22. Nothing can be accounted executry but what is free, after ſatisfying all the debts due by the deceaſed; and therefore theſe muſt be deducted before any teſtament can be divided. As the huſband has the unlimited power of adminiſtration during his life, the debts contracted by him muſt be preferable to the rights both of the widow, the children, and the next of kin: they therefore affect the whole goods in communion; and, ſo far as they go, diminiſh the *jus relictæ* and legitim, as well as the dead's part. Where the huſband, in his marriage-contract, provides the widow in a particular part of the moveables, ſhe becomes the huſband's creditor; and,

in that character, is preferable *pari paſſu* with his other perſonal creditors on the moveable eſtate, if it be not ſufficient for the payment of all the debts. If it be more than ſufficient for that purpoſe, ſhe is intitled both to her ſpecial proviſion and her *jus relictæ*, if ſhe has not accepted the firſt in full ſatisfaction of the laſt, conformably to the rule laid down *ſupr.* § 16. Donations to the wife, and obligations of proviſion to children, delivered to them by the granter *in liege pouſtie*, whether by marriage-contract or in ſeparate bonds, muſt, like other debts due by the deceaſed, come off the whole head of the executry, *June* 19. 1678, *Dickſon*; *July* 16. 1678, *Murray*. The funeral charges of the deceaſed, the widow's mournings, and the alimony due to her from the day of her huſband's death till the firſt moiety of her jointure be payable, affect alſo the whole executry: for tho' thoſe debts are never contracted till after his death, yet becauſe, by the neceſſity of nature, that expence muſt be incurred by all men, it is therefore, in the judgement of law, the huſband's proper debt, *June* 20. 1713, *Moncreiffe*; but legacies or gratuitous obligations, granted by him on deathbed, becauſe they cannot hurt the legitim or *jus relictæ*, affect only his dead's part. The ſhare of the goods in communion, which on the wife's predeceaſe falls to her next of kin, cannot be affected by any debt contracted by the huſband after her death; becauſe the right of that ſhare accrues *ipſo jure* to the wife's executors, by the diviſion conſequent upon her death, after which the huſband hath no power over it. But the wife's funeral charges are conſidered as her own proper debt, and ſo falls wholly on her executors, or next of kin, who are intitled to her ſhare. Perſonal bonds due to the huſband, becauſe they are, by 1661, *c.* 32. moveable in reſpect of ſucceſſion, and heritable as to the widow, muſt therefore increaſe the legitim, and dead's part, but not the *jus relictæ*: and as ſhe has no benefit from ſuch bonds when due to the huſband, neither can her ſhare decreaſe by any perſonal bonds due by him, the burden of which falls altogether upon his children or next of kin. Theſe obſervations concerning the legitim and *jus relictæ*, in queſtions with the widow, children, and next of kin, are not applicable to the caſe of a competition with the creditors of the deceaſed. Let the eſtate falling under communion be ever ſo large, if there be heritable debts due by the deceaſed more than will exhauſt it, the creditors in theſe can affect the whole executry for their payment.

23. By a child foriſfamiliated is to be underſtood one who, by having already received from his father his ſhare of the legitim, and diſcharged it, or by his renouncing it even without real ſatisfaction, is no longer accounted a child in the family, and is therefore excluded from any farther ſhare of it. As this right of legitim is ſtrongly founded in nature, the renunciation of it is not to be inferred by implication. It is not preſumed, either from the child's marriage, or his carrying on a trade by himſelf, or even his acceptance of a ſpecial proviſion from the father at his marriage, *Harc.* 475. if he have not expreſsly accepted of the proviſion in full ſatisfaction of the legitim. But as one, while he has neither wife nor child, has abſolute power over his whole eſtate, he may, by marriage-contract, ſettle proviſions on his younger children to be procreated of the marriage, in ſatisfaction of the legitim; which, though never accepted of by them, will effectually exclude their right to it. On this ground, a daughter was found excluded from the legitim, where the father had, in his marriage-contract, provided the whole conqueſt to the children of the marriage, notwithſtanding her plea, that he had, in the diſtribution of it among his children, given her the ſmalleſt ſhare, *June* 17. 1732, *Sir Ja. Stirling*. A child's renunciation of the legitim, or his acceptance of a ſum in ſatisfaction of it, hath the ſame effect, in regard of the younger children intitled to it, as the death of the renouncer; ſo that his ſhare divides equally among the reſt, *Feb.* 17. 1671, *Macgill*. But a child renouncing the legitim, is not cut off from

from his right to the father's dead's part; for to that he is intitled, not as a child *in familia*, but as next of kin to the father, *Goſf. July* 19. 1672, *Chiſholm*. Where therefore there is but one younger child, his renunciation of the legitim has the effect of turning the whole of that right, to which he was intitled as the only younger child, into dead's part; and conſequently all the executry falls to the renouncer himſelf, in the character of the father's next of kin, unleſs the heir be willing to collate the heritage with him, *Falc.* ii. 62 *. But where a child renounces not only his legitim, but in general all intereſt, of whatever ſort, in the executry, or all that he might claim by his father's death, ſuch renunciation plainly imports a renunciation alſo of the dead's part, *Fount. Dec.* 4. 1694, *Fowbiſter*; ſee *Home*, 101. The renunciation both of the legitim and dead's part by a younger child, operates in favour, not only of the other children who continue in family with their father, but in favour of their deſcendents; ſo that the child renouncing cannot claim the office of executry in competition with any of thoſe deſcendents, though he be truly a degree nearer in blood to the deceaſed than they, *Home*, 101. In like manner, ſuch renunciation excludes, not only the renouncer himſelf, but his deſcendents, in competition with the deſcendents of the children who had not renounced; for they cannot, in their father's right, lay claim to any ſubject to which the father has expreſsly given up his claim; but the renouncer's children are not excluded in a queſtion with collaterals, after all the other deſcendents of the deceaſed have failed; for where the father procures a renunciation of the legitim or executry from any child, his purpoſe is barely, that his other children may have the benefit of it, without the leaſt intention that any of his own deſcendents, even the children of the renouncer himſelf, ſhould be thereby excluded from their natural right, in competition with a collateral kinſman, *Feb.* 2. 1731, *Campbell*, obſerved in *Dict.* ii. *p.* 4.

24. For preſerving an equality in the diſtribution of the legitim among the younger ſons intitled to it, who have an equal intereſt in the father's moveable eſtate, we have adopted the doctrine of the Roman law, *titt. De collatione bonorum, & De dot. collat.* which introduced a *collatio*, by which the child, who had already got a proviſion from the father, was obliged to collate it with the other children, and impute it in his part of the legitim. Every proviſion given by the father to the child falls under collation, *l.* 29. *C. De inoff. teſt.*; not only the tocher, or other proviſions, granted in his or her marriage-contract, or in ſeparate bonds, *St. b.* 3. *t.* 8. § 45.; *Home*, 18.; but all ſums actually advanced by the father to the child, or for his behoof, though without any writing ſigned by the receiver obliging himſelf to account; which ſums may be proved by his oath. But neither the expence of ſuch education as is ſuitable to the child's quality or fortune, nor inconſiderable preſents made to him by the father, ſuffer collation.

25. Collation is excluded, where it appears evidently to have been the granter's intention, that the child ſhould have the proviſion as a *præcipuum*, over and above his ſhare of the legitim. Thus, *firſt*, A clauſe in a bond of proviſion by a father, that the child ſhould, notwithſtanding that proviſion, have at his death an equal ſhare of his goods with his other children, is the cleareſt indication of his will, that the proviſion ſhould not be collated, *Feb.* 9. & 19. 1631, *Corſan.* Stair affirms, *b.* 3. *t.* 8. § 45. 46. that a clauſe, declaring that the child ſhall continue a bairn in the houſe, implies alſo a prohibition to collate; and it was ſo adjudged, *Nov.* 18. 1737, *Beg*, obſerved in *Dict.* i. *p.* 149. But a father's declaration in the bond of proviſion, that the child is to continue in his family, and conſequently to be intitled

* In a late caſe, *Henrietta Sinclair againſt Sinclair of Olrick*, *Nov.* 1768, the Lords found, That the renunciation of the only younger child made the whole legitim accrue to the heir without collation.

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to a ſhare of the legitim, ſeems to be but a ſlight evidence of his purpoſe, that the child is not to collate; for collation is admitted only among thoſe who are intitled to a legitim. *2dly*, A child cannot be compelled to collate a bond of proviſion granted to him by his father on deathbed, contrary to the doctrine maintained by ſome writers, *Mack.* § 11. *h. t.*; for if he were, the proviſion would be altogether fruſtraneous, ſince the child could not receive the leaſt degree of benefit by it, though it be obvious, that the father meant it as a gratification to him. It is true, that the father cannot by a deathbed-deed diminiſh the legitim to the prejudice of any of his children, but he may diſpoſe of his dead's part, *etiam in articulo mortis*; and if he can bequeath it to a ſtranger, much more to his own child. Upon a ground extremely ſimilar, a legacy by a huſband to his wife was preſumed to have been granted wholly out of the dead's part, and ſo not imputable towards ſatisfying her *jus relictæ*, *Jan.* 12. 1681, *Trotter*. Where a land-eſtate, or an heritable right, is provided to a younger child, he is not bound to collate it: for the ſubject of the legitim is not impaired by ſuch proviſion, ſince the fund out of which the legitim is due does not ariſe from heritable rights, *Feb.* 14. 1677, *D. Buccleugh*. As this kind of collation is introduced, that equal juſtice may be done to all who have a right in the legitim, it does not affect the right of third parties. Hence a widow cannot be compelled to collate legacies or donations given to her by her huſband, and thereby to increaſe the legitim, ſaid *Jan.* 12. 1681.; nor, on the other hand, are children *in familia* obliged to collate their proviſions with the widow, in order to increaſe the *jus relictæ*.

26. It has been already ſaid, § 2. &c. that all the moveable eſtate of perſons deceaſed, over which they have full powers, or, in other words, their dead's part, deſcends to their next of kin, in ſo far as it has not been teſted upon: and thus the law ſtands, though another who is a ſtranger, *i.e.* who has no intereſt in the legal ſucceſſion, be named executor by the deceaſed in his teſtament, becauſe he is not by ſuch nomination preſumed to exclude his next of kin from the ſucceſſion, but merely to confer on the executor ſo named, as an *heres fiduciarius* or truſtee, the right of adminiſtration for his behoof. As by the former practice, ſuch executors appropriated the whole to their own uſe, contrary to this natural preſumption, they are by 1617, *c.* 14. declared accountable, not only to the widow and children, but to the remoter next of kin: but they are by the ſtatute allowed to retain to themſelves a third part of the free executry, or of the dead's part, for their trouble in executing the teſtament. An eldeſt ſon, who is named executor, is intitled to retain a third, in the terms of this ſtatute, *St. b.* 3 *t.* 8. § 53. he being accounted a ſtranger *quoad mobilia*, becauſe he cannot ſucceed both in heritage and moveables, where there are younger children. The widow is alſo a ſtranger to the deceaſed in the ſenſe of this act, becauſe ſhe is none of the next of kin. Theſe executors can only retain a third, after the deduction both of debts and even of legacies; for the deceaſed might before that act have diſpoſed of the whole dead's part by legacies, and the ſtatute was not deſigned to make their condition better than before; wherefore if the dead's part be exhauſted by legacies, the executor has nothing but the *nudum officium*, an unprofitable office, *July* 9. 1631, *Wilſon*. Legacies, where they are left to thoſe executors, muſt, by the ſtatute, be imputed towards the payment of their third, and if the legacy exceeds the third, the executor gets the full legacy, but can retain no part of the third. If he who is named executor, hath, as one of the next of kin, a partial intereſt in the legal ſucceſſion, he is intitled to no allowance for his trouble, unleſs ſuch intereſt be leſs than a third; in which caſe he may retain as much of the dead's part as, when added to his legal ſhare, makes up a third.

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The act makes no proviſion for executors, who, without any nomination by the deceaſed, are appointed by the judge, and who therefore are excluded from all ſhare in the teſtament, as they were before the enactment. Where the ſtranger is named, not only executor, but univerſal legatee, there is no room for preſuming a truſt lodged in him for the behoof of the next of kin.

27. As an heir in heritage muſt complete his titles by entry, ſo an executor is not veſted with the right of the moveable eſtate belonging to the deceaſed, without confirmation; which is therefore ſtyled by ſome lawyers, though improperly, *aditio hereditatis in mobilibus*. Confirmation may be defined, A ſentence of the judge competent, authoriſing an executor, one or more, upon making inventory of the moveable eſtate, and debts due to the deceaſed, to ſue for, recover, poſſeſs, and adminiſter the whole, either for the behoof of themſelves, or of others intereſted therein. Where an executor named by the deceaſed is authoriſed by the judge, it is called the *confirmation of a teſtament-teſtamentary;* and when the judge confers the office of executor upon a perſon of his own nomination, it is ſtyled the *confirmation of a teſtament-dative*.

28. Confirmation muſt be carried on before the biſhop's court or commiſſary. This right the biſhops aſſumed gradually to themſelves from very ſmall beginnings. The general opinion of their integrity in the firſt ages of Chriſtianity, not only led dying perſons to commit to their care their orphan children, but alſo induced the civil power to intruſt the biſhop of the dioceſe with the execution of legacies granted for pious uſes, where the deceaſed himſelf had named no executor, *l.* 28. § 1. 2. *C. De epiſc. et cler.* And their claim appeared to have been ſtretched no farther for many centuries after, either by the Canon law, *Decretal. l.* 3. *t.* 26. *c.* 17. 19. nor by our moſt ancient cuſtoms, which left to the ſheriff or judge-ordinary the execution of teſtaments, *Reg. Maj. lib.* 2. *c.* 38. § 4.; unleſs where the party who was brought before the ſheriff objected a nullity againſt the teſtament, or denied that the ſubject in queſtion was bequeathed, in which caſes the biſhop had the ſole cogniſance, *ibid.* § 5. 6. But ſoon after the reign of David I. a right was acknowledged in biſhops, not only of diſpoſing of the goods of all who died without a will, *St. Gul. c.* 22. but of confirming the teſtaments of all Scotſmen who died in foreign parts, 1426, *c.* 89. By this branch of juriſdiction, a great addition was made to Epiſcopal revenues, even after churchmen had been deprived of the right of the dead's part, by 1540, *c.* 120.; for in every confirmation of a teſtament, beſides the other fees of court, the twentieth part of the moveables fell to the biſhop of the dioceſe, which was called the *quot* of the teſtament, becauſe it was the proportion or quota to which the biſhop was intitled at confirming. At firſt the debts due by the deceaſed were not deducted from his effects, in the computation of the quot; ſo that even where the moveable eſtate was not ſufficient for ſatisfying the debts, the biſhop was ſecure of his quot, to the great prejudice, not only of the deceaſed's next of kin, but of his creditors, and in direct contradiction to the above-cited ſtatute of K. William, *c.* 22. § 2. 3. by which the biſhop was made anſwerable for the debts due by the deceaſed, to the full extent of his funds, in the ſame manner as executors named by teſtament. The exacting of quots in the confirmation of teſtaments, was declared a grievance, and therefore prohibited for the future, by 1641, *c.* 61.; which act was revived after the Reſtoration, by 1661, *c.* 28.; and though quots were again reſtored to biſhops the year after, by 1662, *c.* 1. they were by a poſterior act 1669, *c.* 19. ordained to be paid only out of the free gear, or *deductis debitis*. By 1701, *c.* 14. the act 1661, *c.* 28. was revived, whereby quots were prohibited, with a clauſe ſaving the dues of

court payable to the commiſſaries and their clerks; which clauſe is ſo explained in practice, as to juſtify the demand, not only of a reaſonable fee to the clerks, but of a compoſition to the judges, in proportion to the amount of the teſtament.

29. Teſtaments muſt be confirmed in that commiſſariot where the deceaſed had his domicil or reſidence; and if he had two diſtinct places of reſidence, each in a different commiſſariot, the commiſſary in whoſe territory he had his principal domicil, muſt confirm not only the moveables lying within his commiſſariot, but the whole of the teſtament. Thus, though one ſhould have reſided with his family in a city or borough, not for forty days only, but for months immediately preceding his death; yet if his principal ſeat was in the country, the confirmation of all his moveables muſt be carried on before the commiſſariot where that dwelling-houſe is ſituated, *Feb* 7. 1672, *Commiſ. of Edinburgh*; *New Coll.* i. 57. If one die in a foreign country, his teſtament muſt be confirmed at Edinburgh, as the *commune forum*, unleſs he went thither with an intention to return; in which caſe it muſt be confirmed in the commiſſariot where he laſt reſided before he went abroad, 1426, *c.* 89.; *Nov.* 22. 1661, *Douglas*; *Harc.* 459. The teſtaments of common ſoldiers, travelling-merchants, and others who have no fixed reſidence, muſt be confirmed in the commiſſariot where they die, if they have been there for forty days preceding their death; but if for a ſhorter time, the confirmation muſt be carried on at Edinburgh, as the *commune forum*, *Feb.* 16. 1711, *Nisbet*.

30. Confirmation itſelf is preciſely neceſſary, in the general caſe, to veſt a moveable eſtate in the executor. Hence a decree-dative obtained by one as next of kin, is not ſufficient, without a ſubſequent confirmation, to tranſmit the dead's part from him to his executors, tho' he ſhould have died *in curſu diligentiæ*, *Falc.* i. *Jan.* 23. 1745, *Carmichaels*; *New Coll.* ii. 213.: for as the law has ſaid, That no moveable ſubject belonging to one deceaſed is tranſmiſſible to his executor without confirmation, a decree-dative can have no ſuch effect; which, without veſting any right, barely declares, that the obtainer of the decree has a title to be confirmed, if he chuſes to apply for it.——There are ſeveral ſubjects which require no confirmation. *Firſt*, By 1690, *c.* 26. ſpecial aſſignations granted by the deceaſed, though neither intimated nor made public in his life, are declared ſufficient to carry to the aſſignee the full right of the ſubjects aſſigned, without confirmation; and ſpecial legacies being truly aſſignations, have been adjudged to fall under this ſtatute, *Jan.* 1729, *Gordon*. Formerly the law ſtood otherwiſe: ſpecial legacies being incapable of intimation, were, like unintimated aſſignations, regarded as imperfect conveyances; and therefore the ſubject of the legacy remained a part of the executry of the deceaſed, till confirmation by the legatee. *2dly*, Confirmation is not neceſſary by the widow and children, to veſt in them, or tranſmit to their next of kin, that ſhare of the moveables falling under the legitim and *jus relictæ*. That does not fall to them by ſucceſſion. It belongs to them in their proper right, in conſequence of the communion of goods induced by marriage, and the natural obligation on fathers to provide for their iſſue. The caſe is different with regard to the dead's part. It falls to the next in kin in the way of ſucceſſion. Confirmation is therefore neceſſary to veſt it in him, and to tranſmit it from him to his own next of kin. If the next of kin ſhould die before confirmation, it remains *in bonis* of the firſt deceaſed, and can be confirmed by that perſon only who becomes his next of kin on failure of the other, ſince there is no right of repreſentation in the ſucceſſion of moveables. Thus, where one of two younger children dies without confirming the father's teſtament, the ſhare of the father's dead's part, which belonged to the child deceaſed, is not

not tranſmitted to his children who are next of kin to himſelf, but may be carried after his death by his ſurviving brother confirming it as next of kin to the father, to the excluſion of his nephews, who are by one degree removed farther from their grandfather than their uncle: but the child predeceaſing, tranſmits his ſhare of the legitim, without confirmation, to his own iſſue. It may be obſerved, however, that though the *jus relictæ* and legitim fall to the widow and children by way of diviſion of the goods in communion, and conſequently deſcend after their death, even without confirmation, from them to their next of kin; yet theſe next of kin cannot eſtabliſh properly in themſelves the right of the widow and children, but by confirming executors to them, *St. b.* 3. *t.* 8. § 61. And they muſt alſo confirm to the firſt deceaſed, if no other has confirmed before them, in order to carry his teſtament into execution; becauſe till his teſtament be confirmed, the extent of his free executry cannot be known, nor conſequently the ſhares of the widow and children; neither can decree be recovered againſt debtors, but by an executor confirmed. 3*dly*, Such moveables as are capable of actual poſſeſſion *via facti*, need not be confirmed, *Falc.* i. *Nov.* 14. 1744, *Macwhirter.* The next of kin, by the bare poſſeſſion of the *ipſa corpora* of them, acquires the property, and tranſmits it to his own next of kin, to the excluſion of thoſe who become upon his death next of kin to the perſon firſt deceaſed; but without either the actual poſſeſſion of the deceaſed's moveables by the next of kin, or his confirmation, no right is veſted in him, *New Coll.* ii. 213. 4*thly*, The confirmation by an executor *qua* next of kin, of any one ſubject belonging to the deceaſed, as it proves his right of blood, and conſequently his title to the legal ſucceſſion of his moveable eſtate; ſo by our lateſt deciſions it has been adjudged to carry the whole executry out of the teſtament of the deceaſed, and to make even the part which was not confirmed to tranſmit to the executors of the perſon confirming on his death, *Falc.* i. *Jan.* 23. 1745, *Executors of Murray.* The confirmation of a ſtranger, who is an executor nominate or appointed by the deceaſed, as it is merely a truſt for the next of kin, has the effect of eſtabliſhing their right to the ſubject confirmed, as effectually as if themſelves had confirmed them.

31. The form of proceeding in the confirmation of teſtaments is this: The commiſſary, at the ſuit of any perſon having intereſt in the executry, iſſues an edict, which ſerves as an intimation to all concerned, that they may appear in court on a particular day ſpecified in the edict, nine days at leaſt from the publication of it, to ſee the teſtament of the deceaſed confirmed. This edict, as is the caſe of all edictal citations, need not be ſerved againſt any one perſonally, but is affixed on the church-door of the pariſh where the deceaſed reſided; and if he died in a foreign country, *animo remanendi*, citation muſt be uſed upon it at the market-croſs of Edinburgh, and pier and ſhore of Leith, againſt all that may have any intereſt or claim in the executry.

32. In a competition for the office of executor, the commiſſary gives the firſt place to the perſon named to it by the deceaſed himſelf, whoſe will ought to be firſt regarded in the management and diſpoſal of his eſtate after his death. By the former practice, ſo great attention was given to the diſtinction already ſtated between the office of executor and the right of ſucceſſion, that an univerſal legatee, if he was not alſo appointed executor by the deceaſed, was not admitted into the office, if either next of kin, widow, or creditor, appeared to oppoſe him: but now he is preferred to it before the next of kin, or any perſon whomſoever not named by the deceaſed, *New Coll.* i. 125.; becauſe thoſe to whom the deceaſed has given the only ſubſtantial intereſt in his ſucceſſion, ought alſo to have the right of adminiſtering

adminiſtering it, if he has not expreſsly excluded them. After them the next of kin is preferred to the office; if they fail to appear, the widow, then creditors, and laſt of all ſpecial legatees; ſee *Inſt. to Commiſſaries*, 1666. Executors not named by the deceaſed, are called *dative*, becauſe they are given by the judge, and derive their authority ſolely from him. It is true that an executor, even when he is named by teſtament, muſt be confirmed or ratified by the commiſſary: but that confirmation requires no previous ſentence decerning him executor; for it is the nomination of the deceaſed, and not any ſentence of the judge, that makes him executor: whereas in the caſe of one applying for the office, who was not named by the deceaſed, the commiſſary pronounces, previouſly to the confirmation, a ſentence decerning him executor, which gets the name of a *decree-dative*; and if the perſon ſo decerned incline afterwards to confirm, the commiſſary authoriſes him by a ſecond ſentence, which is properly the confirmation, veſting the ſubject of the teſtament in him, and confirming him in the office; *vid. ſupr.* § 27.

33. Where the teſtament of the deceaſed is confirmed, either by an executor of his own nomination, or by his widow, or univerſal legatee, or next of kin, the perſon confirming truly undertakes a truſt for the behoof of all concerned in the moveable ſucceſſion. And as the confirmation excludes all others from the adminiſtration, the executor muſt diſcharge that truſt with diligence. The more effectually to prevent frauds, it behoved the executor decerned to give up upon oath an inventory of the whole moveable eſtate of the deceaſed, in ſo far as conſiſted with his knowledge, in order to obtain confirmation; for this all our lawyers affirm to have been the former uſage, *Cr. lib.* 2. *dieg.* 17. § 2.; *Hop. Min. Pr.* § 71. But now of a long time, the commiſſaries have diſpenſed with that form, and admit of courſe whatever inventories are offered by the executor. Nay, it has been lately adjudged, that commiſſaries are obliged to confirm executors upon any inventory, though it ſhould be notoriouſly defective, *New Coll.* i. 88.: ſome inventory, however, that may be the ſubject of confirmation, muſt ſtill be offered; and ſuch of the goods as are not in caſh, or bonds of borrowed money, which require no eſtimation, muſt be eſtimated, and their values ſtated in money. The commiſſary takes of courſe ſecurity from every executor at his confirmation, to make the ſubject confirmed forthcoming to all having intereſt in it. Where no perſon applied for the office of executor, it was by our old practice competent to the biſhop, in order to ſecure himſelf of his quot, to apply for general letters of horning, which iſſued of courſe at his ſuit, as the truſtee of the eſtates of perſons deceaſed. Upon theſe he charged all perſons intereſted in the executry to confirm, and in default of the appearance of any, he preferred to the office his own procurator-fiſcal, who by his confirmation was intitled to the whole dead's part, (which belonged of right to the next of kin), till one having an intereſt claimed the office; in which caſe the claimant was decerned executor in place of the fiſcal, and was therefore called *executor ſurrogate*. As this was calculated purely for the biſhop's benefit, who could have no right to any quot unleſs the teſtament was confirmed, and as it occaſioned great loſs and expence to the ſubjects, all actions or charges againſt any perſon to confirm a teſtament, are now prohibited by 1690, *c.* 26. except at the ſuit of the widow, children, next of kin, or creditors of the deceaſed. Since the paſſing of this ſtatute, no commiſſary has an intereſt to except to, or oppoſe a confirmation which a creditor or next of kin is carrying on before another commiſſary, on the pretence of the incompetency of that other, more than he has to compel the creditor to confirm before himſelf, *Home*, 63.

34. Before

34. Before proceeding farther in explaining the rights competent to proper executors, and the obligations under which their office lays them, ſome obſervations may be made upon the confirmation of a particular kind of executors who act merely for their own behoof, viz. executors-creditors. Where a creditor hath before his debtor's death begun legal diligence againſt him, he may perfect it after his death, according to the legal forms; *ex. gr.* he may, upon his debtor's death, obtain forthcoming upon an arreſtment that had been uſed when he was yet alive, *Harc.* 95. But ſuch creditors of the deceaſed as have uſed no diligence againſt their debtor himſelf, muſt, on his death, ſue the executor already confirmed, who is the legal truſtee for the creditors, to make payment of his debt; or if there be yet no confirmation, they themſelves may apply for the office as executors-creditors, and confirm the teſtament, which will intitle them to ſue for and recover the ſubject confirmed for their own payment. Where one thus applies to be confirmed executor-creditor to the deceaſed, every co-creditor may apply to be conjoined with him in the office. As an executor-creditor confirms only for the payment of his own debt, he is exempted from the neceſſity of confirming more than is ſufficient to ſatisfy himſelf, *Act of ſederunt, Nov.* 14. 1679. This kind of executor is therefore neither truſtee for others who are intereſted in the executry, nor has he any right in the moveable ſucceſſion of the deceaſed, except in ſo far as he may affect it to recover what is due to himſelf; his confirmation is no more than a form of diligence eſtabliſhed by law, by which he, as creditor, may be enabled to recover payment out of the executry-effects. In caſe he confirmed more than the amount of his debt, our older deciſions were not uniform, whether he was liable in diligence for the whole of what he had confirmed. It was adjudged, *Goſf. July* 18. 1671, *Harlaw*, that he was obliged no farther than to aſſign the ſurplus, after retaining what ſatisfied his own debt, in favour of any other having intereſt; but afterwards he was declared liable in diligence for the whole, *Fount. Feb.* 7. 1679, *Pearſon.* This laſt judgement was ſtrengthened by ſaid act of ſederunt, which expreſsly ſubjects executors-creditors to the ſame degree of diligence with other executors.

35. A creditor who had not conſtituted his debt, or had not brought his claim to an iſſue by decree during the life of the debtor, has no title to demand directly the office of executor *qua* creditor to the deceaſed, becauſe he was never properly creditor to him. In ſuch caſe the creditor may conſtitute his debt in an action againſt the executor, where one is already confirmed. But where there is no confirmation, the following method is preſcribed by 1695, *c.* 41. He may charge the next of kin who ſtands off, to confirm within twenty days after the charge, or otherwiſe to be liable for the debt. If the next of kin neither renounce the ſucceſſion, nor confirm within the days of the charge, he will incur a paſſive title, in the ſame manner that one does in heritage, who is charged to enter heir, and fails to renounce: if the next of kin renounce, the creditor may conſtitute his debt, and obtain a decree *cognitionis cauſa* againſt the *hereditas jacens* of the moveables, declaring them liable for payment of the debt; upon which he may get himſelf decerned executor-creditor, and afterwards confirm in common form: but the directions of this part of the ſtatute are not in univerſal obſervance. Though creditors to a perſon deceaſed might, by the expedients authoriſed either by ſtatute or cuſtom, attach the moveables that pertained to their deceaſed debtor, in order to recover payment of their debts; yet where one was creditor, not to the deceaſed, but to his next of kin, till the fore-cited act 1695, there was no method laid down in our law, by which he could affect the moveable eſtate of the deceaſed, in caſe his next of kin ſhould ſtand off from confirming. By a ſeparate clauſe of that act, the creditor may either require the procurator-fiſcal to

confirm, and afterwards to aſſign to him; or he may obtain himſelf decerned executor to the deceaſed, as if he were creditor to him, and not to his next of kin.

36. Though the words of the act of ſederunt, *Nov.* 14. 1679, above quoted, ſeem to import, that proper executors, who hold the office for all intereſted in the moveable ſucceſſion, are obliged by law to make their inventories full, it is certain that, let the inventory be ever ſo defective, the executor is liable in no penalty for that omiſſion, at the ſuit of creditors or others who are intitled to any part of the executry, *June* 18. 1629, *Peebles*. Where therefore the executor confirmed has either omitted out of the inventory any effects belonging to the deceaſed, or has eſtimated them below their juſt values, the only remedy left to any perſon intereſted, is to apply to the commiſſary, that he himſelf may be confirmed executor to the deceaſed *ad omiſſa vel male appretiata*. Where one applies for a confirmation *ad male appretiata*, it is competent to him to prove by witneſſes, that the goods confirmed in the principal teſtament are undervalued. This holds, though the firſt executor ſhould have ſworn to the values put upon them; both becauſe ſuch oath is to be looked upon merely as an oath of credulity, *Harc.* 451. and becauſe the executor, being truly a party, ought not to have it in his power to fix the values of thoſe goods for which himſelf is to be accountable. But if the goods have been appriſed under the authority of the commiſſary, whoſe office it is to name fit perſons for that purpoſe, there is no room for a ſecond appriſement; nor can the commiſſary in ſuch caſe interpoſe, by directing the goods to be put up to a public ſale, though the creditors of the deceaſed ſhould apply for it, unleſs fraud or colluſion appear in the appriſers. If the deceaſed himſelf has fixed the values, the valuation ought to ſtand good as to the dead's part, becauſe every man is the beſt judge of the value of his own property; and though he ſhould have plainly under-rated them, it is preſumed, that it was his intention to make a preſent to the executor of the difference: nay, tho' the executry-effects ſhould not be ſufficient to ſatisfy the debts, the valuation ſhould be ſuſtained, unleſs the prejudice ariſing from thence to the creditors be enormous, *Feb.* 1. 1662, *Belſches*. Where an executor had intermeddled with any ſubject not contained in his confirmation, it ſeems to have been doubted, whether, by our more ancient practice, the creditors of the deceaſed had any other relief competent to them, than to confirm theſe ſubjects *ad omiſſa*; but it has been ſince adjudged, that they might, without ſuch confirmation, purſue the executor directly for their value, *Jan.* 24. 1639, *Inglis*.

37. He who applies to be executor *ad omiſſa vel male appretiata*, muſt call the principal executor as a party; for the executor in the principal teſtament is by his office intitled to the adminiſtration of the whole moveable eſtate, and ſo has an obvious intereſt to oppoſe the nomination of another executor who is to deprive him of part of that adminiſtration. If therefore it ſhould appear that the firſt executor has neither left out of the teſtament, nor under-rated any ſubject contained in it, *doloſe*, the commiſſary will, in place of naming a ſecond executor, ordain the ſubjects omitted, or the difference between the eſtimations in the principal teſtament, and the the true values, to be added to the teſtament, *March* 12. 1631, *Duff*. If there be ground to preſume fraud, a teſtament *ad omiſſa vel male appretiata*, is not like a principal teſtament divided into legitim, relict's part, &c. but carries the whole ſubjects contained in it to him who is thus decerned executor, in ſo far as his intereſt in the executry extends, to the utter excluſion of the executor in the principal teſtament, *Fount. Feb.* 16. 1703, *Robertſons*. Executors, to prevent any creditor of the deceaſed from confirming *ad omiſſa*, and thereby carrying off from them the ſubjects not formerly confirmed

firmed by themſelves, proteſt ſometimes at their confirmation, for liberty to add or eik to the inventory all ſubjects belonging to the deceaſed that afterwards may come to their knowledge. Theſe additions the commiſſary admits of courſe, without any new confirmation.

38. It is the office of an executor to carry the teſtament into execution, in order to diſtribute the executry-effects amongſt all having intereſt in them. A teſtament is ſaid to be executed in the proper and legal ſenſe, when the executor has obtained poſſeſſion of the moveables belonging to the deceaſed, or received payment of the debts due to him, or at leaſt eſtabliſhed a right to them in himſelf, by decree or corroborative ſecurities. But the office of executor is, like other truſts, perſonal, and conſequently not deſcendible to heirs. Hence, when there are two or more in the office, it accrues upon the death of any one of them to the ſurvivors, and it falls entirely on the death of the laſt: and therefore the commiſſary, in all caſes where the office happened to fall before the teſtament was fully executed, was in uſe to appoint an executor-dative *quoad non executa*, as if there had been no former confirmation, for executing that part of the teſtament which had not received execution during the life of the firſt executor. This executor-dative was accountable to the next of kin; not of the firſt executor, becauſe no right was veſted in him as to that part, it continuing *in bonis defuncti* till execution, but of the deceaſed, whoſe teſtament that executor had confirmed, ſee *Jan.* 31. 1633, *Wilſon*. As to the part which was executed, it was tranſmitted from him who was the executor, to his executors in the common courſe of ſucceſſion. There was at no period of time any place by our law for a confirmation *quoad non executa*, where an executor-creditor, whoſe confirmation is always for his own behoof, died before executing the teſtament; becauſe the ſubjects which are confirmed by an executor of that kind, are by the confirmation carried out of the executry to himſelf alone, as his own property, which therefore he may diſpoſe of to others without limitation. But by the older practice, the confirmation of executor *qua* neareſt of kin, though he confirmed chiefly for his own behoof, did not ſo eſtabliſh in himſelf the right of the ſubjects confirmed, as to enable him to convey them to others, even to the creditors of the deceaſed, before the teſtament was executed as to thoſe ſubjects in the manner above explained; till then, the aſſignation of them by the executor had the bare effect of a procuratory, which ceaſed by the granter's death, *St. b.* 3. *t.* 8. § 60. But by the later uſage it has obtained, that in every caſe where a teſtament is confirmed, chiefly, though not ſolely, for the executor's own behoof, *ex. gr.* by the next of kin, ſuch confirmation is adjudged to have the effect of an aſſignation or procuratory *in rem ſuam*, by which the full right of the ſubjects confirmed, and conſequently the right of execution, is tranſmitted to the repreſentatives of the perſon confirming, *Feb.* 12. 1662, *Bell*; *Home*, 60. ſo that for upwards of a century there have been few or no confirmations *ad non executa*.

39. Though an executor cannot, in the general caſe, ſue the debtors of the deceaſed till he be confirmed, becauſe it is the confirmation which gives him the *jus exigendi*; yet executors who are unwilling to be at the charge of confirming doubtful debts, may, even before confirmation, ſue for payment, if they obtain a licence from the commiſſary for that purpoſe. Theſe licences are never granted, till he who applies for them has obtained a decree decerning himſelf executor. They are intended merely to ſave expence, where there is danger of getting nothing by the confirmation, and for that reaſon they do not include a power to the purſuer to inſiſt for a decree againſt the debtor; they are only granted *uſque ad ſententiam*. If therefore the executor ſhall, before confirmation, take decree for the debt, it cannot avail

avail him, ſeeing the licence, which is the executor's only warrant for purſuing, excludes decree. A licence may be granted, not only to the executor in a principal teſtament, but to an executor ſurrogate, *ex. gr.* to an executor-creditor *ad omiſſa*, there being the ſame or ſtronger reaſon to indulge the laſt than the firſt, *Feb.* 21. 1668, *Scot.* Where an executor hath already confirmed ſundry debts due to the deceaſed, he may, without a licence, ſue for other debts not contained in the confirmation, before that commiſſary who granted the confirmation, *Jan.* 10. 1710, *Bothwell.* A diſpoſition *omnium bonorum*, is alſo ſuſtained as equivalent to a licence, *June* 25. 1663, *Haliburton.* Engliſh letters of adminiſtration, iſſuing from the proper court there, are adjudged to be alſo equivalent to our licences, and conſequently to be a ſufficient title to ſue in any of our courts for recovering of the debts due by the deceaſed, which were contracted and made payable in England, the creditor confirming before extract; becauſe whatever title is ſufficient in England to found an action upon ſuch debts, ought likewiſe to be found ſufficient here, *New Coll.* ii. 203. All diligence uſed by an executor upon a licence muſt fall, if he ſhould die before confirmation; for ſeeing the licence, on which the action and diligence is founded, is a bare perſonal permiſſion, which dies with the perſon licenſed, the diligence uſed by him cannot be ſupported by any confirmation of his next of kin, *June* 30. 1705, *Jackſon.* Such diligence, however, may perhaps have the effect to interrupt preſcription againſt the debt; for it bears the eſſential characters of interruption; it both ſhews the creditor's intention to proſecute his claim, and it is an intimation or notification to the debtor.

40. Where two or more are conjoined in the office of executor, all of them are underſtood to hold the office *pro indiviſo*. They have but one office, and repreſent the deceaſed as one perſon; and therefore all of them muſt concur in ſuing the debtors of the deceaſed, *March* 8. 1634, *contra L. Lag*; and if any one of them ſhall refuſe to concur, he may be excluded from the office at the ſuit of the co-executors. The concurrence, however, of all the executors is only neceſſary, in ſo far as the teſtament is not executed; for after a debt is eſtabliſhed in their perſon by decree, or after the debtors have given new ſecurities for their debts to the executors, every executor may, by himſelf, ſue for his particular ſhare of ſuch debt, and the debtor may ſafely make payment to him of that ſhare, *March* 17. 1630, *Sempill.* But ſince all the executors have an equal ſhare in the debts due to the deceaſed, no executor can grant an acquittance farther than his own ſhare amounts to, unleſs where one executor has already got payment from the debtors of as much as extends to his whole ſhare of the executry; for then the co-executor may, by himſelf, receive payment of, and diſcharge the debts that continue unpaid, *March* 24. 1630, *Sempill.* A debtor, however, ought in prudence to decline paying his full debt to any one executor, till all the other executors be made parties, that it may be known whether theſe other have already drawn their juſt ſhare of the whole executry-effects out of ſeparate funds. In the particular caſe, where the perſons conjoined in the office are executors-creditors, every debtor of the deceaſed who makes the ſmalleſt payment to any one executor, without the concurrence of the co-executors, does it at his peril; becauſe the queſtion, Whether the executor-creditor who received the payment was truly intitled to any part of it? depends entirely on the validity of the debt due to him by the deceaſed, which the co-executors have an obvious title to inquire into, before payment: and if the debt be liable to legal exceptions, the debtor muſt pay what he owed to the deceaſed a ſecond time to the other executors. As all the co-executors have an equal right to the debts due to the deceaſed, they are only liable *pro rata* in the debts due by him. The bur-

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den of thoſe debts muſt fall equally upon all the executors, unleſs it ſhall appear that he who is ſued has by himſelf intermeddled with as much of the executry-effects as extends to the debt ſued for. In that caſe the defender is ſubjected to the full amount of his intromiſſions, without conſidering what his proportion of the burden amounts to, when juſtly divided between him and the other executors, *July* 22. 1630, *Salmon*.

41. The confirmation of an executor, though it ſometimes gets the name of *aditio hereditatis in mobilibus*, does not, like the entry of an heir in heritage, infer any proper repreſentation of the deceaſed: for executry is truly an office; the executor is in the judgement of law a truſtee, appointed either by the deceaſed or by the judge, for executing the teſtament, and therefore is not ſubjected to the debts due by the deceaſed, *ultra vires inventarii*, beyond the value of the inventory. Hence it follows, that he cannot be ſued perſonally for the payment of any debt due by the deceaſed, till decree be awarded againſt him as a proper debtor, upon one or other of the two following grounds: *Firſt*, That he has actually intermeddled with the executry-effects; or, *2dly*, That he ought to have received them; for his office of truſt imports an obligation to diligence, for reducing to money the ſubjects confirmed, and recovering, for the benefit of all concerned, the debts due to the executry, at leaſt ſuch of them as may be in danger of being loſt by delaying to ſue the debtors. A year after confirmation is uſually indulged to executors for this purpoſe, which may perhaps be founded on 1503, *c.* 76. where it is taken for granted, that executors are obliged to make up their accounts within a year. A regiſtered horning is in practice accounted ſufficient diligence, without proceeding the length of a caption. As it is not always in an executor's power, even after diligence, to make the debts due to the executry effectual, he ought to preſerve ſuch vouchers as may prove that he had not neglected to uſe diligence *debito tempore*. The obtaining a decree againſt the debtor will of itſelf ſave the executor, tho' he uſe no diligence upon it, if he can prove the debtor was inſolvent when the decree was pronounced, ſince the expence of diligence muſt upon that ſuppoſition have been laid out unprofitably. The executor, where no benefit can accrue to himſelf by the office, is not bound to any diligence, if he execute the teſtament *quamprimum*, and immediately after aſſign the decrees, regiſtered hornings, and other ſecurities in his perſon, to the creditors of the deceaſed, according to their ſeveral preferences, that ſo they may ſue for payment in their own names. It is the duty of an executor, after he has converted the moveable effects into caſh, in order to a diſtribution thereof among the parties having intereſt, to hold the money in his hands, that he may have it in readineſs when that diſtribution is to be made. If therefore, in place of retaining the money, to which his office obliges him, he ſhould lend it out upon bond bearing intereſt, he lends on his own riſk, though the debtor's credit ſhould have been ever ſo unexceptionable at the date of the bond: and ſeeing he runs the hazard of the debtor's ſolvency, he ought, on the other part, to be intitled to all the profits ariſing from the loan, and conſequently is not accountable to the creditors upon the executry, for the intereſt of the ſum ſo lent, *July* 1730, *Cred. of Thomſon*, obſerved in *Dict.* i. *p.* 41. Upon the ſame principle, an executor who has recovered payment, even of bonds which carried intereſt to the deceaſed, is not liable for the intereſt of the ſums contained in thoſe bonds from the time that he received payment of them, *Falc.* i. 177. unleſs in ſpecial circumſtances, which takes the executor out of the common caſe, *ibid.* *

42. Since executors are truſtees for all intereſted in the executry, they cannot, even after the debts due to the deceaſed are properly veſted in themſelves by the execution of the teſtament, aſſign them to the prejudice of

* See *Kames*, *Rem. Dec.* 79.; *New Coll.* ii. 80. & iii. 108.

thoſe concerned; for the execution does not make them proprietors; they continue barely truſtees of the executry-goods. Though therefore it is the executor alone who can diſcharge the debtors, and grant ſuch conveyances of the debts as are conſiſtent with the truſt; yet if he ſhall aſſign a debt due to the executry in favour of his own proper creditor, which he ought as a truſtee to have aſſigned to the creditors of the deceaſed, the conveyance may be ſet aſide by theſe creditors, in the ſame manner that an aſſignation by a truſtee to a third party may be ſet aſide by the truſter. Upon this ground, the creditors of the deceaſed may affect by diligence, not only the original ſubjects contained in the teſtament, but bonds taken payable to the executor himſelf, where they appear to have been granted as the value of executry-effects; and thoſe creditors are preferable to the executor's own creditors, as to all the ſubjects belonging to the executry, though the creditors of the executor ſhould have uſed prior diligence, *St. b.* 3. *t.* 8. § 71.; *Dec.* 16. 1674, *L. Kilhead.* It ariſes alſo from the truſt implied in the office of executor, that he muſt communicate to all having intereſt in the ſucceſſion, the benefit of the eaſes he may have got in tranſacting ſuch of the debts due by the deceaſed, as he had purchaſed after his confirmation; becauſe from that period he became their truſtee: but as to thoſe he had purchaſed before his confirmation, when he was as yet under no tie to act for the behoof of others, he is preſumed to have acted for himſelf, and ſo he may lawfully retain to himſelf the whole benefit ariſing from ſuch purchaſes, *June* 4. 1747, *Mackenzie.*

43. It may be proper in this place to ſet forth the rules of preference, obſerved both by the former and preſent practice, in competitions among the creditors or legatees of a perſon deceaſed, upon the ſubject of his teſtament or dead's part: *Firſt*, By a general rule, no executor can pay any debt due by the deceaſed, be it ever ſo clearly conſtituted, till decree be recovered againſt him at the ſuit of the creditor, *Nov.* 11. 1664, *Johnſton*; for as he is a judicial truſtee, he has only a power of ingathering the executry-goods, but he has not the diſtribution of them, and therefore ought to make no payment without the warrant of the judge from whom he derives his authority: but as there is no certain way of coming at the knowledge of all the moveable debts due by perſons deceaſed, ſo as the ſeveral creditors may be brought into the field, it is lawful for executors in the common caſe to pay *primo venienti, i. e.* to that creditor who has firſt obtained decree for his debt. There are certain debts, however, which, becauſe they are not only onerous, but ſtrongly founded in humanity, are preferred before all others, and get the name of *privileged.* Theſe the executor may pay without decreet. Of this ſort are reckoned medicines furniſhed to the deceaſed on deathbed, phyſicians fees incurred during that period, funeral charges, a year's rent of the houſe where the deceaſed died, and his ſervants wages, either for a full year, or half a year, according to the time for which they were hired; ſee *Nov.* 25. 1680, *Crawfurd.* Under funeral charges are included all expence neceſſary for the decent performance of the funeral, *ſine quibus funus honeſte duci non poteſt, ex. gr.* hanging the chamber where the dead body is laid with black, if the rank or fortune of the deceaſed require it in point of decency, mournings for the widow, and ſuch of the deceaſed's children as are to aſſiſt at the funeral; but no claim for mournings can be made by the children who were not preſent at it; ſee *New Coll.* i. 57. *2dly*, No executor can warrantably pay, even to a creditor who has obtained decree, if, before actual payment, while the ſubject is yet *in medio*, another creditor ſhall interpel him by a citation, *Dec.* 16. 1629, *White*; for he ought in ſuch caſe to bring the two creditors into the field by a ſuſpenſion and multiple-poinding, that the creditor interpelling may have an opportunity

nity of excepting to the other's ground of debt or preference. Hence he can pay no legatee, without calling all the others contained in the teſtament, that if there be not fund ſufficient for ſatisfying all of them, each of them may ſuffer a proportional abatement, *Jan.* 31. 1736, *Caldwall.* Neither can he make any payment to the prejudice of teſtamentary creditors, tho' they ſhould have made no formal interpellation; for the acknowledgement of their debts by the deceaſed in his laſt-will, which is the executor's own title, muſt be deemed a ſufficient notification as to him, *March* 8. 1631, *Duff.*

44. Executors might, by our former practice, have, without any form of law, made payment of debts due by the deceaſed to themſelves, whether they were the original creditors, or had acquired a right to them before their confirmation; or, to ſpeak more properly, they might have retained in their own hands a ſum amounting to the debts due to them, *Jan.* 26. 1628, *Adie*; upon this ground, That as one cannot demand a decree againſt himſelf, the privilege given to that creditor who firſt obtains ſentence, would be inavailable to an executor, if he happened to be alſo creditor to the deceaſed. But it would perhaps have been more agreeable to the obligations of a judicial truſtee, if it had been made neceſſary for the executor to have applied to the judge for a warrant to appropriate to himſelf as much of the executry-funds as would have anſwered his debt. An executor might alſo, by the former practice, have paid thoſe creditors whoſe debts were acknowledged in the teſtament, though no judgement had been recovered upon them; becauſe the acknowledgement of the debts by the deceaſed himſelf, ought to have as great force as a ſentence or decree of the judge, declaring the debt to be juſt: but he could not warrantably pay even to this claſs of creditors, if, before payment, he was ſummoned at the ſuit of another creditor of the deceaſed, *March* 31. 1624, *L. Curryhill.*

45. A conſiderable alteration has been made upon this head of our law by act of ſederunt, *Feb.* 28. 1662. This act recites the prejudice ſuſtained by the creditors of deceaſed perſons who live at a diſtance, or are otherwiſe late in coming to the knowledge of their debtor's deceaſe, through the earlier diligence of other creditors, by which they were poſtponed, and perhaps totally excluded from their payment. For preſerving an equality, therefore, among all the creditors, a rule of preference is eſtabliſhed, whereby every creditor, uſing diligence within half a year after the debtor's death, either by obtaining himſelf decerned executor-creditor, or by citing one of the executors confirmed, is intitled to a *pari paſſu* preference with thoſe who had uſed more timely diligence. Since this act of ſederunt, an executor cannot avail himſelf of his right of retention, ſo as to exclude any creditor who ſhall have cited him within the ſix months, and thereby ſhall have acquired a *pari paſſu* preference with him in virtue of the ſaid act. Neither can he now make payment, even upon decree, to any creditor, except a privileged one, though he ſhould not be interpelled by any other; becauſe till the running out of the ſix months, it cannot be known how many creditors may be intitled to a dividend out of the executry-funds, by having uſed diligence within that time. The chief purpoſe of citing the executor within the ſix months, is to give him a notification of the debt upon which the citation proceeds. And therefore, *firſt*, A teſtamentary-creditor, even without citation, ſtands on an equal footing with thoſe who have cited the executor; becauſe his debt is ſufficiently made known to the executor by the teſtament. *2dly*, A bare citation within the ſix months by one creditor, does not found him in a preference to thoſe who ſhall cite the executor after that term, while the executry-funds are ſtill *in medio*, *July* 1742, *Cred. of Johnſton*; for the act of ſederunt was intended ſimply to diſcourage too

too haſty diligence, by bringing in all the creditors *pari paſſu*, who ſhould uſe any ſtep of diligence within the half-year, but by no means to give a bare citation as ſtrong effect as a decree, or to exclude thoſe creditors who ſhall after that time have firſt completed their diligence: but a decree within the ſix months will exclude all creditors uſing diligence afterwards, becauſe a decree is a legal ground of preference.

46. After the ſix months are expired, it is the executor's duty to bring into the field all the creditors who have uſed that diligence which is preſcribed by the aforeſaid act of ſederunt, that the whole executry-fund may be divided among them, according to their ſeveral degrees of preference. As that act relates to ſuch creditors alone who have uſed diligence within that period, queſtions of competition among thoſe who have uſed no diligence till afterwards, muſt be determined by the legal rules of preference, as if the act of ſederunt had never been made. In a competition between two creditors of this kind, the preference was governed formerly by the priority of the citations, *July* 1723, *Sir J. Gray*. But by the later practice, which appears more agreeable to law, the firſt citation gives no preference by itſelf, *Feb.* 15. 1738, *Graham*. The executor may, after elapſing of the ſix months, uſe the right of retention which was competent to him by the former practice, as to all debts due by the deceaſed to himſelf, which will be equally available to him, as if he had obtained decree, and conſequently will found him in a preference before all creditors who have uſed no diligence within that period, tho' they ſhould immediately after ſue for their debts, *Falc.* i. *Dec.* 22. 1744, *Cred. of Crichen* *. Legatees, being gratuitous creditors, are poſtponed to the onerous creditors of the deceaſed; but a legatee who has actually received payment, is not bound to reſtore to the creditors of the deceaſed the ſum bequeathed, if it ſhall appear that there was originally a ſufficient fund in the executor's hand for ſatisfying both creditors and legatees, though he ſhould afterwards have become bankrupt: for legatees cannot by any action compel an executor to clear off the executry-debts; the creditors themſelves are alone to blame for having neglected to ſue him while he continued ſolvent; and therefore ought to be the only ſufferers, and not the legatee, who received *optima fide* what had been bequeathed to him by the proprietor as his own, *New Coll.* ii. 241. The expence of confirmation, and the other charges neceſſary for the common management, come off the whole head of the executry-funds, and are therefore, like the debts properly called *privileged*, preferable to every other creditor. All the creditors of the deceaſed who ſhall uſe diligence againſt the moveable eſtate of their debtor, within a year from his death, are preferable to the creditors of his next of kin: but after that period, the creditors of the next of kin have acceſs to attach what remains not affected by the proper creditors of the deceaſed, according to the form preſcribed by 1695, *c.* 41.

47. By our old cuſtom, it behoved executors who wanted to be diſcharged of their truſt, and have their accounts ſettled, to apply for formal decrees of exoneration, upon actions to be purſued by them before the commiſſaries againſt all intereſted in the executry: which decrees muſt have contained a particular inventory both of the funds and debts of the deceaſed, and an account how every part of the executry-funds was applied; for general decrees of exoneration were accounted as covers to fraud and concealments, and therefore did not avail the executor, *St. b.* 3. *t.* 8. § 75.; *March* 10. 1632, *L. Ludquhairn*. But now of a long time this action has been diſuſed; and executors, when they are ſued by creditors, are admitted to plead, by way of exception, that the inventory is exhauſted by lawful articles of diſcharge. What articles are ſufficient for that purpoſe, may

* See *Kames, Rem. Dec.* 62.

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be gathered from the four preceding paragraphs. It may only be farther obſerved, that it is no good defence for the executor, that the teſtament is exhauſted by lawful ſentences recovered by the other creditors againſt him, unleſs he can alſo plead, that payment has been made by him in conſequence of thoſe ſentences; for every creditor, after he has interpelled the executor by proceſs, has a right to diſpute his preference againſt all the other creditors, even thoſe who have obtained decrees upon their debts, if, when the action is brought by them againſt the executor, payment has not been made of the ſums contained in theſe decrees, *July* 8. 1634, *Preſton*. The exception of *Exhauſted*, which is pleadable by executors, may be elided by the creditors reply of ſuperintromiſſions, *i. e.* that the executor has intermeddled with more of the effects of the deceaſed than were contained in the inventory. As for the debts due to the deceaſed, which continue unpaid notwithſtanding proper diligence uſed againſt the debtors, the executors may be releaſed of thoſe, by producing to the court decrees and regiſtered hornings, and aſſigning them to the creditors, together with the grounds of debt, in the manner explained *ſupr.* § 41.

48. The law itſelf has divided ſucceſſion into two branches, the heritable and the moveable: and as each of theſe ought to bear the burdens which naturally attend it, the heir is the proper debtor in heritable debts, becauſe he ſucceeds to all the ſubjects upon which thoſe debts are ſecured; and the executor is primarily liable in the moveable debts, becauſe he is conſidered as heir in the moveable eſtate. Though therefore not only heirs but executors repreſent the deceaſed to the extent of the inventory; and conſequently both one and the other are directly liable to the creditors of the deceaſed, who have, by the ſtyle of their bonds, not only the deceaſed himſelf, but his ſucceſſors or repreſentatives, bound in payment; yet by our ancient law, 1503, *c.* 76. the heir was protected againſt all actions on moveable debts for a year after his anceſtor's death, becauſe he was not the proper debtor. A year was indulged to the heir, becauſe that ſpace of time appears, by the ſaid ſtatute, to have been allowed by our former practice, to executors to make up a ſtate of the executry; after which the heir was intitled to call for that account, and to take ſecurity of them to relieve him of the moveable debts, to the extent of the free moveable eſtate: and it was thought unreaſonable to ſubject the heir to the payment of the moveable debts, till he had it in his power to call the executors to account. By our preſent uſage, however, in contradiction to this ſtatute, the heir may be ſued for moveable debts immediately after the anceſtor's death, if by his actual entry he has loſt the benefit of the *annus deliberandi*; and thus, though he be only a ſubſidiary debtor, he is leſs favoured than the executor himſelf, who cannot, ſince the before-cited act of ſederunt 1662, be obliged to pay any of the executry-debts ſooner than ſix months after the debtor's death. From this doctrine, that the burden of the debts of the deceaſed fall either on the heir or executor, according to their different natures, it follows, that where the queſtion is not with a creditor, but between the heir and executor, the heir who pays a moveable debt, or the executor who pays an heritable, ought to have action of relief or recourſe againſt the primary debtors. This right of relief is accordingly granted by ſpecial ſtatute, the fore-cited 1503, *c.* 76. to the heir who has made payment of a moveable debt, againſt the executor; and though that ſtatute contains no clauſe obliging the heir to relieve the executor as to the heritable debts, that right has been extended in favour of the executor *ex paritate rationis*, *March* 7. 1629, *Falconer*. And indeed our legiſlature has taken it for granted, that relief is alſo competent to the executor againſt the heir, otherwiſe it would not have been enacted by 1669, *c.* 19. that heritable debts due by a perſon deceaſed, ſhall not be ſtated in his teſtament to

the prejudice of the quot, where the deceaſed had heritage ſufficient for the payment of them. This right of relief is not cut off from the heir, by his accepting from the deceaſed a grant of the heritage, with the burden of all his debts, moveable as well as heritable; for ſuch burden is not interpreted to be impoſed with any deſign to alter the natural courſe of the granter's ſucceſſion, or to load his heirs or executors with the payment of debts in which they are not the primary debtors; but merely as a corroborative ſecurity to creditors, unleſs the contrary ſhall be evident from the ſpecial tenor of the grant; ſee *Falc.* i. 185. The ſame doctrine holds with regard to the relief competent to executors againſt the heir, in the caſe of a grant of the whole moveable eſtate in favour of the executor, with the burden of all the granter's debts, heritable as well as moveable.

49. The only paſſive title in moveables is vitious intromiſſion, which conſiſts in apprehending the poſſeſſion of, or uſing any moveable goods belonging to the deceaſed unwarrantably, or without the order of law. It ſubjects the intromitter *paſſivè* to the payment of all the debts due by the deceaſed; and the action founded on it, nearly anſwers to the *actio expilatæ hereditatis* of the Roman law. This paſſive title is not, like thoſe in heritage, pointed only againſt perſons who have a right to ſucceed to the deceaſed, but ſtrikes againſt all intromitters, even ſtrangers. The reaſon is, that moveables are eaſily carried off or embezzled; and as thoſe in the houſe of the deceaſed have it ſo much in their power to poſſeſs themſelves of his moveable effects, and ſometimes of the greateſt value, it was neceſſary to protect theſe by a ſanction beyond ſimple reſtitution. One's ſeizing the poſſeſſion of any moveable ſubject which belonged to the deceaſed, ſo as to bring it under his power, though it ſhould not be employed by him to its proper uſe, infers vitious intromiſſion; *ex. gr.* the bare tranſporting of a trunk by the intromitter to his own houſe, *June* 29. 1705, *Archibald;* but where one barely continues the poſſeſſion of a ſubject, the property of which he had acquired from the deceaſed while he was yet alive, that can neither be called intromiſſion, which implies a new act, nor does it carry with it any vitious character, being truly the continuation of lawful poſſeſſion, *Feb.* 7. 1629, *Brown; June* 9. 1680, *Brown.* Though vitious intromiſſion be a delict, it may be referred to oath; for the action grounded upon it is purſued barely *ad civilem effectum*, to make good the payment of a lawful debt.

50. Stair affirms, *b.* 3. *t.* 9. § 7. that this paſſive title is not incurred, unleſs where the thing intermeddled with is part of ſome ſubject that may be conſidered as an *univerſitas*, as a ſheep out of a flock. But this doctrine is neither founded on reaſon, nor ſupported by practice. The only *univerſitas* to be regarded in this paſſive title, is the *univerſitas* of the moveable eſtate of the deceaſed; and therefore whoever intermeddles unwarrantably with a ſingle ſubject that belonged to him, as a picture, a jewel, a piece of plate, muſt be underſtood to intermeddle *per univerſitatem*, and without doubt commits as great wrong, where fraud is juſtly ſuſpected, as if he had carried off a ſheep from the flock, or a corn-ſheaf from the barn-yard.

51. Intromiſſion cannot be vitious, nor conſequently infer a paſſive title, where the ſubject intermeddled with was truly not *in bonis defuncti*, no part of the eſtate of the deceaſed, or ceaſed to be ſuch before the intromiſſion. Thus, if the deceaſed died a rebel at the horn, and declarator of the gift of his eſcheat has been obtained by a donatary, ſuch declarator veſts the property of the moveables in the donatary; after which, his intromiſſion with them is a lawful act, and ſo cannot infer a paſſive title. Nay, though after the declarator, not the donatary himſelf, but a third perſon, ſhould intermeddle with them, the declarator would ſecure the intromitter againſt a paſſive title; becauſe the goods are, after declarator, no longer *in bonis defuncti*,

defuncti, but become the property of the donatary. Vitious intromiſſion however is not excluded barely by the deceaſed dying at the horn; for though, by the denunciation, his goods are declared to fall as eſcheat to the King, they are ſtill accounted part of the eſtate of the deceaſed, and conſequently affected by the diligence of his creditors, till they are tranſferred by the gift and declarator to the donatary, *Feb.* 7. 1662, *Gray*. On the ſame ground, an intromitter incurs no paſſive title, if one has been, previouſly to the intromiſſion, confirmed executor to the deceaſed; becauſe the goods are, by ſuch confirmation, veſted in the executor, and ſo ceaſe to be *in bonis defuncti*. It might always have been doubted, whether confirmation by an executor-creditor, whoſe confirmation is barely a ſtep of diligence, ought to ſcreen a third party intermeddling after ſuch confirmation from this paſſive title. It was by our older practice ſuſtained as a relevant defence; but as an occaſion was thereby given to frauds, it was enacted by 1696, *c.* 20. that the confirmation by an executor-creditor of a particular ſubject ſhould not protect from a paſſive title thoſe who might afterwards intromit with any part of the deceaſed's moveables. The ſtatute, however, expreſsly ſecures intromitters who claim under the executor-creditor; and if the intromiſſion has been with the ſpecial ſubject confirmed, the intromitter ſeems to be ſecured by the laſt words of the act, though he derive no title from the creditor.

52. If one ſhall, after intermeddling with the goods of the deceaſed, get himſelf confirmed executor, ſuch confirmation, as it ſhews a willingneſs in the intromitter to ſubject himſelf to account, purges the vitioſity of his former intromiſſions, according to the following rules. If the intromitter had an antecedent title, *ex. gr.* if he was executor-nominate, next of kin, univerſal legatee, or relict, law allows to theſe a reaſonable time to confirm, which our cuſtoms have fixed to a year after the death of the deceaſed. Confirmation, therefore, any time within the year will cover ſuch intromitter from a paſſive title, even though an action have been brought againſt him immediately upon the death of the deceaſed, *Jan.* 28. 1663, *Stevenſon*; *Jan.* 1. 1680, *Urquhart*; and though the intromitter ſhould delay confirming till after the year, yet if he ſhall confirm *ante litem motam*, before he be cited by any creditor as a vitious intromitter, he is ſecure. But where the intromitter is a ſtranger, in no degree intereſted in the executry, he muſt in all caſes confirm prior to the creditor's citation, though ſuch citation ſhould be within a year after the death of the deceaſed, otherwiſe he incurs a paſſive title, *St. b.* 3. *t.* 9. § 10. Where an executor confirmed, even one intereſted in the executry, intermeddles with ſubjects not given up by him in inventory, after being cited by a creditor, ſuch ſuperintromiſſion makes him liable as a vitious intromitter, fraud being in the general caſe preſumed from his not giving up in inventory the full ſubject intermeddled with, *Dec.* 13. 1709, *Drummond*; but where ſpecial circumſtances exclude the preſumption of fraud, he is not liable *ultra valorem* of his ſuperintromiſſions. There is no neceſſity for an executor to confirm goods lying, or debts due in a foreign ſtate, in order to clear his intromiſſion from any vitious character; and indeed confirmation would in that caſe be incongruous, as it can confer no right to goods ſituated in a country *extra territorium*: yet ſuch executor is ſubjected to the creditors to the full extent of his intromiſſions, *Harc.* 41. 453.

53. The penalty of vitious intromiſſion being extremely ſevere, and introduced as a check to fraud, is excluded in every caſe where equity interpoſes for the intromitter; where, for inſtance, the value of the things intermeddled with is ſo inconſiderable as to remove all ſuſpicion of fraud, *Jan.* 22. 1713, *Stark*; unleſs there be direct evidence, or at leaſt pregnant preſumptions

preſumptions to the contrary. From this rule it ariſes, that any probable title of intromiſſion, though it ſhould be in itſelf lame or imperfect, ſaves the intromitter from the paſſive title, as it takes off the preſumption of fraud; *ex. gr.* letters of adminiſtration obtained in England, though theſe can give no legal right to intermeddle with goods in Scotland, *extra territorium*, *Harc.* 66.; or a general diſpoſition of moveables, though that is an incomplete title without confirmation, *July* 12. 1666, *Scot*; *New Coll.* ii. 67. Hence likewiſe, if the defender had a probable reaſon to think that the ſubject with which he intermeddled was not the property of the deceaſed, if, for inſtance, he had purchaſed it *bona fide* in the way of trade, he is not to be accounted a vitious intromitter, though that ſubject ſhould be afterwards proved to have been the property of the deceaſed at the time of his death: but as the property of it could not in ſuch caſe be transferred to the intromitter by the ſeller, who was not himſelf the owner, he may be compelled to reſtore it to any creditor who may afterwards confirm it. Neither is this paſſive title incurred where the intromiſſion is neceſſary, that is, where it is barely *cuſtodiæ cauſa*, or for preſervation; as where the widow or next of kin does no more than continue the poſſeſſion had by the deceaſed, for the behoof of all intereſted in the executry, that the goods may be ſaved from periſhing. But the neceſſity of the intromitter, that is, his deſtitute condition, is no good defence againſt the paſſive title; ſo that if he diſpoſe of any part of the deceaſed's goods, or their price, for his own behoof, he is liable *paſſivè*. This is carried ſo far in our practice, that a widow was found liable as vitious intromitter, though ſhe had intermeddled with no more than was applied to the ſuſtenance of her and her children, who had no other fund to keep them from ſtarving, *March* 20. 1624, *Cochran*.

54. This paſſive title is introduced merely in favour of creditors, whoſe debts are conſtituted by an obligation *inter vivos*; and therefore ſuch as have only a right by legacy, or by a *donatio mortis cauſa*, cannot ſue upon it; yet a bond of alimony by a father to his unprovided daughter, though it ſhould be ſo conceived as not to take effect till after his death, is juſtly conſidered as a debt by obligation, rather than as a *donatio mortis cauſa*, becauſe fathers lie under a proper obligation to maintain their children till they can do for themſelves, *Dec.* 5. 1729, *Loch*, obſerved in *Dict.* ii. *p.* 43. 44. Upon this ground alſo, vitious intromiſſion is not pleadable againſt an intromitter, by a widow for the ſhare falling to her *jure relictæ*, or by the children for their legitim: for though both of theſe have a claim to certain proportions of the moveable eſtate of the deceaſed, they are not creditors. And even creditors themſelves, where their debts are heritably ſecured, cannot inſiſt againſt vitious intromitters, till the heir, who is the primary debtor in that ſort of debts, be firſt diſcuſſed. No creditor of the deceaſed can ſue the intromitter's heir on this paſſive title; for vitious intromiſſion is a delict, and delicts, being perſonal, can affect no other than the intromitter himſelf, who is the delinquent. But an action, when reſtricted to ſimple reſtitution, is competent to a creditor againſt the heir of the intromitter; for though an heir does not repreſent his anceſtor in penalties, yet he does in civil obligations; and the anceſtor's intromiſſion induces an obligation, not only againſt himſelf, but againſt his heir, for reſtoring the ſubject intermeddled with, or its value.

55. If vitious intromiſſion be a delict, it follows, that where there are ſeveral vitious intromitters, any one of them may be ſued by a creditor of the deceaſed *in ſolidum* for the whole of the debt due to him, without the neceſſity of making the others parties to his ſuit; for in delicts every one of the offenders muſt be accountable for all the conſequences of the wrong, as fully as if he had had no acceſſories: but if a creditor ſhall ſue them all jointly

jointly in the ſaid ſummons, each of them is liable only *pro virili*, *i. e.* in equal ſums, according to their number, without regard to the extent of their ſeveral intromiſſions, *Cr. lib.* 3. *dieg.* 2. § 7.; *Nov.* 16. 1626, *Chalmers.* If this paſſive title was deſigned only to protect creditors againſt fraud, *vid. ſupr.* § 54. no delinquency or penalty can be pleaded by any but a creditor againſt intromitters, who conſequently, in a queſtion with all others, are intitled to every privilege that would have been competent to them if they had done no wrong. Thus, if one of ſeveral intromitters has by himſelf paid the whole of a debt due by the deceaſed, an action of relief lies at his inſtance againſt the others for their ſeveral ſhares of it, without the neceſſity of following the indirect method of taking a conveyance from the creditor, upon which he might inſiſt for relief in the name of his cedent, *Cr. lib.* 2. *dieg.* 17. § 3. Mackenzie is indeed of a contrary opinion, § 24. *h. t.* upon this medium, That wrong has no warrant: but it ought to be attended to, that the intromitter has, in the judgement of law, committed no wrong to any but the creditors. Hence alſo an intromitter, though, as a vitious one, he was liable in payment to the creditors of the deceaſed, yet having paid the debts due to them, was found intitled to ſue the heir to be relieved of ſuch of them as were heritable, *Dalr.* 133.; for an heir is not a creditor, and therefore cannot plead any delinquency againſt intromitters. Yet the intromitter has no right of relief as to the moveable debts which he may have paid; for theſe debts are deemed to be extinguiſhed in his perſon by the vitious intromiſſion, upon this ground, That the law makes him liable univerſally, in the ſame manner as if he had actually intermeddled with the whole moveable effects, and preſumes, that theſe effects were ſufficient for the ſatisfying of all the debts; ſee the laſt-quoted deciſion.

56. Actual vitious intromiſſion is not now the only paſſive title in moveables. A preſumptive paſſive title is eſtabliſhed by act of ſederunt, *Feb.* 23. 1692, which ordains all the lockfaſt places and repoſitories of every dying perſon to be ſealed by his neareſt relations as ſoon as he becomes incapable of ſenſe, that the embezzling of his writings, caſh, or other valuable moveables, may be prevented; or if he die not in his own houſe, this muſt be done by the maſter or miſtreſs of the houſe where he dies; and the keys muſt be delivered to the judge-ordinary, who is to hold the cuſtody of them for the benefit of all concerned: and ſuch as neglect to obſerve theſe directions are to be accounted embezzlers of the writings and moveables of the deceaſed. It appears, both from the recital and ſtatutory part of this act of ſederunt, that it relates only to the caſe where the heir of the deceaſed is minor; and that it was calculated merely to render the act 1672, *c.* 2. by which inventories of a minor's eſtate are to be made up by his tutors or curators, the more effectual.

TIT. X.

Of Laſt Heirs and Baſtards.

FEUDAL rights were at firſt granted by ſuperiors, only during pleaſure, or for the vaſſal's lifetime, upon whoſe death the lands returned to the ſuperior who granted the right, *b.* 2. *t.* 3. § 4. Even after feus became hereditary, they were deemed ſo far *ſtricti juris*, that for ſome time they reached no farther than to the ſpecial heirs contained in the grant, in default of whom the ſuperior reſumed his right, *lib.* 1. *Feud. t.* 20. & *lib.* 2. *t.* 11. to the excluſion of the heirs of line. This continued to be the law of Scotland,

not only in the opinion of Craig, *lib.* 2. *dieg.* 17. § 11. but in that of Dirleton and Stewart, *v. Limitation*, and of Mackenzie, § 1. *h. t.*: for which reaſon the vaſſal who was to get the right, that he might prevent the excluſion of his heirs whatſoever from the ſucceſſion, took care that, after calling all the ſpecial ſubſtitutes, a clauſe ſhould be inſerted in the charter in the following words, or words of the like import; *whom failing, to his heirs whatſoever.* But Stair, and all our later lawyers, have maintained, agreeably to our preſent practice, that ſince the nature of feus has been ſo much altered from gratuitous to patrimonial rights, the ſuperior ought to be held, by granting a charter, even when it is limited to a ſpecial order of heirs, to be fully diveſted of the property, without any right of reverſion to himſelf upon failure of the ſpecial heirs, unleſs he has expreſsly reſerved ſuch right in the grant, and allowed the vaſſal a valuable conſideration for it, *New Coll.* ii. 194. It may therefore be concluded, that where there is no ſuch reſervation, the ſucceſſion will by our preſent law devolve upon the vaſſal's heir of line, and not on his ſuperior.

2. In the ſame manner, when a grant was made to a vaſſal and his heirs indefinitely, without any limitation, ſome feudiſts have maintained, on the authority of *lib.* 1. *Feud. t.* 1. § 4. that if the vaſſal had no heir within the ſeventh degree, the ſuperior, whether the King or a ſubject, did by the firſt feudal rules return to the right of his own lands. Others affirm, that the ſuperior's right was excluded, if any one claimed the ſucceſſion, who could prove propinquity to the vaſſal, let the degree of blood be ever ſo remote, *lib.* 2. *Feud. t.* 50. This laſt opinion ſeems to have been agreeable to our firſt feudal uſages, *Reg. Maj. l.* 2. *c.* 55. § 2.; where the overlord's right of return is ſaid to take place, only upon the failure of an heir, without any diſtinction of degrees; and to the practice in Craig's time, who cites two deciſions in the caſe of perſons being ſerved heirs to their anceſtors, though the one was beyond the tenth degree of propinquity, the other beyond the ſeventh, to the excluſion of the right of the ſuperior, *lib.* 2. *dieg.* 17. § 11. But in this all were agreed, that if the vaſſal had no heirs at all, then the feu returned to the ſuperior. By our later cuſtoms, however, this right is cut off from the ſuperior, and transferred to the ſovereign, who by his prerogative-royal excludes all other ſuperiors. By the law at preſent then, in default of heirs whatſoever, the King ſucceeds to the feu. Indeed this right of the King is not confined to heritage only. He ſucceeds in the ſame manner to moveables. The rule, *Quod nullius eſt, cedit Domino Regi*, applies equally in both caſes. The ſame doctrine took place in the Roman law, *l.* 1. 4. *C. De bon. vac.* When the King ſucceeds in this way, he is called *ultimus heres*, or the laſt heir.

3. If the lands to which the King thus ſucceeds be holden immediately of himſelf, the property of them is conſolidated with the ſuperiority, in the ſame manner as if they had been ſurrendered to the ſovereign. If they are holden of a ſubject-ſuperior, the King becomes barely proprietor. The ſuperior cannot be deprived of his right of ſuperiority by the King's ſucceſſion as *ultimus heres*, and ſo remains ſtill ſuperior: nay, the ſovereign cannot continue to hold the property thus acquired by him, ſince he cannot be vaſſal to any of his ſubjects; he lies therefore under the neceſſity of naming a donatary, who, in order to complete his title, muſt firſt obtain a decree of declarator of his gift, *July* 30. 1662, *L. Balnagown*; *July* 31. 1666, *Crawfurd*, declaring, that the deceaſed died without leaving any heirs who might ſucceed to him, and that he the purſuer is proprietor of his eſtate as the King's donatary. In declaratory actions, as well as others, there ought to be ſome contradictor; but the very concluſion of this action is, that no perſon has right as heir, and ſo all the King's ſubjects have an equal

equal title to be made parties to it. An edictal citation therefore againſt all and ſundry, is ſuſtained in this caſe, as a ſufficient foundation of the ſuit, without a perſonal citation againſt any one, unleſs where there is a widow or executor; for theſe, according to Stair, *b.* 3. *t.* 3. § 47. *verſ. The gift*, muſt be called as defenders. The donatary, after obtaining his decree, is preſented by his Majeſty to the ſuperior, as his vaſſal, by a letter under the quarter ſeal, charging the ſuperior to receive and infeft him in the lands, with the ſame rights that the former vaſſal enjoyed. If the ſuperior ſhall refuſe to give obedience to this charge, the donatary may, as in the common caſe, apply to the next higheſt ſuperior. In lands holden immediately of the crown, if theſe are gifted, the donatary muſt alſo complete his right, by obtaining a decree declaring the gift, and afterwards infefting himſelf in the ſubject, upon a ſignature preſented in exchequer.

4. Becauſe in this caſe the King ſucceeds as heir, he or his donatary is liable in the payment of the debts due by the deceaſed, *Mack.* § 2. *h. t.* Stair indeed, *b.* 3. *t.* 3. § 47. and ſome others led by his authority, affirm, that the King's right is not a proper ſucceſſion; that it ariſes more from the condition of the ſubject which, as *bona vacantia*, falls to the ſovereign in the way of caduciary confiſcation. Hence it is inferred, that the law of deathbed, being introduced in favour of heirs only, hath no operation in favour of the King. The chief reaſon urged in ſupport of this opinion is, that neither the King, nor his donatary, are univerſally liable for the debts of the deceaſed, but only to the amount of his eſtate. It ſeems incorrect, however, to give the name of *bona vacantia* to ſubjects which paſs from the deceaſed proprietor directly to the crown, or to claſs this right of the crown among confiſcations which imply the loſs of an eſtate for ſome crime or delinquency: it bears a much greater reſemblance to the right of an heir; for the ſubject of it is an *univerſitas*, which in other caſes is called an *hereditas*, comprehending the whole eſtate of the deceaſed, and it paſſes, as ſucceſſion does, from the dead to the living. And the plain reaſon why the King's donatary is not liable beyond the extent of the inventory, and conſequently not ſubjected perſonally, except in ſo far as he has intermeddled, is, that this ſpecial right of ſucceſſion in the ſovereign ariſes from the law itſelf, without any act of his, which can be juſtly interpreted to extend the obligation farther againſt him. Neither is this peculiarity inconſiſtent with repreſentation; for not to mention executors who are *quodammodo* heirs, a method has been eſtabliſhed in our law, by which thoſe who enter *cum beneficio inventarii* repreſent their anceſtors in the moſt proper ſenſe, and nevertheleſs are not liable *ultra vires inventarii*. It has therefore been adjudged, that if one who has no heir to ſucceed to him, ſhall grant a deed on deathbed, alienating his heritage in favour of a third party, the King is intitled to ſet it aſide, as granted to his prejudice, by an action of reduction *ex capite lecti*, as if he were the proper heir, *New Coll.* i. 86. But this doctrine is farther confirmed and amplified below, § 5. The creditors of the deceaſed, to whom the King ſucceeds, may carry on all legal diligence againſt their deceaſed debtor's eſtate, whether heritable, by adjudication, or moveable, by confirmation, in order to make their payment effectual, *Cr. lib.* 2. *dieg.* 17. § 12. 15.; ſee *St. b.* 3. *t.* 3. § 47. But in the deducing of ſuch diligence, the officers of ſtate muſt be called as parties; becauſe the ſubject which the creditors are inſiſting to affect, is the ſovereign's property, who therefore has an intereſt to except to the grounds of debt upon which the diligence is to proceed.

5. This is the proper place for treating of the crown's right ariſing from the death of a baſtard. It has been explained who they are whom the law accounts baſtards, *ſupr. b.* 1. *t.* 6. § 49. 50.; the effects of baſtardy may be

now

now conſidered. It is a ſettled rule in the law of Scotland, That there is no ſucceſſion by the mother, *t.* 8. § 8.; and that all eſtates, whether heritable or moveable, can, after the death of the owner, deſcend only to ſuch as are related to him by the father. A baſtard, his father being uncertain, can have no relations by the father, and of courſe no collateral heirs upon his death. If he die without lawful iſſue therefore, the King takes up his ſucceſſion by the neceſſity of law, in the character of laſt heir. Hence it appears, that baſtardy is a proper ſpecies of *ultimus heres*, the crown ſucceeding, becauſe the baſtard has no agnats to claim his ſucceſſion. The crown's right too is preciſely the ſame in baſtardy as in the other. It comprehends the *univerſitas bonorum* of the deceaſed. It cannot be hurt by a deed on deathbed, *Skene*, *v. Baſtardus*; *Cr. lib.* 2. *dieg.* 18. § 14.; *St. b.* 4. *t.* 12. §7. The ſame methods muſt be purſued by the King to make good his intereſt in the ſucceſſion. On the other hand, the eſtate which accrues to the crown, is in both caſes ſubjected to the ſame diligence of creditors, and to the ſame burdens; the widow, *ex. gr.* is intitled to her legal proviſions of terce, and *jus relictæ*, in either caſe; for the donatary's right is no better than a right of ſucceſſion, ſince he is aſſignee by the King, whom the law looks upon as ſucceſſor; and the legal proviſions of widows cannot be hurt by any right of ſucceſſion, whether legal or teſtamentary, *July* 7. 1629, *Wallace*. There is only one difference between the two. Creditors may confirm the moveable effects of one to whom the King hath ſucceeded as laſt heir. They cannot confirm a baſtard's teſtament; becauſe, as will be immediately explained, a baſtard is incapable of making a teſtament. In this caſe they muſt bring an action againſt the King's donatary, not indeed ſimply, but in ſo far as he hath received of the baſtard's effects.

6. This right in the crown to the eſcheat of baſtardy, is excluded where the baſtard has lawful children of his own body; for theſe children are the baſtard's proper heirs, ſince they have a certain father, *quem nuptiæ demonſtrant*, and to whom they may ſerve heirs in terms of the brief of inqueſt. Upon the death of the baſtard's immediate iſſue, the children of that iſſue ſucceed by the ſame rule; but if theſe laſt ſhall die without lawful children, the King takes the ſucceſſion as their *ultimus heres*, upon the ſuppoſition that their immediate father has died before them, ſince they have no relation by the father, and the mother's line of ſucceſſion is not regarded in the matter of ſucceſſion. Though the baſtard ſhould have no lawful iſſue, it is agreed by all, that during his life, and while he is in *liege pouſtie*, he is abſolute proprietor of his whole eſtate, and as ſuch, may ſell or gift it by any deed *inter vivos*. He may even ſettle his heritable eſtate, by a deſtination which is not to take effect till his death, in favour of any perſon he may think proper. The rule, therefore, That a baſtard can have no heirs, except thoſe of his own body, muſt be limited to legal heirs, and is not to be extended to heirs of proviſion. Moſt of the commentators on the Roman law affirm, that baſtards have the full power of making a teſtament; becauſe there is neither any reaſon in the nature of things, nor any text in that law, which diſables them; and becauſe they have committed no crime which ought to forfeit them of that natural right, as the Roman lawyer equitably argues in their behalf in a ſimilar caſe, *l.* 6. *pr. De decur.* Craig ſeems to be of the opinion, that this is alſo the law of Scotland, *lib.* 2. *dieg.* 18. § 16. where he aſſerts, That if a baſtard die inteſtate, and without lawful iſſue, the King ſucceeds to his moveable eſtate; which clearly ſuppoſes that the baſtard had a right to teſt. It muſt however be acknowledged, that we have by our later cuſtoms adopted the doctrine of ſome other ſtates, that baſtards, who have no lawful iſſue, are incapable of making

king a teſtament. This is ſaid by ſome to proceed *ex defectu natalium*; tho' it is hard to diſcover a reaſon why a diſability to teſt ſhould be one of the conſequences of illegitimacy. Where the baſtard has lawful iſſue, he has without doubt the full *factio teſtamenti*, as the Roman law expreſſes it, and may conſequently make a teſtament, not only in favour of that iſſue, but of ſtrangers. In ſuch caſe, the King has no intereſt to object, ſince he is excluded from all right, even to the moveable ſucceſſion, by the baſtard's children, who are both heirs and executors to the deceaſed, whether he died teſtate or inteſtate. As a conſequence of this, the baſtard muſt alſo have a power of naming tutors to his lawful iſſue, *March* 8. 1628, *Muir*. It has been obſerved, *b*. 1. *t*. 6. § 51. that the iſſue of an intermarriage between an adulterer and the adultereſs, after the diſſolution of the former marriage by divorce, are not, in the opinion of Stair, baſtards, notwithſtanding the act 1600, *c*. 20. If this opinion be well founded, the crown's right here explained cannot take place to their prejudice: for as they are not baſtards, they have the power of teſting; and upon their death, their legal heirs, though not of their own body, will take the ſucceſſion.

7. Baſtards are ſometimes legitimated by the ſovereign. Legitimation, in the proper ſenſe of the word, and in that of the Roman law, intitled the perſon legitimated to all the rights of lawfully begotten children; for which reaſon the Romans did not admit of legitimation *per reſcriptum principis*, where the baſtard's father had at the time lawful iſſue, that ſo their right of ſucceſſion might not be divided with the baſtard, *Nov*. 89. *c*. 9. Letters of legitimation with us, though they contain high-ſounding clauſes, have no tendency to hurt the right of third parties; they enable the baſtard to diſpoſe of his moveable eſtate by teſtament, *June* 18. 1678, *Commiſ. of Berwickſhire:* but they incroach not in any degree upon the rights, either of the lawful children already procreated by the baſtard's father, or of thoſe he may afterwards beget in lawful marriage, or of any of their poſterity; for the ſovereign cannot, nor is preſumed to intend the cutting off the right of third parties. The baſtard is not therefore intitled, in conſequence of this ſort of legitimation, to a bairn's part of gear, nor to any ſhare of the father's ſucceſſion. Yet where the right of third parties is not affected, the King may effectually renounce any right competent to himſelf in favour of the baſtard or any other, ſince he himſelf is the only ſufferer by ſuch renunciation. Though therefore he is by law intitled to the baſtard's ſucceſſion, he may, by letters of legitimation, enable that perſon to ſucceed *ab inteſtato* to the baſtard, who would have been his heir, had the baſtard been procreated in lawful marriage. This prerogative was exerciſed in letters of legitimation granted by K. James III. *anno* 1479, in favour of Andrew Lord Evandale, and Arthur and Walter Stewarts, all natural ſons of Sir James Stewart, ſon of Murdoch Duke of Albany; in virtue of which Alexander, the ſon of Walter, ſucceeded to his uncle Andrew in the eſtate of Evandale *: and though it has been lately drawn into queſtion, on pretence that the ſovereign cannot grant away future caſualties in prejudice of his ſucceſſors, that effect of legitimation has been ſuſtained, *New Coll*. ii. 79.

8. This title may be concluded with mentioning ſome of the chief bars or obſtructions to ſucceſſion by the law or uſage of Scotland. As the legal rights of ſucceſſion are, in this and all other civilized countries, grounded on marriage, they can be claimed by thoſe alone who are procreated in lawful marriage; and conſequently, the iſſue of ſuch marriages as the law has reprobated are incapable of ſucceſſion. It is upon this ground that baſtards, becauſe they are procreated of an unlawful conjunction, are diſabled from taking by ſucceſſion *ab inteſtato*. Stair, *b*. 4. *t*. 12. § 1. and Bankton, *b*. 1. *t*. 2. § 4. are of opinion, that this poſition ought to be li-

* See the letters of legitimation in Crawfurd's lives of the officers of ſtate, *p*. 435.

mited. They admit, that baſtards cannot ſucceed to their father, becauſe they have no certain father; and that they are alſo incapable of heritable or feudal ſucceſſion, even to their mother, becauſe the inqueſt cannot declare them, in terms of the brief, next and lawful heirs to the deceaſed: but they affirm, that they ought not to be excluded from the ſucceſſion of the moveable eſtate of the mother, or of their relations by the mother; becauſe the propinquity of blood is the only point conſidered in that caſe, and not the legitimacy; and becauſe they are not diſabled from taking their mother's moveable ſucceſſion, either by ſtatute or cuſtom. But though there be no ſpecial ſtatute debarring them; yet, ſince neither ſtatute nor cuſtom can be pleaded in their favour, it would ſeem that they are excluded by the rule of law, That ſucceſſion is one of thoſe civil rights to which none are intitled who are not procreated in lawful wedlock; and though the mother of the child be certain, the baſtard is not her lawful child, and conſequently has no claim to her lawful or *legitima ſucceſſio*, either in heritage or moveables. The Romans indeed admitted *ſpurii* or baſtards to the ſucceſſion of their mother; but that proceeded from a peculiarity in their *jus civile*, by which agnates were looked upon as the only relations capable of the legal ſucceſſion, while cognates were deemed to be joined by a tie merely natural, and conſequently to have no better title to the ſucceſſion than baſtards. Hence it happened, that when the pretor admitted alſo cognates *ex æquitate*, contrary to the *jus civile*, *l.* 2. *Und. cogn.* baſtards were alſo brought in, as having as equitable a title as they: and as a conſequence of this, a baſtard's brother by the mother was, by the *jus prætorium*, admitted to the ſucceſſion of the baſtard, *l.* 4. *eod. tit.*; a doctrine quite adverſary to the maxims of our law. It may be farther obſerved upon this argument, that if a baſtard could be decerned next of kin to his mother, it would neceſſarily follow, that where the mother had alſo lawful children, the baſtard, as one of the next of kin, would be intitled to an equal ſhare of the moveable ſucceſſion with any one of her lawful children, which muſt be acknowledged to be a novelty in our law. Though a baſtard cannot ſucceed *jure ſanguinis*, he may by ſpecial deſtination; for nothing hinders the proprietor of an eſtate from calling a baſtard, whether he be procreated by himſelf or another, to his heritable ſucceſſion, by an entail, when he is properly diſtinguiſhed by his name, employment, or other character of diſtinction; or to appoint him executor or univerſal legatee, *Cr. lib.* 2. *dieg.* 18. § 11.

9. Marriage entered into after divorce on the head of adultery, between the parties guilty, is, by 1600, *c.* 20. declared null, and the iſſue of ſuch marriage incapable of ſucceeding to their parents: but this does not ariſe from the natural condition of ſuch iſſue; for the marriage of the parents is not prohibited by any divine or natural law, *b.* 1. *t.* 6. § 43. but barely from the force of ſtatute. The director of the chancery was, by 1609, *c.* 4. forbidden to receive retours, or iſſue precepts thereupon, in favour of perſons excommunicated; and ſubject-ſuperiors were, by the ſame ſtatute, left at liberty to refuſe the iſſuing of brieves, or the granting of precepts of *Clare conſtat* in their favour: but all thoſe penalties are now taken off by 1690, *c.* 28. Dumb perſons, *lib.* 1. *Feud. t.* 6. § 2. and females, were, by the firſt feudal rules, incapable of ſucceſſion, as being unfit for military ſervice; but they were ſoon admitted to it; and even fatuous and furious perſons, though theſe laſt are utterly incapable of the management of their own property. All who profeſs the Popiſh religion are not only diſqualified from purchaſing feudal rights by voluntary diſpoſition, *ſupr. b.* 2. *t.* 3. § 16. but declared incapable, by 1700, *c.* 3. of ſucceeding in heritage, if they ſhall refuſe to ſign the formula preſcribed by that act, containing a renunciation of Popery; and the ſucceſſion is, upon ſuch refuſal, declared to belong

belong to the next Proteſtant heir who would ſucceed, if they and all the intervening Popiſh heirs were naturally dead. The Popiſh heir may, within ten years after incurring the irritancy, be reſtored to the ſucceſſion, if he purge himſelf of Popery by ſigning the formula: in which caſe, the Proteſtant heir, who for a time excluded the Popiſh, makes all the intermediate rents his own, after paying the current intereſt of the debts affecting the eſtate, and its other yearly burdens. If the Popiſh heir neglect to purge himſelf within the ten years, he forfeits his right for ever.

10. Aliens, by which are underſtood thoſe who were born out of the kingdom, and are ſubject to the dominion of a foreign prince, can neither enjoy nor ſucceed to a feudal ſubject in a country to whoſe ſovereign they bear no allegiance. The reaſons of this may be collected from the nature of feudal homage and fidelity; for if an alien ſhould be allowed to enjoy a feu under a prince to whom he owed no obedience, the juriſdiction and power which the liege lord has naturally over the perſon, as well as the eſtate, of his vaſſal, would be rendered eluſory, by the vaſſal continuing to reſide in his native country under the liegeance of another prince: neither can one who is a vaſſal to two different ſovereigns, in caſe of any diſputed claim or rupture between them, perform his feudal ſervice faithfully to both; for if he aid the one, he neceſſarily commits treaſon againſt the other. As this doctrine has obtained in moſt countries which have adopted the feudal plan, it may be affirmed, notwithſtanding the authority of Craig, *lib.* 1. *dieg.* 14. § 7. that it has been alſo obſerved rigorouſly in Scotland; for though the French nation enjoyed, for many centuries together, greater privileges in this kingdom than any other, a ſpecial ſtatute was judged neceſſary to confer the right of holding land-eſtates upon thoſe of that country, when our Q. Mary intermarried with the Dauphin of France, 1558, *c.* 65. 66. When a treaty of union was ſet on foot between England and Scotland, it was alſo thought neceſſary to make a proviſional ſtatute, yet extant in the records of parliament, *Ind. to unprinted acts*, 1607, N° 2. for naturalizing all Engliſhmen who had been born ſince the demiſe of Q. Eliſabeth, or who ſhould be born after the date of the ſtatute, in order to enable them to hold and inherit lands in Scotland; ſee alſo 1669, *c.* 7. In the ſame manner, when the right of holding lands, and inheriting, was intended to be conferred on any private perſon, ſpecial acts of naturalization paſſed; numbers of which, in the reigns of the Jameſes, Mary, and Charles I. are yet preſerved in the records. Upon this feudal maxim, it was unanimouſly adjudged, *Falc.* ii. 66. that an alien could not ſucceed to a land-eſtate in Scotland without naturalization. Naturalization, by which this diſability in an alien is removed, may be defined, A right granted to a ſtranger or alien by the authority of parliament, in virtue of which he acquires the ſame privileges as if he had been born in the kingdom. Mackenzie indeed, in his Inſtitutions, *b.* 1. *t.* 3. § 1. reckons the power of naturalizing among the royal prerogatives; but in his *Obſerv. on act* 1669, *c.* 7. he inclines to the other ſide, from the many inſtances which occurred to him of naturalization paſſing by ſtatute. In this queſtion, the following diſtinction ſeems agreeable to our ancient hiſtory. Letters of denization were granted by the ſovereign, without the interpoſition of parliament. Theſe letters gave the grantee a right of purchaſing lands, and diſpoſing of them to others, and making them deſcendible to ſuch of his iſſue as ſhould be born after the grant. Thus we find in our records a grant of this kind by James V. to Nich. Tronos, *Feb.* 1537; one by Q. Mary to Noye Briſſat, *Dec.* 1555; and one by Charles I. to Viſcount Falkland, *Sept.* 1627. But where the right of naturalization was intended to be conferred, *i. e.* the full right of a free-born ſubject, and a power to the grantee's

grantee's iſſue born before the grant to inherit, the authority of parliament was neceſſary. The general acts of naturalization, 1558, *c.* 65. 66. and 1669, *c.* 7. carry a ſtrong ſuppoſition that aliens cannot ſucceed, or be ſucceeded to, even in moveables. And it obtains at this day in France, that on the death of any foreigner who had taken up his fixed reſidence there, the King ſucceeds by the *Droit d'aubeine*, *alibi nati*, to the moveable eſtate of the deceaſed; but where a foreigner goes to that kingdom as a traveller, a merchant, or a public miniſter, without an intention of fixing his domicil there, the *Droit d'aubeine* is excluded. It may well be doubted, whether this right was ever claimed by our ſovereigns, notwithſtanding thoſe ſtatutes which take it for granted.

11. The diſability to ſucceed, ariſing from a forfeiture in conſequence of high treaſon, or from being convicted of the crime of murdering a parent, will be treated of under *tit. Crimes.*

BOOK