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L A W O F S C O T L A N D.
B O O K I I.
T I T. I.

Of the Division of Rights, and the several Ways by which a Right
may be acquired.

AFTER having explained the legal powers, offices, and duties, of persons, which are the first object of law, the method proposed, *Supr. b. 1. t. 2. § 1.* naturally leads to the consideration of things, which are its second object, and to the setting forth their different kinds and legal properties. Things or subjects fall no otherwise under the consideration of law, than as persons may have right to them. All rights which affect any subject, are called by the Romans, *jura in re*; and by us, *real rights*: and the sovereign or primary real right is that of property; which is the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction. This right necessarily excludes every other person but the proprietor; for if another had a right to dispose of the subject, or so much as to use it, without his consent, it would not be his property, but common to him with that other. Property therefore implies a prohibition, that no person shall incroach upon the right of the proprietor; and consequently every incroachment, though it should not be guarded against by statute, founds the proprietor in an action of damages. But positive statute hath secured property against several incroachments that most frequently happen, by inflicting special penalties on the trespasser; as in the acts for preserving planting and inclosures, in that which appoints winter-herding, 1686, c. 11. &c. If the proprietor has the power of disposing of his property, he must also have a power of charging or burdening it with inferior real rights in favour of others: he may, for instance, grant to his neighbour the right of a road through his lands, or he may impignorate them to his creditor in security of a debt. Though therefore it be a rule founded in common sense, that two different persons cannot

cannot have, each of them, the full property of the same thing at the same time, *Duo non possunt esse domini ejusdem rei in solidum*; yet it is most consistent with this rule, that the right of property may be in one person, while that of servitude, impignoration, or other inferior right in the subject, is vested in another. One and the same subject may also, without any repugnance in the nature of things, belong to two or more different persons: and such right is called *common*, and sometimes *common property*; though the epithet of *common* seems contradictory, and so is not fitly joined to the word *property*.

2. The right of property is not weakened by the restraints which have been laid by law upon proprietors in the use of it: for the restraints of law are not designed to hurt property, but rather to secure and strengthen it, by inhibiting our licentiousness in the exercise of it. The law interposes so far for the public interest, that it suffers no person to use his property wantonly to his neighbour's prejudice; *interest enim reipublice, ne quis re sua male utatur*. But where the proprietor's act is of itself lawful, though it should be in its consequences detrimental to his neighbour, *utitur jure suo*; he is allowed to make use of what is his own, in the manner most beneficial to himself; and though his neighbour suffer damage, he has no redress unless the act of the other was *in emulationem*. Hence he may lawfully drain his swampy or marshy grounds, though the water thrown off from them by that improvement should happen to hurt the inferior tenement. But he must not make a greater collection of water than is necessary for that purpose; seeing such use would be merely *in emulationem vicini*, without any profit arising to himself. It is another legal limitation or restraint on property, That it must give way to the public necessity or utility. This universal right in the public over property is called by Grotius *dominium eminens*; in virtue of which the supreme power may compel any proprietor to part with what is his own. If, for instance, the public police shall require, that a highway be carried through the property of a private person, the supreme power may oblige the owner to give up such part of his grounds as is necessary for that purpose. But in this case there must, *first*, be a necessity, or at least an evident utility, on the part of the public, to justify the exercise of that right; *2dly*, The persons deprived of their property ought to have a full equivalent given them for quitting it.

3. The right of property is not lost by illegal restraints, more than by legal. Though a proprietor should be deprived of the exercise of what is his own, by violence, menaces, or other unjustifiable methods, he continues to have the right: in consequence of which, he can sue all the detainers of the subject, for the recovery of his possession. The rule is general, That whatever is a person's property, cannot, so long as it exists, cease to be such, without either the voluntary act, or the delinquency, or the negligence, of the proprietor. But the different methods, either of limiting or extinguishing property, will be fully explained hereafter.

4. It was a rule, almost universally received by our lawyers till towards the beginning of this century, That *dominium non potest esse in pendenti*; "Property cannot float in an uncertainty," but must, at every period of time, be vested in some one person or another, *St. b. 3. t. 5. § 50. &c.*; *Mack. b. t. § 3.* Lord Dirleton is the only writer of the last century who speaks doubtfully about it, *v. Fiar*, N^o 9. 10. But it appears to have no foundation, either in nature or in law. Many things are, *ex sua natura*, fit subjects of property, which nevertheless have no proprietor; those, for example, which the proprietor abandons with a design to be no longer owner of them, or waste lands of which no person hath as yet seized the possession. In like manner, where the fee or property of any subject is granted to children yet

to be procreated, and the bare liferent to the father and mother, the property of that subject must of necessity be pendent till the existence of a child, *Steu. Anf. v. Fiar*. And as, by the Roman law, all estates *in hereditate jacente* of persons deceased were without proper owners; so, by ours, the fee is, upon the death of all fiars, *in pendent*, till the next heir shall make up his titles. The necessity imposed by the law upon an heir to enter, in order to establish the fee in his person, is a demonstration that he is not fiar till he be entered. Our judges, therefore, have by their later decisions paid but little regard to this rule, *Kames*, 51. 82. &c. The decision, *Home*, 1. finding, that a grant to a person in liferent, and the heirs of his body yet to be born, in fee, constitutes the fee in the father, though it be urged by many as a judgement of the session, that the fee cannot be *in pendent*, truly leaves that point undetermined. All that can be gathered from it is, that in the *species facti* there stated, it was presumed to be the granter's intention, that the father should be fiar; but that judgement cannot affect the case where the granter has by the most express words excluded the father from the fee, and restricted him to a bare liferent.

5. Some things are by nature itself incapable of appropriation, so that they cannot be brought under the power of any one. These got the name of *res communes* by the Roman law; and were defined, things, the property of which belongs to no person, but the use to all. Thus, the light, the air, running water, &c. are so adapted to the common use of mankind, that no individual can acquire a property in them, or deprive others of their use. Other things, though they be of their own nature capable of property, are exempted from commerce, in respect of the uses to which they are destined. Of this last kind are, first, the *res publicæ* of the Romans; which were common, not to all mankind, but to the state or community; such as navigable rivers, highways, harbours, bridges, &c. the property of which belongs to the state or kingdom in which they lie, and their use to all the subjects or members of that kingdom, and to those strangers to whom it allows the liberty of trade. Not only rivers themselves, and their bed, or *alveus*, but their banks also are public, in so far as they may be subservient to the purposes of navigation; and therefore no work or building can be raised, either in the bed or upon the banks of a river, which may hurt its navigation: but in every other respect the property of the banks belongs to the owner of the conterminous grounds, as an accessory, § 4. *Inst. De rer. divif.* If a river, deserting its first channel, shall form to itself a new one; the new channel, because it must necessarily follow the condition of the river, becomes public; and the old one, which, for the same reason, ceaseth to be public, becomes the property of those to whom the adjacent grounds on each side belong, § 23. *Inst. eod. tit.* When a river threatens an alteration of the present channel, by which damage may arise to the proprietor of the adjacent or opposite ground, it is lawful for him to build a bulwark, *ripæ muniendæ causa*, to prevent the loss of ground which is threatened by that incroachment: but this bulwark must be so executed as to prejudice neither the navigation, nor the grounds on the opposite side of the river; and as a guard against these consequences, the builder, before he began his work, was obliged, by the Roman law, to give security, *l. unic. De rip. mun.*

6. The Romans accounted the sea among the *res communes*; and the Dutch, who find it their interest to justify the right of an open trade to all countries, have also asserted, that the sea cannot, by its nature, be brought under the power of any proprietor, *Grot. Mare liberum*. The British have, on the other hand, maintained, *Selden. Mare clausum*, that however incapable the ocean may be of property, yet the seas, which wash the coasts of any

state, are subjects that may be as fitly appropriated to private uses, as rivers, bays, creeks, &c.; and that, in fact, our sovereigns are lords or *domini* of the British seas which surround this island; in consequence of which only it is, that treasures brought up from the bottom of those seas, or wreck goods found floating on their surface, belong to the crown. The sea-shore was also reckoned common by the Roman law, § 1. *Inst. De rer. div.*: but it is obvious, that by the *jus gentium* the sea-shore is not intitled to the appellation of *common*, because it is in its nature as capable of appropriation as any part of the grounds to which it is contiguous; wherefore it is with greater propriety accounted, in other texts of that law, a *res publica*, l. 3. *Ec. Ne quid in loc. publ.* And this is to be understood in the same sense that the banks of rivers are said to be public, viz. in so far as the shore may be used either for navigation, or the protection of trade, or the defence of the state. If our kings have that right of sovereignty in the narrow seas which is affirmed by all our writers, and consequently in the shore as an accessory of the sea, it must differ much in its effects from private property, which may be disposed of or sold at the owner's pleasure; for the King holds both the sea and its shore as a trustee for the public. Both therefore are to be ranked in the same class with several other subjects, which by the Roman law were public, but are by our feudal plan deemed *regalia*, or rights belonging to the crown, *vid. infra*, t. 6. § 17.

7. The second class of things naturally capable of appropriation, which the Romans exempted from commerce on account of their destination to special uses, were *res universitatis*; that is, things proper only to a borough, or an hospital, or a trading company, or some other lawful corporation or society. The property of these belongs not to the private members of the body-corporate, but to the corporation taken jointly as such, and their use to every individual member of it; yet so as both property and use are subject to the regulations of the corporation; as town-houses, market-places, church-yards, public streets, corporation-halls; the right competent to the burghesses of some corporations of pasturing cattle upon the borough's common, &c. But the revenues belonging to a state or corporate body, arising from the rent of lands, houses, customs, tolls, &c. are not to be classed with the *res publicæ* or *universitatis*: for though such revenues are the property of the state or corporation, the use of them is not allowed to any particular members of it, but are *juris privati* as truly as any trust-right; for the directors or managers of those societies, after having received these revenues from the factors or others properly impowered to collect them, are bound, as other trustees, to apply them for the behoof of the corporation for whom they are trustees, 1491, c. 36.

8. Of a like general nature with *res universitatis* are those subjects which have been set apart for the service of God, and are, upon that account, said by the Romans to be *res nullius*: for what is *juris divini* cannot become the property of any man. And though the formal consecration of things to sacred uses hath not been practised by the church of Scotland since the Reformation, Mack. § 4. *b. t.*; yet churches, communion-cups, bells of churches, and other things destined to sacred purposes, retain, to this day, so much of the character of sacred, that they are exempted from commerce; and so cannot be applied to the uses of private property while they continue in that state. Yet our law allows, in certain cases, churches to be removed from one place to another; and the bells of churches, and communion-cups, when they become unfit for service, to be melted down, or sold, by the kirk-session, with consent of the heritors of the parish, and the price applied towards purchasing others. Though churches fall not under commerce, because a church is the house of God himself; the heritors, and o-
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ther inhabitants of a parish, may nevertheless acquire a *quasi* property in the seats of a church, or in part of its area, limited to the special purpose of attending divine service; of which, *infr. t. 6. § 11*. By the Roman law, every place where one buried his dead, became *res religiosa*, and was for ever after exempted from commerce. With us, though every man is at liberty to bury his dead within his own property, such burying-place continues to be *juris privati*; and so passes in a sale to the purchaser, as part of the lands within which it lies. As for our common burying-places, decency requires that these, when they are no longer to continue such, should be sequestered from the ordinary uses of property, till the remains of the bodies there interred shall have returned to their original dust.

9. The ways of obtaining the property of such things as fall under commerce, flow either from natural or positive law. By the law of nature, property is acquired, either by occupation or accession; and it is transferred from one to another by tradition. Occupation arises from a fact of the acquirer; accession, from the dependence or necessary connection that the thing belonging to us hath with other things; and tradition, from the will of the former owner, joined with our acceptance of the thing delivered by him to us. By positive law, property may be transferred by prescription; but this last, being also a way of losing property, falls to be explained under a separate title. Occupation, or occupancy, is the appropriating to one's self of things which have no owner, by apprehending them, or seizing their possession. This was the original method of acquiring property: for in the first state of mankind, before societies were formed, every one, barely by taking into his possession a certain portion of ground, and cultivating it, made the fruits his own; and when he thought fit to abandon it, he who next laid hold of it acquired the same right. This continued, under certain restrictions, to be the doctrine of the Roman law, *Quod nullius est, fit occupantis*; not only as to things which had not as yet fallen under the power of any proprietor, but as to those which had been lost or relinquished by the former owner.

10. The doctrine of occupancy is also agreeable to the law of Scotland, in such moveable subjects as have continued in their original state, and are presumed never to have had an owner, whether animate or inanimate. Thus pearls inclosed in shells, or pebbles cast on the shore, belong to the finder. Thus also we acquire the property of all wild beasts, fowls, or fishes, as soon as we kill or apprehend them, whether upon our own grounds, or even on those of another: for they can belong to no person, where-ever they may be, while they retain their natural liberty; and, consequently, must become the property of him who first seizes them. The right of hunting, fowling, and fishing, is indeed restrained in many cases under fixed penalties, by the statutes to be hereafter mentioned, *t. 6. § 6*. But all game, though it should be caught in breach of these acts, or within another man's property, belongs, by the necessity of law, to him who hath seized it. The prohibition therefore in those statutes can have no other effect than to inflict a fine on the trespasser, unless where the confiscation of what is caught makes part of the statutory penalty. The rule above laid down obtains even in the fishers of salmon without a proper title: for though the fishing of salmon be a royal right, *t. 6. § 15*, which ought not to be exercised by any proprietor of lands without a special clause in his grant; yet the salmon themselves which are so caught, are not *inter regalia*, and therefore belong to the catcher; whereas fishes which the law accounts royal, whether they be killed in rivers or upon the shore, belong neither to the killer, by occupancy, nor to the owner of the ground on which they are caught, by accession; but to the King, *jure co-*

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ronæ. By the *Leges Forestarum*, § 17. according to a copy preserved in the Advocates library, all great whales belong to the King, and also such smaller whales as may not be drawn from the water to the nearest part of the land on a wain with six oxen. But no whales have, for at least a century past, been claimed, either by the King, or by the admiral his donatary, but such as were of a size considerably larger than that there described; see 17^o *Edw. II. c. 11.* By an ordinance of Lewis XIV. of France, *anno* 1681, *touchant la marine, liv. 5. t. 7. Des poissons royaux*, sturgeons, dolphins, and certain other fishes, are declared royal, when they have run aground upon the shore; but if they be fished *en pleine mer*, they become the property of the fisher. Deer inclosed in a park, fishes in a pond, or birds in a volary, as they cannot be said to retain any longer their natural liberty, become the property of him who has brought them under his power; and consequently, whoever carries them off from that owner commits theft, 1474, *c. 61.* But so soon as they get free from their confinement, he who shall have first laid hold of them, after the former proprietor has given over the pursuit, acquires their property, *l. 3. § 2. De adq. rer. dom.* This is also the case of a swarm of bees; which, by abandoning their hive, are understood to have recovered their original liberty; and if they light on the grounds of another, and have been inclosed by him in a new hive, become his property, *l. 5. § 2. 3. 4. eod. t.* But domestic animals which have never been wild, as hens, geese, turkeys, &c. though they should stray from their owner, continue his, *l. 4. eod. t.*; and he who apprehends them, with a design to acquire their property, may be sued as a thief, *l. 5. § 6. eod. t.*

11. A rule quite different from that of occupation, viz. *Quod nullius est, fit domini regis*, obtains, by the usage of Scotland, *first*, in lands, or in rights annexed to lands: for, by our feudal plan, the sovereign is accounted the original proprietor of all the lands within the kingdom, and cannot be divested of that property but by a special right vested in another. Though therefore one should seize the natural possession of a land-estate, and continue in it for a hundred years together; yet if he cannot prove his property by titles in writing, and if he is not infeft upon these titles, his possession does not create even a presumptive title to the property, according to the feudal rule, *Nulla sansa nulla terra*; but the estate is held as caducuary, without a proprietor, and may be claimed by the crown. As this bore hard upon those who held their lands immediately of the crown, and had lost their title-deeds by the calamity of war, or other misfortune, our ancient law allowed such freeholders to cognosce themselves heritable possessors of the lands by an inquest; and if by the verdict they were declared such, a charter was directed to pass under the great seal in their favour, *St. b. 2. t. 3. § 13.* But the only remedy provided in such case by our present practice, is an action of proving the tenor of the lost deeds.

12. The above rule for the crown is also received, *2dly*, in that sort of moveable subjects which are presumed to have once had a proprietor who is now unknown. Hence, by our law, treasures hid under ground, belong neither to the finder, nor to the owner of the ground, as they did by the Roman, § 39. *Inst. De rer. div.* but to the King as escheat, *2. Att. c. 48. § 5.* In the case of strayed or waif cattle, the owner loses not his property in them immediately upon their straying; and therefore he who has laid hold on them is held as a thief, if he neglect to acquaint the sheriff within a short time, (seven days according to Craig, *lib. 1. dieg. 16. § 43.*), that he may cause proclaim them at the market-cross of the county-town, and at the parish-church, where they were found, *2. Att. c. 48. § 14.* But if the true owner shall fail to appear, and claim the property of them, within a year after such notice, they are considered as *res nullius*; and consequently belong

belong either to the King, or his donatary. The sheriff is the King's donatary to waif goods, in consequence of his grant of sheriffship, unless the goods have been found in a special jurisdiction, (*ex. gr.* of regality, while these subsisted), or within the property of such as have an express right to strays in their charter. It is usually affirmed by writers, in general terms, that the crown may, in virtue of this right of escheat, appropriate to itself strays of whatever kind, a year after the above notice given to the sheriff: but the English law has distinguished in this question between strayed animals, and inanimate strays. The first sort is lost to the owners immediately after the year, because it cannot be preserved without trouble and expence; but if the thing lost be inanimate, and so may be kept from perishing, with little or no inconveniency to the possessor, the property continues, by that law, with the owner, during all the years of prescription. And this distinction might perhaps be received by our judges, not barely from its equity, see *Bank. b. 1. t. 8. § 4.* but because the above-mentioned quotation from the *2. Att.* inferring the loss of the property from a year's silence of the proprietor, speaks of no lost goods but waif cattle, and therefore ought not to be extended to a quite different sort of waifs, where there is not the same reason for applying it. Besides, frequent instances occur, where the owners of lost plate, or jewels, have reclaimed them from the finder, and even from the *bona fide* possessor, long after the year, without challenge from the King or his donatary.

13. It is plainly enough assumed for our law, *St. Alex. II. c. 25. § 1.* that, in the general case, wrecks belonged to the sovereign, from the time of the shipwreck, without any right in the former owner to recover them, though they should be reclaimed immediately: for it was provided by that statute, that in the special case where any living creature in the ship, man or beast, escaped alive, the goods should not be accounted wreck, but were to be preserved by the sheriff, for the behoof of those who should within a year after prove their property in them: and even in this most favourable view for the owners, where the wreck was not total, these goods became by the statute escheat to the crown irrecoverably, if they were not reclaimed by the owners within that short period of time. This law, however barbarous and inhuman, was generally received over Europe in the eleventh and twelfth centuries, though it has been softened in most countries by later edicts and constitutions: particularly, this right was given up by our sovereigns, in wrecks belonging to foreigners, if they were subjects of a kingdom or state where the like indulgence was shown when our ships were wrecked upon their coasts, 1429, *c. 124.* Mackenzie remarks, upon this last cited act, that by the usage observed in his time in our admiralty-courts, wreck-goods, even where no creature had been found alive in the ship, were not claimed as escheat, but secured for the owners, if they should insist for the recovery of them within a year, upon payment of a just salvage to the Admiral, who, by his grant of admiralty, was held to be the King's donatary to wrecks, where no special right appeared in another. Nay Bankton, *b. 1. t. 8. § 6.* mentions a decision, *Feb. 17. 1725, Montair*, by which the question was given judicially, in the case of such total wreck, for the owners of the cargo, even after a year.

14. Property may be acquired, not only by occupancy, but accession; by which, in two things which have an intimate connection with or dependence upon one another, the property of the principal thing draws after it that of its accessory; for whatever proceeds or arises from what is mine, is also mine, as being part of my property. Accession is either natural or artificial. The *fetus* of cattle, as foals, calves, &c. are an accessory of the mother, according to the rule, *Partus sequitur ventrem*; and therefore be-

longs to him who owns the mother, by natural acccession, § 19. *Inst. De rer. div.* Trees, shrubs, and all fruits whatever, which spring from the earth, belong to the owner of the field which produced them. But after the trees are cut down, or the fruits reaped, the owner holds them no longer as accessories of the field from which they are disjoined, but as separate subjects; and therefore, if he shall, after that period, sell the field, those trees or fruits which are thus disunited from the ground, continue his own. Nay, a certain sort, even of the *fructus pendentes*, which are not yet separated from the subject which produced them, neither pass upon the death of the proprietor to his heir, nor upon a sale of the lands to the purchaser, as to which *vid. infr. t. 2. § 4. & t. 6. § 11.* In the same manner, the insensible addition which grounds lying on the banks of a river receive, by what the water washes gradually from other grounds, (styled by the Romans *alluvio*), accrues by natural acccession to the owner of the land which receives the addition, § 20. *ibid.* But if a part of one man's ground shall, by a sudden inundation or torrent, be carried off, and joined to lands belonging to a different proprietor, (which is called *avulsio*), the property of that separated part continues, notwithstanding its being joined to another person's field, to be the property of the former owner, § 21. *ibid.*; because what is added to a field by an imperceptible accretion, cannot be distinguished from the ground itself to which it was joined, in order to its being restored to the former proprietor; and it may perhaps have been brought from another place than the adjacent ground: whereas one can easily distinguish, in the sudden alterations occasioned by a flood of water, what ground formerly belonged to each proprietor.

15. The ways of acquiring property by industrial or artificial acccession are various. Trees planted in one's ground, though not by the proprietor, are deemed an accessory of the ground in which they were planted, after they have taken root in, and drawn nourishment from it; and so belong, as an accessory of the ground, to the owner of it. By the same rule, if one shall, even with his own materials, build an house on my ground, the house is mine, because the ground is mine on which it is built; and the builder cannot so much as sue upon an action to have the materials separated from the ground, that they may be restored to himself; for public policy will not suffer buildings once finished to be pulled down. This rule of acccession is so strong, that though I should build an house on my own property, with materials which I knew to belong to another, the house, and consequently all the materials of which it consists, are mine, notwithstanding my *mala fides*. What recompence may in such cases be claimed by the *bona fide* builder, or the owner of the materials, from the proprietor of the ground, shall be explained *infr. b. 3. t. 1. § 11.* The Romans excepted from this rule of acccession the case of paintings drawn upon another man's board or canvas: for these belonged, by their law, not to the owner of the board on which they were drawn, but to the painter. This exception is, by § 34. *Inst. b. t.* said to be made in consideration of the excellency of the art: but it appears rather to arise from the change which the board or canvas undergoes by the work and skill of the artist; for it becomes thereby a new species: and therefore it would have perhaps been as proper to consider the case both of paintings and writings under the head of specification, which is to be handled immediately; for a piece of canvas, paper, or parchment, after it is painted or written upon, is no longer looked upon as so much canvas or paper, but as a picture, a bond, or a disposition.

16. Under acccession may be included specification, by which is understood a person's making a new species or subject, from materials belonging to another. And it is governed by this rule, That where the new species can

can be again reduced to the mass or matter of which it was made, the law considers the former subject as still existing: wherefore the new species continues to belong to the proprietor of that former subject, which still exists, though under another form; as in the case of plate made of bullion. But where the new species cannot be so reduced, there is no room for that *fiction juris*; as in wine, which, because it cannot be again turned into the grapes of which it was made, becomes the property, not of the owner of the grapes, but of the maker of the wine, § 25. *Inst. ibid.* This manner of acquiring is not admitted, where the new species made by one person is united to, and so made part of an immoveable subject belonging to another. Hence, as hath been taught last section, an house built upon another man's property does not become the property of the builder, or of the owner of the materials, by specification, but belongs to the proprietor of the house by proper accession; and in like manner, a picture drawn upon the ceiling or wall of an house, belongs, not to the painter, but to the owner of the house.

17. Commixtion and confusion frequently fall under the description of specification, and are also ways by which property may be acquired. Commixtion, when taken in a large sense, includes the mixture of all substances, of whatever kind they may be; but, in a strict acceptance, it is confined to the mixture of solids. *Confusio* is never made use of but to express the mixture of liquids or fluids. When by the mixing together of two or more substances of different kinds, belonging to different proprietors, a new species is formed, which cannot be again brought back to the first condition of those substances; the mixer, whether he be one of the proprietors, or a third party, must, as the maker of the new species, become the sole proprietor of the subjects mixed, according to the rule of specification, explained last section, l. 5. § 1. *De rei vind.* Where substances of the same kind, belonging to different owners, suffer a mixture, the mixer can have no right by specification; because the species continues after commixtion what it was before. Different rules must be therefore observed as to this sort, according as the mixture is either casual, or made with the consent of the owners. Where the similar substances are casually mixed, and consist of fluids, which cannot be again separated, *ex. gr.* two hogheads of wine, the whole becomes the common property of the former owners; because the different particles of the subjects mixed are by the mixture so confounded with one another, that they can no longer be distinguished: but in the casual mixture of such solids as admit of an actual separation, by which every one of the subjects mixed may be restored to the former proprietors, *ex. gr.* in the case of two flocks of sheep, the property continues distinct after the commixtion. This last rule was, with too great subtlety, extended by the Roman law, to the casual commixtion of all solids, even where a separation was truly impracticable, *ex. gr.* to the mixture of two parcels of wheat, on pretence that each grain or particle retained its own form, notwithstanding the commixtion, § 28. *Inst. De rer. div.* But our law would probably reject an extension which hath no solid or real foundation in reason. Where the commixtion or confusion is made with the consent of the proprietors, such consent of itself makes the whole a common property, according to the shares that each owner had formerly in the several subjects, whether the subjects mixed do or do not admit a separation, or whether a new species is or is not formed by the commixtion, d. § 28. The common property arising from commixtion is an undivided right: what formerly belonged to each of the different proprietors, becomes, by the act of mixing, the joint property of them all *pro indiviso*, according to the proportions above mentioned: but none of them can claim

claim a separate property in any one part of the subjects, because neither of them hath right to the part belonging to the other, which is mixed with their own. This common right still continues till the subjects be divided, either with the consent of the proprietors, or in consequence of a judicial sentence. And if the subjects mixed have been of different qualities, *ex. gr.* a high-priced wine and a lower, the owner of the high-priced wine has a right to demand, that a larger share be allotted to him by the judge in the division, in proportion to the value of his wine above that of the other wines mixed with it, *d.* § 28.

18. The property of such subjects as have already had an owner, is chiefly acquired, or transferred from the owner to another, by tradition; which may be defined, the delivery of the possession of a subject by the proprietor, with an intention to transfer the property of it to the receiver. Two things are therefore required to the conveyance of property in this manner: *First*, The intention or consent of the former owner to transfer it upon some just or proper title of alienation, as sale, gift, exchange, &c.: *2dly*, The actual delivery of it, in pursuance of that intention. The first is called the *causa*, the other the *modus, transferendi dominii*. This manner of acquiring by tradition, is said in the Roman law to be founded on natural equity, § 40. *Inst. De rer. div.*; and without doubt, the present will of the owner properly expressed, is sufficient of itself, in the reason of things, to convey the right of a subject to another, even without the actual delivery. Hence, the fisk and special legatees acquire property to this day, by the usage of Scotland, merely by the proprietor's forfeiture, or a declaration of his will, without tradition of any kind; and transmissions of reversions are perfected, barely by registering the transmission in the register of reversions. But that the will of the owner to transfer may be known with the greater certainty, and that consequently property may be the better secured, the Romans, and other nations, have reasonably required, in all cases which can well admit of it, the delivery of possession for completing the conveyance; or at least some public act, by which it may appear that the former proprietor has given up his right: so that he who gets the last conveyance with the first tradition, is preferred to the property, according to the rule, *Traditionibus et usucapionibus, non nudis pactis, transferuntur rerum dominia, l. 20. C. De pact.*

19. Tradition is made either by the actual or real delivery of the subject itself, as in moveables, the *ipsa corpora* of which are put by tradition under the power of the acquirer; or, *2dly*, by a symbolical delivery, which must of necessity be made use of, where real delivery is impracticable. This last is the case, *first*, of immoveable subjects, *ex. gr.* lands, houses, mills, &c. which, from their fixed situation, cannot pass by delivery from hand to hand, as moveables; *2dly*, of subjects which consist *in jure*, styled by the Romans *res incorporales*, *ex. gr.* rights of jurisdiction, of patronage, of fishings, &c.; for these, not being tangible, are incapable of proper delivery. In all these subjects, which exclude proper delivery, the symbols used are generally such as are fittest to express the delivery of the subject made over, which shall be particularly treated of, *t. 3.* § 36. Though moveables are capable of real delivery, it is not always necessary that the *ipsa corpora* of moveables be delivered. If, for instance, the subjects to be conveyed be under lock and key, the delivery of the key to the purchaser is accounted a legal tradition of all that is contained in the repository; at least when the question is with him who makes the tradition, § 45. *Inst. De rer. divis.* Notwithstanding the general rule, That property cannot be acquired but by tradition, yet where the possession or custody of a subject hath been before with the person to whom the property is to be transferred, *ex. gr.* if he
who

who had been intrusted with the custody of a thing, should purchase it from the owner, no tradition is necessary for perfecting the purchase, either real or symbolical, § 44. *ibid.* It is commonly said, that in such cases there is a *ficta traditio*: the depositary is supposed to redeliver to the owner the thing deposited, and he again is supposed to give it back to the purchaser, upon the title of vendition, which is called by doctors *fictio brevis manus*. But the plain reason why tradition is not required in that case is, because there is no room for it; for no subject can be delivered to one who hath it already in his custody.

20. If property be so nearly connected with tradition, which is the delivery of possession, it cannot be improper in this place to explain the general nature and effects of possession. Property would be but a name, without possession; for it is by possession alone that we are put in a capacity to enjoy our property. The word, in its original acceptation, denoted the settlement of colonies in their particular seats, *tantum sedium positio*; in which case it carried with it the notion of property, as it frequently does in our language at this day. Thus men of extensive property are said to have great possessions. But possession, when made use of in a strict sense, is defined, the detention of a subject, with an *animus* or design in the detainer, of holding it as his own property. It is made up partly of fact, and partly of right. The fact consists in the detention of the subject which the possessor hath in his custody. The right consists in the view with which he holds it: he holds it in his own name, as his own property. In the first acquisition of possession, actual detention is an essential requisite; for if a bare act of the mind were sufficient, possession would be too vague and uncertain, l. 3. § 1. *De adq. vel am. poss.* Yet detention is not sufficient by itself; the possessor must also hold it as his own right. Depositaries therefore, or stewards, who have the custody or management of a subject for the use of another, are not proper possessors, but bare custodiers or keepers of it. The detainer's view of holding it for himself, is *in dubio* to be presumed from the very act of detention; but where his holding the thing as his own infers a crime, the presumption fails. Thus one's detaining strayed cattle is not presumed to be on his own account, because the law considers such detention as theft.

21. Detention, though it be necessary in the first acquiring of possession, is not precisely required for continuing it. A possessor, for instance, of a land-estate, though he should not be always on the spot, retains the possession of that estate, as long as his *animus* continues of holding it as his own, l. 3. § 7. 11. *cod. t.*; and this *animus* is presumed to continue till the contrary appear, *i. e.* till from special circumstances it be evident that the possessor continues no longer in that intention. From that period the possession ceaseth; *ex. gr.* if the possessor shall throw away his money, or other moveable subjects, in a public place, where they must necessarily be laid hold on by others; and much more if he shall deliver them to another, upon the title of sale, or other proper title of alienation, *ibid.* § 9. It is evident, that this way of possessing *solo animo*, can continue no longer than while the real possession of the subject is void, or, in other words, while it can be re-assumed by the possessor at pleasure: for the moment it is taken up by another, in such manner that the former possessor is debarred from re-entering to it, that former possessor loses his possession; since it is as impossible that two persons can have, each of them, the full possession of the same subject at the same time, as that they can have the property of it. And this holds, though the possession hath been taken from the former possessor without a legal warrant, or even by unjustifiable methods, l. 3. § 5. 9.; l. 15. *cod. t.* Possession, where it is not given up totally, but only in-

croached upon by contrary acts of possession used by another, resolves into a partial or promiscuous possession; and where it is interrupted by the bare attempt of another to possess, without actual possession, it is said to be troubled or disquieted, in opposition to peaceable possession.

22. Possession is divided into natural and civil. Natural possession is the holding of the thing possessed corporally or naturally. Moveables, *ex gr.* are possessed by holding them in one's hands, or keeping them in repositories; lands, by cultivating and sowing them, and reaping the fruits; houses, by inhabiting them, &c. Civil possession is, either the holding the subject by a sole act of the mind; of which, *supr.* § 20. 21.; or by the hands of another who holds it in our name, *i. q. De adq. vel am. poss.* Thus the owner of a thing lent or deposited, possesses it by the borrower or depositary; the proprietor of lands, by his tenant or steward; he for whose behoof a trust is created, by his trustee, *New Coll.* i. 138. &c. And it is a consequent of this, that where a right of property is burdened with a servitude, or other inferior right, in favour of another, the two persons interested in the subject may, in the judgement of law, possess it upon their different rights at the same time; as in the case of a pledge, where the proprietor is considered as possessing the subject, by the creditor to whom it was impignorated, in so far as is necessary for supporting his right of property; notwithstanding which, the creditor possesseth in his own name the right of impignoration or security which he has in it. The same doctrine holds in liferenters, tacksmen, and generally in every case where there are inferior rights affecting any subject, distinct from the property of that subject.

23. Possession may be also divided into that which is acquired lawfully, *i. e.* by fair and justifiable means; and that which is got *vi aut clam*, by violence or stealth. Possession is got *clam*, when one, conscious that his right in the subject is disputable, and apprehending that he will not be suffered to take open possession, catches an occasion of getting into it surreptitiously, or in a clandestine manner, without the knowledge of the owner, *l. 6. pr. eod. t.* Violent possession is, when one turns another masterfully, or by force, out of possession, and puts himself in his place. As to this last sort, it may be observed, that the possessor against whom the violence is used, may also use force on his part to maintain his possession, in the same manner that he might in defence of his life. But after he has lost the possession, however unwarrantably, he cannot use force to recover it, unless he do it *ex continenti*, *l. 3. § 9. De vi et vi arm.* but must apply to the judge, that he may be restored by the order of law: for society could not subsist, if it were permitted to private men *jus sibi dicere*, to do themselves right by the methods of force. Where one possesseth at his own request, by the tolerance or bare licence of the proprietor, it is called "possession *precario*:" but that kind hath not the essential character of proper possession, because a precarious possessor does not hold the subject *tantumquam dominus*, or in his own name.

24. The effects of possession may be summed up under the following rules. *First*, It hath been already said, *supr.* § 10. that in things which have never yet come under the power of any person, the property itself is acquired by possession. *2dly*, Such is the natural connection between property and possession, that in moveables, even where they have had a former owner, the law presumes the property to be in the possessor; so that, till positive evidence be brought that he is not the right owner, he will be accounted such by the bare effect of his possession, *July 26. 1673, Hamilton.* Nay, it will not avail one who claims moveables against a possessor, though he should prove that he had once been the owner, unless he also prove *quomodo*

modo desit possidere, the manner how he came to lose the possession; *ex. gr.* that the goods had strayed, or were stolen from him, or that he put them into the possessor's hand, merely in loan, or as a deposit, or for some temporary use, *Feb. 3. 1672, Scot. &c.* And indeed commerce could not have a free course, if it behoved the possessors of moveables, which often pass from hand to hand without either witnesses or writing, to prove the titles of their possession. Though this doctrine reaches not, by the usage of Scotland, to immoveable subjects, in questions with the sovereign, *supr. § 11*; yet, in a competition between private parties, lawful possession had by one of them, even of an immoveable subject, has the effect to burden the adverse party who sues him, with the proof of a better title than that which is in the possessor, according to the rules, *Actore non probante, absolvi-tur reus*, *l. 2. 21. De prob.* and, *In pari causa, potior est conditio possidentis*, *l. 128. pr. De reg. jur.* That it may therefore be known who is intitled to the privileges of a defender, and of a lawful possessor, the question of pos-session, when that is doubtful, must be determined before discussing the point of right, *l. 62. De judic.* If the possessor hath obtained the posses-sion warrantably, he is intitled to continue in it till the question of prop-erty be finally decided; but if he who had been in the possession hath lost it *vi aut clam*, the judge will, upon a summary application, restore it to the former possessor, without waiting the issue of the cause itself, *tit. Inst. De interd. § 6.*

25. In order to explain the strong effects given by law to *bona fide* posses-sion, the difference between *bona* and *mala fide* possession must be shortly stated. A *bona fide* possessor is one, who though he be not truly proprietor of the subject which he possesses, yet believes himself proprietor upon pro-bable grounds, and with a good conscience, *l. 109. De verb. sign.* as in the case of one who purchases a subject which he had reason to think was the property of the feller, but which, in truth, belonged to a third party. A *mala fide* possessor possesses a subject, not his own, and knows at the same time, or, which comes to the same account, may upon the smallest reflec-tion know, that he is not the rightful owner. No person, though he should possess *optima fide*, is intitled to retain a subject, not his own, after the true owner appears, and makes good his claim to it; for the strongest *bona fides* must give way to truth. And seeing the possessor is in that case bound to restore to the true owner the subject itself, there is the same reason, in the nature of things, why he should restore also the whole fruits which it produced during his possession, as an accessory: yet positive law has, from equity, conferred on the *bona fide* possessor the right to a certain part of the intermediate fruits that the subject yielded while he had reason to think his own title good. It has been disputed by doctors, whether the *bona fide* possessor was, by the Roman law, intitled to such of those fruits as he had gathered during that period, if he did not also consume them, *perceptos sed non consumptos*; but however this point might have stood by the Roman law, it is universally agreed, that by our customs perception of the fruits is by itself sufficient for acquiring their property; so that if the fruits have been *percepti* by the possessor, he may retain them as his own, though they should be still extant. This doctrine has been introduced, that the minds of men who bestow their pains and money on what they believe their own, and who afterwards enjoy the profits thereof, may be secured from the conti-nual apprehensions under which they might labour, if the event of a doubtful right should lay them under a necessity of accounting for what they had thus possessed *bona fide*. And indeed the loss ought in that case to fall on the owner, who had all the while neglected to look after his prop-erty, rather than on the possessor, who, if he had not considered the sub-ject

ject as his own, would probably have lived more sparingly; and who, by restoring the intermediate fruits, might, without the least blame imputable to him, be at once reduced to indigence.

26. Such fruits as are *pendentes*, not yet separated from the subject which produced them, continue part of it, *l. 44. De rei vind.*; and consequently must be restored by the *bona fide* possessor to the owner, with the subject itself; except such as are produced by the seed belonging to, and sown by, the possessor, as wheat, barley, &c.; for if he hath sown the ground while his *bona fides* continued, he is by our customs intitled to reap the crop, even though he should, before the time of reaping, have come to the knowledge that the subject belonged to another; according to the rule, *Messis seque[m]entem sequitur*. The rent of lands possessed by tenants is accounted reaped, or *perceptus*, by the possessor, at the legal terms of payment, though he should not, in fact, have received the rent till after that period. All fruits, whether natural, *i. e.* which spring up *sponte*, or industrial, are thus acquired *perceptione*, by the *bona fide* possessor: for it is not so much the possessor's *cultura*, or industry, which intitles him to gather them for his own, as his *bona fides*, which extends equally to all kinds of fruits, *l. 48. De acq. rer. domin.* Even as to civil fruits, *i. e.* the rents or profits arising from subjects which produce no proper or natural fruits, it is universally allowed, that the rents of houses, which are, beyond all doubt, *fructus civiles*, are in the same case with the rents of land. But it has been said by some lawyers, that this doctrine is not to be received with regard to the interest of money; and that, consequently, where one hath *bona fide* received the interest of a bond as his own, for a tract of years together, he must, upon the true creditor's proving his property in the bond, restore to him, not only the principal sum, but that intermediate interest. No reason however hath been assigned for this specialty, which may not be as justly applied to houses, or other subjects which produce no natural fruits; neither does any authority occur that can be brought in support of this opinion, either from the Roman law, or our own practice. On the contrary, whatever is *in fructu* becomes, by the Roman law, the absolute property of the *bona fide* possessor, *d. l. 48.* and *usuræ* are justly said *vicem fructuum obtinere*, in *l. 34. De usur.*; from whence it is consequent, that a *bona fide* possessor is as strongly intitled to retain interest as natural fruits. It is a point contested by none, that a *mala fide* possessor is obliged to restore to the proprietor all the intermediate fruits arising out of the subject, from the time of his entering to the possession, whether he has actually reaped them, or might have reaped them by proper care; or whether they be natural, industrial, or civil; or whether he has or has not consumed them, *l. 25. § 2. 4. De heredit. petit.*; *l. 22. C. De rei vind.*

27. Possession, where it is vitious, that is, where it is attained by stealth, fraud, or violence, cannot be deemed *bona fide* possession; nor can it fall under that description, where the title of it is void by the obvious and universally known rules of law. Hence a right of liferent provided to a widow by her marriage-contract, if the marriage hath not subsisted year and day, cannot screen the widow who entered into the possession of the subject liferented, under the title of her contract, against restoring the whole rents received by her, *Nov. 16. 1633, Grant.* And, on the same ground, one cannot possess *bona fide* upon a right granted by a minor having curators, without their consent. But a right granted by a minor who has no curators, though it should be set aside afterwards on the head of minority and lesion, is a sufficient foundation for a *bona fide* possession; and consequently has the effect to make all the intermediate fruits received prior to the reduction, to belong to the possessor, *Feb. 16. 1666, E. Winton.* Nay, though the

the title should be forged ; yet, if it has the appearance of a fair and valid right, a singular successor, who had no sufficient reason to suspect the forgery, is not liable to restore the interim fruits, since as to him the title was specious, *St. b. 2. t. 1. § 24.* Many decisions are mentioned by Lord Stair, in the passage now cited, upon the article of *bona fides*, most of them in the case of adjudgers, or other creditors, who possessed *bona fide* in consequence of their diligences, though there were produced afterwards rights preferable to theirs ; and they all tend to prove, that where the title has the appearance of validity, the possessor is not bound to restore.

28. The Roman law required *bona fides*, not only in the beginning of the possession, but during the whole course of it, in order to make the fruits of what one possesses his own, *l. 23. § 1. De adq. rer. dom.* And this is universally held to be also the law of Scotland ; so that the moment after *bona fides* ceaseth, the possessor can no longer avail himself of this privilege. *Bona fides* necessarily ceaseth, when the possessor can have no longer a probable opinion that the subject is his own ; for it is in that opinion that the essence of *bona fides* consisteth. *Mala fides* is therefore induced by the *conscientia rei alienæ*, though such consciousness should not proceed from legal interpellation, but barely from private knowledge ; for private knowledge necessarily implies consciousness. This doctrine is agreeable both to the reason of the thing, and to the Roman law, which expressly affirms, *l. 20. § 11. De hered. pet.* that private knowledge, even without the least form of denunciation to the possessor, is sufficient to induce *mala fides*. And it is also established by our practice, particularly in a case observed by Lord Stair, *Nov. 20. 1662, Childr. of Woolmet*, where *mala fides* was inferred from private knowledge, though it was there pleaded, that a legal intimation was necessary for that purpose. His Lordship however seems to adopt the contrary doctrine, *b. 2. t. 1. § 24.* ; and, in support of his opinion, quotes a decision, *March 14. 1626, Nisbet*, where it was adjudged, that the debtor's private knowledge of an assignation did not put him in *mala fide* to pay to the original creditor, in respect the assignation was not intimated to him. But this judgement is truly foreign to the present question ; and proves no more, than that an assignation, without a legal intimation to the debtor, is an incomplete deed, which therefore need not be regarded by him.

29. The *conscientia rei alienæ* is most ordinarily presumed to commence when the proprietor insists in his action against the possessor : for by the libelled summons in that suit, the possessor hath full opportunity to consider the strength of his own right, which is brought under challenge ; and if his title appear by the nature of the action to be lame or insufficient, the citation must induce *mala fides*, *June 30. 1705, Keith*. Where the question still continues doubtful, *mala fides* is not presumed till litiscontestation ; which was at least the general rule of the Roman law, *l. 22. C. De rei vind.* And in instances in which the possessor's case appears uncommonly favourable, he will not be obliged to restore any of the fruits reaped or received by him prior to the sentence pronounced in the suit ; see *Dec. 14. 1677, Dick ; ex. gr.* where the validity of the title depends on facts which require a proof, if, from facts already known, there arise a probability that the evidence may come out for the possessor. But this matter cannot be reduced to abstract rules ; every judgement must depend on the special circumstances of the several cases. — Many other effects of possession occur in our law, which shall be afterwards explained under their proper heads.

30. Where a possessor hath several rights in his person affecting the special subject possessed, a question frequently occurs, To which of these his possession is to be ascribed ? And it is a question of importance, when one of his titles is preferable to that which is in the competitor, and the other

not: for if his possession shall be ascribed to the preferable title, *ex. gr.* an adjudication against the subject not yet expired, the debt contained in that adjudication must, in the course of time, be satisfied or cleared off by his intromission with the rents; after which, the other weaker title will not be able to defend him against the adverse party; whereas, if he be allowed to ascribe his possession to the weaker title, the preferable one, being undiminished by payment, will draw its full value, as if he had had no possession. On this head, the rule of the Roman law was, *Nemo potest sibi mutare causam possessionis*; no possessor, whose possession commenced upon one title, was suffered to invert it, by afterwards ascribing it to another, *l. 3. § 19. De adq. vel amit. pos.*; especially if that other title was not also vested in him when he began to possess. But, by the usage of Scotland, one may ascribe his possession to any right whatever in his person, though acquired by him after his beginning to possess, as he shall judge most for his advantage. A purchaser, for instance, of a land-estate, who had also acquired several real securities affecting it, and who, by the voiding of his author's title, was made accountable for the rents, ought, in equity, to be allowed to impute his intromissions to the last of the investments in his person, which would otherwise be excluded by intervening creditors, that so his preferable rights, continuing undiminished by payment, may be ranked on the subject to their full extent. We must however except from this rule the following cases. *First*, Possession, as distinct from right, cannot be ascribed to a title, other than that upon which it commenced, to the prejudice of him from whom the possessor's right flowed, and to whom it must be restored, notwithstanding any supervening title in the possessor; though that supervening title should be sufficient to recover the possession to him the moment after he has given it up, *St. b. 2. t. 1. § 27*. Thus a possessor by a lease, if, after it is expired, he be pursued by the lessor or fetter to remove, cannot defend himself upon an heritable right which he acquired afterwards, though that should be evidently preferable to the title on which his possession began; but must first restore the possession to the lessor, and recover it afterwards by way of action. *2dly*, If, in a competition of rights, the possessor shall find himself under a necessity of departing from the title on which he first rested, as lame, and betake himself to a better one, he will not afterwards be allowed to ascribe his possession, in prejudice of his competitor in that action, to any other title in his person equally incapable of defending him, with that on which he first insisted, and from which he was beaten. *Neither, 3dly*, can one who is vested with a sovereign right to a subject, ascribe his intromissions to another right, which he acquired only as an accessory to the first; for *accessorium sequitur naturam rei cui accedit*. Hence one who had, in security of a purchase of lands, acquired right to the escheat of the seller, was not allowed to ascribe his possession to the gift of escheat, but was obliged to apply it to the minute of sale, because that was the principal and the sovereign right, *July 7. 1708, Lord Al. Hay*.

T I T. II.

Of Heritable and Moveable Rights.

BY the Roman law, things or subjects were divided into corporeal and incorporeal. Corporeal were those which by their nature might be handled, as a field, a house, a table, &c. Incorporeal things did not admit of being handled, but consisted *in jure*, and so were more properly rights

rights than subjects ; as rights of property, possession, servitude, succession, &c. And indeed even corporeal things are no otherwise the objects of law, than as they create a right in the proprietor, or other persons interested in them ; though, in common language, these two terms are made use of promiscuously.

2. Things corporeal were by that law divided into immoveable, as fields, houses, gardens, &c. and moveable : and these last could either move themselves, as animals, or might be moved from place to place, as corns, household stuff, pictures, &c. Things, by their own nature moveable, might become immoveable, by their being fixed or united to an immoveable subject for its perpetual use, as stone, marble, wood, used either in building any edifice, or for additional ornaments to it after it is built. This division of things into moveable and immoveable was chiefly intended by the Romans, for settling the times necessary for the acquiring of subjects by usucapion ; for regulating the legal powers of guardians, and other administrators, over the subjects that fell under their management ; and for determining what things ought to pass with the conveyance of an immoveable subject, as part or pertinent of it.

3. Things are, by the law and usage of Scotland, either heritable or moveable. For the better understanding of this division, an observation must be hinted at concerning legal succession, which shall be more fully explained in its proper place. By the Roman law, when one died without making a will, the person next in blood to the deceased succeeded in the right of his whole estate, whatever might be the nature of the subjects of which it consisted ; and when there were two or more equally near, they succeeded equally. But since the introduction of the feudal plan, we, and most of the other countries who have adopted that system, have had the preservation of family-estates so much at heart, that where two or more, who are not all females, happen to be next in blood, and consequently in the same degree of consanguinity to the deceased, such subjects as are either properly feudal, or have any resemblance to feudal, descend by law wholly to one of them, who is considered as the heir of the deceased, and the sole representative of the family ; while the others, who are equally near in degree, and who are denominated *the next of kin*, or *executors*, must be contented with that part of the succession which is of a more perishable nature, and which in value bears generally but a small proportion to the share falling to the heir. Heritable subjects are those which on the death of the proprietor thus descend to the heir ; and moveables, those that go to executors, who are on that account sometimes styled *heredes in mobilibus*. It may be also observed here, that those who undertake to gather in and distribute, among such as are interested in the succession, the moveable estate of a person deceased, in virtue of a nomination, either by the testator or by the judge, frequently get the name of *executors*, because it is their office to execute the last will of the deceased.

4. All subjects which were immoveable by the Roman law, as a field, or whatever is either part of the ground, or united to it, *fundo annexum*, as minerals, houses, mills, &c. are heritable by ours. This rule, if understood without limitation, would comprehend all the fruits of the earth not yet separated from the ground, (called by the Romans *pendentes*), because they continue *partes soli* until separation ; but it is, by our usage, restricted to such of that kind as grow annually, for a tract of years together, without repeated culture or industry, as natural grafts not yet cut, or fruits not yet plucked from the tree : for those annual fruits which require yearly seed and industry, as wheat, barley, &c. are accounted moveable, even before separation, from the moment they are sown or planted ; see *Feb. 2.*

1647, *Somervel*; because the seed, and labour in preparing the ground, cannot be said to be employed on the lands for their perpetual use, but for the immediate profit of the possessor. Trees themselves, though they may be called in some sense fruits of the earth, and though most of them require seed and culture at their first rearing, are deemed *partes soli*, and so descend to the heir: for they are truly destined, not for the present use of the proprietor or possessor, as industrial fruits are, but for the use of the ground; and may, after they have taken firm root, continue united to it, without farther culture, for many successive generations.

5. All rights connected with, or affecting any heritable subject, are also heritable; *ex. gr.* rights of superiority, tithes, patronage, servitude, and the like. Rights of annualrent, which fall under this class, deserve a more particular consideration. For understanding the nature of these, it must be known, that the taking of interest for the use of money was accounted unlawful, and therefore prohibited, by the Canon law; because money is a barren subject, which yields no natural fruits. While the authority of that law continued, those who could not apply themselves to commerce, manufactures, husbandry, or some such method of improving their stock, bethought themselves of a way of eluding this prohibition, by purchasing with their money rights of annualrent, that is, rights constituted by infestment upon lands, by which the lands contained in the right were charged with the yearly payment of a certain sum, or, as it was called, *annualrent*, to the purchaser, redeemable by the granter upon repayment of the purchase-money: but as the granter of the right came under no obligation to repay that sum, he could not be compelled to redeem. By this expedient, that profit which the law did not allow to be taken directly, was made by money indirectly; under the notion, that the purchase of a yearly annualrent on land, was not the taking of interest for the use of money, but the acquiring of a feudal right. These annuities, or rights of annualrent, are used frequently at this day in several Popish countries, where interest is not allowed but in mercantile cases, and they are called in the French law *hypothèques*. Even after the reformation, when the prohibition of the Canon law was no longer of force in Scotland, these rights continued in use for more than a century, with this small variation in the style, that the debtor, who was still taken bound to infest the creditor in a yearly sum out of his lands corresponding to the legal interest of the capital, became personally obliged not only to repay the current interest, but the principal sum also, in the special case, that the creditor should chuse to make requisition of the debt due to him, rather than to retain the heritable security: but now these rights have been, for about a century past, changed by our style into the form of proper bonds, by which the debtor is personally obliged to repay both principal sum and interest, and for the creditor's farther security, is bound to infest him in the special annualrent payable forth of the lands. All rights constituted by either of these forms, are heritable; and generally, in judging what rights are heritable, the matter of the right is attended to, more than its form. If the matter be feudal, or connected with land, the right, though not made real by feisin, goes to the heir. Thus naked charters, or dispositions of the property or superiority of lands, or heritable bonds, though feisin has not proceeded on them, are heritable; because they are all rights of or securities upon land; and the proprietor or creditor may complete them by feisin when he shall think proper. But where the creditor cannot, by the style of the clause of infestment, take present feisin, but must wait for the existence of a condition, or of a day, *ex. gr.* if he is not empowered to take feisin unless the debtor shall fail to make payment against a determinate day, the debt continues moveable, till the obligation

to infeft is purified by the exiftence of that day, and the debtor's failure; becaufe till then it is not in the creditor's power to affect or charge the lands with the debt, *Kames*, 10.

6. Titles of honour, and offices, when they are granted to continue after the death of the patentee, are defcendible to the heir, not to executors; *firft*, becaufe they are indivifible rights, and confequently muft belong to the proper heir; *2dly*, becaufe they were originally feudal: and to this day, titles of honour, though they be no longer connected with land, are granted as an ornament and fupport to the patentee and his family, and therefore muft go to the representative of the family. Rights which have a *tractus futuri temporis*, are alfo heritable. Thefe are rights of fuch a nature, that they cannot be at once paid or fulfilled by the debtor, but continue for a number of years, and carry a yearly profit to the creditor while they fubfift, without relation to any capital fum or flock, *ex. gr.* a yearly annuity or pension for a certain term of years. Such rights are heritable, though they fhould have no connection with land; *firft*, becaufe by the annual profits arifing from them, they have a degree of refemblance to feudal rights; *2dly*, becaufe no right goes to executors, but what may be infantly demanded by them from the debtor, upon the creditor's death; for the office of executor goes no farther than to gather in all the funds of the deceased infantly payable, in order to their diftribution among the parties having intereft in the moveable fucceffion, *New Coll.* i. 39.; fo that admitting fuch rights not to be heritable *ex fua natura*, the heir is the only perfon who can take them. Leafes of land are heritable, as to fucceffion, both as they have a tract of future time, and as they are temporary rights affecting land, to which our ftatutes have given, in certain refpects, the effect of real rights of land: yet leafes have been always moveable as to the fift, and fo fall under efcheat, *t.* 5. § 61.

7. On the other hand, whatever hath no refemblance to a feudal right, and produces no annual fruits, is moveable. By this rule, cafh, plate, bullion, jewels, pictures, books, corns, cattle, inftruments of tillage, and household ftuff, are all moveable fubjects; and fhips even of the largeft fize, with their whole furniture. Arrears of whatever kind, incurred by the debtor previously to the death of the creditor, not only arrears of intereft due on a moveable bond, or bond of annuity, but thofe that arife from a leaf, or an heritable bond, or other fecurity on land, are moveable; for as they are already payable, and yield no annual profits to the creditor by being unpaid, law confiders them as cafh deftined for his prefent ufe: fo that the moveable nature of the debt or fubject fecured, which is the arrears, prevails over the nature of the fecurity, which is undoubtedly heritable; for executors may recover the arrears due upon a right of annual-rent, by a real action of poinding the ground. Whether the arrears due upon cafualties of fuperiority are moveable, is not quite fo clear. The opinion of Stair, *b.* 2. *t.* 4. § 10. followed by Bankton, feems attended with the feweft difficulties, viz. that thefe arrears, where a declarator is neceffary for completing a right to them, continue united to the fuperiority, and confequently defcend to the heir, as part of the fuperiority, till they be feparated from it, either by the fentence of a judge afcertainning the amount of them, or by the fuperior's voluntary conveyance. This opinion too is fupported by fome ancient decifions, and by a later one, *July* 11. 1673, *Faa*. But, on the other part, it was adjudged, *Jan.* 28. 1671, *Keir*, that the arrears of liferent-efcheat, which is, without doubt, a cafualty requiring declarator, were moveable, though the donatary had not eftablifhed or afcertainned them by any fentence in his own lifetime: and it is hard to affign a reafon, why the arrears of liferent-efcheat ought to be diftinguifhed from

those of nonentry, or the other casualties which require declarator. All arrears of feu-duties were, by a long uniform practice, accounted moveable; for feu-duties are not casualties of superiority, but a fixed sum, declared by the feu-charter itself to be due annually by the vassal: and since it was never doubted, that the arrears of rent due by a tenant before the death of the landlord, belong to the landlord's executor, the arrears of feu-duty, which is truly the rent reserved out of the lands by the superior to himself, must, on his death, go to his executors. It was for some time thought, that these arrears descended to the superior's heir, because feu-duties are inseparable from the right of superiority itself; and upon that medium it was adjudged, *Kames*, 14. that the payment of them was a burden on the vassal's heir: but though it be true, that the right to current and future feu-duties due to the superior be properly united to the superiority, yet past arrears are as truly disjoined from the right of superiority itself, as the arrears due upon an heritable bond are distinct from the right of the bond. It was therefore adjudged, *Tinw. June 25. 1755, Martin*, agreeably both to the more ancient practice, and to the nature of the subject, that the arrears of feu-duty descend, as a moveable subject, to the superior's executors.

8. It is a fixed point, that sums employed by a merchant upon trade are moveable, because they are not secured upon land, nor yield any regular yearly profit to the adventurer. On the contrary, the stock itself is frequently lost. All writers are also agreed, on the same principle, that the sums sunk by private copartners into a joint stock, are moveable. And indeed, the shares of proprietors in any public company or corporation, constituted either by statute or patent, and the shares of partners in a private society, are precisely of the same nature as to this question, and therefore ought to be governed by the same rules. It can admit of no doubt, that the dividends declared previously to the death of the proprietor or copartner, are moveable; for they are arrears in the most proper sense: and as to future profits, these are neither fixed as to the yearly amount, nor as to their duration; and besides, they are accessories to a capital, viz. the company-stock, contrary to the nature of rights which have a tract of future time, *July 25. 1710, Murray; July 1. 1735, Dalrymple*.

9. Debts, called in the Roman law *nomina debitorum*, when they contain no clause of interest, *ex. gr.* debts due on promissory note or account, are moveable; because money, the subject of them, is moveable; and because they are neither secured upon land, nor yield any annual profits to the creditor. Debts in which interest is expressly stipulated, bear either a clause for seisin in lands, or a bare personal obligation upon the borrower, without any reference to land. The first kind has been already considered. In explaining the doctrine of personal bonds, a distinction must be made between our former and our present law; nor do all personal bonds fall under any one rule. Personal bonds bearing interest were, by a general rule of our ancient law, accounted heritable, as *quasi feuda*, because, by the fixed yearly profits arising from them, they bore some degree of resemblance to rights properly feudal. But as such bonds were indubitably moveable of their own nature, and did not carry the distinguishing character of rights having a tract of future time, since they could be cleared off at once, *supr.* § 6. therefore in every case where the creditor himself considered the sum as moveable, it was judged unreasonable to adhere to a rule which was not truly founded in the nature of the right. Hence, because a creditor, who had lent money on a bond payable against a determinate day, was presumed to have an intention of turning his bond into cash at that day, the bond was deemed moveable till the term of payment; and this obtained, though

though the bond had carried interest from its date, if the term of payment of the interest was postponed till the term at which the bond itself was taken payable; because the clause of interest was presumed in that case to be inserted, barely that the money might not lie useless in the mean time, but not with a view to make the sum heritable, *Feb. 26. 1629, Douglas*. But if the bond was so conceived as to make the term of payment of the interest prior to the term of payment of the bond, the sum descended to the heir, if the creditor survived the period at which the interest fell first due, tho' he died before the principal sum was payable; because he was, after the first term of payment of the interest, presently intitled to a yearly profit on his bond, which was accounted sufficient to make the bond heritable, *July 31. 1666, Gordon; Harc. 348*. Where the term of payment of a bond was made at a distant or uncertain day, the bond was accounted heritable even before that term; because the distance, or the uncertainty of the term of payment, afforded evidence that the creditor intended from the beginning to employ his money for a number of years together at interest, *Jan. 15. 1628, Falconer; Dirl. 39*. It obtained universally by our ancient law, that all personal bonds were heritable after the term of payment of the capital, because the creditor, if he did not then call for his money, was presumed to have taken up a resolution to let it remain some time with his debtor, for a yearly profit. Debts which carried interest, not from the force of any clause in the obligation, but *ex lege*, as bills, claims of relief, &c. were moveable, *July 10. 1628, Cant*; because where interest is due, not from covenant, but from the nature of the subject, or the force of statute, it is not the creditor who creates the interest, but the law itself, which considers not so much the raising of a yearly profit on the subject, as the equity of the case; and indeed bills were calculated, merely to supply the place of cash in commercial matters, and not to bring any annual profit to the creditor.

10. For enlarging the fund for the provision of younger children, all sums contained in contracts or obligations carrying a clause of interest, were declared, by 1641, c. 57. to belong to the bairns and next of kin of the deceased; and this statute, as it fell under the act rescissory of Charles II. was revived by 1661, c. 32. But these bonds, though they now descend to executors, and so are moveable as to succession, still continue heritable by the said statute, in respect, *first*, of the fisk, and, *2dly*, of the rights of husband and wife. By *fiscus*, the Romans understood the crown-revenue; and by the word *fisk* in this statute, is meant the crown's right to the moveable estate of persons denounced rebels on letters of horning; which right is by the act declared not to extend to such bonds bearing interest as are due to the rebel. As to the second, the sense of the act is, that a widow, though she be intitled to a legal provision out of the husband's moveable estate, upon the dissolution of the marriage by his death, in consequence of the communion of goods, hath no claim to any part of the bonds bearing interest which were due to him. And, *e converso*, though the husband hath, in virtue of that communion, a right to a proportion of all his wife's funds which are simply moveable, he has no right to the bonds due to her which carry interest; as to which his claim is limited to the interest which either had arisen on them before the marriage, or which hath arisen or shall arise standing the marriage; because by that clause in the act, such bonds are declared to continue heritable as to husband and wife. Yet if a wife obtain from her husband an obligation for her annuity, in case of his predecease, containing a clause of interest, that clause is presumed to be inserted, rather as a spur to make the debtor punctual in his payments, than with a view of raising interest on the sum itself; and therefore, if she should marry again, the second husband would be intitled, *jure mariti*, to the arrears of the

the annuity incurred before the second marriage, notwithstanding they were constituted by an obligation containing a clause of interest, *Feb.* 23. 1739, *Dunlop*, stated in *Dict.* i. 384. at bottom.

11. If the creditor in a bond takes it payable to himself, his heirs and executors, the bond descends to executors solely, though, by the form of words, it is made payable both to heirs and executors. Nay, though it be granted to his heirs, without mentioning executors, the right devolves not on the proper heir, though heirs are mentioned, but on the executors, who are not mentioned; both because the act 1661 is express, that all bonds shall go to executors, if they be not secluded, and because the word *heir*, when taken in a large sense, is a generic term, which comprehends every person who is to succeed by law in any right after the death of the proprietor or creditor; and since bonds are by that statute declared moveable as to succession, the executor, who is *heres in mobilibus*, is considered as the person to whom such bond is taken payable. The case is different, where a bond is taken to heirs-male, or to a series of heirs, whether male or female, one after another; for the destination of such bond secludes executors as necessarily as if they had been secluded in the most explicit words.

12. From the rule, That obligations having a clause of interest descend to executors, the act 1661 excepts, *first*, Bonds containing a clause of interestment; because such clause plainly discovers the creditor's intention to constitute with his money a feudal right on land. Under this exception may be included even personal bonds which contain an assignation to an heritable subject for the creditor's farther security, *Falc.* ii. 84.; for such deed, being a proper conveyance of an heritable subject, is as truly heritable as the subject conveyed. *2dly*, Bonds excluding executors are excepted from that act; because there also the creditor himself points out by the destination that the sum shall go to his heir. If, in a conveyance of a bond secluding executors, the creditor exclude also the assignee's executors, the bond continues, without all doubt, heritable in the person of the assignee; and, on the other hand, when such bond is conveyed to an assignee, his heirs, and executors, the secluding clause in the original bond flies off, and the sum becomes moveable, *Fount.* June 17. 1680, *Sandilands*, marked in *Dict.* i. 369.; for in both cases the assignee's design is clearly pointed out by the manner in which he directs the conveyance to be drawn. But the question is thought more doubtful where the assignation is taken to the assignee and his heirs. On the one hand, it may be affirmed, that the bond continues in that case heritable in the person of the assignee; because the excepting words of the act are unlimited, that all bonds secluding executors are heritable, without leaving room to distinguish whether the bond does or does not continue with the original creditor; and consequently, that the exception must refer to the instrument of debt, the bond itself, and not to the assignation. Yet the contrary opinion appears more probable, that the secluding clause in the bond loses its force by the assignation, and that the bond afterwards returns to the general moveable condition of bonds: for as a bond taken to the creditor's heir descends to executors, so must the assignation of a bond when taken in the same way. Besides, the exception in the act 1661 proceeds not from the nature of the debt, bonds secluding executors being as truly moveable in their nature as other bonds, but from the destination of the creditor; and though every creditor is intitled by law to settle his own succession, his destination cannot be construed to regulate that of his assignee, over which he has no power. In a late case, where a bond secluding executors had been assigned by the creditor to his eldest son, and his heir, but without an exclusion of his son's executors, the court waved deciding the general point; but, in the special case

case before them, they gave judgement for the son's heirs against his executors, because the bond was assigned by the creditor to his eldest son or heir, *Falc. i. 215*. A bond including executors, which is carried from the original creditor, not to an assignee by a conveyance *inter vivos*, but to an heir of provision by service, continues heritable in the person of the heir; for where one makes provision for his heir, he is understood to make it, not for the first heir only, but for a succession of heirs, as long as the settlement is not altered, according to the rule, *Heres heredis mei est heres meus*, *l. 194. De reg. jur.*; *Kames*, 53. From the whole of this doctrine, it may be observed, that though all subjects immoveable by the Roman law are heritable by ours, yet some things are moveable by that law which are not moveable with us, *ex. gr.* certain kinds of bonds, rights bearing a tract of future time, &c. Another instance of this will occur afterwards in the case of heirship-moveables.

13. The act 1661 is limited to obligations containing clauses of interest. Obligations therefore carrying interest without the stipulation of parties, seeing there is no provision concerning these in the statute, must continue what they were by the former law. On this ground, all subjects bearing interest *ex lege*, because they were moveable by the ancient law, *supr. § 9*. are to this day moveable in all respects, *i. e.* not only as to heir and executor, but as to the fisk, husband, and widow, *Edg. Dec. 18. 1724, Leslie*. And even as to bonds bearing interest, which are the proper subject of the act, the legislature's only intention was, to make certain kinds of them moveable in point of succession, which had been formerly heritable, in order to a more equitable distribution of the effects of deceased persons among their issue; but by no means to alter the nature of any subject which had been moveable by our ancient law, so as to make it heritable in any respect. When therefore it is declared by the act, that bonds shall continue in their former condition, not to fall under the single escheat, or under the *jus mariti aut relicte*, it can be understood only of such bonds as had been by the old law heritable, and were then made moveable as to succession, *ex. gr.* bonds after the term of payment, or even before that term, if they were taken payable at a distant day. But as bonds were, in the general case, accounted simply moveable before the act 1661, till the term of payment was past, and so fell under the single escheat, and under the *jus mariti et relicte*, they still continue moveable in all these respects, notwithstanding the statute, *Falc. ii. 14*.

14. Rights originally moveable may become heritable, *first*, By the destination of the proprietor or creditor, who hath the right of settling any part of his estate in whatever manner he pleases, provided he shall properly discover his intention. He may therefore destine personal bonds due to himself, or his jewels, paintings, plate, books, or even cash lying in his repositories, so as they may descend to his heir. The bare appointment of the proprietor to lay out his money on land, if it be clearly expressed, makes the sum heritable, though he should happen to die without taking any step to carry his appointment into execution. Thus a sum which was destined, by a marriage-contract, to be employed on land for the heir of the marriage, was adjudged to be heritable, though it was never so employed, *Jan. 19. 1637, Robertson*. One's collecting of timber, stones, slate, or other materials, for raising any fabrick or edifice, is not sufficient to make them heritable *destinatione*, till they be united to the surface of the ground by actual building; but where the roof or walls of an house are thrown down, to be immediately rebuilt, the slates, and other materials disjoined from it, continue heritable, notwithstanding their temporary disjunction, *arg. l. 18. § 1. De act. empt.* A moveable debt becomes heritable, *2dly*, by the

the supervening of an heritable security; *ex. gr.* by the creditor's accepting an heritable bond in corroboration of the debt, or by his obtaining a decree of adjudication upon it. In these instances the alteration made in the quality of the right in point of succession, proceeds not from any presumed intention in the creditor; for he only means to secure his payment, without any view of altering his succession; but from the nature of the additional security, which, because it affects land, is heritable; and this heritable bond or adjudication, though it be but an accessory to the moveable right, yet, as it is the preferable and stronger right of the two, has the effect to draw the moveable, which is the inferior right, after it. For this reason, when a creditor in a personal bond executes a summons of adjudication against his debtor, the debt becomes not heritable from the citation, though if the creditor discover an intention, at any step of the process, to alter the nature of the debt, he does it at that period; but it continues in its first moveable state till pronouncing the decree of adjudication, by which an heritable right is constituted, *Fount. Jan. 16. 1700, Carnegie*; and that is the deed of the judge, not of the creditor. This however is not to be so understood as if the supervening security must be made real by feisin before the moveable debt become heritable: so soon as the creditor accepts the heritable bond, or obtains decree of adjudication, the moveable debt changes its nature, though feisin should not follow either on the bond or decree.

15. By this rule, where a debtor conveys his land-estate to his creditors for their security or payment, such conveyance makes the debts due to them heritable, though they had been originally moveable, since they are by that deed secured on the debtor's heritage. And the law is the same, though the estate should be conveyed to a trustee for the use of the creditors; for the trustee being only a name, the trust-deed is considered in the same light as if it were granted to the creditors themselves. But so soon as an alteration is made in the nature of the creditor's right, by a sale of the subject contained in the deed, the debts return to their former moveable condition. And though the creditors should afterwards, at the desire of the purchaser, lead separate adjudications against the subjects sold, for his greater security; that step, as it is intended merely for strengthening the sale, is adjudged not to have the effect of making the debts again heritable; see *Falc. June 5. 1745, Duffs*. As the nature of the creditor's right cannot be changed, without his own consent, by the debtor, the creditor must do some deed, importing his acceptance of the heritable right offered by him. A disposition therefore by a debtor, of his lands, to a trustee, for the behoof of a personal creditor, without that creditor's knowledge, or an heritable security assigned by the debtor in a suspension, works no alteration in the debt from moveable to heritable, *Dirl. 342*.

16. Though moveable sums are rendered heritable by the creditor's securing them on land, yet an heritable debt is not changed into moveable by an accessory moveable security, *ex. gr.* a gift of single sheat, or by a second moveable bond corroborating the first heritable one, *Pr. Falc. 43*; because the supervening security is not only an accessory to the heritable debt, but it is the weaker right, which therefore ought not to draw the *jus nobilius* after it. And indeed there is no ground to presume in such case an intention in the creditor to alter the condition of the debt; for his obvious and only meaning is, to secure the payment of it. Neither does the demand of payment by a creditor in an heritable debt, though made judicially, afford any presumption of an intention to change the nature of it to moveable, but rather to employ his money, when recovered from the present debtor, upon another heritable security more to his liking, or per-

haps

haps on a purchase of land. Thus a decree obtained by a creditor against his debtor, though a decree carries in it a demand of payment, has not the effect to render the debt moveable, *Fount. Feb. 27. 1712, Scot.* Thus also a sum belonging to the wife not falling under the *jus mariti, ex. gr.* a bond bearing interest, continues heritable as to the husband, notwithstanding a demand of payment from the debtor, *Mack. § 7. b. t.* Nay, though the wife should not only demand, but actually recover payment, there is no alteration in the heritable nature of the bond *quoad maritum*, unless a presumption shall arise, from her allowing the husband to apply the sum to his own use, or from other circumstances, that she truly intended a donation to him. In the same manner, though a charge used by a creditor on letters of horning, is the strongest indication of his purpose to recover payment; yet by our latest decisions neither a charge upon a bond that had been made heritable by adjudication, *Nov. 12. 1728, Reids*, nor on a bond secluding executors, *July 24. 1705, Gray*, was adjudged to alter the heritable nature of these sums; see *Falc. ii. 234.* It must however be acknowledged, that by our former law requisition used by a creditor upon a right of wadset, or infestment of annualrent, made the sum in the right moveable, which before was heritable. This seems to have proceeded from the effect then given to requisition, of extinguishing the real security of the wadsetter or annualrenter; for while this was held for law, the debt, which after requisition was secured barely by a personal obligation against the grantor and his heirs, could be no longer heritable: and though this doctrine ought to have been rejected, after custom had introduced a clause in those rights, that, notwithstanding the requisition, the real security should still subsist, it continued long to be received as the law of Scotland, *St. b. 2. t. 1. § 4.; Mack. § 6. b. t.* But our later lawyers, more agreeably to the nature of requisition, and to the above-quoted decisions, are of opinion, that such rights continue heritable even after requisition.

17. In applying the doctrine of this title to the sale of lands, a distinction ought to be made between voluntary and judicial sales. Where the proprietor sells voluntarily either a land-estate, or a right affecting it, for a determinate price; that price, as a moveable subject, descends to the seller's executors, if it be not heritably secured; because by the proprietor's own deed, in turning the right of his lands into money upon a moveable security, he alters the nature of that fund from heritable to moveable. And it is not a formal disposition only, but even a minute of sale, which has this effect; for the minute contains a conveyance of the lands to the purchaser *de presenti*, and the taking of security for the price in a moveable form makes the price moveable. As a consequence of this, though the seller should die before the execution of the minute, the price will descend to his executors, *Fount. Dec. 22. 1704, Cheiflie*; while at the same time his heir may be compelled to fulfil the deed of his ancestor, and grant an ample right of the lands to the purchaser. But in judicial sales of bankrupt estates, the interest in the estate belonging to the real creditors, continues to affect it, and consequently is heritable, not only after the decree of sale, but even after the purchaser is infest; for the sale, which is intended for the benefit of these real creditors, cannot alter the nature of their several rights, by extinguishing the heritable security which they had before on the lands. Though therefore the lands themselves, that is, the property of them, belongs to the purchaser in virtue of his decreet of sale, and infestment upon it; yet seeing the securities of the real creditors remain as a charge upon them, the shares of the price to which these real creditors are intitled, continue heritable till their debts are discharged, or conveyed by them to the purchaser upon payment; and consequently they descend upon their death,

death, in so far as their rights still subsist, not to their executors, but to their heirs. See more on the subject of this title, *t.* 8. § 23. & *t.* 12. § 45.

18. We may here shortly mention the general characters which distinguish heritable and moveable subjects, reserving the particular explication of them to their proper titles. *First*, Heritable subjects, or those which descend to the heir, may be attached at the suit of creditors by inhibition and adjudication only; whereas the proper diligences for securing or recovering moveables are arrestment and poiding. *2dly*, Heritable rights or subjects cannot, by the law of Scotland, be conveyed by any deed of a testamentary nature; they can be transmitted only by deeds *inter vivos*, in the form of a disposition: whereas moveables may be bequeathed by testament, or by any deed which sufficiently discovers the owner's intention to transmit the property of them. *3dly*, Heritage cannot be conveyed, even by disposition, if the proprietor be on deathbed; whereas moveables may be made over or bequeathed in the last moments of life. *4thly*, The heir completes his titles to heritable subjects by a service as heir to his deceased ancestor; whereas the right of moveables is vested in executors by confirmation. It hath been already observed, that moveables fall under the *jus mariti* and *relictæ*, whereas heritage falls under neither.

19. There are particular subjects which may be called *mixed*, because they partake in different respects, both of the nature of heritable and moveable. Personal bonds bearing interest, are, by 1661, *c.* 32. declared moveable in respect of succession, but continue heritable as to the interests of fisk, husband and wife, *supr.* § 10. Such bonds are of a mixed nature in another view: for though they were accounted, even after the act 1661, heritable in every respect but that of succession, it was declared by act 51. of that year, that all obligations, even heritable, having a clause of interest, might, if no seisin had followed on them, be affected, not only by apprising, which was a diligence competent only against heritable subjects, but by arrestment, which is proper to moveables, *b.* 3. *t.* 6. § 6. Other sums may be heritable as to the creditor, but moveable as to the debtor, so that the debtor's executors are liable in payment, without recourse against the heir. This happens in every case where the creditor, who is absolute master of his own property, destines a moveable sum for his heir: for tho' such destination makes the sum heritable as to him; yet as the debtor, over whose succession the creditor hath no power, cannot be affected by the deed of the creditor, the sum continues moveable as to the debtor, and consequently the burden of payment falls upon the debtor's executors, as if the creditor had made no such destination, *July* 25. 1662, *Nasmith*. It appears to be a necessary consequence of this, that the destination of a creditor who takes a bond to his heirs excluding executors, ought not to alter the nature of the debt with respect to the debtor; nevertheless our supreme court demurred upon that question, *Feb.* 22. 1681, *La. Marg. Cunningham*. As a proprietor may transmit his property in any channel he thinks proper, he may also burden it at pleasure; and consequently he can throw the weight of any debt due by himself, either on his heir or his executor. Thus one who has borrowed a sum on a moveable bond, may, by a proper deed, burden his heir *primo loco* with the payment of it, by which the heir becomes the proper debtor, though the executors, and not the heir of the creditor, will have right to the bond: and this is an instance of a sum, moveable as to the creditor, and heritable as to the debtor. The arrears of feu-duty were never accounted a mixed subject, heritable as to the superior, and moveable as to the vassal; for the decision, *Kames*, 14. which, contrary to the doctrine formerly received, adjudged the payment of them to be

be a burden upon the vassal's heir, truly proceeded on the supposition, that the right of them descended to the superior's heir; and as by a posterior decision, *Tinw. June 25. 1755, Martin*, these arrears were declared to be moveable as to the superior, they must now be moveable in all respects, *vid. supr. § 7.* A bond taken payable to a creditor, and failing him to a substitute, is, in the opinion of some lawyers, *Steu. Ans. v. Substitute*, so far moveable, that the creditor may bequeath it by testament: and nevertheless it is incontestably heritable as to succession; for it descends not to executors; and the substitute, upon failure of the creditor, must complete his titles to it by a service as heir of provision, which is a method of making up titles proper to heritage. But it appears to be a rule more agreeable both to the analogy of law, and to practice, that nothing which goes to the heir by service, can be carried off to his prejudice, either by a deed on deathbed, or of a testamentary nature. But of this see more below, *b. 3. t. 8. § 20.*

20. All questions, whether a subject be heritable or moveable in point of succession? must be determined according to the condition of it at the time of the ancestor's death. If it was then heritable, it belongs to the heir, because at that period the right of succeeding to the subject opened to him; if moveable, it must for the same reason descend to executors, without regard to any alterations that may have affected the subject in the intermediate period between the death of the ancestor and the competition. But in judging, whether a subject be heritable or moveable in regard of the *jus mariti*? the time of entering into the marriage must be attended to; for if the subject fell at that point of time under the *jus mariti*, nothing that happens afterwards can alter its nature. Thus, as bonds before their term of payment are moveable in all respects, the husband acquires by the marriage a right to all the bonds due to the wife, the term of payment of which was not then come; and having once acquired it, in consequence of the wife's assignation implied in marriage, that assignation will support the husband's right to them, even after the term of payment is elapsed.

T I T. III.

Of the Constitution of Heritable Rights by Charter and Seisin.

AFTER having given a general view of the nature and properties of heritable and moveable rights, they fall now to be handled separately, beginning with the first, as the most eminent branch of the division.

2. Some writers pretend to have discovered traces of the feudal plan among the ancient Romans, who frequently sent colonies into the conquered countries, and divided the lands among the planters: but those grants were made, not to young robust men in consideration of future military services, but to worn-out veterans, as a reward of their past; neither had the obligations laid upon the grantees any resemblance to feudal ones. There was something which approaches nearer to the nature of feus, in the policy used by the Emperor Alexander Severus, who bestowed the countries taken from the enemy, on the *duces* and *milites limitanei*, to continue the property of them and their heirs as long as they could defend their right; with an express restriction, that they should not be at liberty to sell the lands, *Lampr. in vita Al. Severi*. Others have attempted to deduce the origin of feus from the usages of the ancient Germans and Gauls. The governors or rulers of the former exercised authority in their several boroughs and villages, with a right of jurisdiction over the inhabitants. Every ruler had a number of *comites* to attend upon and assist him, to whom different stations

were assigned at the ruler's pleasure: and there was a mighty emulation among those *comites*, which should be most in his ruler's favour; and among the rulers, which of them should have the greatest number of brave men for his followers, *Tacit. De mor. Germ.* We are told by Cæsar, *De bell. Gall. lib. 3.* that the nobler Gauls had attendants, called in their language *Jol-durii*, who were so entirely devoted to their leaders, that, in their greatest dangers and misfortunes, they either underwent cheerfully a like fate with them, or voluntarily put an end to their own lives. But none of this devotion was feudal; for it was not annexed to lands, which is the only foundation of the proper feudal service. It seems to have borne a greater affinity to our highland clanships, where the assiduous and unreserved obedience paid to the chiefs, proceeds, not from feudal obligations, or oaths of fidelity, but from the affection which all of the same tribe have to their head or chieftain; and as the first inhabitants of Britain agreed wonderfully in their customs and dispositions with their neighbours the Gauls, these voluntary dependencies were probably common to both nations.

3. We may therefore conclude, that it was the Longobards, or Lombards, who laid the foundations, or at least made the most early improvements of the feudal system. That people having early left their original seats in Pomerania, Magdeburgh, and the other northern parts of Germany, after many migrations seized upon Lombardy about the year 568. The better to secure their conquests, they found it their interest to divide among the chief captains the conquered country, reserving the superiority to their King; and these captains, after retaining what was proper for themselves, proportioned the residue among a lower rank of officers, under the conditions of fidelity and military service. These grants were bestowed by the King, or his principal commanders, as a sort of pay to their followers, in place of the *stipendia* given by the Romans to their soldiers in money. The policy of this system was so universally approved of in that military age, that even after an end was put to the reign of the Lombards in Italy, it was adopted by Charles the Great, and by most of all the princes of Europe. It may nevertheless be observed, that the word *feudum* is not once to be found, either in the laws of the Longobards, nor even in the constitutions of Charlemagne; in all which, *beneficium* is the term uniformly used to express a feudal grant.

4. Feudal grants were originally precarious, revocable at the pleasure of the granter, *l. 1. Feud. t. 1. § 1.*; and when afterwards they came to be given for life, the feu returned upon the vassal's death to the superior. During this period, the Feudal law may be considered as in its infancy; for while these grants lasted only for life, no casualties or fruits of superiority could arise to the overlord from the death of the vassal, or from the entry or marriage of the heir. In a short time, heirs of the first degree in the right line of descendents, *i. e.* immediate sons, were admitted to the succession of their father's feu; not the eldest, but at first he on whom the superior was pleased to bestow it, and afterwards all of them equally, *d. l. 1. Feud. t. 1. § 1.*; but where those sons happened to die before their father, the first vassal, grandsons were excluded. The Emperor Conrad the Salick, the more effectually to engage his vassals to his interest, in an expedition which he undertook to Rome, *anno 1026*, to repress the Guelf faction, *Otho Frising. l. 6. c. 29.* extended feudal succession to grandsons; and even in the collateral line to brothers, where the right of the feu had been formerly in their common father, *l. 5. Feud. t. 1.* But in a *feudum novum*, or a feu originally acquired by a vassal who died without issue, his brother could not succeed, without an express clause in the grant, *l. 1. Feud. t. 1. § 2. and t. 20.*

5. Though

5. Though the Feudal law had early received considerable improvements from the many constitutions, both of the Lombard kings, and of Charles the Great, and his successors; yet the rules which governed feudal grants were but little known, as these constitutions were not, for a considerable time after their enactment, collected into one body. The Emperor Frederick, surnamed *Barbarossa*, therefore directed an institute of the feudal system, and usages, to be compiled about the year 1170, which was intitled, *Consuetudines feudorum*, and has been subjoined to Justinian's Novels in almost all the editions of the body of the Roman law. The first book of those usages was written by Gerardus Niger; the second, from the first to the twenty-fifth title, as the books are placed in the vulgar editions, by Obertus de Otho, both consuls of Milan; what remains of the second book was composed by an author whose name hath not reached to the present times; the third book is lost; the fourth was restored by Cujacius from the libraries of Ardizanus and Alvarotus, two Lombard lawyers; and the fifth was collected by the same Cujacius, from the Imperial constitutions, which had been omitted in the former books.

6. This collection, in so far as it is the work of private hands, does not appear to have been confirmed by the express authority of any of the German Emperors, *Bitich. De feud. in proem.* But it is generally agreed, that it had their approbation, and was accounted the customary Feudal law of all the countries subject to the Empire, except in a few particulars, where it appears from the collection itself that different or contrary usages were observed in different cities or districts. But no other state hath acknowledged the authority of those written usages. Every kingdom hath formed to itself such a scheme of feudal rules as best agreed with the genius of its own constitution; and the system received in Scotland differs so widely from the *Consuetudines feudorum* in the most important articles, that whoever studies them as common feudal rules, without duly attending to the special usages of our own country, will wish to unlearn them when he comes to practise in our courts. In the deciding therefore of feudal questions, every state is to have regard, in the first place, to its own statutes or customs; and in inquiring into the ancient feudal usages of Scotland, notable assistance may be had from the books of the Majesty. If there is neither statute nor custom to direct us, we ought to consult the practice of neighbouring countries, if the genius of their law suits with ours, as to the subject under debate; and should the question still remain dubious, we may properly enough have recourse to the written feudal usages, as a treatise which contains the outlines at least, or general principles, on which all nations that have adopted the feudal plan have proceeded in forming their systems. No light can be received from ancient histories or writings, at what period the Feudal law was first introduced into Scotland; for in the confusions into which our kingdom was thrown by its constant wars with England, its oldest records and monuments were either destroyed, or carried off to that kingdom: so that there is perhaps no Scottish charter now extant dated before the year 1095 or 1096. The laws ascribed by historians to Kenneth II. & III. carry no just characters of feudal; and besides they are of uncertain credit: but it can hardly admit of doubt, that the Feudal law must have been received in this country, at least as early as the laws which, in Skene's collection, are ascribed to Malcolm Mackenneth, but are now generally believed to have been enacted by Malcolm Canmore, who began to reign anno 1056 or 1057.

7. *Feudum*, or *feodum*, is by Obertus derived from *fides*, l. 2. *Feud. t. 3. § 1.* But besides that that vocable sounds too harsh to have a Latin original, it is not likely that the Germans, who are held to be the first founders of the
feudal

feudal system, would have borrowed that term from the language of another country. The opinion therefore of Craig, *lib. 1. dieg. 9. § 3.* seems preferable, that it is a primitive German vocable, denoting a reward due for services: in confirmation of which he observes, that the old French word *feaux*, signified those who received a determinate allowance from the masters whom they served; and to this day the wages due to servants are with us called *fees*; see *Spelm. Gloss. v. Feodum*. The word *feudum*, or, as we commonly translate it, *fee*, or *feu*, denotes sometimes the subject itself granted to the vassal. Thus it is said, that a vassal falls from his fee, or that a fee opens to the superior. But it is more properly used to express the right resulting from the feudal contract: and in this acceptation it may be defined, a gratuitous right to the property of lands, made under the conditions of fealty and military service, to be performed to the grantor by the grantee, the radical right of the lands still remaining in the grantor. It is called a *gratuitous right*, because feus were not, by their first condition, to be purchased with money; but those granted by the lower rank of vassals soon became the subject of commerce, equally with any moveable subject, *l. 1. Feud. t. 1. § ult. & t. 16.* Under lands, in this definition, are included all heritable subjects so connected with land that they are deemed part of it, as houses, fishings, mills, jurisdictions, patronages, &c. And nothing can be granted in feu or fee but heritable subjects: for moveables, because they seldom yield any profits otherwise than by being themselves destroyed, cannot be the subject of feus; since, where things perish in the use, the superior must by that extinction lose the right arising from his superiority. Though feus were at first granted solely in consideration of military service, yet services of a civil or religious kind were early substituted in the room of military, at the pleasure of the grantor, *l. 2. Feud. t. 2. § 2.* And in the course of time services of all kinds were entirely dispensed with in some feudal tenures. But where this happens, the vassal, who is exempted from services, must in their place be liable in the payment, either of a yearly sum of money, or of a quantity of grain, as in feu-holdings; or of something else, however inconsiderable, *ex. gr.* a penny money, a rose, a pair of spurs, merely in acknowledgement of the superior's right, as in blanch holdings. In the definition, the radical right is said still to remain in the grantor, because there is not in any feudal grant an absolute or total cession of the subject disposed made by the grantor: he reserves to himself, or rather the law reserves for him, an interest in it; of which more *infr. § 10.*

8. Allodial subjects, or subjects granted *in alode*, are opposed to feus. By these are understood lands or goods enjoyed by the owner independent of any superior, or without any feudal homage. The word is probably derived from *a, privativa*, and *leode*, or *leude*, a German vocable used in the middle ages for vassal, or *fidelis*, (from whence the term *liege* probably draws its origin), *Leg. Wisig. l. 4. t. 5. c. 5.*; *Addit. Leg. Burgund. 1. t. 14. § 2.*; *Du Cange, Gloss. v. Leudes*; for the proprietor of allodial subjects is laid under no obligations of fidelity to a superior. In this sense all subjects, immoveable as well as moveable, were allodial by the Civil law; for the Romans were strangers to the rights of superiority. And even where the feudal system is received, all moveable goods are allodial. But no lands are so, unless the grantor, who makes them over, expressly exempt the grantee from the obligations of homage and fealty, and renounce the rights of superiority which were formerly competent to him against the vassal, in the subject of the grant. Frequent instances of this exemption occurred in the first ages of feus; and the Roman Pontiffs have boasted (though without just grounds) of extensive allodial grants of lands made to their predecessors,

deceffors, by King Pepin, and his fon Charles the Great. By the uſage of Scotland no lands are allodial, except, *firſt*, thoſe of the King's own property; *2dly*, the ſuperiorities, which the Sovereign, as the fountain of feudal rights, reſerves to himſelf in the property-lands of his ſubjects; and, *3dly*, churches, church-yards, manſes, and glebes, the right of which is fully perfected by the designation of the preſbytery, without any grant by the crown.

9. Feudal rights are to be ſtrictly interpreted; *firſt*, Becauſe the Feudal law is cuſtomary, which conſiſts in fact; and therefore ought not to be extended farther than the particular uſage which conſtitutes it. *2dly*, Becauſe feus are, or at leaſt were originally, donations, which ought to be confined within the precise bounds of the grant. Upon this principle, Craig afferts, *lib. 1. dieg. 10. § 7.* that feus where heirs are not expreſſly mentioned, return upon the vaſſal's death to the ſuperior. But this carries the matter too far; for all feudal grants were, even without the mention of heirs, accounted hereditary as early as the reign of the Emperor Lotharius, in ſo far as concerned the deſcendents from the firſt vaſſal, *l. 1. Feud. t. 19. 20.* Some interpreters have affirmed, that feus granted by ſovereigns are *bonæ fidei*, becauſe the favours of princes ought to receive a liberal interpretation. But it is as unreaſonable to preſume againſt the ſovereign as againſt any ſubject, that he has given more than is expreſſed in his grant: and indeed feus granted by the crown are ſtill more ſtrictly interpreted by our cuſtoms, than thoſe that are granted by ſubjects, in the article of warrandice, *infr. § 27.*

10. The granter of the feudal right is called *the ſuperior*; becauſe he ſtands in an higher rank than the grantee, who is ſtyled *the vaſſal*. Craig, *lib. 1. dieg. 10. § 17.* makes the word *vaſſal* a diminutive of *vaſſus*, which, he tells us, denoted in the middle ages a baron who held his lands immediately of the ſovereign. But it is evident, from all the writers of that period, that *vaſſus* ſignified in general an attendant; and was applied, indifcriminately with *vaſſallus*, not to the King's vaſſals only, but to thoſe of counts, abbots, and others of inferior rank, *Du Cange, v. Vaſſus et Vaſſallus*. Cujacius and Spelman fetch its origin, with greater probability, from the German *gebeſſel*, companion, or fellow. The intereſt which the ſuperior retains to himſelf in all feudal grants, is called *dominium directum*, becauſe it is the higheſt and moſt eminent right; and that which the vaſſal acquires goes under the name of *dominium utile*, as being ſubordinate to the other, and indeed the moſt profitable of the two, ſince the vaſſal enjoys the whole fruits which grow out of the ſubject. This diſtinction was contrived by feudal writers, that they might be able to give different names to the different intereſts which the ſuperior and vaſſal have in the ſame ſubject. Cujacius diſapproves of the diſtinction, on this ground, that there cannot be two *domini* of the ſame ſubject *in ſolidum*: he therefore affirms, that the vaſſal's right is a *jus utendi, fruendi*, a ſpecies of uſufruct, which may be tranſmitted to heirs; which is not quite repugnant to the notion of uſufruct, as it is ſometimes underſtood in the Roman law, *l. 14. C. De uſufr.*; and that the right of property remains with the ſuperior, and conſiſts in the homages and ſervices due to him by the vaſſal, *Cuj. De feud. l. 1. in pr. and l. 3. t. 1.* But our writers, particularly Craig, *lib. 1. dieg. 9. § 9. et ſeqq.* have, after the example of the old feudists, expreſſed the intereſt retained by the ſuperior by *dominium directum*, or, as we tranſlate it, the ſuperiority; and that conferred on the vaſſal, by *dominium utile*, or the property. The word *fee* is often uſed promiſcuouſly for both.

11. Some things are eſſential to a feu, ſome natural, and others only accidental. No feu can ſubſiſt without its eſſential characters; and upon

the least alteration made in these, the right must resolve into one of another kind. Thus, in all feudal grants, the right of superiority remains necessarily with the granter, at the same time that the property is transferred to the vassal; and the vassal must acknowledge this superiority by some service or payment. Writing also and feisin are essential to the completing of a feudal grant. By the *naturalia feudi* is understood whatever arises from the nature of the contract; and so is deemed part of it, though it should not be expressly provided for. In this they differ from the essentials of a feu, that they may receive an alteration from the will of the parties, without destroying the feudal contract; but such will must be properly expressed in the grant or contract itself. Thus the obligation which lies on the granter of a feu to warrant it to the grantee, is implied in the grant, though it should not be stipulated: notwithstanding which, that obligation may be discharged by an express clause to that purpose. In like manner, the casualties incident to feudal tenures, are understood to make part of the feudal contract; inasmuch that a provision expressly dispensing with them, when formed only in the terms of a personal obligation by the superior, hath no force against his singular successors, *Dec. 11. 1731, La. Castletail*, stated in *Dict. ii. 69*. It may however be observed, that certain articles might have been natural to a feu originally, which are not so at present. Thus all feudal tenures were presumed to be military, if the grant did not express another manner of holding, till the late act, 20^o Geo. II. abolishing tenures by ward holding. Thus also females were originally excluded in every case from feudal succession, as unfit for military service; and even after they were admitted to it, where they were called by a special clause in the grant, all fees were presumed to be male, in which there was no destination in favour of females, *l. 1. Feud. t. 8. § 1*. Nevertheless feus are, by the later usage of this kingdom, and of the greatest part of Europe, presumed to be female, if they are not specially provided to heirs-male. As to the *accidentalia feudi*, the force of those depends entirely on the convention of parties; and so they are never presumed, but must be the subject of express stipulation. All provisions therefore in the feudal contract, which are neither of the essence, nor of the nature of a feu, fall under this last class.

12. It may not be improper barely to mention in this place the divisions of feus most used in our practice, with their general properties, which will be more fully explained afterwards. Feus are either real or personal. Personal are such as die either with the granter or grantee. Craig, *lib. 1. dieg. 10. § 11*. numbers, among personal feus, the offices of chancellor, treasurer, register, &c. which, like the *feuda soldatæ*, or *custodiæ*, mentioned in the books of the feus, *lib. 2. t. 10. &c.* were considered as feus of an annual pension, paid for services to be performed by the persons employed in those several offices. But, as Craig himself admits, *lib. 1. dieg. 10. § 23*. the term thus understood is used improperly; for nothing ought to be distinguished by the name of a feu, of which it cannot be said, that the fiar died last seised in the subject, and that it descends after his decease to his heir. Fees are also divided into *ligia* and *non ligia*. In a liege-fee, the vassal owes absolute fidelity to his immediate overlord without exception, which is the case of all fees granted by sovereigns; whereas, in those granted by subjects, a reservation is always implied with respect to the highest or liege-lord; since no subject can at his pleasure throw off the obedience he owes to his sovereign. The obligations resulting from a liege-fee affect not only the lands granted by the sovereign, but the whole other estate of the vassal: for the person of the vassal is, in that kind of fee, subjected to the liege-lord; and, of consequence, all his estate, even his moveables,

moveables, *quæ sequuntur personam*. And hence our forfeitures have had their rise; the effect of which, when they fall upon a delinquency against the liege-lord, reaches to the offender's moveable estate as well as to his heritable. The written feudal usages divided feus into *antiqua* and *nova*, which nearly tallies with the division received by us, into heritage and conquest. *Feudum antiquum*, or heritage, is that in which one succeeds to his father, grandfather, or other ancestor. A *feudum novum*, or conquest, comes not by succession, but hath its place only in him who first acquires it, by purchase, gift, or other singular title. We shall afterwards find this division of use in the doctrines of the courtesy and succession. Fees are also either divisible or indivisible. All fees are of their own nature divisible; and the right of property competent to the vassal, actually admits of a division in our law, in the case either of female succession, or of an express clause in the investiture, dividing the succession of the property in certain events. But the right of superiority cannot be divided without the vassal's consent; for the superior has no power to make his vassal's condition worse, by putting him to the expence of double entries, or by increasing the number of the persons to whom the feudal services are due. Lastly, fees are either redeemable or irredeemable. A fee is irredeemable when the right of it is vested absolutely, and without any condition of return, in the grantee. A redeemable fee is granted, either by the proprietor, or by the judge, in security of a debt due by the granter or debtor, which therefore returns to him when he redeems it by clearing off the debt within the time prescribed, either by law, or by the tenor of the right.

13. Every proprietor of an heritable subject, who has the free administration of his estate, and is not debarred by statute, or by the nature of his grant, may dispose of it in fee to another; for the right of property, where it is absolute, necessarily includes a power in the owner, not only to use the subject by himself, but to make it over to whom he will. Nay a vassal, though he has barely the *dominium utile*, may make over his property to a subvassal by a subaltern right, and thereby raise a *dominium directum* in himself, subordinate to that which is in his superior; and so *in infinitum*. The vassal who thus subfeus is called the subvassal's immediate superior, because the subvassal's lands are holden immediately of him; and he of whom the granter holds, gets the name of the subvassal's mediate superior, because a superior intervenes between the subvassal and him. It is so true that a power of alienation is inherent in the right of property, that though the vassal's charter should declare by a special clause, that any alienation of the lands to be executed by him, without making the first offer to the superior, should be null; yet the vassal's grant of the feu to another would be valid, if the clause contains no irritancy of the vassal's right upon counteracting that restriction, *New Coll.* ii. 4. A factor or steward, as he is not the proprietor, cannot without special powers make a grant of his constituent's estate, even for a just price; since commissions of factory import a power barely to manage, not to alienate. Wives must have the consent of their husbands, and minors that of their curators, in order to give a legal force to their grants. Idiots, pupils, and others incapable of consent, cannot alienate. Professed or known Papists are, by 1695, c. 26. debarred from granting gratuitous deeds to the prejudice of their heirs: and it is enacted, that all their deeds shall be held gratuitous, unless the grantor, writer, and witnesses, shall concur in deposing, to the satisfaction of the judge, that they were onerous. A woman who has been divorced for adultery, and afterwards cohabits or intermarries with the adulterer, cannot alienate any heritable right, in favour of the issue of that marriage, so as to exclude her other lawful heirs, 1592, c. 117.

14. Though

14. Though every one may dispose of his own heritage, or grant it in fee to another, under the exceptions above written; yet there are certain heritable subjects, which, though they are not of their own nature exempted from commerce, yet cannot be alienated by the proprietor: such as, *first*, the annexed property of the crown, which is declared unalienable by the sovereign, unless the causes of the grant be previously inquired into, and approved of by parliament, 1455, c. 41. Annexations were introduced to restrain the unbounded liberality of our kings in bestowing the crown-lands upon favourites, and effectually to secure the sovereign in a patrimony sufficient for the support of the royal dignity. If the King should alienate contrary to the directions of the statute, he is intitled to resume the grant, and enter summarily into the possession, without the necessity of bringing any action of reduction against the grantee. But this salutary institution was rendered in a great measure ineffectual by several acts of dissolution, authorising our kings to set the annexed property in feu-farm, provided the feu-duty should not be lower than the just avail of the lands, 1457, c. 71.; 1540, c. 116.; 1584, c. 6. &c.: and to prevent questions concerning the extent of that avail, it is, by the last of the said statutes, declared to be the duty to which the lands are, or may justly be retoured for the new extent. In this the improvement of the revenue was speciously pretended, but it turned out greatly to its detriment: for, by the gradual increase of the nominal value of our coin, an ounce of silver, which was worth no more in 1457, when the crown-lands were first allowed to be feued, than about 8 s. Scots, or 8 d. Sterling, has gradually risen in nominal value to 64 s. Scots, or 5 s. 4 d. Sterling; so that though our kings still receive from the vassals of the annexed lands a feu-duty equal in name to the retoured duty by the new extent, that feu-duty is not above the eighth part of the retoured duty in the weight of silver. Those who have a curiosity to know the history of the gradual debasing of our coin, may easily collect it from the *Affisa Dav. De pond. et mens.* preserved in Skene's collection, p. 161.; *St. Dav. II. c. 46.*; *St. Rob. III. c. 22.*; 1424, c. 23.; 1451, c. 32.; 1483, c. 93.; 1581, c. 106. N° 2.; 1597, c. 249.; 1696, c. 38.; and Mr Ruddiman's preface to *Diplom. Scot.* p. 61. to 84. Notwithstanding the above acts of general dissolution, by which those who had obtained grants of any part of the annexed lands in feu from the sovereign after his majority, without diminution of the rental, seemed absolutely secure in their purchases; yet all alienations of the annexed property, even in feu-farm, granted without a previous dissolution in parliament, (by which must be understood a dissolution of the special lands contained in the grant), are declared null, though they should be ratified by a subsequent statute, 1597, c. 233. and also all those granted by any other holding than feu-farm, except those that had been made in the way of excambion by James VI. or his predecessors, where the lands granted to them were equal in value to those which they had given in exchange, 1597, c. 234.

15. A *second* class of heritable rights which cannot be alienated, is that of entailed lands, granted under the express condition that they should not be sold; which must be subject to the prohibition in the grant. *3dly, Res alienae*, things which belong not to the granter, cannot be disposed of by him. No alienation therefore of an estate *in hereditate jacente*, made by an apparent heir before his entry, is valid; at least its effect is suspended till the granter complete his titles by service and retour; because, till that period, such estate belongs neither to the apparent heir, nor indeed to any one else, *vid. supr. t. 1. § 4.* Leases for a longer term than three years, of the rents of the revenues of boroughs-royal, whether proceeding from lands, fishings, mills, or other subjects yielding a yearly profit, are prohibited

hibited by 1491, c. 36. But there is no limitation with respect to leases or feus of the lands or other subjects themselves ; which therefore may be still lawfully granted by the magistrates and common council, as if the statute had not been enacted, *New Coll.* i. 22. For no more was meant by the legislature, than to forbid the granting of leases to those who thereby became intitled to the tack-duties payable by the proper tacksmen or tenants ; and who, under the pretence of their undertaking the hazard of the deficiencies or bankruptcies of these tacksmen, frequently obtained such general leases at a considerable undervalue : which fort seems to have been known in our law as early as *Iter camerarii*, c. 39. § 37.

16. Those only who could perform military service, were, by the first and genuine feudal rules, capable of receiving or holding a feudal grant : but women, and indeed every one not disabled by special statute, were soon admitted to acquire and to enjoy feus. Even fatuous or furious persons and infants, though they cannot grant, may receive feudal rights by donation, or succeed to them as heirs to their ancestors. By the *Consuetudines feudorum*, neither Jews, heretics, nor excommunicated persons, could enjoy feudal rights. By the ancient law of this kingdom, all who were excommunicated became thereby disqualified from holding or possessing the lands of which they were before the proprietors, either directly or under cover, 1609, c. 3. ; and by the act immediately following, c. 4. the directors of the chancery were prohibited to issue precepts on appraisings deduced by them ; and the treasurer, to receive resignations or grant confirmations in their favour. These acts were ratified under some limitations, 1661, c. 25. But all civil penalties consequent on excommunication are now taken off, by 1690, c. 28. Papists are, by a posterior act, 1700, c. 3. disabled from purchasing by voluntary disposition any heritable right, either in their own name or that of third persons. Every grant executed in breach of this statute is declared void ; and the property of the subject is declared to remain with the seller, as if there had been no grant, without subjecting him to any action at the suit of the Popish purchaser for recovering the price. But this irritancy has been looked upon as so rigorous, and so contrary to the Christian principles of toleration, that there has hardly been one instance of an attempt to take the benefit of it. Though one who is attainted is incapable of acquiring a feu ; yet, by the former practice, a feudal grant made by the sovereign in his favour, was effectual to him ; because the King was understood, by making the grant, to restore him against the forfeiture : but since the union of the two kingdoms, nothing less than an act of parliament can enable a person attainted to hold the property of lands. Where a feu is granted to one who is thus disabled, if the disponent was ignorant of the grantee's attainder, the feu returns to himself ; but if he knowingly makes a grant to a forfeited person, the fisc takes the subject. Those who are denounced rebels at the horn for civil debts are not incapable of holding a feu. Lords of Session, and other members of the college of justice, and all judges or members of any court of justice, are by 1594, c. 216. prohibited to purchase claims of heritable rights concerning which an action is depending, under the penalty of losing their offices, with all the privileges they enjoy in virtue of them : but, notwithstanding this prohibition, the purchase stands good ; the purchaser only incurs the statutory penalty, *Fount. Dec.* 20. 1683, *Purves*. A purchaser of an heritable right from a woman who had been divorced for adultery, and had afterwards married with the adulterer, cannot hold his purchase to the prejudice of the grantor's heirs of her first lawful marriage, or of her other heirs whatsoever ; who will, notwithstanding such alienation, succeed to the grantor's heritage, 1592, c. 117. How far several of the persons mentioned in this section as incapable

of receiving a feudal grant, are incapable also of succeeding to heritage, is to be explained, *b. 3. t. 10. § 8. et seqq.* where the law of aliens, with respect to heritable rights, will be handled.

17. The feudal right is constituted by charter and feisin. By the first feudal customs of Scotland, there was neither charter nor feisin; and the right was completed by that form which was styled a *proper investiture*. *Investiture* is a feudal vocable, denoting the manner of constituting feus, from *vestis*, the vassal being, by the investiture, as it were clothed with the feu. Thus the French use the words *vetu*, and *devetu*, for infest and divest-ed; and the symbols of robes made use of universally in the collation, not only of crowns, but of inferior dignities, as peerages, and other titles of honour, favour this etymology. These robes were, by the ancient usage of this kingdom, immediately after the ceremony of conferring titles of honour, returned to the sheriff who had performed the investiture in the King's name; and the sheriff, as late as Craig's time, *lib. 2. dieg. 2. § 2.* was intitled to a compounded sum in their place. The ancient form of investiture in lands was extremely simple. The superior himself, who gave the right, delivered the possession to the vassal on the ground of the lands, and in presence of the *pares curie*; which of itself perfected the vassal's right. Nor was there any declaration in writing made by the superiors, who in those days could generally use their swords better than their pens. *Curia*, or *curtis*, is the place or court where the superior exercised his jurisdiction over his vassals; and all these vassals, being alike subject to him, and lying under the same obligations to attend his court, were therefore styled *pares curie*. Their presence was, by our ancient usage, so essential to a feudal grant, that it was void without it: and they also had a power of judging in most cases that fell under the superior's jurisdiction, whether civil or criminal; from whence the right which we retain to this day, of being tried in criminal prosecutions by a jury of our *pares* or peers, derives its original. If the superior had no other vassal than him to whom he was making the grant, the vassals of the neighbouring superiors were admitted to supply the place of the *pares curie*. In the course of time, it was judged reasonable, for better preserving the memory of the grant, that the superior should on the ground of the lands give a declaration of it in writing; and in token of his consent, both he and the *pares curie* appended their seals to it. This declaration is called in the books of the feus, *breve testatum*, an attested brief, *l. 1. Feud. t. 2. 3. &c.* and is of the same nature with a charter. When afterwards superiors came to have more frequent avocations, and could not always be present themselves at the investiture, they signed the *breve testatum* in favour of the vassal where-ever they happened to be; and at the same time they ordained their bailie to enter the vassal to the possession, with all convenient speed: which new form was styled an *improper investiture*, where the charter granted by the superior was antecedent to, and distinct from the possession that the vassal afterwards received from the bailie in the superior's name.

18. Craig informs us, *lib. 2. dieg. 2. § 16.* that the traces of the old proper investiture, which was performed *unico contextu*, might in his time be perceived in some parts of our highlands, and in the lands bordering upon England, where the practice was retained of giving possession on the ground of the lands, by the symbol of a stone, a staff, or a bundle of grafs, without any writing, in presence of the neighbouring inhabitants, who were assumed to fill up the place of the *pares curie*. The udal right of the stewardry of Orkney and Zetland is of the same nature. When these islands were first transferred from the crown of Denmark to that of Scotland, the right of their lands was held by natural possession, and might be

be proved by witnesses, without any title in writing ; which had probably been their law formerly, while they were subject to Denmark : and to this day, the lands, the proprietors of which have never applied to the sovereign, or those deriving right from him, for charters, are enjoyed in this manner : but where the right of lands in that stewartry has been once constituted by charter and feisin, the lands must, from that period, be governed by the common feudal rules ; except church-lands whose valuation is no higher than L. 20 Scots, the proprietors of which are allowed, by 1690, c. 32. to enjoy their property by the udal right, without the necessity of renewing their infeftments. Infeftment, or *infeudatio*, though in common speech it be only understood of the feisin, or instrument of possession, is, in its proper sense, synonymous with investiture, and comprehends both the charter, by which the superior signifies his will to grant, and the delivery of the possession in consequence of the charter, *Cr. lib. 2. dieg. 2. § 18.* The word is frequently used for the charter alone, in the *Regiam Majestatem*, and the other old books of our law.

19. By a charter is here understood that writing which contains the grant or transmissiion of the feudal right to the vassal. It imports not, whether it be executed in the style of a disposition, or of a charter, which differs from the other only in form ; or, barely, of a precept of feisin, or procuratory of resignation : for a precept of *Clare constat*, or other precept of feisin, or a bare procuratory of resignation, may supply the place of a charter, because any one of them expresses the present will of the granter to transfer the property. Nay, a disposition, though it should contain a clause obliging the granter to sign a charter, is a valid alienation, without any charter following on it ; and, upon the contrary, a charter, though it should relate to a prior obligation, or though it should bear to be granted agreeably to the conditions contained in a former disposition, is good against the granter, without producing those former deeds. The granter may indeed insist in that case against the vassal to exhibit them, that the effect of the charter may be regulated accordingly ; but if they be lost without fraud, the charter is effectual, *St. b. 2. t. 3. § 14.*

20. Charters by subject-superiors are granted either *a me*, or *de me*. Charters *a me* are those which are holden, not of the granter himself, but of his superior ; and such in an eminent manner are all those that are taken holden of the highest superior, or of the church, or in burghage, where the church or burrough are no more than administrators for the King, *St. b. 2. t. 3. § 27. vers. The doubt is.* The words of such charters are, *Tenend. a me de superiore meo* ; by which is meant, that the superiority is not reserved to the granter, but is transferred from him to his immediate lawful superior. Feisin, if it proceeds on a charter *a me*, is ineffectual till it be confirmed by the granter's superior ; for no lands can be holden of a superior, till he, by some act of his own, shall receive the vassal, or confirm the holding. And it is because charters of this kind require the interposition, not only of the granter, but of his superior, and because vassals were in ancient times publicly received in the superior's court before the *pares curie*, that these charters have got the name of *public rights*. A charter *de me* is that by which the lands are to be holden immediately of the disposer himself, from the words in the charter, *Tenend. de me et successoribus meis*. These rights are sometimes called *base*, from *bas*, lower ; because charters holden of the granter are of a kind inferior to those which are holden of the granter's superior : and sometimes *private* ; because they may be executed in a latent way, without the knowledge of any other than the granter and his vassal ; and consequently, before the establishment of the records, might have been the more easily concealed from singular successors. Charters *de me* are also styled *subaltern*,

subaltern, because they are subordinate to the right which is in the granter himself, in opposition to charters which are either holden of the granter's superior, or confirmed by him. Charters are either original, or by progress. An original charter is that by which the fee is first granted, and it must be the rule for explaining all posterior charters: so that charters by progress are, in dubious clauses, to be interpreted agreeably to the original one; and all clauses in the original charter are in the judgement of law implied in charters by progress, if there be no express alteration, *Cr. lib. 2. diag. 2. § 27.* and *lib. 2. diag. 12. § 9.* All subfeus or charters to be holden of the granter are original; because a new fee is thereby created, which before had no existence. A charter by progress is a renewed disposition or transmissiion of a fee formerly granted, which proceeds, either on retour, or resignation, or confirmation; all which will be considered under their proper heads. Thus charters by the superior to the heir of his vassal, or by a vassal to a singular successor, to be holden of the granter's superior, or charters of adjudication, are all rights by progress; for they are barely transmissiions of a former right. Charters are also divided into voluntary and necessary. Voluntary charters are granted by the superior, of his own free will, without compulsion. A necessary charter, or a charter upon obedience, is that which the law obliges the superior to grant. Thus where a creditor who adjudges his debtor's lands, gives the superior a charge to receive him as his vassal, the superior is laid under a necessity to give obedience to the charge, and to receive the adjudger by giving him charter and feisin.

21. Charters begin with the name and designation (or addition) of the granter, who is the proprietor of the lands disposed. Where there is an uncertainty in whom the property is vested, the grantee may desire, that, for his security, every one who has a claim to the subject may concur in granting the deed: for though the right can be transmitted only by the true proprietor, yet the concurrence of another who is supposed to have also a title to it, is, without vitiating the charter, held as superfluous, or *pro non adjecto*. It has been disputed, whether a charter be valid which is granted by one who is not truly the owner, but to which the owner subscribes as confenter? Craig's distinction upon this question, between a granter who has no shadow of right, and one who has some appearance of a claim to the subject of the grant, *lib. 3. diag. 1. § 29.* seems to be without a real difference. It is a more probable opinion, that as the transference of property is grounded on the proprietor's consent, that consent, in whatever form adhibited, must have the effect, either of transmitting the property, or at least of creating an obligation against the confenter, on which the grantee may bring an action of adjudication in implement; and that this must hold, though he who takes upon him to grant the charter should not have the least colour of a title. In questions which concern the effect of one's subscribing a deed as confenter, a distinction may reasonably be made, between a right of property in land, and that of a debt or sum of money secured upon land. If one who has a claim of property in an heritable subject, consent to a disposition of that subject granted by a third party, his consent is, in the judgement of law, equivalent to a total conveyance of his claim, or at least to an obligation to grant a conveyance; since, if the consent were not so interpreted, it would be quite elusory. But if one who has a sum secured on lands, consent to a disposition granted by another of any lands on which he is secured, his consent imports only, that he is not to use his security to the disturbing of the dispoinee in the possession of his purchase; but by no means to cut himself off from a personal

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fional action against the debtor, or from a real action against any other lands upon which also his debt may be secured, *Home*, 129.

22. After the name and designation of the granter, follows that clause in the charter called *the narrative*, or *recital*. In charters granted by the crown this clause commonly expresses the merit or services of the grantee, as the cause inductive of the grant, if it be an original charter: and as these narratives may be false, our sovereigns have always claimed a power of revoking deeds granted on the suggestion of a false narrative. In charters granted by subjects, the cause of granting is also set forth in the narrative, whether it be for a price, or in implement of a former contract, or a donation, &c. If it bears to be granted for a price, the granter's acknowledgement of the payment, and his discharge of the price consequent thereupon, is full evidence of its being paid; for in rights granted by subjects, a recital, however false, is presumed true against the granter, who himself asserts the truth of it. Yet if it shall appear that the granter, after having got the signed charter in his hands *spe numerandæ pecuniæ*, has fraudulently detained it without paying the price, he is liable *ex dolo*. A charter which proceeds merely from the love and favour which the granter hath for the grantee, is said to be granted for a lucrative or gratuitous cause. If the grant has been made for a price paid, or other valuable consideration, the cause is called *onerous*. To these a third may be added, viz. a rational cause, where it appears reasonable for the granter to execute the deed, though he lies under no legal obligation to it. The different effects of each of these as to the disponee, either in questions with the disposer himself, or with his creditors, shall be afterwards explained. If the narrative expresses no cause, Craig is of opinion, *lib. 2. dig. 3. § 18.* that the question, whether the grant be onerous or gratuitous? may be judged of by the words of alienation. The words *give, grant, and dispose*, he thinks import a donation; but the words *sell and dispose*, imply an onerous cause. Lord Stair, who favours this distinction, *b. 2. t. 3. § 46.* affirms, that if no cause be either expressed or implied, the right is to be accounted gratuitous, *b. 2. t. 3. § 14. vers. 1.* An instance of which he gives, in a right where the dispositive deed is barely a precept of seisin, without reference to any charter or formal disposition, *ibid. vers. 4.*

23. The next clause is the *dispositive*, beginning with these words, *To have given and granted*, or *To have sold, alienated, and disposed*. Here the grantee must be described by his name and designation; and also the particular subject disposed, by its special boundaries or march-stones, or by its situation, or other characters, so that it may be distinguished from all others: for the conveyance of an uncertain subject is inept and ineffectual. In this clause is also inserted, by our present style, the order of succession, and the limitations upon the fee; which, by our ancient forms, were inserted in the clause of *Tenendas*. All subjects which fall not under the appellation of *part and pertinent* of that which is disposed, must be particularly mentioned in the dispositive clause, in order to their being carried by the grant. Nor is it sufficient for that purpose, that they be specially expressed in any other clause; for the chief intention of the dispositive clause is, to mark out and convey to the grantee the whole subjects to which he is to have right by the grant; the other clauses serve for quite different purposes. In charters by progress, whether granted by the crown or a subject superior, a clause is sometimes subjoined to the dispositive, called *De novo damus*, by which the superior grants *de novo* the subjects, rights, or privileges, therein described. These clauses are commonly inserted, where a vassal, sensible of a defect in his former right, or of heavy burdens chargeable upon it for the casualties remaining due to the superior, applies to have his right

renewed by the superior, with a clause of *novodamus*; by which the vassal is effectually secured against the defects of his former right, and against the consequences of all arrears formerly incurred by him. For a charter of *novodamus* is, in the judgement of law, an original right; and an original grant implies a release to the vassal from all burdens affecting the property previously to the date of it. One might imagine, from the words of this clause, that it ought to contain a grant of no subject which had not been made over to the vassal in a former charter; for the expression *de novo damus* seems to import, that the right of that very subject had been formerly made over to the vassal, and that the superior then granted it to him of new; and indeed they are for the most part no more than renewed rights: yet it has been adjudged, by repeated decisions, that a charter of *novodamus* may be itself a first grant, as well as the renovation of a former; and that every subject or right expressed in the clause of *novodamus* is deemed to be effectually conveyed to the vassal, though there had been no antecedent title to it in his person, *Feb. 29. 1680, Scot; July 14. 1737, Heritors of Spey*. In all charters by progress, there is a clause immediately after the dispositive, styled, from its first words, *Que quidem*, which expresses who the former vassal was, and in what manner the right was transmitted from him to the grantor, whether by resignation, or by what other form of conveyance.

24. The next clause in a charter is the *Tenendas*, so called from the first words, *Tenend. prædictas terras*; which points out the superior of whom the lands are to be holden, and the particular tenure under which they are enjoyed, whether by blanch-farm, feu-farm, &c. In this clause, the lands disposed are not only repeated, but, for the vassal's greater security, as seems probable, an anxious enumeration is subjoined of several particulars not expressed in the dispositive clause, *with houses, buildings, tofts, crofts, &c.* But this adds nothing to the right of the grantee: for such of the articles as were truly part or pertinent of the lands disposed, would have been carried by the charter, though no mention had been made of them, either in the dispositive or any other clause of the charter; and such as were neither part nor pertinent of the subject, could not, by the rule laid down *supr. § 23.* be carried, though mentioned in the *Tenendas*, since they were not contained in the dispositive clause. The next clause in a charter is the *Reddendo*, which takes its name from the first words of it, *Reddendo inde annuatim*. By this is fixed the nature and extent of the particular service or duty to be performed or paid by the vassal to the superior; for in all feudal tenures, even the least rigorous, some duty or acknowledgement is due by the vassal. Because the clause of *Reddendo* points out the particular duty to which the vassal is subjected, the duty itself frequently gets the name of the *Reddendo* in our law-language.

25. After the clause of *Reddendo*, follows that of warrandice, or warranty, by which the granter becomes obliged, that the subject made over shall be effectual to the vassal, and not evicted from him by any one as having a better or preferable right to it. The obligation of warrandice is, without any special or express clause, implied in all deeds, either in a more extended or in a more limited degree, according to the nature of the deed. In donations, an obligation is implied, that the donor shall grant no contrary deed, by which the donation may be rendered ineffectual. But as he who makes over a subject gratuitously, is understood to transfer it barely as it was vested in himself when he made the grant, without disabling himself from fulfilling his former obligations, according to the rule, *l. 149. De reg. jur.* the obligation of warrandice extends, in such case, neither to past deeds already granted by the donor, nor even to future, where they are

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are necessary, *i. e.* such as the donor may be compelled to fulfil in consequence of an anterior obligation or promise. Where the deed is granted for a cause, onerous indeed, but below the true value of the subject; or where a doubtful right is, by transaction, conveyed for a compounded sum; warrandice is implied, not only against the granter's future deeds, but his past. In sales of land, or in dispositions for a just and adequate price, an obligation is implied against the granter, to warrant the subject, not only against his own acts, whether past or future, but against all defects that may appear to have been in his right to it antecedently to the grant: for an adequate onerous cause implies always absolute warrandice. Nor is it repugnant to this last rule, that in the assignation of a debt, decree, or other personal right, the implied warrandice does not extend to the solvency of the debtor, but barely to the validity of the debt, though the cedent should, at assigning the debt, have received from the assignee the whole sums contained in it; see *Fount. March 4. 1707, Riddel*; for the assignee's loss in such case arises, not from any defect in the debt or decree assigned, but from the insolvency or disability of the debtor. And this is also agreeable to the Roman law, by which the granter of the conveyance of a debt was bound in no higher warrandice than *debitum subesse*, that the debt was legally due; but he was not understood to warrant *debitorem locupletem esse*, that the debtor was able to pay, *nisi aliud convenerit, l. 4. De hered. vel act. vend.* A bare consenter to a charter or disposition is liable in no degree of implied warrandice: for he is not the seller; he only gives his consent at the desire of the purchaser; which, though it imports a conveyance of all right that he the consenter can claim in the subject, cannot be stretched to an obligation of warrandice against him.

26. Warrandice, when it is expressed in the charter, is either personal or real. Personal warrandice, where the granter is bound only personally, is either general or special. A general clause of warrandice is that by which the granter warrants the deed, but without specifying by what kind or degree. And this clause infers no stronger obligation upon the granter, than if the clause had been omitted; for it is explained into an higher or lower degree of warrandice, according to the rules set forth in implied warrandice. Special warrandice is, either, *first*, simple, that the granter shall do no act inconsistent with the grant; which is of the same nature with that implied in donations. *2dly*, Warrandice from fact and deed, that the granter neither shall do, nor hath done, any contrary deeds; which answers to the warrandice implied in transactions. And this kind is sometimes so expressed as to extend also to the deeds of the granter's ancestors and authors, from whom he himself derives right. *3dly*, Absolute warrandice *contra omnes mortales*, or, as it is commonly translated, *against all deadly*; by which the granter becomes liable, though he or his authors have done no deed counteracting the warrandice, if, through any defect in the right, the subject warranted be evicted, either wholly or in part, from the disponent, by a third party. The clause of absolute warrandice is sometimes so conceived, that the granter is not bound farther than to the extent of the sums received by him in consideration of the right.

27. As, in assignations of debt, implied warrandice reaches not to the solvency of the debtor, because that does not proceed from any defect in the right; so also, though the cedent should bind himself expressly in absolute warrandice, his obligation would import barely, that the bond is a valid deed, not to be impeached by any legal exception, *Nov. 24. 1671, Barclay*; even though it should be conceived in the following words, *that the sum shall be effectual to the assignee, Dec. 12. 1671, Liddel*. And this doctrine holds in every case where the principal subject conveyed is a bond, account,

count, decree, or other voucher of a debt, though the granter should, in farther security of the assignee, make over to him an apprising led upon the debt assigned, with absolute warrandice, *Harc. 1015. 1016.* Express warrandice prevails over that which is implied, though Craig seems to affirm the contrary, *lib. 2. dig. 4. § 1. 2.*; for all obligations, in lawful matters, must be binding on the parties obliged. And therefore, if one who makes a gratuitous grant, shall, *sciens et prudens*, bind himself in absolute warrandice, he ought, both in law and equity, to be tied by his obligation. And, on the other hand, where a subject is made over for an onerous cause, the grantee may without doubt undertake the hazard of all the defects in the right, by accepting of the disposition, with warrandice from fact and deed, *Jan. 1732, Craig*; for, in all these cases, *pacta dant legem contractui*, and *volenti non fit injuria*. Yet, first, a clause exempting the granter from warrandice in the most express terms, is not sufficient to secure him if he shall afterwards grant an inconsistent deed; for no agreement, let it be ever so explicit, ought to protect against the consequences of fraud or deceit. 2dly, In grants by the crown, no action of warrandice lies against the sovereign, though they should contain an express obligation to warrant; for such clause is presumed to have crept in *per incuriam*, through the carelessness of the crown's officers, by whose negligence the King himself ought not to suffer. But the sovereign, when he grants a charter, not in consideration of the grantee's services, as sovereign, *jure coronæ*, but *tantumquam quilibet*, for a just price, must be liable to the common rules; *utitur jure communi*; and therefore he, and his heirs who succeed to him in his private patrimony, are liable in the same degree of warranty as other granters, according to the nature of the right: yet such warrandice cannot affect the patrimony of the crown. 3dly, Churchmen, who had feued or let in lease any part of their church-lands, which were afterwards annexed to the crown in 1587, were not obliged in warrandice, except from their own fact or deed, to the feuers or tacksmen, though they had, by an express clause, warranted their rights; because these lands were, by a public law posterior to their grants, annexed to the crown, 1587, *c. 29. vers. 4.*

28. Warrandice is real only in two cases: First, Where some lands are principally and presently made over to a purchaser; and others, which get the name of *warrandice-lands*, are disposed only eventually in security of the principal lands. The purchaser who has this security, may have recourse to the warrandice-lands, in the event that the principal lands are evicted or carried off from him; but except in the case of eviction, the purchaser acquires no right in them; for they are disposed merely to secure him in the lands, the property of which is presently transferred to him. The purchaser, if the principal lands be evicted from him, must obtain a decree, declaring, that the warrandice is incurred by the eviction, before he be intitled to recourse on the lands disposed to him in warrandice. 2dly, Warrandice may be real, by the excambion or exchange of one piece of land for another: for if, after the excambion, the lands exchanged be evicted from any of the contracting parties, he who suffers the eviction hath recourse upon his own original lands which he gave in exchange for the lands evicted, not only against the heirs of the party with whom he made the exchange, but against his singular successors; that is, all who have acquired any right to them since the excambion, though such right may have been granted previously to the eviction, *Nov. 25. 1623, E. Melro's contra Ker*. And this recourse is competent, not only to the excamber himself, and his heirs, but to all to whom he shall make over the subject excambied by singular titles. This kind of warrandice is constituted by the law itself, without the convention of parties; and may therefore be called *implied*:

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plied: for though no right should be reserved on the subject exchanged, yet the moment after eviction, the right that the party distressed had before to his own original property, *eo ipso* revives. Nor is he under any necessity to prove his right in that subject, otherwise than by the recital in the contract of excambion; because it is to be presumed, that when the exchange was made, he delivered his title-deeds to the other party contracting, *July* 14. 1629, *L. Wards*. To constitute this sort of warrandice, the deed by which the lands are exchanged, must expressly bear to be an excambion.

29. Warrandice, though only from fact and deed, may, in some cases, be incurred from the nature of the obligation, without either any defect in the right, or any deed of the granter. Thus if, in a marriage-contract, the rent-roll of the lands allocated for the widow's jointure should be warranted to amount to a determinate yearly sum, the warrandice is incurred by every accident or misfortune by which they are reduced to a lower rent, *ex. gr.* by inundation or famine, let the right itself be ever so unexceptionable; because, in the case stated, the granter is precisely obliged, that the widow shall in no case have a less jointure than the yearly sum mentioned in the contract, *St. b. 2. t. 3. § 46*. All losses or burdens befalling the subject disposed, after the date of the grant, and which had no cause anterior to it, whether by fatality, *March* 10. 1636, *L. Dumipace*, or by a statute imposing an additional tax on the subject, *St. ibid.*; *July* 12. 1667, *Watson*, are upon the purchaser's hazard, and so infer not contravention of warrandice: for as the whole benefit resulting from the improvement of the lands after the purchase, accrues to the purchaser as proprietor, he must also run all the hazards of their becoming worse. Nay, this doctrine obtains, though the supervening burden should be imposed under the authority of a public law prior to the grant, *July* 1. 1676, *L. Auchintoul*, unless the grantee, who knew, or ought to have known, the burden which might be imposed by law on the subject, hath taken care to secure himself, by the granter's express obligation to warrant the right to him against that special burden; see *Harc. 963*.

30. No action upon warrandice lies against the granter, till the subject be actually evicted from the grantee, either in consequence of deeds of the granter counteracting the warrandice, if it be warrandice from fact and deed, or of a defect in the right, if the warrandice be absolute. Yet if a plain ground of distress shall appear from such inconsistent deeds of the granter, he may be sued, even before eviction, to purge all such incumbrances; and if he either cannot, or refuses to purge, immediate action of recourse lies against him at the suit of the disponent, *Feb.* 17. 1672, *Smith*. It is uncontested, that absolute warrandice, after the subject is evicted, founds the grantee in an action of recourse against the granter, for making up to him the full damage he has suffered, either through the contravention of the warrandice, or any defect in the right. An offer by him who warrants a right, therefore, to put the grantee in his own place, by making him full payment of the price he paid for it, with the interest from the time of eviction, is not sufficient: for though this would indemnify the grantee, so that he would be no loser by the bargain; yet the obligation to warrant is not intended barely for indemnifying the purchaser, but for securing him against all the consequences of contravention; and, of course, for making payment to him, in case of eviction, of the full value of the subject at that period, together with the loss he has sustained through the want of it from that time. All writers admit this for law in the warrandice of irredeemable rights of heritable subjects; because there the buyer accepts of the right, with the chance of the lands becoming better or worse; and as he must suffer the loss upon their sinking in value, he ought also to have the

benefit arising from their improvement. But in redeemable and personal rights, *Stair, b. 2. t. 3. § 46. vers. Warrandice hath no*; and *Bankton, b. 2. t. 3. § 124.* are of opinion, that the effect of warrandice ought not to rise higher than the sum paid for the right; because in these the matter is more liquid. This position, if it is to be restricted to the case of implied warrandice, may perhaps be founded in equity: but if they mean absolute warrandice expressed in the grant, it appears inconsistent with the nature of that obligation, which strikes against all defects in the grant itself, whether it be redeemable or irredeemable, unless where the clause of warrandice is limited to the sums received by the granter in consideration of the grant; and no decisions of our supreme court are brought to support that opinion.

31. As warrandice is penal, at least on the part of him who warrants, it is *stricti juris*; and consequently, contravention of warrandice is not easily presumed, nor the obligation to warrant extended beyond the strict letter of it; see *Br. 51*. Upon this ground, absolute warrandice is not incurred by every light servitude that the granter or his authors may have imposed upon the lands conveyed, such as lands are usually charged with; *ex. gr.* aqueducts, passages, or even a moderate thirlage, *June 21. 1672, Sandilands*. But if the servitude be uncommonly heavy, the granter, who makes over the estate *tanquam optimum maximum*, incurs the warrandice. The observation made by *Stair, b. 2. t. 3. § 46. vers. 1.* that the obligation of warrandice in dispositions, because it is personal, is not transferred by the vassal who is vested with it, to his disponee or singular successor, unless it be either specially assigned in explicit words, or generally in the assignation of the title-deeds, seems not to be founded in law; for the right of recourse upon the warrandice being part of the right of the subject vested in the disponent, ought, as such, to be carried from him, who divests himself of all right he can claim to it in favour of the disponee, though it should not be conveyed *per expressum*. But indeed this observation can be of little use in practice; because dispositions, by their uniform style, bear a clause, conveying all the title-deeds of the subject disposed in favour of the disponee. Where a person who makes a grant of lands, warrants them to the purchaser, but excepts from the warrandice a special right, which he apprehends may be preferable to his own, that exception cannot hinder the purchaser from strengthening his title, by bringing a reduction of the right excepted; for the import of such exception is merely to cut off from the purchaser all claim of recourse against the granter, in case that right should have the effect of evicting the subject from the grantee, without the least intention to favour third parties, or to make that right a good one to him in whom it is vested, *July 18. 1710, Gibson of Dury*.

32. Where lands are threatened to be evicted from a purchaser by a right preferable to that which he got from the seller, the purchaser ought in prudence to intimate to the seller his distress, that so he may defend the right granted by himself: and this prevents the seller from pleading, that the purchaser had suffered the lands to be evicted from him by collusion or negligence; for if it shall appear that the eviction was occasioned by a fact or omission imputable to the grantee himself, he cannot be allowed to throw his loss upon the granter, who was not to blame, let his obligation of warrandice be ever so strong. Yet intimation of distress is not precisely necessary; for the purchaser's right of recourse continues competent to him, without such intimation, if evidence is not brought, that in the action of eviction he had submitted to some irrelevant defence, or subjected himself to an incompetent mean of proof, *June 23. 1681, Clerk*. And upon this ground it was decided, that though no intimation of distress was made, the purchaser,

purchaser, from whom the lands were evicted, might in his action of recourse found his plea upon the proof that was brought in the former process of eviction pursued against himself, reserving to the granter of the warrantice all objections against the validity of that proof, *tanquam in bello*, *Falc.* ii. 2.

33. Long after the proper manner of investiture fell into disuse, in which the possession was delivered to the vassal *unico contextu* with the charter, notarial instruments of feisin were unknown in Scotland. The feudal right was accounted complete, if the superior's bailie, who had given possession to the vassal, affixed his seal to the charter, in testimony that possession was truly given, *Cr. lib. 2. dieg. 7. § 2.*; or if the bailie signed a declaration even in a separate writing, that he had given possession; of which declarations some are yet extant, dated about the year 1400. And indeed, as in those early times, before the attestation of a public notary was made an essential part of the investiture, the express will of the superior, joined to the natural possession of the vassal, was, by the general rules of law, sufficient to vest the full property in him, a proof brought of the vassal's immemorial natural possession of the lands contained in the charter, founded a presumption, that he had been lawfully entered into it by the superior, without any declaration, either by the superior or his bailie, attesting that fact, *June 24. 1625, Bor. of Stirling*. At last, after the beginning of the fifteenth century, a practice was introduced, which soon became universal, that the superior delivered to the vassal, along with the charter, a precept of feisin, which, for above two centuries together, was made out in a writing separate from the charter, till it was enacted, by 1672, *c. 7.* that all precepts, on charters granted by the crown, should be ingrossed in the charter, towards the end of it; that is, immediately before the testing clause. This provision was soon after extended, by uniform custom, to precepts flowing from subject-superiors. Now therefore all charters, without exception, conclude with a precept of feisin; which may be defined, a command by the superior who grants the charter, to his bailie, to give feisin or possession of the subject disposed to the vassal or his attorney, by the delivery of the proper symbols. *Bailie* is derived from the French *bailler*, to deliver, because it is the bailie who delivers the possession at the superior's command. Though the name of the bailie to whom the precept is directed, is left blank, and any person whose name may be lawfully inserted in the blank, can execute the precept, by giving feisin to the vassal; yet the precept must contain a special mandate to invest the vassal, which cannot be supplied by any general powers, however ample; because a power granted by the superior to divest himself of heritage, is not to be presumed. Whoever hath this precept in his hand, is, on the contrary, presumed to be the vassal's attorney, for receiving possession in his name, without any special power for that purpose, because the receiving of possession is an act beneficial to the vassal. But this presumption does not exclude a contrary proof, where the taking of feisin appears hurtful to the vassal, in whose favour the precept was granted. An example of this is given by Craig, *lib. 2. dieg. 7. § 6.* A creditor of a person deceased had procured feisin to be taken upon a retour in the name of an apparent heir, without his knowledge, in order to subject him to the ancestor's debts: on evidence of the fraud, the feisin was declared void.

34. This precept or warrant for taking investiture is executed by an instrument of feisin; which may be defined, the attestation of a public notary, that possession was truly given by the superior, or his bailie, to the vassal, or his attorney, in pursuance of the precept, by the delivery of the proper symbols. By *instrument*, in the Roman law, is frequently meant any voucher or evidence in writing; but we use it in a limited sense, to denote

denote the written attestation of a particular fact or facts, under the hand of a public notary. Craig conjectures, *lib. 2. dig. 2. § 18.* that instruments of feisin were not used in Scotland till the return of James I. from England; but many feisins are yet extant, dated about the beginning of that century, before his return, the style of which differs little from the present. After notorial instruments were first used with us, they were not only sustained as full evidence of the vassal's entry into possession, but have been accounted a necessary solemnity for perfecting the feudal right, not to be supplied by a proof, either of natural possession, or even of that special fact asserted in all feisins, that the vassal was entered into the possession by the superior or his bailie: and hence, the maxim hath arisen, *Nulla sasina, nulla terra.* This rule suffered, by our more ancient usage, an exception in the case of charters granted to communities, which were adjudged to require no feisin, *Hope, Seisin, July 9. 1625, Bor. of Peebles*; but by later decisions, feisin is essential to the first constitution of feudal grants, even where they are made to corporations; because without it, the granter cannot be divested. But infeftment need not be renewed at any time after; for feisin is never renewed, except upon the change of a vassal; and communities never die, but continue always the same, after the death of the present members, in the persons of their successors.

35. An instrument of feisin recites the whole ceremony observed at the taking of infeftment. First, Either the vassal or his attorney appears on the lands of which feisin is to be given, holding in his hand the precept, which he delivers to the superior, or in his absence to the bailie. The bailie immediately delivers it, in the presence of witnesses, to the notary, who is to extend the instrument. Then the notary reads the precept; after which the superior, or his bailie, delivers to the vassal, or his attorney, earth and stone of the lands, or the other proper symbols, if the right granted be not a right of property in lands. Lastly, The vassal, by himself, or his attorney, takes instruments in the hand of the notary, before witnesses, that he hath received state and feisin of the lands in due form. On this whole transaction, an instrument is extended in writing by the notary, who, after reciting in it the precept of feisin, and as much of the charter as is necessary for understanding the precept, subjoins his own attestation, That he having been specially called for that purpose, knew, saw, and heard, that these facts were so done as they are recited in the instrument, to which he and the witnesses adhibit their subscriptions. Seisin, when given by the superior himself, and not by his bailie, is called feisin *propriis manibus*, of which we have few instances, except in rights which are granted to the wife, children, or other persons who are most intimately connected with the granter.

36. The symbols by which the delivery of a feudal subject is expressed, are different, according to the different nature of the subjects that may be made over by a superior. The symbols for land, are earth and stone; for mills, clap and happer; for fishings, net and coble; for parsonage-tithes, a sheaf of corn; for tenements of houses within borough, hasp and staple; for patronages, a psalm-book, and the keys of the church; for jurisdictions, the book of the court, &c. Sometimes symbols are authorised by custom to stand in place of delivery, which have no resemblance to the subject conveyed. Thus the symbol in resignations, which was originally a pen, has been now, for centuries past, staff and baton; which hath nothing analogous, either to the subject resigned, or the act of resigning. *Stair, b. 2. t. 5. § 3.* and *Mackenzie, b. 2. t. 8. § 15.* are of opinion, that the symbol of a right of annualrent is either a penny money, if the annualrent be payable in money, or a parcel of corn, or victual, if it be payable in victual: and though others maintain, that

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that the symbol for all rights of annualrent ought to be earth and stone; because they are rights annexed to land; and that the additional symbol of a penny, or a parcel of corn, ought to be joined to that other symbol, as the annualrent is payable in money or in victual; yet no good reason can be assigned, why earth and stone should make any part of a right of annualrent, since the property of land is not thereby intended to be conveyed, but merely a rent issuing from it; which is aptly enough figured by a penny of money, or an handful of grain. Doubtless custom is sufficient to decide this point; and till long uniform custom shall have fixed it in one way, feisin taken in either way will be received. Though feisins ought regularly to bear the special delivery of the proper symbol, yet the court of feisin have, in consideration of particular circumstances, sustained feisins which mentioned barely, that actual, real, and corporal, possession of the lands was given, *June 17. 1630, E. Wigtoun*; or which bore delivery of the ground of the lands according to the precept, *Dec. 23. 1680, L. Lamerton*; or of earth and stone of the land and mill, *cum omni juris solemnitate, March 15. 1631, L. Smeton*. Seisin must be taken on the ground of the lands contained in the precept: but this rule may, in cases of necessity, be dispensed with by proper authority; as it was in the feisin of Nova Scotia and Canada in favour of Viscount Stirling, which by the King's special appointment was taken at the gate of the castle of Edinburgh, *St. b. 2. t. 3. § 18.* and afterwards ratified by parliament, 1633, *c. 28.*

37. Seisin of all lands, whether holden of the crown, or of a subject, might by our old law have been given in consequence of the precept, by any person whom the superior appointed for bailie; and the instrument might have been extended by any notary: but by 1540, *c. 77.* and 1555, *c. 34.* all feisins upon precepts issuing from the King's chancery are ordained to be given by the sheriff as bailie, and to be extended by the sheriff-clerk, or his deputy, as notary. These statutes are restricted by a posterior declaratory one, 1606, *c. 15.* to feisins on such precepts issuing from the chancery as pass to heirs upon retour; because when an heir is to enter by retour to lands holden of the crown, he becomes debtor to the crown in the casualties of non-entry and relief; and therefore the precept ought to be executed by none other than the King's sheriff, as his bailie; whose duty it is to receive payment, or take security for these casualties, and to account to the crown for them; whereas precepts issuing from the chancery upon resignation are not directed to the sheriff of the shire, (because in these the crown's demands on him who is applying to be infeft are fully paid at passing the signature of his charter), but to the sheriff in that part, *i. e.* to any one who may be filled up in the blank; and who is perhaps called *sheriff in that part*, because he is to perform the sheriff's office in that special matter. This reason of the difference between the two was suggested by Craig, *lib. 2. dieg. 7. § 22.* before the declaratory statute in 1606 was passed.

38. A feisin is barely a relative writing, referring to the precept on which it proceeds as its warrant; and therefore is not received as evidence, unless the precept referred to, which is its warrant, be produced; *non enim creditur referenti, nisi constet de relato*. Yet there are some feisins which admit of no precept; *first*, Seisins by a husband or father *propriis manibus*, which are not given in consequence of any precept or mandate from the granter, but by the granter himself. These are sustained *per se*, without any previous deed under the granter's hand, where the provision is rational, in a question with the granter's heir, *St. b. 2. t. 3. § 19.*; *Mack. § 15. b. t.* But in order to give validity to a feisin *propriis manibus*, where there is no antecedent deed to support it, it must be signed, not only by the notary, but by the granter; for there cannot be in any case an effectual conveyance of

a feudal right, without some deed signed by the proprietor divesting himself; and the law gives no credit to a notorial feisin *per se*, which is but the assertion of a third party, as evidence that the proprietor was divested, *Pr. Falc.* 28. And hence it is, that a feisin on the superior's precept of *Clare constat*, in favour of an apparent heir, is not valid, unless it be supported by writings which prove, that the lands contained in the precept have been vested in the heir's ancestor. 2dly, A feisin of burgage-tenements, given by the magistrate of a borough to an heir by half and staple, can have no precept for its warrant; because in that form of entry the magistrate, after the heir's propinquity to his ancestor is proved, gives him feisin by his own hand. These feisins therefore are full evidence, both of the heir's propinquity, and of his being entered into the possession, without any adminicle, *St. b. 2. t. 3. § 19. vers. Feisins within b.*; but the ancestor's titles to the subject must be proved *aliunde*. Feisins *propriis manibus*, even of burgage-tenements, when they proceed upon resignation in favour of singular successors, are accounted null, without proper adminicles or vouchers supporting them, *St. ibid.*; *Harc.* 592. An instance will be given *infr. t. 7. § 25.* in which one who possesses under a feisin which had a precept for its warrant, is exempted from the necessity of producing the precept.

39. Instruments of feisin were, for a long time, not discoverable by creditors or purchasers, after the strictest inquiry. The protocol books given by the clerk-register to notaries at their admission, in which it was their duty to insert, in their own hand-writing, copies of all the instruments made out by them, could contribute little towards the publication of feisins to the lieges; both because the protocols were not ordained to be lodged in any proper office for public inspection, till the year 1587, and because notaries at this day, even when they keep protocols, seldom insert in them any instruments which are not thought of more than ordinary importance. They were truly calculated for no other end, than to make the use of all notorial instruments more certain to the proprietors, by their having access to the notary's protocol for recovering them, if through any misfortune they should have been lost. This latency, as we express it, of feisins, rendered all conveyances of heritable rights most insecure; for purchasers could not know by any research, whether the lands for which they were to give their money, had not been formerly sold, or charged with debts. The first statutes enacted for publishing feisins were, 1503, *c.* 89. and 1540, *c.* 79.: by which sheriffs who gave feisin of lands holden of the crown, were obliged to bring yearly to the exchequer a note, subscribed by themselves, of the dates of those feisins, and of the description of the lands contained in them, to be entered into a record of that court. This was, with some additions, extended by 1555, *c.* 46. and 1587, *c.* 64. to all feisins, even of lands holden of subjects: but as no abbreviate was thereby directed to be taken of any other real right than of feisins, and as, in the abbreviate of feisins, it was not made necessary to insert any of the conditions or limitations affecting the right, a more certain provision was made for the security of purchasers and creditors, by two unprinted statutes; the one passed at Falkland July 31. and recorded in the books of session November 3. 1599; the other at Edinburgh, Nov. 1600, contained in the list of the unprinted acts of that parliament, N^o 34. and referred to in an act of federunt, Jan. 6. 1604, enacting, That the full tenor, not only of feisins, but of several other real rights therein mentioned, should be registered within forty days after their dates, in the register of the secretary, under the sanction of nullity.

40. As it appears by the before-cited act of federunt, Jan. 6. 1604, that those unprinted statutes were but little observed, a third act passed, 1617, *c.* 16.

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c. 16. printed in our statute-book; by which all reverfions, regreffes, bonds for making reverfions and regreffes, affignations and difcharges thereof, renunciations of wadsets, grants of redemption, and instruments of feifin, are ordained to be registered within fixty days after their dates. The whole kingdom is, by this act, divided into a certain number of diftricts, and a fpecial register appointed for each of them, without precifely obferving the limits of our counties. Thus feifins taken of lands within the ftewartry of Monteith, which lies locally in the fhire of Perth, muft be recorded in the register of the county of Stirling. Thus alfo one register is made to ferve for the three fhires of Aberdeen, Bamff, and Kincardine; and fo of fome others. It is left to every one's option to record his feifins, reverfions, &c. either in thofe particular registers, or in the general register at Edinburgh appointed for that purpofe: And if the lands lie in two or more different diftricts, the right muft be recorded, either in the particular register of each of thefe diftricts, or in that general register at Edinburgh, which will ferve for all. If feifins are not thus recorded, the act 1617 declares, That they fhall make no faith in judgement, to the prejudice of thofe who have acquired right to the lands contained in them; referving liberty to the obtainer of the feifin, to ufe it againft the granter and his heirs. The not registration, therefore, does not avoid the feifin; it is only a ground for poftponing it in a queftion with third parties, who may claim the fame fubject under a title which has no dependence upon that feifin. Hence tenants fued by their landlord for rent, cannot object againft the purfuer, that his feifin is not registered; for let the landlord's right be ever fo lame, it is the only foundation of theirs. And this is alfo the cafe of a vaffal, who cannot object the want of registration againft his fuperior's feifin, upon which alone his own right is grounded. Neither can this exception be moved, even by one who has a preferable title, if he be heir to the granter of the unregistered feifin; for the ftatute exprefsly referves the full effect of fuch feifins, not only againft the granter himfelf, but againft his heir, *June 30. 1705, L. Ludquhairn*. The hiftory above related of this part of our law, ferves to explain a paffage in Craig, *lib. 3. dieg. 3. § 25.* which might otherwife embarrafs the reader, and feems to have miffed Lord Stair in his reafoning, *b. 2. t. 11. § 11.* Craig, in that paffage, takes it for granted, that a feifin not registered within forty days after its date, is void; whereas, by the only printed ftatute relative to that matter, feifins may be registered within fixty days: and though they fhould continue unregistered, they are not utterly void, fince full effect is referved to them by the act againft the granter and his heirs. But no obfcurity remains, when it is attended to, that the printed ftatute in 1617 had not paffed when Craig's treatife was compofed; and that the unprinted acts then in force, required the registering of feifins within forty days, under the fanc-tion of abfolute nullity.

41. From this act, ordaining the registering of feifins, burgage-feifins are excepted. It had been enacted by a former law, 1567, c. 27. That all feifins of burgage lands and tenements fhould be given by the bailie of the borough, and the instrument made out by the common clerk; otherwife that they fhould be void. After the paffing of this ftatute, the common clerks, who alone could be notaries to burgage-feifins, were tolerably exact in booking them in their protocols; which Mackenzie, in his obfervation on that ftatute, affigns as the reafon, why feifins within borough were excepted from the pofterior act 1617. But as the fecurity of fingular fucceffors remained ftill imperfect by this exception, depending entirely on the diligence and probity of the common clerks, and as their exactnefs was fometimes perceived to fail, particularly in a cafe *June 30. 1668, Burnet*, the

the court of session, by act of federunt, *Feb.* 22. 1681, declared, that they would hold all feifins granted within borough, which were not registered in the borough-books after the manner prescribed by the act 1617, as fraudulent deeds: And immediately after, a statute passed in parliament, 1681, *c.* 11. extending the regulations of 1617, *c.* 16. to feifins within borough. In this act, it is also declared, that the books of the town-clerks of boroughs shall depend on their own magistrates, and not on the clerk-register. Though, when a borough happened to be without magistrates, feifin of the tenements within that borough, given by the sheriff of the county, has been sustained from the necessity of the case, *July* 21. 1666, *Thomson*; yet the expedient mentioned *supr. b.* 1. *t.* 3. § 23. is now generally made use of for supplying that temporary want.

42. Where feifins, or other real rights, were recorded in pursuance of the act 1617, the principal writings, after they were entered into the record, were delivered back to him who presented them for registration, with an attestation, signed by the keeper of the register, that they were so entered: And because the keeper sometimes neglected to enter them in the register-book, it was enacted by 1686, *c.* 19. That though no entry should be truly made, the writings were to be held as registered, if they were given back to the party, with the usual attestation subscribed by the keeper. This act was, as Lord Stair justly argues, *b.* 2. *t.* 3. § 22. utterly inconsistent with the former law, which it pretended barely to explain; and at the same time destroyed the security of singular successors, who could not, by any search, discover feifins, or other real rights, which had never been inserted in the record. It was therefore found necessary to declare, by 1696, *c.* 18. that no feifin, nor other real right, appointed to be recorded by act 1617, should be of force, if it was not booked and inserted in the register: And the party who shall lose his preference by the negligence of the clerks or keepers, in not registering the writings presented to them, is, by that statute, intitled to an action of damages, not only against the clerks themselves, but against their heirs, though no such action should have been commenced in the clerk's lifetime; which penalty, against the heir of the clerk, is introduced in odium of such negligence, contrary to a rule to be explained, *b.* 4. *t.* 1. § 14. It was long made a doubt, whether, in a competition between two feifins, both registered within sixty days after their dates, in pursuance of the act 1617, the feifin first in date, or that which was first registered, tho' posterior in date to the other, ought to be preferred, *Steu. Ans. v. Seifin*. But this doubt is removed by 1693, *c.* 13. which enacts, that all real rights, on which feifin shall be taken, shall be preferred according to the priority, not of the feifins themselves, but of their registrations: the reason of which is given in the act immediately following, *c.* 14. viz. that though real rights should be registered within sixty days after their dates, they continue latent, as to singular successors, till registration; for the date of a feifin cannot be known till it be registered. Though a competition between two feifins of lands holden of the granter, is determined solely by this rule of preference, something more is required in rights which hold of the granter's superior; for as no feifin upon a public right is valid, till it be confirmed by the superior, the preference, in a competition between two such rights, depends, not on the date of the registration of the feifins, but of the superior's confirmation, 1578, *c.* 66.; *vid. infr. t.* 7. § 14. 15.; *St. b.* 4. *t.* 35. § 10. But if feifin was not taken upon the public right till the superior had confirmed it, the date of the registration of the feifin is the rule of preference, *St. ibid.* § 11. and *Append.* § 2. From this rule, that feifins are preferable according to the dates of their registration, several exceptions are

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are at length mentioned by Stair, *b. 4. t. 35. § 13. to 25.*; all of which shall be explained under their proper heads.

43. An instrument of feisin cannot be supported against an allegation of forgery, by producing an extract of it from the register of feisins; for as the principal feisins are, upon the registration, delivered back to him who presented them, that register serves only for publication to the lieges, not for the custody or preservation of the original instruments: but in every other case, the extract of a feisin is as probative as the principal itself. Where the principal feisin is lost, it may be renewed by the notary in whose hand it was taken, from his protocol, if the witnesses be still alive to attest it; and this instrument will be as effectual in all respects as the one lost, since both are the attestations of the same facts, by the same notary and witnesses. It is therefore the duty of the keeper of the register, to mark the renewed instrument as registered of equal date with the registration of the instrument lost, *Jan. 2. 1678, Ramsay*. If the notary or witnesses be dead, the feisin may be transumed upon production of the protocol; which is likewise deemed to be as sufficient as the original feisin, *St. b. 2. t. 3. § 25*. It was chiefly with a view to those transumps, that all protocols were ordained, upon the notary's death, to be lodged in the register of the session for public use, 1587, *c. 45*. If the notary neglected to keep a protocol, the tenor of the feisin may be proved on proper adminicles.

44. In particular cases feisin is not required to a right of land. Thus, as the sovereign is by the feudal system the highest superior of his whole territories, and the common fountain from which every feudal grant flows, the right in the crown over all the lands within the kingdom is constituted *jure coronæ*, without feisin. His being King completes his right as fully as a feisin does the rights of subjects. And, in truth, feisins in favour of the crown are not only unnecessary, but inept; for feisin supposes a superior by whom it is given; which supposition can have no place as to the sovereign. As a consequence of this, lands holden of the crown, when they fall to the King by forfeiture, are *eo ipso* consolidated with the superiority. But where the King succeeds in a feudal right to any of his subjects, it behoves him to be served heir in special to the deceased, as Charles I. was to Queen Anne his mother, in the lordship of Dunfermline, and Charles II. to the Duke of Lennox, in the earldom of Lennox. And this service, after it is returned to the chancery, establishes of itself a perfect right in the sovereign. It is affirmed by Stair, *b. 2. t. 8. § 35. vers. Ecclesiastical benefices*, that though patronages are ordinarily conveyed as annexed to lands, yet they may pass by separate gifts, as *jura incorporalia*, without feisin; and he instances particularly in the crown's patronages, which the King may transmit to any of his subjects by separate grants. As to which, it would seem, that though in the first constitution of a patronage, *ex. gr.* in the founding of a church, the founder acquires the patronage *ipso jure*, without feisin, and may transmit his right in the same way to another; yet if that patronage comes afterwards to be conveyed, in a disposition annexing it to lands, and followed with feisin, all subsequent disponees must also complete their right to it by investment, *New Coll. i. 84*. In other cases, one feisin may serve for many different lands. In several parcels of land which lie contiguous to one another, one feisin serves for all, with the following exceptions. *First*, Lands, though contiguous, which are holden of different superiors, being distinct tenements, require each of them a distinct feisin. *2dly*, Contiguous lands, though they hold of the same superior, if they have been conveyed by him to the vassal by different tenures, are truly distinct fees; and therefore feisin must be taken separately on the ground of each of them. *3dly*, Two conterminous tenements pos-

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feffed by two different vassals, one of whom becomes afterwards proprietor of both by purchase, require each of them a separate feisin, though both tenements should be holden of the same superior, whose right to them is contained in one and the same charter; since though both are united in the superior's person, yet as to the vassal, who enjoys them under different titles, they are distinct subjects, *July 1729, Bank of Scotland*. It is a common opinion, that though two conterminous tenements should be contained in the same right, yet, if they are of different kinds, each must have a separate feisin; and tenements are said to be of different kinds, when they have different symbols of possession. Whence it is inferred, that if a land-estate be passed over, together with a mill, the mill, though it stands on the ground of the lands contained in the grant, must have a separate feisin from the lands, because their symbols of possession are different, *Mack. § 17. b. t.* But this doctrine, though it be both taught by writers, and observed in practice, is hardly reconcileable to principles. Doubtless, where a mill is disposed of without the land, the purchaser must be infeft in the mill by its proper symbol, clap and happer: but where a charter carries right both to the lands, and to the mill which stands upon them, why should not a feisin of the lands include the mill, which is a proper part of them, by the same reason that it includes houses, orchards, and even coal? For though, when a right is granted to the coal by itself, without the lands, the coal becomes a separate tenement, and so must have a separate feisin; yet where a charter is granted of lands where there is coal, it was never doubted but that the full feudal right to the coal is carried by a feisin of the lands, because the coal is truly *pars fundi*, *Jan. 30. 1662, Lo. Burleigh*.

45. Where lands lie discontiguous, though all the tenements should be of the same kind, and holden by the same tenure, and derived from the same author, under the same superior, there must be a special feisin for each, unless the King shall have united them into one tenantry, by a charter of union, *i. e.* by a charter in which the sovereign dispenses with the necessity of taking a separate feisin upon every discontiguous tenement, and declares, that one feisin shall be sufficient for the whole. If the charter of union expresses the special place where feisin is to be taken, that must be the rule; and a feisin taken any where else, reaches only to the contiguous lands, *March 19. 1636, L. Lauriston*. But if no place be expressed, feisin taken on any part of the lands united will serve for the whole, *St. b. 2. t. 3. § 44.*: for it is implied in the very notion of union, that the lands united by the charter receive the same quality as if they had been conterminous, or naturally united; and if a clause of union be not allowed to have this effect, it can have none. Bankton affirms, *b. 2. t. 3. § 40.* that in lands holden of the crown, lying in different counties, the precept of feisin upon the heir's retour must be directed to all the sheriffs of the several counties where the united lands lie. But this appears to be a mistake in fact: for, by the constant usage, the precept is only directed to the sheriff of that county where the heir intends to take feisin; and feisin taken in consequence of that precept serves for the whole. Where lands are derived from different authors, or holden of different superiors, or of the same superior by different tenures, such lands are incapable of union: for union has this only effect, to give the discontiguous lands the same quality as if they were naturally united or contiguous. In consequence of the received opinion, that separate seisins are always necessary in tenements of different kinds, *ex. gr.* lands, mills, fishings, &c. feisin was by the uniform practice taken of each of these tenements, though they were united by a charter of union; but now it is, by the constant style, expressed in all charters of union, that the symbols of earth and stone shall serve for the delivery, not only of the lands

lands themselves, but of all the other feudal rights or subjects conveyed by the charter, let them be ever so different in their natures. Craig maintains, *lib. 2. dieg. 7. § 19.* that the disposing of any one part of the lands united dissolves the whole union, just as a bundle of arrows tied together will fall asunder if but one arrow be drawn out. But the doctrine laid down by Stair, *b. 2. t. 3. § 45.* appears better founded, that a grant of part of the lands united dissolves not the union as to the part which remains undivided; because the sovereign, when he unites discontinuous lands, unites every part of them to every part; so that the dividing of one part operates only as to the part withdrawn from the union by the alienation: and though numberless instances have occurred, where that objection might have been made to a feisin, after part of the lands united had been sold, it was never doubted, but that the parts not made over continued united, so as one feisin should serve for the whole.

46. The erection of lands into a barony confers an higher degree of right on the grantee than a charter of union, *vid. infr. t. 6. § 18.* It hath therefore not only the effect of uniting subjects that are naturally separated from each other by situation, but it makes one feisin serve for all, though the subjects erected should be ever so distinct, as lands, patronages, &c. which could not be done by a bare charter of union, without a special dispensation. No other feudal privileges, higher than those of barony, are included in the erection of lands into an earldom or a lordship, &c.; for these last are only titles of greater dignity conferred upon a barony; but all have precisely the same feudal effects. Craig seems to think, *lib. 2. dieg. 7. § 17. 18.* that any superior, for he does not distinguish between king and subject, may, in the charter which he grants to his vassal, unite discontinuous tenements; probably because he accounted union to be a privilege of less importance than barony: but Mackenzie's opinion, § 20. *b. t.* which is supported by a decision, *Jan. 16. 1623, Aitken*, appears more agreeable to law, that no charter by a subject-superior can confer that privilege on lands, unless the charter be confirmed by the sovereign; because by union the several tenements united acquire a new quality, which exempts them from the common rules. Nevertheless the quality of union, after it is once conferred upon lands by the sovereign, may be transferred or communicated by his vassal to a subvassal, *Jan. 25. 1627, Stuart*. It is agreed on all hands, that a barony can neither be erected by any other than the King, nor after its erection be communicated by any base or subaltern investiture to be holden of the baron himself; because no feudal erection which imports any degree of dignity, as our baronies formerly did, can be granted but by the crown, nor are capable of being enjoyed but by those who hold immediately of the crown. Though a baron, therefore, may make over his barony to be holden *a me, i. e.* to be holden immediately of the crown, on which grant, when it is perfected, either by resignation or confirmation, the grantee acquires the right of the barony itself, with all its consequent privileges; yet he cannot divest himself of the barony by any grant in which he reserves to himself the superiority of the lands; *vid. supr. b. 1. t. 4. § 27.* though he may convey to a vassal the privilege of union, which is implied in barony, in so far as concerns the lands conveyed, *St. b. 2. t. 3. § 45. vers. 1.*

47. Though an erection into a barony was intended merely for uniting the lands as to the vassal, but not for altering their jurisdiction with respect to the shires or stewartries where they lie; yet where lands thus erected were situated in different counties, the inhabitants of that part of the barony which lay in a different shire from the manor-place, claimed anciently an exemption from the jurisdiction of the sheriff within whose territory the lands

lands lay, on pretence that the barony to which they were united was in a different shire. It was, for cutting off this pretence, enacted, by 1503, c. 93. That the inhabitants of all barony-lands should be amenable, or obliged to answer, to the respective courts within which the lands were situated. And this statute is *a fortiori* applicable to lands united by a bare charter of union; for union being still a lesser degree, ought not to have stronger effects, with respect to the exemption of the lands united, than the statute hath given to barony-lands. All feudal privileges intended to be conferred on lands by the sovereign, whether of union, barony, *regalia*, &c. because they are part of the subjects conveyed to the grantee, must be expressed in the charter, which is the deed of conveyance in his favour. The feisin which follows upon the charter is not designed to confer any new right, but barely to perfect such rights as have been before granted by the charter.

48. A charter or disposition which is not yet followed by feisin, creates in the disponee a right barely personal. It lays the granter, and his heirs, under an obligation to divest themselves agreeably to the tenor of the grant: but it has not the effect of transferring to the acquirer the feudal right of the lands; and consequently the subject may be affected and carried off from the disponee, before his taking infeftment, by any debt or diligence which is capable of divesting the disponer, in whom the feudal right of the lands still continues vested. A creditor or purchaser, therefore, contracting with one who has a bare personal right to the subject, rests not on the security of the records, but contracts at his peril, and must accept of the right as it stands, with all its burdens, and be affected with every declaration or deed, however latent, that could affect his author. But from the moment that the author perfects his right by feisin, the grantee, if he purchases from the true proprietor, acquires a complete real right in the subject; which therefore secures him, as soon as his own right is perfected by feisin, against the consequence of all deeds, even feisins themselves, the registration of which is posterior, though the charters that they proceed upon should be prior in date to his. No singular successor, therefore, whose right is thus made feudal by feisin, can be affected by an incomplete or personal right of lands granted by his author to a third party, *ex. gr.* a charter, or an adjudication, on which no feisin hath been taken; nor, *a fortiori*, by the assignation of any such right, *June 20. 1676, Brown*; nor by any backbond or declaration whatsoever, not discoverable in the registers appointed for real rights, unless inhibition or other legal diligence shall be used upon them prior to the feisin taken by the singular successor, which may render the matter litigious, *St. b. 3. t. 1. § 21*. If it were otherwise, creditors and purchasers would reap no benefit from the security intended for them by the establishment of the records. And though the translation of a disposition, adjudication, or other personal right of lands, may, as long as the right continues personal, be burdened with the assignee's backbond or declaration, which will be effectual against his singular successors, *July 6. 1676, Gordon*; yet so soon as the singular successor is infeft upon his translation, the burden or limitation which was laid upon the conveyance, flies off; and that right which was before qualified, becomes absolute; *vid. infr. t. 12. § 36*. This rule secures purchasers, not only in the lands themselves, but in all the privileges which pass as part thereof. Though therefore a landholder should renounce the right he has to insist for a sale of his tithes, such renunciation, however obligatory it may be against the granter and his heirs, cannot affect singular successors; since no personal deed can deprive a singular successor of any right which law considers as inherent in the lands, except where it is contained in the deed making them over,

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over, or recorded in the proper public register, or by diligence made real, so as to burden or qualify the right transmitted. If the real right of an heritable subject cannot be completely vested in him to whom the fee is made over, without feisin, it follows, that any impropriety or mistake in the words of the feisin, must have full effect against the disponent, since it is by the feisin only that the feudal right is perfected: and hence, where a feisin expressed no more, than that liferent state and feisin of the subject was delivered to the disponent, the court adjudged that the bare liferent was the only right that could be carried by such feisin, *New Coll.* ii. 189.

49. The conditions and qualities with which a proprietor intends to burden his grant, ought to be expressed in the deed itself in such words as are proper to constitute a real charge or burden upon the lands; or, as it is called of late, a *lien*, a vocable borrowed from the French, signifying a tie or bond. Where the deed is expressly granted with the burden of a determinate sum therein mentioned, *Fount. Dec.* 14. 1698, *Count. of Rothies*; or with the burden of the payment of that sum, *July* 1719, *Cred. of Coxton*; *Jan.* 10. 1738, *Cred. of Smith*, stated in *Dict.* ii. 66. 67.; or where there is a clause, declaring the right void if payment be not made against a precise day therein specified, *Dirl.* 41.; the burden is accounted real. But where the grantee is, by his acceptance, barely taken bound to make payment of a sum, without any clause, either charging the right itself with it, or declaring the right null upon the failure of payment against the day fixed, the burden is only personal, *Pr. Falc.* 101.; which is indeed obligatory on the acceptor of the grant and his heirs, but constitutes no real incumbrance on the lands. The creditor in whose favour this burden is imposed, hath no immediate access to the rent of the lands for his payment, since he has no title of possession: the grant burdened, which is his only title, is made, not in his favour, but in favour of the grantee, whose property is charged with the debt; and therefore, in order to make the real debt or burden effectual, the creditor must deduce an adjudication against the lands; the preference of which, and of other adjudications proceeding upon *debita fundi*, in a competition with adjudications led upon personal debts, is to be explained, *t.* 8. § 37.

50. A clause charging the lands contained in the grant with the disponent's debts in general terms, without mentioning the names of the creditors, was, by repeated decisions, in the cases of the creditors of Lovat, Coxton, and Kerland, adjudged to constitute a real burden on the lands disposed, in consequence of the right competent to all proprietors, of disposing of their property under such conditions and limitations as they shall judge proper. But two of those judgements having been reversed by the House of Lords, the court of session did, in July 1734, *Cred. of Maclellan*, and by several later decisions, alter their former rule, upon this principle, That no perpetual unknown incumbrance ought to be created on lands; because the purchaser cannot by the strictest inquiry know, who the creditors in that burden are, so as by a proper process to force the production of their grounds of debt, in order to clear it off. Like to this is a clause in a charter or disposition, by which a faculty is reserved to the granter, to charge the lands with a fixed sum therein specified, to any whom he shall afterwards think fit to name. By the former style used in such clauses, the disponent reserved a power to charge the lands with investments of wadset, or of annualrent, for a certain sum to his creditors, or others whom he should incline to favour; in which case, a personal bond granted afterwards by the disponent in consequence of the reserved faculty, though it was good against the grantee and his heirs, was not effectual against singular successors, see *July* 12. 1671, *Learmont*; both because the granting a personal

bond is not a *modus habilis* of constituting a real right by infeftment, and because the grantee cannot, by any search, discover who the creditor in the bond is. And even, when, by the more modern style, the power of burdening reserved by the grantee was left in general, without restricting the granter in the manner of exercising it, it was adjudged, on the same grounds, that the granter, who, in place of an heritable bond and infeftment, which would undoubtedly have constituted a real burden on the lands, granted a personal one, had not properly exerted his powers or faculty; and consequently, that the personal bond, though it bore an express reference to the faculty, was ineffectual against the grantee's singular successors, *Home*, 58. Yet a contrary judgement was soon thereafter pronounced in a case nearly similar, *Home*, 134. Where the faculty expresses, not only the special sum, but the name of the creditor in whose favour the reservation is made, a bond granted to that person, though only personal, appears to be a proper manner of creating a real burden; because there the purchaser may know the extent of the burden, and how to extinguish or clear it off, with as great certainty, as if the granter, in place of reserving a faculty to burden, had in the grant itself charged the lands disposed with a particular sum to be paid to a person therein specially described.

51. No real burden can be constituted on a feudal right, which is not expressed in the investiture; and a question has been frequently moved, What is meant in such case by the investiture? It was adjudged, *July 26. 1737, Cred. of Smith*, stated in *Dict. ii. 71.* that a general reference in the feisin to the burdens and conditions specially inserted in the charter, was sufficient to create a real burden on the lands, effectual against singular successors; upon this medium, That the charter is part of the feudal right or investiture, as well as the feisin. But this judgement is not only contrary to three decisions pronounced since the beginning of this century, *July 17. 1706, Campbell; Fount. Nov. 27. 1711, La. Monboddo*; and *Feb. 13. 1730, Duke of Argyll*, finding, that all the conditions and limitations of the grant ought to be particularly recited in the precept and instrument of feisin; but appears also destructive of the principal view of the legislature in establishing the records; and is hardly to be reconciled to the rule now universally admitted, That there can be no real burden upon lands, which is incapable of being discovered by creditors and purchasers: for though a general burden may appear from the feisin, which is upon record; yet it cannot be known by any record what the nature and extent of it is; since charters granted by subjects need not enter into any record; and the chancery-record of charters granted by the crown, which are to pass under the great seal, is not intended for the publication of real rights.

52. Mention is made of some real burdens on houses within borough, under the names of *ground-annual*, *top-annual*, and *feu-annual*, in 1551, c. 10.; the very meaning of which words, Sir John Skene, not above forty years after the statute was enacted, professes himself utterly ignorant of, *Sk. De verb. sign. v. Annual*. See the conjectures of Craig, *lib. 1. dig. 11. § 38.* and of Stair, *b. 2. t. 5. § 7.* concerning the signification of those terms.

T I T. IV.

Of the several Kinds of Holding.

FEUDAL grants have been, in the law of Scotland, distinguished from one another, according to the different tenures or manners of holding under which vassals enjoyed them. These were, *first*, Tenures by military service; *2dly*, Tenures in feu-farm; *3dly*, In blanch-farm; *4thly*, In bur-gage; to which most writers add a *5th*, viz. Holding by mortification. This title, which is merely preparatory to several of the following, serves only to explain the general properties of those different tenures, reserving a more particular consideration of them to their proper heads.

2. From what has been already observed concerning the origin of feus, it is evident, that the most ancient feudal tenure was by military service: for all vassals were at first obliged, by the nature of their grant, to serve the superior in war, in such manner, and as often, as his occasions called for it; whence it arose, that the proper *Reddendo* in their charters was, services used and wont, or services indefinitely. And even after feus came to be given in consideration of annual payments to be made in money, grain, &c. or of yearly services to be performed by the vassal, which had no resemblance to military ones, so great attention continued to be paid to the primitive and genuine nature of feus, that the tenure by ward was still accounted the most proper holding; and consequently all feudal grants were, *in dubio*, presumed to be military. By this rule, though the *Reddendo* of the charter had required only some special service, or yearly payment, from the vassal, in place of *servitio solita et consueta*, the tenure was considered as military, if the charter did not express that it was due in name of feu-farm or blanch-farm. This military feu was by the feudists called *feudum rectum*. In the books of the Majesty it got the name of *feudum militare*, l. 2. c. 27. § 1.; and the vassal who was liable to the service was styled *miles*, *ibid*, § 2. Ward holding is now abolished by 20^o Geo. II. c. 50.

3. As in this tenure the superior, during the nonage of his vassal's heir, while he was yet unfit for war, lost the benefit of that service, in consideration of which the grant was made, the minor was, in the opinion of some feudal writers, obliged to serve the superior by a substitute: but however that question may have stood as to his obligation to service, this is certain, that by an express text in the feudal usages, l. 2. t. 26. § 4. *verf. Si minori*, & § 5. he continued, notwithstanding his lesser age, in the possession of his ancestor's fee. Agreeable to this was the ancient usage of England; by which, not the superior, but some near kinsman of the heir, managed his estate during his minority, who was to be accountable for the rents, *qui justus esse debet*; see *Magna Charta* of Henry I. preserved by *Matth. Paris*, edit. 1684, p. 46. It has however obtained in Scotland as early as the laws ascribed to Malcolm Mackenneth, that the superior, to compensate for his loss through the want of his vassal's services, was intitled, not only to the full rents of the heir's estate, but to the custody of his person, and the management of his whole affairs as tutor, while he was under age, *Reg. Maj.* l. 2. c. 42. § 7. from which guardianship that tenure got the name of *ward holding*, *Skene, v. Varda*. In this full extent was the right of tutory exercised by the superior downwards to the beginning of the last century, *Cr. lib.* 2. *dieg.* 20. § 13. But superiors grew at length weary of an office which brought no profit; and therefore what is now called the casualty of ward, is not the ward of the heir's person, but of his estate.

4. Because

4. Because the casualty of ward seldom failed to draw after it, in the case of frequent minorities, the utter ruin of the vassal's family, ward vassals found it their interest to charge the ward fee with a determinate sum, to be paid yearly to the superior, in place of that casualty, where the superior could be brought to accept of it. The usual way of executing this agreement was by a charter granted by the superior to his vassal; in the *Reddendo* of which that yearly sum was made payable to the granter, as the valued or taxed duty of the ward. This holding was therefore called *taxed ward*; and when the ward was taxed, the casualty of marriage, which is to be explained in the next title, was also taxed. A vassal who held a fee ward of a subject-superior, who likewise held the same fee ward of his superior, was said to hold his lands by *black ward*. This was the most rigorous holding known in our law: for the subvassal's heir in that holding lost the whole rents of the fee belonging to his ancestor, not only during his own minority, in which case they fell, by the nature of his grant, to his immediate superior; but also during the minority of that superior's heir; because then the rents fell to the highest superior, who, as he was not obliged to regard any subaltern right granted by his immediate vassal to a third party, to which himself had not consented, was intitled, during the minority of that vassal's heir, to the ward of all the lands contained in the charter granted by himself, even of those which his vassal had made over to a subvassal by a base infeftment.

5. As no kingdom can flourish under an utter neglect of agriculture, which was much obstructed by the vassal's obligation to military service, many landholders perceived the necessity of making feudal grants of small portions of land, under the condition, that the grantee should, in place of serving the granter in war, cultivate and sow the grounds which the granter kept in his natural possession. These were called tenures by *focage*; which, it has been proved, *supr. b. 1. t. 1. § 35.* were anciently common to us with our neighbours of England, though they are now fallen altogether into disuse. From the same view of improving the lands by agriculture, the tenure by feu-farm was introduced into Scotland as early as the *Leges Burgorum*, c. 100. The vassals who held by that tenure, were obliged to pay, or deliver to the superior, a fixed yearly rent, either in money or grain, *nomine feudifirmæ*; and sometimes also they were bound, like foccagers, to perform services proper to a farm, as ploughing, sowing, reaping, carriages, &c. But the words usually adjoined to the *Reddendo* of feu-farm charters, *pro omni alio onere*, imported an exemption to the vassals from all services, of whatever kind, which were not specially contained in that clause. This holding, after it had been in a manner forgotten, was again revived by 1457, c. 71.; *vid. infr. t. 5. § 7.* If there be no special provision in the *Reddendo* of a feu-charter, at what place the feu-duty shall be paid or delivered to the superior, payment or performance ought, in the general case, to be made on the ground of the lands which are charged with that duty, *Cr. lib. 2. di. 4. § 37.* But if the *Reddendo* consist of a quantity of grain for the use of the superior's family, of which many instances occur in the feu-charters granted by abbots and other churchmen, it behoves the vassal to carry the grain to the manor-place of the superior, because it was for the use of that house that the delivery was stipulated. Yet if the superior chuse to reside without the barony, the vassal is not bound to follow him with the grain *extra curtem domini*.

6. Though the body of the Roman law was finished before the Feudal law had its existence, Craig, and other writers, with great propriety, express a grant in feu-farm by the Roman vocable *emphyteusis*: for on comparing the two rights, a close resemblance must appear between them in their

their most essential characters. *Emphyteusis* gave to the *emphyteutà*, or purchaser, a *jus dominio proximum*: and though it was sometimes called a perpetual location, it conferred an higher right than location could give. An *actio in rem* was competent to the *emphyteuta*; he might at his pleasure alter the face of the ground; he was intitled to the whole profits arising from it, and could impignorate the land for debt without consent of the *dominus*; all which rights are competent to vassals by feu-farm: He paid to the *dominus* a yearly rent or pension for his grant, called *canon emphyteuticus*, which corresponds to the duty payable in a feu-holding to the superior; he forfeited his right, if he did not pay that rent regularly, in the same manner as is provided in our feu-holdings by 1597, c. 246.; and he was not at liberty to sell, without making the first offer to the *dominus*; which bears some analogy to the limitation frequently laid on vassals in their feu-charters, not to alienate without the superior's consent. Mackenzie, § 6. b. t. would make the two differ in point of succession; for that our feu-charters go by feisin to heirs. But it is obvious, that the right of the *emphyteuta* descended also to heirs; though indeed it did not pass by service and infeftment; because the Romans were strangers to that manner of transmitting rights from the dead to the living, and to the difference between the succession in heritage and in moveables. It must be attended to, that when mention is made of a feu or subfeu, we are not necessarily to understand a grant of lands holden in feu-farm, but a feudal grant in general, a *feudum* or *subfeudum*, unless where the subject treated of naturally confines it to a feu-holding; yet the word *feu-charter* is never made use of, but to denote the special tenure by feu-farm.

7. Blanch holding is generally defined to be, that in which the vassal pays a small duty to the superior, in full of all services, as an acknowledgement of his right, either in money, or in some other subject, as a penny money, a pair of gilt spurs, a pound of wax, or of pepper, &c. *nomine albe firmæ*. It bears a near resemblance to the *feudum francum*; which, though not expressly mentioned in the *Consuetudines feudorum*, was much used over Europe in the middle ages; but with this difference, that in the *feudum francum* all services were remitted to the vassal, so that it was by the oath of fealty alone that the right was known to be feudal; whereas in our blanch holdings, some duty is always payable to the superior, most frequently trifling, but sometimes more considerable when the *Reddendo* is payable in money. It often happens, that the duty, especially where it is elusory, is, by the *Reddendo* of the charter, made payable *si petatur tantum*; that is, as the words have been constantly explained by practice, *si petatur intra annum*; and in that case the vassal is free, unless the duty, whatever the quality of it may be, is demanded within the year; because the demand of the duty within that time is made an express condition of its becoming due. But though the *Reddendo* should carry this particular limitation, Stair is of opinion, b. 2. t. 3. § 33. that the holding is not to be accounted blanch, if the duty be not at the same time expressed to be payable *nomine albe firmæ*; which is grounded on this principle, That blanch holdings, which of all others deviate the most from the original nature of feus, ought never to be presumed, but must always be specially mentioned in the grant. The words *si petatur*, are interpreted as favourably for the vassal, as if the taxative word *tantum* had been subjoined, Feb. 16. 1627, *Lo. Sempill*. Where the words are wholly left out, lawyers make this distinction, that if the duty be payable in a subject not of a yearly growth, as a pair of gloves, or of gilt spurs, it may be exacted at any time within the years of prescription; but where it consists in a thing which is produced from year to year, *ex.gr.* a stone of wax, it is understood to be passed from if it be not

demand within a year after it becomes payable by the *Reddendo*, *St. b. 2. t. 3. § 33.* By act 1606, *c. 14.* which proceeds on a recital, That the blanch duties due by the crown-vassals, were originally intended, not as a burden on the vassals, but as an acknowledgement by them of the crown's right, the vassals holding of the crown in blanch-farm, are declared not to be liable in payment of their yearly blanch-duties, unless they be demanded. The court of exchequer does however exact them though they have not been demanded within the year; for which this reason is assigned by Lord Stair, *ibid.* That by a prior statute, 1600, *c. 14.* it had been enacted, That the crown is not to suffer by the negligence of its officers. The same statute 1606 also provides, that if the blanch-duties be not valued to a fixed sum in the vassals infeftments, the vassals are not to be charged for any sum as their estimated prices. By our practice for many years past, blanch-duties due to the crown are generally converted in the investitures themselves to a fixed sum; but even when they are not, their values continue to be exacted by the exchequer.

8. Burgage holding is that tenure by which royal boroughs hold of the sovereign the houses and lands that lie within the limits described in their several charters of erection. Where the sovereign intended to erect a borough which held of a subject-superior into a royal borough, the superior's consent was sometimes adhibited, that so the lands might hold of the crown, and be subject to such jurisdiction as might be specified in the charter of erection. And hence, in the charters of several royal boroughs that were afterwards ratified in parliament, the ratifications contain an express salvo of such lands lying locally within the erection as were holden of a subject-superior. When, therefore, boroughs of regality were erected into royal boroughs, as St Andrew's, Dunfermline, Glasgow, Culrofs, &c. or boroughs of barony were so erected, as Dyfart, the lords of regality, or barons, preserved their rights of superiority, if they did not consent to the erection; see *July 14. 1676, Bor. of Arbroath*; and consequently the borough thus erected, and all the tenants of it, held, not of the crown, but of a subject-superior, contrary to the general rule of burgal tenements, *Hop. Min. Pr. p. 96. § 233.* But even where the lands erected into a royal borough are holden of a subject, the borough holds of the crown all the liberties and privileges contained in their charter. Craig delivers it as the common opinion, *lib. 1. dieg. 10. § 31. & 36.* that burgage holding does not, or at least did not, constitute a separate manner of holding, but that it was a species of ward holding; with this only difference, that in a proper ward holding the vassal is a single person; whereas in a burgage tenure it is a community. Accordingly in the erections of the most ancient royal boroughs, and particularly in a charter by Robert III. erecting the borough of Inverkeithing, the *Reddendo* is, *servitium solitum et consuetum*, which the law interprets to be military service: and in most of the later charters erecting boroughs-royal, the service specially expressed is watching and warding; which might properly enough be said, some centuries ago, to be of the military kind. This service of watching and warding is one of the *naturalia* of a burgage tenure, and is due by the burgesses within the liberties or territory of the borough, though it be not expressed in the charter. Without doubt, boroughs must be free from the casualties incident to proper ward holdings, of ward, nonentry, relief, and marriage: but that arises, not from the nature of the right, but from the particular condition of the vassal; for the borough, who is the vassal, neither marries, dies, nor is minor.

9. As the royal borough is the King's vassal, all the burgage-holders hold immediately of the crown, with the exception already mentioned; and

and accordingly all burgage-charters bear, that the lands hold of the King *pro servitio burgali*. Though the bailies of the borough have a superiority, in point of dignity and jurisdiction, over their fellow-burgeffes, they are not for that reason superiors of the borough in a feudal sense. Their powers in receiving the resignations of burgage-holders, and giving them feisin, are barely ministerial; for in those matters they act merely as the King's bailies specially authorised by statute, 1567, c. 27. for completing the titles of the burgage-holders, *St. b. 2. t. 3. § 38.*; *St Martin's styles*, p. 39. & 528.: and hence they have no right to any composition for the entry of singular successors in burgal lands, *July 22. 1634, Hay*. If any part of the common lands of a borough are feued by the magistrates to a private purchaser, such lands hold, not of the crown in burgage, but of the borough in feu-farm, *Hop. Min. Pr. p. 97. § 235*. Neither are lands purchased by a borough *tanquam quilibet*, out of their common stock, to be accounted burgal tenements, not being contained in their charter of erection. In relation to these, the borough *utitur jure privato, i. e.* is considered, not as a borough, but as an ordinary purchaser; and so must hold them under that tenure which is expressed in the grant by the feller: consequently the feisins of such lands must be registered, not in the borough-books, but in the books of the county or district where they are situated, according to the directions of 1617, c. 16.

10. Feudal subjects granted in donation to churches, monasteries, or other corporations, for religious, charitable, or public uses, are said to be given in mortmain, or, in our law-style, to be mortified; either because all casualties must necessarily be lost to the proprietor, where the vassal is a corporation, which never dies, *Cr. lib. 1. dieg. 10. § 35.*; or because the property of those subjects is made over to a dead hand, which cannot, contrary to the donor's intention, transfer it to another. *Craig, lib. 1. dieg. 10. § 32. et seqq.* distinguishes between donations of land made to prelates for the behoof of the church, and those granted in mortification, or in *puram eleemosynam*. He affirms, that in the last no services were due, because they were given merely in consideration of the prayers and masses to be performed by the donees, for the souls of the granter and his departed friends; but he is of opinion, that the first sort was truly holden ward, and that the only difference between a church-fee and a common ward holding arises from the different conditions of the vassals. Thus the superior loses his casualties in a church-fee, because the church, who is truly the vassal, being in the judgement of law a corporation, never dies. Thus also prelates, where they were the vassals, though the Canon law disabled them from fighting in person, *Decretal. l. 3. t. 34. c. 9. § ult.* were yet bound to serve by a substitute, as if they had enjoyed the lands by military service. But however this might have been the case in the infancy of feus, the only service due to the superior in church-fees for some centuries before the Reformation were of a spiritual kind; so that if donations to churches or monasteries constituted no distinct holding by itself, the service required from the donees approached nearer to blanch holding than to ward.

11. The purposes for which lands had been given to the church in the times of Popery were, after the Reformation, accounted superstitious, and therefore declared to belong to the crown by the act of annexation, 1587, c. 29.; so that now the only lands which continue mortified to the church are the manes and glebes of parochial ministers, which by that statute are appropriated to the use of the Reformed clergy. But mortifications may still be granted in favour of hospitals, either for the subsistence of the aged and infirm, or for the maintenance and education of indigent children, or in favour of universities, or other public lawful societies, to be holden either in blanch

blanch or in feu-farm : and whatever the society be to whom the donation is made, the superior must lose all the casualties of superiority for the reason before assigned. As a consequence of this, lands cannot be mortified without the superior's consent, *Cr. lib. 1. dieg. 11. § 21*. And the Barons of Exchequer, upon this ground, refuse to pass signatures of lands in favour of corporations, that so the crown-revenue may not be impaired by the loss of its casualties.

T I T. V.

Of the Rights of Superiority, and its Casualties.

CERTAIN rights are, in a feudal grant properly constituted, retained by the grantor, who is the superior; and others are acquired by the grantee or vassal. The rights retained by the grantor are either fixed or casual. The fixed rights of superiority are various. The superior, by the grant to his vassal, is not truly divested of the lands contained in it; his right continues unimpaired, except in so far as the grant conveys the *dominium utile*, or property, to the grantee: his investiture subsists as to every other respect, both in questions with his own superior, and with third parties. *First*, In questions with his own superior. Thus, on the death of a vassal who had made over, by a subaltern grant, part of his lands in favour of another, that vassal's heir can compel his ancestor's superior, upon his entry, to invest him in the whole lands conveyed by the ancestor's charter, even in those, the property of which the ancestor had disposed to another, in the same manner as if no such subaltern grant had been made; for as no superior can be hurt by any subaltern grant of his vassal, without his own consent, neither can he avail himself of it, so as, upon that pretence, to refuse entering his immediate vassal's heir in all the subjects specified in the charter granted by himself to that vassal's ancestor. Yet sometimes, through oversight or inadvertency, those investitures by the superior to the vassal's heir, in so far as relates to the lands of which the property had been thus passed over by the vassal's ancestor, are given, not of the lands themselves, but barely of the superiority. *2dly*, The grantor's investiture still subsists, notwithstanding the grant made to his vassal, in all questions with third parties. Thus the grantor, or superior, is, in consequence of the *dominium directum*, which he retains to himself, intitled to pursue all real actions concerning the lands, against every person, other than the vassal to whom he has made the grant, or such as derive right from him. On this ground, an action was found to be competent to one who was invested barely in the superiority, for removing a possessor from the lands, if he could not produce an heritable right affecting them in his favour, sufficient to maintain himself in the possession, *Nov. 19. 1624, L. Lag.*

2. Superiority carries likewise a right to the yearly feu-duty payable by the vassal to the superior in his *Reddendo*; and because this, and all other rights of superiority, where the superior is not in possession of the lands themselves, are *debita fundi*, or real burdens affecting the fee, an action for pointing the ground lies at his instance for the payment of them, against all singular successors in the land; which, however, is no bar to a personal action for recovering them, against such as have either come under an obligation to pay them, or have intermeddled with the rents of the lands out of which they are due. The superior is also intitled to the personal services which the vassal is bound to perform by his charter. The rule laid down concerning the payment of blanch-duties, *supr. t. 4. § 7.* obtains in all

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all feudal grants, with regard to personal services, viz. That where they are annual, *ex. gr.* the reaping of corns, cutting of hay, &c. the vassal is free unless they be demanded within the year, *Jan.* 30. 1624, *L. Carnoufy*. In our more ancient charters, vassals were frequently taken bound to attend on their superiors at huntings and hostings; but as those clauses were thought to heighten too much the authority and influence of superiors over their vassals, all such personal services, whether due by charter or custom, were abolished by 1^o *Geo. I. st. 2. c. 54*. And though the title of this statute be confined to the highlands of Scotland, yet that part of the enactment which abolishes those services is unlimited, and so must extend over all Scotland, where-ever the lands of the vassal liable in them may happen to be situated. To make up for the superior's loss through the want of these services, an annual sum is appointed to be paid by the vassal, which, if it cannot be fixed by the parties themselves, is to be settled by the court of session. In a case decided in 1721, between the Duke of Gordon and Hay of Ranas, who is none of the most inconsiderable of the Duke's vassals, the court awarded 5 s. Sterling as the annual value of the vassal's personal services.

3. It may be mentioned as another fixed right of superiority, that all superiors are intitled to know the nature of the deeds they may have granted to the vassal, in case they have neglected to keep copies of them: and tho' they be furnished with copies, they may bring an action to have the deeds themselves judicially exhibited, that their validity or import may be ascertained. This was in our ancient law called an action *for shewing the holding*, *2. Attach. c. 25.*; *St. Rob. III. c. 36*. The superior's title in it was his charter, containing the lands possessed by the vassal. But if he had once forced the production of his vassal's title-deeds, he could not bring a new action of the same kind during that vassal's lifetime. This action, though it continued in use till the reign of James I. 1424, *c. 9*. hath been now long laid aside; but the purposes of it are fully answered by an action of reduction-improbation, which is to be explained *infr. b. 4. t. 1. § 19. et seqq.*

4. A subject-superior, though he may sell his right of superiority to another by a public infestment, to be holden of the King, or his own immediate superior, cannot dispose of it by a subaltern grant to be holden of himself; because, by that method, he interposes a new vassal between himself and his former vassal, and so renders that former vassal's condition harder than before, by increasing the number of superiors between the crown and him; upon which medium it was taken for granted, that an infestment of this sort was invalid, *Jan.* 30. 1671, *Douglas*. And though several ancient charters are yet extant, in which our sovereigns, who thought themselves free from such restraints, granted rights of superiority to third parties, in prejudice of the crown-vassals, who were thereby made to hold of a subject-superior, such grants were prohibited by special statute, *Rob. III. c. 4*. This rule, however, hath no force, where lands fall to a superior on the forfeiture of his immediate vassal, who happens to have a subvassal under him: for such superior is intitled, by the nature of the feudal contract, to provide a new vassal for himself in the room of the forfeiting person, and consequently to interpose a vassal between himself and the subvassal, unless he has by some deed accepted the subvassal as his immediate vassal, *Nov.* 26. 1672, *E. Argyll*. And indeed, in this and the like cases, the reason of the rule ceaseth: for the subvassal's condition is no worse than it was formerly; he only changes one superior for another, without having a greater number of superiors interposed between the crown and him than he had before.

5. Besides the fixed constant rights inherent in superiority, the superior
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hath several advantages, which, because they depend on uncertain events, get the name of *casualties*. Some of these are common to all tenures, and others incident to particular tenures. The casual rights proper to a ward holding were three; ward, recognition, and marriage: as to which, now that that tenure is abolished, with all the casualties incident to it, a general account of their nature and effects may suffice. The casualty of ward intitled the superior, during the heir's minority, to the whole profits of the ward fee, which formerly arose to the deceased vassal, either from the natural product of the ground, or from the rent payable by tenants. As to the profits accruing from woods, collieries, or other such casual rent, the superior, whom it behoved to exercise his temporary right as a liferenter, *salva rerum substantia*, or without committing waste, could not exceed the measure formerly used by the deceased; *vid. infr. t. 9. § 57. 58.* Upon this ground he was obliged to uphold the tenants houses, orchards, inclosures, &c. in as good condition as he first received them, and give security for that purpose, 1491, c. 25.; 1535, c. 15. The right of this casualty was perfected by the death of the vassal, and the minority of the heir, without the necessity of a decree of declarator, (because it was due by the genuine nature of the contract, and by the *Reddendo* of the charter); and consequently, upon the concurring of these two events, the superior might immediately grant leases, remove tenants when these leases determined, sue them for their rents, and, in general, exercise all other lawful acts of administration during the continuance of his right. But if the ward was taxed, the minor retained the possession, and the superior had nothing to demand but the yearly taxed duty.

6. The casualty of ward, while that tenure subsisted, was burdened or restricted, either by law, or by the consent of the superior. It was burdened by law, *first*, With an alimony to the minor heir, 1491, c. 25. Tho' by the words of this statute, the heir was intitled to an alimony, in every case where he had no blanch or feu-farm lands sufficient for his maintenance, equity interposed for the superior, if the heir had either an employment, or an estate in money, which might serve that purpose, *infr. t. 9. § 62.*: but in so far as such separate estate or income fell short of a reasonable subsistence, the superior was to make up the deficiency. In taxed ward, the superior was free from this obligation: for the duty payable to him, in case of taxing the casualty, was restricted to a liquid yearly sum, and the vassal's heir had the whole surplus for a fund of subsistence. *2dly*, The law restricted the ward by the terce of widows; for the terce was a provision given to widows by the law itself, (except where it was excluded by an entail), and therefore operated without the superior's consent: but it behoved the widow, in this case, to relieve the superior of a share of the heir's alimony, in proportion to the value of the terce-lands enjoyed by her. Thus also the courtesy, or the husband's legal liferent over the whole estate in which his predeceased wife was seised, totally excluded the ward.

7. *3dly*, The ward was for a certain period restricted *ex lege*, by subaltern grants made by vassals holding their lands in feu-farm. For understanding this, what was formerly said, *t. 4. § 4.* must be attended to, that the superior was intitled, by our ancient law, to the ward of all the lands contained in the grant made to the vassal, even of those lands that the vassal had subfeued to another. For this reason, when the King's ward vassals were, for the encouragement of agriculture, allowed to grant subaltern infeftments, to be holden in feu-farm, 1457, c. 71. it became necessary, for the subvassal's security, to enact in the same statute, That notwithstanding the ward's falling to the King by the minority of his immediate vassal, the subvassal should retain the possession of his feu, upon paying to the crown the

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the yearly feu-duty contained in his subaltern right while the ward continued. By this means, the King, in place of enjoying the full rent of his vassal's fee during the ward, as he might have done by the former law, was limited, in so far as related to the subvassal's lands, to the feu-duty contained in the subvassal's charter. This statute seemed to require the King's subsequent approbation, in order to give effect to the subfeus granted by his immediate vassals; for the words are, that "the King shall ratify and approve the said assentions:" but as the statute was truly an invitation by the legislature to the King's vassals to feu out their lands for promoting the public policy, it was itself held as equivalent to the King's ratification, *Feb. 12. 1674, M. of Huntly*. This right of subfeuing competent to the crown's vassals was renewed by two temporary acts, 1503, c. 90. 91. which were to expire upon the demise of James IV.: but it continued to be exercised after that period; and in the course of time came to be assumed by all proprietors, even those who held of subjects, to the great detriment of their immediate superiors. Subject-superiors were therefore, by 1606, c. 12. prohibited to subfeu without the consent of their superiors; and this prohibition was extended, by 1633, c. 16. to the King's ward vassals. The right of these last was indeed restored to them by an act passed during the Ufurpation, 1641, c. 58.; but that act having been rescinded upon the Restoration, 1661, c. 15. the law which regards the right of subfeuing, was, after the act 1633, brought back to the same state it was in before the year 1457. 4thly, Though it has been universally admitted, that an appriſer or adjudger, allowing him to be both infeft and in poſſeſſion, is not truly constituted vassal to the superior of the lands adjudged, during the currency of the legal, for the reasons assigned below, t. 12. § 46. and though this doctrine has been approved by July 24. 1739, *Cred. of Bonbard*; yet it was held for the law of Scotland, in that very decision, that where the adjudger was in poſſeſſion, and actually infeft by the superior, the casualty of ward, falling afterwards to the superior by the death of his vassal, the adjudger's debtor, was burdened with the adjudger's debt, against which the ward had no operation: and even a charge given by the adjudger to the superior to infeft him, in consequence of 1469, c. 37. had the same effect, if he was *in mora*, or blameable in not giving obedience to the charge. But if the superior had good reason for not entering him, *ex. gr.* if the adjudger neglected to offer him a year's rent for his entry in terms of that statute, the superior continued to have full right to the ward falling afterwards by his vassal's death, *Feb. 9. 1669, Black*. If the ward had actually fallen by the death of the adjudger's debtor before the charge given to the superior, the adjudger's debt could be no burden on the ward; because, in that case, a right was acquired to the superior by the vassal's death previously to the charge.

8. Ward might also have been excluded or restricted by the consent of the superior; for *volenti non fit injuria*. Hence, the same statute which prohibited subfeus of ward lands by superiors holding of subjects, 1606, c. 12. authorised them, where the superior consented to the grant, provided his consent appeared from some positive act or deed; in which case they still continued to exclude the ward falling afterwards by the vassal's death, in so far as concerned the subvassal. Grants therefore by the vassal to be holden of the superior, perfected either by resignation or confirmation, excluded the superior from the claim of the ward by the granter's subsequent death: for from the moment of the superior's confirming the right, or accepting the resignation, the disponent became vassal by the superior's own consent; and consequently, it was by the disponent's death alone that the casualty could fall. But no debt contracted, or voluntary right granted by the ward

ward vassal, without either the authority of law, or the superior's consent, could have the effect of restricting the ward to his prejudice. Thus servitudes constituted by the vassal on the ward fee, were not effectual against the superior, when the lands fell to him by the ward, unless they had been established by prescription. Nay, a decree of the sheriff fixing the marches of the ward lands, was not effectual against him in that case, if he had not been made a party to the suit, *Feb. 8. 1662, Lo. Torphichen*. In consequence of this rule, the superior was not bound to pay, even the interest, growing during the ward, of any debts contracted by the deceased vassal; which in the case of long minorities proved frequently the ruin of the vassal's family, in contradiction both to a more equitable rule established by our ancient law, That the superior should pay during the ward a certain proportion of the vassal's debts, *pro quantitate hereditatis et temporis, Reg. Maj. l. 2. t. 42. § 5. 6.* and to the customs of Normandy, *art. 215.* which, from the same consideration of equity, obliged the superior to pay all the yearly burdens chargeable on the estate, and the interest that should fall during the ward, of all the heritable securities or *hypoteques* affecting it, that had been granted by the vassal.

9. The casualty of ward lasted, in the case of male heirs, to their age of twenty-one, because till then they were not accounted able to endure the fatigue attending military service; and in females, till fourteen, 1547, *c. 5.*; 1571, *c. 42.* because these could not before that age, by our ancient law, marry an husband capable of serving the superior, *Reg. Maj. l. 2. c. 48. § 1.* which continued to be the law of Scotland till towards the beginning of the last century, *Skene, v. Varda*. And even after women were, by our later practice, allowed to marry at twelve, it was thought proper not to shorten the duration of the ward, probably to give the greater benefit to the superior, whose case was in those days accounted more favourable than it hath been since. In coheiresses, the ward determined when the eldest attained the age of fourteen: for as the right of superiority was a *jus individuum*, belonging solely to the eldest, the casualties due by two or more vassals, ought also to be regulated by the age of the eldest. Besides that heirs-portioners were heirs *pro indiviso*, each of them had a property in every *gleba terræ*; and therefore, when the eldest came to be fourteen, the superior had a vassal fit for marriage, who was truly vassal in every inch of ground in the ward fee. The ward determined also in male heirs before their age of twenty-one, if they had committed treason. This the law considers persons to be capable of, as soon as they are presumed to be *capaces doli*; that is, according to the general opinion, at the age of sixteen. In that case, however, it may be observed, that the lands fell not to the superior by the casualty of ward, but to the crown by forfeiture.

10. Recognition, though ranked by some writers among the casualties of superiority, was indeed a total forfeiture of the fee; since the vassal who incurred it, fell from the whole lands contained in his grant. The word, as it was anciently used, included under it all the ways by which the superior returned to his fee, or claimed it again as his own. Thus the overlord was said to recognise the lands by the falling of the vassal's escheat, or by the nonentry of the heir. But the term came afterwards to be used in a more limited signification, to express that special casualty, by which the fee returned to the superior, in consequence of the alienation made by the vassal of the greatest part of it to a stranger, without the superior's consent. It was first introduced, that if the vassal should, by alienating his lands, disable himself from feudal services, the superior might have it in his power to name another in his room capable of performing them, *l. 2. Feud. t. 52. pr.*; and to this all the other reasons commonly assigned for that casualty,

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casualty, drawn from the vassal's ingratitude, and the transmission of the fee to a family at enmity with the superior, may be easily reduced. In the infancy of feus, vassals were left at liberty to alienate part of their lands without the consent of the superior, and to subfeu the whole of them, *l. 1. Feud. t. 21. vers. Si quis; l. 2. t. 9. pr. vers. Si vero*: and even after the alienation of any part was prohibited, it was only the part alienated that was forfeited to the superior, *l. 2. Feud. t. 38*. The law of Scotland gave more liberty to the vassal, than the written usages of the feus; for it allowed him to sell to the extent of the half: but our penalty was severer; for the vassal, if he exceeded the half, forfeited not only the part sold, but the whole.

11. Recognition, notwithstanding those severe consequences, fell not on the vassal as the proper penalty of a crime or delict, but rather as a feudal right implied in ward holdings, which the superior reserved to himself in the feudal grant, and which the vassal subjected himself to, by accepting of it. Hence it followed, *first*, that that casualty, though it had been incurred by the minor's ancestor, might have been declared, upon the ancestor's death, in a proper action against the minor, even during his nonage, notwithstanding the rule, *Minor non tenetur placitare*, *Jan. 28. 1681, L. Dun*: for the superior's plea in such case would not have been founded on a right preferable to that which was in his deceased vassal; but upon this, that the vassal had not fulfilled the condition implied in his right, and that therefore the lands returned to him the grantor; *vid. supr. b. 1. t. 7. § 46. 2dly*, If this casualty was a right inherent in a ward superior, he was consequently intitled to an action against his vassal's heir, declaring, that it had been incurred by the ancestor, though no action had been brought against that ancestor in his lifetime, *Feb. 19. 1662, Lo. Carnegie; vid. infr. b. 4. t. 1. § 14. 3dly*, It was a consequence of this principle, that recognition was incident to all ward fees, though the casualties of ward and marriage should have been taxed, (for by the taxing of these, the quantum of them was only ascertained, without altering the nature of the holding); and indeed in every case where there was no express clause cutting it off. But it had no room in any other holding than ward; and therefore tithes fall not under recognition, because tithes were not enjoyed by ward holding.

12. All voluntary deeds, whether public or base, inferred recognition, even such as were granted for an onerous cause; because whoever accepts of a grant prohibited by law, though he may have given a valuable consideration for it, has no title to the rights of a lawful creditor. Hence it required a special statute, 1503, *c. 91*. to secure subvassals against that casualty, when the crown-vassals were invited to grant subaltern rights of their ward lands. Under voluntary alienations were included all grants that became a charge upon the property, *ex. gr.* wadsets; for the vassal thereby disabled himself from serving the superior as effectually as by a direct alienation of the property itself. But infeftments of warrandice fell not under this rule, because they were not present deeds of alienation; their effect was suspended, till the lands principally made over were evicted: and this reason being equally strong in infeftments of relief, which have no effect till the cautioner is distressed for the debt, these infeftments did not infer recognition, unless the right was purified by distress; see *July 7. 1681, Hay*. Necessary or legal alienations by apprising or adjudication led for the payment of debts contracted by the vassal, drew no forfeiture after them, which proceeded from favour to lawful creditors; yet adjudications deduced against the vassal after the fee had actually fallen by recognition, could not hurt the right that had been previously acquired by the superior.

13. It is a favourable doctrine, which is taken for granted by Mackenzie,
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zie, § 5. *in fin. b. t.* that where the property was not transferred *cum effectu* by the vassal's alienation, this casualty had no place. Hence, *first*, It was not incurred, either if the deed was not perfected by seisin, (and this is admitted by all), or if the seisin was null. *2dly*, Recognition could not fall against an heir upon a deed granted by the ancestor *in leſſo*, since all death-bed-deeds affecting heritage are subject to reduction at the suit of the heir. Hence, *3dly*, A disposition granted by the vassal, to be holden, not of himself, but of his superior, if the seisin following upon it should not be confirmed by the superior, could not infer recognition; for a right to be holden of the superior is null before confirmation. Yet see upon this head, *Cr. lib. 3. dig. 3. § 25.; St. b. 2. t. 11. § 11. 12.*

14. Though alienation by the vassal of less than the half of his ward fee was a lawful act, inferring no forfeiture; yet neither the feller nor purchaser was secure without the superior's consent, or confirmation: for the purchaser acquired under the tacit condition, that if the vassal should afterwards sell as much as, when joined to the first alienation, would exceed the half, his purchase should resolve, or become void. And indeed, in such case, the whole ward fee fell under recognition, both the first and last alienations, and all likewise that remained unfold, *Feb. 23. 1681, Hay*. This head of our law hath given rise to several questions; in what cases one deed of alienation should be joined to another, to make up the half of the ward fee? and what was to be deemed the half? Let it suffice to mention two or three. A public infeftment granted by the vassal before his prior base infeftments had amounted to the half, could not be brought, in any shape, *in computo* with these prior base rights, so as to infer recognition against them; because the subsequent public right, proceeding either on resignation to the superior, or upon confirmation by him, being truly the superior's own deed, could not justly draw any penal effects after it against the vassal, *March 21. 1707, L. Grant*. A charter of *Novodamus* by the superior to his vassal being an original right, implied a confirmation of all prior deeds of alienation; and, consequently, hindered them from being conjoined with those that were granted by the vassal posterior to the *Novodamus*, so as to infer recognition, *Pr. Falc. 53*. Though the whole ward fee should have been alienated by the vassal, to be holden of himself, recognition was not incurred, if the yearly feu-duty payable by the subvassal was equal to the half of the rent of the lands; for, in that case, the vassal retained, not only the *dominium directum* of the whole ward fee, but the full rent of the half of it, *St. b. 2. t. 11. § 14*. On a like ground, a right of annualrent, or of wadset, though granted by the vassal over all the ward lands, inferred not recognition, if the sum secured by the right fell within the half of their value, *Steu. Ans. v. Recognition; July 7. 1681, Hay*.

15. It was not every vassal whose deeds of alienation drew recognition after it. For, *first*, a vassal whose lands were subject to a right of redemption in favour of another, could not grant any deed inferring recognition, to the prejudice of that other; *ex. gr.* if the wadsetter of a ward fee should have alienated the half of it before the right became irredeemable, though the lands would without doubt have recognised, in so far as concerned his interest in them, the alienation could not hurt the right of reversion; which, by the constitution of the wadset, was vested in the debtor. *2dly*, Recognition was not incurred by deeds granted by a vassal interdicted, without consent of his interdictors; because they might have been declared null, and ineffectual to transfer property, as having been to the great prejudice of the granter, and because persons interdicted, in that, as in all other penal questions, fell to be considered in the same light with idiots, or others naturally incapable of making grants, through a defect of judgement.

3dly,

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3dly, Creditors who had used inhibition upon their grounds of debt, were secured by 1686, c. 15. against the effect of all deeds of alienation granted by their debtor, after publishing that diligence, which might otherwise have inferred recognition; and the lands falling under recognition were, by that statute, declared to be burdened with the debt on which the prior inhibition proceeded.

16. No deed of alienation granted by a vassal inferred recognition, if it was not made in favour of a stranger; and all were deemed strangers to the vassal but those who were *alioqui successuri*, i. e. those who, if they had survived the vassal, would have necessarily succeeded to him, though there had been no grant in their favour. Hence recognition was inferred by a vassal making over his lands to a son of his own, if he was not the eldest; or to a brother, though he should have been, at the date of the grant, next in succession to the grantor; because the grantor might have had afterwards issue of his own body, July 29. 1672, *Lo. Hatton*. Nay, a husband was, in this question, adjudged a stranger to his wife, *Edg. Jan. 13. 1725, Hall*.

17. Recognition, even where it had been actually incurred, might have been passed from by the superior; either, *first*, by his express consent; for instance, if he should have expressly confirmed a feisin given by his vassal, upon which recognition had already fallen; or, *2dly*, by his presumed consent; *ex. gr.* by his granting to the vassal a charter of *Novodamus*, which implies a discharge of all casualties incurred by the vassal prior to the charter; *vid. supr. § 14.* Thus also a precept of *Clare constat* granted by the superior to the vassal's heir, imported a passing from the penal effects of all deeds granted by the ancestor inferring recognition. But a precept granted, not voluntarily, but in obedience to a charge given to the superior upon a retour, had not this effect; because a superior's granting a precept in obedience to the law, ought not to deprive him of any right competent to him before granting it. In general, every voluntary act of the superior, from which an approbation of the vassal's right might be presumed, was construed to purge recognition already incurred.

18. Marriage, in the feudal sense of the word, or *maritagium*, is that casualty by which the superior was intitled to a certain sum of money, to be paid by the heir of his former vassal, who had not been married before his ancestor's death, at his age of puberty, as the avail or value of his tocher. In some cases, the single avail of marriage was due; in others, the double. Though this casualty be no where mentioned in the written feudal usages, it was received in Scotland as part of the feudal plan, as early as the books of the Majesty, l. 2. c. 48.; *2. Attach. c. 91. & seqq.* Lord Stair affirms, b. 2. t. 4. § 45. that it was introduced as a recompence to ward superiors for the burden which lay upon them of alimenting the heir; and yet he acknowledgeth, that there was no law charging them with that burden, till 1491, c. 25.; that is, upwards of four centuries after the time that marriage was introduced by Malcolm into our law, according to his Lordship's own opinion, *ibid. § 37.*

19. This casualty, if we are to rest on the authority of *2. Attach. c. 93. § 2.* took its rise chiefly from the right which superiors were understood, by our old law, to have over the person, as well as the estate, of the minor heir; in virtue whereof they claimed the sole power of giving him a wife, and at last demanded, as their due, what the heir might have got by her in name of tocher. Anciently, therefore, the heir was not subjected to it, if he was either major when the succession opened to him, or not required by the superior to marry, *ibid. § 1.*; because, in this last case, he showed no contempt. But, by the later practice, marriage was accounted a right inherent

inherent in the feudal grant, accruing to the superior, in every case where the heir was not married at the time of his ancestor's death, whether major or minor, and whether required by the superior to marry or not, *Jan. 3. 1677, Campbell; Dirl. 415.* This casualty fell, though the heir, when required to marry, should have accepted of the superior's choice, *Q. Attach. c. 93. § 1. in fin.*; but the superior's express consent to the marriage was, by our later practice, construed as a renunciation by him of the casualty, *Dirl. 434.* Marriage did at no period of time take place, if the heir died before puberty; because till then he was incapable of marriage: nor if he married during the life of his ancestor; because, while the ancestor lived, the superior had no right to dispose of his heir in marriage: but the casualty was not excluded, where circumstances made it presumable, that the former vassal had fraudulently precipitated or hurried on the marriage of his heir, on purpose to cut off the superior from his casualty, *Feb. 20. 1667, Lo. Treasurer.* If the vassal had divested himself of the fee in his heir's favour, and the superior had received that heir as his vassal, during the life of the former vassal, this casualty could not be demanded from the new vassal after the death of the first: for it was only to the heir's marriage that the superior was intitled; and the heir, after having been entered by the superior, was no longer heir, but vassal. In the case of heirs-portioners, one marriage only was due, according to *Stair, b. 2. t. 4. § 56.*; because heirs-portioners enjoy the estate as if they were one person: yet the practice stood otherwise not long before, *Hop. Min. Pr. p. 47. 48.*

20. It was not the precise tocher which one got by his wife that fell to the superior as the single avail of marriage, but what his estate might have been reasonably supposed to intitle him to, *June 14. 1673, Gibson;* and in estimating this estate for fixing the worth of either of the two avails, not the ward lands only were computed, but all the heir's other estate, real and personal. At first the computation was made without regard to the heir's debts, *St. b. 2. t. 4. § 46.*; but afterwards all debts were deducted, *ibid. 47.*; *June 19. 1630, Somervell.* The court of session, in 1674, modified the single avail to three years free rent, *Dirl. 202.*; and afterwards they brought it down to two, *St. ibid.*; *Fount. Nov. 7. 1701, Baird.* Stair was of opinion, *ibid. § 55. verf.* But this, that the estimation of the estate ought to be made as at the time of the vassal's marriage, when he did marry; and if he did not, as at the time when he was required to marry: but it seems more agreeable to law, that the avail should have been estimated according to the value of the estate at that period when the heir first became *pubes*, or capable of marriage; because it was then that the casualty fell due. Craig, *lib. 1. dieg. 21. § 28.* is of opinion, that the superior was, in strict law, intitled to almost the whole ward lands, as the value of the marriage, where the heir was a female; because the tocher which a man gets by marrying an heiress is her whole estate: but this reason is inconclusive: for by the casualty of marriage was understood the tocher which the heir, whether male or female, might have reasonably expected by the marriage; and in the case of an heiress, nothing can be considered as tocher, but the sum which she had reason, from her fortune, or other circumstances, to hope for by a husband.

21. It is probable, from the name, that the double avail was estimated originally at two single avails; but Craig affirms, that it was reduced, out of favour to the vassal, to little more than a heavy single avail, *lib. 1. dieg. 21. § 24.* And as, by the later practice, the single avail was estimated at two years free rent, it is probable that the double, if the quantum of it had been lately brought into dispute, would not have exceeded three. The double avail was not due, except in the precise case where the superior, having

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ving offered to the heir a wife without disparagement, the heir, not contented with refusing the match offered, intermarried with another woman without the superior's consent, *Q. Attach. c. 91. § 2.* To intitle the superior to this heavy avail, he must have required the vassal, under form of instrument, to treat with him in some unsuspected place, upon the marriage offered, *July 3. & 11. 1622, French.* If the heir refused at that interview to name a day for celebrating the marriage, the superior did it for him; and upon the day appointed, brought the lady to church, who must have openly declared her willingness to accept of the heir for her husband. As it can hardly be figured, that a woman of character would have stooped so low in favour of a man who had declined making addresses to her, it cannot be matter of wonder, that no instance occurred since the institution of the college of justice, in which the double avail of marriage was adjudged against an heir, *St. b. 2. t. 4. § 47.*

22. Where a vassal held different ward fees of different superiors, the marriage was due only to one of them; because the heir could be married but once, and so could get but one tocher. The eldest superior was, in this case, preferred to the casualty: and he was deemed the eldest from whom the vassal's ancestors in blood had received the first grant by the tenure of ward, *Q. Attach. c. 94.*; for since he alone was intitled to that casualty at the time of the original grant made by him or his author to the vassal's ancestor, he could not be deprived of it by any posterior fact of the vassal purchasing ward lands from another. But where one of the ward fees was holden immediately of the crown, the King, because he is the fountain of all feudal grants, was accounted the eldest superior, though the right granted by the crown to the ancestor of the vassal whose marriage fell, had been posterior in date to the grants of the vassal's other lands holden *cum maritagio*. Though the sovereign, as eldest superior, excluded all others from this casualty; yet where he changed the holding of any of his immediate vassals from ward to feu, he was no longer their ward superior, and consequently he could be no longer intitled to the marriages of the vassals whose holdings he had thus changed; and when this happened, the case of these vassals became harder than before the change of their holdings, as the King is justly accounted the gentlest superior. To obviate this inconvenience, it was enacted, 1661, *c. 58.* that every vassal holding ward or feu *cum maritagio*, of the King or Prince, who should get his holding changed from ward, should be exempted from the marriage that might be claimed from him by other superiors, in the same manner as if the lands had still continued to be holden ward of the crown.

23. This casualty was not due in any other tenure but ward holding, unless the clause *cum maritagio* was in the vassal's charter, which, in feucharters, was not uncommon. It was in all cases *debitum fundi*: for it arose, either from the nature of the grant, if it was a ward holding, or from the express words of the investiture, if the holding was feu or blanch, *Dec. 17. 1673, Haldane.* But though, in fixing the amount of it, the value of the vassal's whole estate was considered, by whatever tenure it might be holden, it was a real burden only upon the ward lands: the heir was not liable for it, if, instead of entering to these lands, he abandoned them to the superior, *Jan. 5. 1681, L. Dun*; for no heir ought to be compelled to make up titles to an estate by which he necessarily subjects himself to burdens which exceed the full value of it.

24. By the late British statute, 20^o *Geo II. c. 50.* the tenure of all lands in Scotland by ward holding, whether simple or taxed, and the casualties of ward, marriage, and recognition, consequent upon that tenure, are utterly abolished. The tenure of the lands holden ward of the crown is, by

that act, turned into blanch holding, for the payment of one penny Scots yearly, *fi petatur tantum*; and the tenure of those that are holden of subject-superiors into feu holding, for the payment of a determinate yearly rent in money, cattle, or grain, in place of the said casualties, and of all services. The court of session is, by the act, authorised to consider the difference in value to the vassals, arising from the change of their holdings from ward to feu, and what constant yearly rent may be a just recompence to the superior for that difference, and make an act of federunt upon it, according to which parties are to settle the quota of the feu-duties; and in case of difference, the court is to determine: and whatever they shall so modify, is to be the yearly feu-duty payable for such lands, in the same manner as if feu-charters had been granted of that date by the superiors to their respective vassals, on the resignation thereof into their hands. Till such modification shall be made, the vassal is to incur no irritancy for the not payment of the feu-duty; and these modifications are to be inserted as the feu-duty, in the future renovation of the investments by the vassals and their heirs. In consequence of the above-mentioned powers, the session, by an act of federunt, Feb. 8. 1749, established the following rules: In lands that are holden simple ward of a subject, one *per cent.* of the constant yearly rent is to be paid as a yearly feu-duty on account of the marriage, and one *per cent.* as the value of the other casualties incident to ward holdings; but where the vassal holds other lands ward of the crown, he is not liable to his subject-superior in any feu-duty on account of the marriage. In lands holden taxed ward of a subject, two *per cent.* of the sum taxed by the charter of the lands is to be paid yearly as the value of all the casualties, whether the vassal holds other lands ward of the crown or not. A doubt having arisen, Whether the principality-lands, *i. e.* the lands holden ward of the Prince of Scotland, were included under this statute? and in what manner the vassals of the Prince were to be entered? an act was passed, 25^o Geo. II. c. 20. giving to the King the same powers which had been formerly exercised by the Kings of Scotland over the principality-lands, when there was no Prince; in pursuance of which, his Majesty, by warrant under the privy seal, dated Jan. 1753, signified his pleasure, that all lands, which were formerly holden ward of the Prince, should for the future be holden blanch.

25. The only casualty, or rather forfeiture, proper to feu holdings, is the vassal's loss of his feu-grant, by his failing to pay the feu-duty for two years together. Because this casualty may fall in consequence either of a legal or conventional irritancy; the nature and effects of an irritant clause may be shortly explained. A clause-irritant is that which expresses a condition or event, on the existence of which the charter, contract, or other deed, to which it is annexed, is voided. No irritancy, whether legal or conventional, if it be properly penal as to him against whom it is pointed, has any operation till a decree of the session shall have declared it to be incurred, *infr. t. 8. § 14.* But where it is not penal, it has full force as a condition or provision affecting the right or contract, without the necessity of any previous judicial sentence. Hence irritancies are most strictly observed against the grantee in gratuitous deeds; for as that sort proceeds from the mere liberality of the granter, who had full power over the subject to dispose of it to whom he pleased, the grantee, who paid no valuable consideration for the grant, truly suffers nothing though it be irritated or annulled. On this ground, where creditors-adjudgers had gratuitously restricted the sums due to them, and prorogated the legal reversion of their adjudications for four years, under an irritancy, that if the restricted sums were not paid within that time, the restriction and prorogation should be null, no action was adjudged necessary for declaring that the irritancy took

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took place upon the failure of payment to the creditors-adjudgers; that clause having been truly beneficial, not penal to the debtor, *Br. 17.*

26. No irritancy, or other penalty, lay, from the nature of the grant, against vassals in a feu holding for not making regular payment of their yearly *Reddendo*: but by 1597, *c. 246.* all vassals by feu-farm, failing to pay their feu-duty for two years, haill and together, are declared to lose their right, in the same manner as if an irritant clause had been specially ingroffed in their charter. The act refers to the Roman law, which irritated the right of an *emphyteuta*, if he ran in arrear of his *canon emphyteuticus*, or yearly duty, for three years, *l. 2. C. De jure emph.*; or two, if the right was derived from the church, *Nov. 120. c. 8.* This casualty was styled in our old language *the tinsel of the feu-right*, (from *tyne*, to *lose*); and as it is in every case penal upon the vassal, whether it arise merely from the legal irritancy, or also from a conventional, the superior must in either case obtain a decree declaring the tinsel of the vassal's right, before the forfeiture can fall.

27. But though the aforesaid act gives, by the letter of it, the same force to a legal irritancy as to a conventional one, the following distinction has been observed by the court of session. Where no irritant clause is inserted in the feu-charter, the vassal is allowed to purge the legal irritancy at the bar, before sentence; *i. e.* he is allowed to prevent his forfeiture, by making payment at any time during the dependence of the action of declarator, before judgement pronounced in it: but where the legal irritancy is fortified by a conventional, the vassal cannot, or at least by the old practice could not, purge, without his being able to assign a reasonable cause why payment was not regularly made, *Feb. 13. 1666, Wedderburn*; or unless an obscurity appeared in the words of the irritant clause, *Feb. 18. 1680, E. Mar.* Where the irritant clause was conceived in these words, *That the feu-right should fall, if two years duty happened to run into a third*, which was long the usual style, the irritancy was not incurred by our older practice till the whole of the third year's duty was due, *June 19. 1673, Smith.* But that expression is now understood to infer an irritancy when two years feu-duty is fully in arrear, and the third year's duty has begun to run; more agreeably, not only to the statutory irritancy, but to the conception of the clause.

28. Till of late, two conditions were frequently adjoined to charters granted in feu-farm, viz. That the vassal should be liable in the casualty of marriage; and, That it should not be lawful to him to alienate his lands without the superior's consent; and these clauses were effectual. But by the before-mentioned act, 20^o *Geo. II. c. 50.* they are declared to be of no force, even where they had been inserted in grants prior to the statute; and the court of session are directed to modify an additional feu-duty, as a recompence to the superior for the loss of those special rights, if the parties themselves cannot agree upon the sum. In consequence of these powers, the session, by an act of sederunt, *March 10. 1756*, declared, That a feu-duty equal to a fourth of one *per cent.* of the valued rent of the lands subjected to the clause, prohibiting alienations without the superior's consent, where the lands were valued, or if the lands were not valued, then a feu-duty equal to a sixth part of one *per cent.* of the real rent, should be deemed a recompence to the subject-superior for the discharge of such prohibitory clause. As there is no prohibition against that clause which was always inserted in the Roman *emphyteusis*, That the lord of the ground should have the first offer of the lands where the vassal intended a sale, it would seem that such clause continues effectual, notwithstanding the statute, as it is quite different from a clause *de non alienando*; and so ought to have

have the same force when adjected to our feu-charters, as it had when adjected to the emphyteutical grants of the Roman law. Yet by our feudal rules a clause declaring any sale of the lands that shall be made by the feuer, without offering them first to the superior, to be null, is not of itself sufficient to invalidate the sale, unless there be also a clause irritating the feuer's right in that event, *New Coll.* ii. 4.; the reason of which is fully explained, *infr.* b. 3. t. 8. § 29.

29. The casualties which arise from the general nature of feudal rights as modelled by our customs, and which therefore have place in every holding, are, nonentry, relief, disclamation, purpresture, and liferent-efcheat. Nonentry is that casualty which arises to the superior out of the rents of the feudal subject, through the heir's neglecting to get the investiture renewed after the death of his ancestor. By the most ancient Feudal law, when the vassal held his grant only for life, his heir had no right to demand a renewal of the investiture upon the ancestor's death; for the feudal right ended with the life of the grantee, on whose decease the lands returned to the superior. After feus became hereditary, the investiture of the right was, by the first feudal usages, to be renewed upon every change, either of the superior or vassal. Upon a change of the superior, either by his death, or by granting over his right of superiority to another, the vassal was obliged to apply to his new superior for a renovation of the investiture; and upon the vassal's death, it behoved his heir to apply to have the investiture renewed in his own name; and if the vassal, or vassal's heir, neglected this, he forfeited the fee, *l. 2. Feud. t. 24. pr.* As for the usage of Scotland, it has at no time required the renewing of the investiture on the superior's death; and when the vassal died, the superior, who is the *dominus directus*, and whom nothing excluded from the lands but the grant he had made to the vassal, might, by our ancient custom, resume the possession of them without any form of law, in virtue of his own radical right, till the vassal's heir should be served by an inquest, and demand to be received by the superior, *St. Rob. III. c. 19. § 1. 2. c. 38.* But as the heir has been now of a long time indulged in the possession, even before his entry, the superior's right is consequently turned into a claim, which must be made effectual by an action for declaring that the lands have fallen in nonentry. This casualty was introduced, that the superior, while he was without a vassal, might be enabled by the fruits of the feu to provide himself with a person fit for his service. But because the forfeiture of the heir to perpetuity, imposed by the written feudal usages, appeared too severe a penalty on the heir to compensate for the superior's temporary loss, the heir, by our customs, forfeits the rent no longer than while the fee is void, *i. e.* without a vassal; so that as soon as he becomes by his entry capable of serving the superior, he returns to the full enjoyment of his fee.

30. While the tenure by ward subsisted, the lands truly fell in nonentry as often as the heir happened to be minor, because an heir in ward lands could not enter during his minority; but this necessary casualty got the special name of *ward*. What falls under the proper appellation of *nonentry* arises from the voluntary neglect of the heir, who is in a capacity to enter, yet declines to enter. The superior is intitled to this casualty in every case where the vassal last infeft is dead, or has resigned, and the heir or resignatary not yet entered. Hence lands continue in nonentry, though the superior should grant a precept for infefting the heir, till seisin be taken upon it; or though he should accept of a resignation from his vassal in favour of a third party, till seisin be taken by the resignatary, *St. b. 3. t. 2. § 12;* for one cannot be said to be entered to lands till he be infeft by the superior. Nay, though seisin be actually taken by the heir or resignatary,

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tary, yet if his retour on which the feisin proceeded be set aside upon any nullity, the lands become again void, and of course fall in nonentry from the date of the decree of reduction; for a retour declared null is equal to none, *July 12. 1625, Lo. Cathcart; Feb. 29. 1628, E. Nithsdale*. The rents forfeited by nonentry are computed in the most favourable way for the heir, in the period from the death of his ancestor till he himself be cited by the superior in an action of general declarator of nonentry; for till then the superior must be contented with the retoured duties of the lands. For this reason, before proceeding farther, the nature of retoured duties must be explained.

31. It was necessary that the lands in Scotland should be valued, both for adjusting the proportion of the public subsidies at which every individual landholder in the kingdom was to be rated, and for ascertaining the quantum of the nonentry and relief duties payable to superiors. Alexander III. who about the year 1280 had occasion for an extraordinary subsidy, towards the payment of his daughter's tocher, who was then to be married to Eric King of Norway, is the first who now appears to have settled a general *census* or valuation of our lands. In the parliament 1326, an indenture passed between Robert I. and his freeholders, (an extract of which, from the records of the parliament 1327, is preserved in the Advocates library), whereby, upon a recital, That the crown-revenue was much lessened by the late wars with England, the freeholders granted to the King the tenth part of their rents, according to the old extent, as it was fixed by Alexander III. with this provision, that in lands which had sunk in their rents by the devastation of the late war, the proprietors were to be allowed such an abatement of the subsidy as should be settled by an inquest. This brought on a revaluation of the particular lands that the proprietors pretended had suffered by the war, by which it might appear that they were truly intitled to an abatement: and the value of these lands, as thus reduced by the inquest, was called *the new extent*, in contradistinction to that of Alexander III.

32. That those valuations might be of more certain and perpetual use, a custom soon crept in, that the inquest on the service of heirs were required, by the brief directed to them from the chancery, to ingross in the retour the valuation of the lands in which the heir's ancestor died seised. In the lands where no revaluation was demanded on account of the sinking of the rent in the reign of Robert I. no other valuation could be inserted in the retour, than the old one of Alexander III.; but in the retour of lands which had been revalued, both the old extent, *quantum valuerunt tempore pacis*, and the new, *quantum nunc valent*, were inserted: and it is obvious, that from this period, to the establishing of some posterior general valuation of lands, the new extent might be lower, (and indeed was so in most retours), but could never be higher, than the old. The author of *Hist. law-tracts*, from whom this short abstract of the history of extents is borrowed, conjectures, that the two extents continued on this footing, till a new valuation of our lands was settled in 1424, on occasion of a subsidy to be raised for the payment to England of the costage, as it was called, of James I. i. e. of the cost due to England for his subsistence and education, *Black acts*, 1424, c. 10. 11. But as in many retours prior to that time, several of which lie in the charter-chest of the family of Keir, the new extent is higher than the old, a general valuation must have been established in the interval between the reigns of Robert I. and James I. And no time appears more likely for this, than the year 1365 or 1366, when a tax was to be imposed for the ransom of David II. long after the lands that were revalued in consequence of King Robert's indenture had, under the sunshine of his long and peaceable reign, fully recovered, and several of them far exceeded their first value.

33. Though the extent taken in 1424 was considerably higher than the old, yet from the improvement of our country by agriculture, and a well-ordered police, it soon became too low a standard for the casualties of superiority; especially considering, that by the gradual heightening of the nominal value of our coin about that time, superiors, though they got the same nominal value for their casualties as formerly, truly lost, upon every such rise, part of the weight in silver which they were originally intitled to. It was therefore enacted, by 1474, *c.* 56. (but without setting on foot any new general valuation), that retours should specify both the old extent, and the precise avail that the lands contained in the retour were worth at the time of the inquest's serving the heir: and this last has been ever since called *the new extent*, or the *nunc valent*. For some time after passing this act, a proof by witnesses was brought before the inquest, at the service of every heir, to fix the present rent of the lands to which he was to be served. But inquests did not long continue a practice, so troublesome in itself, and so unfavourable to landholders, as stretching the value of their lands to the utmost height upon every new service. When therefore lands had been once retoured in pursuance of this statute, the inquest fell gradually into the custom of inserting in all subsequent retours thereof, as the *nunc valent*, or new extent, the precise sum to which it was fixed by the former retour. And where there had been no former retour specifying the new extent, Skene informs us, *v.* *Extent*, that it was, by an almost general rule, fixed to the quadruple of the old; for which reason it was usually called *the fourth mail*; *Hist. law-tracts*, *v.* 2. *p.* 217. *et seqq.*

34. Even after passing the act 1474, the old extent established by Alexander III. long continued the rule for proportioning the subsidies chargeable upon private landholders, as appears by a tax imposed by parliament in 1633, which was levied by that standard. But the old extent settled by Alexander could not be of universal use in subdividing the subsidies upon all the lands of Scotland. It could not be applied to those that were enjoyed either by the church or by boroughs; for as churches and boroughs die not, their lands cannot pass by retour; so that their proportions of the subsidies were fixed by other rules. The church was, as far as we can trace its history upwards, subjected to the equal half of all our subsidies; the burden of which half was subdivided among the several church-beneficiaries, according to the value of the several benefices, as they stood settled by Bagimont's roll, many copies whereof are yet extant: and to that proportion of subsidies church-lands continued to be subjected even after the Reformation, 1597, *c.* 277.; *Act convention* 1665. The estate of boroughs paid a sixth part of every taxation for their burgh-lands and their trade; which sixth was at first proportioned among the several boroughs by express enactments in the statutes imposing the taxations, but now by the boroughs themselves, who are authorised to alter these proportions from time to time in their annual conventions, according to the flourishing or declining state of the particular boroughs, 1702, *c.* 6. Neither could the old extent be the rule in the King's property-lands; for these were originally subjected to no public taxation. The first tax with which they were charged was imposed by 1597, *c.* 277. by which act therefore special rules are prescribed, according to which the stewards and bailies of the King's lands were to conduct themselves in retouring them.

35. It appears, by several acts passed during the Usurpation, 1640, *c.* 34.; 1645, *c.* 6.; *Aug.* 1649, *c.* 21. that in the levying of public taxes at that time, the rule of the old extent was laid aside as unequal; in place of which, new valuations were substituted, that were made, or to be made, for every shire, by commissioners appointed for that purpose. By two acts
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of the Usurper's parliament, holden at Westminster, 1656, c. 14. & 25. imposing taxations upon Scotland the rates laid upon the several shires are precisely fixed, and the equal assessment of those rates, among the individual landholders in every shire, is left to the adjustment of commissioners. The first tax after the Restoration, which was charged properly on land, was imposed by the convention 1665, and levied by the rule of the old extent. The next was imposed *anno* 1667, by an act of convention of that year; which, after affirming in its preamble, that it was directed to be levied according to the valuations 1660, proceeds to specify the proportions on each shire and borough, which are nearly the same as those that had been fixed at Westminster in 1656. It is however worth observing, that no mention is made of any general valuation in 1660, to which the act of convention 1667 seems to refer, in any of our statutes or records. The commissioners appointed for levying this last tax, imposed in 1667, were by the act directed, in so far as concerned the proportioning of the total sums to which every shire was subjected, upon the individual landholders of that shire, to proceed according to the former valuations of their respective lands, where they appeared equal and just; and where the commissioners were of opinion, that the lands of any particular landholder were over-rated, to rectify their valuations according to equity, but without altering the total sums charged by the act upon every shire. All the taxations upon land granted since the year 1667, are, by the acts imposing them, to be levied according to the rules and valuations settled by the act of convention of that year, 1670, c. 3. &c. The rent thereby fixed gets the name of the valued rent, in opposition to the old and new extents; and this valuation is the rule observed at this day, not only in levying the land-tax upon the individual landholders of the several counties, but in proportioning the payment of several public burdens relating to manse, &c. among the landholders or heritors of the parish.

36. Though both old and new extents may, without impropriety, be styled *retoured duties*, because both are inserted in retours; yet where retoured duties are mentioned indefinitely, that appellation denotes the new extent, by which the rates of the superior's casualties are regulated, and particularly the nonentry-duties before citation. In feu holdings, the yearly feu-duty contained in the *Reddendo* is retoured as the new extent; because the law presumes, that superiors, in the charters granted to their feu-vassals, reserve to themselves a *Reddendo*, or yearly pension, adequate to the rent; and feu-grants by the crown, of the annexed property, are not effectual to the vassal, where the yearly feu-duty is less than the former rent. In this holding, therefore, the superior gets in effect nothing in name of nonentry before citation; for he would have been intitled to the yearly feu-duty by the *Reddendo* of the charter, though the fee had been full; *i. e.* though a vassal had been infeft in the lands. The doctrine held by some, that when nonentry falls in a feu holding, one year's duty in the *Reddendo* ought to be paid by the heir to the superior in name of nonentry, before citation, and another properly as feu-duty, carries this absurdity with it, that where the feu-duty exceeds the half of the true rent, which is not a rare case even at this day, the vassal would be liable in the yearly payment to his superior of a sum exceeding the full rent of the subject contained in his charter; and consequently his condition would be harder before than after citation. In tithes, where the right of them is holden blanch, the superior gets the fifth part of the retoured duty of the lands, in name of nonentry, before citation; because the law considers the yearly tithe to be worth a fifth part of the rent of the lands: but where the

the right is holden feu, he is, by the foregoing rule, intitled only to the yearly feu-duty payable by the vassal until citation.

37. It is because the new extent or retoured duty is, by a favourable construction, presumed to be the rent, that the nonentry-duties due before citation are governed by it. If therefore no retour of the lands in nonentry shall appear, the superior is intitled, even before citation, to the real rent; or, which is more favourable for the vassal, to the valued rent, as ascertained by the books of the land-tax: yet if the retoured duties be discoverable any how, though not by a formal retour, the casualty will be restricted. Thus if a barony, whose retour appears on record, has been sold by different parcels to different purchasers, in a question concerning the nonentry-duties of a particular parcel, the gross retour of the whole barony is to be proportioned among the several parcels into which it is divided, according to the present rent, and the heir not entered is liable before citation, only in that share of the retoured duty of the whole which corresponds to his part, *Feb. 5. 1623, Ker.* A rule has been lately laid down by the court of exchequer, *Feb. 17. 1731*, that the old and new extents of lands, of which the *valent* is not known, shall be adjusted according to the valued rent, and to the old and new extents of other lands within or adjacent to the county in which the lands to be retoured lie.

38. Infestments of annualrent, of which *vid. supr. t. 2. § 5.* are usually granted by the debtor to be holden of himself; a most absurd practice, seeing the creditor becomes thereby vassal in that feudal right to his debtor; and consequently the right must fall in nonentry upon the creditor's death. Because annualrents arising out of lands had no distinct valuation or extent, therefore they were laid in the *valent* clause of the retour, *valere seipsum*; i. e. the annualrent itself was accounted the retoured, and consequently the nonentry duty; and thus the creditor's heir, as long as he lay out unentered, lost the whole interest of the debt due to him by the superior his debtor. To prevent this, it was enacted by 1690, c. 42. that such annualrents should, for the future, be only retoured to the blanch or other duty contained in the infestment. But as that act regulates only the retoured duties due before citation, the creditor still continues to lose the whole interest which may grow on the debt, from his being cited in the general declarator, till he enter, unless it be guarded against by a special clause, obliging the debtor to make over to the vassal's heir the nonentry-duties *gratis*, as often as the right shall fall in nonentry by the vassal's death.

39. From the rule, that nonentry-duties before citation are to be ascertained by the retoured duties, where the lands appear to have been retoured, there was an exception while the tenure by ward subsisted. That where the lands had been, immediately before their falling in nonentry, in the superior's possession by the casualty of ward, he might, on the expiration of that casualty, without the necessity of a declarator, continue his former possession while the heir lay out unentered, which was called *the nonentry subsequent to the ward*; to which possession the law gave the same extent as it did to the ward itself. But if the superior had not attained possession in virtue of the ward, *ex. gr.* if the lands were holden taxed ward, he was intitled to no more than the retoured duty, till the heir was cited in the action of general declarator. This rule admits of another exception, by the present law, in the case of lands holden formerly ward of the crown; for it is declared by 20^o Geo. II. which changes the tenure of all those lands into blanch, that as often as they fall in nonentry, they shall, in place of the new extent, or the retoured duty, be only liable in the annual payment of one *per cent.* of the valued rent according to which they are now liable for the land-tax: and the more effectually to ascertain the quantum of the non-

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entry-duty, the same act directs, that all retours of such lands shall set forth, not only their old and new extent, but their valuation, or valued rent.

40. The casualty of nonentry, when restricted to the retoured duties before citation, falls, not as a penalty of the heir's transgression, or as a punishment of his *mora* or *culpa*, but as a casualty naturally accruing to the superior in consequence of his radical right; from which, therefore, he cannot be excluded, whatever the cause of the nonentry may be, and tho' no degree of blame may be imputable to the heir. Hence the superior is at this day intitled to the nonentry-duties of that very year which the law has indulged to the heir, as a time for deliberating whether he will enter or not, though his availing himself of that legal benefit cannot be construed as a contempt of the superior. But where the heir's not entering proceeds from a defect in the superior, equity will not suffer him to claim a forfeiture against his vassal, of which he himself is the sole occasion, *infr.* § 45. After the heir is cited by the superior in the general declarator, the rent of the lands falling in nonentry is computed in a way the most unfavourable for the heir, so as to extend to the full rent; because the heir's delay, after he is required to enter, argues a higher degree of blame, and gives more ground to presume a contempt of the superior. Yet as this severe casualty appears, even after the delinquency is thus aggravated, to be too heavy, where there is the least ground for an excuse, therefore, if the heir lie under a legal incapacity, *July* 24. 1677, *Lo. Melvil*, or has, by a probable mistake, believed himself already entered, *Jan.* 22. 1706, *Maitland*, or if he offer any reasonable apology for still declining to enter, *Dirl.* 273. no more than the retoured duty will fall to the superior, even after citation, as long as such probable ground of doubting shall subsist.

41. In the action of general declarator, the superior must produce as his title his feisin in the lands, to prove his right of superiority; and if it be a donatary who sues, he ought to produce his gift from the superior. But neither superior nor donatary need bring evidence that the lands were without a vassal from the time libelled, because that is a negative, which proves itself, unless the defender make it appear that the lands were full. Where the superior executes a grant of any casualty without limitation, the donatary ought, by the common rules of law, to hold the grant as long as the casualty subsists; yet in gifts by the crown, the donatary of the ward, and of the nonentry subsequent to it, was not intitled to all the nonentry-duties so long as the heir lay out, but only to the three terms duties immediately ensuing the ward, probably that the King might have it in his power to oblige a second donatary. But such gifts by subject-superiors were interpreted in their full extent, according to the natural meaning of the words, *St. b. 4. t. 8. § 9.*; *Fount. Feb.* 25. 1696, *E. Cassilis*.

42. The libel in a general declarator bears no personal conclusion against the apparent heir, though he must be made a party to the suit; for the action is directed against the lands themselves. Nothing can be comprehended in the libelled summons but the retoured duties; because the full rent is not due till the heir be cited upon that summons: and to make these retoured duties effectual, the pursuer may throw into the libel a conclusion of poinding the ground. A decree proceeding on this action intitles the superior, not only to a poinding of the ground as a real creditor, for recovering the retoured duties due before citation, but to enter into the total possession of the lands, and levy for his own use the full rents from the citation downwards to the heir's actual entry. And if the tenants refuse payment, he may recover the rents by a petitory action against tenants and other intromitters, which is improperly called an action of *special declarator*.

These declarators were anciently brought by the superior before his own court, agreeably to a general rule laid down in *Reg. Maj. l. 2. c. 63. § 8.*; which practice began to fall into disuse in Craig's time, *lib. 2. dieg. 19. § 11.* and was soon after quite laid aside. From those observations, it appears, that all nonentry-duties are not, without exception, *debita fundi*. With regard to the duties before citation, which constitute a right of credit upon the vassal's lands to the superior for a liquid sum, he may doubtless recover payment of these by a poinding of the ground, which is an action competent to every real creditor: but the right he has to the full rents which become due after citation, does not accrue to him in the character of creditor, but as *interim dominus*, or proprietor of the rents; and consequently the action for making those effectual, must be the same that a proprietor is intitled to for recovering the rent of his estate, which can be directed only against tenants and other possessors; for it would be incongruous and inept in a proprietor, to use real diligence by poinding the ground of his own lands, for a debt due to himself, *St. b. 2. t. 4. § 22.*

43. It yet remains to be considered under this head of our law, *first*, How the casualty of nonentry is excluded; and, *2dly*, What deeds of the superior are accounted a passing from nonentry-duties already incurred by the heir. As to the first, it is obvious, that there can be no place for nonentry in lands where a community, or corporation, is vassal; for a corporation never dies, *supr. t. 3. § 34.*; and consequently, after seisin is once given to a corporation, the fee must continue full as long as the corporate body subsists; *Harc. 588.* This is the case of grants, not only to hospitals and universities, but to royal boroughs: for though every individual burgher is said by his charter to hold of the crown the special tenements of lands or of houses expressed in it, and consequently ought, in the general case, to be equally subject to nonentry as vassals whose lands lie in no borough; yet in truth it is not the particular burghers who are the vassals, but the borough itself, or the corporation of inhabitants, to whom the King grants, in their charter of erection, all the lands and tenements within the limits of it, to be holden burghage of the crown. If, therefore, no nonentry can fall against the borough itself, because it is a corporate body, neither can it fall against individuals; *Cr. lib. 2. dieg. 19. § 26.*; for if nonentry be excluded with regard to the whole, it cannot obtain with regard to any part. This doctrine, that nonentry is excluded where a corporation is vassal, cannot be applied to those villages which have been erected by the crown into boroughs of regality or barony: for such boroughs had, by their erection, no grant made over to them of lands, or any feudal subject capable of falling in nonentry, as royal boroughs had; but barely a right to such privileges or immunities as the crown was pleased to confer on them; and particularly that of having magistrates appointed from among themselves for preserving good order within the borough, and exercising a certain degree of jurisdiction over the inhabitants. Now these rights were holden, not of the crown, but of the lord of regality, or baron, in whose favour the erection was made: and as the boroughs so erected were formerly parts of the regality or barony, and the lord of regality or baron was intitled to the same casualties out of the lands and houses situated within the borough, as out of the rest of the regality or barony-lands, they still continued parts of the regality or barony; because the erections could not impair or weaken the right of the superiors, at whose desire the boroughs were erected, *Cr. lib. 2. dieg. 19. § 27. 28.*

44. Lands cannot fall in nonentry as long as the fee is full, *i. e.* as long as the vassal last seised in them by the superior continues alive. Hence, *first*, Infeudments of property, either granted or confirmed by the superior, exclude

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exclude nonentry, during all the days of the grantee's life, though the vassal infeft should have afterwards made over the fee to another. *2dly*, Nonentry is excluded by an infeftment in conjunct fee and liferent, granted by a husband to his wife, and confirmed by the superior, which, tho' properly it be no better than a liferent in the wife, saves from the nonentry during her life. And this holds, though the wife should, after the husband's death, formally renounce her conjunct fee, and restrict her right to a bare liferent, *Balf. p. 263. § 27.* Lord Stair affirms, *b. 4. t. 8. § 7.* that nonentry is not excluded by a common liferent-infeftment; yet he admits, *b. 2. t. 4. § 23.* that because an heir can have no benefit by his entry, while he is excluded from the whole profits of the fee by a liferenter, no declarator of nonentry can pass against him, by which the superior may point the ground, or enter into the possession of the lands from which he is thus barred by the liferenter, till the liferent falls. *3dly*, Subfeus, which had been granted under the authority of the above-mentioned statutes authorising them, 1457, *c. 71.* and 1503, *c. 90. and 91.* excluded the nonentry, which would otherwise have fallen by the death of the immediate vassal; and even after the repeal of these statutes, a superior, who himself confirms a base infeftment granted by his immediate vassal, is thereby understood to renounce the benefit arising from such nonentry, and must be contented, upon that vassal's death, to demand, as in his right, from the subvassal, the yearly duties and whatever else might have been demanded from him by his immediate superior had he been alive, *Bankt. b. 2. t. 4. § 25.* Stair admits as to this article, *b. 2. t. 3. § 28.* that the superior's confirmation of a subfeu, secures the subvassal against such casualties falling by the death or delinquency of the immediate vassal, as entirely carry off the property, *ex. gr.* recognition, while ward holding subsists; but he affirms, that it ought not to abridge the superior of his other casualties, which infer only a temporary right to the rents, such as ward or nonentry: and it is certain, that his Lordship's doctrine obtains in the confirmation of base infeftments granted by the crown. *4thly*, Nonentry is excluded by the superior's confirmation of public infeftments granted by his vassal; for since public rights are holden from the disponer of the superior, the superior by his confirmation accepts the grantee as his vassal, and consequently the fee must be full during that vassal's life. *5thly*, It is excluded by the terce, during the widow's life, as to a third of the lands; and by the courtesy, during the life of the husband, as to the whole of them; these being legal provisions, which require no seisin to perfect them: yet the wife, through whom the husband claims the courtesy, or the husband, whose widow claims the terce, must have been infeft in the lands; for without their seisin there can be no terce or courtesy, *infr. t. 9. § 51.*

45. A superior is barred, *personali exceptione*, from nonentry-duties, after he is *in mora*, *i. e.* after it is owing to himself that the heir is not entered. Upon this ground, nonentry is excluded from the time that an heir retoured has charged the superior, on a precept issuing from the chancery, to seise him in the lands, *July 18. 1678, Fullarton:* but such charge hath no effect, unless the heir do *simul et semel* offer to the superior the relief and the nonentry duties, in so far as they are yet unpaid; see *Gosf. Feb. 10. 1671, L. Kilhead.* Thus also this casualty is excluded by an adjudication of the vassal's lands, and a charge given upon it to the superior, provided the adjudger at the same time offer him a year's rent, according to the injunction of 1469, *c. 37;* *Feb. 3. 1681, Ker.* In like manner, the superior, where he is not himself infeft, and so not in a capacity to enter the heir, and nevertheless refuses to complete his titles upon a charge, forfeits the nonentry-duties during his life, 1474, *c. 58.* *Lastly*, Upon a similar ground, nonentry is excluded, even

even as to the retoured duties before citation, in every case where either the heir of the superior has not perfected his right to the superiority by a service, or where from the involved situation of the superior's affairs, the heir of the vassal cannot, with any degree of certainty, know to whom he is to apply for his entry, *Falc. i. June 29. 1745, Chalmers*. As to the question, Whether leases granted by the vassal to tenants, exclude the superior from this casualty over the lands let? see *infr. t. 6. § 26*.

46. As to the instances in which the superior is presumed to pass from his claim of nonentry-duties already fallen due, *Firſt*, Craig, on the authority of some decisions pronounced before his time, while yet the act 1617, concerning prescriptions, was not passed, affirms, *lib. 2. dig. 19. § 17*. that the fee having been full for thirty-six years backwards, presumed that the superior had received payment or satisfaction for all preceding nonentry-duties: which presumption is, since the act 1617, more applicable to the term of forty years. *2dly*, A charter of *Novodamus* by the superior, imports a release to the vassal of all former casualties, *ſupr. t. 3. § 23*. and consequently of all nonentry-duties prior to the grant, *Feb. 12. 1713, Erſkine*. *3dly*, Three feifins granted by the superior to three consecutive heirs, proceeding either on retours or on precepts of *Clare conſtat*, presume that all preceding nonentries are paid, or passed from, in the same manner that three consecutive discharges of rent or interest presume a release of all arrears, *Cr. lib. 2. dig. 19. § 16*. *4thly*, Entry by the heir, upon a precept of *Clare conſtat* voluntarily granted by the superior, even without a clause of *Novodamus*, imports a passing from all nonentry-duties incurred previously to the death of the ancestor; because the superior's affirmation in the precept, that the ancestor died feifed in the lands, includes an acknowledgement, that the fee was full at his death, *St. b. 2. t. 4. § 23*. But charters or precepts by the superior, in consequence of legal charges directed against him, exclude not his claim for duties already incurred; for these charters or precepts, being granted not from choice, but in obedience to the law, imply a reservation of all claims formerly competent to him. Yet feifin upon such charter or precept, will bar nonentry for the future; because, by the feifin, the fee is full.

47. Relief is that casualty which intitles the superior to an acknowledgement or consideration from the heir of the deceased vassal, for receiving him as vassal in the lands; and it gets that name, because by the heir's entry, his fee is relieved or recovered from the superior. Craig, after Cujacius, derives the origin of this casualty from the thirteenth constitution of Leo, by which the administrators of the church were prohibited to exact more from their tacksmen for the renewing of a lease, than two years rent of the subject: but it may with greater probability be derived from the acknowledgement given by the singular successor of an *emphyteuta* to his *dominus*, upon the renewing of his right, *l. 3. C. De jur. empb.* First, after feus were descendible to heirs, the superior was obliged to receive his vassal's heir without any acknowledgement; and he could in no case be compelled to receive singular successors. No mention therefore is made of relief in the *Conſuetudines feudorum*, nor indeed of any thing resembling it, except in *l. 1. Feud. t. 24*. which provides, in the special case of the vassal's death without male issue, that the daughter shall redeem the feu from the superior.

48. This casualty hath, however, been early received in most of the countries in Europe. It has indeed been made a doubt, whether it ought to be reckoned among those that by our law are common to all feudal tenures; and it must be admitted, that by a decision in 1610, observed by Hope, *v. Vassal*, and a later one, *Nov. 24. 1736, E. Dundonald*, it was ad-
judged,

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judged, that relief was not due in feu holdings flowing from subject-superiors, without a special provision in the charter, for doubling the feu-duty at the entry of every heir. But the reasons that may be urged against these decisions, appear strong: *First*, The Norman customs, from which both parts of this island have borrowed many feudal usages, admit this casualty, not only in military or ward fees, but in ignoble, and in *maifures*, or those granted for the vassal's alimony, *art.* 158. 159. *2dly*, Our neighbours of England have received it, not only in tenures by ward, but by foccage, *Glanv. l. 9. c. 4.* *3dly*, This also appears to have been the law of Scotland by *Reg. Maj. l. 2. c. 71. § 3.* And indeed the doctrine, That relief is incident both to feu and blanch holdings, hath been asserted by every Scottish writer who has treated of that subject; by Craig, indeed with greater diffidence, *lib. 2. dieg. 20. § 32.* who nevertheless quotes a former treatise of our law in support of it; by Skene, in his note upon the foresaid passage of the books of the Majesty; by Hope, who adopts the words of Craig, *v. Varda*; by Stair, *b. 2. t. 4. § 27.* and Mackenzie, *§ 22. b. t.* *Lastly*, This doctrine is strongly supported by the analogy of our law. For, *first*, Not only proper vassals, but tenants, and naked possessors of land, were obliged, on their entry after the death of their ancestors, to pay to the landlord a duty much resembling relief, *Q. Attach. c. 23.*; *Skene, v. Herezeld. 2dly*, Where relief is specially expressed in a holding by feu-farm, the words, *uti mos est in feudifirmis*, are commonly subjoined; which plainly import, that the casualty would have been due though it had not been expressed. *3dly*, The sovereign, who is never presumed to exact arbitrarily from his vassals, does, in all the precepts directed to sheriffs for infefting heirs in a feu-farm fee, uniformly require them to take security of the heir for the payment of the double feu-duty as the relief, though the charter should bear no such clause, *St. b. 2. t. 4. § 27.*

49. In ward lands holden of the crown, the relief of a knight's fee was anciently taxed to 100 s. Scots, *Reg. Maj. l. 2. c. 71. § 2.*; that of a baron's fee was left uncertain, *ibid. § 4.* But the later practice fixed the quantum of that casualty in all ward holdings universally, to a year's rent of the fee, computing it in the favourable way, by the new extent, or the retoured duty, where the heir happened to be major at the ancestor's death, *Cr. lib. 2. dieg. 20. § 33.* In case of the heir's minority at that period, the superior, if he was in possession of the lands in virtue of the ward, had a right to a year's full rent in name of relief, for which he continued his possession another year after the heir's majority, *Cr. ibid.*: but no relief was due, in case the heir entered to the lands before the expiration of that year, either by our ancient law, *Reg. Maj. l. 2. c. 68. § 3.* or by the usage of England, *Glanv. l. 9. c. 4.* or of Normandy, *Art. 225.* in which it is equitably suggested, that the rents accruing to the superior from the ward ought also to serve him for the relief. It is agreed by all lawyers, that the relief in blanch and feu holdings, at least where the charter expresses that casualty, is estimated to the double of the blanch or feu duties. But this is not to be so understood, as if double of the *Reddendo* were paid properly in name of relief: for one year's *Reddendo* goes to the superior, as the constant yearly feu-duty payable out of the lands; it is the other only that is paid as an acknowledgment to him for relieving the feu out of his hands.

50. This casualty, as it cannot extend to the full rent since the statute abolishing tenures by ward, is a *debitum fundi* affecting the ground of the vassal's lands; and consequently may be made effectual to the superior by a poiding of the ground: but it cannot be exacted while the vassal's heir lies out unentered, because it is intended merely as a present or acknowledgment to the superior for receiving the heir as vassal in the lands. Hence

where lands hold of a subject, the heir, though he obtain a precept of feifin from the fuperior, is not liable in payment of the cafualty of relief fo long as feifin is not taken upon it ; for till he be infeft, he is not received as vaffal : but in lands holden of the crown the heir fubjects himfelf to the relief, barely by taking a precept from the chancery ; becaufe the fheriff is in all fuch precepts required to take fecurity of the heir, for the fums due to the crown for the nonentry and relief duties, which are all ftated in the *refponde* book kept by the director of the chancery, and are chargeable upon the fheriff, who muft account or anfwer for them to the exchequer, by 1587, c. 73. ; and hence that book hath got its name. In confequence of this ftatute, the crown may demand the relief-duties, either from the heir or from the fheriff, by a perfonal action ; and if payment be made by the fheriff, he has recourfe, in the character of cautioner, againft the heir, whofe proper debt it is, either by a perfonal action, or by a pointing of the ground, *March* 12. 1628, *L. Laurifon*. No compofition can be received in exchequer for this cafualty, by 1587, c. 73. ; and it is from this enactment, that, as Sir George Mackenzie in his obfervations on that ftatute informs us, the rule of exchequer has arifen, by which, though a donatary fhould obtain a gift of nonentry and relief from the crown, the Barons of Exchequer demand the cafualty from the vaffal, as if no gift had been granted to a donatary.

51. Difclamation, in a large fenfe, fignifies a vaffal's difowning or difclaiming one for his fuperior, whether he who is thus difowned be the true fuperior or not. Thus where one who claims the fuperiority of a feudal fubject, fues the perfon whom he alledges to be his vaffal for exhibition of his title-deeds, the defender muft either exhibit, or difclaim, that is, deny judicially, that the purfuer is his fuperior ; and if he deliberately difclaim upon frivolous grounds, he forfeits his fee : fo that difclamation is not fo properly a cafualty, as a total forfeiture. It obtains in all feudal tenures : for a vaffal who wilfully difclaims his true fuperior, acts contrary to the homage and fealty which is implied in every feudal grant ; and difclamation, even when it was confined to a fmall detached part of the fee, drew after it by our old law the forfeiture of the whole, *Reg. Maj. l. 2. c. 63. § 4. 6. 9.* But now a probable ground of ignorance, or fpecious colour of excufe, faves the vaffal from this heavy penalty ; as if the vaffal fhould deny one to be the fuperior's heir, through any difpute relating to the order of the deceased fuperior's fucceffion ; or if, in the cafe of feveral conterminous tenements belonging in property to the vaffal, and holden of different fuperiors, he fhould, from a miftake, either of law or of fact, affirm a field to belong to one tenement which truly belonged to another. Craig moves a queftion, Whether there can be any difclamation that is not judicial ? but without doubt certain extrajudicial acts may infer difclamation as ftrongly as judicial, *ex. gr.* if the vaffal fhould accept of a feifin from any other than his true fuperior.

52. Purpresture, or purpifion, is alfo a feudal delinquency, inferring a total forfeiture of the fee ; and was incurred by the vaffal's incroachment on the ftreets, highways, or commonties, belonging to the King or other fuperior, *Reg. Maj. l. 2. c. 74. § 1. 8. &c.* The old penalty of purpifion was, by 1600, c. 5. inflicted upon thofe who, without proper authority, inclofed or tilled up any part of the King's commonties ; but it has long fallen into difufe, *Mackenz. Obf. on act* 1477, c. 80. The word is derived from the French *perprijon*, which fignifies the taking poffeffion of wafte or common grounds without the order of law ; fee *Cotgrave's Dictionary*, v. *Perprijon*, and *Du Fresne*, v. *Porprendre*.

53. Liferent efcheat is alfo a cafualty incident to all or to moft feudal tenures.

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tenures. Escheat, from the French *echoir*, to happen, or fall, was used, in the old books of our law, to denote all forfeiture or confiscation, by which any part of a man's estate fell from him, and all casualty or obvention accruing to the superior, *Reg. Maj. l. 2. c. 55. § 2. ; 2. Attach. c. 48. &c.* But in the more modern acceptation of the word, it is restricted to that particular confiscation which most commonly falls through the denunciation of a person at the horn : and it is either fingle or liferent. This is not the proper place for explaining the doctrine of fingle escheat, because it accrues to the King, and not to the superior ; but as the coincidence between the two is so close that the one cannot be well understood without the other, both shall be handled under this title, beginning with fingle escheat, which precedes the liferent escheat in the order of time.

54. It is a general rule, That no creditor can use diligence on his obligation without the previous sentence of a judge. But because it was thought unnecessary, where the obligation was clear, to have a formal warrant in order to diligence, the expedient was fallen upon, that most deeds should bear a clause, by which the granter consents to their registration in the books of any competent court. This registration, in consequence of the granter's consent, is in the judgement of law a decree as to the special effect of execution : and indeed it carries the essential characters of a decree ; for the deed bears to be registered by the authority of that judge in whose books it is recorded : the extract is signed by the clerk of court, and mentions the appearance of the granter's procurator or advocate consenting to the decree. Bills of exchange, and inland bills, are registrable by statute, 1681, c. 20. ; 1696, c. 36. ; though their style admits no clause of registration. In every other obligation which bears no such clause, a warrant must be granted by the judge for a foundation of diligence : but if the ground of debt be liquid, and not clogged with conditions, the warrant may proceed on a bill or short petition preferred by the creditor to the court of session, which passes of course without citation of the debtor, unless where diligence by horning is to be used, which cannot be obtained on such obligation without a previous decree.

55. After a debt is constituted, either by a formal decree, or by registration of the bond, or other ground of debt, the creditor may obtain letters of horning, issuing from the signet, and directed to a messenger, who is required to charge the debtor to pay the debt, or perform the obligation, within a limited time, under the pain of rebellion. The number of days, or the *induciæ legales*, which, by the letters, are indulged to the debtor for fulfilling his obligation, if he be within the kingdom, are different in different cases, according to the rules set forth *infr. b. 4. t. 3. § 10.* The messenger must execute these letters against the debtor, either personally, or, if he cannot lay hold of his person, at his dwelling-house. Though any house where one resides for forty days together, is, in the common case, accounted his domicil, or dwelling-house, *vid. supr. b. 1. t. 2. § 16. ;* yet, in consideration of the severe consequences of escheat, an inn does not constitute such a dwelling-house as to be the ground of denouncing a person rebel, *Nov. 20. 1672, Paterfon.* If the messenger get access to the house, he must, by 1540, c. 75. deliver a copy of the letters, (which is generally called the *citation* or *charge*), to the debtor himself, if he appear, or otherwise to his wife, or any of his children or servants ; and if they refuse to take the copy from him, he must affix it on the gate or principal door of the house. If he be not admitted into the house, he must give six knocks at the door, so audibly that those within may hear, and afterwards he must affix a copy of the letters to it. If proof be brought, either that no knocks were given, or that they were so given that they could not reach the ears of those in the house, the execution will be improbated or annulled,

led, and the messenger subjected to the pains of falsehood, *St. b. 3. t. 3. § 4.* These statutory rules are not limited to the execution of hornings, but extend to that of all summonses, and letters of diligence. By the messenger's execution is meant the written attestation signed by him, that he has given a citation or charge on the warrant according to the usual solemnities: and it was, in the style of our old statutes, sometimes called *an indorsation*, because it was written on the back of the summons, or letters of horning, 1540, *c. 74. 75. et passim.* All the above-mentioned solemnities required by statute ought to be expressed in the execution; and the omitting to insert them particularly has been adjudged fatal to the diligence, *Nov. 19. 1680, Hay.* It must be allowed that our decisions have not been uniform upon the import of objections made to executions founded upon the afore said act: but these two particulars may be observed: *first*, That our former practice appeared more inclined to multiply, by a large interpretation, these statutory solemnities, and more rigorous in requiring the observance of them, than it has been of late years; *2dly*, That greater liberty may be taken in dispensing with the omission of the less essential forms, in the execution of a common summons, which, without loss to either party, saves to the pursuer the necessity and expence of a new action, than in the execution of letters of diligence, where each party is struggling hard *de damno vitando*, to support his own ground of debt, and make the payment of it effectual. If the debtor has no dwelling-house, or if the messenger cannot go safely thither, the court of session grant warrant to charge him at the cross of the head borough of the shire where he most commonly resides, under the penalty of being holden as confessed if he fail to appear. Where the debtor is not in Scotland, he must be charged on sixty days, at the market-cross of Edinburgh, and pier and shore of Leith.

56. If the debtor obey not the will of the letters within the days mentioned in them, the messenger may immediately after publish the diligence by denouncing the debtor rebel. This publication must be made at the market-cross of the head borough of the shire where the debtor dwells, *arg. 1592, c. 126.*; or if he lives in a separate jurisdiction, as a regality or stewartry, at the head borough of that jurisdiction, 1597, *c. 264.* There the messenger must, before witnesses, first make three several Oyessees with an audible voice, *Feb. 15. 1681, Gordon.* Next, he must read the letters, also with an audible voice; and afterwards blow three blasts with an horn; by which the debtor is understood to be proclaimed rebel to the King for contempt of his authority, and his moveables to be escheated to the King's use. Hence the letters of diligence are called *letters of horning*, and the debtor is said to be denounced at the horn. Lastly, he must affix a copy of the letters and execution to the market-cross, *St. b. 3. t. 3. § 8.; Dirl. 413.* All those forms, being by our customs essential to the publication, must, as in the case of statutory solemnities, *vid. § 55.* be inserted in the execution; and if this be neglected, an offer to prove, by witnesses, that the forms were precisely observed, will not be admitted to supply the defect, *July 11. 1676, Stevenson.* Yet slighter omissions are sometimes overlooked, *Nov. 30. 1711, Lady Sempill,* especially in points where the practice has varied, *Fount. Dec. 7. 1698, Yeaman.* If the debtor be not within the kingdom, the publication must be made where the charge was given, at the market-cross of Edinburgh, and pier and shore of Leith, and copies affixed at all those different places. Denunciations, where-ever they may be used, are declared null, if the letters of horning, and executions, be not registered within fifteen days in the books of the shire, or other separate jurisdiction, where the party was denounced, 1579, *c. 75.*; 1597, *c. 264.* But by a posterior act, 1600, *c. 13.* registration, either in the books

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books of that shire, or in the general register at Edinburgh, is declared sufficient. Letters of horning which get the name of general, sometimes issue from the signet, without any previous decree, or so much as citation against any particular party; of which more *infr. b. 4. t. 3. § 11*. But hornings are, by 1592, c. 140. declared to be no foundation for denouncing any person who has not been previously cited to hear and see the letters directed against him.

57. Denunciation may proceed, either on civil debts, or on crimes. Denunciations on debt are void, if they be not used within a year after the charge given to the debtor upon the horning, or if the ground on which the diligence proceeded be insufficient, or if the debt have been paid previously to the denunciation. But to preserve the crown's right against the consequences of collusion between the debtor and creditor, *first*, The officers of state must be made parties to all such actions of reduction, *Spot. p. 104. 105. Douglas*; and, *2dly*, No discharge granted by the creditor to the person denounced, though it bear a date prior to the denunciation, can be pleaded as a ground of reduction, in prejudice of the crown's right, unless the denounced make oath before the session, that it is of a true date, 1594, c. 209. In criminal cases, denunciations may be used against persons cited to the court of justiciary, either, *first*, if they appear there with a greater number of followers than is permitted by statute; or, *2dly*, if, by failing to appear, they are declared fugitives from the law. In the first case, the denunciations must be made at the cross of the head borough of the shire where the court is held, and registered, either in the books of the shire of the domicile, or in the books of adjournal of the justiciary. In the last case, the denunciation, if used at the market-cross of Edinburgh, within six days after the sentence of fugitation, is declared as effectual, as if it had been made at the cross of the county-town of the rebel's domicile, 1592, c. 126. Single escheat may fall without any denunciation by a messenger. Thus it falls, by our customary law, upon sentence of death pronounced in a criminal trial; and by special statute, upon one's being convicted of certain crimes, though not capital, *ex. gr.* perjury and bigamy, 1551, c. 19.; deforcement, and breach of arrestment, 1581, c. 118.; and usury, 1597, c. 247.

58. The effects of denunciation thus orderly used, or of conviction in the criminal trials before mentioned, are, *first*, that the moveable estate of the person so denounced or convicted, falls as escheat to the King: and it is doubtless the natural consequence of proper rebellion, that the rebel's whole estate should fall to the crown, *supr. t. 3. § 12.*; but it seems inconsistent, both with humanity and justice, to fix the consequences of high treason upon any man, merely because he is unable to pay his debt; and at the same time, to bestow upon the crown even the smallest part of the debtor's funds; all of which ought to be applied, in the first place, towards the creditors payment. Upon this ground, some lawyers have been led to conjecture, that this doctrine was originally devised, not for enriching the crown, but as a means of doing justice to the creditors of obstinate and wilful debtors; that the King is not truly proprietor of the escheat goods, but barely a trustee accountable to creditors; and that it is for this reason gifts of single escheat are always granted by the officers of the crown, not to strangers, but to the creditors of the denounced, according to fixed rules. But this favourable hypothesis has little support from our statutes: on the contrary, the right of the escheat goods in the crown is expressly established by several acts, 1551, c. 7.; 1579, c. 75.; 1592, c. 145.; with this only proviso in favour of creditors, that the creditor complaining or offended, that is, the creditor on whose diligence the escheat falls, shall be

intitled, *ante omnia*, to the payment of the debt contained in his letters of horning. And this burden upon the crown's right is most just; for no right would have arisen to the crown, had it not been for the diligence of that creditor. Hence it may be concluded, that the preference given by the Barons of Exchequer, to the other creditors of the rebel, in their nomination of a donatary, is merely an act of equity or humanity, and could not be demanded by those creditors as of right.

59. Towards forming a judgement, or at least a probable conjecture, concerning the origin of denunciation for civil debts, it may be observed, that by the ancient laws, a most reasonable distinction was made between the effect of obligations for liquid debts, which the debtor may, by misfortunes, be sometimes disabled from discharging, and of those for the performance of facts in one's own power. To recover payment of the first, the creditor might have attached the debtor's estate, real and personal, but without treating him as a criminal in default of payment; whereas obligations *ad factum præstandum* might have been made effectual by letters of four forms, or of horning; two diligences nearly of the same nature; both of which drew after them the heavy pains of rebellion upon the party's failing to perform. This rigour might perhaps have been necessary, in those ages of licentiousness, to enforce obedience to the law; and it could not be taxed with injustice, because it affected none but those who refused to comply with the directions of the law, where it was in their power to have given obedience to it. That this distinction was observed, appears not only from 1535, c. 9. which, in obligations to perform, authorized the issuing of letters of four forms; and in obligations of debt, the diligences of apprising and poinding; but likewise from a letter of Q. Mary, recorded in the books of *feederunt*, March 1. 1564, requiring the session to grant letters of horning on the decrees of commissaries, where the sentence relates to the performance of facts in the debtor's power, and letters of poinding where the decree was pronounced on a civil debt. When afterwards horning came to be granted for payment of debt, whether in virtue of the debtor's own consent in the clause of registration, or in consequence of the statute 1584, c. 139. the heavy consequences of denunciation fell equally on all persons denounced, whether the denunciation proceeded on an obligation for debt, or for the performance of a fact, the legislature having neglected to distinguish between the effects of the two. Thus it is plainly taken for granted in 1612, c. 3. that it was till then accounted a sufficient defence against slaughter or mutilation, that the person slain or mutilated had been denounced rebel, though only for a civil debt: and thus it also obtained, that the moveables of a person denounced, even for a civil cause, continued, long after that period, to be forfeited to the crown, as if he had been in actual rebellion, till passing of the late statute for abolishing ward tenures; which for ever extinguished, not only the forfeiture of single escheat incurred by denunciation upon a civil debt, but the casualty of liferent escheat; which is soon to be explained. Nevertheless, as both single and liferent escheats are still incurred in the case of crimes, notwithstanding that British act; and as all the consequences of denunciation, escheat excepted, remain still in force, even where it is used upon a civil debt; it is necessary to proceed in explaining them.

60. The second effect of denunciation is, that the denounced, being in the construction of law a rebel, is not personable; or, in other other words, he cannot appear judicially in any court, either as pursuer or defender. Where indeed he is cited to appear for proving of any fact, upon oath, either as witness or party, or for exhibiting writings called for in an action of reduction, the pursuer cannot bar him from appearing in these and the like

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like cafes, after he himfelf has cited him, *July 12. 1676, Purves*. But his denunciation precludes him from all defences, to the pleading of which he was not fpecially fummoned. And hence a defender at the horn was not fuffered to object to the purfuer's proof, in an action of fpuilzie and oppreffion, *Falc. ii. 113*. This exception againft the denounced, being moft unfavourable, is perfonal: it is only competent againft the rebel himfelf, and cannot be pleaded againft the affignee, though the affignation fhould be dated after the commencement of the fuit; fince the adverfe party is not, by fuch affignation, barred from any defence or method of proof otherwife competent to him againft the cedent, and fo can fuffer no prejudice by it.

61. All moveables belonging to the rebel the time of his rebellion, and all that may be afterwards acquired by him till relaxation, fall under his fingle efcheat, whether the rebellion proceeds on denunciation, or on conviction in a criminal trial: and even tacks, though they be heritable in point of fucceffion, *t. 2. § 6*. fall under the tackfman's fingle efcheat, unlefs they be liferent tacks, which are declared, by 1617, *c. 15*. not to fall by the fingle, but by the liferent efcheat. From this general rule, That moveables are the proper fubject of fingle efcheat, may be excepted, *firft*, Bonds bearing intereft; which though they are made moveable as to heir and executor, by the act 1661, continue heritable as to the fife, and fo fall not under the creditor's fingle efcheat. *2dly*, Though all moveables that are or fhall be acquired by the rebel, fall under his fingle efcheat, where he either dies, or is relaxed within a year after denunciation; yet where he lies at the horn unrelaxed for a year, that rule, as to future acquifitions, is confined to thofe particular moveables which are not the fruits of heritable rights; for fuch of the fruits arifing from heritage, whether natural or civil, as become due after the term next enfuing the rebellion, are in that cafe referved as the proper fubject of the liferent efcheat, *infr. § 66*. Yet all rents or profits, arifing even from heritable fubjects, which are not vefted in the rebel during his own life, but depend upon the life of another, fall, notwithstanding this exception, under the fingle efcheat; not only thofe that were due at the time of rebellion, or became due within a year after it, but all that fhall become due while the rebel continues unrelaxed. This is the cafe of a liferent leafe assigned by the tackfman to the rebel, or of any other liferent right assigned to him by the liferenter, and of the right that the rebel has *jure mariti* to the profits of his wife's heritable eftate during the marriage; all which profits, arifing from thofe and the like temporary rights belonging to the rebel, make part of his fingle efcheat, *infr. § 70. 71*.

62. Our former law authorifed the treafurer to levy the efcheat goods fummarily, and bring them into exchequer in virtue of letters of intromiffion, which were raifed in the name of the treafurer, and directed to the fheriff of the fhire where the rebel refided, or to officers at arms, 1579, *c. 75*. without giving him an opportunity to object, either againft the order ufed in the procefs of horning, or againft the ground of debt on which that diligence proceeded. But this method was neither juft of itfelf, nor agreeable to the rules of our law: for fingle efcheat is truly a legal conveyance of the rebel's goods in favour of the crown, which, like other conveyances, ought to be completed by fome publication that may ferve for an intimation, *infr. b. 3. t. 5. § 3*. This old and oppreffive uſage is therefore juſtly gone into difufe: and by the later practice, our kings, in place of retaining the efcheat to themſelves, make it over to a donatary; whoſe right to the efcheat goods is not perfected, till upon an action of general declarator, to which the rebel himſelf muſt be made a party, a decree be extracted,

extracted, declaring that the right of the rebel's escheat is fallen to the King by his denunciation, and that that right is now transferred from the King to the pursuer, as his donatary, *Nov. 8. 1710, Borthwick*. Gifts of single escheat granted by the sovereign, though in the form of words absolute, had by the older practice a limitation implied in them with respect to their duration, *Feb. 2. 1627, Somervell*; for though such gift had contained an express clause, making over all which the rebel had then acquired, or should afterwards acquire till relaxation, it was adjudged to carry no more than what he should acquire within a year after the gift, *Pr. Falc. 76. 113.*: but by later decisions, those gifts have received a full interpretation according to the natural meaning of the words, *Feb. 8. 1712, Lo. Minto*, observed by Forbes; where, for *arrestor*, the last word, read *donatar*.

63. The creditor on whose diligence the escheat falls, seeing that forfeiture is burdened with the payment of his debt, may, in an action for payment, sue all donataries and intermeddlers whatever with the escheat goods, on a summons of six days, 1592, *c. 143.*: and it has been adjudged, that let the defender's intromission be ever so small, the creditor has a right to recover from him the full payment of his debt, even though the rebel's whole funds should not be sufficient for clearing it, *March 15. 1631, Fletcher*. The Barons of Exchequer therefore never refuse a gift of the rebel's escheat to such creditor, when he demands it, upon his granting backbond that he shall be accountable for his intromissions; and that as soon as his debt is cleared off, he shall divest himself in favour of the person whom the Barons may name. Though there is no statutory restraint on the sovereign in the nomination of a second donatary, *supr.* § 58. yet the Barons, from a just favour to lawful creditors, never name a stranger, so long as any debt due to the rebel remains unpaid. This second donatary, who is in effect assignee to the backbond granted by the first donatary, is intitled to call that first to account, in so far as his intromissions have exceeded the amount of his debt. Second gifts require no declarator, because by the declarator of the first gift, the rebel has been already declared to be duly denounced; but if any nullity should afterwards appear in the process of horning and denunciation upon which the first gift has proceeded, the first gift and declarator would become destitute of a foundation; and the second gift, which thereby would become the first, must be declared, as if there had been no former declarator.

64. It was much contested by lawyers before the abolishing of heritable jurisdictions, whether the single escheat of rebels who resided within a regality-jurisdiction, belonged to the sovereign according to the rule now explained, or to the lord of the regality in virtue of a right implied in all regalities erected by the crown. Stair confined the right of escheats to such lords of regality as were infected expressly with that privilege, *b. 3. t. 3. § 20.*; and the reasons offered for this opinion by Dirleton, *Doubts, v. Regality*, were strong, viz. that it was contrary to the nature of jurisdiction, that any judge should, without a special grant, claim forfeitures arising from sentences pronounced, or denunciations used, without his territory; and far less the forfeiture by single escheat, which is a right proper to the King, arising from the obedience due to him by his subjects, and which is therefore in all letters of horning declared to belong to the crown, without any restriction. Mackenzie, on the other hand, *Crim. Treatise, part 2. tit. 11. § 9.* affirmed, that every lord of regality, though that right was not expressed in his grant, was intitled to the single escheats of those who resided within the regality, even though the moveables belonging to the rebels should have been situated elsewhere; which doctrine rests upon this ground, that no argument drawn from the general nature of jurisdiction ought to be

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be applied against a regality, which is a jurisdiction *regalem haben sdignitatem*, and therefore not to be circumscribed by common rules.

65. A person denounced for a civil debt, may obtain letters of relaxation from the horn, by which he is relieved from the consequences of denunciation; either, *first*, where he offers any sufficient objection, or ground of suspension, against the validity of the debt, or the formality of the diligence; or, *2dly*, where the creditor, upon payment or satisfaction made to him, consents in his acquittance to the relaxation of the debtor: but those letters, whether they proceed on the creditor's consent, or the debtor's reasons of suspension, must be published at the same market-cross where the debtor was denounced, and registered, within fifteen days after publication, in the same books in which the horning was recorded, 1579, c. 75. Relaxation, when it proceeds on a nullity in the ground of debt or diligence, has the effect of restoring the denounced to his former state in all respects; for a denunciation which is void, can have no legal consequences. But where the relaxation is grounded barely on the creditor's consent, which cannot hurt the interest of the crown, it has no retrospective quality, restoring to the rebel the right of the moveables which had belonged to him previously to his relaxation; for all those are already forfeited to the King, and may therefore be given to any donatary, notwithstanding the relaxation, if the letters bear no special clause restoring them to the rebel. Hence, letters of relaxation cannot be granted, till the King be satisfied for the escheat, *Act of Sederunt*, Dec. 3. 1601; and they commonly bear the payment by the rebel of a particular sum to the exchequer, in consideration of which he is restored to the whole subject escheated. As to the moveable subjects which the rebel may afterwards acquire, the relaxation carries in its own nature a right to them; or, to speak more properly, they do not fall as escheat.

66. If the rebel continue unrelaxed for year and day after denunciation, his liferent escheat falls to his immediate superior or superiors; *i. e.* each of them, where there are more than one, acquires a right to the rent or other profits of such of the rebel's heritable subjects as hold of himself, during all the days of the rebel's life, while he continues unrelaxed, whether those subjects belong to the rebel in property, or barely in liferent. Tho' therefore it is a common expression, that heritable rights fall under liferent escheat; it is only the liferent, or the profits arising from those rights during the rebel's life, that are carried by that casualty; which profits, tho' they be in themselves moveable, are the fruits of heritable subjects. This right is fully ascertained by 1535, c. 32. which declares, that by our former practice, the rents of the lands belonging to those that were year and day denounced, returned to the superior during the rebel's life, except when he was guilty of treason; and that our law should be so interpreted for the future. The reason assigned for this casualty is, that the vassal continuing rebel for year and day, ceaseth to be vassal, being in the judgement of law civilly dead; that during the rebel's natural life, no heir can be served to him, so that the superior must be without a vassal till his death; and that therefore he is intitled to the rents of the rebel's lands, (from which nothing ever barred him but the grant he had made to the vassal), that so with these he may in the mean time make up for the loss he sustains through the want of a vassal. From the descriptions now given, of single and liferent escheat, it is easy to distinguish between the different natures and properties of the two. Single escheat is a legal penalty arising from disobedience to the will of the King's letters, and therefore accrues to the King alone, who is the party offended. But liferent escheat falls not so much by way of penalty, as from the condition of the vassal, who, by being *civiliter mortuus*, can be no longer considered under the character of vassal. *Stair, b. 2. t. 4. § 64. 69. and Mackenzie, § 28.*

b. t. in treating of the time in which escheat falls, express themselves as if liferent as well as single escheat falls from the time that the party is denounced rebel; but say, that by the indulgence of the law a year is given to the denounced, within which he may obtain relaxation. One might be apt to draw it as a necessary inference from thence, that the casualty of liferent escheat is suspended during that period; but that, if the rebel be not relaxed within the year, the liferent has full effect from the time that the casualty truly fell, so as to intitle the superior to all the profits of the rebel's lands due after the term immediately ensuing the denunciation: nevertheless it seems to be held as the law of Scotland, both by our writers and decisions, that liferent escheat has no retrospective quality, so as to include any rents of the rebel's heritable subjects, but such as fall due after year and day from the denunciation, *St. b. 3. t. 3. § 15. vers. For clearing, and b. 4. t. 9. § 7.; Bank. b. 2. t. 4. § 39.; July 1. 1626, Haliburton.*

67. As the superior acquires a full right to this casualty, merely by the act of the vassal's continuing unrelaxed for a year after denunciation, no voluntary act done by the rebel afterwards can cut off the superior from the right he hath thus acquired to the rents of his vassal's lands while the casualty shall subsist. Hence, even where the lands were laid under the strictest entail, an irritancy incurred by the proprietor, after the falling of his liferent escheat to the superior, by suffering adjudication to pass against his lands upon a personal debt he had formerly contracted, was adjudged to have no effect against the superior's casualty, *Kames, 34.* Nor can the rebel's relaxation after the year have force to carry off from the superior any of the intermediate rents due to him preceding the relaxation; to which he hath the same right as if the rebel had not been relaxed. But none of the subjects acquired by the rebel after relaxation, or fruits thereof, fall either by the single escheat to the King, or by the liferent to the superior; for after relaxation he is no longer either rebel to the King, or civilly dead as to his superior. If one who had been denounced for not appearing in a criminal trial, and who upon his relaxation had given new security for his appearance, should again suffer himself to be denounced for the same cause, the year is computed as to the liferent escheat from the first denunciation, as if there had been no relaxation.

68. It is the superior alone who is intitled to this casualty, as he is to all other rights connected with the superiority; and consequently, where there is no superior, no liferent can fall. In feudal rights belonging to the rebel, which require no feisin, the escheat accrues to him who would have been superior to the rebel had the right required a feisin; the disposition of the law supplying in that case the want of a feisin. By this rule, the liferent escheat of a minister's manse, glebe, and stipend, falling during the minister's life or incumbency, accrues to the King; because if feisin were essential to those rights, the King would be the natural superior, both as he is sovereign, and as the subjects liferented by the incumbent are presumed to have been originally granted by him, *March 28. 1628, Fletcher.* In like manner liferents by courtesy or terce, which are legal rights complete without feisin, fall to the superior of the lands liferented; because had feisin been necessary to perfect them, the dispositive in the liferent right would have been made to hold of that superior, *Hope, (Horning), July 12. 1622, Maxwell.* It is from this principle, that landlords have right by that casualty to the profits of liferent tacks granted by themselves in favour of the tacksmen who has been year and day denounced: for the tacksmen derives right from the landlord alone, and is bound to acknowledge no other; and if tacks had required feisin, the right would naturally have been taken to be holden of the granter, *St. b. 2. t. 4. § 62.*

69. In