ſhire, whether pronounced by himſelf or by the court of ſeſſion, 1537, *c.* 58. he was intitled to his ſheriff-fee for them all, 1491, *c.* 30. When this became a taſk too burdenſome for the ſheriff himſelf, a cuſtom was introduced, of directing letters of diligence, which iſſued from the ſignet-office, againſt a debtor's perſon or eſtate, not to the ſheriff, but to a meſſenger, 1537, *c.* 58. who, becauſe he was ſubſtituted in the ſheriff's ſtead, and with his powers as to that particular matter, was ſtyled in the letters *ſheriff in that part*, and was under that character intitled to the ſheriff-fee, 1503, *c.* 66. By the juriſdiction-act, no fines to be afterwards recovered are to belong to the ſheriff, or his deputy, but to the King; and all exaction of ſentence-money by them is declared unlawful; in place of which, they have ſtated ſalaries from the crown: whereby the bias is removed, that the former practice of poundage or ſentence-money might have given them, of riſing too high in their fines againſt offenders, or in other ſums contained in their decrees. Meſſengers, when employed in poindings, are to this day intitled to the ſheriff-fee; which they uſually aſſign to the creditor, upon getting a reaſonable allowance for pains or trouble.

TIT. V.

Of Eccleſiaſtical Perſons.

IN all ſtates where proviſion is made for the worſhip of the Deity, the members may be divided into laymen and clergymen; the laſt of whom are perſons conſecrated to the ſervice of God and religion. Some account has been already given of the power and authority of the civil magiſtrate, and of juriſdiction, as it is exerciſed in Scotland by laics, in cauſes merely ſecular. We are in this title to take a view of the offices peculiar to the clergy, in ſo far as they have any relation to our law, and of the ſeveral juriſdictions exerciſed in this kingdom, either by churchmen themſelves in matters purely ſpiritual, or by laymen in eccleſiaſtical cauſes.

2. The Chriſtian church was early divided into five general diſtricts; Jeruſalem, Alexandria, Antioch, Rome, and Conſtantinople; each of which had a church-governor, called a *Patriarch*, who had Primates, Archbiſhops, and Biſhops, under him, in their ſeveral orders of ſubordination; though the general appellation of *Biſhop* was frequently uſed to expreſs the higher dignitaries of the church, even patriarchs themſelves. All theſe patriarchs were at firſt of equal authority; and continued ſo till the beginning of the ſeventh century, when, by the concurrence of ſeveral favourable incidents, the patriarch of Rome was acknowledged, by almoſt all the Weſtern parts of Chriſtendom, as the firſt and univerſal biſhop of the church, by the name of *Papa*, or father; an appellation that had been formerly common to all biſhops.

3. The clergy was divided into the ſecular and the regular. The ſecular were thoſe who had the inhabitants of a particular tract of ground given them in charge, over whom they exerciſed the paſtoral office, either in an higher degree, as Primates, Archbiſhops, and Biſhops, who exerciſed ſpiritual juriſdiction over the inferior clergy within their dioceſes; or in a lower, as Preſbyters, Deacons, &c. whoſe charge was confined to a particular pariſh or congregation. The church where the biſhop had his ſeat or ſee was ſtyled a *cathedral*. Gentlemen of eſtates frequently founded colleges, or collegiate churches, the head of which was called *præpoſitus*, provoſt, under whom were certain canons or prebendaries, ſo called, becauſe they had a ſtated portion, or *præbenda*, allotted to them, each of them according to his degree or ſtall in the church

where the muſic was performed, *St. b. 2. t. 8. § 15.* Others of leſſer fortunes endowed chapels; which were built generally at ſome diſtance from the parochial church, for the benefit of the founder, and of thoſe who lived in the remoteſt parts of the pariſh; and which were ſerved by a chaplain, or *capellanus*. Altarages were ſmall donatives, deſtined for the maintenance of a prieſt, who was to perform divine ſervice for the ſoul of the founder, or ſome of his deceaſed kinſmen, at a particular altar, ſeveral of which were placed in every church, *Dirl. Doubts*, v. *Altarages*. The clergymen who officiated in thoſe colleges, chapels, and altarages, were of the ſecular kind; though none of them, except the chaplain, had any cure of ſouls.

4. The regular clergy had no *cura animarum*, nor the charge of any congregation, but were tied down to cloſe reſidence in their monaſteries, unleſs when they were ſent out on miſſions. And they got the name of *regular*, becauſe they were circumſcribed by vow to certain rules of devotion and penance, according to the inſtitution of their ſeveral orders; and the individuals of them were ſtyled *monks*. Their governor had the name of *abbot*; and under him was a prior, who governed in the abbot's abſence, or while the office was vacant. But many inſtances occur of priors, independent of any abbot, who were the heads of ſeparate religious houſes called *priories*. Some few monaſteries were founded in Scotland for the redemption of captives from the infidels, under the name of *hoſpitals* or *miniſtries*. *Prelate* is uſed chiefly in the Canon law as a word ſynonymous with *biſhop*, *Decretal. l. 3. t. 10.* &c.; but in our ancient ſtatutes it denotes any dignified clergyman, whether ſecular as biſhop, or regular as abbot, who had a ſeat in parliament in virtue of his office; ſee *title prefixed to acts of James V.*; 1540, *c. 125.* &c. Upon the vacancy of any benefice, ſecular or regular, ſtewards were frequently appointed to levy the fruits during the vacancy, who, becauſe they were mere truſtees, were called *commendators*. Biſhops were in uſe to grant the inferior benefices within their dioceſes, *in commendam* for ſix months. The Pope alone could name commendators for the higher; and he at laſt, from the fullneſs of his power, appointed them for life, and without any obligation to account: which was chiefly intended as a cloak for the plurality of benefices, and to elide the canon of the ſecond council of Nice, by which one benefice only was allowed to be given to one and the ſame churchman. But all commendams were by our law prohibited, even during Popery, by 1466, *c. 3.* except thoſe that ſhould be granted by biſhops for a term not exceeding ſix months.

5. The Papal juriſdiction was firſt aboliſhed in Scotland by an act in 1560; which, becauſe it was enacted in a parliament not regularly authoriſed by the Sovereign, was ratified by 1567, *c. 2.* Though from that time the regular clergy was totally ſuppreſſed, yet ſeveral abbacies and priories were, on the death or reſignation of the Popiſh beneficiaries, given by the King *in perpetuam commendam* to laics; in virtue of which grants, the commendators not only enjoyed the benefices for life, but were intitled to a ſeat in parliament, as coming in the place of the former abbots and priors. As for the ſecular clergy, we had, by the firſt plan of church-government after the Reformation, only parochial preſbyters, and over them certain church-officers, ſtyled *ſuperintendents*, who watched over the affairs of the church, each within his proper diſtrict. In 1572, the names of archbiſhop and biſhop, which had been almoſt loſt ſince the Reformation, were reſtored to thoſe clergymen who were then, or ſhould be, ordained miniſters of the cathedral churches, with the right of ſitting in parliament, and with the ſame ſpiritual juriſdiction over the inferior clergy which had been enjoyed by the ſuperintendents. By 1592, *c. 114.* Preſbyterian church-government was eſtabliſhed, by kirk-ſeſſions, preſbyteries, provincial

cial ſynods, and general aſſemblies. The vacant biſhopricks were, by 1597, *c.* 231. ordained to be filled up by the King with actual preachers or miniſters, who were to have vote in parliament; reſerving the ſpiritual policy of the church to be ſettled as the King and general aſſembly ſhould agree. Biſhops were, by 1606, *c.* 2. reſtored to all the rights, ſpiritual and temporal, formerly belonging to them, which were conſiſtent with the Reformation. Preſbytery again took place *anno* 1638; then Epiſcopacy for the ſecond time, by 1662, *c.* 1.; and, laſtly, Preſbytery, by 1689, *c.* 3. and 1690, *c.* 5.

6. As the Pope had, during the Papacy, exerciſed a moſt abſolute juriſdiction over churchmen, and in eccleſiaſtical cauſes, quite independent of the civil magiſtrate, which ſome of the Proteſtant clergy ſeemed willing to draw to themſelves after the Reformation, the King was, by 1584, *c.* 129. declared to have royal authority over all eſtates; and to be, by himſelf and his council, judge competent to all perſons ſpiritual and temporal, in all matters on which they might be charged. His ſupremacy over the church was, by 1669, *c.* 1. raiſed up to the right of directing its external government: but that act was repealed by 1690, *c.* 1. as inconſiſtent with Preſbytery, which was then upon the point of being eſtabliſhed. By 1584, *c.* 131. all aſſemblies, even in eccleſiaſtical matters, which had not the King's previous licence, were prohibited; and though the powers of the church ſeem to have been enlarged in that reſpect, by 1592, *c.* 114. they have not attempted, even ſince the Revolution, to meet in a national aſſembly without the royal warrant: and when the King's commiſſioner thought it incumbent on him, in the diſcharge of his office, to diſſolve the aſſembly before their buſineſs was over, they prudently ſubmitted to the diſſolution.

7. While our church-government was Epiſcopal, we had two archbiſhops, viz. of St Andrew's and Glaſgow. The firſt had the precedency, with the title of *Primate of all Scotland;* the other was called *the Primate of Scotland*. It cannot be affirmed with certainty in whom the right of electing archbiſhops and biſhops was veſted for ſome ages after Conſtantine the Great. Several Papal reſcripts, from the year 450 to 850, make the clergy and the people joint electors, *Diſt.* 61. *c.* 13.; *Diſt.* 63. *c.* 11. 13. &c.; and this is conformable to the 4th council of Toledo, held *anno* 633, *Diſt.* 51. *c.* 5. § 1. and to an Imperial conſtitution made about the year 800, *Capit. Kar. et Lud. l.* 1. *c.* 84. Others place the election in the clergy, upon the propoſition or demand of the people, *Diſt.* 62. *c.* 1. &c. The Emperor Juſtinian, *anno* 528, directed, that three clergymen ſhould be propoſed by the inhabitants of the Epiſcopal city; of whom one might be named biſhop, (probably by the clergy of the dioceſe), *l.* 42. *pr. C. De epiſc. et. cler.* At laſt, it was decreed by that Lateran council which was holden in 1215, that the right of election ſhould be in the chapter of the vacant cathedral church, *Decretal. lib.* 1. *t.* 6. *c.* 42.

8. James V. willing to have the Epiſcopal ſees filled with churchmen in whom he could confide, did, after the example of Francis I. of France, his father-in-law, who had obtained that right by a concordat with Pope Leo X. aſſume to himſelf the ſole nomination of biſhops; ſee 1540, *c.* 125. He indeed continued to ſend to the chapter a *congé d'elire*, or a power to elect, under the colour of preſerving their former right; but, at the ſame time, he recommended to them a particular churchman, whom it behoved them to chuſe. He who was thus recommended, got the name of *Biſhop-elect*, after he was choſen; and the King's patent under the great ſeal, confirming the election of the chapter, eſtabliſhed in him a right to the ſpirituality of the benefice. The King afterwards granted a mandate for his

his conſecration, at which the preſence of at leaſt three biſhops is required, both by the firſt council of Nice, *can.* 3. and by *Diſt.* 66. *c.* 2.; to which church-canons our ſtatute 1617, *c.* 1. ſeems to refer. Upon this conſecration, the King was, by the laſt-quoted act, to make a ſecond grant of the temporality of the benefice; but as the firſt was underſtood to comprehend the whole of the benefice, the ſecond fell ſoon into diſuſe. The biſhop afterwards did homage, and ſwore obedience to the King; and till then he could not intermeddle with the fruits: but after his right was completed, he was intitled to the fruits, downward from the date of his election. Every biſhop had his council; which was called *chapter*, or *capitulum*, becauſe it was deemed the inferior head of the dioceſe. It conſiſted of an archdeacon, dean, and ſeveral canons or prebendaries, who were generally miniſters within the dioceſe; and, by their advice, the biſhop not only exerciſed his ſpiritual juriſdiction, but managed the temporal affairs in which he had a concern within the dioceſe.

9. A clergyman who has the charge of a pariſh-church committed to him, is ſtyled in the canon law a *presbyter*, or *rector;* and frequently, in ours, a *parſon*, from *perſonatus*, a general term made uſe of by the canoniſts for an eccleſiaſtical office, 6° *Decretal. l.* 3. *t.* 4. *c.* 6. &c. After he was admitted to the church canonically, or according to the preſcribed rules, he had a right to the benefice *proprio jure.* It hath been much conteſted, whether, in the earlier ages of Chriſtianity, the people had the election of their own paſtors or preſbyters, as they ſeem originally to have had of their deacons, *Acts* vi. 1. *et ſeqq.* Gratian affirms, from the authority of a council held at Orleans *anno* 511, that then, and by former church-canons, all inferior churches within the biſhop's dioceſe were under the biſhop's power, *Cauſ.* 16. *q.* 7. *c.* 10. But ſoon after, that right was, for the encouragement of pious donations, transferred to the founder, who is by Juſtinian called the *patron*, or *advocatus eccleſiæ*, *Nov.* 123. *c.* 18.; and it has been acknowledged in this kingdom by our moſt ancient cuſtoms, *Reg. Maj. l.* 3. *c.* 33.

10. All are deemed founders, who have either built a church, or endowed it with yearly revenues, *dict. Nov.; Cauſ.* 16. *q.* 7. *c.* 31. Garſias and ſome other canoniſts affirm, that the proprietor of the ground on which the church is built, has alſo the right of a founder, as ſoon as the church is actually built on it. As theſe foundations were entirely voluntary, patrons uſed for ſome time great liberties, both with thoſe whom they placed in the church, and with its revenues. They frequently compounded with the incumbent for the half, or ſome other proportion, of the oblations of the Chriſtians who attended divine ſervice there; a practice heavily complained of, and forbidden by the third council of Brancara, *anno* 570. And in truth patrons conſidered themſelves in thoſe days to have as ſtrong an intereſt in church-benefices, as ſuperiors had in temporal. Hence, upon the emerging of a vacancy, they not only named the perſon who was to ſupply it, but they *collated* him, by giving him inveſtiture or poſſeſſion of the church, in theſe or the like words, *Trado tibi eccleſiam; Accipe eccleſiam.* And though collation was ſoon declared to belong ſolely to churchmen as a ſpiritual right, which laics were forbidden to exerciſe under the pain of excommunication, *Decretal. l.* 3. *t.* 38. *c.* 4. & 10; yet patrons were univerſally acknowledged to have the right of preſenting to the biſhop a proper perſon for ſupplying the vacant church, whom it behoved the biſhop to collate. The powers aſſumed by patrons in the appropriation of benefices, are to be explained *infr. b.* 2. *t.* 10. § 11. The Pope, while his authority continued, was the preſumed patron of all churches, the right of which was not claimed by another; and ſince the Reformation, the King is the univerſal patron, where no right of patronage appears in a ſubject, *St. b.* 2. *t.* 8. § 35.

All

All patronages appendant upon lordſhips and baronies which belonged to the church before the Reformation, were, by 1587, *c.* 29. annexed to the crown. Thoſe which belonged to archbiſhops, biſhops, or their chapters, were reſtored to them by 1606, *c.* 2.; 1617, *c.* 2. But ſince the ſuppreſſion of Epiſcopacy, the King, as coming in their place, is now the patron of all churches which belonged formerly, either to the biſhops, or their chapters.

11. Patrons continued to have this right of preſenting, from the Reformation down to the 1649, by the 39th act of which year it was aboliſhed; and after they were reſtored to it by the act reſciſſory of Charles II. 1661, *c.* 9. it was again taken away by 1690, *c.* 23. and the election of parochial miniſters veſted in the heritors and elders of the pariſh. The heritors were by that act ordained to give to the patron, as a compenſation for his loſs, 600 merks Scots; in conſideration of which the patron was obliged to renounce and convey the right of preſentation in favour of them and the kirk-ſeſſion, and of the magiſtrates of the borough, where the church was within a royal borough. Patrons were again reſtored to this right by 10° *Ann.* *c.* 12. with the exception of the few preſentations which had been ſold in conſequence of the act 1690. Many inſtances occur where two or more are joint patrons to the ſame church; *ex. gr.* where different perſons have contributed to the foundation, or where the right of patronage deſcends to coheireſſes, or where two churches which had formerly belonged to different patrons, are united into one. In the laſt caſe, the two patrons are, by ſpecial ſtatute, directed to preſent to the united benefice *alternis vicibus*, or by turns, 1617, *c.* 3. § 3.; and it is probable that the ſame rule would, from analogy, be obſerved in the other two. No patron can preſent to the expectancy of a benefice; for that right ariſes only upon the death, tranſlation, deprivation, or reſignation, of the former incumbent, *Decretal.* *l.* 3. *t.* 8. *c.* 16.

12. Though the collegiate churches, chaplainries, and altarages before deſcribed, were ſuppreſſed on the Reformation; the parliament, who had no intention to incroach on the right of laic patrons, inſtead of annexing their benefices to the crown, applied the revenues to the education of burſars at the univerſities, who were to be bred to the church, and the preſenting of whom was continued with the former patrons or their heirs, 1567, *c.* 12. As the provoſt or other churchmen provided to thoſe benefices before the Reformation, had been the proper beneficiaries or titulars, and conſequently the ſuperiors of the lands which were holden of them; ſo the burſars, who were by that act veſted in their right, became the ſuperiors, by whom alone, according to the feudal rules, their vaſſals could be entered: but as it was not ſo eaſy to diſcover the reſidence of burſars, who were perhaps diſperſed over all the univerſities of the kingdom, as it had been formerly to find out the church-beneficiaries, whoſe reſidence was fixed, the entry of the vaſſals to their lands is, by 1661, *c.* 54. declared to belong to the laic patrons, whoſe right from the crown is better known, and may in moſt caſes be found out by the records. Mackenzie, *Obſ. on laſt quoted act*, doubts, whether the patrons are thereby made the proper ſuperiors of the lands holden of thoſe benefices, becauſe it is only ſaid, that they ſhall come in the place of the titulars, as ſuperiors; that is, that they ſhall ſupply their room in entering the vaſſals: but it is abſurd to ſuppoſe, that a law was to grant to any perſon a perpetual right of infefting vaſſals, without conferring on him all the other rights attending upon ſuperiority; ſee *Falc.* *Feb.* 26. 1745, *Sir Patrick Dunbar*.

13. Beſide the right of preſenting, patrons are intitled to all the tithes in the pariſh not heritably diſponed, *vid. infr.* *b.* 2. *t.* 10. § 49. and to a ſeat

and burial-place in the church; and they have alſo the power of receiving and diſpoſing of the fruits of the benefice during a vacancy. This laſt right appears, by our ſtatutes paſſed ſoon after the Reformation, to be not a bare right of adminiſtration, but of property; ſo that the patron could have held and diſpoſed of them as his own, 1584, *c.* 137.; 1592, *c.* 115.; 1593, *c.* 172.; 1612, *c.* 1. But by 1644, *c.* 20. the patron was obliged to apply them, with the advice of the preſbytery, to pious uſes within the bounds of the pariſh, or at leaſt of that preſbytery. And though patrons were by the act reſciſſory, 1661, *c.* 15. reſtored to their former rights, it appears by 1661, *c.* 52.; 1672, *c.* 20. &c. to have been the ſenſe of the legiſlature in the reign of Charles II. that the right of patrons to the vacant ſtipends was merely a truſt; ſo that they ſtill continued under the reſtraint impoſed on them by the act 1644, of applying them to pious uſes within the preſbytery. Patrons were farther limited in the exerciſe of this right by 1685, *c.* 18. which preciſely obliged them to apply their vacant ſtipend, not any where within the preſbytery, but within the pariſh, yearly as it fell due, under the penalty of loſing their right of preſenting an incumbent for the next turn. But as there was no longer room for this penalty, after the right of preſentation was taken from patrons by the act 1690, *c.* 23. it is declared by that act, that the patron who neglects to apply the vacant ſtipend according to law, ſhall forfeit the right of diſpoſing of it for that and the next vacancy. Lord Bankton's opinion, *b.* 2. *t.* 8. § 77. appears to be well founded, That now, ſince the right of preſenting is reſtored to patrons by the act 10° *Ann.* the firſt penalty, of loſing the next preſentation, which was impoſed by the act 1685, is to be applied againſt patrons who neglect to diſpoſe of the vacant ſtipend for pious uſes; both becauſe the right of preſentation, which was reſtored to patrons by that Britiſh ſtatute, muſt be underſtood to be burdened with all the qualities which formerly affected it, and becauſe the ſaid ſtatute, which reſtores alſo in expreſs words the adminiſtration of the vacant ſtipend to patrons, virtually repeals the act 1690, in ſo far as it transferred that right from the patrons to the preſbytery. The patron, though he muſt, by the act 1685, apply the vacant ſtipend at the ſight of the heritors, is not bound to follow their advice in the appropriation; for the only intereſt of the heritors is, to take care, that the ſtipend be applied to ſome pious uſe within the pariſh. The act 1663, *c.* 21. has declared the reparation of the manſe during a vacancy, to be a pious uſe preferable to all other; but the patron's right of application is not by ſtatute limited to any other particular uſe. Though therefore the building of a manſe be undoubtedly a pious uſe, he is under no neceſſity of relieving the heritors of that expence, by appropriating the vacant ſtipend to defray the charges of the building, but may apply it to any other pious uſe he thinks fit.

14. The Sovereign is expreſsly exempted, by the ſaid act 1685, from that preciſe application of the vacant ſtipends of the churches of his patronage to which the patrons of other churches are limited; ſo that the King's right in the diſpoſal of theſe continues, notwithſtanding that act, to be what it had been formerly; that is, he may appropriate them to any pious uſe within the kingdom: for though none of our kings ſince the Reformation have conſidered their right to the vacant ſtipends of the crown's churches otherwiſe than as a truſt, yet they were not confined in the diſpoſal of them to pious uſes within any particular pariſh or preſbytery. And this uſage is not obſcurely hinted at in the aforeſaid act, 10° *Ann.* by which the patronages of the churches formerly belonging to prelates are declared in general terms to belong to the King, who may diſpoſe of the vacant ſtipend to pious uſes, as in the caſe of other patronages belonging to the crown.

It

It has been doubted, whether the King is intitled to the ſame privilege, as to the patronages to which he has acquired right ſince the act 1685, by purchaſe or forfeiture; *1ſt*, From the words of the ſtatute, *whereof the King is patron*, which, by the rules of grammar, exclude thoſe of which he *ſhall be* patron; *2dly*, From the rule of law, that the Sovereign, when he acquires any right from a ſubject, can be in no better caſe than his author, and ſo is liable to the ſame burdens to which the original patrons were ſubjected: yet it was adjudged, *New Coll.* i. 106. that the exemption, being a perſonal privilege competent to the King, ought to be extended to patronages acquired ſince the act 1685, as well as to thoſe which were veſted in the crown at that time. It is not a fixed point, whether patrons are intitled to apply the fruits of the glebe during a vacancy to pious uſes. It would ſeem that they are not; for the glebe is not a proper part of the ſtipend, but an allowance given by ſpecial ſtatute to the miniſter over and above his ſtipend; as was adjudged, *July* 6. 1665, *Colvill*; and therefore the heritors, on whom the burden of the glebe falls, appear to have an equitable right, in the character of donors, to diſpoſe of the produce of it to any pious uſe within the pariſh.

15. It is affirmed by ſome canoniſts, and by Hope, *Min. Pr. p.* 14. that the founder of a church does not become patron of it, unleſs he had in the deed of foundation reſerved the right to himſelf; for that patronage, being a ſervitude upon churches, is not to be preſumed without an expreſs conſtitution. But it is a more probable opinion, that ſuch founder is patron, unleſs he ſhall have formally renounced the patronage in favour of the church; *firſt*, Becauſe both the Imperial conſtitutions and church-canons already quoted, expreſsly aſcribe this right to the founder, without making his reſervation a condition of it; *2dly*, Founders would have been intitled to the patronage, where they had expreſsly reſerved it to themſelves, without the aid of any canon or conſtitution; *3dly*, If all churches were exempted from patronage where that right had not been reſerved in the foundation, every church where no deed of foundation is extant to prove the reſervation, muſt be free from patronage, contrary to the known rule, that the King is preſumed to be the patron of all ſuch churches. In the ſpecial caſe, of a pariſh which is judged too extenſive for the cure of one miniſter, if a fund ſhall be raiſed by voluntary contribution, or from the revenues of a borough, for the maintenance of a ſecond, not the contributors, but the patron of the mother-church within which the other is erected, is deemed alſo the patron of that other church; unleſs either, *firſt*, Where the contributors reſerve in the deed of foundation the patronage to themſelves; or, *2dly*, Where they have been in the exerciſe of any of the rights of patronage without challenge from the patron of the firſt church, *Pr. Falc.* 42. The right of patronage cannot, in Craig's opinion, be transferred, without alſo transferring ſome part at leaſt of the lands to which it was united in the original right, *lib.* 2. *dieg.* 8. §37. But it is very poſſible, that a patronage may be granted or conveyed, without any lands or baronies to which it muſt be annexed; for it is originally not a feudal right, but a perſonal privilege, which may ſubſiſt of itſelf, as a *jus incorporale*, and conſequently may be carried by a diſpoſition without ſeiſin, *St. b.* 2. *t.* 8. § 35. But though this may hold in patronages which have never been conjoined to lands, yet where they are once united to, and tranſmitted along with lands by infeftment, the acquirer of the right cannot diveſt himſelf of it, otherwiſe than by infefting the diſponee, *New Coll.* i. 84.

16. Rules have been eſtabliſhed, both by the Canon law and our ſtatutes, for the more ſpeedy filling of vacant churches, where either the patron, or thoſe appointed by law to admit the preſentee, appear backward. If the biſhop

biſhop refuſed to collate a preſentee who laboured under no legal incapacity, he was obliged, by the Canon law, to provide him in ſome other competent benefice, *Decretal. l.* 3. *t.* 38. *c.* 29. By the acts paſſed in Scotland immediately after the Reformation, if the ſuperintendent refuſed to admit the preſentee, the patron might appeal to the provincial ſynod, and from thence to the general aſſembly, whoſe ſentence was to be final, 1567, *c.* 7. After the eſtabliſhment of Epiſcopacy, the patron was directed, in caſe of the biſhop's refuſal, to complain to the archbiſhop; and if he alſo refuſed, the privy council might grant warrant for letters of horning againſt the ordinary, *i. e.* the biſhop of the dioceſe, charging him to perform his duty; and if he ſtill continued obſtinate, the patron was allowed to retain the vacant ſtipend, 1612, *c.* 1. Preſentations muſt now be tendered to the preſbytery, as coming in place of the biſhop: and though no letters of horning have been directed againſt preſbyteries ſince the ſtatute of Queen Anne reſtoring to patrons their right of preſenting; either becauſe that part of the former law was not expreſsly revived by the ſtatute, or becauſe ſuch a form of diligence againſt a ſpiritual court might be thought inconſiſtent with Preſbyterian church-government; yet the right of preſentation is by that act reſtored to patrons, and of courſe all the conſequential rights, and among others that of retaining the vacant ſtipend. Hence the admiſſion of one into a church by the preſbytery, in oppoſition to the preſentee, though it may confer on the perſon admitted a paſtoral or ſpiritual relation to that church, cannot hurt the civil right of the patron, who therefore may retain the ſtipend, as if the church had continued vacant, *Falc.* ii. 213.; and this doctrine was confirmed by a judgement of the Houſe of Lords, *April* 1753, on an appeal in the caſe of Dr Dick, then miniſter of Lanerk. The patron's right of retention, however, muſt not be underſtood in the ſenſe of the old acts, as if he had the abſolute property: he can only retain as a truſtee, on the footing of the preſent law.

17. A laic patron who neglected to preſent a fit perſon to the biſhop within four months after the vacancy might have come to his knowledge, forfeited, by the Canon law, his right of preſenting for that turn, *Decretal. l.* 3. *t.* 38. *c.* 27.; which was transferred *jure devolutionis* to the biſhop in the firſt place, then to the archbiſhop, and ſo upward till it came to the Pope; and this limitation of four months obtained alſo by our ancient law, *Reg. Maj. l.* 1. *c.* 2. § 3. A church-patron might have preſented by the Canon law within ſix months. By the later law of Scotland ſix months have been indulged to lay patrons for preſenting; which term is computed, as in the Canon law, not from the vacancy, but from the patron's probable knowledge of it, if it happened through the incumbent's death, 1567, *c.* 7.; and if through his deprivation, from the time of ſhewing the extracted ſentence of deprivation to the patron, 1592, *c.* 115. In default of the patron's preſenting within that time, the nomination devolved on the church, 1567, *c.* 7.; that is, on the preſbytery, under Preſbyterian church-government, 1592, *c.* 115. and on the biſhop, during Epiſcopacy, 1612, *c.* 1. Though the act 10° *Ann.* reſtoring the right of preſentation, mentions the ſix months, as if they were to be computed from the vacancy itſelf, it were hard to conſtrue that general expreſſion into a repeal of the rules formerly eſtabliſhed for computing that time; as the legiſlature's declared intention was, not to alter, but to reſtore to us our ancient law. The preſentation by a patron of one who has not taken the oaths to the government, or who is miniſter of another church, or who ſhall not accept the preſentation, is not accounted an interruption of the ſix months, 5° *Geo. I. c.* 29. § 8.; but if the preſentee be qualified in the terms of that ſtatute, the currency of the ſix months is ſuſpended by the preſentation, during the whole time that the

the church-courts are employed in deliberating whether to receive him or not; and if they ſhould at laſt reject him for heterodoxy, or whatever other cauſe, the patron has as much time left him to preſent after their ſentence, as was to run of the ſix months when the preſentation was offered to the preſbytery.

18. In the ceremony of receiving a parochial miniſter to his church, during Epiſcopacy, three different acts muſt have been performed: *firſt*, Preſentation, by which the patron, in a writing directed and delivered by him to the biſhop of the dioceſe, named a perſon capable of being admitted into the vacant church, and required the biſhop to collate him to it. *2dly*, Collation, called alſo *inſtitution* by the canoniſts, which was a writing ſigned by the biſhop, whereby he approved of the perſon preſented as properly qualified, and conferred on him the vacant benefice, requiring a certain number of the inferior clergy to induce him to the church. *3dly*, Induction, which was an act of the parochial miniſters or preſbyters thus deputed by the biſhop, carrying the preſentee to the church, and giving him poſſeſſion, by placing him in the pulpit, and delivering to him the Bible, and the keys of the church. Upon this the miniſter took inſtruments in the hands of a public notary; and it gave him the ſame real right to his benefice, that ſeiſin does to lands.

19. Collation by the biſhop was neceſſary in all benefices which had a *cura animarum* annexed to them, and in thoſe only. It behoved therefore all parochial miniſters to be collated; not only proper beneficiaries, who were intitled to the tithes themſelves, or had allocations of certain parts of them, but thoſe who were merely ſtipendiary, *i. e.* who, becauſe their benefices had been appropriated to cathedrals or monaſteries, had only a ſtipend modified to them, either out of the tithes or ſome other fund: for both the one and the other had the ſouls of their congregations in charge. But prebends, and other benefices which had no ſuch charge, might be fully veſted in the preſentee, by the bare nomination of the patron, without any interpoſition of the biſhop, unleſs perhaps to confer orders on the perſon named, if he had been a layman. In churches within the biſhop's dioceſe, where he himſelf was patron, there was no room for preſenting; for preſentations were to be offered by the patron to the biſhop, and the biſhop could not with propriety preſent to himſelf. In theſe, therefore, he collated *pleno jure*, that is, without preſentation, whether they were menſal churches, *vid. infr. b.* 2. *t.* 10. § 11. and ſo parcel of the biſhop's benefice, or ſeparate churches, of which he was barely patron, *July* 4. 1627, *Mackenzie*. If he was patron of a church that lay in another dioceſe, it behoved him to preſent in common form to the biſhop of that dioceſe. Common churches, or thoſe which were appropriated to chapters, paſſed alſo, before the Reformation, by ſimple collation, without a formal preſentation, *St. b.* 2. *t.* 8. § 35: but as the King, or his donatary, became patrons of theſe upon the ſuppreſſion of chapters, they were ordained to be conferred, like other parſonages or vicarages, on the patron's preſentation, 1594, *c.* 196. It is the leſs neceſſary to enlarge on this head, that all parochial churches are now patronate, *i. e.* ſubject to the right of preſenting, which was originally inherent in patronage; without excepting even thoſe, the preſentations of which were ſold in purſuance of the act 1690; for the heritors and kirk-ſeſſions, in whoſe favour they were renounced, became truly the patrons of thoſe churches, as to the right of preſenting to the preſbytery.

20. Since the Revolution, the form of admiſſion into vacant churches is more ſimple; for inſtead of collation and induction, the preſbytery, by an act, proceeding either upon the preſentation addreſſed to them by the patron, or on their own *jus devolutum*, or on a call or invitation given by the

heritors and elders of the pariſh, admit the perſon preſented, or called, as miniſter of the pariſh; or, as it is expreſſed in our ſtatutes, 1592, *c.* 115. &c. they collate him to the benefice, after having ordained him a preſbyter, if he was not before in orders. And this judicial act of admiſſion gives to the perſon admitted a legal title to the benefice.

21. As the ſeveral expedients attempted, after the Reformation, to provide the Reformed clergy in reaſonable ſtipends, to be explained below, *b.* 2. *t.* 10. fell ſhort of the end propoſed by them, a commiſſion of parliament was appointed in the reign of James VI. by 1617, *c.* 3. to plant churches, and modify ſtipends to miniſters out of the tithes of every pariſh within the kingdom; and to unite ſmall churches, where the tithes were not ſufficient for the maintenance of two miniſters. To this commiſſion a power was ſoon ſuperadded, by 1621, *c.* 5. of dividing large pariſhes, and erecting new churches. By 1633, *c.* 19. a ſecond commiſſion was granted, with authority not only to modify ſtipends, but to value and ſell tithes; which was therefore ſtyled, *The commiſſion for the plantation of kirks and valuation of teinds*. Several new commiſſions were afterwards appointed, with more ample powers, of uniting and disjoining pariſhes, of tranſporting churches already built to more convenient places, and of annexing and diſmembering churches, as the commiſſion ſhould think proper, 1661, *c.* 61. &c. The laſt of this kind was authoriſed by 1693, *c.* 23.: but the power of that and all the former commiſſions were, by 1707, *c.* 9. transferred to the court of ſeſſion, with this proviſo, that it ſhould not be lawful for them to tranſport churches, disjoin pariſhes, or build or erect new churches, without the conſent of three fourths of the heritors, reckoning the votes, not by the number of heritors, but by their valued rent within the pariſh. Though the commiſſion-court is thus reſtrained from erecting new churches without the conſent of three fourths of the heritors, it hath been adjudged, that that clauſe is to be underſtood only of building a new church in the old pariſh, or tranſporting a church from one part of the pariſh to another; but that they have authority to annex or unite two pariſhes into one, without ſuch conſent; in which caſe, they may judge what ſpot of the united pariſh is the moſt commodious to build the church upon, *July* 18. 1750, *Pariſh of Kirknewton*. The reaſon why the conſent of the heritors is neceſſary to the disjunction of a pariſh is, becauſe they are, by the diſjunction, to be loaded with a certain expence in building the church, and perhaps in providing a ſtipend and glebe for an additional miniſter; whereas they can have little or no intereſt to oppoſe the union of two pariſhes into one, by which union one incumbent is to ſupply the place of the two former.

22. By the aforeſaid act 1707, the court of ſeſſion, in the character of commiſſioners of tithes, in order to make up for the loſs of the records of the commiſſion-court, which had been burnt by an accidental fire in the parliament-cloſe, *anno* 1700, are impowered to receive ſuch extracts as had been taken from the record before that period, which, after being booked in the new regiſter, are to have the ſame authority as the principal writings; and where no extract of the deed or decree had been taken out, the court is authoriſed to make up the tenor of the loſt writing upon proper evidence. As all the above-mentioned powers are conferred on the ſeſſion by ſpecial ſtatute, they are conſidered, when ſitting in the commiſſion-court, not as judges of the ſeſſion, but as a commiſſion of parliament; and therefore they have, in that character, diſtinct clerks, macers, and other officers of court. All ſummonſes of citation before this court, and all diligences iſſuing from it, paſs under the ſignet of the ſeſſion; nevertheleſs, it is the Lord Regiſter, or his deputies, and not the clerks of the ſignet, who

who muſt ſubſcribe them, 1707, *c.* 9. Though it be this court alone who can grant augmentations of ſtipend, (at leaſt out of the tithes), or pronounce decrees of modification or locality, or of the ſale or valuation of tithes, it is the court of ſeſſion, *qua* ſuch, who muſt judge in all queſtions that may afterwards be moved, on the legal effect and import of ſuch decrees.

23. The only fund for modifying or augmenting ſtipends, which is put under the power of this court by the ſeveral ſtatutes eſtabliſhing it, is the tithes of the pariſh where the miniſter who inſiſts for the modification ſerves the cure, unleſs there ſhall be a previous agreement to provide for the miniſter, out of a ſeparate fund, by the parties who have intereſt in that fund. And hence, though the miniſters of a borough ſhould bring an action of augmentation before the commiſſioners, and, in ſupport of it, offer to prove that there are ſeparate funds, ariſing either from royal grants or private donations, under the management of the magiſtrates, out of which an augmentation ought to be decreed to them, the court hath no juriſdiction in ſuch action, *Dec.* 12. 1764, *Miniſters of Edinburgh:* the reaſon has been formerly aſſigned, *ſupr. b.* 1. *t.* 2. § 7. If therefore the preſbytery have erected a new church, either where there are no tithes, as in boroughs, or where the tithes have been already exhauſted, the commiſſion-court cannot decree a ſtipend, however expedient, or even neceſſary, the erection may have been. In ſuch caſe, a ſtipend cannot be eſtabliſhed otherwiſe than by a voluntary deed of the borough, or by royal or parliamentary grant, or by private contributions or donations. Nay, though a ſecond church ſhould be erected in an old pariſh, without the authority of the commiſſion-court, by the voluntary donations or ſubſcriptions of the inhabitants, even where the tithes of the pariſh are not exhauſted, the court cannot grant to ſuch miniſter an augmentation out of the tithes of the pariſh, which remained free after what was appropriated for the maintenance of the firſt miniſter. The terms of the voluntary agreement among the donors muſt be the only rule for the rate of ſuch ſtipend; which is not to be augmented at the expence of heritors, who perhaps never conſented to the original erection, and cannot therefore be bound by the deed of third parties. The miniſter of a new erected church is intitled to a judicial augmentation, only where the erection hath been made, or at leaſt ratified, by the commiſſion-court, all the heritors having been made parties.

24. The juriſdiction veſted in churchmen is either ſpiritual or civil. By the preſent eſtabliſhment, our general aſſemblies, or convocations of the clergy, may define or explain articles of faith, condemn heretical opinions, and make canons for the better eſtabliſhment of the government and diſcipline of the church, provided their reſolutions be conſiſtent with the laws of the realm, from which our national church derives its whole authority. It is the buſineſs of preſbyteries to inflict church-cenſures on offenders, plant miniſters in vacant churches, and ordain them, tranſlate them from one church to another, ſuſpend them from the exerciſe of their office, and deprive them of the office itſelf. But an appeal lies from all ſentences of preſbyteries, firſt, to the provincial ſynod, and from them to the general aſſembly. Churchmen, during the height of the Papal authority, extorted from the German Emperors an abſolute exemption from the juriſdiction of temporal courts, ſo as not to be amenable to them, even in civil or criminal cauſes, *Conſt. Frid. II.* § 4. *ſubjoined to the books of the Feus;* which appears alſo to have been the law of Scotland, 1466, *c.* 8. And though now, ſince the Reformation, they are equally ſubject with layman to the juriſdiction of the civil magiſtrate; yet no act of a ſpiritual nature can, to this day, be exerciſed, nor any ſpiritual cenſure inflicted, either on the clergy

clergy or the laity, but in church-courts. A clergyman, for inſtance, may without doubt be tried by the juſticiary for treaſonable diſcourſes, though uttered from the pulpit; but no perſon can be either received into orders, or deprived of them, or be thrown out of the church by excommunication, but by the ſentence of a church-judicatory. It may however be obſerved, that certain ſentences or proceedings of church-courts, in ſpiritual matters, draw civil effects after them. Thus, the admiſſion by a preſbytery of one to the paſtoral charge of a church, who has a legal capacity or qualification for it, gives the perſon admitted a title to the benefice, 1690, *c.* 5. and their ſentence of deprivation cuts off that right, 1592, *c.* 115. Our law formerly annexed civil penalties to the ſentence of excommunication; all which are now taken away, by 1690, *c.* 28. And, by our preſent law, the civil magiſtrate is prohibited to compel any perſon to give obedience to the ſentence of excommunication, or to appear in any proceſs brought for the purpoſe of inflicting that cenſure, 10° *Ann. c.* 6. To have a juſt notion of the church's *civil* juriſdiction, as it preſently ſtands, a diſtinction muſt be made between *eccleſiaſtical courts* and *proper church-courts*. By the laſt, we underſtand thoſe that are compoſed partly of clergymen, and partly of a number of laymen, who bear office in the church under the name of *elders*, *ex. gr.* preſbyteries, ſynods, &c. Eccleſiaſtical courts conſiſt of laymen only, as commiſſariots, the commiſſion-court, &c. The civil juriſdiction of proper church-courts conſiſts of the following particulars. 1*ſt*, Preſbyteries have, in ſome reſpect, the charge of parochial ſchools. By 1696, *c.* 26. the heritors in pariſhes where no parochial ſchool has been before eſtabliſhed, are ordained to provide a ſchool-houſe, and modify a ſalary to the ſchoolmaſter, not under 100 merks Scots, and not above 200, and to proportion it among themſelves, according to their valued rent. If the heritors fail, then the preſbytery is directed to apply to the commiſſioners of ſupply of the ſhire, who, or any five of them, have power to eſtabliſh a ſchool, and ſettle a ſalary, in terms of the ſtatute. 2*dly*, All ſchoolmaſters and teachers of youth are made liable to the trial and judgement of their reſpective preſbyteries, not only for their ſufficiency and qualifications, in order to their being elected, but for their conduct and deportment after their admiſſion, while they continue in their offices, 1693, *c.* 22. Their powers in the deſignation of manſes and glebes are explained, *ſupr. b.* 1. *t.* 2. § 2. *& infr. b.* 2. *t.* 10. § 56. 58. 59.

25. Before explaining the extent of the civil juriſdiction veſted in *eccleſiaſtical courts*, the judges of which have, ſince the Reformation, been laymen, it may be premiſed, that in the firſt ages of Chriſtianity, when the church, in place of being protected, was perſecuted by the ſtate, dying perſons, from the great confidence they repoſed in the clergy, frequently committed to them the care of their eſtates, and of their orphan children: but theſe were merely rights of truſt, not of juriſdiction. During that period, Chriſtians, to ſhun appearing before the courts of idolaters, uſually referred their differences, in point of private right, to one of their own number, of approved integrity, for the moſt part to the biſhop. Soon after the Roman Emperors had become Chriſtian, all queſtions which properly concerned religion, fell under the biſhop's cogniſance; yet, at firſt, no proper juriſdiction was conferred on biſhops, even in religious matters, but ſimply a power of judging where the parties conſented to it; as appears by a conſtitution of Arcadius and Honorius, *anno* 398, *l.* 7. *C. De epiſc. audi.* The year after, 399, the ſame Emperors appear to have granted to biſhops a proper juriſdiction in cauſes concerning religion, but to have excluded them from any power of judging in points of civil right, even where the parties were willing to have ſubmitted to their cogniſance, *Cod. Theod. l.* 16. *t.* 11. *c.* 1.

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At laſt, they were authoriſed by the ſame Emperors to judge in all queſtions where the parties voluntarily brought their differences before them, without diſtinguiſhing between civil and religious; and it was declared, that their judgements, where the juriſdiction was thus prorogated, ſhould not be ſubject to the review of any civil court, *l.* 8. *C. De epiſ. audi.* In proportion to the growth of Papal authority, the clergy had the addreſs to eſtabliſh in themſelves a proper juriſdiction, not only in queſtions of tithes, patronage, ſcandal, breach of vow, and in other matters which might with ſome propriety be ſtyled *eccleſiaſtical*, but in every cauſe which they could find the ſmalleſt colour to give that name to. Thus, becauſe they had been early intruſted with the adminiſtration of certain legacies bequeathed to pious uſes, *Decretal. l.* 3. *t.* 26. *c.* 3. 17. 19. they gradually aſſumed the excluſive right, not only of proving or confirming all teſtaments, but of naming adminiſtrators for managing the moveable eſtates of all who died inteſtate, *vid. infr. b.* 3. *t.* 9. § 18. 28. Thus alſo, biſhops took on themſelves to judge, not only in queſtions of divorce, baſtardy, and adultery, becauſe marriage was accounted a ſacrament, but in the reſtitution of tochers, *Decretal. l.* 4. *t.* 20. *c.* 2. becauſe tochers were given in the view of marriage. In like manner, our ancient law gave them the cogniſance of all controverſies in which an oath intervened, becauſe an oath was an act of religious worſhip, addreſſed to the Deity, *Reg. Maj. l.* 1. *c.* 2.; *l.* 2. *c.* 38. 59. &c.; and of the trial and deprivation of notaries, 1503, *c.* 64. becauſe all notaries were, by our ancient uſage, authoriſed by churchmen in their ſeveral dioceſes. As the clergy were, by the means of this extenſive juriſdiction, too much called off from their proper functions, they committed the exerciſe of it to their vicars, who are in our ſtatutes called *officials*, 1466, *c.* 8. or *commiſſaries*. Hence, the commiſſary-court is called *the biſhop's court*, or *curia Chriſtianitatis*, and ſometimes *the conſiſtorial court*; a vocable firſt made uſe of to denote the court in which the Roman Emperors ſat with their council, the *comites conſiſtoriani*, either for determining private cauſes, or for deliberating on public affairs, *tit. C. De Com. Conſiſt.*; *Gothofr. Com. in Cod. Theodoſ. lib.* 11. *t.* 39. *l.* 5. and afterwards tranſferred to courts of judicature held by churchmen. Thus the conclave of cardinals is called *the ſacred conſiſtory*.

26 As the act paſſed 1560, and ratified 1567, *c.* 2. by which all Epiſcopal juriſdiction under the authority of the Roman Pontiff was aboliſhed, did, from its firſt enactment, put a ſtop to judicial proceedings in conſiſtorial cauſes, Queen Mary made a new nomination of commiſſaries, one in every dioceſe, who were to act under the royal authority: and immediately after, by a grant, Feb. 8. 1563-4, preſerved by Balfour, p. 670. ſhe erected a new commiſſary-court at Edinburgh, conſiſting of four commiſſaries; the powers of which were ratified by ſeveral acts, particularly by an unprinted one in 1592, preſerved alſo by Balfour, p. 676. This court is veſted with a double juriſdiction; one dioceſan, which is exerciſed within the territory ſpecified in the grant, viz. the counties of Edinburgh, Haddington, Linlithgow, and Peebles, and a part of Stirlingſhire; and another univerſal, by which they may ſet aſide the ſentences of all inferior commiſſaries, and confirm the teſtaments, not only of all who die in foreign parts, or who had no fixed reſidence in this country at the time of their deceaſe, but even of thoſe who had, at that time, their reſidence in another commiſſariot, during a vacancy in that commiſſariot.

27. Q. Mary, by a letter recorded in the books of ſederunt, *Jan.* 7. 1567, gave up the nomination of commiſſaries to the court of ſeſſion, who had about that time obtained a grant of the quots of teſtaments; authoriſing them to preſent to her perſons proper for the office, after making trial of their quali-

fications; and declaring all grants of commiſſariot made without ſuch previous preſentation, null. But upon the eſtabliſhment of Epiſcopacy in her ſon's reign, biſhops were, by 1609, *c.* 6. reſtored to the nomination of their commiſſaries: and the right of naming the four commiſſaries of Edinburgh was, by that ſtatute, divided between the archbiſhops of St Andrew's and of Glaſgow, each of whom was to name two. After the erection of Edinburgh into a biſhop's ſee, in 1633, the nomination of the two commiſſaries of Edinburgh, which had been in the gift of the archbiſhop of St Andrew's, was transferred to the biſhop of Edinburgh, provided that that archbiſhop ſhould conſent to the nomination; in conſequence of which, the biſhop of Edinburgh preſented Wiſhart and Aikenhead to the commiſſariot of Edinburgh, with the conſent of the archbiſhop of St Andrew's. But, ſince the Revolution, the right of naming all the commiſſaries of this kingdom has again devolved on the crown, as coming in place of the biſhops. There was but one commiſſary-court in every dioceſe, till the erection of the commiſſariot of Edinburgh in 1564. Afterwards, in purſuance of a royal commiſſion in 1581, preſerved by Balfour, p. 673, authoriſing the ſeſſion to erect new ones, for the conveniency of thoſe who lived at a diſtance from the court of the dioceſe, commiſſariots were eſtabliſhed at Stirling, Peebles, Lauder, and a few other places which had never been Epiſcopal ſees.

28. As the juriſdiction aſſumed by the clergy during Popery was entirely independent of the civil power, and of all ſecular courts, the ſentences pronounced by them were ſubject to the review of the Pope only, or his delegates; ſo that the juriſdiction of the biſhops courts were in that period ſupreme, with reſpect to the courts of Scotland. But on the Reformation they were ſtripped of this character, by an act paſſed 1560, and ratified by 1581, *c.* 115. by which, the appeals from the biſhops courts, then depending at Rome, were ordained to be decided, not by the commiſſaries of Edinburgh, as the ſupreme conſiſtorial court, but by the ſeſſion; and by a poſterior act, 1609, *c.* 6. the court of ſeſſion is declared the King's great conſiſtory; and, as ſuch, is veſted with the power of reviewing all decrees pronounced by the commiſſaries. Nevertheleſs, as the ſeſſion had no inherent juriſdiction in conſiſtorial cauſes prior to that act, and as the act authoriſes them to judge only in the way of advocation, they have not at this day any proper conſiſtorial juriſdiction in the firſt inſtance, even though the commiſſaries ſhould not reclaim the cauſe to themſelves, *St. b.* 4. *t.* 1. § 36. Neither do they give ſentence in any conſiſtorial cauſe brought from the commiſſaries, but remit it to them, with inſtructions how to proceed. By the uſage immediately ſubſequent to the act 1609, the ſeſſion did not admit advocations to themſelves from the inferior commiſſaries; the action muſt have been firſt carried to the commiſſaries of Edinburgh: but as that practice had been diſuſed for upwards of a century, a defence founded on it was repelled, *Edg. Jan.* 28. 1725, *White.* After ſentence pronounced by the commiſſaries of Edinburgh, and extracted, they have no power of reviewing it, except on a remit from the ſeſſion.

29. The extent of the commiſſaries juriſdiction, and their forms of proceeding ſince the Reformation, both in common actions, and in the confirmation of teſtaments, have been ſet forth in ſpecial inſtructions given to them from time to time. Q. Mary, ſoon after ſhe had named commiſſaries, ſigned particular inſtructions to be obſerved by them, *March* 12. 1563-4; to which the ſeſſion, after the Queen had reſigned to them her right of nomination, added a few more, *March* 26. 1567. In purſuance of the act 1609, *c.* 6. directing the commiſſaries to obſerve the injunctions which ſhould be preſcribed to them, the biſhops ſigned a full ſet of inſtructions, both

both to the commiſſaries and their clerks, *March* 2. 1610; all which are preſerved by Balfour, p. 655. *et ſeqq.* After the Reſtoration, it was thought proper to reinſtate the commiſſary-courts in their ancient rights and forms, which had ſuffered conſiderable innovations under the Uſurper, by new injunctions, drawn up by the biſhops, and authoriſed by the King, *Jan.* 21. 1666.; which are inſerted, both in Lord Stair's deciſions, and in the printed acts of ſederunt. To this day, the commiſſaries retain a privative juriſdiction in all matters properly conſiſtorial, *ex. gr.* in declarators of marriage, actions of adherence or divorce, in adultery, baſtardy, the execution of teſtaments, &c. Their juriſdiction in queſtions of baſtardy is limited to the life of the perſon alledged to be a baſtard: an action for having it declared, that one deceaſed was a baſtard, and that his eſtate is fallen to the King, muſt, like all other declarators of eſcheat, be purſued before the ſeſſion.

30. In actions which bear only a remote reſemblance to conſiſtorial cauſes, the juriſdiction of the commiſſaries is cumulative with other judges-ordinary, as in actions for tithes, or the payment of ſtipend, in thoſe brought by wives for a ſeparate alimony againſt their huſbands, in applications for inſpecting or ſealing up the writings of perſons deceaſed, or in actions brought by their creditors or legatees againſt the executors. But where a privileged creditor of the deceaſed ſues on his debt, only to conſtitute it, without a concluſion of payment, ſuch action is deemed properly conſiſtorial, and ſo muſt be brought before the commiſſaries in the firſt inſtance, *Fount. Feb.* 10. 1693, *Graham.* Queſtions of ſlander and defamation have been in every period of time, even ſince the Reformation, proper to the cogniſance of the commiſſaries. In all the inſtructions given from time to time by the crown, or by biſhops, to theſe judges, actions of ſlander are mentioned as falling under their juriſdiction, immediately before the confirmation of teſtaments, in which it is inconteſtable that their judicial powers are privative. But verbal injuries ſtrictly taken, *i. e.* haſty words uttered ſuddenly *in rixa*, of which below, *b.* 4. *t.* 4. § 80. have been for ſome time paſt judged of by the court of ſeſſion, and even by the juſtices of the peace, *New Coll.* i. 147. By the above-mentioned inſtructions, commiſſaries had a cumulative juriſdiction in the actions, though not properly conſiſtorial, of widows, orphans, and other *perſonæ miſerabiles*, not exceeding L. 20 Scots; and in cauſes referred to oath, not exceeding L. 40; and indeed in all cauſes where the parties prorogated their juriſdiction: but where their juriſdiction was not prorogated, they were found not to have the cogniſance of phyſicians fees, where the ſum exceeded L. 40, *Nov.* 26. 1622, *Liddel*; nor of tutory-accounts, *Dec.* 8. 1675, *Wright*; tho' they claimed a juriſdiction in both, as the cauſes of dying perſons and orphans. This part of their juriſdiction, which relates to cauſes that have not the proper conſiſtorial character, is now preciſely defined by act of ſederunt *July* 29. 1752, proceeding on a complaint exhibited by the ſheriff-clerks againſt the commiſſaries, for illegally extending their juriſdiction. That act declares, that the commiſſaries have no power to pronounce decrees in abſence, for any ſum above L. 40, in actions of debt or other civil cauſes referred to oath; or, in other words, that they have not the cogniſance of ſuch cauſes, unleſs their juriſdiction be prorogated by the conſent of parties: but they are declared competent to the authenticating of tutorial and curatorial inventories; and to the regiſtration, not only of bonds, contracts, or other deeds which bear a clauſe of regiſtration in the books of any judge competent, but of proteſts upon bills; without any limitation as to the extent of the ſums contained in thoſe inventories, bonds, contracts, or bills. But this muſt be attended to, which has been already ſuggeſted, *b.* 1. *t.* 2. § 28. that the common clauſe, bearing the granter's conſent

ſent to regiſter in the commiſſary-books, does not give *juriſdictio contentioſa* to the commiſſaries, in queſtions concerning the legal effects of the deed regiſtered. The conſent is merely to regiſter, and ſo can go no farther, unleſs the parties ſhall ſubmit to the juriſdiction of the court.

31. Inferior commiſſaries have no juriſdiction in ſuch conſiſtorial cauſes as are, from their importance or intricacy, proper to the commiſſariot of Edinburgh. Of this kind are actions of divorce, 1609, *c.* 6. and declarators of the nullity of marriage, under which are included queſtions of baſtardy and adherence, when they have a connection with the lawfulneſs of marriage, or with adultery, *Inſtr.* 1666, *c.* 2. The right in the commiſſaries of Edinburgh to ſet aſide the judgements of inferior commiſſaries is limited in point of time by ſaid inſtructions, § 16. which requires, that the reduction ſhall be carried on before the commiſſaries of Edinburgh within a year from the decree of the inferior commiſſary.

TIT. VI.

Of Marriage, and of the Relation between Parents and Children.

I. *Of Marriage.*

AFTER having treated of the ſeveral ranks of perſons as they are diſtinguiſhed by their public characters, they may be conſidered in their more private capacities, as huſband and wife, father and child, tutor and pupil, maſter and ſervant. The relation between huſband and wife is conſtituted by marriage; which may be defined, after the Roman lawyers, the conjunction of man and woman in the ſtricteſt ſociety of life, till death ſhall ſeparate them. The words *man* and *woman* may perhaps have been put in the ſingular number, to exclude bigamy, by which is underſtood a man's marrying a ſecond wife, or a woman's marrying a ſecond huſband, while either of them ſtands married to a firſt.

2. Marriage is truly a contract, and ſo requires the conſent of parties, of which, *infr. b.* 3. *t.* 1. § 16. And it is conſtituted by conſent alone, by the *conjunctio animorum*; ſo that though the parties, after conſent given, ſhould by death, diſagreement, or other cauſe whatever, happen not to conſummate the marriage *conjunctione corporum*, they are nevertheleſs intitled to all the legal rights conſequent on marriage. Neither idiots, nor pupils, can marry, becauſe both are incapable of conſent. The Canon law indeed affirms, that a pupil may enter into marriage, where there is an ability to procreate or conceive, *Decretal. l.* 4. *t.* 2. *c.* 3.; or, as it is expreſſed by ſome doctors, *ſi malitia ſuppleat ætatem.* But, *firſt*, this doctrine draws after it an indecent *inſpectio corporis*, which is not to be admitted without the moſt urgent neceſſity, *l.* 3. *C. Quand. tut. vel cur.* *2dly*, It is adverſary to firſt principles: for if the law declares a pupil incapable of entering into the moſt trifling contract, from a defect of judgement, it ſurely ought not to ſuffer him to engage in an indiſſoluble ſociety, the nature of which he cannot form the ſmalleſt notion of; yet if the married pair ſhall continue to cohabit after puberty, ſuch acquieſcence makes the marriage valid, *l.* 4. *De rit. nupt.*

3. Marriage is ſeldom contracted without previous eſpouſals, or a promiſe of marriage, called by the Romans *ſponſalia*, or *ſtipulatio ſponſalitia*; but theſe are quite diſtinct from the marriage itſelf, which requires preſent conſent. The written antenuptial contracts, therefore, in uſe with us, do not conſtitute marriage: for though their ſtyle ſeems to import a conſent

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de præſenti, in the followings words, *We take one another for our lawful ſpouſes;* yet the obligation which is immediately ſubjoined, to ſolemnize the marriage in the face of the church, ſhews that the parties do not hold the contract for perfected, till that ceremony be performed. Hence inſtances have occurred of perſons being charged upon letters of horning to ſolemnize the marriage in the terms of that written obligation; whereas if the marriage had been deemed perfected by ſubſcribing the contract, the proper action would have been a declarator of it before the commiſſaries. The *ſtipulatio ſponſalitia* had this only effect by the *jus antiquum* of the Romans, that an action for damages lay againſt the party promiſing and refuſing to perform, *Gell. Noct. Att. l.* 4. *c.* 4. And when afterwards earneſt, *arrhæ ſponſalitiæ*, came to be given by the bridegroom, he loſt his earneſt if he reſiled; and if the bride reſiled, ſhe was obliged to reſtore it with as much more, *l.* 5. *C. De ſponſal.* The Canon law allows the party a liberty to reſile, though he ſhould have promiſed upon oath, *Decretal. l.* 4. *t.* 1. *c.* 2. 17. In Holland, he who has entered into eſpouſals, according to the law of that country, may, at the ſuit of the other party, be compelled to fulfil his engagements *remediis prætoriis*, by impriſonment, ſeizing his goods, &c.; and if he ſtill continue obſtinate, the judge may, by his ſentence, declare the marriage perfected; the conſent given in the eſpouſals being in ſuch caſe brought down, *fictione juris*, to the date of the ſentence, *Brower. de jure connub. p.* 255. By the cuſtom of Scotland, all promiſes of marriage, whether private or more ſolemn, contained in written contracts, may, in the general caſe, be reſiled from; which proceeds from our cloſe adherence to the rule, *Matrimonia debent eſſe libera*, and from the conſideration of the fatal conſequences which often attend forced marriages. But if we ſuppoſe matters not entire, that is, any thing done in conſequence of the promiſe, whereby damage ariſes to any of the parties from the non-performance, the party refuſing to fulfil, though he cannot be compelled to celebrate the marriage, may be condemned to pay the damage ſuſtained by the other party.

4. In the caſe of a promiſe of marriage followed by a *copula*; if the promiſe hath been declared by a written marriage-contract in the uſual ſtyle, the ſubſequent *copula* muſt doubtleſs be conſidered as the perfection or conſummation of the prior contract, after which there can be no room for reſiling: and indeed, though the promiſe *de futuro* ſhould be barely verbal, the canoniſts, *Decretal. l.* 4. *t.* 1. *c.* 30. and, upon their authority, both our judges and writers are agreed, that a *copula* ſubſequent to ſuch promiſe conſtitutes marriage, from a preſumption or fiction, that the conſent *de præſenti*, which is eſſential to marriage, was at that moment mutually given by the parties, in conſequence of the anterior promiſe, *St. b.* 1. *t.* 4. § 6. and *b.* 3. *t.* 3. § 42.; *New Coll.* i. 46. This preſumption, though but ſlightly founded in nature, is abundantly recommended by its equity, and the juſt check which it gives to perfidy.

5. The conſent eſſential to marriage is either expreſs or tacit. Expreſs conſent in regular marriages is ſignified by a ſolemn verbal vow of the parties, accepting each other for their lawful ſpouſes, uttered before a clergyman, who thereupon declares them married perſons. But it is not eſſential to marriage, that it be celebrated by a clergyman: the conſent of parties may be expreſſed before a civil magiſtrate, or even before witneſſes; for it is the conſent of parties which conſtitutes marriage. And hence the ſame ſtatute which declares, that no perſon can be a miniſter without Epiſcopal ordination, takes it for granted, that marriage celebrated by a perſon who is not ordained by a biſhop, is valid, 1672, *c.* 9. Marriage may be alſo, without doubt, perfected by the conſent of parties declared by

writing, provided the writing be ſo conceived as neceſſarily to import their preſent conſent. The proof of marriage is not confined to the teſtimonies of the clergyman and witneſſes preſent at the ceremony. The ſubſequent acknowledgement of it by the parties, is ſufficient to ſupport the marriage, if it appear to have been made, not in a jocular manner, but ſeriouſly and with deliberation. Thus a marriage was ſuſtained againſt the huſband, *Feb.* 1739, *Arrot*, chiefly on his owning it to the midwife whom he had called to aſſiſt his wife in the birth, and to the miniſter whom he had deſired to baptize the child, without any actual proof, either of the marriage, or of the parties cohabiting together as married perſons.

6. Marriage may be alſo entered into, where the conſent is not expreſs, but is diſcovered *rebus ipſis et factis*. In this way it is preſumed or inferred from cohabitation, or the parties living together at bed and board, joined to their being habite, or held and reputed, man and wife. Cohabitation therefore does not by itſelf eſtabliſh this preſumption; for a man and woman may thus cohabit to gratify their unlawful deſires, without any intention of being bound by marriage. This legal preſumption is grounded, not only on the nature of things, but on ſtatute, 1503, *c.* 77. which provides, that a woman who has been reputed the wife of a man till his death, ſhall be intitled to and enjoy the terce as his widow, till it be proved that ſhe was not his lawful wife. Hence it may be obſerved, that the preſumption of habite and repute is not ſo ſtrong an evidence of marriage as to exclude a contrary proof; it only throws the burden of it on him who denies the marriage.—— Hitherto of the conſent of the parties themſelves. By the Roman law, the father's conſent was ſo neceſſary to the marriage of his ſon, while he continued in his family, that it was doubted, whether his ſubſequent approbation could ratify that marriage to which he had not given an antecedent conſent. But this duty, of conſulting parents on ſo important an article, is one of thoſe which our legiſlature hath not thought fit to enforce, either by annulling the undutiful act, or by inflicting any penalty on the actor, though the marriage ſhould be entered into even againſt the expreſs remonſtrances of the father. The conſent of curators is not neceſſary to the minor's marriage, either by the Roman law, or the uſage of Scotland.

7. Marriage is in itſelf null, where either of the parties is, at the time of contracting it, naturally incapable of procreation; for ſuch marriage is inconſiſtent with the propagation of mankind, which is at leaſt one great deſign of its inſtitution: yet where the diſability proceeds, not from nature, but from ſome temporary infirmity of body, or even from old age, the law allows ſuch perſons to aſſume to themſelves perpetual companions in the way of marriage, *in ſolatium vitæ*. 2*dly*, Marriage is null, where either of the parties ſtands already married to a third perſon; for as one cannot be married to two perſons at once, the marriage to the firſt being valid, the other muſt be void: but of this, *infr. b.* 4. *t.* 4. § 54. It is alſo null, 3*dly*, when it is contracted within the degrees of propinquity or affinity forbidden by law.

8. Propinquity is diſtinguiſhed by its different lines, and meaſured by degrees. A line in propinquity is a ſeries of perſons deſcended from the ſame ſtock or root. That line where the propinquity is conſtituted between the perſons generating and generated, is called *the direct*. A father is, with reſpect to his child, in the direct line of aſcendents; a child, in regard of his parents, in the direct line of deſcendents. Where the perſons related are not deſcended the one from the other, but have the ſame common parent, by whom the propinquity is formed, that line is called *the oblique*, *tranſverſe*, or *collateral*. In computing the degrees of conſanguinity,

nity, according to the Roman law, every perſon who was generated made a degree, without reckoning the common ſtock. By this rule, father and ſon were in the firſt degree of conſanguinity, becauſe the ſon is the only perſon generated; brothers in the ſecond, uncle and nephew in the third, and firſt couſins or couſins-german in the fourth. The computation of the degrees of propinquity in the Canon law, agrees preciſely with that in the Roman, in the direct or right line of aſcendents and deſcendents; but in the collateral, the canoniſts compute, not by the number of perſons deſcended on both ſides from the common ſtock, but by the number of generations upon one ſide only. According to this reckoning, couſins-german are in the ſecond degree, becauſe each of them is but two generations diſtant from the grandfather, who is the common ſtock; whereas they are by the Roman rule in the fourth. In the unequal collateral line, where one of the two is farther removed than the other from the common ſtock, the Canon law reckons the diſtance by the number of generations of the perſon fartheſt removed, *Decretal. l.* 4. *t.* 14. *c.* 9. Thus, a niece is related in the ſecond degree to her uncle, becauſe ſhe is related in the ſecond degree to her grandfather, the common ſtock; and, by the ſame rule, ſhe is no farther removed from her uncle's ſon; which abundantly diſcovers the abſurdity of that method of reckoning. Affinity is that tie which ariſes in conſequence of marriage, betwixt one of the married pair and the blood-relations of the other; and the rule of computing its degrees is, that the relations of the huſband ſtand in the ſame degree of affinity to the wife, in which they are related to the huſband by conſanguinity; which rule holds alſo, *e converſo*, in the caſe of the wife's relations. Thus, where one is brother by blood to the wife, he is brother-in-law, or by affinity, to the huſband. But there is no affinity between the huſband's brother and the wife's ſiſter, which is called by doctors *affinitas affinitatis;* becauſe there the connection is formed, not between one of the ſpouſes and the kinſmen of the other, but between the kinſmen of both.

9. As to the degrees in which marriage is prohibited, the law of Scotland has adopted the Jewiſh law, by act 1567, *c.* 15. declaring, that marriage ſhall be as free as God hath permitted it; and that ſeconds in the degrees of conſanguinity and affinity, and all degrees farther removed, contained in the word of God, may lawfully marry; by which manner of reference it would ſeem, that our legiſlature hath conſidered the law of Moſes in that matter to be obligatory upon all nations. By *Levitic. c.* 18. the following rules are eſtabliſhed, either expreſsly, or by conſequence. *Firſt*, Intermarriage between aſcendents and deſcendents in the direct line is forbidden *in infinitum*, let the degrees of propinquity between the parties be ever ſo diſtant; for ſuch marriages are univerſally agreed to be repugnant to the law of nature, and deſtructive of the ties of birth, *Grot. De jur. bell. l.* 2. *t.* 5. § 12. *verſ.* 2. *2dly*, Marriage, even in the collateral line, is forbidden *in infinitum*, where one of the parties is *loco parentis* to the other, *i. e.* where he is brother or ſiſter to the direct aſcendent of the other party. Thus, one cannot intermarry with his grand-niece, though he be as far removed from her in degree as firſt couſins are, both by the computation of the Civil and of the Canon law. *3dly*, In every inſtance which falls not under either of theſe two rules, marriage is lawful in the ſecond degree according to the Canon law, or in the fourth according to the Roman; and conſequently couſins-german may intermarry, and all that are farther removed than they. It may be obſerved, that the act 1567, which was enacted not long after the Reformation, has followed the rule of the Canon law, as it was the common way of computing degrees in Scotland at that time, and continues to this day among the vulgar. *4thly*, The degrees prohibited by the law of Moſes

Moſes in conſanguinity, are, in every caſe, virtually prohibited in affinity; and, by the aforeſaid act 1567, the prohibition is equally broad in the degrees of affinity as in thoſe of conſanguinity. Thus, one cannot marry his wife's ſiſter, more than he can his own. In all this matter, the rules are the ſame by the law of Scotland, whether the parties be related by full or by half blood.

10. Marriage is either regular or clandeſtine. That is regular marriage, where bans have been regularly publiſhed, according to the rules of the church. Proclamation of bans is the ceremony of publiſhing, with an audible voice in the church, immediately before divine ſervice, the names and deſignations or additions of thoſe who intend to intermarry; and inviting all who know of any ſufficient objection againſt the marriage to offer it before it be too late. This ceremony has probably been intended, not only as a guard againſt bigamy, and inceſtuous marriages, but that the parties themſelves might have time to think ſeriouſly, before they entered into engagements that were to laſt for life. Publication of bans was firſt introduced by the Lateran council which was holden in 1216, in general terms, without ſpecifying in what churches or how often the publication was to be made, *Decretal. l.* 4. *t.* 3. *c.* 3. *pr.* Afterwards the council of Trent, *ſeſſ.* 24. *De reform. matr. c.* 1. ordained bans to be proclaimed on three ſucceſſive holidays, in the pariſh church or churches of the perſons contracting; and this canon was adopted by our firſt Reformers, and hath been ever ſince obſerved by our church. A certificate ſigned by the clerk of the kirk-ſeſſion, that the bans were duly publiſhed, is received as legal evidence that they were proclaimed on three different Sundays; not to be traverſed by poſitive proof, that all the three proclamations were made on the ſame day. Not biſhops only, but preſbyteries, were indulged, by act of aſſembly 1638, *ſeſſ.* 23. *c.* 21. with a power of diſpenſing with this form on extraordinary occaſions: but the Preſbyterian clergy have not exerciſed it ſince the Revolution.

11. Clandeſtine marriages, which are contracted without the previous ſolemnity of publiſhing bans, are as valid as regular marriages are; but certain penalties have been annexed to them from time to time by ſtatute, affecting not only the parties, but the celebrator and witneſſes. By 1661, *c.* 34. whoever ſhall marry, or procure themſelves to be married, without proclamation of bans, or by perſons not authoriſed by the eſtabliſhed church, are ſubjected to impriſonment for three months, and to the payment of the ſums ſpecified in the act, in name of fine, higher or lower according to their ſtation and quality; and the celebrator is to be condemned to perpetual baniſhment. After the re-eſtabliſhment of Preſbytery, the prohibition to ſolemnize marriages was pointed againſt miniſters who were not ordained by preſbyteries, 1695, *c.* 12. This reſtraint, in ſo far as it affected the Epiſcopal clergy, was taken off by 10° *Ann. c.* 7. which gave ſuch of them liberty, both to baptize, and to celebrate marriages, as ſhould take the oaths of allegiance and abjuration, and pray in expreſs words for the Sovereign and all the royal family, at ſome time during divine ſervice. The parties who are clandeſtinely married, muſt, by 1698, *c.* 6. declare the names of the celebrator and witneſſes, under high pecuniary penalties, and the witneſſes are alſo to be fined in L. 100 Scots each. Thoſe whoſe marriages were celebrated by perſons not authoriſed by the church, had been alſo ſubjected by a prior act, 1672, *c.* 9. to the loſs of ſome of the rights conſequent on marriage; the huſband loſt his *jus mariti*, and the wife her *jus relictæ*; which ſtatute, with ſeveral others enforcing conformity, that had paſſed in the reigns of Charles II. and James VII. were, after the Revolution, reſcinded, by 1690, *c.* 27. in the lump, without mentioning

tioning any of their contents: and it was adjudged, *Fount. Dec.* 11. 1705, *Carruthers*, that the firſt act 1672 was reſcinded in all its parts by the laſt; and that conſequently neither of theſe rights are now forfeited by a clandeſtine marriage. This judgement may receive ſome ſupport from the favour of marriage, and the ſtrict interpretation which ought to be applied to penal ſtatutes; and likewiſe from this negative argument, that in a poſterior act, 1698, *c.* 6. for making more effectual the former acts againſt clandeſtine marriages, the only two expreſsly confirmed by that ſtatute are, 1661, *c.* 34. and 1695, *c.* 12. without any mention of the act 1672. Yet in ſtrict law it ſeems to carry ſome doubt with it; *firſt*, Becauſe the reſciſſory act 1690 plainly appears, both by its rubric and general ſtrain, intended merely to ſtrike againſt the penalties inflicted upon nonconformity by the acts repealed; 2*dly*, Becauſe it is declared, by 1695, *c.* 12. that the acts formerly made againſt clandeſtine marriages (*acts* in the plural number) ſhall continue in force: nevertheleſs, if the act 1672 be not included in the reckoning, there is but one ſtatute to be found then enacted on that ſubject.

12. The rights conſequent on marriage are either legal, which are conferred by the law itſelf, where there are no ſpecial ſtipulations between the parties contracting; or conventional, where the contracters ſettle their ſeveral intereſts by ſigned articles of agreement. It is the firſt ſort only which is to be conſidered under this title. A man and woman, by entering into marriage, are joined in the ſtricteſt ſociety or copartnery, which neceſſarily draws after it a communication of their mutual civil intereſts, (as far as is neceſſary for preſerving the ſociety), ſtyled in our law, *the communion of goods*. This communion does not however extend to all ſubjects belonging to the married pair at their marriage. As the ſociety entered into is to laſt no longer than the joint lives of the partners, rights that have a perpetual duration, and may be tranſmitted from one generation to another without periſhing in the uſe, (which our law ſtyles *heritable*), are not brought under the partnerſhip; *ex. gr.* a land-eſtate, a tenement of houſes, a right of tithes: nay, a bond of borrowed money, if it carries intereſt, and ſo produces annual fruits, while the debt ſubſiſts, is, as to this queſtion, accounted heritable. Nothing therefore becomes common to huſband and wife, but ſubjects which are of a temporary nature, and produce no yearly profits while they laſt; and which are therefore ſaid by lawyers to be *ſimpliciter* moveable, or moveable in all reſpects.

13. By the common rules of ſociety, the adminiſtration of the goods falling under communion ought to be veſted equally in the huſband and wife, who are the two *ſocii*. But as the wife is by nature itſelf placed under the direction of the huſband, the huſband hath by the law of Scotland the ſole right of adminiſtering the ſociety-goods. This right gets the name of *jus mariti*; and may be defined, that right or intereſt accruing from the marriage to the huſband in the moveable eſtate, which either belonged to the wife at the marriage, or ſhall be acquired by her ſtanding the marriage. It is ſo abſolute, that it bears but little reſemblance to a right of managing a common ſubject: for the huſband can by himſelf receive all the ſums due to the wife which fall under the communion, and grant acquittances to the debtors; he can ſell, and even gift at his pleaſure, her whole moveable ſubjects, by any deed that is to take effect during the marriage; and his creditors may attach them as his, for their payment: ſo that marriage carries all the characters of a legal aſſignation by the wife, in favour of her huſband, of her whole moveable eſtate. Hence any moveable ſubject which after the wife's death ſhall be diſcovered to have belonged to her, falls to the ſurviving huſband; which it could not do, if the *jus mariti* imported barely a temporary right of adminiſtration during the marriage. As

the fruits produced from heritable ſubjects, *ex. gr.* the rents of land, or the intereſt of money, are truly moveable, the huſband muſt not only have the right of doing whatever is neceſſary for making the profits of his wife's heritage effectual, but he is as truly proprietor of them as he is of any other of her moveable ſubjects. This abſolute power in the huſband over the moveable eſtate belonging to the wife, may be thought inconſiſtent with the notion of a communion of goods; but it can be no matter of wonder, to find ſtrong deviations in the ſociety of marriage, from the nature of an ordinary copartnerſhip; ſince the huſband's confeſſed ſuperiority over the wife, muſt neceſſarily give to this particular communion properties very different from thoſe which obtain in the ordinary contract of ſociety.

14. It has been always an agreed point, that the conveyance of an eſtate by a ſtranger in favour of the wife, whether real or perſonal, under condition that it ſhall not fall under the huſband's adminiſtration, effectually excludes the *jus mariti*; for every proprietor may diſpoſe of his own under ſuch limitations as he ſhall think proper. And though the conveyance to a wife, of a ſum or yearly ſubject, ſhould contain no direct excluſion of the *jus mariti*, all are likewiſe agreed, that the huſband can have no intereſt in it, if it be given for her maintenance or alimony; becauſe ſuch proviſions are ſo perſonal to the wife, for whoſe ſubſiſtence they are ſpecially deſtined, that they cannot be transferred to the huſband, nor of courſe be ſubjected to the diligence of his creditors, *St. b.* 1. *t.* 4. § 9. But the *jus mariti*, as to all ſubjects which truly fall under it, was conſidered, both by our ſupreme court, and by all our writers of the laſt century, except *Dirleton*, v. *Jus mariti*, as a right ſo inſeparable from the character of a huſband, that all reſervation of it by the wife, or renunciation of it by the huſband, even in an antenuptial contract, was ineffectual, and by the neceſſity of law returned to the huſband; becauſe that very reſervation or renunciation fell under the *jus mariti*, as a moveable right conceived in favour of the wife, *St. ibid.*; *July* 13. 1678, *Nicolſon*. This doctrine, which ſprings from a mere ſubtlety, is irreconcileable to that *bona fides* which ought to prevail in marriage-contracts, and indeed to common ſenſe; for all rights not unalienable may be renounced by thoſe intitled to them, and the huſband's right of adminiſtering his wife's moveable eſtate, is not accounted by the law of any other country ſo eſſential to him, but that he may diveſt himſelf of it. It is therefore now received as a ſettled point, both by our judges and writers, that a huſband may, in his marriage-contract, renounce his *jus mariti*, in all or any part of the wife's moveable eſtate, *June* 23. 1730, *Walker*; *Falc. Feb.* 5. 1745, *Truſtees of Mrs Murray*. The *jus mariti* ariſes from the marriage *ex lege*, from an act of the law itſelf, and therefore needs no intimation, or other form, to its conſtitution, *Dec.* 18. 1667, *Auchinleck*. His being huſband gives him a complete title to his wife's moveable eſtate.

15. From the *jus mariti* paraphernal goods are exempted. Over theſe the huſband has no power: they are neither alienable by him, nor can they be attached for his debts. By the Roman law, the whole eſtate belonging to the wife continued her property, and was enjoyed by her as ſuch after marriage, except the *dos* or tocher, of which, though it was to be returned to her on the death of the huſband, he enjoyed the fruits while the marriage ſubſiſted. Every ſubject belonging to the wife, *præter dotem*, or beſide the tocher, was in that law ſtyled *paraphernal*; and we alſo make uſe of the word to denote that kind of moveables which continues the wife's property notwithſtanding the marriage. By a ſolemn deciſion, *Fount. Dec.* 4. 1696, & *Jan.* 15. 1697, *Dicks*, *paraphernalia*, as underſtood in the law of Scotland, are declared to include the whole *veſtitus* and *mundus muliebris*;

i. e.

i. e. not only the lady's body-cloaths and wearing apparel, but all the ornaments of dreſs proper to a woman's perſon, as necklace, ear-rings, breaſt or arm jewels, given by her huſband to her at any time of her life, either before or ſtanding the marriage. Things of promiſcuous uſe to man and wife, *ex. gr.* watch, jewels, medals, plate, and even the repoſitories for holding *paraphernalia*, are not paraphernal, unleſs they be made ſuch by the bridegroom's giving them to the bride before or on the marriage-day: for if he ſhould make a preſent to her of a ſubject not properly paraphernal the next morning after the marriage, the donation is revocable; of which ſee *infra*, § 29. *et ſeqq.* Things of this laſt kind are paraphernal only with reſpect to that huſband who made them ſuch; and therefore are eſteemed common moveables, if the wife, who had right to them, be married to a ſecond huſband, unleſs he ſhall in like manner appropriate them to her. The preſent frequently given to a wife by a purchaſer of lands, for her renunciation of the liferent-right ſhe had in the lands purchaſed, which is commonly ſtyled *the lady's gown*, hath by our cuſtoms the like nature and effects with goods properly paraphernal, *July* 26. 1709, *La. Pitſirran.*

16. As the huſband acquires by his marriage a right to the moveable eſtate belonging to the wife, he is liable in payment of the moveable debts contracted by her before the marriage, according to the rule, *l.* 149. *De reg. jur. Ex qua perſona quis lucrum capit, ejus factum præſtare debet.* And as this right is univerſal, extending to the univerſal *jus* of his wife's moveable eſtate, his obligation alſo reaches to her whole moveable debts, which, as ſome lawyers chuſe to ſpeak, *tranſeunt cum univerſitate*, though they ſhould far exceed her moveable eſtate. But this burden ſuffers a reſtriction in point of time: as the obligation was created by contracting the marriage, it falls by its diſſolution. And in truth the huſband is not the debtor in his wife's debts even while the marriage ſubſiſts: In all actions for payment, the wife, who continues debtor notwithſtanding the marriage, is the proper defender; the huſband is made a party to the ſuit, merely for his intereſt; that is, as curator to the debtor; and he is made liable, as having, under the name of adminiſtrator, the abſolute diſpoſal of the goods common to the debtor and himſelf. As ſoon therefore as the marriage is diſſolved, and the ſociety-goods ſuffer a diviſion, the huſband is no longer concerned in the ſhare belonging to his deceaſed wife; and conſequently he is no longer liable in payment of her debts; which the creditors muſt recover, either by a demand from her repreſentatives, if ſhe have any, or by legal diligence againſt her ſeparate eſtate.

17. This obligation upon the huſband is perpetuated againſt him in the following caſes: *firſt*, If complete diligence have been uſed upon his wife's debts, againſt his eſtate, real or perſonal, while ſhe was alive; for there the huſband, as proprietor of the ſubject affected, muſt, by the common rules of law, either abandon his property, or relieve it from the burden with which it ſtands charged. Though, therefore, diligence have been commenced, during the marriage, againſt his land-eſtate, by ſummons of adjudication, or againſt his moveables by arreſtment, the diligence will fall, unleſs it hath been alſo perfected before her death, by decree of adjudication, or of forthcoming, *Jan.* 23. 1678, *Wilkie*; *St. b.* 1. *t.* 4. § 17. Nay, though decree hath been recovered againſt the huſband for the debt during the marriage, yet if it has no relation to land, the obligation upon him will fall by the wife's deceaſe, even ſuppoſing the utmoſt diligence to have been uſed upon it againſt his perſon, by impriſonment, *Dirl.* 10. § 2.; *Had. Feb.* 26. 1623, *Douglas*; becauſe ſuch decree, and all the perſonal diligence conſequent on it, is directed, not againſt the huſband's eſtate, but againſt his perſon, barely for his intereſt; and ſo ceaſeth with his intereſt.

2dly,

2*dly*, If the wife's creditors have not been able to obtain payment, after her death, out of her ſhare of the ſociety-goods, or her other ſeparate eſtate, the ſurviving huſband continues liable to thoſe creditors, though they ſhould not have uſed the leaſt ſtep of diligence againſt him; not indeed *in ſolidum*, for the whole of their ſeveral debts, but *in quantum lucratus eſt*, in ſo far as he hath enriched himſelf, or been a gainer, by the marriage; for equity will not ſuffer him *locupletari cum detrimento alterius*, to retain any profit out of the wife's eſtate, by which her creditors are cut off from the natural and only fund of their payment. A huſband is not accounted *lucratus*, who has got no more than an ordinary tocher by his wife; for a tocher is given for an onerous cauſe, *ad ſuſtinenda onera matrimonii*: it is therefore the exceſs alone which is *lucrum*; and that muſt be judged of by the rank and fortune of the two parties, *Dec.* 23. 1665, *Burnet*. The huſband, becauſe he was at no period the proper debtor in the ſums due by the wife, is only liable in payment of them *ſubſidiariè*, if her own ſeparate eſtate be not ſufficient to clear them off; and therefore no action can lie againſt him as *lucratus*, at the ſuit of the creditors of his deceaſed wife, till the primary debtors, that is, the wife's repreſentatives, be diſcuſſed, *Jan.* 23. 1678, *Wilkie*; *Pr. Falc.* 54.

18. Where the wife was, prior to her marriage, debtor in ſuch debts as would have excluded the *jus mariti* if they had been due to her, *ex. gr.* in bonds heritable by a clauſe of infeftment, or even in moveable bonds bearing intereſt, the huſband is not liable for the principal ſums contained in thoſe bonds, but merely for the intereſt remaining due at the marriage, or which may grow upon them during the marriage; becauſe, in bonds of that kind due to the wife, the huſband would have been intitled to no more than that intereſt, and a huſband's obligation for his wife's debts ought to be commenſurated to the right he hath in her eſtate, *Fount. Jan.* 10. 1696, *Osborn; July* 13. 1708, *Gordon*. But in the following inſtances, he is liable even for the principal ſums contained in ſuch bonds: *firſt*, Where he has been, by the marriage-contract, aſſigned to the *univerſum jus* of the wife, heritable as well as moveable; for if the huſband be liable to pay his wife's moveable debts, in conſequence of the legal right which he acquires by marriage to her moveable eſtate, he ought, by the ſame reaſon, to be ſubjected to her whole debts, where he accepts of a preſent conventional right to her whole eſtate, *Jan.* 24. 1738, *Dick*. 2*dly*, The huſband, where he is *lucratus*, is bound for his wife's debts of whatever kind, in ſo far as the *lucrum* goes, if ſhe has no ſeparate eſtate for the payment of her creditors; for the principle on which that obligation is grounded, is equally ſtrong and forcible, whether it be applied to debts which carry intereſt, or to thoſe that are ſimply moveable, *Fount. Jan.* 23. 1708, *Leſly*.

19. The huſband acquires, by the marriage, a power over both the perſon and the eſtate of the wife. Her perſon is in ſome ſort ſunk by the marriage; ſo that ſhe cannot act by or for herſelf: and as for her eſtate, ſhe has nothing that can be truly called her own, where matters are left to the diſpoſition of the law; for not only her perſonal, but the rents of her heritable eſtate, and the intereſt of her bonds, become the property of the huſband. In conſequence of this power, *firſt*, The huſband can recover the perſon of his wife from all who ſhall with-hold or withdraw it from him: nay, her perſon, while ſhe is *veſtita viro*, is free from all execution upon debts contracted by herſelf; which, by her coverture, ſhe becomes diſabled to pay, *Fount. Jan.* 11. 1704, *Gordon*. At the ſame time the huſband, who is not the proper debtor, is liable to perſonal diligence at the ſuit of her creditors, ſo long as the marriage ſubſiſts. But notwithſtanding this power in the huſband, execution may be uſed againſt a wife's perſon,

ſon, to compel her to the performance of facts which are in her own power, and cannot be validly performed but by herſelf; *ex. gr.* to enter the heirs of her vaſſals, to receive adjudgers in lands holden of herſelf, or to exhibit writings in her own cuſtody, upon letters of diligence, *St. b.* 1. *t.* 4. § 14. *2dly*, As the wife is incapable of acting for herſelf, the huſband is laid under an obligation to provide for her; not only to ſupply her with the neceſſaries of life, but with its conveniencies and comforts, ſuitable to his rank and eſtate. Upon this principle, where the uſe of the waters at Bath, or in any foreign country, is judged neceſſary for the wife's health, the huſband, if his fortune can afford it, is made liable in repayment of the ſums borrowed by her from her relations or acquaintance, for defraying the expence of the journey, *Fount. July* 19. 1711, *La. Kinfawns*. As it is the wife's duty to live in family with her huſband, he cannot be compelled to maintain her in a ſeparate houſe; yet, if he ſhould either abandon his family, or turn his wife out of doors, or by barbarous treatment endanger her life, or even offer ſuch indignities to her perſon as muſt render her condition quite uncomfortable, the judge will, on proper proof, authoriſe a ſeparation *a menſa et toro*, and award a ſeparate alimony to her, ſuitable to her huſband's fortune, to take place from the time of the ſeparation, and to continue till there ſhall be either a reconciliation between the parties, or a ſentence of divorce.

20. It ariſes from this *poteſtas maritalis* that the huſband becomes, by the uſage of Scotland, curator to his wife. He was, by the Roman law, incapable even of being named his wife's curator by a magiſtrate, *l.* 2. *C. Qui dar. tut.* leſt the wife, either through affection or fear, ſhould be backward to call him to account. But this reaſon, in ſo far as concerns the goods in communion, can have no place in our law, which authoriſes the huſband to manage them without account. It is ſaid by Lord Stair, *b.* 1. *t.* 4. § 13. and after him by Sir George Mackenzie, § 11. *h. t.* that the huſband is both tutor and curator to his wife: but women are ſet free from the power of tutors at the age of twelve; and till they arrive at that age, they are incapable of marriage. Sir James Steuart, *v. Curator*, affirms, that on the marriage of a female minor, who had before been under curatory, the former curatory, though it expires in ſo far as it relates to her perſon and perſonal eſtate, which fall under the huſband's power, yet ſtill ſubſiſts as to her heritable eſtate: but it is the more common opinion, that the moment that the huſband's right of curatory commences, the office of the former curators expires *in totum*.

21. In conſequence of the huſband's office of curatory, *firſt*, No ſuit can proceed againſt the wife, till he be cited as defender, for his intereſt; and if the huſband hath not his domicil within the territory of the inferior judge before whom the cauſe is brought, application muſt be made by the purſuer to the court of ſeſſion, who of courſe grant letters of ſupplement, as a warrant for the huſband's citation. If the ſuit be brought before an inferior judge, againſt an unmarried woman, who marries during the dependence, and whoſe huſband is ſubject to his juriſdiction *ratione domicilii*, he may be made a party to it, by letters of diligence proceeding on the warrant of that judge, *Spottiſ. Baillie, p.* 154. But if he be not ſubject to that juriſdiction, letters of ſupplement are neceſſary; which muſt be granted by the ſeſſion; and get that name, becauſe they are deſigned to ſupply the want of juriſdiction in the inferior judge, by the interpoſition of our ſupreme and univerſal civil court. Neither, *2dly*, can the wife ſue in any action without the concurrence of the huſband. If the huſband without reaſon refuſe to concur, *Falc.* i. 235. or ſhall be incapable of concurring, on account of any diſability, either legal, as forfeiture;

natural, as fatuity; or accidental, as reſiding for the time in a foreign country; or if the ſuit is to be brought againſt her own huſband, for ſecuring to her the ſtipulations in her favour, contained in the marriage-contract, *Fount. Feb.* 17. 1703, *Scot*, the judge will of courſe authoriſe any perſon ſhe is pleaſed to recommend, to concur with her, and carry on the action in her name, *Jan.* 9. 1623, *Marſhal.* Yet a wife is not to be authoriſed to ſue her huſband, except in neceſſary or urgent caſes, *ex. gr.* if he be *vergens ad inopiam*, *Fount. Nov.* 16. 1704, *Roſs*, or if he has wilfully diverted from or thrown off his wife, *Dec.* 21. 1626, *La. Foulis.* Proceſs is ſuſtained at the ſuit of the wife, though no curator be authoriſed, where ſhe ſues her huſband after ſeparation, for payment of a yearly ſum which he had agreed to give her in name of alimony, *Fount. Nov.* 7. 1695, *E. Argyll;* for if her perſon be in that caſe ſo far recovered from her huſband's power, that ſhe is capable of enjoying the property of an alimentary proviſion, ſhe muſt alſo be capable of holding plea for the recovery of that proviſion. To ſave the trouble of applying to judges for the authoriſing of ſuch actions, care is generally taken, in marriage-contracts, to name ſome of the wife's neareſt kinſmen, at whoſe ſuit execution may paſs againſt the huſband, for performing his part of the articles.

22. It alſo proceeds from the curatorial power of the huſband, that all deeds done or granted by a wife without his conſent, are in themſelves null, though they ſhould relate to her own property, and make no incroachment on any right competent to the huſband; ſee *infr.* § 27. The rule, That wives are under the curatory of their huſbands, is applicable even to brides: for though a bride be truly *ſui juris* while ſhe continues unmarried, yet, on her actual marriage, the huſband's curatorial powers draw back to the time of proclaiming the bans; after which, the bride is diſabled from contracting debts, or granting deeds, not only to the prejudice of her future huſband, but her own. She cannot therefore, after the proclaiming of bans is begun, contract any debt which will be effectual either againſt herſelf or the bridegroom; nor can ſhe diſpoſe of any part of her eſtate in donation, or even as a proviſion to her children of a former marriage, without his conſent, *Dirl.* 13.; though he cannot properly be ſaid to ſuffer prejudice by ſuch proviſion or donation, ſince he is brought under no obligation to pay, and only loſes the hope of what might have otherwiſe been his upon the marriage. Yet it is not ſufficient for this purpoſe, that the bans have been publiſhed at the bridegroom's pariſh-church; for no notification, by publiſhing bans, can interpel a perſon from contracting with any woman, unleſs it be made in the pariſh-church where ſhe herſelf dwells. Beſides, bans ought to be publiſhed in the ſpecific terms of law; the law refers to the order of the church, 1661, *c.* 34. and the church hath required their publication in the pariſh-churches, both of the bridegroom and of the bride, *ſupr.* § 10.; *July* 8. 1623, *Macdougal.* But if the perſon contracting with the bride knew, before executing the deed, that her bans were proclaimed in a church, though not that of her own pariſh, ſuch private knowledge is, in the judgement of law, accounted an interpellation with reſpect to him.

23. In the following particular the legal curatory of an huſband differs from common curatory. Curators are given to minors, ſolely for the minor's benefit, not their own; and therefore they cannot, by an interpoſition of their authority, give ſtrength or validity to any deeds of the minor in which they themſelves have a direct intereſt; but a huſband can give a legal effect to deeds of that ſort granted by the wife: for the huſband's conſent is required, not becauſe the wife is incapable of judging for herſelf, (for no incapacity can be alledged againſt ſuch at leaſt as are of perfect

perfect age), but becauſe ſhe is under the power of the huſband; and as his curatorial powers ariſe in part from his ſuperiority over the wife, and ſo are to be conſidered as a mutual benefit to both, it would be unjuſt to wreſt that authority which is veſted in him partly for his own benefit, to his prejudice, by rendering him incapable of receiving any preſent or donative from his wife. It has therefore obtained in practice, that in all caſes where the conſent of the huſband would be neceſſary, if the deed were to be granted by the wife in favour of a third party, his ſimple acceptance or intervention equally authoriſes it if it be granted in favour of himſelf. Thus, in poſtnuptial contracts, or in renunciations by the wife of her liferent, or in pure donations to the huſband, there is no neceſſity of a formal interpoſition of his authority; his barely intervening as a party in the poſtnuptial contract, or his acceptance of the renunciation or donation, implies his authority, and conſequently is ſufficient to give force to the deed. This doctrine is univerſally held to be juſt where the wife is major; but if ſhe be minor, it admits of a doubt, whether ſhe can execute any deed in her huſband's favour, ſince no minor has a power of granting deeds without the conſent of his curator, and no curator to a minor can be *auctor in rem ſuam*. There is this other difference between the curatory of a huſband, and that to a minor, that the wife's contracts after majority, authoriſed by her huſband, are not only valid, but not ſubject to challenge upon leſion.

24. There are ſome obligations granted by the wife during marriage, which require the huſband's conſent; others are valid without it; and a third ſort are null, though his conſent be interpoſed. Obligations ariſe either from delict or contract. Obligations formed by the wife's delict, ſtand good againſt herſelf, becauſe marriage affords no indemnity to delinquents; but they have no operation againſt the huſband, unleſs he be convicted of acceſſion to the crime or delict which produced the obligation; for delicts, being perſonal, ought to draw no puniſhment on the innocent; *Culpa tenet ſuos auctores*. The effect of ſuch obligations is in ſeveral reſpects limited even as to the wife: for though her perſon be under the power of the law, ſo as ſhe may be baniſhed, impriſoned, or even puniſhed capitally upon a criminal trial; yet where the puniſhment reſolves into a pecuniary fine, neither can her perſon be attached for the payment of it during the marriage, becauſe ſhe is by her coverture utterly diſabled from paying; nor the goods in communion, becauſe theſe are the property of the huſband, who is not liable: diligence muſt therefore be ſuſpended till the diſſolution of the marriage, except as to ſuch heritable eſtate of the wife as is not ſubject to the *jus mariti*, *Edg. July* 2. 1724, *Murray; Home*, 105.

25. As for obligations ariſing from contract, our law hath been ſo ſolicitous to protect wives from impoſition while they are *ſub cura mariti*, as to declare all perſonal obligations granted by the wife, though with the huſband's conſent, to be *ipſo jure* void; *ex. gr.* bonds, bills, promiſſory notes, obligatory receipts, contracts, &c. for whatever cauſe they may have been granted, whether for borrowed money, the price of goods, or as cautioner for others; becauſe her perſon being *quodammodo* ſunk in that of her huſband, is not a proper ſubject of obligation. For this reaſon perſonal obligations granted by a wife, do not acquire force even by her judicial ratification of them, *Feb.* 18. 1663, *Birſh*; for deeds in themſelves null, cannot be rendered effectual by any ratification, (though they may, by acts of homologation performed by the granter after becoming *ſui juris*, *infr. b.* 3. *t.* 3. § 47.): and indeed this doctrine is neceſſary for the ſecurity of women clothed with huſbands. But this rule ſuffers divers exceptions. *Firſt*, Where the wife gets a ſeparate *peculium* or ſtock, either from her father or a ſtranger, for the maintenance of herſelf and children, which is by

by the grant exempted from the *jus mariti*, ſhe can lawfully charge or burden that ſtock, and bind herſelf for ſums of money, in ſo far as it extends, *Dirl.* 164. By ſtronger reaſon, 2*dly*, Where there is a legal, or even voluntary ſeparation of the huſband and wife, and the huſband hath ſettled a yearly ſum for the wife's ſeparate maintenance, her perſonal obligations during their ſeparation are effectual againſt her: yet not ſo as diligence may proceed on ſuch obligations againſt her perſon; ſince no wife can be ſubjected to perſonal diligence upon a civil cauſe, even after either legal or voluntary ſeparation, till the marriage itſelf be diſſolved by divorce. Theſe obligations contracted by the wife after ſeparation, cannot in the leaſt degree affect the huſband: for by his ſecuring a yearly annuity for her maintenance, he fulfils the natural obligation the marriage laid him under to provide for her; and therefore the creditors who continue to deal with her, contract upon her faith ſolely.

26. Where the wife is *præpoſita negotiis* by the huſband, intruſted with the management, either of a particular branch of buſineſs, or of his whole affairs, all the contracts ſhe enters into in the exerciſe of her *præpoſitura*, and even the debts due by her for the price of goods, though they ſhould not be conſtituted by writing, but ariſe merely *ex re*, from furniſhings made to her, are effectual: but ſuch obligations have no force againſt herſelf, for ſhe acts not in her own name, but againſt her huſband, who gave her powers to act, and who muſt on that account be bound by her deeds. A *præpoſitura* may be conſtituted, either expreſsly, by a written commiſſion or factory, or tacitly, when the wife has been in uſe, for a tract of time together, without a formal mandate, to act for her huſband, while he either approves of her management by fulfilling her deeds, or at leaſt, being in the knowledge thereof, connives at or acquieſces in it, *Dirl.* 319. With regard to diſburſements neceſſary for a family, the rule is, that the wife, who is formed by nature for the management within doors, is preſumed, while ſhe remains in family with her huſband, to be *præpoſita negotiis domeſticis*. In this character ſhe hath power to purchaſe whatever is proper for the family; and the huſband is liable for the price, even though what was purchaſed may have been applied to other uſes, or though he may have given the wife a ſum of money *aliunde* ſufficient for the family-expence, *Dirl.* 310.; *Harc.* 871. This *præpoſitura* ceaſeth, *firſt*, By the wife's delict: for if ſhe ſhould abandon her huſband's family, and take up her reſidence elſewhere, ſhe can be no longer looked upon, either as manager of the family, or as being under the huſband's protection; and ſo hath no longer power to oblige him to the payment of any of her debts, except thoſe that ſhe may have contracted for her neceſſary ſubſiſtence, *July* 6. 1677, *Allan*. 2*dly*, It ceaſeth by the turning off of the wife by the huſband from the management of his family. This is effected by inhibition; which is a remedy competent to every huſband whoſe wife diſcovers an inclination to live beyond his fortune. It is obtained upon a bill or petition preferred to the court of ſeſſion, and prohibits all perſons to contract with the wife, or give her credit. As the wife's *præpoſitura* falls by the perfecting of this diligence, according to the forms obſerved in common inhibitions, *infra*, *b.* 2. *t.* 11. § 4. *et ſeqq.* the huſband is not liable for any debt contracted by his wife after inhibition, except for ſuch furniſhings, ſuitable to her quality, as he cannot prove that he provided her in *aliunde*, *Goſ.* *June* 23. 1675, *Auchinleck*; *July* 25. 1676, *Campbell*. As the wife's right of managing her huſband's family is founded entirely on the preſumption that he placed her in the direction; and as every one may remove his managers at pleaſure, without aſſigning any reaſon for it; inhibition may paſs againſt the wife, *etiam cauſâ non cognitâ*, though the huſband ſhould not offer to juſtify that meaſure

meaſure by an actual proof of her bad œconomy, or profuſeneſs of temper, *Falc.* i. 209.—— Hitherto of perſonal obligations.

27. All obligations granted by the wife, either charging, or even alienating, any eſtate or ſubject of which ſhe retains the property excluſive of the *jus mariti*, whether proper heritage, or bonds bearing intereſt, are effectual, provided the huſband as curator conſent to them: for though a wife cannot oblige her perſon, which is in ſome ſort ſunk by the marriage, ſhe continues capable of holding a real eſtate, and her *paraphernalia*; and in grants or obligations relative to ſubjects which are her own property, her eſtate is ſolely conſidered, and not her perſon. Such obligations are valid, even where they are acceſſory to a perſonal obligation, though it be certain, that perſonal obligations granted by a wife have no degree of force, *Harc.* 878. 882. Nay, though the obligation be in its form merely perſonal, yet if, by a backbond or defeaſance of the ſame date, it ſhall be reſtricted to her heritage, it will be effectual, *Jan.* 23. 1678, *Bruce*; for by ſuch backbond the nature of the obligation, of which the backbond makes a part, is in effect changed, and continues no longer perſonal. If the wife can, with the huſband's conſent, grant ſecurities upon, or even make over her heritage to a ſtranger, ſhe may with the ſame conſent grant leaſes of it: but it may be doubted, whether ſhe can do this, or indeed any act of adminiſtration relative to her heritage, without his conſent, notwithſtanding a deciſion, *Fount. Feb.* 21. 1679, *Cockburn*, obſerved in *Diction.* i. 401.; for though the *jus mariti* extends not to the heritable ſubjects themſelves, yet the huſband's conſent to the granting of leaſes, removing of tenants, and other acts of adminiſtration exerciſed by the wife, appears indiſpenſable, on account of his office of curator, under which character he muſt interpoſe in all her deeds, whether reſpecting heritage or moveables. This is ſo true, that if the wife ſhould, without his conſent, make a grant of lands, though with the reſervation of the huſband's *jus mariti* and the courteſy, the grant would be void; for he is her guardian for ſecurity of her and her heirs, as well as for himſelf. Upon this ground, though paraphernal goods are not ſubject to the *jus mariti*, being truly the wife's property; yet the huſband's right of curatory extends over them, in the ſame manner that it does over her proper heritage; ſo that ſhe can do no deed by which they may be affected without his conſent. Hence, if the wife ſhould impignorate any paraphernal ſubject, in ſecurity of a debt contracted by herſelf without the huſband's conſent, the ſubject continues the free and unburdened property of the wife, notwithſtanding the impignoration, which being null for want of his conſent, can create no real ſecurity to the creditor, *July* 11. 1735, *Gemmil.* But a wife may effectually impignorate her *paraphernalia*, in ſecurity of a debt contracted by the huſband, even without his conſent; becauſe that is accounted a donation by the wife to the huſband, which requires not any formal interpoſition of his conſent, *ſupra*, § 23. Where the huſband is, from furioſity, or other diſability, rendered incapable of interpoſing his conſent as curator, the neceſſity of the caſe may ſupport a deed granted by the wife alone, affecting her heritage, if it be rational.

28. The wife's powers in making grants which are not to take effect till after her death, are more ample; becauſe the huſband's intereſt ceaſeth before ſuch grants or deeds can have the leaſt operation. Perhaps ſhe cannot, in the form of a writing *inter vivos*, diſpoſe of or burden ſuch moveable ſubjects as may accrue to her on the death of her huſband, though his intereſt be then at an end; becauſe no ſubject can be conveyed effectually by a preſent deed of alienation, to which the granter has not a proper right at the date of the grant; and the wife has no more than the hope or proſpect

ſpect of a right to the goods in communion while the marriage ſubſiſts; ſee *Dec.* 19. 1626, *Matthew.* But ſhe can bequeath her ſhare of theſe goods by teſtament, even without the huſband's conſent, in the ſame manner that a minor can teſt without the conſent of his curators. And ſhe may, upon the ſame ground, become bound for a ſum of money, in the form of a deed *inter vivos*, if it be not to take effect till after her death, *Feb.* 1720, *Colquhoun.* Though minors are, from the weakneſs of their judgement, and inſtability of their inclinations, incapable of ſettling the ſucceſſion of their heritable eſtates; yet wives, thoſe at leaſt who are of perfect age, againſt whom unripeneſs of judgement cannot be objected, may, it is thought, lawfully execute ſuch ſettlements, even without their huſband's conſent: for no reaſon occurs, why his conſent ſhould be neceſſary to deeds, which can neither affect his intereſt, nor have the leaſt operation till his *poteſtas maritalis* be at an end.

29. All deeds, whether granted by the wife to the huſband, or by him to the wife, importing a donation, are indeed valid; but may, both by the Roman law and ours, be revoked or avoided by the donor, at any time of his or her life; leſt either of the two ſpouſes ſhould, by ill-judged teſtimonies of their affection, undo themſelves or their families, *Reg. Maj. l.* 2. *c.* 15. § 10. 11.; *l.* 1. *De don. int. vir.* Deeds, though gratuitous, executed by the huſband or wife to a third party, are not revocable, not even a ratification by the huſband of a diſpoſition granted by the wife in favour of her children of a former marriage, *Jan.* 15. 1669, *Hamilton;* ſee alſo *July* 12. 1671, *Murray;* becauſe theſe are not donations between the two ſpouſes. But a deed, the only genuine intention of which is to convey a gratuitous right from one of the ſpouſes to the other, though it be granted nominally, or in truſt, to a third party, is, notwithſtanding that maſk, ſubject to revocation, *Feb.* 1. 1728, *Sanders: Plus enim valet quod agitur, quam quod ſimulate concipitur.* And, on the other hand, an obligation, though it ſhould be granted by one of the ſpouſes directly to the other, and even truly intended for the benefit of the grantee, is nevertheleſs ſecure againſt revocation, if it contain a right, even gratuitous, in favour of a third party, *Spottiſ. L. Hiſlide, p.* 155. And hence it would ſeem that a wife's impignoration of any paraphernal ſubject, in ſecurity of a debt contracted by her huſband, which truly conſtitutes a donation by her to her huſband, cannot be revoked; becauſe the huſband's creditor, who is a third party, acquires a direct intereſt by the impignoration, which ought therefore to ſubſiſt irrevocably as to him; ſee *Dalr.* 170. Donations, where they are antenuptial, fall not under this deſcription; for the parties are not huſband and wife till marriage: conſequently, not only are paraphernal donations irrevocable, but even gratuitous bonds granted by the bridegroom to the bride at any time before marriage, *Harc.* 888. All donations are thus revocable, in whatever form they may be conſtituted. Craig indeed affirms, *lib.* 1. *dieg.* 12. § 38. that though a gratuitous diſpoſition by a huſband to his wife, of lands to be holden of himſelf, be ſubject to revocation; yet his reſignation or ſurrender of lands to the ſuperior in her favour, cannot be revoked: and he repeats the ſame doctrine, *lib.* 3. *dieg.* 1. § 34. in the caſe of a wife's ſurrender in favour of her huſband. But the diſtinction made in this queſtion between the effects of a baſe right, and a reſignation or ſurrender, is not ſupported by either reaſon or authority: it defeats the plain intention of the law, by opening a way to make all donations between huſband and wife, of heritage, irrevocable; and it ſeems to have been diſapproved of by our lawyers, who do not ſo much as uſe it as an argument for ſecuring ſuch ſurrenders againſt revocation, *Harc.* 883.

30. Donations are grants which ariſe from the mere liberality of the giver,

ver, without any antecedent cauſe or obligation. Hence, *firſt*, mutual remuneratory grants between the ſpouſes, made in conſideration of each other, are not revocable, *Jan.* 26. 1669, *Chiſholm*, where there is any reaſonable proportion between the value of the two; for as trifling inequalities ought to be overlooked in the tranſactions of thoſe who are ſo cloſely united, the exceſs on the one ſide ought to be conſiderable, in order to found the party who is hurt in a right of revocation, *l.* 28. § 2. *De don. int. vir.* But where an onerous cauſe or remuneration is ſimulated, and a donation appears truly intended, the grant is revocable as a pure donation. Hence, *2dly*, grants, given in conſequence of a natural obligation, are not ſubject to revocation. Thus, as it is the huſband's duty, where there has been no previous written contract, to make a rational proviſion for his wife, in the event of her ſurvivance, ſuch proviſion is not revocable; and if it ſhould be immoderate, it might be revoked only *quoad exceſſum*, *June* 27. 1677, *Short.* And though it be no proper part of a wife's duty to provide for her huſband, yet a poſtnuptial ſettlement of her eſtate, in favour of him and the iſſue of the marriage, if it ſhall appear rational, will probably ſtand ſecure againſt revocation; ſee *July* 25. 1710, *Chalmer.* But where the intereſts of the huſband and wife have been ſettled by an antenuptial contract, poſtnuptial deeds are revocable, in ſo far as they either add to or diminiſh the proviſions of the firſt contract, without a valuable conſideration on the other part: for every ſuch proviſion, adding to the wife's prior ſettlement, is a donation by the huſband to her; and every deed by which the wife renounces the leaſt ſhare of her former proviſion, is a donation by her to the huſband, *Dirl.* 368.; *Jan.* 1724, *Exec. of Bairnsfather.* Every bond or diſpoſition granted by the huſband to the wife is not preſumed to be gratuitous, nor conſequently to be uſed as a cover to a donation: for many inſtances occur, in which a huſband may truly become his wife's debtor, *ex. gr.* by intermeddling with ſuch of her effects as fall not within his *jus mariti*, &c. And if it is to be held for law, that the huſband cannot, by any deed or declaration, eſtabliſh a charge againſt himſelf in ſuch caſes, the conſequence muſt be, that the wife lies under the neceſſity of accepting one for her curator, who cannot by any deed effectually bind himſelf to account for his intromiſſions. In a queſtion therefore concerning the validity of ſuch bond or obligation, the mention, in the recital, of any probable occaſion by which he became his wife's debtor, is ſufficient to ſupport it as onerous, and not revocable by the granter, if the fact be not diſproved by legal evidence. In ſuch caſe, however, it may be prudent for the wife to preſerve ſome written voucher, in proof of the truth of that affirmation in the recital; leſt the granter ſhould afterwards, upon a revocation, alledge, and offer to prove, that the inſerting of it was intended merely as a cover to the donation. All voluntary contracts of ſeparation between huſband and wife, by which the huſband ſettles on her a fixed annuity for her maintenance, were, by our more ancient practice, null from the beginning, as contrary to one of the eſſential duties of marriage, viz. the adherence of the married pair to one another, *Feb.* 11. 1634, *Drummond.* But by our later deciſions they are effectual, during the whole period of the ſeparation, as being granted by the huſband, in conſequence of his natural obligation to maintain the wife. But they are revocable, and accounted actually revoked, ſo ſoon as he ſhall offer to receive her again into his family, *Feb.* 6. 1666, *Livingſton*, unleſs the ſeparation ſhall have proceeded from harſh uſage, or other reaſons ſufficient to found a legal or judicial ſeparation.

31. Donations between huſband and wife may be revoked, either expreſsly or tacitly. Expreſsly, by an explicite declaration of the donor's will

will to revoke. Where the donation is conſtituted by writing, it ought to be revoked alſo by writing; both in reſpect of the rule, *l.* 35. *De reg. jur.* and becauſe, by the genius of our law, the effect of written deeds is not, in the common caſe, to be taken off by the teſtimony of witneſſes. This revocation may be ſigned *etiam in articulo mortis:* and at what time ſoever it may have been ſigned, whether upon deathbed, or in a ſtate of health, there is no neceſſity for the donor to make it known to the other ſpouſe. A donation may be tacitly revoked, by any deed of the donor inconſiſtent with the gift; *ex. gr.* if the donor ſhall make over abſolutely to another the ſubject gifted, *l.* 12. *C. De don. int. vir.*; for by that conveyance he is underſtood to reſume the property from the donee to himſelf, and in the character of proprietor to transfer the right to another. But a right of annualrent, or other ſecurity, with which the donor has charged the ſubject to a creditor, or any third perſon, imports not a total revocation of the gift; for the law, which preſumes always *in dubio* for the donation, *l.* 32. § 4. *De don. int. vir.* conſiders the donor to have in that caſe reſumed the property to himſelf, only in ſo far as was neceſſary for charging the ſubject with the right granted to the third party, *Dirlet.* 204. Revocation is not preſumed, from a diſpoſition *omnium bonorum* being granted by the donor in favour of a ſtranger, *Fount. Feb.* 7. 1699, *Handiſide;* for the general clauſe in ſuch diſpoſition cannot be conſtrued to include any ſpecial ſubject of which the granter had formerly diveſted himſelf, *l.* 80. *&c. De reg. jur.*; ſee *infr. b.* 3. *t.* 4. § 9. The bare contracting of debt by the donor, creates not the ſlighteſt preſumption of an intention in him to revoke: indeed the poſterior creditors, where the debtor has no ſeparate funds ſufficient for their payment, may plead upon the faculty of revocation competent to him, which the law will transfer to thoſe creditors from the debtor, if he cannot be prevailed on to revoke voluntarily; but the repreſentatives of the donor cannot plead upon poſterior contractions as a tacit revocation of the gift. It may even be doubted, whether, though the donor ſhould ſuffer a decree of adjudication to paſs againſt the ſubject of the donation, a revocation would be implied, while the legal reverſion is current, farther than extends to the ſums adjudged for; becauſe adjudication, during that period, is but a right in ſecurity. It is affirmed by Bankton, *b.* 1. *t.* 5. § 100. that a revocation is preſumed from the commiſſion of adultery by the wife, not forgiven by the huſband; and that this operates *ipſo jure in odium* of the crime: but the deciſion from Hope, *Donatio inter v. et ux. Douglas*, cited in ſupport of this doctrine, requires a decree of divorce as eſſential to the revocation or avoidance of the gift.

32. Though a donation between man and wife is not null, yet the donee holds it under the tacit condition, that it ſhall fall in the caſe of revocation; ſo that the donee's right continues pendent upon the donor's will, during his life. The donee cannot therefore alienate the ſubject, nor charge it with any burden to the prejudice of the donor; and conſequently the donor returns, upon his revocation, to the full property of the ſubject, free from the conſequences of all the intermediate deeds granted by the donee, even to his creditors or ſingular ſucceſſors: *Reſoluto enim jure dantis, reſolvitur jus accipientis.* This right of revocation is perſonal to the donor; and therefore, if he himſelf do not revoke, his heirs or repreſentatives cannot: the thing gifted becomes, after the donor's death, the abſolute property of the donee: *Morte donantis donatio confirmatur.*

33. All deeds granted, or contracts entered into, by any perſon, through force or fear, are in themſelves void, being deſtitute of the eſſential character of a free conſent. As huſbands have in their power various methods of prevailing on their wives to grant irrational deeds, not only by perſuaſion,

ſion, but by violence or menaces, third parties in whoſe favour deeds had been granted by wives, were frequently vexed with actions of reduction brought by the wife, upon an allegation, that ſhe had been compelled to grant them *vi aut metu*, through the force or fear of the huſband. In like manner if the huſband had, with the wife's conſent, made over to a ſtranger any part of the lands ſettled on her in liferent, action was competent to her for ſetting aſide the alienation, upon this ground, that the conſent given by her to the deed had been extorted from her by the huſband. To ſecure the grantees againſt the conſequences of ſuch actions when they were purſued vexatiouſly, ratifications have been introduced into our practice, by which the wife, appearing before a judge, declares upon oath, that the huſband neither induced her by force nor fear to grant the deed, or give her conſent, but that ſhe did it freely, and for her own utility; and that ſhe ſhall never afterwards call it in queſtion. A deed may be ratified by a wife before any judge, even before one within whoſe territory neither ſhe, nor her huſband, nor the grantee, reſides; nor is it neceſſary that ſhe make oath in court, or *pro tribunali*, *July* 8. 1642, *Grant*, becauſe ſuch ratifications are acts of voluntary juriſdiction. If the huſband be preſent at the ceremony, the deed is preſumed to have been ratified under his influence; nay, if the ratification do not ſpecially mention that he was not preſent, it is null. Though judicial ratifications were, both by our ſtatute law, 1481, *c.* 84. and by long inveterate uſage, made upon oath, we are now inſenſibly coming into the cuſtom of being contented with the wife's ſolemn declaration. It may be doubted, however, whether this would be eſteemed ſufficient, were it brought to a trial.

34. After this ratification, upon which an inſtrument is always taken in the hands of a notary, and a judicial act extracted, the wife is for ever cut off from her right of impeaching the deed ratified, though ſhe ſhould offer to bring the cleareſt evidence that ſhe was compelled to grant it. This doctrine was eſtabliſhed by a judgement in a private cauſe, pronounced by the Lords of Council, *March* 6. 1481, which, becauſe it is ingroſſed in the body of our ſtatutes, 1481, *c.* 84. is become part of our written law. By a poſterior deciſion of the ſeſſion, *July* 8. 1642, *Grant*, the wife's right of reduction was excluded by her ratification, though ſhe offered to prove compulſion by the huſband, in the ratification, as well as in the deed ratified. This judgement appears contrary to the rules of reaſon; and is repugnant both to the Canon law, *Decretal. l.* 2. *t.* 24. *c.* 28. which gives that effect only to ſuch ratifications of the wife upon oath as are made *ſine vi aut dolo*, and to the principle on which our practice is grounded; for if the law accounts all ratifications made by the wife in her huſband's preſence null, from a preſumption that ſhe is thereby laid under undue influence, it muſt, *a fortiori*, reject ſuch ratifications as ſhall appear, upon poſitive evidence, to have been actually extorted from her *ex vi aut metu* of the huſband.

35. Every deed by which any right accrues to a third party, may be thus ſecured by the wife's ratification, though a conſequential benefit ſhould ariſe to the huſband; for the aforeſaid act 1481, which eſtabliſhes the law of ratifications, and fixes their extent, applies them expreſsly to the caſe of a wife, whoſe huſband was preſſed by debt to ſell his eſtate, and who had renounced her intereſt in her jointure-lands, that the purchaſe might be diſincumbered; and had judicially ratified her renunciation. Sir George Mackenzie, *h. t.* § 14. makes ratifications of more general uſe, and affirms, that deeds granted by wives, not only to ſtrangers, but to their huſbands themſelves, though they ſhould be pure donations, become irrevocable by the wife's ratification; and this opinion ſeems to be favoured by a deciſion obſerved by *Fount. Dec.* 4. 1685, *Richardſon*; but cannot be

reconciled to the confeſſed notion of ratifications, which, all our writers admit, were intended merely to ſecure grants againſt the exceptions of force or of fear. Donations, therefore, by the wife, which proceed from the love, not from the fear of the huſband, cannot be the proper ſubject of ratification; for though the wife ſhould ſwear *optima fide*, that ſhe had not been induced to make the grant through the force or fear of the huſband, it may nevertheleſs be true, that ſhe made it from an exceſs of fondneſs for him, which the law hath expreſsly ſaid to be a ſufficient ground for ſubjecting the gift to revocation. And if a donation by a wife to her huſband might be rendered irrevocable by her ratification, which an huſband can ſeldom fail to obtain by the ſame methods of perſuaſion or force which procured the gift, the law of donations between huſband and wife would turn out a moſt hurtful one to the wife, whoſe donations to the huſband might be made irrevocable by her ratification, while the donations by the huſband to her would ſtand expoſed to revocation all his life long, *Feb.* 15. 1678, *Gordon.* See a ſingular opinion of Sir James Steuart on this point, *v. Donatio int. vir. et ux.* This reaſoning may be juſtly applied to all deeds granted by the wife to third parties, in truſt, for the uſe of the huſband; for theſe are truly *donationes velatæ*, gifts under a cover, *ſupr.* § 29. If a deed granted by a wife in favour of a ſtranger, hath been extorted from her *vi aut metu*, not of the huſband, but of the grantee, her ratification ought not to exclude her right of reduction: for ratifications were not introduced, that third parties might profit by the force or threatenings uſed by themſelves againſt the wife, but merely that they might be ſecured againſt her plea of the force or fear of the huſband; and therefore her oath expreſſes no more, than that ſhe was not compelled by her huſband. Ratifications by the wife, therefore, though they bar reductions founded on the force or fear of the huſband, have no tendency to exclude her right of revoking donations which ſhe has made from the affection ſhe bears to him, or of ſetting aſide deeds which ſhe may have granted to third parties, on the head of violence or menaces uſed againſt her by the grantees.

36. It appears, that, by the old practice, the wife's ratification was abſolutely neceſſary for ſecuring the grantee, inſomuch that every deed granted by her to a ſtranger, or conſent adhibited by her to a deed of her huſband, was accounted null, unleſs her ſubſequent ratification had been alſo obtained, *Cr. lib.* 1. *dieg.* 15. § 20. But ever ſince Craig's time, a wife's deeds are held valid, though not confirmed by her judicial ratification, if they have been executed according to the legal ſolemnities. It is indeed competent to the wife to bring an action for reducing any deed that ſhe has not ratified, upon the head of force or fear: and if this be ſufficiently proved, the deed falls to be ſet aſide; (for which reaſon, it may be prudent in the grantee to demand her ratification, in order to exclude that right of reduction); but if ſhe fail in the proof, the deed, though not ratified, remains effectual to the grantee, *Jan.* 27. 1681, *Steuart*; *June* 28. 1706, *Hay.*——Hitherto of the legal effects of marriage while it ſubſiſts.

37. Though marriage be a contract which is perfected by the conſent of parties, it cannot be diſſolved by a contrary conſent: for the character of perpetuity ſeems to have been impreſſed on it by God himſelf, in its firſt inſtitution, when he declared the two common parents of all mankind to be one fleſh, *Gen.* ii. 22. *et ſeqq.*; which was afterwards confirmed by our Saviour's injunction, that no man ſhould put aſunder whom God had joined, *Matth.* xix. 6. Hence a marriage entered into by minors *puberes*, who are capable of conſent, cannot be declared null for want of the conſent of their curators; and however the articles aſcertaining the ſeveral intereſts of the two ſpouſes may be ſubject to reduction on the head of minority and leſion,

leſion, the marriage itſelf is ſecure againſt all reduction. The Romans indeed, who paid no regard to this rule, and looked on marriage as a common contract of ſociety, admitted divorces, not only on the ſpecial grounds of old age, want of health, or of children, &c. *l.* 60. § 1. *l.* 61. *De don. int. vir. et ux.*; or upon the joint agreement of both parties, *l.* 62. *pr. eod. t.*; but even when either of the two intimated to the other, by a proper writing, his or her intention to be free, *l.* 3. 7. *De divort.* And this unlimited power of divorcing, after it had been reſtrained in part under the Chriſtian Emperors, *l.* 8. § 2. 3. *C. De repud.* was again authoriſed by *Nov.* 140. *pr. et c.* 1. But it is adverſary to the rules, not only of our holy religion, but of right reaſon and of ſound policy: for married perſons, if they ſhall be left at full liberty to break off from their firſt engagements, may be too apt, on the lighteſt diſguſt, to look out for more agreeable companions; and thus the natural ties, between parents and their firſt iſſue, muſt be quickly ſlackened, if not totally diſſolved, and the education of children miſerably neglected. For theſe reaſons, marriage cannot, by the uſage of Scotland, be diſſolved till death, except by divorce, proceeding either upon the head of adultery, *Matth.* xix. 8. 9.; *Mark* x. 11. or of wilful deſertion, 1 *Cor.* vii. 15.

38. Marriage may be diſſolved by death, either within year and day from its being firſt contracted, or not till after the year. If it be diſſolved within year and day, all grants made in conſideration of the marriage become void, and things return to the ſame condition in which they ſtood before the marriage. The tocher, if it was originally the wife's property, returns to her; or if ſhe die before the huſband, to her executors: if it was given by a father, or other relation, it muſt be reſtored to the giver: and every intereſt accruing to the wife from the marriage in the huſband's eſtate, heritable or perſonal, whether by the diſpoſition of law or by covenant, returns to the huſband, or his heirs. This rule extends to all ſettlements in marriage-contracts in favour of any of the two ſpouſes which are expreſsly made *intuitu matrimonii*, *July* 16. 1678, *Lo. Burleigh*; and to every proviſion where the wife, or iſſue of the marriage, are ſecured in any part of the ſubject provided, though it ſhould not be expreſsly mentioned to be made in contemplation of the marriage; becauſe ſuch proviſion cannot poſſibly be granted in any other view: but ſtipulations in a marriage-contract which are formed merely between the contracters on the one ſide, without ſecuring any benefit to the other, are not, without an expreſs clauſe, accounted to be made *intuitu matrimonii*; and therefore ſtand good, notwithſtanding the diſſolution within the year. This is the caſe of a proviſion of land or money made by the huſband's father, not to the wife, or to the iſſue of the marriage, but without reſtriction to his own ſon; which, becauſe it does not form a contract between the married parties, but barely between one of the parties and his father, without any ſtipulation in favour of the wife, or the iſſue of the marriage, continues in full force, let the marriage be of ever ſo ſhort a duration, *Home*, 132.

39. In conſequence of this rule, the right which the huſband acquires by marriage in the wife's moveable eſtate, though it ariſes *ipſo jure*, determines by the diſſolution within year and day; which is conſidered as a reſolutive condition, on the exiſtence whereof that right evaniſhes *retro*, as if it had never been acquired. And ſince the wife hath in that event no intereſt in the goods falling under the communion, it is neceſſary for preſerving a juſt equality in the ſociety of marriage, that the huſband's intereſt in them ſhould alſo fall and reſolve. He is even obliged to account for the wife's tocher, without deducting the ſums by which it has been diminiſhed for her maintenance during the marriage; though tochers are given for that very

very conſideration, of defraying the expence of a married ſtate: but he is allowed to retain out of it her funeral charges, becauſe theſe are expended after the marriage is diſſolved; and the ſums he had applied towards the payment of the debts contracted by herſelf before the marriage, *Feb.* 23. 1681, *Gordon.* The huſband is accounted a *bona fide* poſſeſſor, with reſpect to what he has conſumed of his wife's moveables, on the faith of his right, while the marriage ſubſiſted; for which therefore he is not accountable, *Dirlet. et Steu. v. Jus mar.* Where things cannot be reſtored on both ſides to their former ſtate, it would be inconſiſtent with equity, and with the ſpirit of the law, to reſtore one party and not the other. Hence, an infeftment granted by the huſband for the wife's jointure was found to ſubſiſt, though the marriage diſſolved within the year, as a ſecurity for the repayment of her tocher, *July* 20. 1664, *Petrie.*

40. Preſents made on occaſion of the marriage to the new-married pair, by the friends on either ſide, are underſtood to be abſolute gifts, not fettered with any tacit condition of return; and therefore, though the marriage ſhould be diſſolved within the year, ſuch preſents are not reſtored to the donors, but are divided equally between the ſurviving ſpouſe and the repreſentatives of the deceaſed, *Jan.* 14. 1679, *Wauch.* But if from the nature of the preſent it ſhall appear, that it could be intended for one of them only, it goes entirely to that party for whoſe uſe it is preſumed to have been given, *Nov.* 14. 1710, *Dewar.* In like manner, the preſents made by the huſband himſelf to the wife at the marriage, whether of ſubjects properly paraphernal, or of common goods, ought not to be reſtored, at whatever time the diſſolution may happen; but muſt either remain with her, in caſe ſhe be the ſurvivor; or, if the marriage ſhall diſſolve by her death, go to her executor. If a living child has been procreated of the marriage, who was heard to cry, the marriage, though it hath been diſſolved within the year, is as effectual to all purpoſes as if it had ſubſiſted beyond it. The crying of the child is, in Lord Stair's opinion, the only legal evidence receivable by the judge of its being born alive, *b.* 1. *t.* 4. § 19.; *b.* 2. *t.* 6. § 19. that the matter may not be left to the uncertain conjectures of thoſe who are preſent at the birth. And though the doctrine of the Roman law ſeems fully as conſonant to equity, and to the analogy of ours in other caſes, (as to which *vid. infr. b.* 3. *t.* 8. § 96.), which admits of other circumſtances, provided they be equally pregnant, in proof of that fact, *l.* 3. *C. De poſth. hered.*; yet in this particular the court of ſeſſion has departed both from the reaſon and the authority of that law, and by a recent deciſion, *July* 1765, *Dobie*, has conſidered a child which by both parties was admitted not to have come to proper maturity, and was not heard to cry, as a fœtus, or untimely fruit of miſcarriage, rather than a child.

41. If the marriage hath been diſſolved by death after year and day, the ſurviving huſband becomes the irrevocable proprietor of the tocher; and the wife, in caſe ſhe ſurvive, is intitled to all the proviſions ſecured to her in that event, whether legal or conventional. Where the intereſts of the married pair have not been fixed by marriage-articles, ſpecial rights ariſe, by the diſpoſition of the law itſelf, to the ſurviving ſpouſe, whether huſband or wife, and to the iſſue of the marriage. The intereſt of the ſurviving huſband in the heritable eſtate of the wife is called *the courteſy;* and that of the ſurviving wife in the huſband's heritage, her *terce.* A particular ſhare of the goods in communion falls to the ſurviving wife, in virtue of her *jus relictæ*, and another to the children, either in the right of *legitim*, or as next of kin; all which ſhall be explained in their proper places. As the widow has, upon the huſband's death, no preſent fund for the ſubſiſtence

ence of herſelf and her family, ſhe has a claim againſt her huſband's repreſentatives for alimony, from the day of his death, to the firſt term of payment of her proviſion, whether legal or conventional; the meaſure of which is to be aſcertained, not by the extent of that proviſion, but by the huſband's quality and fortune, and the number of ſervants left by him in his family when he died, *July* 15. 1713, *Cred. of Scot; Home*, 76. She has alſo a legal claim to mournings for her huſband, ſuitable to his quality, where his eſtate or rank requires mourning in point of decency, *July* 7. 1675, *Wilkie*. And in the caſe of a poſthumous child, ſhe may recover from the huſband's repreſentatives the expence incurred by her on occaſion of the birth or baptiſm of the child, *Nov.* 10. 1671, *Haſtie*. But none of thoſe articles, not even the laſt, can be claimed, if her huſband, let his ſtation be ever ſo high, hath not left a ſufficient fund for the payment of all his onerous creditors. Where the wife ſurvives, the paraphernal goods continue her property, and cannot be attached by the huſband's creditors. If the wife die firſt, they go to her children, or her other next of kin.

42. If a marriage ſhall ſubſiſt for a year, and part only of the day next enſuing the year, all deeds granted in contemplation of the marriage ſubſiſt, *Feb.* 25. 1680, *Waddel*. Which ariſes, not ſo much from the favour of marriage, the only reaſon aſſigned in that deciſion, as from the legal meaning of the expreſſion *year and day:* for where any right is to be completed, or act to be performed, within a year, of which many inſtances are to be met with in our law, a day is generally adjected to the year, 1661, *c.* 62.; 1695, *c.* 24. &c. *in majorem evidentiam*, that it may appear with the greater certainty that the year itſelf is completed; and therefore the running of any part of the day next after the year hath the ſame effect as if the whole day were elapſed. The diſputes which might ſpring from the diſſolution of a marriage within the year, are now, for the moſt part, prevented by a clauſe in the marriage-contract, ſtipulating, that the intereſts of the two ſpouſes ſhall continue in full force, though the marriage ſhould be diſſolved before the year, without a living child.——Hitherto of the diſſolution of marriage by death.

43. A marriage which is null from the beginning, and may be declared ſo by a ſentence of the proper court, (inſtances of which have been mentioned, § 2. 7.), cannot be ſaid to be diſſolved, becauſe it was never truly contracted; and as marriages in themſelves void can have no legal effects, every thing muſt, on a declarator of their nullity, return *hinc inde* to its former condition. Marriage, when it is lawfully conſtituted, may be diſſolved, not only by death, but by divorce; which may be ſued for, either on the head of adultery or wilful deſertion. Divorce is ſuch a ſeparation of married perſons, while they are both alive, as looſes them from the nuptial tie, and leaves them at freedom to intermarry with others. Marriage being by the canoniſts numbered among the ſacraments, is accounted a bond ſo ſacred, that no crime committed, or provocation given, by either of the parties, can diſſolve it. Hence, though in the caſe of adultery, the Canon law admits of a *ſeparatio tori*, a ſeparation as to bed and board, the nuptial tie remains ſtill undiſſolved, the parties continue married, *Lancel. Inſt. jur. Can. l.* 2. *t.* 16. § 9. and their intermarrying with third parties infers bigamy. And even by the uſage of Scotland, neither adultery, nor wilful deſertion, are grounds which neceſſarily diſſolve marriage; they are merely occaſions or handles, which may be laid hold of towards obtaining a divorce: but if the injured party chuſe to live on in a married ſtate, the marriage continues in full force. The poſition laid down in general terms by Mackenzie, *h. t.* § *ult.* that after divorce the party guilty

cannot marry, is inconſiſtent with the notion of divorce, which extinguiſhes all the ties and obligations conſequent on marriage. The adulterer, therefore, being as effectually looſed by the divorce as the party injured, may lawfully enter into a ſecond marriage. This liberty is indeed abridged by poſitive ſtatute, 1600, *c.* 20. which, in the caſe of divorce on the head of adultery, diſables the party divorced from marrying him or her with whom the adultery is ſaid, by the ſentence of divorce, to have been committed; a doctrine borrowed from the Roman law, *l.* 13. *De his quæ ut ind.:* but the guilty perſon is at full liberty to intermarry with any other. The Canon law does not carry the reſtraint ſo far: it permits the adulterer, after the marriage is diſſolved by the wife's death, to intermarry with the very woman with whom he was guilty, except in the ſpecial caſe where the adulterers had contrived and been acceſſory to the death of the wife, *Decretal. l.* 4. *t.* 7. *c.* 6.

44. Divorce may alſo proceed on wilful deſertion, *i. e.* where either of the ſpouſes, deliberately and without juſt cauſe, deſerts or diverts from the other, and thereby defeats the chief purpoſes for which marriage was inſtituted. This ground of divorce is not only approved by St Paul, 1 *Cor.* vii. 15. but eſtabliſhed by ſtatute, 1573, *c.* 55. which enacts, That where any of the ſpouſes ſhall divert from the other without ſufficient grounds, and ſhall remain in his or her malicious obſtinacy for four years, the party injured may ſue the offender for adherence before the judge-ordinary; and if the defender diſregard the ſentence, the purſuer may apply to the court of ſeſſion for letters of horning to enforce it. After this, the church is directed to admoniſh the defender to adhere; and if he ſhall ſtill continue obſtinate, the church-court is to proceed to excommunication; which previous ſteps are by the ſtatute declared to be a ſufficient foundation for a divorce. Though the offending party muſt by the words of this act have deſerted four years before he can be cited in the preparatory proceſs for adherence, the commiſſaries, *de praxi*, admit that action, and even pronounce ſentence in it, upon one year's deſertion; judging it to be a ſufficient compliance with the injunction of the act, if four years intervene between the firſt deſertion and the decree of divorce. Though the act makes no diſtinction as to the judge competent, between the previous proceſs of adherence and ſubſequent action of divorce; yet by the inſtructions given to the commiſſaries, 1666, § 2. and the practice immediately following, the juriſdiction of the inferior commiſſaries is limited to the previous proceſs of adherence; the divorce itſelf muſt be proſecuted before the commiſſaries of Edinburgh. It would ſeem, that the only perſons who can be ſued on the proceſs for adherence, are ſuch as continue within the kingdom; for theſe alone are capable of receiving admonition from the church, and of incurring, through their wilful obſtinacy, the cenſure of excommunication. Action might perhaps be ſuſtained at the ſuit of the innocent party againſt the deſerter, though not reſiding in this kingdom, upon evidence adduced that the deſertion was wilful, and that the defender left the kingdom, and ſtill remains abroad, from a deliberate purpoſe of abandoning the conjugal ſociety, leſt ſuch wrong ſhould be left without a remedy. But, on the other hand, it may be ſafely maintained, that without ſuch evidence no action for adherence would receive ſupport, either from equity or the analogy of law, againſt perſons continuing abroad, even beyond the four years, ſince divorce is not founded either in the divine law or our own upon the head of deſertion, if it does not appear to be wilful. If a woman ſhall contract with a ſecond huſband, upon falſe intelligence that her firſt had died abroad, that firſt hath it in his power, upon his return, either to take his wife home to his family, or to ſue for a divorce againſt her on the head of adultery;

adultery; for bigamy ought, as to this queſtion, to be accounted adultery: but the woman, if ſhe had probable grounds to believe her huſband dead, is not ſubjected to any criminal trial, upon an accuſation, either of bigamy or of adultery.

45. It is a reaſonable practice, that in all actions of divorce, whether on adultery or wilful deſertion, the purſuer muſt ſwear, that the action is not carried on by colluſion; otherwiſe parties, contrary to the firſt law of marriage, might at pleaſure diſengage themſelves from that ſacred tie by their own conſent. Upon this ground, cohabitation by the injured party, after being in the knowledge of acts of adultery committed by the other ſpouſe, if it has not been conſtrained by force or menaces, imports a paſſing from or forgiveneſs of the prior injury, and is therefore ſufficient to elide any action of divorce that may afterwards be purſued upon thoſe injurious acts, *July* 15. 1681, *Watſon*. A proof of colluſion, where it has not been brought till after the decree of divorce, can hardly have the effect to ſet aſide the prior decree as to the divorce itſelf; but it ought to ſave the intereſt of creditors from being affected by ſuch colluſive devices, *i. e.* the wife will not be put in preſent poſſeſſion of her terce or jointure, in conſequence of the decree, ſo as to exclude the huſband's creditors from the fund of their payment; or if ſhe hath already obtained poſſeſſion, ſhe may be obliged to give it up.

46. The legal effects of divorce upon deſertion, are defined by the aforeſaid act, 1573, *c.* 55. in theſe words, "The party offending ſhall loſe the tocher, "and the *donationes propter nuptias*." The Roman law, from which this act is borrowed, *Nov.* 117. *c.* 8. § 2. deſcribes *donationes propter nuptias* to be that ſum or ſubject which is given by the huſband, either in remuneration or in ſecurity of the tocher; which, when applied to our law, muſt ſignify the proviſions granted by him to the wife, in conſideration of the tocher given by her or her friends to the huſband. The meaning of the act, therefore, is, that the offending wife not only loſes her tocher, which is in that caſe to be retained by her huſband, but forfeits her *donationes propter nuptias*, all the proviſions which would otherwiſe have accrued to her in the event of her ſurvivance; and *vice verſa*, the huſband, if he be the party offending, not only loſes the tocher, or, in other words, muſt not only reſtore to the wife the ſum he received in the name of tocher, but he is alſo bound to make good to her all the proviſions in her favour, as well legal as conventional; ſo that ſhe hath immediate acceſs to them upon the decree of divorce, tho' neither the legal proviſion of terce, nor the conventional ones ſecured by marriage-articles, are, in the common caſe, due to a wife, till the actual death of her huſband; ſee *March* 21. 1637. *La. Manderſton*.

47. Some writers interpret this ſtatute, as if the loſs of the tocher related only to the offending wife, who, by her deſertion, forfeits it to the huſband; and that conſequently the huſband, where he is the guilty party, is not obliged to reſtore it to his injured wife, *Wallace*, *Inſt. b.* 4. *t.* 15. § 287. But the ſtatute thus explained would be moſt unequal: for it appears irreconcileable to juſtice, that the offending wife ſhould be puniſhed with the loſs of her tocher, which is generally her all, without receiving the leaſt conſideration in its place, while the offending huſband, though he ſuffers the immediate loſs of the proviſion ſecured by him to the wife, is allowed to retain to himſelf the tocher, which is the valuable conſideration he received at the marriage in place of that proviſion.

48. By the opinion both of Lord Stair, *b.* 1. *t.* 4. § 20. and Bankton, *b.* 1. *t.* 5. § 134. which is ſtrongly founded on analogy, the ſame penalty lies againſt the offending party in a divorce for adultery, that the act 1573 has impoſed on thoſe that are divorced on the head of wilful deſertion, agreeably

greeably to the Roman law, *d. Nov.* 117.; and the court of ſeſſion, in the late caſe of Mr Juſtice, *Aug.* 5. 1761, pronounced judgement conformably to that opinion by their firſt interlocutor; but on a reclaiming bill, it was decided, that the offending huſband, in a divorce for adultery, was not bound to reſtore the tocher, in regard that it had been ſo fixed by an uniform tract of old deciſions, partly obſerved by Sir J. Balfour, and partly recovered from the records.

II. *Of the Relation between Parents and Children.*

49. AFTER having explained the rights and duties of huſbands and wives conſequent on marriage, the relation of parents and children falls naturally to be handled. The moſt uſual diviſion of children is into lawful and unlawful. Lawful children are thoſe who are either procreated in marriage, or who are afterwards legitimated or made lawful. All children born in wedlock, *i. e.* born of a mother who at the time of the conception was lawfully married, are preſumed to have been begotten by him to whom the mother was married, according to the rule, *Pater eſt quem nuptiæ demonſtrant*; and conſequently to be lawfully begotten children. This legal preſumption may doubtleſs be over-ruled by a contrary proof; but the favour of marriage is ſo ſtrong, and the ſecuring of the point of legitimacy ſo important to ſociety, that it cannot be defeated, but by direct evidence that the mother's huſband could not be the father of the child. Though therefore it ſhould be proved, that the wife was engaged in a criminal correſpondence with a ſtranger for ſome tract of time together, and that her huſband and ſhe lived in ſeparate houſes during that whole period, the preſumption for the legitimacy of the children ſtands good, becauſe thoſe facts do not infer an abſolute impoſſibility that the mother's huſband could be their father. The canoniſts however maintain, that the concurring teſtimonies of the huſband and wife, denying upon oath the child to have been procreated by the huſband, ſufficiently elide the legal preſumption, *Decretal. l.* 4. *t.* 17. *c.* 3.; which doctrine is adopted by Craig, *lib.* 2. *dieg.* 18. § 20. and by Stair, *b.* 3. *t.* 3. § 42. But it is an agreed point by all writers, that if either of the two have, before making ſuch oath, acknowledged the child as lawful, there is a right acquired to him by that acknowledgement, which is not to be redargued by any poſterior teſtimony to the contrary, *Decretal. l.* 2. *t.* 19. *c.* 10.; *Cr. ibid.*

50. The two principal grounds upon which this preſumption may be defeated, are the huſband's abſence from the wife, and his frigidity or impotency, becauſe either of theſe exclude all poſſibility of the child being procreated by the huſband. Impotency is of moſt difficult proof; and few or no inſtances have occurred in this kingdom of queſtions either of divorce or of baſtardy upon that medium. As to baſtardy on the head of abſence, the great difficulty is, to fix the preciſe period of time backward from the birth of the child, at which, if the huſband be abſent from the wife, the child is to be deemed unlawful. The ſolution of this doubt depends on two queſtions, more proper for the diſcuſſion of phyſicians than of lawyers, viz. What time is neceſſary for the production of a living child? and, How long a woman may continue pregnant before her delivery? As to the *firſt*, Hippocrates, in his treatiſe *De ſeptimeſtri partu*, and the Roman law upon his authority, have pronounced ſix months as the *minimum*, *l.* 12. *De ſtat. hom.*; that is, ſix ſolar months, as it is explained *l.* 3. § 12. *De ſu. et leg. her.* But our ſupreme court have, from the favour of legitimacy, adjudged, that to fix baſtardy on a child, the huſband's abſence muſt continue till within ſix lunar months of the birth. As to the *ſecond*, a child born after

after the tenth month is accounted a baſtard, *d. l.* 3. § 11. The proof of abſence muſt be ſpecial and pregnant. It is not indeed required by our uſage, as it is ſaid to be by that of our neighbours of England, that one of the ſpouſes muſt have been out of Britain; but the diſtance between them ought to be ſo great, as to carry full evidence with it, that they could not have cohabited during the whole time libelled, *St. b.* 3. *t.* 3. § 42.

51. All children born of a woman who was not married at the time of her conception, are unlawful, otherwiſe called *natural children*, or *baſtards*; and conſequently are intitled to none of the civil rights conferred by law on thoſe who are procreated in marriage; of which rights *vid. infr. b.* 3. *t.* 10. As all marriages reprobated by law, whether on account of bigamy, or propinquity of blood, are utterly null, the iſſue of them muſt be illegitimate, in the ſame manner as if they had been born out of wedlock, § 12. *Inſt. de nupt.*; but if either of the parties were, at the time of the marriage, ignorant of the near relation they ſtood in to one another, or of the prior marriage, the *bona fides* of that party, though it could not make the marriage lawful, had by the Canon law the effect of legitimating the iſſue, provided the marriage labouring under the nullity had been ſolemnized in the face of the church, *Decretal. l.* 4. *t.* 17. *c.* 14. Craig is of opinion, *lib.* 2. *dieg.* 18. § 18. that ſuch of the children as are procreated after both parties have come to the knowledge of the fact which made the marriage unlawful, are to be reputed baſtards; but that the ignorance of any one of them ought to ſupport the legitimacy of the children begotten prior to the decree by which it is declared void, becauſe till then none of the ſpouſes ought to decline the conjugal duties, *lib.* 2. *dieg.* 18. § 19. When it is ſaid, that thoſe children are baſtards who are born of a mother whoſe marriage with the father was unlawful, Lord Stair, *b.* 3. *t.* 3. § 42. underſtands that expreſſion in a limited acceptation, of marriage forbidden by the divine law, *ex. gr.* marriage within the forbidden degrees, or that which is contracted while either of the parties ſtands already married; and from thence concludes, that marriage between the adulterer and adultereſs, after the diſſolution of the former marriage by divorce, does not fix baſtardy on the iſſue, notwithſtanding the ſtatutory prohibition, and penalty annexed to ſuch marriage, by 1600, *c.* 20. As to the conſequences of this doctrine with reſpect to the legal rights of ſucceſſion competent to ſuch iſſue, *vid. infr. b.* 3. *t.* 10. § 6.

52. Legitimated children are thoſe who were born baſtards, but have afterwards been made lawful. By the Roman law, children were thus legitimated, either by letters of legitimation from the Sovereign, at the deſire of their natural father, who had no iſſue lawful, *Nov.* 89. *c.* 9. of which afterwards, *b.* 3. *t.* 10. or by the ſubſequent intermarriage of the mother of the child with him by whom it was procreated. This laſt kind, though it was not received by our moſt ancient cuſtoms, *Reg. Maj. l.* 2. *c.* 51. § 2. 3.; *Cr. lib.* 2. *dieg.* 18. § 8. has been adopted into our law for ſome centuries paſt, and intitles the children ſo legitimated to all the rights of lawful children: and conſequently, if they be ſons, they exclude, by their right of primogeniture, the ſons procreated after the marriage, from the ſucceſſion of the father's heritage, though theſe ſons were lawful children from the birth. The ſubſequent marriage, by which this ſort of legitimation is effected, is by a fiction of the law conſidered to have been contracted when the child legitimated was begotten; and conſequently no children can be thus legitimated, but thoſe who are procreated of a mother whom the father at the time of the procreation might have lawfully married: if, therefore, either the father or the mother of the child were at that period married to another, ſuch child is incapable of legitimation. It is a hard doctrine which is main-

tained by Voet, *Comment. tit. De concub.* § 11. that legitimation by a ſubſequent marriage has full effect, even to the prejudice of the children of a marriage intervening betwixt the procreation of the baſtard, and the ſubſequent marriage by which that baſtard was legitimated. Put the caſe, that a perſon, after the death of his wife, who left behind her a lawful ſon of the marriage, intermarries with a woman by whom he had a baſtard ſon prior to his firſt marriage: the baſtard, being thus legitimated, excludes, according to this opinion, by his right of primogeniture, not only his brothers by the full blood, procreated after the marriage of their parents, but the ſon of the father's firſt wife; who, though he was indubitably at his birth his father's only lawful ſon, is nevertheleſs by this laſt marriage, without the leaſt fault imputable to him, deprived of the right ariſing from his primogeniture, by an act of his father to which he never conſented. But the contrary opinion is more agreeable to the analogy at leaſt of the Roman law, *d. Nov.* 89. *c.* 9.; and it would ſeem, that that kind of legitimation is ſufficiently favoured, when it puts the baſtard in the ſame condition, in a queſtion with his brothers by the full blood, as if the father had been actually married to their common mother at the time of his procreation, though it ſhould not have effects with regard to third parties, which tend ſo much to weaken, and muſt ſometimes render quite eluſory the ſtipulations by which brides ſecure their own and their childrens rights in marriage-contracts.

53. Parents lie under the ſtrongeſt obligations, from nature itſelf, to take care of their iſſue during their imperfect age, *infr.* § 56.; in conſequence of which, they are veſted with all the powers over them which are neceſſary for the proper diſcharge of their duty. This parental power or authority is chiefly diſcovered in the father, whom nature has conſtituted the head of the family, and who in that character has the ſole and abſolute right of directing whatever concerns the perſons of his children under age, of exerciſing that degree of diſcipline and moderate chaſtiſement upon them which their perverſeneſs of temper or inattention calls for, and of ordering every thing relating to their education, or the improvement of their minds. He is intitled to all the profits accruing from their labour and induſtry, while they continue in his family, or are maintained by him at bed and board, *St. b.* 1. *t.* 5. § 6. 8. But even then the children are capable of receiving donations, either from the father himſelf, or from others, which thereby become their own property. Children who get a ſeparate ſtock from the father during their minority, for carrying on any trade or manufacture, or ſetting up a ſeparate employment by themſelves, even though they ſhould continue in his family, may be ſaid to be emancipated or forisfamiliated, in ſo far as relates to that ſtock; for the whole profits ariſing from it are their own: but if the profits ariſing from ſuch employment ſhall be ſufficient for their ſubſiſtence, the father is not obliged to maintain them in his family at his own expence, but may article with them for the payment of board. Forisfamiliation, when underſtood in this ſenſe, is alſo inferred by the child's marriage, or by his living in a ſeparate houſe, with his father's conſent or permiſſion, *St. b.* 1. *t.* 5. § 13.

54. A father is, in conſequence of thoſe powers, the natural guardian, or, as we expreſs it, adminiſtrator-in-law for managing the eſtate belonging to his children during their minority; not only their tutor while they are pupils, but their curator after they become *puberes*, till their perfect age. That the father was tutor-in-law to his iſſue, was never doubted; for he muſt neceſſarily have that authority himſelf over his pupil children, which he can devolve on others after his death: but becauſe fathers could not, by our former law, name curators for their children paſt pupillarity, (nor

(nor indeed can at this day, except in *liege pouſtie*, 1696, *c.* 8.), ſome have held, that a father was not curator to his child: but the contrary was adjudged, *Dirlet.* 55. This right of legal adminiſtration is not limited to the ſubjects gifted to the children by the father, but extends to every eſtate which they may get from others, either by donation or ſucceſſion; for the relation of a father lays him under a natural tie to look after whatever belongs to his iſſue, till they are capable of managing it themſelves. Hence, though minors who have attained the age of puberty, may, with the father's conſent, name curators for the management of an eſtate properly their own; yet the nomination, if the father ſhall oppoſe it, cannot proceed, *July* 14. 1681, *Bartholomew*. Minor children may however have other curators than the father, without his conſent, in the following caſes. *Firſt*, Where the child has a claim againſt the father, the judge will of courſe authoriſe a curator *ad lites* to maintain the ſuit againſt him. *2dly*, Where a child has an eſtate left to him by a ſtranger, excluſive of the father's adminiſtration, and no curator for the management of it is named in the grant, the judge muſt, from the neceſſity of the caſe, name, not the father, but another curator to look after it; becauſe every proprietor may bequeath or deviſe his own property under ſuch reſtrictions as he ſhall judge proper. *3dly*, The father's right of legal adminiſtration to his daughter is, upon her marriage, transferred from him to the huſband, who is by our law intitled to the legal curatory of the wife.

55. The father's adminiſtration is reſtricted, with us, to ſuch of his children as continue in family with himſelf; and a child is, as to this queſtion, held to continue in his father's family, though he ſhould reſide elſewhere, if he earns not his livelihood by his own induſtry and labour, independent of any aid from the father; ſee *Dirlet.* 31.; *Dec.* 7. 1666, *Mackenzie*. It is the father alone who is adminiſtrator-in-law to his children; the father's father has no title to the office, upon the predeceaſe of the immediate father, *Harc.* 713. This right requires no cognition or ſervice to complete it, but ariſes *ipſo jure* from the relation in which the father ſtands to his child. And becauſe fathers are, from the affection ſtamped by nature itſelf upon that relation, preſumed to act to the beſt of their power for their childrens intereſt, the obligations ariſing from their right of adminiſtration are not near ſo ſtrong, as thoſe which we ſhall ſoon learn are impoſed, in the common caſe, on proper tutors and curators. They are under no neceſſity to take the oath *de fideli adminiſtratione*, nor to give ſecurity that they ſhall account for their management; unleſs where, from the lowneſs of their circumſtances, the child's property may be in danger, *Feb.* 12. 1633, *Govan*. They are not obliged to make inventory of the child's eſtate; nor are they liable for omiſſions. This office of legal adminiſtration being a right properly civil, can be exerciſed on ſuch children alone as are procreated in lawful marriage. A father therefore cannot be adminiſtrator-in-law to his baſtard ſon, becauſe a baſtard hath, in the judgement of law, no father. The deciſion brought by ſome writers in ſupport of the contrary opinion, *March* 17. 1624, *L. Touch*, proves no more, than that every perſon, whether father or ſtranger, who makes a donation to a minor, is preſumed to reſerve the adminiſtration to himſelf during the minor's leſſer age. The power inherent in a father, of naming to his iſſue tutors and curators, whoſe office does not commence till after his own death, falls to be explained under the next title. Lord Stair ſeems to affirm, that the father may, even after the childrens majority, compel them to live in his family, and contribute their labour towards his ſervice, *b.* 1. *t.* 5. § 13.; but it is the more general opinion, and better founded in nature, that the compelling power of a father over his iſſue, laſts only till

till they arrive at perfect age; and that they are from that period their own maſters in every reſpect, and continue no otherwiſe obliged to him, but by the bonds of duty, affection, and gratitude, which no length of time, nor ſtation of life, ought to diſſolve, or even ſlacken. Yet where a child is fatuous or furious, the ſame grounds of natural law which intitle the father to be his child's legal adminiſtrator while he is minor, intitle him alſo to the office of curatory after his majority, during the continuance of his diſtemper, *infr. t.* 7. § 49.

56. As to the duties of a father towards his children, from which duties all his powers over them are truly derived, he is obliged to preſerve and protect them during their nonage; to provide them in bed, board, and cloathing, and all the neceſſaries of life; and to give them an education ſuitable to their rank, in their younger years. Nor is this obligation merely natural; for if they refuſe to diſcharge it, they may be compelled to performance by the civil magiſtrate, according to their ſtation of life, and the meaſure of their fortune, *l.* 5. § 10. 12. *De agn. lib.* It is not limited to the father alone; though he, as the head of the family, and as the ſole manager of the goods in communion, is bound moſt directly, and in the firſt place: but in default of the father, who is the aſcendent in the firſt degree, either through death or incapacity, the burden of maintaining the children falls upon his father, or the childrens paternal grandfather, and ſo upwards upon the other aſcendents by the father; and failing theſe, upon the mother, and the aſcendents by her, *Feb.* 23. 1666, *Children of E. Buchan.* And though a grandfather is not, in the common caſe, obliged to maintain any of the iſſue of his daughter; becauſe daughters are by marriage transferred from their father's family to that of the huſband, *l.* 8. *eod. t.*; yet the law makes him liable *ſubſidiariè*, in every caſe where thoſe who are more directly obliged become indigent, *ibid.* Parents are not, however, bound to give their children a ſeparate alimony, that is, to maintain them in a houſe by themſelves: it is enough that the father, or other parent, offer to entertain them in his own family; unleſs he ſhall, by his harſh treatment of them, forfeit his right to that alternative, *July* 30. 1734, *Hepburn*; ſee *K.* 27.; in which caſe, the judge will ordain the child to be taken from the father's cuſtody, and decree a reaſonable ſum for his maintenance. As ſoon as the children can ſubſiſt by their own labour or induſtry, the obligation ceaſeth, *d. l.* 5. § 7.; for he who can earn his own bread, has no right or claim of maintenance from another: and upon this ground a father may exact board from a child who enjoys a ſeparate eſtate of his own. But the obligation which lies on parents to maintain their indigent children is perpetual; inſomuch that though the parent himſelf ſhould be reduced to neceſſitous circumſtances, yet, as long as he keeps houſe, he is obliged to give the ſame entertainment that he takes to himſelf, to ſuch of his children as have not ſufficient funds for their own ſubſiſtence, *Jan.* 13. 1666, *Dick.* Parents are thus bound to maintain their iſſue, though the relation ſhould be merely natural; not only the mother, who is always certain, *d. l.* 5. § 4. but likewiſe the father, if he hath either acknowledged the child for his, or may be preſumed from other circumſtances to have begotten him. It does not ſeem fixed in general how long parents are bound to maintain their natural children: in the caſe of a gentleman, the obligation was found to continue till the child was fourteen years of age, *New Coll.* ii. 97.

57. In conſequence of this obligation, an action lies againſt the father for the price of goods given upon credit to his child, if they were ſuitable to his fortune, though he ſhould not be living in family with his father, *New Coll.* ii. 119. unleſs he bring proof that he gave the child a ſeparate allowance

lowance to provide for himſelf, or that the child was provided *aliunde*. Nor is it neceſſary, in ſuch caſe, for the ſhopkeeper or tradeſman to conſult the father beforehand, or to demand from him a warrant to furniſh the child upon credit for what he calls for, *Jan.* 20. 1672, *Wallace; Fount. Jan.* 14. 1698, *Hopkirk*. This obligation for maintenance is reciprocal between parents and children; and hath as ſtrong effects againſt the laſt as the firſt; for the tie of piety and gratitude, by which nature hath bound children, when they have a fund ſufficient for it, to maintain their indigent parents, is ſupported by the civil ſanction, *d. l.* 5. § 1. 2. 15.; *l. ult.* § 5. *C. De bon. quæ liber.*; *July* 20. 1710, *Brown*.

58. A father is not barely bound to maintain his children during his own life; he ought ſo to provide for all of them, that they may be able to live comfortably after his death: it is therefore his duty, either to make over by a deed *inter vivos*, or to bequeath to each of them by teſtament, ſuch a patrimony or proviſion, in land, money, or other ſubjects, as is ſuitable to his circumſtances. This duty is however one of thoſe which is left entirely upon the conſcience, without being enforced by any civil ſanction; and therefore, if the father neglect to grant proviſions to his younger children, that obligation is not, upon his death, transferred againſt his heir. But the obligation to maintain the younger children is, by the uſage of Scotland, juſtly continued after the father's death, if he was proprietor of a land-eſtate, and is transferred againſt the eldeſt ſon or heir; who, as repreſenting the father, muſt maintain theſe his younger brothers and ſiſters: for the right of primogeniture, which intitles the eldeſt ſon to the father's whole heritage, excluſive of the other children, would be moſt iniquitous, if it were not charged with the alimony of the younger brothers and ſiſters, where the father has left them unprovided.——Here an obſervation may be made by the way, (though it does not directly concern the relation between parents and children), that in queſtions about the continuance of the burden, as thus transferred after the father's death againſt his heir, a reaſonable diſtinction is made in our practice between the alimony due to brothers and to ſiſters. The heir is bound to maintain his younger brothers, only until their majority, becauſe they are preſumed capable, after their perfect age, of earning a livelihood to themſelves by buſineſs or employment. But ſiſters muſt be maintained till their marriage; becauſe the daughters of gentlemen can do as little for themſelves after as before majority, till they get a huſband to provide for them, *Home*, 114. In perſons of lower rank, the obligation to maintain the ſiſters laſts no longer than till they are fit to be put to an employment, or to enter into ſervice. By the law of nature, conſidered abſtractly, the eldeſt brother is not obliged to maintain a younger while the mother is alive, who is more directly debtor in that obligation: yet in the caſe of an eldeſt ſon ſucceeding to the whole heritage of his father, the right of primogeniture is juſtly charged with the maintenance of all the younger children of him to whom that eldeſt ſucceeds as ſole heir; and the mother's jointure is conſidered as no more than a ſuitable proviſion for herſelf, *Home*, 114. This obligation upon an eldeſt ſon to maintain his brothers and ſiſters, hath place only where he takes an eſtate as heir to his father: if he does not ſucceed to or otherwiſe repreſent him, he is not ſubject to any ſuch claim of alimony.

59. It were to deviate from the proper ſubject of this treatiſe, to enter into a particular detail of thoſe natural obligations between parents and children which ſeldom receive ſupport in any country by poſitive law; *ex. gr.* the honour and obedience due by children to their parents. But we

ſhall afterwards learn, that ſome groſſer breaches, even of that duty, may, by our law, be brought under the cogniſance of the civil magiſtrate.

TIT. VII.

Of Minors, their Tutors and Curators; and of the Relation between Maſter and Servant.

I. *Of Minors, their Tutors and Curators.*

PERSONS who, from the want either of years, or of the exerciſe of reaſon, cannot conduct themſelves, or manage their eſtates with diſcretion, and who have loſt their father, who was their natural guardian, *ſupr. t.* 6. § 54. are made the ſpecial object of the protection of the law in every country, and are furniſhed with proper guardians, till their perfect age, or their return to a ſound judgement.——And firſt, of thoſe who ſtand in need of guardians on account of their leſſer age. The Roman law takes notice of ſeveral ages, as infancy, the age next to infancy, the age next to puberty, puberty itſelf, and majority: and though the law of Scotland makes ſome difference in each of theſe, the ſtages of life principally diſtinguiſhed with us are only three, pupillarity or pupilage, puberty or minority, and majority. A child is in pupilage from the birth till the age of fourteen, if a male, and till twelve, if a female. Minority begins where pupillarity ends, and continues till majority; which is, by our law, the age of twenty-one years, both in males and females. But minority, when made uſe of in a larger ſenſe, includes all under age, whether pupils or *puberes*. The guardians who are intruſted with the care of minors, get the name either of *tutors* or *curators*. Tutory, from *tueri*, is a power and faculty to govern the perſon, and to manage the eſtate, of a pupil; that is, of one who hath not yet attained the age of puberty. Curatory, from *cura*, is the power of managing the eſtate, either of a minor *pubes*, or of a major who is incapable of acting for himſelf through a defect of judgement.

2. In the doctrine of tutors, the law of Scotland nearly reſembles the Roman; moſt of the variations between the two ariſing from the different general contexture of the two ſyſtems. With us tutors are either teſtamentary, otherwiſe called *nominate*, or of law, or dative; which diviſion is analogous to the *tutores teſtamentarii*, *legitimi*, and *dativi*, of the Romans. A tutor-teſtamentary is he whom the father names tutor to his child, either by teſtament, or other writing which ſufficiently indicates his will. The right of nomination was, by the Roman law, founded ſolely on the *patria poteſtas*; and by ours alſo it is an effect of the natural guardianſhip inherent in the father, of his child's perſon and eſtate; for the effects of that right are not wholly extinguiſhed by the father's death. It includes a power of naming perſons who may look after what concerns his child during his pupilage, after death ſhall have put an end to the father's own adminiſtration. The right of naming teſtamentary tutors is neither competent by the Roman law, nor by ours, to any but fathers: a grandfather therefore, as he is not adminiſtrator-in-law to his grandchild, ſo neither can he name tutors for him, even though the immediate father be dead, *ſupr. t.* 6. § 55. As every proprietor can diſpoſe of his property, under ſuch limitations as he ſhall judge proper, a mother, or any ſtranger who deviſes an eſtate to a pupil, may name one to manage it during the child's pupilage: but though ſuch nominee gets the name of a tutor, *l.* 4. *De teſt. tut.* the appellation

appellation is improper; for he has no power over the pupil's perſon, and even his right of adminiſtering the eſtate is limited to the ſpecial ſubject deviſed by the deceaſed. Such pupil may therefore, notwithſtanding that nomination, be put under the power of a proper tutor, who hath a right to defend his perſon, and manage his other property. The nomination of tutors by a father being entirely pendent on his will, may, like a teſtament, be altered at his pleaſure, in the very laſt moments of life, *l.* 8. § 3. *De teſt. tut.* Nay, it retains its ambulatory nature, though it ſhould be ingroſſed in a deed *inter vivos* which is in itſelf irrevocable, *ex. gr.* in an abſolute diſpoſition. A father is not limited in his nomination to any number of tutors; he may appoint one, or two, or more, as he judges beſt.

3. Teſtamentary tutors are juſtly preferred before all others; becauſe the father's expreſs will, declared by his nomination, ought to prevail over his preſumed will, upon which the office of tutor of law is entirely grounded. Hence the rule of the Roman law, That as long as a tutor-teſtamentary can be hoped for, there is no room for any other ſort of tutor. Though therefore teſtamentary tutors ſhould not have for many years moved the leaſt ſtep, importing the acceptance of the office; yet ſo ſoon as they accept, they exclude the tutor of law, though he ſhould have actually ſerved himſelf tutor, and entered upon the management, *Dec.* 17. 1631, *Auchterlony*. Upon this ground alſo, the father's nomination is ſo favourably interpreted, that though one or more of the tutors-teſtamentary ſhould lie under a legal incapacity, yet if there are others in the nomination who can lawfully exerciſe the office, the perſons incapable are held *pro non adjectis*, as if they had not been named, and law ſupports the nomination as to the reſt, *July* 3. 1711, *Baird*. Hence, laſtly, a teſtamentary tutor is authoriſed, by the nomination itſelf, to enter into the immediate exerciſe of his office, without any form of law, and is exempted from making oath *de fideli adminiſtratione*. And from the ſame favour of law, he neither was by the Roman law, nor is by ours, under a neceſſity of giving ſecurity *rem pupilli ſalvam fore*, that he ſhall juſtly account for his management; becauſe the confidence which the father places in him by the nomination, creates a preſumption, that he was well aſſured of his probity and diligence, *l.* 7. § 5. *C. De curat. fur.* Yet the court of ſeſſion ſometimes ordain, *ex officio*, teſtamentary tutors to give ſecurity, where there is ground to ſuſpect either their honeſty or their circumſtances, *Fount. Feb.* 23. 1693, *Count. of Callander*.

4. If the father hath made no nomination of tutors, or if the tutors named by him have not accepted, or if their nomination has fallen by their death, or by a ſupervening diſability, there is place for a tutor of law, or tutor-legitim; ſo called, becauſe his right proceeds from the mere diſpoſition of law. As tutors of law may, after they have ſerved tutors, in the manner ſoon to be explained, and entered upon their office, be obliged to quit it, upon the teſtamentary tutors offering to accept, *ſupr.* § 3. they frequently make the teſtamentary tutors parties to the ſervice, that they may then declare their option either to accept or to renounce; and if they renounce, they cannot be afterwards admitted to the office, *July* 6. 1627, *Campbell*. By the ancient Roman law, the office of tutory-legitim devolved on the next agnate, to the excluſion of cognates; becauſe the next agnate was intitled to the legal ſucceſſion, and it was to be preſumed that he who had the proſpect of ſucceeding to the pupil's eſtate, would be the moſt careful to preſerve it, *l.* 1. *pr. De leg. tut.* Agnates, in the ſenſe of the Roman law, were perſons related to each other through males only; the relation of cognates was connected by the interpoſition of one or more females. Thus a brother's ſon is his uncle's agnate in the language of the Romans, becauſe

becauſe the propinquity is connected wholly by males; a ſiſter's ſon is his cognate, becauſe a female is interpoſed in that relation, § 1. *Inſt. De leg. agn. tut.* But in our law-language, all kinſmen by the father are agnates, though females ſhould intervene; and thoſe by the mother, cognates. Juſtinian aboliſhed ſo entirely the diſtinction of the old Roman law between agnates and cognates, that he admitted, both to the legal ſucceſſion, and to the office of tutor of law, not only kinſmen by the father, though a female had been interpoſed in that relation, but even thoſe by the mother, *Nov.* 118. *c.* 4. 5. We in Scotland have ſteered a middle courſe: for we exclude from thoſe rights all who, in our law-ſtyle, are called *cognates*, that is, all relations by the mother; but we admit all kinſmen by the father, though they ſhould not be agnates in the ſenſe of the Roman law. The tutor of law muſt be a male agnate: for though a father or a magiſtrate may appoint female tutors; yet, in the caſe of tutors-legitim, who are marked out purely for the ſake of blood, without regard to perſonal qualifications, the law has thought fit to paſs by thoſe whom nature ſeems to have formed for offices of a more domeſtic kind. Hence a woman, though ſhe be next in ſucceſſion to the pupil in default of his own iſſue, cannot be ſerved tutor of law to him.

5. Where there were two or more agnates equally near in blood to the pupil, and of courſe equally intitled to the legal ſucceſſion, the Roman law gave the office to all of them, *l.* 9. *De leg. tut.*; but as the ſucceſſion of heritage in males deſcends only to one by the law of Scotland, though there ſhould be others equally near in degree, the office of tutor-legitim goes to that one who would be heir at law to the pupil. By this rule, if we ſhall ſuppoſe, that, of three brothers, the ſecond dies, leaving a child without naming a tutor to him, the youngeſt of the ſurviving brothers muſt be ſole tutor of law to his nephew, becauſe he alone is his heir at law. This is doubted, both by *Mack. Obſerv. on* 1585, *c.* 18. and by *Dirl.* v. *Tutor*, in the ſpecial caſe where the eſtate of the deceaſed, to whom the pupil had ſucceeded, was conqueſt, *i. e.* acquired by himſelf, upon this ground, That the legal ſucceſſion of conqueſt aſcends to the elder brother. But this ground of doubt is improperly applied to the preſent queſtion; for though the eſtate was conqueſt in the perſon of the deceaſed, it becomes proper heritage upon the ſucceſſion opening to the pupil, and ſo deſcends after his death to his younger uncle, *infr. b.* 3. *t.* 8. § 14. ſince it is the ſucceſſion to the pupil, not to the deceaſed, that is to be regarded in this caſe. The queſtion appears more doubtful, Whether, where the whole eſtate of the pupil conſiſts in moveable ſubjects, the tutory of law ought to devolve on all the male agnates of the ſame degree, as being equally intitled to the ſucceſſion of moveables, or upon him alone who could ſerve heir-general to the pupil on his death? But it would ſeem, that even in that caſe the heir-general ought to exclude the others in the ſame degree: *firſt*, Becauſe none of thoſe other have a right to ſerve heir at law, and our cuſtoms admit of only one tutor of law; *2dly*, Becauſe it muſt create too much uncertainty, and too frequent altercations, if the rule of preference were to vary according to the different nature of the pupil's eſtate. Though minority ends by our law at twenty-one years of age, the age of twenty-five is expreſsly required in tutors of law by 1474, *c.* 52. on account of the firmneſs and maturity of judgement neceſſary for the proper diſcharge of that office: but there is no ſuch limitation in the appointing of tutors teſtamentary or dative, who may be received at twenty-one; probably from a reaſon ſimilar to that which has been aſſigned in the caſe of female tutors, *ſupr.* § 4. *in fin.* The laſt-cited ſtatute, which requires the age of twenty-five in a tutor of law, expreſsly enacts, That where the pupil has a younger brother, the

the tutory of law ſhall not devolve upon him, but on the agnate next after him, who hath attained the age of twenty-five, though farther removed in blood from the pupil than his brother. When the next agnate was thus under the age required by law, the Romans admitted of an interim curator to be named by the magiſtrate, till the agnate ſhould become capable of the office, *l.* 10. § 7. *De exc. tut.*; which has given occaſion to ſome to affirm, that, by our law likewiſe, the office conferred on the remoter agnate of twenty-five years of age by the act 1474, is but temporary, to continue only till the pupil's next agnate attain that age, who may then ſerve tutor of law, and exclude the other. But this doctrine does not appear agreeable to the ſtatute, which gives the office to the remoter agnate paſt twenty-five *purè*, under no limitation in point of time; whereas the curatory-dative appointed in this caſe by the Roman law, was, in the nomination itſelf, limited to a certain time of duration.

6. Where the next agnate is to undertake the office, he purchaſes or obtains a brief from the chancery, directed not to this or the other particular judge, but to any judge having juriſdiction, *March* 8. 1636, *Stewart*; becauſe the ſerving of the next agnate to the office, is a point which truly admits of no oppoſition, and ſo is *juriſdictionis voluntariæ*. The judge is required to call a jury or inqueſt of ſworn men to inquire into the following heads: *Firſt*, Who is the next male agnate of the full age of twenty-five, and intitled to ſucceed to the pupil on his death? *2dly*, Whether that agnate be attentive to his own affairs? *3dly*, Whether he is able to give ſecurity for the pupil's indemnification? and, *4thly*, Who is the next cognate, with whom the perſon of the pupil may be intruſted. Inquiry is, *de praxi*, made by the jury only into the firſt head. The agnate's good œconomy or fitneſs to manage is preſumed, till the contrary be proved; the point of ſecurity in the third head is the proper province of the clerk; and the laſt, which relates to the next cognate, is left to the deciſion of our courts of law.

7. As to this laſt head of the brief, it may be obſerved, that though, by the Roman law, the tutor-legitim, as well as the teſtamentary and dative, had the charge both of the pupil's perſon and eſtate; yet, by the uſage of Scotland, the cuſtody of his perſon hath been, in the caſe of a tutor-legitim, committed to the mother, and in default of her, to the next cognate, agreeably to the laws of the Majeſty, *l.* 2. *c.* 47. § 4. from a juſt ſuſpicion, that he to whom a ſucceſſion is to open by the death of his pupil, will not be overcareful to preſerve a life which ſtands in the way of that ſucceſſion. But ſtill the tutor-legitim has the direction of the pupil's education, and of the whole expence which is to attend his perſon. The mother, if ſhe continue a widow, is preferred to the cuſtody of the pupil, ſo long as the pupil is *infantiæ proximus*, that is, till he be ſeven years of age, and ſometimes longer, according to circumſtances. But ſo ſoon as ſhe intermarries with a ſecond huſband, the pupil may be taken from her, though ſhe ſhould offer to entertain him *gratis*, *Feb.* 5. 1675, *Fullarton*; and delivered over to the tutor, if he be not tutor of law, and ſo his immediate heir; or if he be tutor of law, to the next cognate. The ſecurity given by the tutor of law upon his entry, muſt be recorded in the books of that judge's court before whom he ſerved; and he ought to make oath *de fideli*. The inqueſt's verdict or ſentence, declaring the obtainer of the brief to be the next agnate, muſt be retoured to the chancery, from whence the brief iſſued; and the nomination of the tutor, which follows on it, is of itſelf a ſufficient title and warrant for his adminiſtration; but he ought to give ſecurity for his accounting, before he actually enter upon the exerciſe of his office.

8. In default of tutors-legitim, there is place for tutors-dative; who were

by the Roman law named by the magiſtrate, but with us, by the King alone, as *pater patriæ*, in his court of exchequer. Becauſe the tutor of law, who is to be preferred to the office before tutors-dative, ought to have a reaſonable time to deliberate, whether he will ſerve or not, no tutory-dative can be given, till the expiring of a year from the time when firſt the tutor of law might have ſerved. And this period commences differently, according to different circumſtances. A tutor of law may ſerve immediately upon the father's death, if there has been no nomination of tutors, or if the nominees do not inſtantly accept. If they accept, the tutor of law cannot ſerve, till the nomination falls either by their death or legal diſability; and in the caſe of a poſthumous child, he may ſerve immediately after the child's birth. The tutor of law is thus preferred before the tutor-dative, becauſe he is preſumed, both from his proximity and hope of ſucceſſion, to have a more hearty concern in the pupil's affairs than any ſtranger. Hence, though the tutor of law had not, within the year in which he ought to have ſerved, given ſecurity, which is a duty incumbent on all tutors of law, previouſly to their entry, he excluded the tutor-dative, *June* 29. 1632, *Irvine*. Nay, Steuart, *Anſ.* v. *Tutors*, is of opinion, that though the next agnate had taken no ſtep towards his ſervice within the year, he might oppoſe a tutory-dative, and ought to be preferred to the office, if no exception lay againſt his character and circumſtances, and if matters were entire.

9. The form of paſſing tutories-dative, is, by preſenting a ſignature to the court of exchequer; which, after it has been received by the Barons, and a ſmall compoſition paid to the crown by him who offers it, is ſtamped with the King's caſhet, and then paſſes by the quarter-ſeal; and not by the privy ſeal, as Mackenzie affirms, § 5. *h. t.* Of old, the ſecurity given by tutors-dative for their accounting, was recorded in the commiſſary-books, but is now in thoſe of the exchequer; and when ſeveral tutors are appointed by the gift, they are received as mutual cautioners for one another. The oath *de fideli* hath not for a long time been exacted from this kind of tutors. It would appear, that, by the former practice, tutories-dative were upon the matter granted of courſe to any who applied for them; but, that pupils may not ſuffer by being caſt upon the care of improper tutors, all gifts of tutory are declared null by 1672, *c.* 2.; which paſs in exchequer without ſummoning the next of kin both by the father and mother, at leaſt without their conſent to the gift, or their declaration that they have no objection againſt the perſon applying for it.

10. That pupils may not be left entirely defenceleſs, when they are without a tutor or guardian of any kind, which frequently happens, if their affairs are involved, a factor or ſteward is in ſuch caſe named by the court of ſeſſion, at the ſuit of any kinſman of the pupil, for the management of his affairs; which factor muſt conduct himſelf by the rules ſet forth in the act of ſederunt *Feb.* 13. 1730; but that act does not extend to the caſe of minors *puberes*, who can chuſe curators for themſelves.

11. Minors, after attaining the age of puberty, were preſumed to be poſſeſſed of ſuch a degree of judgement and diſcretion, that guardians could not be impoſed on them againſt their wills, either by the Roman law, § 2. *Inſt. De curat.* or by our former uſage; ſo that they might, in every caſe, have aſſumed to themſelves the ſole management of their affairs, if they had opinion enough of their own capacity and prudence. But by 1696, *c.* 8. it is declared lawful to fathers, while they are in a ſtate of health, or, as we uſually expreſs it, in *liege pouſtie*, to name curators as well as tutors to their children; which by the general opinion of lawyers they had no right to do before that ſtatute. Thus, by our preſent law, curators may be divided into neceſſary, who are impoſed on the minor in conſequence of the act 1696,

1696, and voluntary, whom the minor himſelf chuſes for guardians without compulſion. The minor, when he intends to put himſelf under the direction of curators, muſt, by 1555, *c.* 35. raiſe and execute a ſummons, citing at leaſt two of the moſt honeſt of his kin perſonally, and all others having intereſt edictally, at the head borough of the juriſdiction where the minor's lands lie, to appear on nine days warning before his own judge-ordinary, to hear and ſee curators given to him. At the day and place of appearance, he offers to the judge a liſt of thoſe whom he propoſes for curators. Such of them as are willing to undertake the office, muſt ſign their acceptance, and give ſecurity for accounting; and upon this proceeding, an act of curatory is extracted. It was adjudged, *July* 23. 1674, *Wallace*, that in order to the choice of curators, it behoved two of the next of kin to be cited on the father's ſide, and two on the mother's: and though Lord Stair has by miſtake given for the *ratio decidendi*, that the ſtatute 1555 expreſsly required the citation of that number of friends to every act of curatory, whereas it requires only two in whole; yet the deciſion may be juſtified as agreeable to the ſpirit of the ſtatute, eſpecially after the paſſing of a later one, 1672, *c.* 2. which clearly requires the citation of the next of kin, both on the ſide of father and mother, at making up the minor's inventories. And from hence it is, that cuſtom has now eſtabliſhed the requiſite taken for granted in the above deciſion as neceſſary. It would ſeem, both from the narrative and the ſtatutory part of the above-cited act 1696, that the choice of curators by the minor, cannot exclude from the office thoſe who are named by the father according to the directions of that act.

12. All perſons may be appointed either tutors or curators to minors, who are fit for the management of an eſtate, and are not debarred by law or cuſtom. Tutory, being accounted by the Romans *officium virile*, could not be exerciſed by women, excepting mothers in ſpecial caſes, *tit. C. Quand. mul.* Married women are utterly diſqualified for the office: for if it be, as Juſtinian reaſons in a parallel caſe, a ſhameful confounding of names and things, that the ſame perſon ſhould be both tutor and minor, *l.* 5. *C. De leg. tut.*; it muſt be equally abſurd, for one who is herſelf ſubjected to the power or curatory of an huſband, to have another under her care and tuition. But a father may name for tutors to his children, either his own widow, or any other woman who is not married, *vid. ſupr.* § 4.; and ſuch nominee may lawfully exerciſe the office till ſhe be *veſtita viro*; and no longer, though the nomination ſhould expreſsly provide the contrary; *vid. infr.* § 29. All children, under Popiſh tutors or curators, are, by 1661, *c.* 8. to be taken from under their care; and by a poſterior act, 1700, *c.* 3. profeſſed Papiſts, and even perſons who are only ſuſpected of Popery, are declared incapable of the offices of tutory or curatory, till they purge themſelves, by ſigning the *formula* appointed for that purpoſe. Thoſe who are either creditors or debtors to the minor were, by the *jus antiquum* of the Romans, capable of the office of tutory, *l.* 9. § 5. *De adm. tut.*: and though they were afterwards diſabled by Juſtinian, *Nov.* 94. *c.* 1. we have juſtly adhered to their ancient law; for ſuch perſons are, from their knowledge of the minor's affairs, and frequently from the proximity of blood, the moſt proper for the office.

13. Curators are ſometimes named to a minor for a ſpecial purpoſe, without any general power of management. Thus, *firſt*, As a ſtranger may name a tutor to a pupil to whom he has deviſed an eſtate, for managing that eſtate, *ſupr.* § 2. ſo he may name a curator to a minor *pubes* for the ſame purpoſe. But ſuch nominee is more properly *curator bonis*, curator to a ſpecial eſtate, than guardian to a perſon; and therefore the nomination by the deceaſed cannot hinder the minor from chuſing proper curators for the adminiſtration

adminiſtration of his other eſtate, *Dirl.* 316. 2*dly*, Where a minor is either purſuer or defender in any action, he muſt have a curator to ſupport him in his proſecution or defence, under whoſe authority the ſuit may be managed on his part: for, *ſententia contra minorem indefenſum lata, nulla eſt.* Whether, therefore, the minor be engaged in a law-ſuit with his curators, or, having no curators, with a ſtranger, a curator *ad lites* muſt be given him by the judge, even though the nomination ſhould be demanded from him, not by the minor himſelf, but by the adverſe party; for every litigant has an intereſt, that the proceedings, in any cauſe in which he hath a concern, be regular. And if ſuch curator be not demanded by either party, the judge ought to appoint one *ex officio.* This ſort of curator makes oath *de fideli*; but he is under no neceſſity to offer ſecurity, becauſe he has no power to intermeddle with the minor's eſtate. If curators *ad lites* are named to minors paſt pupillarity, by ſtronger reaſon they muſt be given to minors yet under pupilage, who are parties in a ſuit againſt their tutors; but even then, they get the name, not of tutors, but of curators, becauſe they are appointed merely for a ſpecial purpoſe; and when that is over, the office ceaſeth.

14. The chief difference between tutory and curatory is, that *tutor datur perſonæ*, § 4. *Inſt. Qui teſt. tut. Curator rei;* not that tutors are more directly bound by their office to take care of the pupil's perſon than of his eſtate, but becauſe a pupil has no perſon in the legal ſenſe of the word. He is incapable of acting, or even of conſenting: the tutor, therefore, ſeeing he ſupplies this defect in his pupil, and acts for him, is ſaid with great propriety to be given *perſonæ*, even when he is managing the pupil's eſtate. But a minor paſt pupilage being himſelf perſonable, as he hath not only a natural perſon, but a legal, which can act and be obliged, a curator is ſaid to be given *rei*, to concur with the minor, that his intereſt may not ſuffer by his raſhneſs or levity. Hence a pupil cannot ſubſcribe with his tutor; for ſubſcription imports conſent, of which a pupil is preſumed incapable: but after he has attained the age of puberty, it is properly himſelf who acts; the curator does nothing more than concur with him, or conſent to his deeds: and, conſequently, a deed ſigned by the curator only, without the minor, is as truly void as one ſubſcribed by the minor only, without his curator, *Dirl.* 216.; *Dec.* 1725, *E. of Bute.* Hence alſo, though the natural perſon of a pupil is under the power either of his tutor or next cognate, yet a curator cannot claim the cuſtody of a minor's perſon who hath attained the age of puberty, or preſcribe to him where he muſt reſide, *Dirl.* 316.

15. In moſt other reſpects, the privileges, the powers, the duties, and the obligations, of the two offices of tutory and curatory, coincide. Neither tutors nor curators have ſalaries for their trouble or loſs of time, in attending the management, becauſe they are preſumed to have undertaken their offices, purely from natural affection, or conſiderations of friendſhip: and this obtains, let the minor's affairs be ever ſo much embarraſſed, *Home*, 22. And if ſalaries be expreſsly allowed by a father to the tutors-teſtamentary, or by a minor *pubes* to his curators, they are underſtood to be given as an allowance, in full of all incident charges that they might have otherwiſe had a claim to. The reſtrictions which lie on teſtamentary tutors, and on curators choſen by the minor, as to their manner of proceeding, and powers of acting, muſt be governed by the tenor of the writing which conſtitutes them. Where ſeveral are named, the number that is to make a quorum is uſually fixed in the nomination itſelf, the concurrence of which number is requiſite in every act of adminiſtration. Sometimes one is named *ſine quo non*, in which caſe no meaſure can be agreed on,

on, without the concurrence of the number fixed for the quorum, of which he who is *ſine quo non* muſt be always one. Where the tutors or curators are called by the father or minor to the joint adminiſtration, no deed is valid without the concurrence of every one of them; but when they have powers to act jointly and ſeverally, or indefinitely without any limitation, the nomination ſtands good if any one accept; and if more than one accept, the concurrence of the majority of the accepting nominees then alive, is ſufficient to give force to their acts of adminiſtration. In no caſe can a quorum be appointed of a leſſer number than the major part of the nominees, unleſs where one of them is declared *ſine quo non*: for if deeds done by a leſſer number were to be valid, matters would be inextricable; as it would be in the power of the majority, who are ſuppoſed not to have concurred, to act in contradiction to, and over-rule all the reſolutions formerly taken by the minority.

16. The powers which are, by our law or uſage, conferred on tutors and curators, are, for the greateſt part, included in the notion of adminiſtration. They can ſue for, receive, and grant acquittances of all ſums due to the minor, whether rents of land, intereſt of money, or even principal ſums, if the minor's neceſſities ſhall call for it; and they may uſe all diligence competent by law, both againſt the perſon and the eſtate of the minor's debtors, to compel them to payment. Thus alſo they may remove the minor's tenants from their poſſeſſions on the expiration of their tacks, and grant leaſes of the lands to others. But, *firſt*, Such leaſes muſt neceſſarily determine or expire with the granter's office; *Reſoluto enim jure dantis, reſolvitur jus accipientis*: and if a leaſe granted by a tutor or curator be ſo conceived as to laſt longer than his office, the minor, after the tutory or curatory is at an end, may recover the natural poſſeſſion of his own lands, upon an action of removing againſt the tenant, without the neceſſity of any previous ſuit for ſetting aſide the leaſe, *Harc. ſuppl.* 16. *2dly*, Leaſes cannot, in the general caſe, be granted by tutors or curators under the former tack-duty. Where no offer riſes ſo high, application is ſometimes made to the court of ſeſſion for leave to let the lands lower: and if the court decline to interpoſe, which they frequently do, becauſe in ſuch petitions there is no contradictor, *Dirl.* 277. the lands ought to be let by public auction, upon proper advertiſement. When, from the great extent of the minor's eſtate, or other circumſtances, tutors or curators cannot conveniently undertake the whole management by themſelves, they may appoint factors or ſtewards under them with reaſonable ſalaries, on their giving ſecurity for the faithful diſcharge of their offices.

17. The power of tutors and curators to ſell the minor's moveable eſtate was, by the *jus novum* of the Romans, limited to things which were either of ſmall account, or which could not be preſerved without ſinking in their value, unleſs where the ſentence of a judge was interpoſed, *l.* 22. *C. De adm. tut.* But frequent inſtances occur in our practice, of tutors and curators diſpoſing of the moſt valuable and durable moveables belonging to the minor, by their own authority: and ſuch ſales, if called in queſtion, would probably be declared valid, though ſubject to reduction at the ſuit of the minor on the head of leſion. No immoveable ſubject belonging to a minor, whether land, *l.* 1. *et ſeqq. De reb. eor.* or houſes, *l.* 22. *C. De adm. tut.* could, by the Roman law, be ſold without a previous decree of the pretor. But though it was declared, by *l.* 1. § 2. *De reb. eor.* that the pretor could only authoriſe ſuch ſales for payment of the minor's debt, this rule was diſpenſed with, in inſtances where the ſale was beyond all doubt profitable to the minor, leſt the law which was calculated for his advantage, ſhould, contrary to its intention, be explained to his prejudice. In

the ſame manner, our ſupreme court hath authoriſed tutors to ſell ſuch heritable ſubjects belonging to the minor as could not be uſed for his profit, even though his eſtate was quite clear of debt, *New Coll.* ii. 21. The Roman law declared all alienations of heritage null, whether they were made by tutors or by curators. This doctrine, in ſo far as it relates to ſales made by a tutor, is agreeable to our uſage. Hence, in all ſales of a pupil's eſtate, an action muſt be brought by him before the court of ſeſſion, to which his next heirs and his creditors muſt be made parties; and in which an inquiry is made by the court into the yearly rent of the purſuer's lands, and the amount of his debts, that, upon balancing the two, they may form a judgement, whether the ſale is neceſſary, either in whole or in part, for clearing off the purſuer's debts; and the ſeſſion muſt authoriſe the ſale, by a decree pronounced upon this action. But Stair's opinion, *b.* 1. *c.* 6. § 44. that the alienation of heritage by a minor *pubes*, with conſent of his curators, is valid, without the judge's interpoſition, unleſs leſion be proved, is ſupported by repeated deciſions, *Feb.* 2. 1630, *Hamilton*; *Fount. Dec.* 6. 1699, *Clerk*. Yet even in this laſt ſort of ſales, by minors *puberes*, the purchaſer, to ſecure himſelf from the danger of reduction on the head of minority and leſion, ſometimes inſiſts to have the authority of the court interpoſed to the ſale, *Feb.* 17. 1731, *Campbell*. Heritage includes, as to this queſtion, not only lands, but houſes, fiſhings, tithes, and whatever is *fundo annexum*, redeemable rights; and even infeftments of annualrent, though theſe are not, in ſtrict ſpeech, rights of property. Under alienation is comprehended, not only ſale, but exchange, or any deed by which a real right in the ſubject is carried from the pupil; *ex. gr.* a ſervitude, or a deed charging the ſubject with a yearly payment. But this prohibition to alienate the minor's heritage, cannot extend to thoſe alienations which are made by the law itſelf, in which the tutor hath no part, ſuch as adjudications of the pupil's eſtate, which are legal or judicial ſales; nor, 2*dly*, to thoſe to which the tutor or his pupil might be compelled. Hence the renunciation of a right of wadſet veſted in the pupil, where it is granted by the tutor to the reverſer upon payment made of the debt, is effectual *ſine decreto*, though it be truly an alienation of heritage; becauſe the pupil was compellible by the tenor of the right to renounce upon payment, *Jan.* 31. 1735, *Graham*. On the ſame ground, a tutor may, without the authority of our ſupreme court, grant infeftment in his pupil's lands to any perſon, in favour of whom the pupil's anceſtor had granted an obligation of infeftment; or to receive his pupil's vaſſals, by giving them charters as heirs to their anceſtor. Yet if any right ſhall be conferred by the charter, either of property or poſſeſſion, which the former vaſſal had not, it is in the judgement of law a prohibited alienation.

18. By the Roman law, tutors were not even authoriſed to tranſact doubtful claims concerning heritable ſubjects belonging to the pupil, *l.* 4. *C. De præd. et al. reb.* Whether we would adhere ſtrictly to this doctrine, in caſes where the pupil had much at ſtake, and faint hopes of prevailing, may be doubted. But both tutors and curators may, by our cuſtoms, either tranſact, or refer to arbiters, all claims of moveable ſubjects competent to the pupil; and the tranſactions made by the tutor, or the decrees-arbitral pronounced in conſequence of ſuch references, are good againſt the minor, where enormous prejudice is not proved, *Fount. Jan.* 18. 1711, *Ayton; Fount. Nov.* 14. 1711, *Aikenhead*. Tutors cannot, without weighty reaſons, change the nature of any ſubject belonging to the pupil, ſo as to invert or alter the courſe of his ſucceſſion; for over that their office was never deſigned to give them power. They cannot, for inſtance, to the prejudice of the pupil's heir, change a bond in which the creditor had originally

nally excluded executors, into one payable to heirs and executors; nor can they, on the other hand, change a bond taken payable to executors, into one excluding executors, *Harc.* 1000: but they may, for the better ſecuring a debt due to the minor, take an heritable bond from the debtor in place of a perſonal one, *Harc. ſuppl.* 14.; or they may, where it appears profitable to the minor, lend out his rents, or the intereſt of his money, upon heritable ſecurity, though the effect muſt be, to make thoſe ſums devolve on the minor's heir, which would otherwiſe have deſcended to his executors. Curators have as little power as tutors to invert the order of the minor's ſucceſſion, by acts in which the minor himſelf bears no part; *ex. gr.* by giving up to the minor's debtor a bond payable to executors, and accepting in its place one excluding executors; becauſe, by ſuch alteration, the curator aſſumes a power of regulating the minor's ſucceſſion, and the minor is neceſſarily cut off from his legal right of bequeathing that ſubject by teſtament; for a bond excluding executors cannot be carried by teſtament, *infr. b.* 3. *t.* 8. § 20. But a curator may properly concur with the minor in any deed *inter vivos* by which the ſucceſſion of a teſtable ſubject is to be altered; ſince the minor can, even without his conſent, make a teſtament, and conſequently diſpoſe of any teſtable ſubject at his pleaſure, *vid. infr.* § 33.

19. Neither tutors nor curators can be *auctores in rem ſuam.* They cannot, contrary to the nature of their truſt, interpoſe their authority to any deed of the minor, in which themſelves have an intereſt, or which tends to produce an obligation againſt him in their own favour, more than they can be judges or witneſſes in their own cauſe. Thus a tutor cannot lend money to the minor; becauſe a loan lays the debtor under an obligation of repayment, *l.* 5. *pr. De auct. et conſ. tut.*; nor can he purchaſe any ſubject belonging to the minor, unleſs it be put up to public ſale; in which particular caſe, his raiſing the price of the minor's goods, muſt, without expoſing him to the leaſt danger, bring him a certain profit. But a deed authoriſed by a quorum of the tutors, from which an intereſt ariſes to a cotutor, who does not concur in that deed, ſtands good, unleſs leſion be proved, *d. l.* 5. § 2. It proceeds alſo from the truſt implied in guardianſhip, that no tutor or curator can aſſign any ſubject belonging to the minor, for the payment even of a debt due by the minor himſelf. And for preventing frauds, the aſſignation by a tutor of a bond in which the minor is creditor, is diſcountenanced in our practice, though the conveyance ſhould be granted in conſideration of neceſſaries applied for the minor's own uſe, *Fount. July* 24. 1694, *Craufurd*: for the guardian ought, in that caſe, to have granted bond for theſe neceſſaries; which law would have ſupported againſt the pupil, in ſo far as the ſum contained in it was profitable to him. But where a debt due to the minor is paid by a cautioner, the cautioner is intitled to demand an aſſignation of that bond from the tutor or curator, that he may thereby make good his relief againſt the principal debtor: and ſuch aſſignation being neceſſary, muſt be effectual to the cautioner. On the ſame principle, tutors or curators who have acquired rights affecting the minor's eſtate, for a ſum leſs than they have a juſt title to draw, are obliged to communicate the benefit of ſuch tranſactions to the minor, though it ſhould appear that the rights were purchaſed with the tutor's proper money; for in every tranſaction of a tutor or curator which hath a natural connection with the minor's eſtate, it is preſumed that he acts as his truſtee: which doctrine is borrowed from the Roman law, *Nov.* 72. *c.* 5. And if it were otherwiſe, a tutor, through his knowledge of the minor's affairs, and concealing them from others, might raiſe to himſelf a fortune by ſuch purchaſes, at his ward's coſt. Nay, though the right made over

to

to the tutor ſhould bear to be granted from perſonal favour, the preſumption, that he accepted it in behalf of the minor, will prevail over the recital of the right, *Feb.* 17. 1732, *Cochran.*

20. As neither tutory nor curatory are, by the uſage of Scotland, *munera publica*, to which perſons may be compelled, every one is at liberty to accept or decline the office; and till he accept, he cannot be ſubject to any of the duties attending it, *Dirl.* 233. Acceptance, as it may draw ſevere conſequences after it, is not to be inferred by implication. Whatever therefore one does in the affairs of a minor previouſly to his knowledge of the father having named him tutor, is to be conſtrued merely as an act of friendſhip, if it can bear that conſtruction, *July* 19. 1678, *Beatſon.* But acceptance is fixed on tutors-teſtamentary, *firſt*, by any writing ſigned by them, expreſſing their acceptance; and conſequently by receipts or acquittances granted by them, in which they aſſume to themſelves the deſignation of teſtamentary tutors, or acknowledge their being veſted with that character: *2dly*, by acts of adminiſtration done by them, in conſequence of the father's nomination, after they were in the knowledge of it. Acceptance is fixed on tutors of law, tutors-dative, and curators, by their ſoliciting for the ſeveral offices, ſigning their acceptance, or doing ſome act from which acceptance may be juſtly inferred; ſuch as, ſigning deeds for the pupil as tutor, or with the minor as curator; ſee *St. b.* 1. *t.* 6. § 6. And though neither tutors of law, tutors-dative, nor curators, are properly conſtituted into their offices till they give ſecurity, the omiſſion of that ought not to put them in a better caſe than if they had given obedience to the law, *Nov.* 18. 1671, *Caſs.* Tutors or curators, having once accepted, are accountable for the conſequences of their failure in any part of their duty, from the time of acceptance; inſomuch that though they ſhould not have had the leaſt intromiſſion with the minor's eſtate, they muſt account as if they had intermeddled.

21. Tutors and curators who have undertaken the office, ought, in order to diſcharge the duties of their truſt properly, firſt, to make inventory of the minor's whole eſtate, whether conſiſting of heritage, bonds, or moveable effects, previouſly to their adminiſtration. This is preſcribed, both by the Roman law, *l.* 7. *pr. De adm. et per. tut.*; and by ours, 1672, *c.* 2. Our ſtatute requires, that theſe inventories be made with conſent of the minor's next of kin both by the father and mother; that three duplicates thereof, ſubſcribed both by the tutors or curators, and by the next of kin, be judicially produced before the minor's judge-ordinary; and that after being alſo ſigned by the clerk of court, one duplicate be delivered to the next of kin by the father, another to the next of kin by the mother, and the third to the tutors or curators. The next of kin, if they refuſe to concur, are to be cited before the judge, that he may decree their concurrence; and in default of their appearance, the inventories are to be made up at the ſight of the judge, or his delegate, who alſo muſt in that caſe ſign the three duplicates; and the inventories thus made up, are declared to have the ſame force as if the next of kin had appeared and concurred. By our uſage ſubſequent to this act, which ſtill ſubſiſts, the two next of kin by the father, and the two by the mother, were always cited; and when the tutor or curator is himſelf one of the next of kin, he muſt cite the two who are next in degree to the minor after himſelf, *Fount. June* 24. 1701, *Guthrie.* The judicial extracts made out in either of theſe caſes, in which the inventories are always ingroſſed, ſerve both as a warrant to the tutors or curators for the exerciſe of their offices, and as a charge againſt them in accounting. If, after completing the inventories, any other eſtate belonging to the minor ſhall come to the knowledge or poſſeſſion of the

the tutor or curator, he muſt, by the ſame ſtatute, add it to the firſt or original inventory within two months after having attained the poſſeſſion; obſerving the ſame forms that are preſcribed in relation to that firſt inventory.

22. The penalties inflicted by this ſtatute on tutors and curators for neglecting to make inventory, are, *firſt*, That no expence diſburſed by them in the minor's affairs, ſhall be allowed to their credit. As this penalty, if underſtood in a large ſenſe, appears too ſevere, for a fault which may be owing to pure indolence, it is by act of ſederunt, *Feb.* 25. 1693, limited to ſuch expence as has been laid out in law-ſuits and legal diligence; and ſo extends not to diſburſements on the minor's entertainment, or on his lands and houſes; neither does it include the expence incurred by the tutor in completing the minor's titles, *ex. gr.* ſerving him heir, or confirming him executor, *July* 18. 1707, *Yeaman.* Tutors and curators who neglect to make inventory, are, *2dly*, declared by the act accountable, not only for actual intromiſſions, but for omiſſions, and may be removed from their offices as ſuſpected. What was intended by impoſing theſe laſt penalties, is not ſo obvious: for tutors and curators were always liable for omiſſions, from the truſt implied in their offices; and they might alſo have been removed by the common law upon juſt ſuſpicion of fraud, or upon conviction of any groſs neglect of duty, which the law conſiders as fraud. It was perhaps meant, that they ſhould, upon neglect to make inventory, be liable for the ſlighteſt failure of their duty, or *ex culpa leviſſima*, to which tutors are not in the common caſe ſubjected; and they might be removed for omitting to make inventory, though no fraudulent intention ſhould appear; ſee *Fount. Feb.* 9. 1698, *Turnbull.* Where a tutor or curator had wilfully neglected to make inventory, the minor was, by the Roman law, allowed to give his oath *in litem*, upon the extent of the eſtate which the tutor either had or might have intermeddled with, *l. 7. pr. De adm. et per. tut.* And without queſtion, an oath *in litem* is particularly neceſſary, in inſtances where it is not practicable to make up a charge againſt the party by the ordinary methods of evidence: yet it may be doubted, whether our law would admit it in this caſe; becauſe where ſtatute hath inflicted ſpecial penalties upon any offence, all others are underſtood to be excluded.

23. It is enacted by the ſame ſtatute, That no tutor or curator ſhall have authority to exerciſe their ſeveral offices, till they have made inventory; which expreſſion imports ſtrongly, that all payments made by the minor's debtors to ſuch tutor or curator are unwarrantable, ſince a debtor cannot lawfully pay to one who has no authority to receive. Yet ſuch payment was ſuſtained, *Dec.* 1722, *L. Logan*, in reſpect of a poſterior clauſe in the act, that debtors ſhall not be obliged to make payment to the tutor or curator, if the debts due by them be not contained in the inventory; which clauſe proceeds on the ſuppoſition, that debtors may warrantably pay to them, and does no more than give thoſe an option whether to pay or not.

24. It is the duty of tutors and curators, to take proper care of the minor's perſon, to educate him in a manner ſuitable to his birth and fortune, and to diſburſe, out of his yearly rents, the expence neceſſary for his ſubſiſtence and education; which if they refuſe, a reaſonable ſum ought to be modified by the judge for that purpoſe, *l.* 1. *C. De alim. pup. præſt.* No more is to be allowed to a minor under pupilage, either by the tutor or judge, for mere alimony and education, than the neat rent of his eſtate, or the yearly intereſt of his money, *Nov.* 17. 1680, *Sandilands:* but after the pupil has attained the age of puberty, when it is full time, if his ſtock be inconſiderable, to breed him to an employment, it is the curator's duty to employ part of the capital, and even the whole of it, if leſs will not ſerve,

in order to put him at once in ſome way of buſineſs, *Br.* 110. And in the caſe of a perſon of birth or family, who propoſes to raiſe himſelf by the public ſervice, the curator may lawfully advance a yearly ſum far beyond the intereſt of his patrimony, that he may appear ſuitably to his quality, while he is unprovided of any office under the government by which he can live decently, *New Coll.* i. 170. Tutors and curators ought carefully to preſerve the title-deeds of the minor's eſtate, and the other writings belonging to him; and if by their neglecting to complete his titles, he ſhould ſuffer, either in point of right or poſſeſſion, they muſt make up the damage, *Jan.* 26. 1628, *Commiſſ. of Dunkeld*; *July* 18. 1635, *Edmonſton.* As to the minor's perſonal eſtate, if his guardians do not without loſs of time ſell ſuch moveable ſubjects as cannot by any care be preſerved from periſhing, or ſinking conſiderably in their value, they muſt make up the loſs to the minor, *l.* 7. § 1. *De adm. et per. tut.* They ought to diſcharge *quamprimum* all the obligations that lie on the minor, *ex. gr.* to pay off all the debts due by him, as ſoon as his funds can be conveniently raiſed for that purpoſe. If a creditor of the minor wants his money, he muſt, in the action brought againſt his debtor for payment, make the tutors or curators parties to the ſuit. Theſe it is ſufficient to cite edictally at the croſs of the head borough of the juriſdiction where the minor reſides, without mentioning their names; for the purſuer is not bound to know them; and decree will go forth againſt both the minor debtor, and them for their intereſt: but as they are not truly the debtors, no execution can paſs either againſt their perſons or eſtates, on ſuch decree, unleſs it has been pronounced upon this medium, That they were poſſeſſed of the minor's money, by which the debt might be paid either wholly or in part. Where the obligation of the tutor or curator conſiſts *in facto præſtando*, in performing a fact to which his office obliges him, and which it is in his power to perform, *ex. gr.* to renew inveſtitures to the heirs of vaſſals, or to extend a leaſe in conſequence of a former minute, execution may paſs againſt his perſon on a decree proceeding upon ſuch obligation. As to the debts due to the minor, the tutors or curators lie under no neceſſity of calling in the minor's money which is lent to debtors of good credit, unleſs his occaſions ſhall require it; but they are liable to the minor in damages, if they omit uſing diligence againſt a debtor, ſo ſoon as he is ſuſpected to decline in his circumſtances. If he has a land-eſtate, the tutor ought to inhibit him, and adjudge his heritage; if he has moveable effects, poinding is the proper diligence; and if ſums are due to him, arreſtment ought to be uſed, and an action of forthcoming inſiſted in, to make good the debt arreſted, *July* 9. 1667, *Steven.* If the diligence uſed againſt the debtor's eſtate has no effect, the tutor is to have recourſe to perſonal execution; as to which, it is generally ſaid, that if he charge the minor's debtor upon letters of horning, he need go no farther. But where the debts due to the minor are deſperate, tutors ought not to throw away their ward's money in uſing fruitleſs diligence againſt a debtor who has no fund of payment, *July* 2. 1628, *Hamilton.* As for the minor's heritable eſtate, they ought to take care that his principal ſeat, if it was left habitable by the deceaſed, be preſerved in good condition, together with the incloſures, and tenants houſes; that his farms, fiſhings, and other heritable ſubjects, be provided with proper tenants; and that the rents be demanded in due time from thoſe that are liable in payment, leſt they ſhould periſh in their hands. Curators cannot be accountable for the rents of land or intereſt of money received by the minor himſelf, without their conſent, or in ſpite of their remonſtrances; but as ſuch payment does not releaſe the debtor, or extinguiſh his obligation,

tion, *Dec.* 5. 1707, *Cuningham*, it is their duty to uſe legal diligence againſt him, as if no payment had been made by him to the minor.

25. Tutors and curators, after having received the yearly rents or fruits of the minor's eſtate, ought to employ them profitably for his behoof. In explaining how far they are bound to put the minor's money out at intereſt, we muſt diſtinguiſh between the ſums belonging to the minor prior to the commencement of their office, and the rent or intereſt which becomes due during the office. As for the firſt, if the ſums carried no intereſt at the tutor's entry to the office, they ought to be recovered from the debtors without loſs of time, and put out at intereſt; and if any part of the minor's ſtock conſiſts in merchandiſe, or goods proper for ſale, they ought to be ſold, and the price lent to ſufficient debtors, within a year, *July* 9. 1667, *Steven.* The ſums which become due to the minor during the office, are, for the moſt part, the rents of land, or the intereſt of money. A year is allowed after rents fall due, if they are payable in grain, and ſix months, if in money, for collecting them, and finding proper debtors to lend them to, *St. b.* 1. *t.* 6. § 19. As for the growing intereſt of bonds ariſing during the tutory, tutors are obliged to accumulate it into a capital bearing intereſt, once, either before, or at the expiration of the office, *Pr. Falc.* 91. which if they neglect, they are liable to the pupil in the intereſt of that intereſt from the time that their office expires, *Jan.* 27. 1665, *Kintore*; *Fount. Jan.* 16. 1696, *Irvine:* but curators are under no ſuch obligation to lay out the current intereſt, either during their office, or when it determines; it is enough if they leave it in the hands of reſponſible debtors, *Harc.* 996. 998. It is an equitable opinion of Sir James Steuart, *v. Pecun. pupill.* that if the particular periods at which the tutor has received the intereſt, can be fixed by proof, that intereſt ought to carry intereſt to the pupil within a competent time after, ſince a provident man would have put it out at intereſt *in re propria.* If a ſucceſſion ſhould open to the minor during the office, the tutor or curator muſt obſerve the ſame rules in relation to the ſums accruing thereby to the minor, as if that ſucceſſion had opened to him before the commencement of the office. The doctrine laid down by Stair, without any limitation, *b.* 1. *t.* 6. § 36. That no part of the minor's money ought to be applied to the purchaſe of lands, ſuited better with thoſe times, than with the preſent: for where a minor, quite clear of debt, has a conſiderable yearly increaſe of revenue ariſing from the rents of his eſtate, it may be prudent to employ part of it at leaſt on land; and inſtances of ſuch purchaſes begin now to be frequent: but tutors ſeldom adventure upon them without the warrant of the court of ſeſſion; ſee *New Coll.* ii. 83.

26. Tutors and curators are not all liable in the ſame degree of diligence. *Firſt*, It has been already obſerved, that fathers, in the character of adminiſtrators to their children, are not laid under ſo ſtrong obligations in ſeveral reſpects as other guardians, *t.* 6. § 55. *2dly*, Honorary tutors, who are appointed by the father, not to manage by themſelves, but barely to overſee and direct the management of others, are only liable for actual intromiſſions, not for omiſſions. *3dly*, Neither interdictors, of whom below, § 53. *et ſeqq.* nor curators *ad lites*, are liable in diligence: for both theſe are given *ad auctoritatem præſtandam;* interdictors for authoriſing the ſubſcription of deeds, and curators *ad lites* for the conducting of law-ſuits. *4thly*, Even among tutors, in the proper acceptation of the word, it is ſufficient that a teſtamentary tutor employ the ſame degree of care in his pupil's affairs that he does in his own; ſince he acts at the deſire, and in obedience to the will, of the deceaſed: but both tutors of law and dative ought to be liable in that exact diligence which may be expected from a provident man; for if they are not fit for management, they ought not to have ſought after the office.

27. Tutors

27. Tutors and curators were, by the Roman law, *l.* 3. *C. De divid. tut.* liable for the miſconduct of their colleagues, only *ſubſidiariè*, after theſe colleagues were themſelves diſcuſſed; but, by our uſage, all of them are liable in diligence, *ſinguli in ſolidum*; *i. e.* the minor may ſue any one of them by himſelf, and make that one liable, not only for his own miſconduct, but for that of his co-tutors or co-curators, *Feb.* 22. 1634, *Davidſon*; which obtains, though the tutor who is ſued ſhould not have intermeddled, *Harc.* 985.; that ſo all of them may, from the conſideration of their own intereſt, be incited to a greater watchfulneſs over one another's conduct: but he who is condemned in the whole, has an action of recourſe againſt the co-tutors. From this rule of our law two caſes muſt be excepted. *Firſt*, Where a father, in his nomination, divides the management into different branches, and allots to each a particular department, every tutor is liable only for his own conduct in that branch of management which was intruſted to him. *2dly*, Fathers are, by 1696, *c.* 8. permitted to name tutors and curators to their children, with the ſpecial proviſo, that they ſhall be liable only for intromiſſions, not for omiſſions; and that each tutor or curator ſhall be liable only for himſelf, and not *in ſolidum* for the others. This act was intended to encourage thoſe to accept of the office, whoſe probity and care the father might confide in, and who might be found unwilling to expoſe themſelves to nice queſtions of diligence, or to the danger of being made accountable, not only for their own diligence, but for that of all the co-tutors. But becauſe the great ſecurity of minors lies in the obligations impoſed by law on tutors and curators, the act requires, that the father be in *liege pouſtie* when he diſpenſes with them; and, *2dly*, His power of diſpenſing is expreſsly limited by the act, to the means and eſtate deſcending from himſelf: ſo that the tutor thus named by the father cannot plead the benefit of the diſpenſing clauſe in relation to any ſeparate eſtate belonging to the pupil. A deciſion, however, is obſerved by Mr Forbes, *Feb.* 1. 1710, *Ranken*, which is hardly to be reconciled to this laſt limitation.

28. Under this obligation to diligence, the law has alſo laid pro-tutors and pro-curators. By theſe are underſtood perſons who act as tutors or curators without having a legal title to the office, whether they ſincerely believe themſelves tutors, or know that they are not. By the Roman law, they were made liable in all points as tutors or curators, *l.* 1. *pr. De eo qui pro tut.* not only for intromiſſions, but for omiſſions, after they had once intermeddled, *d. l.* 1. § 9.; and juſtly, ſince he who aſſumes to himſelf an office to which he hath no title, ought to be in no better caſe than one who acts under a proper warrant. The court of ſeſſion, however, would not adventure to adopt this doctrine into our law, *June* 10. 1665, *Swinton*, till, by an act of ſederunt of that date, pro-tutors and pro-curators are declared liable as tutors and curators, not only for what they ſhall have intermeddled with *de facto*, but for what they might have intermeddled with. Yet they are accountable only from the time at which they began to act: for the only ground upon which they are made liable is their actual intermeddling; which ought not to be carried *retro*, by preſumption, to the period at which the minor became firſt *indefenſus*, eſpecially if they appear to have aſſumed the office from friendſhip to the minor, and the neceſſity of his affairs. Though they are thus put on the ſame footing with tutors and curators as to their paſſive title, *i. e.* the obligations they are brought under, they enjoy none of the active powers or privileges competent to tutors or curators: they can neither ſue the minor's debtors for payment, nor have they authority to receive the ſums due to him: conſequently, a minor's debtor who makes payment to them, does it at his peril; and therefore

fore is not releaſed by the payment, if the ſum paid was not *in rem minoris verſum*, employed profitably for the minor's uſe, *Br.* 122. Hence alſo they may be ſued by the minor in an action for accounting, even during the pro-tutory, though proper tutors or curators are not bound to account till their office determine, *infr.* § 31. Yet equity indulges them in this active title, that, after they have given up the management, action lies at their inſtance againſt the minor for recovering the ſums diſburſed by them during their adminiſtration, in ſo far as it appears from the proof, that they have been profitably laid out for the minor, *l.* 5. *eod. tit.*

29. Neither tutory nor curatory expires by the renunciation of the tutors or curators: for though no perſon can, by our uſage, be compelled to accept of either of theſe offices; yet having once accepted, he cannot throw it up, without a reaſonable cauſe, admitted by the judge, 1555, *c.* 35. according to the rule, *Id quod prius fuit voluntatis, poſtea fit neceſſitatis*; ſee *July* 21. 1664, *Scot.* It is indeed declared, by 1696, *c.* 8. that one who is named by the father both tutor and curator to his child, may, though he ſhould accept of the tutory, refuſe the curatory; (a clauſe deſigned to induce the tutor named to undertake the office the more readily): but that is more properly a declining to accept, than renouncing the office after acceptance; for if he ſhall accept alſo of the curatory, he muſt hold it till the minor's perfect age. Tutory expires, by the death either of the tutor or pupil, and by the pupil's attaining the age of puberty. If a tutor continue to act for the minor after his puberty, he is liable as curator, *St. b.* 1. *t.* 6. § 24. Curatory expires by the death, either of the curator or of the minor, by the minor's becoming of perfect age, and, in caſe of a female minor, by her marriage. Where a minor obſtinately refuſes to ſign the neceſſary deeds of adminiſtration, the curator may apply to the court of ſeſſion to be diſcharged of his office: but the court, from a conſideration of the dangers to which a defenceleſs minor of ſuch a diſpoſition may lie open, have in ſuch applications waved removing the curator, till the minor ſhould conſent to make a new nomination. The office both of tutory and curatory expires, *firſt*, by the marriage of a female tutor or curator. Thus where a father named his wife as tutor to their common child, the nomination was adjudged to fall, upon her ſecond marriage; both from the impropriety of a woman's having one under her power who is herſelf ſubjected to the power of another, *March* 8. 1636, *Steuart*; *vid. ſupr.* § 12.; and from the bad conſequences which might be dreaded, from leaving a pupil's eſtate to the management of one under the influence of his ſtepfather. *2dly*, Both tutory and curatory fall by any ſupervening incapacity, whether natural or legal, which may diſqualify the tutor or curator from diſcharging the office. *3dly*, If tutors or curators ſhould fail in any part of their duty through negligence, or ſhould fraudulently miſapply the minor's money to wrong purpoſes, they may be removed as ſuſpect, by an action, or rather complaint, called by the Romans, *accuſatio ſuſpecti tutoris*; which by their law was *popularis*, *i. e.* might be purſued by any perſon, even a ſtranger to the minor; but, with us, is competent only to the minor's next of kin, or to a co-tutor or co-curator. By our more ancient law, 1555, *c.* 35. any judge-ordinary was authoriſed to decide upon the cauſes for which tutors or curators ought to be removed; but by our later uſage that branch of juriſdiction is appropriated to the court of ſeſſion. Bankton, *b.* 1. *t.* 7. § 34. affirms, without limitation, that this complaint may be tried in a ſummary way before that court; but the act 1696, on which alone this opinion is grounded, relates to the ſpecial caſe of tutors named by the father in *liege pouſtie*. Our ſupreme court is ſo tender of a tutor's reputation, that where his miſconduct proceeds merely from indolence or

inattention, he is ſeldom removed; but to ſecure the minor, a curator is either joined to him, *Dirl.* 90. or, if he be a teſtamentary tutor, he is put to give ſecurity, though, in the common caſe, ſecurity is not taken of that kind of tutors, *Fount. Feb.* 16. 1705, *Balfours.*

30. The duration of theſe two offices depends frequently on the tenor of the writings which conſtitute them. If a father names ſeveral tutors to his children, ſimply, without calling them to the joint adminiſtration, or if a minor appoints ſeveral curators in the ſame manner, the office ſubſiſts if any one of them accept; and upon the death of any one of many accepters, it accrues to the ſurvivors, and continues in the perſon of the laſt ſurvivor. For though in deeds *inter vivos*, *ex. gr.* mandates, where two or more mandataries are named in general terms, they are underſtood to be named jointly, *vid. infr. b.* 3. *t.* 3. § 34.; yet the favour of laſt wills, and of minority, creates a preſumption, that the father or minor prefers any one of the tutors or curators ſo named, to thoſe who are pointed out by the law, *Feb.* 14. 1672, *Elleis.* Where a number of perſons are expreſsly named tutors or curators, and joint adminiſtrators; as the nomination hath no force till all the nominees accept, ſo it falls on the death of any one of them; for the epithet of *joint*, plainly ſhews that it was not intended to truſt the management to any one or two of them ſeparately, but to the whole taken together, *Jan.* 17. 1671, *Drummond.* The non-acceptance, or death, or ſupervening incapacity, of a tutor or curator *ſine quo non*, hath neceſſarily the ſame effect, *Harc.* 995.; for without the *ſine quo non* no act of adminiſtration is valid. Which rule holds, even in the nomination of tutors by a father, in which he has fixed a certain number for a quorum, though there ſhould be as many tutors left alive, after the ſupervening incapacity of the *ſine quo non*, as conſtitute a quorum; for ſtill the father's nomination becomes entirely void by the incapacity of the *ſine quo non*, which makes way for the tutor-in-law, notwithſtanding the preſumption above mentioned, that the father would have truſted any of thoſe who were named by himſelf, rather than the tutor of law, *Fount. June* 24. 1703, *Aikenheads*; *Feb.* 14. 1735, *Blair.* Where a father names two perſons tutors to his children, and in default of them by death, certain others to fill their place, the powers granted to the firſt two are not underſtood to ceaſe totally upon the death of any of them; but the ſurvivor may act by himſelf under that nomination, excluding thoſe of the ſecond claſs, who are no more than ſubſtitutes in caſe of a total failure of the firſt.

31. Upon the determination of the tutory or curatory, an action is competent to the minor, or his heir, called *actio tutelæ vel curatelæ directa*, againſt the tutor or curator, and his cautioners, and their heirs, for exhibiting a particular account of his intromiſſions and diſburſements in the management, for payment of the balance to the purſuer, and for reſtoring to him his writings, and whatever elſe belongs to him, which is in the defender's poſſeſſion. This action does not lie till the office be at an end; becauſe, as the tutors or curators are intruſted with the complex management of the minor's whole affairs, the different parts of the adminiſtration are ſo interwoven, as to make it impoſſible to form a diſtinct judgement on any one part till all be wound up. In this account, the defender muſt charge himſelf, *firſt*, with all the rents and profits of the minor's heritable ſubjects, contained in the inventory and eiks, and with all the ſums of money belonging to him, and with the intereſt upon the whole, according to the rules before mentioned; *2dly*, even with ſuch debts due to the minor, though not taken up in inventory, as it appears, by inſpecting the minor's charter-cheſt, the defender might have come to the knowledge of, *June* 24. 1680, *Cleland.* But he is not bound to account for the value

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of ſuch ſervices as have been performed by the tenants to himſelf, unleſs the deceaſed proprietor had it in his option to demand money for them, *Jan.* 11. 1668, *Grant;* nor for ſuch of the ſmaller flying cuſtoms, *ex. gr.* kain-hens, chickens, &c. as may reaſonably have been uſed by him in the courſe of his management, *Harc.* 979. As guardians ought to make no profit by their offices, they muſt account for that part of the minor's rent which is payable by the tenants in grain, at the prices truly received by them from the merchants, though they ſhould be higher than the rates fixed by the ſheriff-fiars. But they will not be allowed to ſtate the prices lower than the fiars, unleſs they ſhew ſpecial cauſe why the grain was ſold under the fiars, *Harc.* 971.

32. Tutors and curators may, on the other hand, ſue the minor upon the *actio tutelæ vel curatelæ contraria*, to diſcharge them of their office and adminiſtration; to relieve them from all engagements for the minor, under which they have been brought in the courſe of their management, in ſo far as they were rational; to reimburſe them of the ſums ſuperexpended by them on the minor's account, and of their perſonal charges; together with the intereſt of the whole from the times of advancement, in ſo far as they were diſburſed by the purſuer out of his proper money. This action muſt be fruitleſs, when the direct action for accounting has been already brought by the minor: for in the account exhibited in that ſuit by the tutor, he takes credit for all thoſe particulars; and the balance, if any be due by the minor, is there decreed of courſe to the tutor. If the minor has not called the tutor to account, the tutor, in this action for reimburſement and indemnification, muſt exhibit a full account, both of his receipts and diſburſements, in which he muſt charge himſelf with all the particulars formerly mentioned, and take credit for the ſums expended by him on the minor's account, by which it may appear whether he is intitled to a diſcharge or to any balance: and law preſumes, till accounting, that the tutor *intus habet*, or, in other words, that he hath in his own hands as much of the pupil's money unaccounted for, as will balance the claim he has againſt the pupil. Hence all purchaſes made by the tutor, of rights affecting the pupil's eſtate, are preſumed to have been made with the pupil's money, till ſettling the tutory-accounts, if there is not poſitive evidence brought that they were not, *Jan.* 24. 1662, *Ramſay.* The exception or defence competent to the minor upon this preſumption is not elided, though the tutor ſhould not have ſued upon his claim, till the obligation he lay under to account to the minor was extinguiſhed by the decennial preſcription of tutorial accounts, *Dalr.* 124.; for *quæ ſunt temporalia ad agendum* are frequently *perpetua ad excipiendum.* And the defender does not in this caſe inſiſt for any balance that may be due by the tutor upon his tutorial accounts; he only pleads the legal defence, That the ſum demanded from him by the purſuer was preſumed to be paid before the years of preſcription were elapſed; which preſumption muſt be available to him till the tutor make up his accounts. It would ſeem, that this preſumption ought to be applied only to ſuch claims as may ariſe to the tutor from his diſburſements in the courſe of his adminiſtration, and not to extend to debts due by the minor's anceſtor to the tutor before the commencement of his office; *firſt*, becauſe the only rational foundation on which it is eſtabliſhed, reſtricts it to the expence incurred by the tutor on the minor's account: *2dly*, becauſe it is repugnant to juſtice, that a creditor's right of demanding a juſt debt ſhould be poſtponed, for no better reaſon, than that he hath undertaken a friendly and gratuitous office for his debtor; for *officium nemini debet eſſe damnoſum.* Yet the preſumption was extended to ſuch debts, in the ſpecial caſe where an action for accounting was actually depending

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at the minor's inſtance againſt the tutor, which might ſoon be brought to a period, *Harc.* 990.

33. After explaining the rights and the obligations of tutors and curators, thoſe which are competent to or lie upon their pupils or minors may be conſidered. All deeds done, or contracts entered into, whether by a pupil, or by a minor, having curators, without their conſent, are null in this reſpect, that they have no effect againſt the minors; but they are obligatory on the other contracters, who may be compelled to perform their parts if the contract be judged beneficial to the minor. This rule obtains, contrary to the nature of contracts, both from the favour of minors, to whom the law has not denied the power of making their condition better, though they cannot make it worſe, and *in pœnam* of thoſe who would impoſe upon their weakneſs. But it is to be received with the two following exceptions: *Firſt*, Minors are effectually obliged, by their own acts and deeds, and even by bonds of borrowed money granted by them, though without the conſent of their curators, for all ſums that have been profitably applied to their uſe, *Dec.* 11. 1629, *Gordon;* in which caſe the maxim holds, *Nemo locupletandus eſt cum detrimento alterius:* and this exception reaches, not only to the neceſſaries of life furniſhed to the minor, *Feb.* 5. 1631, *Inglis*, but to the charges of education, *ex. gr.* to the expence of entering notary. *2dly*, A minor *pubes* may marry without the conſent of his curators; for curators have no power over the minor's perſon: yet their conſent appears neceſſary in ſettling the proviſions granted by him to his wife and children. Every deed of a minor who has no curators, is as effectual as if he had curators, and had acted with their conſent. He can even alienate his heritable ſubjects, without the interpoſition of a judge, *Cr. lib.* 1. *dieg.* 12. § 30.; *Dec.* 13. 1666, *Thomſon.* As to deeds ſigned by minors which are not to take effect till their death, a minor who has attained the age of puberty, may, without the conſent of his curators, bequeath his perſonal bonds and all his moveable eſtate, *Nov.* 30. 1680, *Stevenſon*; and diſpoſe of ſuch ſums by teſtament as have been left to himſelf abſolutely, without clauſes of ſubſtitution. But the conſent of the curators muſt be interpoſed to all the minor's deeds *inter vivos*, even to thoſe which truly import no more than a bequeſt of moveables, *New Coll.* ii. 66. He cannot, even with his curators conſent, make a ſettlement of his heritable eſtate, *Kames*, 70. 71.; for in order to alter the legal ſucceſſion of heritage, there muſt be a deliberate *animus* in the granter of the deed, which cannot be preſumed in a minor; and it would be moſt dangerous to allow the conſent of curators to ſupply that defect.

34. Minors, whether they have or have not curators, may be reſtored againſt all deeds granted by them in minority that are hurtful to them, by an action of reduction *ex capite minorennitatis et læſionis.* As we have no ſtatute-law to direct us in this point, we obſerve the Roman with little or no variation. The reſtitution of minors is, upon account of its importance, proper to the cogniſance of our ſupreme civil court. The minor need not uſe the remedy of reduction for reſtoring him againſt deeds which are in themſelves null by exception, *ex. gr.* thoſe granted by a pupil, or by a minor having curators, without their conſent. But where hurtful deeds are granted by minors with the concurrence of their curators, or by thoſe who have no curators, or by a proper tutor in name of the pupil, reduction is neceſſary, becauſe ſuch deeds ſubſiſt in law till they be ſet aſide. Some have affirmed, that when a minor having curators, executes a deed with their conſent, the intervention of the curators ſupplies the want of years in the minor, as to all queſtions with third parties, and of courſe cuts off the right of reſtitution; and that the only remedy competent in ſuch caſe to the

the minor, is an action againſt his curators for what he hath ſuffered by their undue conſent. But reſtitution is as truly competent to the minor, when the deed is executed with the conſent of his curators, as when he is without curators; both by the Roman law, *l.* 2. 3. *C. Si tut. vel cur. int.* and by our cuſtoms, *St. b.* 1. *t.* 6. § 44.; *Dirl.* 88. Yet there ought to be in ſuch caſe the cleareſt evidence of leſion in order to ſet aſide the deed, otherwiſe that commerce with minors which is frequently neceſſary, would be too much imbarraſſed.

35. The law indulges to a minor the ſpace of four years after his perfect age, within which he can ſue for the reduction of any deed he may have granted to his own prejudice while he was yet a minor, that ſo he may have a reaſonable time, from that period in which he is firſt preſumed to have the exerciſe of reaſon, to conſider with himſelf what deeds granted by him in his minority are truly hurtful to him. Theſe years, becauſe they are thus profitable to the minor as a *tempus deliberandi*, are by us called *anni utiles*; though not in the ſenſe of the Roman law, in which *tempus utile* ſignified thoſe days in which it was lawful to hold courts, and ſo were uſeful or profitable to the party, in oppoſition to *tempus continuum*, which comprehended under it every day, unlawful as well as lawful. It is not enough, to preſerve the minor's right of reſtitution, that he ſign a revocation of the deed complained of within this *quadriennium*, or four years, *Fount. Dec.* 28. 1697, *Marq. Montroſe*; for that is a private act, not directed againſt nor intimated to thoſe who have an intereſt to ſupport the deed: he muſt within that period raiſe and execute a ſummons of reduction; which will be effectual, though there ſhould be no revocation. But the minor loſes not only his right of being reſtored againſt third parties, but his recourſe againſt his tutors or curators who have granted or conſented to the deeds brought under challenge, if he does not ſue them for damages before his age of twenty-five, though he ſhould ſue them within the ten years allowed to minors for calling them to account, *Kames*, 98.; for by his ſilence during the *quadriennium*, there ariſes a *præſumptio juris et de jure*, not to be traverſed even by legal evidence to the contrary, that the minor was not hurt by the deed upon which the proceſs of recourſe againſt his tutors or curators is grounded.

36. In this action for reſtitution, two particular facts muſt be proved by the purſuer, before he can prevail: *Firſt*, That he was minor when he or his tutor ſigned the deed, or entered into the contract, in queſtion: *2dly*, That he is truly hurt by that deed or contract. Evidence, though not ſtrictly legal, called an *aliqualis probatio*, joined with an extract of the minor's baptiſm from the books of the kirk-ſeſſion, has been always ſuſtained as a proof of the minor's age, *Dirl.* 72. And by a deciſion, 1722, *L. Logan*, minority was found proved by an extract of the ſeſſion-books *per ſe*, without any collateral evidence to ſupport it. The years of minority are computed *de momento in momentum*, both becauſe one cannot in proper ſpeech be called *major*, till the twenty-one years of minority be completely run, and becauſe that manner of computation is moſt profitable to the minor: and hence a deed granted by one who wanted but a ſingle day of his perfect age of twenty-one, was adjudged to have been granted in minority, *June* 26. 1624, *Drummond*. As to the minor's leſion, *firſt*, If it be inconſiderable, reſtitution is excluded; for actions of reduction are extraordinary remedies, not to be applied but on great and urgent occaſions: *2dly*, As reſtitution is not intended to put minors in a better condition than majors, but purely to defend them againſt the raſhneſs or imbecillity of nonage, the minor's leſion muſt proceed either from the weakneſs of judgement or levity of diſpoſition incident to youth, or from the imprudence or negligence

of his curators. If, for inſtance, a minor without curators, who had purchaſed an houſe, which was afterwards burnt, ſhould bring an action to be reſtored againſt the bargain, he would not prevail, if it appeared that the purchaſe was rational, and the price equal; and that his only damage aroſe from an accident which the greateſt prudence could neither foreſee nor prevent. Upon this ground, minors cannot be reſtored againſt deeds done by them from the badneſs of their heart, *ex. gr.* againſt breach of truſt, fraud, illegal violence, or any other unjuſtifiable act; for *deceptis, non decipientibus, jura ſubveniunt.* Hence if a minor ſhould fraudulently draw one to contract with him, by pretending he was major, there can be no reſtitution; but where the fraud is preſumed barely from the minor's affirmation in a deed that he was major, that preſumption may be taken off by a proof that the minor was induced to inſert that clauſe by the perſuaſion of the other contracter, or that that other knew, or had ſtrong reaſons to believe that he was minor, *Feb.* 23. 1665, *Kennedy.* The minor cannot be reſtored againſt neceſſary payments, though he ſhould ſuffer prejudice, unleſs the leſion may be juſtly imputed to him who made the payment. Thus, as a minor's tenant or debtor may be compelled by law to pay to the tutor or curator, who is authoriſed to receive the debts due to the minor, he is ſecure in making payment, though the ſum paid has not been applied to the uſe of the minor; whoſe only remedy in ſuch caſe is an action for damages againſt his guardians.

37. In certain caſes, leſion is preſumed from the nature of the deed itſelf, by a preſumption ſo ſtrong that it cannot be over-ruled by a contrary proof, *ex. gr.* in a deed of donation, or in a bond of cautionry, granted by the minor. In others, though the preſumption of leſion requires no collateral evidence to enforce it, it may be taken off by a contrary proof: but the burden of that proof, or the *onus probandi*, is thrown upon the adverſe party. Thus, in the payment of a debt made to the minor himſelf, and not to his curator, the law preſumes againſt him who made the payment, that the minor has ſquandered away the money, except he bring evidence, that it was profitable to the minor, *in rem minoris verſum.* Leſion is, by the general opinion of writers, *St. b.* 1. *t.* 6. § 44.; *Bank. b.* 1. *t.* 7. § 83. preſumed in a voluntary loan of money made to the minor, even with the conſent of his curators, though the minor's affairs ſhould, at the date of the bond, have required money ever ſo much; and conſequently the minor will be reſtored againſt the bond, unleſs the creditor ſhall prove that the ſum turned to the minor's account; in which opinion theſe writers are ſupported by a deciſion obſerved by *Dirl.* 88.

38. Reſtitution is competent to the minor, againſt all obligations ariſing from contract by which he may be hurt, be they ever ſo ſolemn; even againſt marriage-contracts, in ſo far as the proviſions contained in them are prejudicial to him, *July* 4. 1632, *Davidſon*; *Nov.* 22. 1664, *Macgill*; *Br.* 18. & 70. But there lies no action for reſtitution againſt the marriage itſelf; which by the divine law cannot be diſſolved on civil conſiderations. It is alſo competent to the minor againſt the payment by the tutor or curator, of debts due by the minor, even juſt ones, if the payment could not in equity be demanded of him; *ex. gr.* againſt the payment of a debt due by a perſon deceaſed to whom the minor is confirmed executor, if the executry-funds are not ſufficient to clear it. A minor who betakes himſelf to any buſineſs or profeſſion, as trade, manufacture, law, &c. cannot be reſtored againſt deeds granted by him in relation to that employment, *Dirl.* 360. For as a minor is not reſtrained from carrying on buſineſs as a merchant, manufacturer, &c. the law ought to ſecure thoſe who deal with him from vexatious proceſſes of reduction. But this is no bar to the minor's being reſtored againſt ſuch deeds as are not connected with the employment undertaken

undertaken by him, *Dec.* 7. 1666, *Mackenzie*. Sums contained in bills of exchange accepted by a minor merchant or trader, are preſumed to have been advanced to him in the courſe of his buſineſs; though bills by their ſtyle do not expreſs the cauſe of granting, *July* 5. 1732, *Craig*. Reſtitution lies not only againſt extrajudicial acts, but judicial; *ex. gr.* againſt the ſentence of a judge, though pronounced *in foro contradictorio*, where the proper allegations or defences either in law or in fact have been omitted; or where others, falſe in fact, or hurtful to the minor, have been offered to the court by his guardians, *Dec.* 7. 1705, *Murray*; *Tinw. Dec.* 19. 1744, *Chriſties*. But if the proper plea or defences have been offered for the minor, and repelled by the judge, there is no place for reſtitution; ſince the leſion ariſes, in that caſe, purely from iniquity in the judge, to which majors and minors are equally expoſed, *Fount. Jan.* 7. 1698, *Count. Kincardin.* In this claſs of judicial acts may be reckoned a minor's entry by ſervice as heir to his anceſtor; for if he ſhall be thereby ſubjected to debts exceeding the value of the inheritance, he will be reſtored, *l.* 7. § 5. *De minor.*; *Dec.* 1. 1708, *Barclay*.

39. By our former law, agreeably to the conſtitution of Frederick Barbaroſſa, *Sacramenta puberum ſunt ſervanda*, *Auth. l.* 1. *C. Si adv. vend.* the benefit of reſtitution was denied to the minor againſt ſuch deeds as he had ſworn never to call in queſtion. But our legiſlature obſerving, that minors might with the ſame facility be perſuaded to ratify obligations upon oath, as they were to grant them, did, by 1681, *c.* 19. declare the elicitors of ſuch oaths infamous; and leſt the minor might be backward to bring, in his own name, a reduction of the deed which he had ſworn not to revoke, it was made lawful to any of his kinſmen to purſue an action for ſetting it aſide. But if the minor, at any time after his age of twenty-one, even within the *quadriennium*, approve the deed done in his minority, either expreſsly by a formal ratification, or tacitly by any act importing approbation, *ex. gr.* by paying the intereſt due upon it, reſtitution is excluded; for ſuch approbation gives to the original deed approved, the ſame validity, as if that original deed had been granted of equal date with the approbation.

40. It is generally ſaid by doctors, that a minor cannot, *in pari caſu*, be reſtored againſt a minor; becauſe both parties have equal privilege. The rules obſerved in this caſe by the Roman law appear equitable, that where the one party is truly a ſufferer, while the other graſps at profit, reſtitution is competent to the firſt againſt the laſt, in ſo far as the laſt may be a gainer. Where both are ſufferers, without fraud on either ſide, the poſſeſſor's caſe is deemed the moſt favourable, *l.* 91. § 3. *in fin. De verb. ob.*; and on this ground, one minor who has borrowed a ſum from another, and hath ſpent it unprofitably, is not bound to repay it, *l.* 11. § *pen. De minor.* A minor may ſue for reſtitution, not only againſt the original creditor in the deed brought under challenge, but againſt thoſe who have acquired the debt without a valuable conſideration. Nay, though they be onerous purchaſers, the minor may be reſtored againſt them, if the right they have acquired be barely perſonal; for it is a general rule in all perſonal rights, That every exception is good againſt the onerous purchaſer which is good againſt the original creditor. But if the right be real, completed by ſeiſin in the perſon of the original creditor, the onerous purchaſer, who relied on the faith of the records, is ſecure againſt reduction, unleſs the right has been rendered litigious by a ſuit prior to the purchaſe, *Jan.* 25. 1728, *Gourlay*; or unleſs the purchaſer was *in mala fide* to acquire, knowing that the right was granted by a minor.

41. A minor's reſtitution ought, not only from the nature of the privilege, but from equity, to be both mutual and complete. Where matters are entire, the other party ought to be fully reſtored to his former ſtate, as well as the minor, *l.* 24. § 4. *De minor.* Thus, in a reſtitution againſt a

ſale

ſale of lands, the minor, at the ſame time that he recovers the ſubject ſold, with the intermediate fruits which it has produced from the time of the ſale, muſt repay to the purchaſer the price received by him or his curators, with the intereſt of it; and he muſt alſo reimburſe him of the expence which he may have laid out on the ſubject while it was enjoyed by him, in ſo far as it has been brought by that expence to yield higher yearly profits. Where, from after accidents, reſtitution cannot be complete on both ſides, a diſtinction muſt be made between voluntary and neceſſary contracts. In voluntary, the minor ought to be reſtored fully, though the other party, who had it in his power not to have contracted, ſhould be a ſufferer; ſince it is for the benefit of minors that reſtitution was intended. Thus a minor who is reſtored againſt a ſale, cannot be compelled to pay the price to the purchaſer, unleſs in ſo far as it has been *in rem verſum*, *Dirl.* 61. And in like manner, when he is reſtored againſt a bond of borrowed money voluntarily granted by himſelf and his curators, the creditor will recover that part of the ſum only which has been employed profitably for the minor, *ſupr.* § 37. But in neceſſary contracts, where one is, without his own fact, brought under the neceſſity of contracting with a minor, there can be no reſtitution to the minor, whatever loſs he may ſuffer, unleſs the other party be alſo put in his own place. Thus a pupil who has been by his tutor ſerved heir to a bankrupt, cannot be reſtored againſt the ſervice, till he make payment to the bankrupt's creditors of all the intermediate rents of the eſtate, not only ſuch as were actually received by the tutor, but thoſe which he might have received, *Dec.* 1. 1708, *Barclay*; becauſe in that caſe the bankrupt's creditors were, by an act of the law uſed by the tutor himſelf, laid under a neceſſity of quitting the poſſeſſion to the tutor.

42. The privilege of reſtitution dies not, in all caſes, with the perſon intitled to it. Where he dies either in minority, or within the *anni utiles*, the law tranſmits that right in particular events to his heir, though ſuch heir be major, and conſequently intitled to no privilege in his own perſon. The following rules are obſerved in this point by the Roman law. If a minor ſucceed to a minor, the time indulged to the minor heir, within which he may exerciſe his anceſtor's right, is governed by his own minority, not by that of his anceſtor; and conſequently he has the benefit of all the years of his minority, and the whole *quadriennium* after, as a *legitimum tempus reſtitutionis*, *l.* 5. § 1. *C. De temp. in int. reſt.* If the anceſtor died a major, but within the *quadriennium*, the minor heir may, as in the firſt caſe, ſue for reſtitution at any time during his own minority; but no more of the *quadriennium* after his majority can be profitable to him, than remained not expired to his anceſtor when he died, *l.* 19. *verſ. Plane*, *De minor.* If a major, whether paſt his *quadriennium* or not, ſucceed to a minor, law allows him full four years, computed downwards from the minor's death, to make uſe of his right, becauſe the *quadriennium* was left entire to the minor at his death; and if he ſucceed to a major who died within the *quadriennium*, he cannot, by the ſame reaſon, avail himſelf of more of it than remained entire to the anceſtor when he died, *arg. d. l.* 19.; *l.* 5. § 2. *C. De temp. in int. reſt.* The only deciſion of the ſeſſion on this ſubject is, *March* 14. 1628, *Macmath.* Stair indeed affirms, *b.* 1. *t.* 6. § 44. that the rules laid down in act 1621, *c.* 6. concerning the privilege of minors, and their heirs, in the redemption of appriſings, are to be obſerved alſo in reſtitutions. But Mackenzie's opinion, § 12. *h. t.* is more probable, that that act ought not to be extended beyond the proper ſubject of it: and it is worth obſerving, that no argument is drawn from the act 1621 in the before-mentioned deciſion, though that judgement was pronounced only a few years after the act had paſſed.

43. Another

43. Another privilege hath been early introduced into our law for the benefit of minors, of the feudal kind; *Minor non tenetur placitare ſuper hereditate*, *Reg. Maj. l.* 3. *c.* 32. § 15. 16. 17.; *St. Gul. c.* 39. *Placitare* ſignifies to be party in a ſuit, from *placitum*, a vocable of the middle ages for ſuit or proceſs: and the meaning of the rule is, that a minor cannot be compelled to defend the right he has to the heritage of an anceſtor, when it is queſtioned by one who claims it under a title preferable to that which was in the anceſtor. Though the rule, as ſtated in our old law-books, is general, comprehending all heritage, from whatever quarter it ſhould come, it has been limited for two centuries paſt to *hereditas paterna*, and ſo has no place in heritage derived from collaterals, as brothers, uncles, &c. But Stair, *b.* 1. *t.* 6. § 45. includes under it inheritances flowing from the mother, and, in general, from any aſcendent in the right line, either by the father or mother, however remote.

44. *Hereditas*, or heritage, when it is oppoſed to executry, includes all rights which bear a tract of future time; but, in this place, it is underſtood more ſtrictly of thoſe only which are in their nature perpetual. A leaſe therefore, though for the longeſt term of years, falls not under this rule. As the privilege is feudal, all rights which are *fundo annexa* are comprehended under it, even incorporeal ones, *ex. gr.* rights of patronage, *Harc.* 703. and all rights of property, even redeemable, as wadſets granted to the minor's anceſtor, where the action brought againſt the minor is intended to ſet them aſide upon any ground of nullity, *Fount. Nov.* 21. 1694, *Davidſon*. But the privilege is not admitted in rights which were not veſted in the anceſtor by ſeiſin, where ſeiſin is neceſſary to perfect them; becauſe ſuch rights are barely perſonal, not feudal. If therefore a father whoſe only title to lands is a charter, or diſpoſition, die before taking infeftment in them, the minor heir, againſt whom an action is brought after the father's death for evicting theſe lands, muſt anſwer to the ſuit, *Jan.* 31. 1665, *Kello*. Yet, *firſt*, If ſeiſin has been taken on the right by the father's author, and if the father was afterwards in the natural poſſeſſion of the ſubject, though without ſeiſin, the minor heir is intitled to the privilege, *June* 23. 1625, *Pringle*. *2dly*, He may plead it, if either the father himſelf, or his author, had done all in his power to obtain infeftment; if, *ex. gr.* the father had charged the ſuperior to infeft him in lands which he had adjudged from his debtor, the ſuperior's vaſſal; for ſuch charge is, in the judgement of law, equivalent in this queſtion to actual ſeiſin, *Pr. Falc.* 66. An eſtate in which the minor's father had done *omne quod in ſe erat* to obtain infeftment, is accounted the minor's heritage, though it had been conqueſt in the father's perſon; *i. e.* though it had been acquired by him upon a ſingular title. For though lands enjoyed by deſcent from an anceſtor, and lands acquired by one's ſelf, are oppoſed to each other in a queſtion concerning the ſucceſſion of the next heir; yet, where the minor hath actually ſucceeded to his father in that conqueſt, it is juſtly deemed *hereditas paterna* as to him, ſince it is an inheritance which has deſcended to him from his father, *d. Pr. Falc.* 66.

45. This privilege may be pleaded by a minor who is cited as party to a ſuit, though the right which is directly conteſted by the purſuer, ſhould belong to a major, if the eviction of the minor's heritage muſt neceſſarily be the conſequence of ſetting aſide the major's right, *June* 23. 1625, *Pringle;* for the privilege which was deſigned to protect minors againſt the eviction of their paternal inheritance would be eluſory, if the law admitted any proceeding againſt the minor which muſt neceſſarily iſſue in ſuch eviction. It is true, that all privileges are perſonal, and ſo cannot be communicated to others: where therefore the validity of the minor's right de-

pends on that of a major, the minor's privilege cannot defend the major from an action of reduction, unleſs their rights be ſo connected together, that they are inſeparable; *ex. gr.* if the major and minor be joint proprietors of the ſame ſubject. But no ſentence pronounced in the action againſt the major can affect the minor; who, though he be called as a party, is not obliged to anſwer, agreeably to the rule, *Res judicata inter alios, aliis neque nocet neque prodeſt*; ſee *Nov.* 25. 1624, *Hamilton.*

46. This privilege is in ſeveral caſes excluded. *Firſt*, It cannot avail the minor in actions which relate either to the ſettling of marches, or to the diviſion of lands; for the firſt ſort is intended barely for fixing boundaries, and the other for aſcertaining the juſt proportion of property which the minor ought to have in a ſubject that was before common to him with others: but neither of them tends to cut off from the minor any right competent to him in his anceſtor's heritable property. On the ſame ground, it does not obtain in actions of moleſtation *in poſſeſſorio*, *Dirl.* 64. nor in any judgement merely poſſeſſory, *Mack. Obſ. on act* 1587, *c.* 42. *2dly*, It does not defend the minor againſt the ſuperior ſuing for his feu-duties, or for feudal caſualties or delinquencies; ſeeing ſuch actions, in place of queſtioning the minor's right, acknowledge it to be good; and they are, in the common caſe, deſigned, not to evict any heritage, but to recover that debt with which law has burdened it in favour of the *dominus directus*, or ſuperior. We ſhall afterwards learn, *b.* 2. *t.* 5. § 11. that this doctrine holds, even in ſuch caſualties as infer a total eviction of the lands. *3dly*, It cannot be pleaded in bar of any action for evicting the minor's heritage which had been commenced againſt the father in his own lifetime. This exception is grounded on the rule to be explained hereafter, *Actio contra defunctum cœpta, continuatur in heredes.* By this rule, though a ſuit ſhould not be tranſmiſſible of its own nature againſt heirs; yet, if it be begun againſt the party himſelf, it may be continued againſt his heirs: and it ought, with ſtronger reaſon, to be thus tranſmitted in the preſent caſe, where the action lies againſt the heir at common law, but, on account of a temporary privilege, is ſuſpended only for a time. *4thly*, If the privilege fails, where action was begun againſt the father, though he had retained the poſſeſſion, it muſt alſo fail, where the father had loſt the lawful and peaceable poſſeſſion of the eſtate before his death. *5thly*, It is not pleadable by a minor, ſo long as he puts off entering to his father; for till he be ſerved heir to him, he can have no intereſt to put in any plea relative to ſubjects which belonged to him, *Pr. Falc.* 66. And it appears both by *Reg. Maj. l.* 3. *c.* 32. § 3. and from the courſe of our deciſions, that he ought to be alſo infeft on his ſervice. But the moment that he has completed his titles, he can avail himſelf of this privilege; and therefore the production of his ſpecial ſervice, and ſeiſin upon it, in any proceſs of reduction, ſuperſedes the neceſſity of all farther production of writings till his majority: for to what purpoſe ſhould more be produced, ſince the action itſelf cannot proceed againſt the minor, after proving his title as heir to his father in the ſubject? Yet where the grounds of reduction depend on parole-evidence to be brought by the purſuer, the court will, notwithſtanding the minor's privilege, examine the witneſſes, that the mean of proof may not periſh, *Jan.* 31. 1665, *Kello.* From theſe obſervations, it is conſequent, *6thly*, That no other than the heir of the inveſtiture is intitled to the benefit of this privilege. Where therefore the deceaſed had, by charter and ſeiſin, completed his right to a ſubject which ſtands deviſed to heirs-male, it is not competent to his heir of line, if a ſuit ſhould be brought againſt him after the anceſtor's death for evicting that ſubject from him, to plead the benefit of the rule; for a minor, before he is intitled to ſuch plea, ought to be ſerved

ved heir in the ſubject, and the heir of line cannot poſſibly be ſerved heir in a ſubject from which he is expreſsly excluded by the inveſtiture. 7*thly*, This privilege is not competent, when the minor is ſued upon his father's fraud or delict, *Dec.* 27. 1711, *Craufurd*. Neither, *a fortiori*, is it competent, nor indeed any privilege of a civil kind, where the action is founded on the fraud or delict of the minor himſelf. What privilege minors have in defending themſelves againſt proper criminal accuſations, *vid. infr. b.* 4. *t.* 4. § 82. 8*thly*, As a minor cannot plead this feudal privilege in an action in which his anceſtor's right is acknowledged by the purſuer, neither is it competent to him where the action is grounded upon the anceſtor's obligation to convey that right; for the purſuer is in that caſe ſo far from impugning the anceſtor's title, that he reſts his claim upon it, and barely inſiſts, that the minor may be decreed to fulfil his anceſtor's deed, *July* 25. 1710, *Mackenzie*. Hence alſo it cannot be pleaded in bar of an action for payment of the anceſtor's debt, conſtituted by a liquid obligation, though that action ſhould be the ground of an adjudication, by which the minor's heritage muſt be neceſſarily evicted, *Reg. Maj. l.* 3. *c.* 32. § 16. And for the ſame reaſon it is not competent to the minor againſt a reverſer, who had granted a wadſet of his lands to the minor's anceſtor, and inſiſts in a declarator of redemption; for the only purpoſe of ſuch action is, that the lands be ſurrendered to the purſuer upon payment of the debt, in the preciſe terms of the anceſtor's right. Neither is the deciſion obſerved by Fountainhall, *Nov.* 21. 1694, *Davidſon*, inconſiſtent with this doctrine; becauſe there the purſuer was not inſiſting to redeem the wadſet granted to the minor's anceſtor, but to ſet it aſide upon a legal ground of reduction, *ex capite inhibitionis*; againſt which action, as tending directly to evict the minor's heritage in point of right, the minor might undoubtedly plead the privilege. *Laſtly*, It is the common opinion, that the minor cannot defend himſelf on this privilege againſt a minor who ſues for reduction on the head of minority and leſion; not merely becauſe the purſuer has in that caſe equal privilege with the defender, but alſo becauſe the caſe of the purſuer, who is *in damno vitando*, is more favourable than that of the defender, who is *in lucro captando*.

47. It may be mentioned, as another legal privilege of minority, that the perſons of pupils are ſecured againſt impriſonment upon civil debts, by 1696, *c.* 41. The rights of minors in the matter of preſcription, redemption of adjudications, &c. are to be explained under their proper heads.

48. It has been ſaid, that our law provides curators, not only for minors, but for every perſon who, either from a total defect of judgement, or, 2*dly*, from a diſordered brain, or, 3*dly*, from the wrong texture or diſpoſition of the organs, is naturally incapable of managing affairs with diſcretion. Of the firſt claſs are fatuous perſons, called alſo idiots in our law, who are entirely deprived of the faculty of reaſon, and have an uniform ſtupidity and inattention in their manner, and childiſhneſs in their ſpeech, which generally diſtinguiſh them from other men; and this diſtemper of mind is commonly from the birth, and incurable. Furious perſons, who may be ranked in the ſecond claſs, cannot be ſaid to be deprived of judgement; for they are frequently known to reaſon with acuteneſs: but an exceſs of ſpirits, and an overheated imagination, obſtruct the application of their reaſon to the ordinary purpoſes of life; and their infirmity is generally brought on by ſickneſs, diſappointment, or other external accidents, and frequently interrupted by lucid intervals. Under theſe may be included madmen; though their madneſs ſhould not diſcover itſelf by acts of fury, but by a certain wildneſs of behaviour flowing from a diſturbed fancy. Lunatics are thoſe who are ſeized with periodical fits of frenzy.

frenzy. Some doctors diſtinguiſh between fatuity, and a certain degree of imbecillity which nearly approaches to it. They define a fatuous perſon, *is qui omnino deſipit*, who is quite deſtitute of reaſon; but if the perſon appears to have the leaſt ſpark of judgement, *ſi aliquid ſapit*, they affirm, that he may by himſelf, without the conſent of curators, execute deeds of leſſer moment, which cannot, in their nature, prove ſo hurtful to him. This diſtinction appears to have received ſome ſupport from our practice, in the caſe of one who was found to have underſtanding enough to make a teſtament; becauſe that is revocable at pleaſure: though he was adjudged incapable of ſigning a deed, diſabling himſelf from making a ſecond teſtament, whereby he would be ſtripped of all power over any of his effects, *Tinw. June* 16. 1752, *Halliday*. And, upon the ſame ground, the marriage of a perſon was declared null, upon the head of imbecillity or fatuity, though, by his anſwers to certain queſtions judicially put to him, he appeared to be not abſolutely void of reaſon; becauſe the tie made by marriage is indiſſoluble, *July* 1747, *Blair of Borgue*. Stair, *b.* 4. *t.* 3. § 9. ſeems to take it for granted, that all who are dumb and deaf from the birth are, without exception, incapable of management; as to which, *vid. infr. b.* 3. *t.* 1. § 16. But however this queſtion ought to be decided, thus far muſt be allowed to his Lordſhip, that where ſuch as labour under that infirmity cannot properly exert their reaſon in the conduct of life, curators may be appointed for them as well as for minors.

49. There has been, it is believed, no inſtance in our practice of teſtamentary curators given to idiots: but ſurely where any natural incapacity appears in a ſon for management, the father is as juſtly intitled to name a curator to manage for him, while he continues under that diſability, as he is to appoint one for protecting him againſt the follies of youth; and this was the doctrine of the Roman law, *l.* 16. *pr. De cur. furioſ.* Yet before the teſtamentary curator can enter upon the exerciſe of his office, the ſon ought to be declared or cognoſced an idiot by the ſentence of a judge; ſince no perſon is after majority to be denied the right of conducting his own affairs, unleſs he be properly declared incapable of it. The regular method therefore pointed out by our law for declaring fatuity or furioſity is, by brieves iſſuing from the chancery, and directed to a judge; who is ordained to call an inqueſt for inquiring, *firſt*, Into the perſon's true ſtate; and, *2dly*, Who is the next male agnate, on whom the office of curatory may be conferred, *Cr. lib.* 1. *dieg.* 12. § 29.; 1475, *c.* 67. It has been already obſerved, that brieves of tutory may be directed to any judge, being *juriſdictionis voluntariæ*; but brieves of idiotry and furioſity can be directed to no other than the judge-ordinary of the territory where the perſon who is ſaid to be fatuous or furious, reſides: and he ought to be made a party to the brief, becauſe if he be truly of a ſound mind, he has good intereſt to oppoſe it; and inſtances have occurred of ſuch brieves being advocated upon the party's oppoſition.

50. As to the firſt head of the brief, the condition of him who is alledged to be fatuous or furious, the inquiry of the inqueſt was, by our old law, confined to his preſent ſtate; whether he was, while the inqueſt were ſitting, of a ſound mind: and conſequently, when one was to ſet aſide, on the head of fatuity, a deed granted prior to the verdict of the inqueſt, it behoved him to bring evidence that the granter was fatuous at the preciſe time of granting the deed; becauſe though an inqueſt had declared him an idiot poſterior to the date of the deed, yet the evidence laid before the inqueſt, which was limited to his preſent ſtate, could be of no uſe towards proving his fatuity ſtill farther back, to the date of the deed brought under challenge. That theſe verdicts, therefore, might be of more general uſe, the inqueſt was ordained, by 1475, *c.* 67. to inquire how long the perſon had

had been fatuous; and it was enacted, that no alienation made by him after the time fixed by the inqueſt as the commencement of his diſtemper, ſhould be valid. Thus the verdict is now a ſufficient foundation, without farther evidence, for ſetting aſide, not only all ſuch deeds of the fatuous perſon as were granted after producing the evidence to the inqueſt, but likewiſe ſuch as were granted before that, if after the time when according to the proof the fatuity began. As to the ſecond head, concerning the perſon to be appointed curator, our law hath always committed the care of fatuous perſons to the next male agnate, in the ſame manner as in the tutory of minors: but the care of furious perſons belonged anciently to the crown, becauſe the King alone has the power of coercing with fetters or chains, *Cr. lib. 2. dieg.* 20. § 9. This diſtinction is aboliſhed by 1585, *c.* 18. which ſtatutes, that the next agnate ſhall be preferred to the tutory and curatory, both of fatuous and furious perſons, according to the common law. It would ſeem, that ſuch agnate ought to have attained the age of twenty-five; not merely becauſe the Roman law, to which the act refers, requires that age in all tutors and curators, but chiefly, becauſe by a ſtatute of our own, 1474, *c.* 52. the next agnate of twenty-five years of age is expreſsly declared to be, for the future, lawful tutor. And it is obvious, that the guardians given by the law to idiots are tutors in the moſt proper ſenſe: They are given *perſonæ*, to wards who are incapable of conſent; they have the name of tutors given them by the aforeſaid act, 1585, *c.* 18; and they are appointed upon brieves, in the ſame form as tutors of law to minors are: and ſince the words of the act 1474 may with great propriety receive this interpretation, why ought they to be reſtricted, ſo as to exclude the tutory of idiots, which is an office requiring as great a degree of prudence and aſſiduity as that of minors. It muſt be admitted, that in the brieves of tutory to minors, one of the heads is, Whether the next agnate be twenty-five years? whereas in that of idiotry it is left in general, *Si ſit legitimæ ætatis*; but the ſtyle of the two brieves continuing different in this clauſe ſince the act 1474, may have proceeded from the overſcrupulouſneſs of the chancery-clerks, who ſuſpected, that if they had made both writs run in the ſame ſtyle, they might be charged with aſſuming a power, by changing the ſtyle of writs without an expreſs warrant, of altering our laws or uſages, according to their fancy, by inconcluſive implications. A father has a right, founded in nature itſelf, to the curatory of his fatuous or furious ſon: and a huſband, as his wife's adminiſtrator-in-law, excludes agnates, in the caſe of her fatuity, in the ſame manner that he excludes them in the caſe of her minority; though this is contrary to the Roman law, *l.* 14. *De curat. fur.*; ſee *ſupr. t.* 6. § 20. There is no difference in the ſtyle between the two brieves of idiotry and furioſity, except in the clauſe expreſſing the different conditions of the perſons. In the brief of idiotry the words are, *Si ſit incompos mentis, fatuus, et naturaliter idiota*; in that of furioſity, *Si ſit incompos mentis, prodigus, et furioſus, viz. qui nec tempus nec modum impenſarum habet, ſed bona dilacerando profundit.* By this deſcription of the furious perſon, one might be apt to underſtand a prodigal, rather than a madman; but it will ſoon appear, that the hands of prodigals are tied up by quite different forms of law.

51. When one is to be cognoſced fatuous or furious, his perſon ought regularly to be exhibited to the inqueſt, that they may be the better able, after conferring with him, to form a judgement of his ſtate from their own knowledge: and this holds more eſpecially in the caſes of fatuity, and of a diſtempered brain, which are habitudes not quite ſo obvious to the ſenſes as furioſity, and in ſome caſes hardly to be diſcovered but by conference. The verdict, therefore, of the inqueſt, concerning the perſon's preſent con-

dition, is grounded on the conviction ariſing in their breaſts from what themſelves have ſeen: but that part of it which looks backward to his paſt ſtate, muſt of neceſſity reſt ſolely on the teſtimony of witneſſes. As fatuous and furious perſons are, by their very ſtate, incapable of conſent, and conſequently of obligation, all deeds granted by them may be declared void, by an action before the ſeſſion, at the ſuit even of their heirs, upon proper evidence by witneſſes of their fatuity or furioſity at the time of ſigning, though they ſhould never have been cognoſced idiots during their lives by an inqueſt, *July* 26. 1638, *Loch*; *Fount. Feb.* 13. 1700, *Aird.* Some few inſtances occur, of the Sovereign's giving curators to idiots, where the next agnate has not claimed the office: but ſuch gifts are truly a deviation from our law, ſince they paſs, without any inquiry into the ſtate of the perſon to whom the curator is appointed; and they are admitted only from neceſſity, that the affairs of the idiot may not ſuffer. Hence the curator of law to an idiot, though he ſhould not ſerve till after the year in which he might have ſerved, is preferred to the tutor-dative as ſoon as he offers himſelf, *Jan.* 21. 1663, *Steuart*; *Fount. Feb.* 28. 1710, *L. Mornipae.*

52. The powers of curators to idiots and furious perſons, and the obligations which their offices bring them under, are preciſely the ſame as thoſe of tutors to pupils, and ſo need not be repeated. Their office expires, either by the death of the perſon under curatory, or by his return to a ſound mind. But a curator cannot reſign his office on the ſhort lucid intervals that commonly attend furioſity: it is neceſſary that the diſtemper be radically cured; and that ought regularly to be declared by the ſentence of a judge. It is probable, that the benefit of reſtitution competent to minors would from analogy be indulged to idiots and furious perſons. *Bank. b.* 1. *t.* 7. § 106.

53. Perſons, let them be ever ſo profuſe, or liable to be impoſed upon, if they have the exerciſe of reaſon, can effectually oblige themſelves, till they be fettered by the methods of law. This is done by interdiction; which may be defined, a legal reſtraint laid upon thoſe who, either through their profuſeneſs, or the extreme facility of their tempers, are too eaſily induced to make hurtful conveyances, by which they are diſabled from ſigning any deed to their prejudice, without the conſent of their curators, who are called *interdictors.* Interdiction is either voluntary or judicial. In voluntary interdiction, the perſon to be interdicted agrees to the reſtraint. This ſort is generally executed by a writing, in the form of an obligation, by which the granter, ſenſible of his own unfitneſs for buſineſs, binds himſelf to do no deed that may hurt his eſtate, without conſent of the friends therein particularly mentioned. By the Roman law, there could be no interdiction, without a previous inquiry into the condition of him who was to be laid under it, *l.* 6. *De curat. fur.*; for it was deemed contrary to the nature of property, that any man ſhould be ſubjected, even by his own conſent, in the diſpoſal of his eſtate, to the humour or caprice of another, without legal grounds. Agreeably to this, interdictions were, by our ancient practice, diſallowed, when they were granted *citra cauſæ cognitionem*,—*Hope, Interdiction, Jan.* 30. 1618, *Robertſon.* But becauſe few perſons could bear the ſhame which attends judicial interdictions, even when they knew that the reſtraint was neceſſary for the preſervation of their families, voluntary interdictions have gradually received the countenance of law, *Dec.* 11. 1622, *Seton; Fount. Dec.* 23. 1703, *Row.* Upon this ground a bond of interdiction will be ſuſtained, though the cauſes of granting which are recited in the bond, be but gently touched, or inſufficient to found a judicial interdiction; for men are naturally backward to acknowledge their unfitneſs for buſineſs by an explicit declaration under their hand; ſee *Nov.* 10. 1676, *Steuart.*

54. Judicial

54. Judicial interdiction is impoſed by a ſentence of the judge, diſabling perſons of profuſe or facile diſpoſitions from granting deeds to their prejudice, without the conſent of interdictors. Interdiction being an extraordinary remedy, belongs only to judges veſted with the *nobile officium*. By the Roman law, it was the pretor who interdicted; by ours, the cogniſance of judicial interdictions is proper to the court of ſeſſion. Their ſentence proceeds either, *firſt*, *poſt cauſam cognitam*, upon an action brought againſt the prodigal, by his heir, or his next of kin; or, *2dly*, *ex nobili officio* of the judge; who, if he perceive, during the pendency of a ſuit, that either of the litigants is, from the facility of his temper, ſubject to impoſition, will interdict him *ex proprio motu*, *Feb.* 17. 1681, *Robertſon*. The ſentence of the court impoſing this reſtraint has no retroſpective quality, as the verdict upon a brief of idiotry has: for an idiot, being deſtitute of reaſon, is incapable of obligation; whereas the prodigal, ſince he has the exerciſe of reaſon, muſt neceſſarily be obliged by his own deeds, till he is put under ſome legal reſtraint. Beſides, the firſt appearance of an idiot frequently betrays him; whereas one who contracts with a prodigal, can ſeldom diſcover, from his appearance or converſation, the profuſeneſs, or even the facility of his temper, and is conſequently *in bona fide* to deal with him till he be properly interpelled. Thoſe lawyers therefore appear to be miſtaken, *Bank. b.* 1. *t.* 7. § 118. who affirm, that prodigals may be interdicted on a brief of furioſity: for though the deſcription of the furious perſon in that brief may be properly enough applied in ſundry particulars to a prodigal, yet that clauſe which contains the retroſpect, *quamdiu ſuſtinuit iſtam furioſitatem*, cannot.

55. Though voluntary interdiction be impoſed by the ſole act of the perſon interdicted, without the authority of a judge; yet, after it is impoſed, it cannot be recalled at his pleaſure; becauſe the law, preſuming that he would not have laid himſelf under that reſtraint if he had not been conſcious of his incapacity for buſineſs, conſults his intereſt againſt his inclination, and therefore continues his fetters. Nevertheleſs the interdiction may be taken off, *firſt*, upon a proper proceſs brought before the ſeſſion by the interdicted, though it ſhould be oppoſed by the interdictors, if it ſhall appear in proof, either that there was from the beginning no juſt ground for the reſtraint, or that the purſuer hath, ſince the date of the bond, become *rei ſuæ providus*. *2dly*, Where the interdictors concur with the granter to have the reſtraint removed, the interdiction may be diſſolved by that mutual conſent, without the authority of the ſeſſion, even though the reaſon of granting the bond ſhould ſtill continue. After the interdictors named in the bond have given up their office, no *termini habiles* remain for continuing it, ſince there can be no interdiction without interdictors. On this ground, *3dly*, Where the bond of interdiction requires a determinate number for a quorum, a voluntary interdiction falls, if the interdictors are, by death or otherwiſe, reduced to a leſſer number, *Dec.* 8. 1708, *Hepburn*. Judicial interdiction cannot be taken off, but by the authority of the ſame court which impoſed it, finding that the party is become ſober. And this authority ſecures all who ſhall contract with him, though the ſtrongeſt evidence ſhould be brought, that he ſtill continues profuſe, or liable to be impoſed upon; for as it was the ſentence of the court which alone gave force to the reſtraint, the ſame authority is ſufficient to take it off.

56. There is no neceſſity for intimating an interdiction to the party who is laid under the reſtraint: for if the interdiction was voluntary, he himſelf was the impoſer of it; and if it was judicial, he was made a party to the action, and ſo is preſumed to have been preſent at the ſentence conſtituting it, *Dec.* 11. 1622, *Seton*. But interdictions muſt be publiſhed to all the

the lieges, and afterwards regiſtered, that the danger of contracting with thoſe who are laid under that reſtraint may be publicly known. And becauſe interdictions are declared to have no effect till regiſtration, 1581, *c.* 119. N° 1. the bare publiſhing of an interdiction is not deemed ſuch a notice or interpellation as puts third parties *in mala fide* to deal with the interdicted, *Colv. Nov.* 1586, *Cranſton.* Yet ſo ſoon as an interdiction is delivered to the interdictor, it operates againſt all deeds granted in favour of that interdictor after the delivery: for ſince it was his duty as interdictor to regiſter the interdiction without loſs of time, he muſt be *in peſſima fide* to avail himſelf of his own wilful or blameable omiſſion, *July* 24. 1678, *Grierſon; Dec.* 1725, *Tenant.* The forms required in the publiſhing and regiſtering of interdictions, being the ſame with thoſe that are eſſential to inhibitions, ſhall be explained *infra*, *b.* 2. *t.* 11. § 4. 5.

57. It appears that interdiction, when it was firſt received into our practice, ſecured the moveable as well as the heritable eſtate of the interdicted from alienation: *Firſt*, By the ſtyle of letters of interdiction (which continues to this day) reſtraining the party from doing any deed, without the conſent of his interdictors, by which he may be hurt either in his lands or moveables: *2dly*, By our uſage, which was for a long time conformable to that ſtyle; for though particular kinds of obligations granted after interdiction have been always ſuſtained from favour to the creditors, as bonds granted to artificers for the price of their works, or for wages, *July* 29. 1624, *L. Collington;* yet the general rule continued, that interdiction ſecured the whole eſtate of the interdicted without any diſtinction; ſee *July* 7. 1625, *Son of L. Innerwick*; with this limitation nevertheleſs, that even in the period where moveables were ſecured by interdiction, denunciation might proceed on moveable bonds granted after that reſtraint; in conſequence of which, the liferent eſcheat of the interdicted fell, *Hadd. Feb.* 8. 1610, *Hay*, and *Dec.* 21. 1610, *L. Brockſmouth*, mentioned by Stair, *b.* 1. *t.* 6. § 41. As this proved an obſtruction to the free courſe of trade, it obtained at laſt, *July* 11. 1634, *Bruce*, for the encouragement of commerce, that the interdicted ſhould have, notwithſtanding his reſtraint, full power over his moveables, ſo as to diſpoſe of them at pleaſure, not only for onerous cauſes, or by teſtament, but by preſent gratuitous deeds of alienation, *June* 20. 1671, *Crawfurd*; ſee *Fount. Feb.* 8. 1684, *Sir B. Davidſon.* The queſtion, Whether obligations, with a clauſe of infeftment, granted for ſecuring ſums of money, but not made real by actual ſeiſin, are in this particular to be accounted moveable, ſo as they may be alienated after interdiction? is to be diſcuſſed, *b.* 2. *t.* 11. § 9. the law being the ſame as to that point in inhibitions and interdictions. Though in conſequence of the power that the party interdicted continues to have over his moveables, all perſonal bonds granted by him after interdiction are effectual, in ſo far as concerns his perſon and perſonal eſtate, to the creditor, to whom all perſonal diligence is competent; yet not only moveable obligations, *July* 24. 1678, *Grierſon*, but even releaſes or diſcharges of them, granted by him after that period in favour of his debtors, *Edg. Jan.* 31. 1724, *Arbuthnots*, are reducible, in ſo far as they may either be the ground of diligence againſt his heritable eſtate, or may in the leaſt degree tend to incroach upon or impair it.

58. Since the law does not look on a perſon as if he had any defect of judgement from his being laid under interdiction, all his deeds, though granted without the conſent of his interdictors, are valid. They are indeed ſubject to reduction, where he appears to have been hurt or overreached; but where the deed is either onerous, *Goſf. Feb.* 27. 1672, or even rational, *Nov.* 10. 1676, *Steuart*, it is as effectual as if he had not been interdicted.

terdicted. As to deeds *mortis cauſa*, he hath doubtleſs a power of bequeathing his moveable eſtate by teſtament, ſince he may diſpoſe of it by preſent gratuitous deeds, which is a greater power; but he can make no ſettlement of his heritable eſtate, nor alter any former ſettlement of it, though upon the moſt rational grounds, either with or without his interdictors conſent, *Dec.* 27. 1725, *Tenants*; ſo that he is in that reſpect in a like condition with minors, who are utterly incapable of making deeds of ſettlement in relation to heritage. All deeds granted with conſent of the interdictors, are as valid as if the granter had been laid under no reſtraint, inſomuch that though groſs leſion ſhould be proved, he has not the remedy of reduction competent to minors: his only recourſe lies againſt the interdictors, whom he can ſue for making up to him what he has ſuffered through their undue conſent. This rule, That all deeds conſented to by the interdictors are effectual, was extended, by our older cuſtoms, even to ſuch as were granted in favour of the interdictors themſelves, which is mentioned with juſt indignation by Craig, *lib.* 1. *dieg.* 15. § 24. as contradicting another moſt equitable rule, by which the firſt ought to be limited, that no tutor, and conſequently no interdictor, whoſe office is a ſpecies of tutory, and implies as ſtrong a truſt, can be *auctor in rem ſuam*.

59. The action of reduction *ex capite interdictionis* is competent, *firſt*, To the interdictors, either before or after the death of the perſon under their care. *2dly*, It ſeems hard to deny this right of action to the interdicted perſon himſelf; for the benefit of interdiction, intended by the law for protecting him againſt hurtful deeds, would loſe much of its uſe, if he were not intitled to purſue that action by himſelf, in caſe the interdictors ſhould, from wilfulneſs or caprice, refuſe to lend their names to the ſuit. Yet it is certain, that the interdicted was not allowed, by our ancient practice, to ſue in his own name, for ſetting aſide a deed granted by himſelf, *Maitl. March* 14. 1554, *Ure*. *3dly*, Reduction may be purſued by the heir of the interdicted, who is accounted *eadem perſona* with the interdicted himſelf, *Dec.* 27. 1725, *Tenants*; and therefore can purſue for ſetting aſide any deed or conveyance by his anceſtor relating to heritage, which has been granted after interdiction. But, notwithſtanding this fictitious identity, the heir is ſubjected to no ſuch perſonal diligence upon his anceſtor's moveable obligations, as was competent againſt the granter himſelf, provided he abſtain from the moveable eſtate, *St. b.* 1, *t.* 6. § 41. *4thly*, This action is alſo competent to the aſſignees of the interdicted perſon, who come into the right of the interdicted himſelf, *St. b.* 1. *t.* 6. § 42. And, *laſtly*, To the creditors-adjudgers of the ſpecial ſubject conveyed by the interdicted without conſent of the interdictors, *Feb.* 20. 1666, *Lo. Salton*. The nullity of deeds on the head of interdiction, is not receivable by way of exception, but muſt be inſiſted in by an action of reduction, *June* 20. 1671, *Crawfurd*; ſee *Stair*, *b.* 1. *t.* 6. § 42. The duty of interdictors differs much from that of proper tutors or curators: for they are neither given *perſonæ*, as tutors are, to ſuſtain the perſon of their ward; nor *rei*, as curators, to manage his eſtate; but barely *ad auctoritatem præſtandam*, to give their conſent to ſuch deeds affecting heritage as it is reaſonable for the interdicted to grant. Hence, interdictors are not liable for omiſſions; for they have no ſubject to manage: all that they are anſwerable for is, their fault, or fraud, in conſenting to deeds which may be granted by the interdicted to his prejudice.

II. *Of the Relation between Maſter and Servant.*

60. By the Roman law, ſervants, or *ſervi*, were the property of their maſters, and might be bought and ſold as their goods; ſo that they were

conſidered as ſubjects of commerce rather than as perſons; and whatever they acquired, either by teſtament or their own induſtry, accrued to their maſters. The Romans had alſo a kind of ſlaves, called *adſcripti*, or *adſcriptitii*, who were bound to perpetual ſervice in cultivating a particular field or farm, and who were rather ſlaves to that farm, than to the owner of it; ſo that he could not transfer his right in them, without alienating the farm to which they were aſtricted, *tit. C. De agric.* Much like to theſe were our ancient *nativi*, or bondmen; who could not indeed be ſold by their maſters, but in moſt other reſpects reſembled the Roman *ſervi*; for they had nothing which they could call their own, *Reg. Maj. l. 2. c. 12. § 4. 5.*; *Q. Att. c. 56.*: yet they preſcribed an immunity from their ſervitude, by reſiding for a year together in any royal borough without challenge from their maſter, *Reg. Maj. l. 2. c. 12. § 17.* All ſervants have now of a long time enjoyed the ſame rights, by our uſage, as other ſubjects, unleſs in ſo far as they are limited by ſtatute, or by their own voluntary engagements.

61. Servants are, by our preſent law, either neceſſary or voluntary. Thoſe may be called neceſſary, whom the law obliges to work. Of this ſort are, *firſt*, indigent children, who, if they be declared indigent by the magiſtrates of the borough, or kirk-ſeſſion, where they are ſeized, may be compelled, by 1617, *c.* 10. to ſerve any of the King's ſubjects without wages, till their age of thirty; and whatever is gained by their work during that period, is gained to their maſters. *2dly*, Vagrant and ſturdy beggars may, by 1663, *c.* 16. be compelled into ſervice by any manufacturer within the kingdom, at the ſight of the magiſtrates of the place where they are laid hold on. And becauſe few perſons were willing to take vagrants into their ſervice, public workhouſes are, by 1672, *c.* 18. ordained to be built in the ſeveral boroughs mentioned in the act, for entertaining and ſetting to work vagrants and idle perſons; and the profits of their labour are, by that act, appropriated for the ſupport of the houſes. *3dly*, If labourers, workmen, or ſervants, ſhall refuſe to ſerve at the rates fixed by the juſtices of the peace, the juſtices may compel them to it, by impriſonment, or farther puniſhment, at their diſcretion, 1661, *c.* 38. By labourers or ſervants, in this clauſe of the act, may be underſtood all able-bodied men or women, who have neither a ſufficient ſtock for their maintenance, nor any ſettled employment, though they ſhould not have, at any time formerly, earned a livelihood by ſervice. In this claſs of neceſſary ſervants may be reckoned colliers, coal-bearers, ſalters, and other workmen neceſſary for the carrying on of collieries, and ſalt-works, as they are particularly deſcribed in 1661, *c.* 56. Theſe are, by the law itſelf, without any paction, bound, merely by their entering upon work in a colliery or ſalt-manufactory, to the perpetual ſervice thereof; and if the owner ſell or alien the ground upon which the works ſtand, the right of the ſervice of theſe colliers, ſalters, &c. paſſes over to the purchaſer, as *fundo annexum*, without any expreſs grant: yet, to cut off all cavilling, it is uſual to inſert in the diſpoſition a ſpecial clauſe, making over that right to the grantee. If the proprietor have a ſeparate colliery at a moderate diſtance from the firſt, he may compel the collier to work at either of the two; and the ſame is the caſe with ſalters. All proprietors of colliers are prohibited to receive into their ſervice thoſe who fall under the deſcription of the act 1661, without a teſtimonial from their former maſter; and where colliers and ſalters deſert from the ſervice they are bound to, and enter on work elſewhere, he who receives them without a teſtimonial, muſt reſtore them to their maſter within twenty-four hours after they are reclaimed, under the penalty of L. 100 Scots, provided they be reclaimed within a year from their deſertion, 1606, *c.* 11. If the deſerters ſhould not be reclaimed within the year, he cannot indeed plead the

the benefit of that clauſe, by which the poſſeſſor is obliged to reſtore them under a penalty: but he does not, by that ſhort preſcription, loſe his property in the deſerters; for the act, which was made in favour of coalmaſters, ought not to be ſo interpreted as to cut off or weaken any right to which they had been intitled by our former law or cuſtom, *New Coll.* i. 117. There is no room for this legal aſtriction in the following caſes. *Firſt*, If a child ſhall, during his pupillarity, while he is yet incapable of conſent, be entered as a bearer into a colliery, by his parent, or other kinſman, he can hardly be ſaid to be aſtricted in the terms of that ſtatute, unleſs he ſhall continue to work in the colliery after puberty. *2dly*, Children who enter as bearers to their fathers, in a work to which the father was not originally aſtricted, even after having attained the age of puberty, are preſumed to have been employed by the father to aſſiſt him, and ſo are left at liberty to withdraw their ſervice from that work without the proprietor's conſent; becauſe the proprietor, who was no party to any private agreement that may have paſſed between the father and ſon, cannot, by that agreement, acquire any right or power over the ſon; agreeably to the rule, *Res inter alios acta, aliis nec nocet nec prodeſt*. But it may be doubted whether this preſumption would exempt the ſon from becoming bound, by entering under his father to a colliery to which the father was from the beginning aſtricted. It may be added, *3dly*, That colliers, ſalters, &c. where the work to which they are aſtricted is either given up by the proprietor, or not ſufficient for their maintenance, may lawfully engage in other works for their neceſſary ſubſiſtence, *Hope, Coalheughs, March* 7. 1616. But this manner of getting free from the aſtriction is but temporary; for if the work be again refitted, the proprietor may reclaim them to it, *Fount. Feb.* 4. 1708, *Wallace*.

62. Voluntary ſervants are thoſe who enter into ſervice without compulſion, by an agreement or covenant, for a determinate time; either ſimply, for bed, board, and cloathing; or alſo for wages. Under voluntary ſervants may be included apprentices, (from the French *apprentice*), who engage to ſerve under a merchant, artificer, or manufacturer, for a determinate number of years, on condition, that the maſter ſhall, in that time, inſtruct them in the knowledge of his particular art or profeſſion. Minority is the proper age for apprentices to enter into theſe engagements. Where a pupil is to be bound, the father, tutor, or ſome kinſman, uſually engages for him; but no action lies upon the indentures againſt the pupil himſelf. Indentures entered into by a minor *pubes*, who has no curators, are valid; but may be ſet aſide on the head of minority and leſion; *ex. gr.* if a young gentleman of fortune ſhould bind himſelf to an employment beneath his birth or eſtate, or oblige himſelf to pay an enormous apprentice-fee. All maſters have a power of moderate chaſtiſement over their ſervants, whether voluntary or neceſſary; and the maſters of public workhouſes are, by 1672, *c.* 18. allowed to go all lengths in correction, life and torture excepted. It has been ſaid by ſome writers, that one cannot bind himſelf to perpetual ſervice; ſuch obligation being contrary to liberty, which is an unalienable right. But it is hard to conceive, how an engagement of that ſort, which is to laſt for life, is more inconſiſtent with liberty, than one which is to expire after twenty or thirty years. And there appears nothing repugnant either to reaſon, or to the peculiar doctrines of Chriſtianity, in a contract by which one binds himſelf to perpetual ſervice under a maſter, who, on his part, is obliged to maintain the other in all the neceſſaries of life, *Grot. De jure bell. l.* 2. *c.* 5. § 27. This however is certain, that, excepting the caſe, either of Turks or Moors, made ſlaves by way of repriſal, or of negroes bought for the uſe of the European ſettlements in the Indies,

Indies, the power claimed by maſters, of ſelling their ſervants, is not allowed in any Chriſtian country. And, by the practice of Holland, negro ſlaves, as ſoon as they ſet their foot in the Dutch territory, may aſſert their freedom from ſervitude, in ſpite of their maſters, *Voet ad tit. De ſtat. hom.* § 3.

63. The poor make the loweſt claſs or order of perſons. They may be divided into thoſe nuiſances to ſociety, who, though they are able, are not willing to work; and ſuch indigent perſons as from age or bodily infirmities cannot earn a ſufficient livelihood by labour. The puniſhments inflicted by law on the firſt ſort ſhall be explained, *b.* 4. *t.* 4. The poor who are aged, or diſabled from work, were appointed to be maintained by a tax to be levied upon the pariſhes where they were ſeverally born, 1535, *c.* 22. This tax was to be proportioned among the inhabitants of boroughs by the magiſtrates; and in landward pariſhes, by judges named by the King, 1579, *c.* 74. By a poſterior act, 1663, *c.* 16. a power is given to the landholders in landward pariſhes, to aſſeſs themſelves for the maintenance of ſuch of the poor as cannot fully maintain themſelves by labour, in the manner ſpecially deſcribed in that act, and to demand relief of the half of the ſum ſo raiſed, from their tenants. Where the place of a poor man's nativity is not known, the burden of his maintenance falls on the pariſh where he has had his moſt common reſort for the three years immediately preceding his being taken up, or his applying for the public charity, 1663, *c.* 16.; 1698, *c.* 21.; ſee *New Coll.* ii. 19.; and in a late caſe, *Aug.* 7. 1767, *Baxter*, it was adjudged, that the maintenance of indigent or poor perſons ought to fall on the pariſh of their laſt three years reſidence, even preferably to the pariſh of their birth, though that ſhould be known. In pariſhes where a ſufficient fund cannot be raiſed for all the poor, either by taxation, or by voluntary contribution at the church-doors, the magiſtrates of the borough or the kirk-ſeſſion are authoriſed to give them badges, as a ſufficient warrant to them to aſk alms at the dwelling-houſes of the inhabitants; but they muſt neither beg at churches, nor where there is any public meeting, nor without the limits of their own pariſh, 1579, *c.* 74.; 1672, *c.* 18. The execution of theſe regulations, ſo charitably intended for the relief of the poor, is attended with ſo much difficulty in moſt of our pariſhes, eſpecially thoſe which border upon the Highlands, that it is in few places only it has been attempted.

64. Before finiſhing the doctrine of perſons, a ſhort account may be given of communities, or corporations. A corporation, ſtyled by the Romans *collegium*, or *univerſitas*, is compoſed of a number of men united or erected by proper authority into a body-politic, to endure in continual ſucceſſion, with certain rights and capacities of purchaſing, ſuing, &c. as appear moſt ſuitable to the nature of that ſpecial community, and moſt neceſſary for anſwering the purpoſes intended by it. Cities, boroughs, hoſpitals, &c. may be thus incorporated; and we have frequent inſtances of leſſer corporations within greater. Thus, in moſt of the cities and boroughs of the kingdom, we ſee wrights, weavers, merchants, &c. incorporated, with certain rights and franchiſes granted to each of them: and of the ſame ſort may be reckoned the college of juſtice, which includes ſeveral leſſer corporations under it. As all corporations formed, or aſſemblies held, without the Sovereign's licence, are unlawful, *l.* 1. *pr. Quod. cuj. univ.*; *l.* 3. § 1. *De colleg. et corp.*; 1661, *c.* 4.; they cannot be conſtituted but by the King's patent, or by act of parliament. Corporations are accounted perſons, *l.* 22. *De fidej.* becauſe they have their own proper ſtock, rights, and privileges, as perſons have: and that union by which the individual members of a corporation are conſtituted into one body, makes each

each corporation to be conſidered as one perſon; ſo that no particular member can claim any property in the goods belonging to the community. Communities being eſtabliſhed for a public permanent good, are, for the moſt part, formed to perpetuity: and they continue always the ſame; for though the individuals of which they are compoſed muſt die out by degrees, thoſe that come in their places, either by ſucceſſion to the deceaſed, or by the election of the ſurvivors, or by the nomination of the founder, according as the charter is conceived, preſerve the corporation entire. Yet trading companies, whoſe duration is generally limited by the grant to a certain number of years, are likewiſe proper corporations; becauſe they too endure in continual ſucceſſion while they ſubſiſt. But copartnerſhips fall not under this deſcription: for they are intended merely for the private intereſt of the parties contracting, and may therefore be conſtituted without the Sovereign's permiſſion; and they laſt no longer than the lives of the partners. Communities have a power of naming magiſtrates, directors, or other adminiſtrators and officers, who may repreſent the whole community, and whoſe reſolutions may oblige them, in ſuch particular matters as theſe adminiſtrators are properly authoriſed to tranſact, by their charter, or by the powers granted to them by the community. There are ſeveral things ſo natural to a corporation, that the grant or charter is underſtood to include them without an expreſs clauſe to that purpoſe. Thus they have a capacity of purchaſing or bargaining for ſuch moveables as are neceſſary for their own uſe, and to be ſued for the price thereof; to have a common ſeal for authenticating all the conveyances, acquittances, and other deeds, which it is lawful for them to make by their charter; they may aſſemble or hold courts for deliberating upon their common concerns; and they have an implied power of making by-laws and ordinances, for the good order and right adminiſtration of the ſtock, and other affairs of the community, though ſuch power ſhould not be expreſſed in the incorporating charter. But this limitation is alſo implied, that their acts or ordinances ſhall not in any degree be repugnant to the laws of the kingdom. Communities are diſſolved, either by the expiration of the term to which they are limited, if they be temporary; or, 2*dly*, by act of parliament; or, 3*dly*, by forfeiture; when they abuſe the powers intruſted with them: in which laſt caſe, though all the members muſt ſuffer in their political capacity, no proſecution lies againſt ſuch of the individuals as had no acceſſion to the crime. After a community is diſſolved, the private members are not, in the general caſe, bound, even *ſubſidiariè*, for ſums borrowed by the corporation. The eſtate or goods which ſtill belong to the corporation are the only fund of the creditors payment: for it was upon the faith of the corporation, as ſuch, and not on that of any of the private members, that the money was lent.