69. In heritable rights which have been perfected by ſeiſin in the perſon of the anceſtor, the liferent eſcheat of the apparent heir (or heir not yet entered) falls to the ſuperior of the right, as if he were entered; for the heir's neglecting what was in his power to perform, ought to be neither profitable to himſelf, nor hurtful to the ſuperior, *July* 3. 1624, *Mure*. But if the rebel has acquired right to an heritable ſubject, not as heir, but as ſingular ſucceſſor, and is not infeft on his charter, he cannot be deemed vaſſal in the ſubject till he be ſeiſed; and of courſe, the ſuperior of the lands, ſince he is not ſuperior to the diſponee, cannot be intitled to his liferent-eſcheat. The rents, therefore, of ſuch lands, while the rebel continues unrelaxed, accrue to the King, *July* 22. 1675, *Menzies contra Kennedy:* not indeed by the liferent eſcheat; for the King, though he be the rebel's ſovereign, is not his ſuperior; but in the right of ſingle eſcheat, or more properly as a penal conſequence of rebellion, by which the whole of the rebel's moveable eſtate, which is not by ſpecial ſtatute or cuſtom appropriated to the ſuperior by the liferent eſcheat, falls to the King. On this ground, the intereſt due to a creditor, after his being year and day denounced upon a bond bearing a clauſe of infeftment, but without mentioning either lands or ſuperior, was adjudged to belong to the King or his donatary, *July* 1. 1626, *Haliburton*. Hence alſo, though perſonal bonds bearing intereſt are, by the act 1661, heritable *quoad fiſcum*; yet the whole intereſt that is due upon them falls to the King, not only what may have become due before the expiration of the year immediately enſuing the denunciation, (which falls properly under ſingle eſcheat), but all that may become due afterwards till relaxation; for it cannot accrue to any ſuperior by the liferent eſcheat.

70. By this caſualty, the ſuperior is intitled to the profits of all heritable rights, of which the rebel vaſſal is either full fiar, as an infeftment of property, a right of annualrent, &c.; or even bare liferenter, as a liferent of lands by the courteſy or terce, a liferent tack, a liferent office, &c.; but with the following difference between the two: In liferent rights, the caſualty cannot fall, if the rebel has acquired them by aſſignation; for in ſuch caſe, he can have no proper right to them in his own perſon, by which he may be intitled to the fruits during his own life: and hence a liferent infeftment, or a liferent tack, when it is aſſigned by the liferenter to another, falls not under the aſſignee's liferent eſcheat, but his ſingle, *July* 29. 1625, *Ker*; *ſupr.* § 61.; becauſe a proper liferent right cannot be communicated to the aſſignee, whoſe right by the conveyance reaches no farther than to the rents during the cedent's life, not during his own, *infr. t.* 9. § 41. Whereas heritable rights of property on which ſeiſin has followed, fall under the liferent eſcheat, even in the perſon of an aſſignee, *ex. gr.* a diſpoſition of lands, or an aſſignation of an infeftment of annualrent; becauſe the right of theſe is as fully veſted in an aſſignee upon a proper conveyance, as it was before in the proprietor or original creditor, and does in no degree depend on the life of the cedent. If liferent leaſes, when aſſigned, fall under the ſingle eſcheat, much more muſt leaſes for a definite number of years; for theſe fall under the ſingle eſcheat in the perſon of the tackſman himſelf: but it would ſeem, that a leaſe granted for a determinate time longer than the natural life of man, ought to fall under liferent eſcheat, both in the perſon of the tackſman and of his aſſignee, *Steu. v. Single eſcheat*; becauſe ſuch leaſe is as permanent in every reſpect as a liferent leaſe, and its duration of as long continuance in the perſon of the aſſignee as in that of the tackſman.

71. On the principle of the preceding ſection, no liferent right veſted in the wife, to the profits of which the huſband is intitled *jure mariti*, falls under

der the huſband's liferent eſcheat, but under his ſingle; for the *jus mariti* is a legal aſſignation to the huſband, which transfers to him the fruits of the ſubjects belonging to her merely during her life. By the ſame rule, the caſualty of liferent eſcheat, when it is tranſmitted to a donatary, becomes moveable in his perſon, and ſo falls under his ſingle eſcheat, *March* 10. 1631, *Steuart*. Hence, if we ſuppoſe the liferent eſcheat of a ſubvaſſal to fall firſt, by his being year and day denounced, and then that of the vaſſal, his immediate ſuperior, the ſubvaſſal's liferent, after it has accrued to the vaſſal, muſt make part of that vaſſal's ſingle eſcheat; becauſe the vaſſal's right to the ſubvaſſal's liferent is not a liferent right in his (the vaſſal's) perſon, ſince it depends, not on his own life, but on that of the ſubvaſſal; and therefore neceſſarily falls to the King by the ſingle eſcheat, and not to the vaſſal's immediate ſuperior as liferent. But if the liferent of the vaſſal ſhould fall firſt, and afterwards that of the ſubvaſſal, the ſubvaſſal's liferent muſt fall, not as ſingle eſcheat to the King, but as liferent to his mediate ſuperior, who, by coming in place of the immediate one, acquires the ſame right to the ſubvaſſal's liferent that ſuch immediate ſuperior would have had, if he had not been diſabled from taking it, by being year and day rebel, *Feb.* 26. 1623, *Sibbald*; *July* 24. 1632, *Rule*, near the end, as obſerved by Dury; where the word *albeit* ought to be read *becauſe*.

72. Liferent eſcheat, though common to ward, feu, and blanch holdings, hath no room in burgage tenures, nor in mortifications or mortmains; for as that caſualty continues only during the life of the vaſſal, it cannot, with propriety, be applied to holdings, where the vaſſal is a corporation, which never dies. This furniſhes us with one obvious reaſon, why the liferent eſcheat of a borough ſhould not fall, on the magiſtrates being denounced rebels for a debt due by the incorporation. Another is, that whatever effect ſuch denunciation may have in certain caſes againſt the perſons denounced, the borough ought not to ſuffer for the negligence of the magiſtrates in not clearing off its debts, *St. b.* 2. *t.* 4. § 67. It can admit no doubt, that when a private burgeſs is denounced upon a debt due by himſelf, his ſingle eſcheat muſt fall as a conſequence of the rebellion implied in denunciation: and though it ſhould be allowed, that the liferent eſcheat of his burgage-lands cannot, in proper ſpeech, fall to the King as ſuperior, becauſe liferent eſcheat never falls but from the want of a vaſſal; yet the rents of all the heritable rights belonging to the rebel, which fall not to the ſuperior as liferent, muſt be forfeited to the King as ſovereign, according to the rule ſet forth *ſupr.* § 69. No heritable right belonging to any number of perſons who are conſtituted into a corporation, can fall, either in whole or in part, upon the denunciation of any individual member of the ſociety, for his own proper debt, *ex. gr.* lands belonging to a biſhop's chapter, or to any corporation of tradeſmen within a borough; becauſe none of the profits of ſuch rights can be ſaid to belong to the perſon denounced, but are common to the whole corporate body: yet if a churchman who has a benefice proper to himſelf, be denounced for his own debt, his liferent eſcheat falls, *i. e.* the profits of the benefice during his life or incumbency; becauſe, though the fee of ſuch benefice be not in him, he hath a liferent right proper to himſelf in the ſubject; whereas in the former caſe, both fee and profits are in the ſociety, *St. b.* 2. *t.* 4. § 68.

73. In liferent eſcheat, as in ſingle, the right is made over to a donatary. But though the ſuperior's right to the liferent is truly completed, by the elapſing of a year after the rebel's denunciation, *ſupr.* § 66. 67.; yet, before the donatary can take poſſeſſion of the heritable rights falling under the eſcheat, he muſt get his gift judicially declared, upon an action of general declarator, for the two following reaſons: *Firſt*, That it may appear

pear that a year is run from the rebel's denunciation; till which, the ſuperior's right of liferent does not take place. *2dly*, That the gift made over to the ſuperior may be fully eſtabliſhed in the donatary: for his gift is no other than a conveyance of the eſcheat from the ſuperior; which has not the effect of diveſting him, or transferring his right to the donatary, till it be intimated, or made public, by a decree of declarator, ſee *June* 19. 1669, *Scot*, in the ſame manner that a general declarator of ſingle eſcheat ſerves for declaring, that the rebel's eſcheat is fallen, and for intimating the donatary's right thereto from the crown, *St. b.* 3 *t.* 3. § 23. Hence, in a competition between donataries, whether of ſingle or liferent eſcheat, (for the rule holds in both), the gift which is firſt declared is preferable to the other, though that other ſhould be the firſt in date. Hence alſo, a diſcharge granted by the ſuperior to his vaſſal, of the caſualty of liferent eſcheat, is preferable to a gift of the ſame date; becauſe a diſcharge or acquittance is a complete deed in itſelf, whereas a gift requires a decree of declarator to complete it. In a competition between two donataries, before either of them has obtained decree of declarator, that donatary is preferred whoſe ſummons of declarator was firſt executed; becauſe citation is the firſt ſtep towards declarator, and ſo ought to be conſidered as a begun diligence, which, in many inſtances, lays the foundation for a preference, *Jan.* 31. 1635, *L. Renton*. Where all other things are equal in ſuch competition, priority in date is the rule of preference; and the date is fixed, not by the time of the gift's paſſing in exchequer, but by its paſſing the ſeals, *Dec.* 6. 1662, *Steuart*. As a decree of general declarator of liferent eſcheat, is declaratory in a proper ſenſe, it has retroſpective powers as to the ſuperior; and does not ſo much confer a new right, as declare the right to have been formerly veſted in him as far back as the civil death of his vaſſal. Hence, after the donatary has got this decree, the fee is void, from the end of the year immediately enſuing the denunciation; and conſequently he has acceſs to the rents from that time, and may exerciſe his temporary right to the lands, in the ſame manner that the vaſſal himſelf might have done before he was denounced.

74. Though the decree of general declarator intitles the donatary to the poſſeſſion, without farther proceſs, it is uſual, and frequently neceſſary, for putting the tenants *in mala fide* to pay to others, to ſue them for payment in an action, which is called, of *ſpecial* declarator; though moſt improperly; for it has none of the characters of declaratory, but is merely a petitory action, of the ſame nature with that of mails and duties. In this action, the intromitters with the eſcheat goods are the proper defenders, without any neceſſity of calling the rebel, or his repreſentatives. Both declarators may be inſiſted upon in the ſame ſummons; but before the purſuer proceeds upon that branch of his libel which relates to the ſpecial declarator, he muſt obtain ſentence in the general one, and extract his decree.

75. From the above-mentioned obſervations, the rules of preference between the crown or ſuperior on the one part, and the rebel's creditors on the other, may be eaſily collected. *Firſt*, It is a rule, common both to ſingle and liferent eſcheat, That no debt contracted by the rebel after denunciation, can found a preference to the creditor, to the prejudice of him who is intitled to the eſcheat; nor can ſuch debt receive force, either by grants made by the rebel for the creditor's ſecurity, or even by legal diligence uſed by the creditor for recovering payment, leſt it ſhould be in the rebel's power to diſappoint the crown of the ſingle eſcheat, or the ſuperior of the liferent, by contracting debts after denunciation which might exhauſt the ſubject, *Feb.* 24. 1669, *Count. of Dundee*. Hence, where the King

had confirmed an heritable right granted by the rebel after denunciation, the donatary, who had by his gift acquired a right to the eſcheat previouſly to the confirmation, was preferred to the right confirmed, *Feb.* 10. 1710, *Leſlie*. In denunciation proceeding on a criminal cauſe, no debt contracted by the rebel after the criminal act, though before his denunciation, could, by our old practice, affect the eſcheat, *St. b.* 3. *t.* 3. § 16.: but Bankton, *b.* 3. *t.* 3. § 36. juſtly obſerves, that ſince, by act 1690, *c.* 33. the creditors of perſons, even guilty of treaſon, were ſecure, if the debts due to them were contracted before the citation given to the traitor in the proceſs of forfeiture, by ſtronger reaſon, the falling of eſcheat for leſſer crimes ought not to have the effect of excluding ſuch creditors, whoſe debts were contracted before the denunciation, whereby the crime is rendered public.

76. If the rebel can contract no new debt after denunciation to the hurt of the donatary, neither ought he, *2dly*, to have the power of granting any voluntary deed after that period, in ſecurity, even of a debt contracted previouſly to it; for the granting ſuch right is, in effect, the contracting of a debt, and is equally hurtful to the donatary. But a deed granted to a creditor after denunciation, in conſequence of, or for perfecting, a right to which the rebel was obliged before he was denounced, is not accounted voluntary, becauſe he might have been compelled to it by law; and is therefore effectual to the rebel's creditor againſt the donatary, *July* 9. 1662, *Bones*. Though voluntary ſecurities granted after rebellion in favour of creditors, cannot affect the right of eſcheat; yet actual payment made by the rebel to the creditor after that period, or ſome deed equivalent to payment, *ex. gr.* the acceptance by the creditor of a voluntary aſſignation granted by the rebel in full ſatisfaction of the debt, before declarator obtained on the gift, ſecures the creditor againſt any action for repayment at the ſuit of the donatary, if the debt had been contracted previouſly to the rebellion, *Dec.* 10. 1673, *Veitch*; which ariſes, both from favour to the creditor, who receives no more than his juſt debt, and becauſe payment is an extinction of the debt, after which no *termini habiles* for a competition remain between the donatary, and one who had indeed been a creditor to the rebel, but by having received either actual payment, or full ſatisfaction of his debt, before the donatary had got his gift perfected by declarator, continued no longer his creditor. In like manner, one who has bought goods *bona fide* by voluntary purchaſe from the rebel, even after denunciation, and has paid the price previouſly to the gift, cannot be compelled, either to reſtore to the donatary the ſubject purchaſed, or to make a ſecond payment of the price to him; becauſe the tranſmiſſion of moveables is, for the encouragement of commerce, rendered by the law as eaſy as poſſible, *St. b.* 3. *t.* 3. § 16. *verſ. ult.* But if the purchaſer has not attained poſſeſſion of the goods purchaſed, before the date of the gift, the donatary is preferable, from a preſumption that the ſale was colluſive.

77. The rules which are peculiar to competitions in ſingle eſcheat, are, *firſt*, That the creditor upon whoſe diligence the eſcheat falls, is in all caſes preferable to the donatary, *ſupr.* § 58. *2dly*, That every creditor of the rebel, whoſe debt was contracted before denunciation, and who has uſed diligence before declarator, is alſo preferable to the donatary, whether ſuch diligence be complete in its kind, as poinding, or confirmation as executor-creditor, &c. *Nov.* 8. 1710, *Borthwick*; or though it be only begun, as arreſtment, *Feb.* 19. 1667, *Glen*, without regard to the time of obtaining the forthcoming, by which the arreſtment is completed; becauſe the right of eſcheat is not truly veſted, either in the King, or his donatary, until declarator, *ſupr.* § 62.; which therefore has no retroſpective quality, ſo as to exclude any diligence uſed by the rebel's creditor previouſly to that period.

3dly,

3*dly*, Where no legal diligence has been uſed by the creditor before declarator, the donatary is preferable, though the debt ſhould have been contracted before denunciation; becauſe in all competitions of debt, regard is had to the priority, not of the ground of debt, but of the diligence uſed upon it, *Feb.* 22. 1628, *Anderſon*; *vid. infr. b.* 3. *t.* 6. § 1. From the ſecond rule above mentioned relating to ſingle eſcheat, it may be obſerved, that though it is owing to the benignity of our ſovereigns, that gifts of ſingle eſcheat are beſtowed on the rebel's creditors, and not upon ſtrangers, there is no room for aſcribing to that favour (as Stair, *b.* 3. *t.* 3. § 16. *verſ. But the queſtion*, and Mackenzie, § 35. *h. t.* do) the limited extent of ſuch gifts in queſtions with the rebel's creditors. The ſovereign has never paſſed from any of the rights or rules of preference in ſingle eſcheat ariſing to him or his donatary, but hath left them to the determination of our ſupreme court; and our judges have uniformly given the queſtion againſt the crown, where the debt due by the rebel to his creditor has been contracted before rebellion, and diligence uſed upon it before declarator.

78. The rules which govern competitions in liferent eſcheat, are ſhortly theſe: *Firſt*, No diſpoſition, or obligation to infeft, granted by the rebel, though before his rebellion, and for an onerous cauſe, is effectual againſt the ſuperior or his donatary, unleſs ſeiſin has been taken on ſuch obligation within the year after denunciation, or, as we expreſs it, *in curſu rebellionis*: nor is it enough, that the ſeiſin has been taken previouſly to the date of the gift, *Nov.* 28. 1710, *Lo. Al. Hay*; becauſe the full right of liferent eſcheat was conſtituted to the ſuperior, before the gift was granted by him to the donatary, from the moment that the vaſſal became civilly dead; which therefore cannot be affected by any poſterior ſeiſin. As a conſequence of this, 2*dly*, Not even legal diligence by adjudication deduced by the creditor againſt the rebel's eſtate, though begun *in curſu rebellionis*, can exclude the liferent, unleſs ſuch diligence be alſo completed within that period, either by ſeiſin, or by a charge againſt the ſuperior, if the lands are holden of a ſubject; or by a ſignature preſented in exchequer, if they are holden of the crown; becauſe adjudication without either of theſe, is not accounted a perfect diligence, *Feb.* 16. 1631, *Lo. Cranſton.* But if the adjudication be thus completed *in curſu rebellionis*, it excludes the donatary, though it had not been begun to be led till after denunciation, *St. b.* 2. *t.* 4. § 66.

79. When the fee returns to the ſuperior on the falling of any caſualty or forfeiture that is implied in the nature of a feudal grant, as nonentry, (and formerly ward and recognition), his right is doubtleſs affected with ſuch burdens as are eſtabliſhed by the law itſelf, as the terce, &c. and with all deeds granted by the vaſſal to which the ſuperior hath conſented; but he is not bound to regard the voluntary grants made by the vaſſal without his conſent, though theſe grants were effectual againſt the vaſſal himſelf, as long as the fee remained in him; becauſe in caſualties ariſing from the genuine nature of feus, the ſuperior is underſtood, when he firſt made the grant, to have ſtipulated, that the right of fee ſhould return to himſelf, in the event of their falling, as ample as he granted it. But liferent eſcheat, though it has been of long ſtanding in Scotland, is only ſuperinduced upon feus by our ſpecial cuſtoms; and indeed it ſeems extraneous and foreign to the true nature of feudal grants, as it is entirely founded on denunciation, which proceeds, not from any feudal delinquency againſt a ſuperior, but from an offence againſt the ſovereign. For this reaſon, no higher right accrues to him by that caſualty, than was veſted in the vaſſal himſelf at the time of its falling. And hence alſo the caſualty is charged with all ſubaltern infeftments and leaſes granted by the vaſſal, on which poſſeſſion hath followed before denunciation, though they had not been conſented to by

by the ſuperior himſelf, *Jan.* 19. 1672, *Beaton*; and with ſuch leaſes granted even after denunciation as have been entered into without diminution of the rental; becauſe the granting of leaſes is a neceſſary act of adminiſtration, profitable both to the ſuperior and vaſſal, *St. b.* 2. *t.* 4. § 66.; and in general, with every burden that might have been charged at the time of the denunciation, upon the vaſſal, in whoſe place he the ſuperior comes.

80. Gifts of eſcheat are null if granted before denunciation, by 1567, *c.* 23. And indeed, in rights which depend on the death, delinquency, or act of another, no grant is effectual by the common rules of law, if made before the exiſtence of the contingency which conſtitutes a preſent right in the granter; ſee *Feb.* 24. 1666, *Sinclair*. Hence a gift of eſcheat was adjudged null, becauſe it did not mention any particular horning on which denunciation had proceeded, *Nov.* 20. 1628, *Weſton*. A gift of eſcheat, whether ſingle or liferent, may be alſo ſet aſide on ſimulation, *i. e.* when it is upon falſe pretences, or miſrepreſentations, obtained by the donatary, for the behoof of the rebel himſelf, to cover his effects from the creditors, 1592, *c.* 145. But the act declaring this nullity, reſtricts it to the time of the rebel's continuing unrelaxed; ſo that, after relaxation, either himſelf, or any in truſt for his uſe, may be conſtituted donatary. Yet as no right in the debtor ought to exclude his creditors, ſuch right is ineffectual againſt the rebel's creditors, even againſt thoſe who have uſed no diligence on their debts: it only ſecures the rebel from the claim competent to the crown againſt him; and ſo is conſidered merely as an extinction of the forfeiture, in queſtions with the King or ſuperior.

81. Simulation may be objected againſt a gift, not only by a poſterior donatary in competition with a prior, but by the rebel's creditors. Yet it is not competent to one whoſe only title is a voluntary right from the rebel poſterior to the gift, to plead this nullity; becauſe he had no intereſt at the date of the gift to object to it, *Jan.* 10. 1712, *White*. The rebel's poſſeſſion of the eſcheat goods, either by himſelf, wife, children, or near friends, founds a preſumption by the aforeſaid act 1592, that the gift is ſimulate. By the words, *near friends*, may be underſtood, ſuch near kinſmen of the rebel as are incapable of judging in his cauſe; for the ſimilar term of *conjunct perſons* in the act 1621, againſt the alienations of bankrupts, has been ſo explained, *Feb.* 8. 1712, *Lo. Elibank*. The donatary muſt be allowed a reaſonable time after the gift, to turn the rebel out of poſſeſſion; but how long, is an arbitrary queſtion, ſee *Dec.* 4. 1669, *Jaffray*. If the mere poſſeſſion by a child of the rebel is ſufficient to ſet aſide the gift, one might think, that a gift taken directly in the child's own name, ought by ſtronger reaſon to preſume ſimulation; but this preſumption is elided, either if ſuch child lived in a ſeparate family from his father at the date of the gift, ſaid *Dec.* 4. 1669, *Jaffray*; or if it appear that the gift was not obtained for the father's behoof, *March* 20. 1623, *Dalgarno*; or if the child was truly his father's creditor. Neither is ſimulation inferred, where the gift is taken directly to the wife or children of the rebel, from conſiderations of compaſſion, and expreſsly bears to be for their alimony and ſubſiſtence, *Bankt. b.* 3. *t.* 3. § 28. But in this laſt caſe, the gift will have as little effect againſt the rebel's creditors, as a gift to the rebel himſelf would have after relaxation. Another preſumption of ſimulation is, that the gift was procured by the credit and intereſt of the rebel, and at his expence. This fact may be proved *per membra curiæ*, by the officers and clerks of exchequer, and by the keepers of the ſeals, *Nov.* 28. 1626, *E. Kinghorn*. But if the gift be taken in the name of a creditor, it is effectual, in ſo far as concerns the debt due to him, though the rebel's money or intereſt was uſed in procuring it, *March* 11. 1624, *Douglas*. And where ſuch donatary

donatary has given backbond to the exchequer in favour of the rebel's other creditors, the preſumption, even from ſuffering the rebel to poſſeſs for four years after the gift, though it be a ſtatutory one, is elidable by the donatary's oath, that the gift was taken for the payment of his own debt, *Dec.* 12. 1673, *Dickſon.*

82. This title may be concluded with a ſhort account of ſignatures, and of the different ſeals uſed in completing all royal grants, whether of gifts of caſualty, or of offices, charters of lands, or other ſubjects flowing from the crown; all which proceed upon ſignatures that paſs by the ſignet of the ſeſſion. By *ſignature* taken in a large ſenſe is underſtood a ſubſcription or mark ſet to a writing; and in this acceptation it is frequently uſed, to denote thoſe interlocutors of a Lord Ordinary, where, without dipping into the cauſe itſelf, ſomething is ordered in point of form. But the word, in its moſt proper meaning, ſignifies a writing indorſed by a clerk or writer to the ſignet, and preſented to the King, or the Barons of Exchequer as the King's commiſſioners, importing a grant of ſome ſubject, office, or right, to him by whom, or in whoſe name, it is preſented. Before the union of the two crowns in 1603, all ſignatures paſſed under the King's own hand; but when our kings took up their reſidence in England, the Lords of Exchequer got powers from the crown to paſs certain ſorts of ſignatures in the King's abſence, *vid. ſupr. b.* 1. *t.* 3. § 32.; which powers are now tranſferred to the new court of exchequer, which was eſtabliſhed in Scotland after the union of the two kingdoms in 1707. And becauſe our ancient forms required the royal ſuperſcription to be prefixed to all ſignatures, a caſhet or ſeal was made, having the King's name engraved on it, imitating the manner of his ſuperſcription, in purſuance of an act of privy council, *April* 4. 1603, with which all ſignatures were to be afterwards ſealed that the Lords of Exchequer had been, or ſhould be, authoriſed to paſs.

83. Signatures, according to their different ſubjects, paſs either by the great ſeal only, or by the privy ſeal only, or both by the great and privy ſeals, or both by the great and quarter ſeals; which however is not to be ſo underſtood, as if the ſame individual writing paſſed under different ſeals; but that after one part of the right has paſſed by one of the ſeals, another part paſſes by another. Every ſignature muſt ſpecially mention through what ſeal or ſeals it is to paſs. If the ſignature is to convey the right of a land-eſtate, or other feudal ſubject, holden immediately of the crown, which requires a formal charter and ſeiſin, the precept, of which it is the warrant, muſt paſs by the privy ſeal, and the charter itſelf by the great ſeal. Hope in his *Min. Pr.* 86.—89. has given us a moſt diſtinct account of the forms obſerved in paſſing a charter under the great ſeal: which forms continue to this day, with the two following variations; *firſt*, That whereas by the old practice, the privy ſeal was uſually appended to the precept directed to the great ſeal before it was regiſtered, it is now enacted, by 1672, *c.* 7. that all writings paſſing under the great and privy ſeals ſhall be regiſtered in the regiſters of the great and privy ſeals reſpectively, before the ſeal be appended to them. *2dly*, That ſignatures and charters of the vaſſals of kirk-lands, where their valuation does not exceed L. 10 Scots, paſs by the great ſeal *per ſaltum*, without paſſing any other ſeal, 1690, *c.* 32. All grants of prelacies and church-dignities, when the government of our church was Epiſcopal, paſſed by the great ſeal; and the commiſſions to the principal officers of the crown, as Juſtice-Clerk, King's Advocate, Solicitors, &c. do ſo at this day. Mackenzie affirms, § 41. *h. t.* that commiſſions of juſticiary are by ſpecial ſtatute ordained to paſs by the quarter ſeal: he has probably had in his eye the act 1587, *c.* 81.; but that ſtatute relates to the commiſſions of the juſtice-deputes, not of the juſticiary-court as modelled

delled by the act 1672; for the commiſſions of that court have always paſſed by the great ſeal.

84. If the ſignature be intended to confer the right of a moveable eſtate, or of any temporary caſualty which requires no ſeiſin, as nonentry, eſcheat, &c. it paſſes by the privy ſeal only: for the privy ſeal is proper to aſſignable rights; and whatever rights are tranſmiſſible by ſubjects by ſimple aſſignation, the ſovereign tranſmits by his privy ſeal. Yet the right of moveables may be tranſmitted in the ſame ſignature which contains a grant of lands, and conſequently paſſes by the great ſeal, if theſe moveables be ſpecially expreſſed in the ſignature; becauſe the great ſeal virtually comprehends under it the privy ſeal, *Mack. Obſ. on act* 1571, *c.* 36. Grants of, or preſentations to, inferior offices, whether eccleſiaſtical, as chaplainries, or civil, as commiſſary-clerkſhips, &c. paſs alſo by the privy ſeal, without the neceſſity of being preſented in exchequer.

85. The quarter ſeal is kept by the director of the chancery. It is, in ſhape and impreſſion, the fourth part of the great ſeal; and is, both in our old ſtatutes, and in the ſignatures themſelves, called *the teſtimonial of the great ſeal*, becauſe anciently it was never appended but to that kind of rights to which the great ſeal had been firſt appended. Thus in charters, and precepts of ſeiſin proceeding upon them, the charter paſſes by the great ſeal; and the precept, which by our former cuſtom was made out in a ſeparate parchment, paſſed by the quarter ſeal; but by 1672, *c.* 7. the cuſtom of writing precepts of ſeiſin apart, and paſſing them under the quarter ſeal, is prohibited, and thoſe precepts are ordained to be ingroſſed in the charters, which is declared to be as ſufficient a ground for taking ſeiſin, as if the precepts had paſſed under the quarter ſeal, *ſupr. t.* 3. § 33. Commiſſions of tutory, and of brieves iſſuing from the chancery, paſs alſo by the quarter ſeal; and all gifts and letters of preſentation to lands, proceeding upon baſtardy, forfeiture, or *ultimus heres*, where the lands are holden of a ſubject: but where they are holden of the crown, ſuch grants muſt, agreeably to the former rule, paſs by the great ſeal.

86. By art. 24. of the treaty of Union, all public acts, inſtruments, and treaties, are to be from thenceforth ſealed with the great ſeal of the united kingdom of Great Britain; and by the ſame article a new ſeal was appointed to be made for Scotland, to be uſed in all matters of private right, offices, and grants, which formerly paſſed by the great ſeal of Scotland. The privy ſeal and quarter ſeal continue on the ſame footing as before the Union. Seals are neceſſary for giving authority to, or authenticating, the grants which paſs under them; and ſo are to royal grants what ſubſcription is to grants by ſubject-ſuperiors. The paſſing of grants by the ſeals is alſo of uſe in giving to the King's officers a reaſonable time to inquire whether the right applied for ought to be granted; for if it ſhould appear that it is ſolicited *ſubreptione vel obreptione*, by concealing the truth, or affirming a falſehood, the Barons may ſtop it, even after paſſing the ſignature, at any time before it has gone through all the forms.

TIT. VI.

Of the Right which the Vaſſal acquires by getting the Feu.

AFTER explaining what is contained under the *dominium directum*, or right of ſuperiority, which the ſuperior reſerves to himſelf in the feudal grant, the *dominium utile*, or right of property, which is thereby conferred on the vaſſal, offers itſelf naturally to our conſideration. The vaſſal acquires

acquires the property, *firſt*, of all the baronies, tenantries, fields, and other lands whatſoever, which are either expreſſed in the charter, or which the law conſtrues to be carried by it, though not ſpecially mentioned; and, 2*dly*, of whatever is accounted part or pertinent of land, whether above the ſurface, as houſes, trees, &c. or under it, as minerals, coal, limeſtone, &c. *a cœlo uſque ad centrum.*

2. As to the firſt, differences can ſeldom ariſe concerning the extent of the lands conveyed in a bounding charter, which points out the limits of the grant by march-ſtones, the courſe of a river, or other obvious and indubitable boundaries. Though it cannot be proved at what time march-ſtones were fixed, their having been reputed the boundary will ſupport the right of the vaſſal who grounds a claim upon them, if he has not loſt it by preſcription. Where a charter, without referring to any boundary, deſcribes the lands or baronies by ſpecial names or deſignations, it can only be known by the common opinion of the country, what lands fall under the deſignations expreſſed in the charter, and by what limits thoſe lands are circumſcribed. Controverſies of this kind are determined upon an action of moleſtation, to be explained *b.* 4. *t.* 1. § 48.

3. Sometimes ſeparate farms or tenantries, though they had not been formerly reputed to belong to, or, as it is commonly expreſſed, to be pertinent of the lands ſpecially mentioned in the charter, are carried by it, if they have been poſſeſſed by the grantee as pertinent paſt memory of man, *Nov.* 17. 1671, *Young*; for by the grantee's immemorial poſſeſſion, ſuch tenements are conſidered to have belonged originally to the lands expreſſed in the grant. In this matter, the following rules are obſerved by our practice. *Firſt*, In a bounding charter, no poſſeſſion can eſtabliſh to the vaſſal a right of lands without the bounds ſpecified in his charter; for he is circumſcribed by the tenor of his own grant, which excludes whatever is not within theſe bounds from being pertinent of the lands diſponed, ſaid *Nov.* 17. 1671. But nothing hinders a landholder who has not himſelf a bounding charter, from acquiring, by preſcription, lands which lie within the boundaries of another proprietor, as part or pertinent of his own lands; for he cannot be limited by the bounding charter of another. 2*dly*, Where a tenement of land is poſſeſſed by one barely as pertinent, and by another in virtue of an expreſs right, he who poſſeſſes under the expreſs right is *in dubio* to be preferred to the other. 3*dly*, Where neither party is expreſsly infeft, but both poſſeſs the ſame ſubject as pertinent, the mutual promiſcuous poſſeſſion of both reſolves into a commonty of that ſubject. But queſtions of this nature depend much on the different kinds of the poſſeſſion had by the two competitors: for if one has had the excluſive poſſeſſion of paſturing cattle on the ground, and has alſo been in uſe to caſt feal and divot, and perhaps to turn up part of the field with a plough, while the poſſeſſion of the other was confined to the caſting of feal and divot only, he who hath exerciſed all the different acts of property the ſubject is capable of, is accounted the proprietor; and the other, whoſe poſſeſſion was more limited, is intitled merely to a ſervitude upon the property. 4*thly*, The poſſeſſion of a tenement not contiguous to the lands ſpecially conveyed, ſeldom carries right to the ſubject as pertinent; and though it may, in ſome ſingular caſes, for which ſee Craig, *lib.* 2. *dieg.* 3. § 24. this at leaſt is certain, that another who is infeft in lands lying contiguous to the ſubject in diſpute, will be preferred upon a more ſlender proof of poſſeſſion.

4. As to the ſecond point, it is univerſally admitted, that every thing which, from its cloſe coherence or connection with land, is conſidered in law as part or pertinent of it, goes to the vaſſal as an acceſſory of the ſubject contained in the feudal grant. Moſt of theſe are, however, anxiouſly enumerated

enumerated in the *Tenendas* of every charter; and it may not be amiſs to explain, ſhortly, ſuch of them as require illuſtration. *Cum domibus, ædificiis:* under theſe words are included, not only dwelling-houſes, ſtables, barns, and other out-houſes, but walls, incloſures, &c.; all which being proper *partes ſoli*, are carried by every charter, *St. b. 2. t. 3. § 75.* As to incloſures, the vaſſal has a ſuperadded right, by poſitive ſtatute, to compel proprietors whoſe lands lie conterminous with his own, to bear half the expence of building, ditching, and planting a dike upon the limits which divide their grounds, or otherwiſe fence the march, 1661, *c. 41.* As this ſtatute may, if taken in its greateſt latitude, be uſed as a cover for oppreſſion, it is not in practice extended againſt feuers whoſe property exceeds not five or ſix acres, *Home*, 123. Several other caſes may be figured, where equity requires a ſimilar judgement; and indeed ſome lawyers have conſidered that part of the act as temporary, though the contrary has been found by repeated deciſions, *July* 28. 1713, *Dunbar*, &c. Landholders who are to incloſe their grounds, may, if the march be crooked, apply for a viſitation of the grounds to the judge-ordinary; who is authoriſed to adjudge, from the one proprietor to the other, ſuch parts of the conterminous lands as may be neceſſary to make ſtraight the incloſure, and at the ſame time to determine and decree what compenſation may be due from the one to the other, 1669, *c.* 17.

5. Mills are alſo mentioned often in the *Tenendas* of charters. As to theſe, two queſtions have been moved, *firſt*, Whether mills already built are carried by a charter of the grounds on which they ſtand? *2dly*, Whether proprietors have a right of erecting new mills upon their own property? As to the firſt, a mill has been, by the general opinion, accounted a ſeparate tenement from the lands, not to be carried by a charter, without either a ſpecial grant of it in the diſpoſitive clauſe, or the erection of the lands into a barony. And it muſt be admitted, that a mill is capable of being made a ſeparate tenement, by actually ſeparating it from the lands, *ex. gr.* by a grant of the mill without the lands; ſince, in that caſe, it is not only ſuſceptible of, but requires a ſeparate ſeiſin. But while the right of the lands and mill continues veſted in the ſame proprietor, the queſtion, Whether a charter of the lands ought to carry the mill? is a *quæſtio voluntatis*, depending entirely on the granter's intention, which muſt be gathered from circumſtances. If one who has built a mill on his lands, ſhould entail his eſtate, the mill would no doubt be carried by the entail, though there ſhould be no expreſs mention of mills in the deed: and in the ſame manner, an heir would carry the right of mills by a ſpecial ſervice and retour, though the retour ſhould only mention the lands. There is as good ground for maintaining, that mines of coal are a ſeparate tenement from land, as that mills are; for coal is not more properly part of the land than mills; and a coal-mine, like a mill, is ſometimes made a ſeparate tenement from the land, by conveying the coal without the land: yet both our judges and lawyers are agreed, that a charter of the land includes the coal as a natural part thereof, *Cr. lib. 2. dieg. 8. § 17.*; and conſequently, that he who is firſt ſeiſed in the lands, hath a right to the coal of theſe lands, preferably to one afterwards ſeiſed *per expreſſum* in the coal, *Jan.* 30. 1662, *Lord Burleigh.* As to the ſecond queſtion upon this article, relative to the proprietor's right of erecting mills, a purchaſer has, in the common caſe, an undoubted right of building mills on his own property, though there be no clauſe *cum molendinis* in his charter; becauſe that is a right conſequential to property: but where the grain growing on his lands is thirled to a mill belonging to another, law hath reſtricted his property in that reſpect, in conſequence of the ſervitude of thirlage with which the lands are burdened; ſo that the reſtraint

ſtraint on the proprietor from building a corn-mill within the thirl, is implied, *ineſt de jure*, without any explicit clauſe. Nor will his offer of ſecurity, that no grain ſubject to the aſtriction ſhall be grinded at it, be ſufficient for taking off this limitation; becauſe the admitting ſuch a ſecurity would open a wide door to frauds, *Fount. Feb.* 28. 1684, *Macdougal*; *New Coll.* i. 54. But this implied prohibition extends not to mills that are incapable of manufacturing the ſpecial ſort of grain which is thirled, or are particularly adapted to ſome other purpoſe, as barley or lint mills, *New Coll.* ii. 48. 49.; becauſe the perſons intitled to the thirlage, for whoſe ſole benefit the limitation was introduced, cannot be hurt by the building of any mill which by its conſtruction is altogether unfit for manufacturing that kind of grain which is aſtricted. And hence, even where the lint or barley mill may, by a ſmall variation in the machinery, be fitted for grinding any of the ſpecies of grain that falls under the aſtriction, the proprietor cannot be compelled to demoliſh the mill, provided he give ſecurity, that he ſhall not uſe it for grinding any grain of the kinds aſtricted.

6. *Cum aucupationibus, venationibus, piſcationibus.* The right of hunting, fowling, and fiſhing, within one's own grounds, naturally ariſes from one's property in the lands; but it is reſtricted by ſundry ſtatutes. Among theſe, perſons who have not a plough of land in heritage, are denied the liberty of hunting and hawking, 1621, *c.* 31. without diſtinguiſhing between grounds which are, and thoſe which are not, part of their own property. No proprietor whoſe valued rent does not amount to L. 1000 Scots, can uſe ſetting-dogs, 1685, *c.* 20.: nor is any proprietor, whatever the extent of his property may be, permitted to ſhoot, hunt, or hawk, within ſix miles of the King's woods, parks, or palaces, 1594, *c.* 210.; or to kill moorfowl or tarmagan from November 10. to July 25. or partridge from February 1. to September 1. or pheaſant from February 1. to October 1. or heathfowl from December 1. to Auguſt 25. 1° *Geo. III. c.* 21. It has been lately made a doubt, whether a perſon qualified to kill game, may not hunt or ſhoot within another man's property without a treſpaſs: And indeed the act 1707, *c.* 13. which prohibits all without exception to come within their neighbour's property with "ſetting-dogs and nets," without the proprietor's conſent, ſeems to take it for granted, that a perſon qualified may hunt in any ground with hounds or greyhounds, or ſhoot with a fowling-piece, provided he does not uſe a net: but ſurely ſuch privilege carries with it a moſt ſevere limitation upon property; and beſides, hath a manifeſt tendency to deſtroy the game; the preſervation of which our lawgivers ſeemed to have had ſo much at heart. Stair is at a loſs, *b.* 2. *t.* 3. § 69. to comprehend the meaning of the clauſe *cum piſcationibus*; becauſe he conſiders the right of fiſhing for white fiſh, as cod, trout, perch, &c. either at ſea, or in rivers or lakes, as common to all, without the neceſſity of any grant from the King or ſuperior. But this opinion may be called in queſtion; and if it were admitted, appears inconſiſtent with what his Lordſhip affirms in the ſame ſection, that a vaſſal infeft *cum piſcationibus*, may, by interrupting others in the exerciſe of that right for the years of preſcription, conſtitute to himſelf an excluſive property in the fiſhing; for no right common to mankind can be taken away from one and acquired by another, by interrupting particular perſons from the uſe of it for the longeſt courſe of time. As to ſalmon-fiſhing, *vid. infr.* § 15.

7. *Cum cuniculis et cunicularíis*; "with rabbits and warrens." The right to theſe is alſo implied in property. Craig, *lib.* 2. *dieg.* 8. § 22. though he acknowledges, that it is not cut off by any ſtatute, ſeems to be of opinion, that no proprietor can make new warrens on his eſtate, unleſs he incloſe them, on account of the great damage they may bring to the neighbouring corns. But that author has overlooked an act of James IV. 1503, *c.* 74.;

which, in place of reſtraining that natural right, injoins landholders to exerciſe it, by making parks with deer, cuninghars, and dovecotes. Some lawyers ſay, it was meant, that ſuch cuninghars were to be incloſed or emparked; but according to that interpretation, dovecotes, which is the next particular in the act after cuninghars, ought alſo to be incloſed; which is evidently abſurd. *Cum columbis et columbariis*; "with doves and dovecotes." Though the laſt-quoted ſtatute commanded alſo the building of pigeon-houſes, pigeons were at laſt found ſo deſtructive to corns, that by 1617, *c.* 19. no landholder is allowed to build one, unleſs he has in yearly rent ten chalders of victual lying within two miles of it; and even then, he can build one dovecote only upon ſuch eſtate. This act, though it denies to proprietors the right of erecting a dovecote, unleſs they have ten chalders victual yearly rent lying within two miles of it, has been found to lay no reſtraint on ſuch as are poſſeſſed of a greater rent, ſuppoſe forty or fifty chalders, provided they build only one within the limits of that ground which yields ten chalders yearly rent, *New Coll.* i. 23. It is hard to gueſs at the reaſon why Craig, who died before paſſing that act, ſhould have affirmed, *lib.* 2. *dieg.* 8. § 23. that no landholder could build a dovecote, who had not ſix acres of land in property; whether he did it on the authority of cuſtom, or of an act of council. This ſtatute extends not to dovecotes which had been then built: and if poſitive evidence be not brought, that the dovecote under challenge was built after the ſtatute, the preſumption is, that the building was lawful, *i. e.* that it was built before paſſing the act. If an eſtate is purchaſed with a pigeon-houſe upon it, from a perſon who was qualified to build one, the purchaſer is intitled to the benefit of it, though he have not the ſame legal qualification; but if it become ruinous, he cannot rebuild it, *Jan.* 19. 1731, *Kinloch.*

8. *Cum fabrilibus, braſinis, et brueriis*; "with forges, malt-kilns, and "breweries." Though the right to theſe be a natural conſequence of property, we are aſſured by Craig, *lib.* 2. *dieg.* 8. § 25. that no vaſſal had anciently the right of brewing, or of a ſmith's forge, where horſes might be ſhod, or plough-irons made, without a licence from the ſuperior: for which this reaſon is aſſigned by Stair, *b.* 2. *t.* 3. § 72. that as the inſpection of inns, or whatever contributed to the accommodation of travellers, or to the improvement of the public police, was committed to magiſtrates of boroughs, and to barons, 1535, *c.* 18.; barons, from that occaſion, aſſumed to themſelves the excluſive right of licenſing forges and breweries, even within that part of their baronies which they had feued to others. But, by the later practice, feuers, more agreeably to the nature of their grants, are intitled to brew within their own property, without either an expreſs clauſe in their charter, or a licence from the ſuperior, *Pr. Falc.* 14. Though a baron cannot with-hold from his feuers the privilege of brewing, as a natural right attending the ſubject feued, he can hinder them, and, by ſtill ſtronger reaſon, every ſtranger, from importing and vending within the barony ale which has been brewed without it: for, by the erection of the lands, a prohibition is implied againſt the importation of foreign ale into the barony, by which part of the profits which might be reaped from the growth of the barony-lands is drawn by ſtrangers, to the detriment of the baron, for whoſe ſole behoof the lands were erected. And, upon this ground, the magiſtrates of Muſſelburgh, a village erected into a barony by the crown, were found to have a right to prohibit the importation of ale into the grounds contained in their charter. But even boroughs-royal have no ſuch privilege, if the right of barony be not expreſſed in their charter: for grants to boroughs are not, like thoſe granted to private perſons, erected for the behoof of any particular grantee; they are eſtabliſhed for the general intereſt

reſt of the kingdom: the lands erected cannot be alienated, and indeed continue *inter regalia*; and the extent, both of their juriſdiction and other privileges, are preciſely aſcertained by the grants made to them; and nothing is implied in theſe grants which is not eſſential to the conſtitution of a borough-royal, *New Coll.* i. 25. It may be worth obſerving, that though the word *bruerium* in our charters has been, for ſome centuries paſt, uſed to denote the right of brewing; yet, in our moſt ancient charters, it ſignified heath, from the French, *bruyere*. Thus "Thomas filius Thomæ de "Gordon" granted to the monks of Kelſo "licentiam vellendi bruerii in "territorio de Thorndike," *Chart. of Kelſo*. See alſo *St. Rob. III. c.* 11.; *Du Freſne Gloſſar. v. Bruarium, Bruera, Brueria*; *Sibbald's State of the ſhire of Fife, p.* 151.

9. *Cum libero exitu et introitu*, "with free iſh and entry." This clauſe muſt without doubt import a right to all ways and paſſages, in ſo far as they may be neceſſary for the vaſſal's acceſs to kirk and market, through the adjacent grounds of the granter, who is, by the clauſe, laid under that obligation. But though the ground through which the vaſſal muſt neceſſarily paſs, ſhould belong to another, and though it ſhould not be ſubjected to any conventional ſervitude, the vaſſal is intitled to free iſh and entry, becauſe without it property would be uſeleſs. It therefore ariſes from the rights and obligations eſſential to property, that every proprietor may claim from, and afford to, his neighbour all neceſſary ways and paſſages. But it would be both unjuſt in itſelf, and moſt deſtructive to the public quiet in its conſequences, to extend that right, which is founded in neceſſity, to all convenient paſſages, or to roads by the neareſt line, or through different parts of the grounds belonging to the conterminous proprietor, *St. b.* 2. *t.* 7. § 10.

10. *Cum herezeldis.* By *herezeld* is meant the beſt moveable, or rather the beſt thing which moves itſelf, horſe, or ox, or cow, belonging to the deceaſed tenant, which, by ancient cuſtom, was due upon his death to the landlord. The word comes from *here* and *zeld*, both Saxon vocables; the one ſignifying maſter or lord, and the other relief or ſubſidy; for which ſee *Black acts, Ja. I. parl.* 1. *c.* 10.; and *Skene, v. Herezeld.* As this was a compoſition due by the natural poſſeſſor of the ground, not to any ſuperior, but to the landlord, the ſuperior could not be underſtood to reſerve that right for himſelf to the landlord's prejudice, though the right of herezeld had not been ſpecially expreſſed in the feudal grant; ſee *Br.* 105. Craig derives its origin from the obligation which, in his opinion, lay upon tenants to bequeath to their landlords the moſt valuable moveable belonging to them, in which he has probably had an eye to *Reg. Maj. l.* 2. *c.* 36. § 2.; but that paſſage appears to relate to vaſſals rather than to tenants, and has the appearance rather of a direction to the dying perſon what he may lawfully do, than of an injunction of what it behoves him to do. It was not demandable if there was a tack current at the death of the tenant, becauſe the landlord was in that caſe obliged, by his own deed, to continue the repreſentative of the tenant in the poſſeſſion, without any compoſition or acknowledgement, *Balf. p.* 200. *c.* 6. Neither was it due where the deceaſed tenant was under warning, and a decree of removing recovered againſt him, *Hope, v. Herezeld*; ſo that there was no place for it, except where the deceaſed tenant poſſeſſed, either by tacit relocation, or by a verbal tack, without having been warned by his landlord to remove; in which caſe the herezeld might be demanded, though the tenant's heir was willing to quit the poſſeſſion. But it was not lawful to the landlord, after having received the herezeld, to remove the heir for a year after, *Cr. lib.* 2. *dieg.* 8. § 32.; *March* 20. 1629, *L. Auchinleck.* Though this right obtained anciently over the whole kingdom, and is ſtill expreſſed in many charters, it is,

is, by our preſent practice, underſtood to be local, and conſequently not due where it is not the cuſtom of the barony, *July* 1733, *Ferguſon*. And, in fact, it is now ſeldom exerciſed any where but in ſome highland countries.

11. Some rights, though not commonly expreſſed in the *Tenendas*, are carried to the vaſſal, either as proper *partes ſoli*, or as appurtenances or pertinents of the land, in virtue of the general words in the diſpoſitive clauſe of the charter, *cum pertinentiis*. Thus natural fruits, which grow up *ſine cura et cultura*, and which are not yet ſeparated from the ground, are carried by the charter as part of the lands to which they are ſtill united, *ex. gr.* apples, graſs on paſture-grounds, or natural graſs intended for cutting: but corns, and in general all *fructus pendentes*, which require annual induſtry and culture, remain as moveable ſubjects with the granter. As for ſown graſſes, which produce ſeveral ſucceſſive crops before they run out, theſe ought to paſs to the purchaſer: for if the crops ariſing from ſuch graſs-ſeeds for a number of years ſubſequent to the purchaſe were to continue with the ſeller, the purchaſer, if he has purchaſed by a rental or rent-roll, would be excluded from the rent of thoſe very years for which he is preſumed to have given an adequate value. The right in the area of the pariſh-church, though it cannot properly be called part of the lands contained in the charter, is yet ſo cloſely connected with them, that it is carried to the purchaſer as pertinent, in virtue of the natural right that every landholder has in ſuch a proportion of it as correſponds to the valuation of his lands in the pariſh; and conſequently the owner of a right to a ſeat in his pariſh-church cannot diſpoſe of it as his abſolute property, though he may, of the materials of which the ſeat is compoſed. If the area of the church has never been legally divided, a diviſion will be ordained at the ſuit of any proprietor, by which the area may be parcelled out among the ſeveral landholders in the pariſh by the proportions above mentioned; nor will the former poſſeſſion by any proprietor, of a greater ſhare of area than his valuation intitled him to, ſtand in the way of ſuch diviſion. In churches where part of the area is taken up by the inhabitants of a borough or village, an inhabitant, who had bought a ſeat for the uſe of his family, may perhaps be permitted, if he intends to change his reſidence to another pariſh, to ſell it to any other reſidenter, at the ſight of the kirk-ſeſſion, or the magiſtrates of the borough. But as to that part of the area which was by the diviſion appropriated to the ſeveral landholders according to their valuations, it appears reaſonable, that the right of the ſeller's ſhare thereof ought to be carried by his diſpoſition to the purchaſer, as a right eſſentially connected with the lands diſponed. And indeed if a landholder had it in his power to ſeparate the two, either by expreſsly reſerving the area to himſelf in his diſpoſition, or by making over the lands and the area to different grantees, a church might ſoon be made the property of ſtrangers, to the utter excluſion of the inhabitants of the pariſh; ſee *Fount. Jan.* 15. 1697, *Lithgow*. Upon the ſame ground, the right of a burial-place ought alſo to be carried by a grant of the lands, in virtue of the clauſe *cum pertinentiis*.

12. Till towards the beginning of this century, landlords, the better to enable their tenants to cultivate and ſow their farms, frequently delivered to them at their entry, corns, ſtraw, cattle, or inſtruments of tillage, which got the name of *ſteelbow goods*, under condition that the like in quantity and quality ſhould be redelivered by the tenants, at the expiration of the leaſe. This claim competent to the proprietor could not, in the caſe of a ſale of the lands, paſs with them to the purchaſer, from the nature of the ſubject: for the landlord's right to the ſteelbow is moveable; and for that reaſon

reaſon is arreſtable, *Dec.* 4. 1638, *La. Weſtmoreland*, and falls under the ſingle eſcheat, *St. b.* 2. *t.* 3. § 81. But an aſſignation of that right in favour of the purchaſer is implied from equity, if the purchaſe be made by a rental; becauſe the tenant having been enabled by the ſteelbow goods to pay an advanced rent, for which the purchaſer is preſumed to have given a juſt price, the purchaſer would loſe that additional rent which he has paid for, if the right to the ſteelbow were not deemed part of the purchaſe. But if the bargain be made in the lump, without reference to a rental, it would ſeem that the ſteelbow, which is of its own nature a moveable ſubject, ought not to be carried by the charter. Steelbow can in no caſe be exacted from the tenant by the condition of the right till the determination of the leaſe, *Dec.* 6. 1628, *Lawſon.*

13. No right in lands which is by our feudal cuſtoms appropriated to the ſovereign, and therefore goes by the name of *regale*, is preſumed to be conveyed by the charter unleſs it be expreſſed. By *regalia*, in a large ſenſe, are underſtood all rights that the King has in or over the eſtates or perſons of his ſubjects. And they are either *majora* or *minora*. The *majora* are ſo inſeparable from the royal dignity, that they are incommunicable to ſubjects abſolutely and without exception, as the ſeveral branches of the royal prerogative, and the King's right of ſuperiority over all the lands within his dominions; or at leaſt they are not communicable without the interpoſition of the ſtates of the kingdom, *ex. gr.* the annexed property of the crown, which is declared not alienable without conſent of parliament. The *regalia minora* are thoſe rights which the ſovereign can by himſelf communicate to his ſubjects at pleaſure, *ex. gr.* the right of waifs, or of goods confiſcated, and thoſe which accrue to the crown from the vaſſal's want of an heir, or from baſtardy, or forfeiture, or from feudal caſualties. But the *regalia* now to be explained are truly parts or pertinents of land, and as ſuch would naturally go to the vaſſal by his charter, if they had not been by our feudal cuſtoms appropriated to the ſovereign, and ſo underſtood to be excepted from the grant.

14. Juriſdiction is, by the generality of writers, numbered among the *regalia* of this laſt ſort: but improperly; for though it be a royal right, it is not included neceſſarily in the notion of property, and therefore cannot be ſaid to be, by the conſtruction of law, excepted from a grant of property. How far juriſdiction hath been by the law of Scotland, or is now, conferred on vaſſals, has been conſidered, *b.* 1. *t.* 4. § 25.—28. Foreſts are *inter regalia*; or, in other words, no charter of lands granted by the crown, within which any foreſt lies, carries the property of it to the vaſſal, without a ſpecial clauſe in the grant. By a foreſt is underſtood a large tract of ground incloſed, where deer have been in uſe to be kept. Becauſe the hunting of deer in thoſe foreſts was accounted a right proper to the crown, foreſts themſelves have been brought under the ſame claſs; and they remain in that ſtate though the trees in the foreſt ſhould fail. Lands erected by the crown with the right of foreſtry had all the privileges of a King's foreſt; which were ſo grievous to the country, from the heavy penalties inflicted by our ſtatutes enacted for ſecuring foreſts againſt incroachments, that our ſupreme court gave their opinion, that application ſhould be made to the crown againſt ſuch grants for the future, *June* 24. 1680, *M. Athol.* Woods or parks which are incloſed by private perſons for the running of deer are *juris privati*, and conſequently are carried in charters as part of the lands diſponed, though they be not expreſſed.

15. Salmon-fiſhing is alſo a *jus regale*, and therefore is not carried by a charter, without an expreſs clauſe. Yet by our uniform practice, the common clauſe, *cum piſcationibus*, is a ſufficient title for conſtituting a right to

ſalmon-fiſhing by preſcription; ſo that where the vaſſal hath been in the uninterrupted poſſeſſion of it for forty years, ſuch poſſeſſion, joined to the general clauſe, eſtabliſhes a right to that *regale*. As this right, in conſequence of its being *inter regalia*, remains with the ſovereign after he is diveſted of the property of the lands on both ſides of the river, the crown may make a grant of the ſalmon-fiſhing in a river, or any part thereof, in favour of one who has no lands on either ſide. The whole eſtate of ſuch grantee conſiſts in the fiſhing; and this right intitles him to draw his nets on the banks of the adjacent grounds, without the proprietor's conſent, as a pertinent of the fiſhing. The fiſhing of ſalmon is prohibited, from the feaſt of the Aſſumption of our Lady, Auguſt 15. to the feaſt of St Andrew, November 30. by 1424, *c.* 35. The ſpecial manner of fiſhing by cruives or zairs, where they are ſet in that part of a river where the ſea ebbs and flows, is abſolutely prohibited: and where the proprietor has a right to uſe cruives in freſh water, he muſt make their hecks three inches diſtant from one another, that the young fry may have free acceſs to paſs and repaſs; and muſt alſo obſerve the Saturday's ſlop, that is, the hecks of all the cruives muſt be pulled up the height of an ell on every Saturday at ſix in the evening, and continue ſo till Monday at ſun-riſing, 1424, *c.* 11.; 1477, *c.* 74.; 1489, *c.* 15. The laſt of theſe acts directs, that the hecks ſhall be five inches wide: but it was adjudged, that the number *five* was wrong tranſcribed from the record into our ſtatute-book, and ought to be corrected into three, according to the reading of the two former acts, *Jan.* 26. 1665, *Her. of the fiſhing of Don.* Stair affirms, *b.* 2. *t.* 3. § 60. that the killing of ſwans is ſo much a regal right, that it is not carried by the vaſſal's charter, though the lands ſhould be erected into a barony: but nothing appears, either in our ſtatutes, law-books, or practice, in ſupport of the opinion, that ſwans were ever accounted *inter regalia*.

16. Gold-mines are, by 1424, *c.* 12. declared to belong to the King without limitation; and ſilver-mines, when they are of ſuch fineneſs that three half-pennies of ſilver can be extracted from the pound of lead. Three half-pennies were in the reign of James I. equal in intrinſic value to about two ſhillings and five pennies of our preſent Scots money, according to Ruddiman, *Pref. to Dipl. Scot. p.* 82. It appears by an unprinted act in 1592, mentioned in the liſt of the unprinted acts of that year, N° 12. that not only mines of gold and ſilver, but of tin, copper, and lead, had been formerly annexed to the crown, and ſo not alienable without conſent of parliament: but they are by that ſtatute diſſolved from the crown; and it is made lawful to the King to ſet in feu-farm, not to any of his ſubjects indiſcriminately, but to the baron or other freeholder of the ground, all metals or minerals that may be found within his own lands, on payment of the tenth part to the King, without any deduction of charges: and in caſe the freeholder ſhould refuſe to work them, the King may then, and then only, either cauſe work them for his own uſe, or feu them to others. The meaning of this ſtatute is, in two material articles, now fixed by deciſions; *firſt*, That by the words, *it ſhall be lawful to his Majeſty*, a poſitive right is conferred on the freeholder, by which he may demand a grant from the crown, in purſuance of the ſtatute, *Falc.* 2. 120. *2dly*, That by the word *freeholder* is underſtood, in this queſtion, not the ſuperior of the lands in which the mines lie, who holds immediately of the crown, but the proprietor, though he ſhould hold of a ſubject, *Dec.* 8. 1739, *D. Argyle*.

17. All the ſubjects which were by the Roman law accounted *res publicæ*, are, ſince the introduction of feus, held to be *inter regalia*, or *in patrimonio principis*, as rivers, free ports, and highways leading from one city, borough, public port or ferry, to another, which for that reaſon are called

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the King's highways. From hence, the narrowing of a highway, or altering the courſe of a river, is ſaid by our moſt ancient law to infer the crime of purpreſture, *Reg. Maj. l.* 2. *c.* 74. § 1. Hence alſo, an obligation lies on thoſe who unloads ſhips in rivers, to pay ſomewhat in name of *vectigal* or cuſtom to the ſovereign. In the ſame manner, the right of a public ferry, or of a free port, which was formerly *juris publici*, now belongs to the King, and cannot be transferred from him without a ſpecial grant. This grant lays the grantee under an obligation to keep ſufficient boats on the ferry for the uſe of travellers, or to maintain the port in a condition fit for receiving ſhipping; in conſideration of which, the grantee of a free port has either an expreſs or an implied power to levy anchorage, ſhore-dues, and other ſuch reaſonable impoſitions, on ſhips which receive benefit from the port or harbour, *Cr. lib.* 1. *dieg.* 15. § 15. But as the *regalia* of this ſort are little capable of property, and chiefly adapted to public uſe, the King's right in them is truly no more than a truſt for the behoof of his people; for he cannot hurt the navigation of rivers, nor ſhut up highways, nor demoliſh bridges, unleſs that meaſure ſhall become neceſſary for the public ſecurity, in times of general diſtreſs. It is public rivers only which are *inter regalia*; by which writers generally underſtand navigable rivers, or thoſe on which floats may be carried to navigable rivers. Smaller rivulets or brooks are, according to the general opinion, *juris privati*, *l.* 1. § 4. *De flumin.*; and conſequently the landholder within whoſe grounds they run, may divert their courſe, unleſs he be reſtrained by a ſervitude, or other poſitive right in favour of the inferior tenement, *l.* 21. *De aqua et aq.* On the ſame ground our anceſtors formerly accounted fortalices among the *regalia*; not the King's caſtles only, which were always erected on the King's property-lands, and the right to them conferred by his ſpecial commiſſions on thoſe in whom he could moſt confide; but places of leſſer ſtrength, which had been, during our wars with England, or inteſtine commotions, built by private gentlemen upon their own eſtates, chiefly near the border, as a defence againſt the incurſions of ſmaller parties. Becauſe the defence of the kingdom was a right proper to the ſovereign, theſe fortalices were in ancient times underſtood, not to be conferred on the vaſſal by a ſimple charter; but they now paſs as part of the lands, without either the privilege of barony, or a ſpecial clauſe in the grant. Doubts have been moved, whether ſea-greens ought to be reckoned *inter regalia*; *i. e.* grounds in ſome meaſure gained from the ſea, but which ſtill continue to be overflowed in ſpring-tides? Some maintain the affirmative, in regard that theſe grounds are deemed part of the ſea-ſhore, which by the Roman law was *juris publici*; but though by that law the ſea-ſhore reached as far from the ſea as the higheſt ſpring-tide, it goes no farther, by the cuſtom of Scotland, than the ſand over which the ſea flows in common tides; and by our conſtant practice, proprietors who border on the ſea, incloſe as their own property grounds far within the ſea-mark, *Br.* 10.

18. The vaſſal is, or was by our former law, intitled to ſundry ſuperadded rights by the erection of his lands into a barony, *vid. ſupr. b.* 1. *t.* 4. § 25.; *t.* 3. § 46. Barony is, in the language of our law, *nomen univerſitatis*, that includes under it all the different ſubjects or rights of which it conſiſts, though they be not expreſſed, and incorporates them ſo ſtrongly together as to make them *unum quid*, one individual right. From this quality, the rule ariſes, that poſſeſſion of any part of a barony is reputed poſſeſſion of the whole, and preſerves to the baron his poſſeſſion as entire as if it had been total. On the ſame principle, the general conveyance of a barony is ſufficient to carry all the different tenantries and tenements which truly belong to it, or have been poſſeſſed as part and pertinent of it, though

though they be not ſpecially enumerated; and the ſame rule holds with reſpect to lands which, without erection into a barony, have been joined by a ſimple charter of union under a ſpecial name, *March* 23. 1622, *Lo. Borthwick*: but the ſeveral tenements erected or united, ought regularly to be diſtinguiſhed in the original charter of barony or of union by ſpecial names or characters. It ariſes alſo from this known quality of barony, that where the baron has by his charter a particular right to any of the *regalia*, *ex. gr.* to a borough of barony, a ſpecial retour or grant of the barony, without the enumeration of theſe *regalia*, is effectual to tranſmit them to his heir or ſingular ſucceſſor, *Jan.* 15. 1668, *E. Argyll.* Lord Stair, *b.* 2. *t.* 3. § 60. and after him Mackenzie, § 3. *h. t.* carry this point higher, and maintain, that the erection of lands into a barony, *eo ipſo* intitles the baron to moſt of the *regalia*; from which rule Stair ſeems only to except minerals, and treaſures hid under ground: but this poſition appears not to have been at any period the law of Scotland. A charter of barony never carried to the baron the rights inherent in a free port, of exacting ſhore-dues, and other ſuch petty cuſtoms, nor thoſe which are included under a free foreſtry. Lord Stair himſelf admits, that no immediate right is acquired to ſalmon-fiſhing by the privilege of barony; and that it affords to the baron barely a title of preſcription. Mills were never *inter regalia*, nor has the ſovereign claimed them as ſuch; it is only from their being accounted a ſeparate tenement, that it has been doubted, whether they are carried, without the erection of the ground on which they ſtand into a barony; and fortalices were, long before Lord Stair's time, ranked in the ſame claſs with common country-ſeats, which paſſed to all purchaſers indiſcriminately.

19. The doctrine which ſeems to be taught by Craig, *lib.* 2. *dieg.* 8. § 37. That no right of patronage can be conveyed by itſelf, without conveying part at leaſt of the barony or lands to which it had been originally united, is neither ſupported by the rules of law, nor by practice: for the ſpecial ſymbol of ſeiſin eſtabliſhed for a right of patronage, is ſufficient evidence, that the law conſiders that kind of right as tranſmiſſible by itſelf, without the neceſſity of conveying along with it any lands or other ſeparate tenements; and there is nothing more frequent in practice, than for a baron or landholder to whoſe lands a patronage happens to be united, to make over a grant of the patronage to another, without the leaſt intention of conveying at the ſame time any part of his lands; which grantee is, after ſeiſin taken on his grant, veſted in the full and unqueſtionable right of the patronage.

20. The vaſſal has a right, in conſequence of his property, to receive the rents of his own lands from his tenants, and to recover the arrears of rent from them, in default of payment, by an action for rent before his own court; or, if they have changed their domicil, by an action before that ſheriff within whoſe territory they now reſide. He can alſo remove from his grounds tenants who have no leaſes, and grant leaſes to whom he will. A tack, or leaſe, is a contract of location, by which the uſe of land, or any other immoveable ſubject, is ſet to the leſſee or tackſman, in conſideration of a determinate yearly rent or duty, to be paid or performed to the leſſor or landlord, either in money, the fruits of the ground, or ſervices. It is neceſſary to explain the doctrine of leaſes in this place, though they are truly contracts, becauſe they have by ſtatute received ſpecial qualities which diſtinguiſh them from the common contract of location. They are in our law-books frequently called *aſſedations*; an appellation alſo given in ſome old ſtatutes to grants holden in feu-farm, 1457, *c.* 71. *&c.* They were at firſt granted in the form of charters by the proprietor, without any written obligation ſigned by the tenant, *St. b.* 2. *t.* 9. § 5.: but becauſe no deed

deed could bind the tenant to his part of the bargain, which was not ſubſcribed by himſelf, they were afterwards drawn in the form of mutual contracts.

21. The granter of a leaſe muſt be either the proprietor of the ſubject let, or the adminiſtrator of it. Leaſes granted by liferenters, wadſetters, or adjudgers, who have only a temporary or a redeemable right to the lands, determine the moment the granter's right expires, or is extinguiſhed by payment; *reſoluto enim jure dantis, reſolvitur jus accipientis.* As adminiſtrators given either by the law, as tutors, or by the judge, as factors on ſequeſtered eſtates, are never appointed but from neceſſity, their powers are limited to neceſſary acts of adminiſtration; and conſequently they cannot, by the aforeſaid rule, grant leaſes to endure for a longer term than their own right of adminiſtration. But this rule is not applicable to commiſſioners ſpecially authoriſed by the proprietor himſelf to grant leaſes. The powers given to ſuch commiſſioners, muſt be underſtood to authoriſe all leaſes that do not exceed the ordinary term of endurance; and which, therefore, when granted, muſt ſubſiſt for the whole years contained in the leaſe, though the proprietor ſhould recall his commiſſion during the currency of it. A written minute of tack, or an obligation by the proprietor to grant one, hath equal force with a formal tack; for upon that minute or obligation an action lies againſt the granter, and his heirs, for fulfilling it. Hence ariſes the rule, *Pactum de aſſedatione facienda et ipſa aſſedatio æquiparantur;* and this rule obtains in moſt rights which eſſentially require nothing to their conſtitution, but bare conſent, or conſent accompanied with poſſeſſion. Thus, an obligation to grant a conveyance, an acquittance, or a ſervitude, is as effectual, as the right itſelf, when executed, *St. b.* 2. *t.* 7. § 1.

22. In a leaſe of lands, the uſe which the leſſee acquires in the ſubject let, is not underſtood to compriſe every right which was before competent to the landlord, but is limited to thoſe yearly fruits which either naturally, or by the leſſee's induſtry, ſpring up from the ſurface. He is not therefore intitled to any of the woods or growing timber above ground, nor to the minerals, coal, limeſtone, &c. underneath the ſurface, the uſe of which conſumes the ſubject, except in ſo far as the proprietor has given him right by a ſpecial clauſe in the tack, *Gilm.* 103.; *Feb.* 15. 1668, *Colquhoun.*

23. Leaſes are, like other contracts, perſonal rights in their own nature, and therefore effectual againſt the granter and his heirs only, but not againſt purchaſers from the granter, or his other ſingular ſucceſſors: for thoſe who ſucceed to lands by a ſingular title, have, in conſequence of their property, a right of removing all poſſeſſors whomſoever, from grounds which are their own, notwithſtanding any leaſe they may have got from the former proprietor; agreeably, not only to the Roman law, which conferred no *jus in re* upon the leſſee, *l.* 9. *C. De loc. cond.*; but to our feudal rules, which ſuffered no right of lands to have effect againſt ſingular ſucceſſors without ſeiſin. While leaſes were conſidered as bare perſonal rights, tenants who had on the faith of their leaſes employed their ſtock in furniſhing or improving their farms, might be turned out of their poſſeſſions upon a ſale of the lands to a new proprietor; and it was to ſecure them in their farms, that in ancient times ſeiſin proceeded on their leaſes, the leſſee thereby imagining to give them the effect of real rights againſt the granter's ſingular ſucceſſors: but to complete their ſecurity beyond the poſſibility of challenge, it was at laſt enacted, by 1449, *c.* 17. That all tenants having leaſes for a term of years, ſhould hold their farms till the expiration of that

term, for payment of the rent contained in their leaſes, into whoſe hands ſoever the lands ſhould fall.

24. To give a leaſe the benefit of this ſtatute, it muſt, *firſt*, be reduced to writing; for all rights and obligations relating to land muſt be perfected by writing, *infr. b.* 3. *t.* 2. § 2. It muſt, 2*dly*, like all other deeds, mention the contracters names, with their deſignations or additions, and deſcribe the ſubject let, ſo as it may be diſtinguiſhed from all others. 3*dly*, It muſt expreſs the ſpecial duty payable by the tenant, either in money or grain, or ſervices to be performed to the landlord, as cutting down his corns, mowing his graſs, carriages, &c.; which tack-duty, though it ſhould be below the true value, affords to the tenant an abſolute ſecurity againſt removing. Though the term of the tenant's entry be not ſpecified, the tack is good againſt ſingular ſucceſſors, and the entry underſtood to commence at the term next enſuing its date; in the ſame manner, that one who obliges himſelf to pay a ſum, without mentioning any term of payment, muſt pay it the next lawful day, *infr. b.* 3. *t.* 1. § 6. A leaſe in which the term of endurance, or iſh, is not expreſſed, is conſidered as granted for a year; and if the intention of parties that it ſhould continue for more than one year, appear by any clauſe in the tack, *ex. gr.* if the tenant be obliged to bring to his landlord's houſe yearly a certain quantity of coals, the tack is ſuſtained for two years only as the *minimum*, *Nov.* 22. 1737, *Redpath*; during which two years it is good againſt ſingular ſucceſſors. A tack granted to perpetuity, is ineffectual againſt ſingular ſucceſſors, who cannot poſſibly know tacks to be perpetual, either from the nature of the tenant's poſſeſſion, or from the records; ſee *July* 26. 1631, *Crichton*. And this reaſon ſtrikes alſo againſt tacks with an indefinite iſh, *ex. gr.* tacks to endure till the tenant receive payment of a debt due to him by the proprietor, *Gilm. June* 1666, *Dobie*. But backtacks in wadſets, which expreſs no other term of duration than the not redemption, are valid againſt ſingular ſucceſſors, *infr. t.* 8. § 28.

25. A tack muſt be alſo accompanied with poſſeſſion, in order to ſecure the tenant againſt the ſingular ſucceſſors of the granter: for though leaſes, in the form in which they have been executed for ſeveral centuries paſt, admit not of ſymbolical poſſeſſion by ſeiſin; yet natural poſſeſſion is required for giving them this effect of a real right: and hence a poſterior leaſe followed by poſſeſſion, is preferable to a prior upon which there has been no poſſeſſion. Though therefore the granter was proprietor at the date of the tack, yet if he ſhall be diveſted of his right before the term of the tenant's entry, the tack cannot affect ſingular ſucceſſors; becauſe a tenant can have no poſſeſſion upon his tack till the term of his entry, *Dirl.* 346. Poſſeſſion is as neceſſary for ſecuring the tranſmiſſion of a tack or ſubtack to an aſſignee or ſubtackſman, as for ſecuring the tack itſelf to the original tackſman; or, at leaſt, there muſt be ſome publication by which the conveyance may be made known, that ſo third parties may not be inſnared by latent or private conveyances: and becauſe the adjudication of a leaſe is a public and judicial act of the ſupreme court, transferring the right of tack to the adjudger, *St. b.* 3. *t.* 2. § 16. a creditor adjudging that right from the tackſman, before the tackſman's voluntary aſſignee has obtained poſſeſſion upon his conveyance, is preferable to the aſſignee, *Nov.* 16. 1750, *Campbell*.

26. This ſtatute 1449 gives no ſecurity to the tenant againſt the ſuperior, when the fee opens to him by nonentry, though the words, *into whoſe hand ſoever the lands ſhall come*, extend in proper ſpeech to ſuperiors as well as purchaſers. For ſince the feu ought, by the nature of feudal rights, to return as entire to the ſuperior upon the falling of any feudal caſualty, as when he firſt made the grant, ſuperiors are not bound to regard any deed granted

granted by the vaſſal without their conſent, before the caſualty was incurred. Yet the tenant cannot be turned out of the poſſeſſion ſummarily, but may continue in it till the Whitſunday immediately following the decree declaring the caſualty, upon payment made to the ſuperior of the ſtipulated tack-duty, 1491, *c.* 26. And though he may after that term be compelled to remove, his right is not loſt; it only lies dormant during the nonentry: ſo ſoon therefore as the heir enters, the tenant may reſume the poſſeſſion, and continue in it for as many years as the leaſe had to run when he was firſt excluded by the ſuperior. Our law was the ſame in the caſualty of ward, while the tenure by ward ſubſiſted.

27. No mention is made in the act 1449 but of leaſes of land; and its narrative bears, that the law was enacted in favour of poor labourers of the ground. A leaſe therefore of the profits of a whole eſtate already under tenantry, is not effectual againſt ſingular ſucceſſors; for ſuch tackſman neither labours the ground, nor is indeed tenant of any land, but barely farmer of the rents and profits payable by the ſeveral tenants on the eſtate; a diſtinction which has been formerly ſtated, *t.* 3. § 15. But cuſtom has from analogy extended the enactment of the law to tacks of mills, and of caſual rent, *ex. gr.* ſalmon-fiſhings, collieries, &c. and of ſuch other ſubjects as are *fundo annexa.* Tacks of houſes within borough are ineffectual againſt ſingular ſucceſſors; not chiefly becauſe the ſtatute has left them out of the enactment, but becauſe ſuch tenements are generally let only from year to year, *Fount. Feb.* 5. 1680, *Rae*, cited in *Dict.* ii. *p.* 417. Mackenzie, in his obſervations on this ſtatute, affirms, that it extends not to rentals, becauſe in theſe the tack-duty is generally low. This reaſon, if good, ſtrikes with greater force againſt leaſes where the tack-duty is plainly eluſory; which ſurely fell not under the intendment of the legiſlature, though they are not ſpecially excepted.

28. Since this ſtatute ſecures the tackſman in the poſſeſſion of his farm, it muſt conſequently intitle him to all actions againſt poſſeſſors neceſſary for removing them, or for recovering the fruits they have intermeddled with. And if the tenant has been in the peaceable poſſeſſion of the lands for ſeven years under the title of a leaſe, that title, though it ſhould, from ſome nullity or defect, be ſubject to reduction, intitles him to a poſſeſſory judgement; by which he may continue his poſſeſſion till his tack be formally ſet aſide, *Dec.* 1. 1676, *Hume*; *vid. infr. b.* 4. *t.* 1. § 50.

29. Purchaſers, though they cannot call in queſtion the leaſes granted by their authors, are intitled, in conſequence of their property, to the whole tack-duties contained in them. Though therefore the tack-duty be made payable, not to the landlord himſelf, but to one of his creditors, or even though the tackſman be allowed by the leaſe, retention of the tack-duty, or any part of it, in payment of a debt due by the landlord to himſelf, ſuch clauſes are unavailable againſt the landlord's ſingular ſucceſſors, *Falc.* i. 240. This doctrine is indeed contrary to a deciſion, *June* 15. 1664, *Thomſon*; by which a tenant was allowed, in virtue of a ſpecial clauſe in the tack, to retain, in a queſtion with a purchaſer from the landlord, ſuch part of his tack-duty as correſponded to the yearly intereſt of a debt due to him by the landlord: but it appears to be grounded, both on the ſtatute, and the known rules of our feudal ſyſtem: for the retention was, in the caſe of the deciſion, claimed by the tenant, not *qua* tenant, but in the character of a creditor to the landlord; with which laſt character it is obvious that the ſtatute hath no concern, ſince the only view of it was, to ſecure tenants in the poſſeſſion of their farms, but not the landlord's creditors in the payment of their debts. Beſides, if ſuch retention were admitted to the prejudice of a purchaſer from the landlord, leaſes would be raiſed

raiſed up to rights of wadſet, or other real right upon land, which requires ſeiſin to their completion; and the ſecurity intended for ſingular ſucceſſors by the records, would dwindle to a mere name, as tacks need not be regiſtered. Though therefore writers rank leaſes among real rights, becauſe they ſecure the tackſman againſt ſingular ſucceſſors, no real effect ought to be aſcribed to them, which the ſtatute has neither given, nor intended to give them; ſee *St. b.* 2. *t.* 9. § 11. & 28. This, however, muſt be admitted, that thoſe clauſes of retention, though they be perſonal, will defend the tackſman againſt the ſetter's ſingular ſucceſſors, if he ſhould be ſued by them for the payment of any rent that had fallen due before they had properly interpelled him. And, upon this footing, a right of retention was ſuſtained to a tackſman, in a queſtion with the factor appointed for the landlord's creditors, as to all the tack-duties fallen due prior to the decree that had been obtained by the factor againſt him before an inferior court, *Falc.* i. 240.

30. A leaſe, if it has the eſſential characters of a contract, and carries nothing in it inconſiſtent with the nature of location, is effectual againſt the granter and his heirs; who may be ſued, either to fulfil the bargain, or make good the damage, though it ſhould be deſtitute of the ſolemnities neceſſary to bring it within the ſtatute; *ex. gr.* a leaſe with a clauſe of retention, or upon which there has been no poſſeſſion. Verbal tacks muſt however be excepted from this rule, *July* 16. 1636, *Keith:* for though theſe conſtitute a ſpecies of location, which may in the common caſe be perfected verbally, *infr. b.* 3. *t.* 3. § 1.; yet they have no effect even againſt the parties themſelves for more than one year; becauſe, by another rule of our law, no obligation or contract relative to land is conſidered as finiſhed till it be reduced into writing, *b.* 3. *t.* 2. § 2. Yet if an alternative be ſtipulated in a verbal leaſe for a term of years, that the parties ſhall either ſtand to the bargain, or ſubject themſelves to a penalty, action is ſuſtained for the penal ſum, *July* 15. 1637, *Skene*; becauſe an obligation to pay a ſum, upon failing to perform a poſſible fact, hath no relation to or connection with land. Some have affirmed, that leaſes granted either to perpetuity, or with an indefinite iſh, are ineffectual even againſt the granter or his heirs; becauſe it is contrary to the nature of property to reſtrain a proprietor for ever, or even for an indefinite time, from the full exerciſe of what is his own: but there is nothing more inconſiſtent with property in ſuch leaſes, than in thoſe granted for life, or for a term of years exceeding the common period of life; and any proprietor may lawfully bind himſelf to diſpoſe of his property, or of the uſe of it, in what manner he may think moſt proper, *July* 26. 1631, *Crichton*; *Jan.* 23. 1717, *Carruthers*, ſtated in *Dict.* ii. *p.* 419.

31. In all leaſes there is a *delectus perſonæ*. The proprietor chuſes a tenant, ſuch as he judges fit for cultivating his farm. Leaſes therefore are *ſtricti juris*; and conſequently the granter is underſtood to depart from no right but what is expreſſed in the tack. This doctrine was formerly ſtretched ſo far, that, by ſome old deciſions, the right of a tack was adjudged not deſcendible to heirs where heirs were not mentioned. Aſſignees are at this day excluded by the nature of the right, in tacks which are not expreſsly granted to aſſignees; ſo that an aſſignation by the tenant without the landlord's conſent, though it infers no forfeiture of the right of tack itſelf againſt the tackſman, can tranſmit no right from him to the aſſignee. Marriage is a legal aſſignation of a tack by the wife to the huſband: for though a tack be deemed an heritable ſubject as to ſucceſſion, yet as it is granted *propter curam et culturam*, and as the whole ſtock of ploughs, oxen, horſes, wains, and other utenſils of a farm, go by the marriage to the huſband

band as moveable, the marriage alſo transfers to him the right of the tack, which cannot in that view be ſeparated from the implements of tillage, *Jan.* 1734, *Hume*. A leaſe, therefore, to an unmarried woman, falls by her marriage, becauſe the marriage, which conſtitutes the aſſignation, cannot be annulled.

32. From this rule, That leaſes cannot be aſſigned, liferent-tacks are excepted, which carry a power to aſſign, though it ſhould not be ſpecially granted; both becauſe they import an higher degree of right in the tackſman than thoſe whoſe endurance is only for a definite number of years, and becauſe in liferent leaſes there is no *delectus perſonæ*, but barely the conſtitution of a right in the liferenter, *July* 16. 1672, *Duff*. Craig affirms, *lib.* 2. *dieg.* 10. § 6. that even a liferent leaſe, if it be granted to a widow, falls by her marriage to a ſecond huſband. But this poſition appears to be ill grounded: for if that kind of leaſe implies a power in the tenant to aſſign, the widow, who is tenant, may doubtleſs aſſign it to a ſtranger: and ſhall her huſband be the only perſon to whom the law will not ſuffer her to convey it? This power of aſſigning was adjudged to be implied in a leaſe granted for a definite term of years exceeding the period of human life, *Spot. p.* 326. *Roſs*. The poſition received by our former cuſtoms, That though leaſes are not aſſignable, they may be adjudged, holds not univerſally in our preſent practice. Where indeed a leaſe does not expreſsly bear to aſſignees, the excluſion of aſſignees, which in that caſe ſprings merely from the nature of leaſes, without any ſecluding clauſe, reaches not to adjudications, which are judicial tranſmiſſions; and therefore ſuch leaſe, though it cannot be voluntarily aſſigned by the tenant, may be adjudged by his creditor, in favour of whom many things are indulged contrary to common rules: but where a leaſe bears an expreſs conventional excluſion of aſſignees, every aſſignee is excluded, without excepting even adjudgers, who are judicial aſſignees, *Falc.* 1. 217.

33. Though it be incontеſted, that tacks are not aſſignable where they are not granted to aſſignees, it remains a doubt, whether the power of ſubſetting is implied in the nature of a tack, without a ſpecial clauſe. By the Roman law, that power was implied in a leaſe, *l.* 24. § 1. *Loc. cond.*; *l.* 6. *C. De loc. et cond.*: and indeed there is not the ſame reaſon againſt the power of ſubſetting as of aſſigning; becauſe by a ſubſet the principal tackſman is not changed, and a ſubtackſman is not generally of an higher rank than the principal. If a deciſion obſerved by Harcarſe, 955. and the others there referred to, be agreeable to law, adjudging, that even a clauſe expreſsly ſecluding aſſignees was no bar to ſubſetting; far more ought a tackſman to have that power where the excluſion of aſſignees is barely implied. Yet Lord Stair, *b.* 2. *t.* 9. § 22. and Mackenzie, § 8. *h. t.* are of opinion, that no tackſman can ſubſet, if the tack be not granted either to him and his ſubtenants, or with a ſpecial power to output and input tenants.

34. A ſubtack requires the ſame ſolemnities as a principal tack; and is as effectual, if it be followed by poſſeſſion, to defend the ſubtackſman againſt ſingular ſucceſſors, as the principal is to defend the tackſman; and therefore no action of reduction brought by the proprietor againſt the tackſman for ſetting aſide his leaſe, can hurt the ſubtackſman in poſſeſſion, if he be not made a party to the ſuit, *Dec.* 13. 1626, *E. Galloway*. The ſubtackſman is tenant, not to the proprietor, but to the principal tackſman; and as the right of the principal leaſe cannot be withdrawn from the tackſman at the pleaſure of the proprietor, neither will a ſubtackſman loſe his right, though the principal tackſman ſhould deſert his leaſe, or renounce his right to it in favour of the proprietor, *July* 14. 1625, *E. Morton*. But

the ſubtackſman has no active right to ſue poſſeſſors on his ſubtack, unleſs the principal leaſe be produced, or has been by ſome former act or deed acknowledged by the defender, *St. b.* 2. *t.* 9. § 22. From what has been obſerved, one difference may be perceived between an aſſignee to a leaſe and a ſubtackſman. The ſubtackſman lies under an obligation to pay his tack-duty, not to the proprietor, but to the principal tackſman, whoſe tenant he is; and upon ſuch payment his obligation is extinguiſhed, though the original tackſman to whom he has made payment ſhould have fallen ever ſo much in arrear to the proprietor. But an aſſignee to a leaſe is bound directly to the proprietor, in payment, not only of the tack-duties fallen, or that may afterwards fall, due, during the ſubſiſtence of his right, but of thoſe that had remained unpaid at the date of the aſſignation; for he is by his aſſignation ſubſtituted in place of the cedent, and ſo becomes obliged to fulfil all the articles which were laid on him by the leaſe; yet without extinguiſhing the obligation againſt the principal tackſman himſelf.

35. If a landlord ſuffer his tenant to continue in the poſſeſſion after the years of the tack are elapſed, the parties were, by the Roman law, underſtood to have entered into a new tack, upon the ſame conditions as the former, *l.* 14. *Loc. cond.* This doctrine we have adopted into our law, and given it the name of *tacit relocation.* The conſent of both parties for thus continuing the leaſe, is, by our uſage, inferred from the concurrence of theſe two negatives, the proprietor not executing a warning or intimation againſt the tenant to remove, and the tenant not renouncing or giving up the poſſeſſion to his landlord in proper time: and therefore the tacit relocation is broken or interrupted, when either the proprietor warns the tenant, or the tenant renounces his poſſeſſion. But if the proprietor do not bring an action againſt the tenant for removing upon the warning, or if the tenant, notwithſtanding his renunciation, ſtill continue in the natural poſſeſſion without diſturbance from the landlord, the parties are underſtood to have again changed their purpoſe, and the tacit relocation revives, and ſubſiſts till a new warning or renunciation.

36. The doctrine of tacit relocation obtains in the caſe, not only of proper tackſmen, but of moveable tenants who poſſeſs from year to year under verbal tacks; and even in tacks granted by liferenters or wadſetters, after the granter's own right has determined, *St. b.* 2. *t.* 9. § 23.; *Jan.* 16. 1663, *E. Errol.* But it has no place in judicial tacks of ſequeſtered eſtates granted by the court of ſeſſion: *Firſt*, Becauſe there is no deed of the court interpoſed in judicial tacks, from which the conſent of the judges to continue the leaſe may be inferred; for warning is never uſed by the court of ſeſſion, and it is the omiſſion of this form in voluntary leaſes, by landlords who are wont to uſe it, which is one of the grounds of tacit relocation: *2dly*, Becauſe in judicial leaſes, where the tackſman muſt give ſecurity to the creditors for the tack-duties during the leaſe, the relocation or new leaſe cannot ſubſiſt on the ſame preciſe footing with that which was firſt granted by the court, and reduced into writing; for the tackſman's cautioner in the leaſe is looſed from his engagement after the expiration of the term expreſſed in the judicial tack, to which term only he had bound himſelf. Judicial tackſmen are therefore accountable for the rents they have received after the expiration of the term expreſſed in the judicial leaſe, not as tackſmen, but as factors or ſtewards, *Dec.* 1709, *Bethune.* As the proprietor's conſent to the new leaſe is founded on the continuance of the tackſman with whom he had contracted in the natural poſſeſſion after the term expreſſed in the original leaſe is expired, there can be no tacit relocation where the tackſman had before that period quitted the natural poſſeſſion in favour of a ſubtackſman; nor can the conſent of both parties implied in relocation, be in ſuch caſe preſumed as to the principal tackſman,

tackſman, whom we ſuppoſe to have given up the poſſeſſion. If therefore the proprietor ſhould, without warning the principal tackſman, bring an action of removing againſt the ſubtackſman after the expiration of the leaſe, it is no ſufficient defence, that the principal tackſman ought to have been alſo warned, as having the right of tacit relocation, *March* 6. 1632, *La. Lauriſton*; *St. b.* 2. *t.* 9. § 23. *verſ. Tacit relocation.*

37. A rental is a particular ſpecies of tack, now ſeldom uſed, granted by the landlord, for a low or favourable tack-duty, to thoſe who are either preſumed to be lineal ſucceſſors to the ancient poſſeſſors of the land, or whom the proprietor deſigns to gratify as ſuch: and the leſſees are uſually ſtyled *rentallers*, or *kindly tenants*. The tack muſt expreſsly bear, that the lands are ſet in rental. If the proprietor barely inrol a tenant in his rental-book, among his liſt of rentallers, the inrolment is ſufficient to defend the tenant againſt the leſſor and his heirs, *July* 5. 1625, *Ayton*; but cannot operate againſt ſingular ſucceſſors, unleſs a ſigned rental be delivered to the rentaller himſelf. Rentals had no iſh expreſſed in them; and there has been a great diſcrepancy of opinions concerning their endurance, where they were granted perſonally to the rentaller, without mention of heirs; as to which, ſee *Craig*, *lib.* 2. *dieg.* 9. § 24.; ſaid *July* 5. 1625; *Mack.* § 9. *h. t.* It is the moſt probable opinion, that as rentals were granted from a ſpecial regard to the rentaller, they were accounted rights of liferent, which ſubſiſted during his life. This opinion is ſupported by the analogy of rentals granted by the church or by the King; both which were conſidered as liferent rights, 1587, *c.* 68.; *Cr. ibid.*; *St. b.* 2. *t.* 9. § 20. And if the law regarded them in this light, it was natural to give them effect againſt ſingular ſucceſſors, though they had no iſh expreſſed in them. Rentals, when they were thus granted perſonally, were, upon the tenant's death, frequently renewed in favour of the heir; but this could not be demanded as of right. On ſuch renewal, the heir paid to the landlord a graſſum or fine, in name of entry, the quantity of which was regulated by the cuſtom of the barony; and it behoved the landlord, after receiving the graſſum, to continue the heir in the farm during his life. On this ground Stair and Craig affirm, that kindlineſs, or a rental, is to be preſumed from the payment of a graſſum: but graſſums are now frequently given by tenants on their entry, when neither the landlord or tenant means to conſtitute a rental.

38. Where a rental was granted to the rentaller and his heirs, the term of endurance was, by our older practice, the ſame as if no heirs had been expreſſed, ſaid *July* 5. 1625, *Ayton*; but afterwards, more agreeably both to the Roman law, *l.* 14. *C. De uſufr.* and the tenor of the right, ſuch rentals were adjudged to ſubſiſt, only during the lives of the rentaller and his firſt heir, *March* 15. 1631, *E. Galloway*; *March* 13. 1632, *Ahannay*; becauſe that made the leaſt deviation from what was accounted the genuine nature of rentals; and if they had been made to extend to all ſucceeding heirs, they would have become proper heritable rights, which, by the feudal rules, could not be conſtituted but by ſeiſin. Rentals commonly bear a clauſe, that the rentaller ſhall neither aſſign nor ſubſet: and though, in the aſſignation of a common tack, the only penalty upon the tackſman is the avoiding of the aſſignation, without his forfeiting the right of tack, *ſupr.* § 31.; yet, in the aſſignation or ſubſet of a rental, the deed is not only void, but the right of rental is forfeited. Nay, the rentaller, even where he had an expreſs power of ſubſetting, was adjudged to forfeit his whole right, by aſſigning more than the half of it, as in recognition, *March* 21. 1623, *L. Craigie-Wallace*. A rentaller alſo, by exchanging his rental lands for thoſe of a like quantity, incurs the forfeiture of his right,

if

if the excambion be followed by poſſeſſion, though it be declared to be made under the expreſs condition, that the proprietor ſhall agree to it, *March* 15. 1631, *E. Galloway;* ſee *Stair*, *b.* 2. *t.* 9. § 21. Theſe forfeitures were enacted, to puniſh the ingratitude of ſuch rentallers as, notwithſtanding the ſpecial regard ſhewed to them by the proprietor, might be diſpoſed to transfer the poſſeſſion of the lands to another without his conſent.

39. Certain obligations are, by the contract of tack, laid on both parties, whether it be a tack of lands or of houſes. In a tack of lands, the landlord is underſtood to be bound to warrant the right to the tenant, and to defend him in the poſſeſſion. He is uſually obliged to put all the houſes and offices neceſſary for the farm in ſufficient condition at the tenant's entry, and ſometimes the tenant accepts of them as ſufficient by a ſpecial clauſe; and in whatever condition the tenant owns he has received them, he muſt alſo maintain them during the tack, and leave them in the ſame repair at his removal, unleſs the landlord himſelf undertake that burden in whole or in part, *Fount. Dec.* 20. 1707, *Whites*. The tenant, though he ſhould enlarge the houſe, or build new offices, as ſtable, barn, coach-houſe, &c. during the leaſe, is intitled to no abatement of rent on that ſcore, without a previous agreement with the landlord. He is, when the term of entry comes, obliged to enter immediately into the poſſeſſion, to furniſh the graſs-grounds with a ſufficient ſtock of cattle, and to cultivate and manure the corn-grounds, *Feb.* 27. 1623, *L. Randiford*. He is, by the nature of the contract, obliged to uſe the power given him over the ſurface *tanquam bonus vir*, without running out or waſting the ſoil; and conſequently he is in ſundry circumſtances, which muſt be left *in arbitrio judicis*, tied down, without any expreſs clauſe, both with reſpect to the grounds which he may turn up with a plough, and as to the method of cultivation and huſbandry, *l.* 25. § 3. *Loc. cond.*; *Feb.* 6. 1633, *L. Haddo*; *Nov.* 19. 1762, *Stirling*; *St. b.* 2. *t.* 9 § 31.; ſee alſo *Gilm.* 144.

40. A tenant, if the landlord refuſe to receive his victual-rent when offered to him in due time, is liable only for the prices as fixed by the ſheriff-fiars of that year; and if the grain periſh by lying in his hands, the landlord muſt ſuffer the loſs: but if he do not offer his rent in kind, when obliged to it by his leaſe, he muſt account to his landlord according to the ordinary prices of the country, *Harc.* 900. And if the landlord ſhould enter into a contract of ſale with a merchant, for any part of his farm wheat or barley, and be diſabled from performance through the tenants not delivering to him their ſeveral proportions of grain according to their leaſes, they muſt make good to the landlord the damage recovered by the merchant againſt him for not fulfilling his bargain.

41. By a rule which may be collected from § 39. no rent is due where the tenant, through any occaſion not imputable to himſelf, is debarred from the poſſeſſion of his lands. When therefore the lands are poſſeſſed by an enemy, or happen to be overflowed by the ſea, the landlord loſes his tack-duty, *l.* 15. § 1. 2. *Loc. cond.* And though the tenant ſhould have got poſſeſſion, and ſown his arable grounds, the landlord cannot, by the Roman law, claim any part of the rent of that year, if inundation, the calamity of war, the corruption of the air, or the inclemency of the weather by earthquakes, lightning, &c. hath brought upon the crop a damage *pluſquam tolerabile*; but if the loſs be more moderate, he may exact the full rent, *l.* 25. §6. *eod. tit.* It is no where defined in that law, what degree of ſterility or vaſtation makes a loſs that cannot be born; but, by the common opinion, the tenant is liable for the rent, if the produce of the crop exceed the expence of the ſeed and tillage. Though the landlord cannot in equity demand the tack-duty in the caſe above mentioned, yet as to the expence of

of ſeed and labour laid out voluntarily by the tenant on the ſubject, the profits of which were to accrue wholly to himſelf, the landlord is not obliged, even in equity, to indemnify him of that expence, either in conſequence of his right of property in the lands, or from the nature of the contract, *arg. l.* 15. § 2. *eod. tit.* If the tenant's loſs ariſe, not from the want of increaſe, but from the bad quality of the grain, *ex. gr.* from his corns having been blighted, or ſpoilt by rain after reaping, or from the running out of his grounds, or the decay of his fruit-trees, he is not intitled even to an abatement of rent on that account, *ibid.* If the next crop be uncommonly rich, it is burdened with the payment to the landlord, both of the rent of that year of plenty, and of the former year of ſterility, *d. l.* 15. § 4. No exemption can be pleaded, on account of an extraordinary ſterility, by a *colonus partiarius*, who pays a certain ſhare of the increaſe in name of tack-duty; for he, being conſidered as copartner with a proprietor, rather than as tenant to a landlord, muſt, in that character, divide the loſs with the proprietor, according to the proportions ſettled by the contract, *l.* 25. § 6. *eod. tit.* Theſe rules have been adopted into the law of Scotland, not only in the opinion of writers, but by our deciſions, ſo far as they have gone in that matter, particularly by *Dirl.* 108; *Home*, 213.

42. Tenants are exempted from the payment of all taxations, or public burdens, to which they are not expreſsly ſubjected by their leaſes: but the law itſelf divides the burden of the ſchoolmaſter's ſalary between the landlord and the tenant; ſo that, without any paction, the landlord pays the one half, and the tenant the other, 1696, *c.* 26. Clauſes are frequently inſerted in leaſes, obliging tenants to indefinite ſervices, under the name of *arriage and carriage*, or *ſervices uſed and wont*; but, by the act 20° *Geo. II.* aboliſhing ward holdings, no tenant can be compelled to perform any ſervices, but ſuch as ſhall be ſpecified, and the number and kinds of them enumerated, either in the leaſe itſelf, or in a ſeparate writing; but there is a proviſo, that that enactment ſhall not extend to mill-ſervices, which are to continue upon the former footing.

43. In the leaſe of a dwelling-houſe, the landlord muſt deliver the ſubject ſet to the tenant in an habitable condition at the time of his entry, unleſs the tenant himſelf do, in the leaſe, undertake the burden of repairing it; for where a ſubject is let for a particular purpoſe, the nature of the contract implies, that it ſhould be fitted for that purpoſe. The landlord muſt alſo, if it be not otherwiſe ſtipulated, uphold the houſe in tenantable repair during the leaſe. Where, therefore, a houſe becomes inſufficient in whole or in part while a leaſe is current, the rent muſt be either entirely remitted, or at leaſt abated, in proportion to the damage ſuſtained by the tenant, though the inſufficiency ſhould happen by an accident not imputable to the landlord, *Jan.* 2. 1667, *Hamilton*; *Harc.* 948.: yet ſee a later deciſion obſerved by Harcarſe, 956. But a ſlight inconveniency is not to be regarded, *l.* 27. *pr. Loc. cond.* Where the inſufficiency ariſes from the inconſiderate or culpable act of the landlord, he not only loſes his rent, but muſt make up to the tenant the full loſs which he has ſuffered through that fault, *l.* 30. *pr. eod. t.*; and if the houſe ſhould tumble down, or the tenant be debarred from the poſſeſſion, even without any raſhneſs or unjuſtifiable omiſſion in the landlord, no rent is due for the time that it is uninhabitable, *l.* 33. *eod. t.*; nor if the tenant ſhould abandon the houſe from a juſt ſuſpicion of its inſufficiency, *l.* 27. § 1. *eod. t.* The tenant himſelf, when he diſburſes the expence of repairing without conſulting his landlord, may retain out of the rent ſuch part of the charges as ſhall appear to have been neceſſary for upholding the houſe; but he has no retention for the ſums expended for ornament, or even greater conveniency, unleſs the landlord

has previouſly conſented to that expence. In tenements within a royal borough, where the neceſſary repairs require a conſiderable ſum, and the landlord appears backward, it is uſual for the tenant, the better to ſecure his indemnification, to apply to the dean of guild; whoſe warrant, proceeding on the eſtimate of tradeſmen, is a legal evidence, both of the neceſſity, and amount of the expence, of repairing. On the other hand, the tenant of an houſe is bound to uſe a reaſonable degree of diligence in preſerving it from harm. By the Roman law, if, in default of the tenant's diligence, the houſe ſhould have received damage, the landlord had not only a perſonal action againſt him for the amount of it, but a right of hypotheck on the furniture for his farther ſecurity, *l.* 2. *In quib. cauſ. pign.*

44. Tacks may determine or ceaſe, either during their currency, or when the years of the tack are expired. They may be evacuated while they are yet current, *firſt*, by the tenant running two full years rent in arrear, in the ſame manner that a feu-right is irritated by the feuer failing to pay; which is alſo agreeable to the Roman law, not only in the caſe of an *emphyteuta*, but of a proper tenant, or *colonus*, *l.* 54. § 1. *l.* 56. *Loc. cond.* This irritancy, though it was by our former practice cognifable only by the court of ſeſſion, may, by act of ſederunt, *Dec.* 14. 1756, be now declared by the judge-ordinary, *i. e.* the ſheriff-depute or ſheriff-ſubſtitute; who has alſo power to pronounce judgement againſt the tenant in the removing. But the irritancy will be prevented if payment be made by the tenant at any time before it be declared. *2dly*, Though the tenant had been but one year's rent in arrear, he might, by the former cuſtom, have been decreed by the ſeſſion to remove, if ſufficient ſecurity was not given for the rents that had fallen, or ſhould fall due, during the tack, *Feb.* 27. 1627, *Lawſon*; which was extended alſo to tenements within borough, *Dirl.* 429. But it is now provided by the above-mentioned act of ſederunt, that where the tenant ſhall either fall one full year's rent ſhort in his payment, or ſhall deſert his poſſeſſion, or neglect to cultivate his farm at the uſual ſeaſon, the judge-ordinary ſhall, at the ſuit of the landlord, ordain the tenant to give ſecurity for the preceding arrears, and for the rent of the five following crops, if the tack ſhall ſubſiſt ſo long; and upon the tenant's failure, ſhall decree him to remove ſummarily, as if the years of the leaſe were expired, and the tenant had been legally warned. *3dly*, Leaſes may ceaſe or determine before their iſh by the mutual conſent of both parties, either expreſſed or implied. A leaſe determines by expreſs conſent, when a renunciation of it, ſigned by the tenant, is delivered by him to and accepted by the landlord; whoſe acceptance is commonly proved by a notorial inſtrument taken by the tenant at the time of delivery: but verbal renunciations may be refiled from, in the ſame manner as verbal tacks. The conſent of parties to give up a current tack is preſumed, when the tenant accepts of and uſes a poſterior tack, in which any variation is made from the firſt, either as to the tack-duty, term of endurance, or other proviſions relating to it; much more when he acquires an heritable ſecurity, or other real right in the ſubject let, theſe being titles of poſſeſſion incompatible with the former; for the ſame perſon cannot be landlord and tenant, *Cr. lib.* 2. *dieg.* 10. § 7. But if the ſecond tack, or the heritable right, ſhould be declared void, the tenant may reſume his firſt title; becauſe the implied renunciation of the firſt tack is only proviſional, not to take place, if the ſecond tack, or heritable right, ſhould prove ineffectual to him, *Cr. ibid.*; *St. b.* 2. *t.* 9. § 36. A tack ceaſes or determines by the elapſing of the years contained in it, if either the tenant renounce his poſſeſſion to the landlord, or the landlord warn the tenant to remove, *i. e.* in every caſe where there is no room for tacit relocation. The tenant's renunciation ought, in the opinion of Craig,

lib.

lib. 2. *dieg.* 9. § 2. to be ſigned, and delivered to the landlord, forty days before the Whitſunday at or immediately preceding the iſh; and to bear a conſent, that the landlord may, at the iſh, enter into the poſſeſſion *brevi manu:* but by the preſent practice, tenants ſeldom or never execute written renunciations, except when they are intended to have immediate effect, before the expiration of the years of the tack. Where the tenant is reſolved not to quit his tack during its currency, he contents himſelf with a verbal declaration to his landlord, that he is to give up the poſſeſſion at the iſh.

45. Little ceremony was obſerved ſome centuries ago in the removing of tenants. The landlord came to the door of the tenant's houſe at any time of that year wherein the tack was to expire, with a wand in his hand, which having broke in two, as an evidence of his reſolution to put an end to the tack, he warned the tenant verbally to remove at the iſh; and if the tenant did not then remove voluntarily, the landlord might the very next day have ejected him, with his family and goods, *via facti*, *Cr. lib.* 2. *dieg.* 9. § 4. To repreſs the frequent violences occaſioned by this oppreſſive and barbarous cuſtom, it was enacted by 1555, *c.* 39. That previouſly to the removing, the landlord ſhould ſign a precept of warning, commanding his officer to intimate to the tenant, forty days before the Whitſunday at or immediately preceding the term of the iſh, to remove at that term from his poſſeſſion, with his ſubtenants, family, and effects; and that this precept ſhould be executed againſt the tenant, either perſonally, or at his dwelling-houſe, and a copy, if he was not perſonally warned, delivered to one of his family, or affixed on the door of his houſe. This precept muſt, by the ſtatute, be alſo executed on the ground of the lands, a form uſed in all real executions affecting land, and afterwards read in the pariſh-church where the lands lie, on a Sunday before noon, in the time of preaching or prayers, and a copy affixed on the moſt patent door of the church. But warnings are *de praxi* ſuſtained, though the publication at the pariſh-church be prior to the execution upon the ground of the lands, provided that both one and the other be uſed forty days before Whitſunday, *Dec.* 2. 1712, *Stirling*; and by immemorial uſage, they are now always read at the church-door immediately after the forenoon's ſervice, and not in the church in the middle of the ſervice.

46. This whole proceſs of removing muſt be uſed forty days before Whitſunday, though the term of the iſh ſhould be Martinmas or Candlemas, *June* 15. 1631, *Ramſay*; becauſe as Whitſunday is, at leaſt was at the date of this ſtatute, the ordinary term of entry over the greateſt part of Scotland, tenants would not otherwiſe have had a reaſonable time for providing themſelves in a farm elſewhere. The forty days before Whitſunday muſt be ſo computed, as to include neither the term-day, nor the day on which the warning was uſed, *Cr. lib.* 2. *dieg.* 9. § 2. As warning is not a citation on a ſummons, but a bare intimation to the tenant, that an action is to be brought againſt him in a certain event, the ſtatute requires no more, but that forty days intervene between the warning and the next term of Whitſunday, without conſidering whether the tenant be within the kingdom or in foreign parts, *Feb.* 20. 1666, *Macbrair*; but the common *inducia* muſt be allowed to him in the citation upon the ſubſequent action of removing. Whitſunday was formerly a moveable term, which frequently reached far into ſummer; ſo that the tenant who was to enter, ſuffered conſiderable damage through the eating up of the early graſs by him who was to remove; but by 1690, *c.* 39. the legal term of removing is declared to be the 15th of May, which the act extends to borough-tenements as well as rural: and by a ſtill later act, 1693, *c.* 24. which is truly declaratory

ratory of the former, the term of Whitſunday is fixed to that preciſe day, not only in queſtions of removing, but in every other civil reſpect.

47. The ſolemnities of the act 1555 are not required in the warning of tenants from tenements which have no relation to a country-farm. In theſe, *ex. gr.* in dwelling-houſes, that have no connection with a rural tenement, it is ſufficient that the tenant be warned to remove forty days before the iſh of the leaſe, whether the term of the iſh be Whitſunday or Martinmas, *Nov.* 21. 1671, *Riddel.* And in the caſe of houſes within borough, whether boroughs royal or of regality, the ceremony of chalking the door by a borough-officer, is held for a legal warning, without any execution at the pariſh-church, *July* 18. 1634, *Hart.* By the uſage in Craig's time, the officer obtained a warrant for this purpoſe from the magiſtrate; but now he may uſe that form without even a verbal warrant, *June* 24. 1709, *Barton*; for as a precept, ſigned by the proprietor, is ſufficient for the warning of tenants from rural tenements, without the interpoſition of a judge, the proprietor's verbal order ought to be ſufficient within borough, without the warrant of a magiſtrate. In what reſpects inhibition of tithes reſembles a warning to remove, ſee *infr. t.* 10. § 45.

48. Warning is, in the common caſe, a neceſſary ſtep previous to the action of removing; and the effect of it is not loſt by the death either of the landlord or of the tenant. If the landlord ſhall die before bringing his action of removing, his heir may inſiſt in that action upon the warning uſed by the anceſtor, *July* 28. 1637, *E. Hadington:* and if the tenant who has been warned, ſhall die before a removing be commenced againſt him, his heir may be ſued by the landlord to remove, upon the warning uſed againſt the deceaſed, without the neceſſity of renewing it, *Jan.* 27. 1630, *Hume.* It has been affirmed, that an executor may ſue tenants in a removing, upon a warning uſed by the deceaſed, to the ſpecial effect of recovering the violent profits, explained *infr.* § 54. which, being a moveable ſubject, can be claimed by no other than the executor: but, *firſt*, An action for removing tenants from lands, is competent to ſuch only as have a real intereſt in theſe lands: *2dly*, It is abſurd to admit a right in two different perſons to bring a removing at one and the ſame time againſt the ſame defenders; and it is inconteſtable, that, in the caſe ſuppoſed, the landlord's heir hath a right to inſiſt in a removing, upon the warning uſed by his anceſtor: from which it appears, *3dly*, That the violent profits belong to the landlord's heir, not to his executor; for if the landlord tranſmits to his heir the right of proſecuting the removing, he muſt alſo tranſmit to him the right of the violent profits, which are truly appurtenances of that right of action, and ſo cannot be ſeparated from it. In every caſe where warning was neceſſary, it behoved the landlord, by our former law, to obſerve ſtrictly the whole order preſcribed by the act 1555; but becauſe tenants frequently took occaſion, from the multitude of forms preſcribed by that act, to object nullities in the order of warning, which was attended with numberleſs inconveniencies, both to landlord and tenant, an option is, by the before-cited act of ſederunt 1756, given to landlords, either to follow the directions of the ſtatute, or to bring their action of removing before the judge-ordinary, ſo as it may be called in court forty days before the Whitſunday preceding the iſh, which is by the ſaid act of ſederunt declared (as it is indeed in common ſenſe) equivalent to a warning executed according to the directions of the ſtatute.

49. In ſundry caſes, actions of removing might, even before the ſtatute 1555, have been inſiſted on without any previous warning. This kind of removing is competent either by law or paction. It is competent by law, *firſt*, Againſt vitious poſſeſſors who have ſeized the poſſeſſion by force, or intruded

intruded into it, after the former poſſeſſor had given it up; for no ſtatute can be conſtrued to give countenance or protection to acts of violence or deceit: 2*dly*, Againſt precarious poſſeſſors who have no more than a tolerance to poſſeſs during pleaſure. Yet even in this caſe the proprietor will not be ſuffered to eject the poſſeſſor inſtantly, without giving him a competent time to look out for a place of abode to himſelf and his family. 3*dly*, Summary removing is competent againſt tenants who have been ſued to give ſecurity for the rent already due, or which may fall due during the leaſe, and have given none; for the landlord is in danger of loſing his rent by the delay, and the tenant has himſelf to blame for neglecting it or putting it off, *Pr. Falc.* 13. 4*thly*, Warning is not neceſſary againſt one who had ſold lands to the purſuer, and who nevertheleſs holds the poſſeſſion after the term of the purſuer's entry; for ſuch poſſeſſion is deſtitute of all title. On the ſame ground, when a liferenter who was in the natural poſſeſſion, dies, the fiar may enter to it without any form of law: and if he be hindered, he may ſue the poſſeſſors of the liferented lands to remove without warning; for the right of liferent, which is the only title of their poſſeſſion, being extinguiſhed by the liferenter's death, can no longer ſupport the poſſeſſion: but if the liferenter poſſeſſed by tenants or tackſmen, theſe tenants, though they derived their only right of poſſeſſion from the liferenter, cannot after his death be turned out of it till the next Whitſunday, that, according to the ſpirit of the act 1491, *c.* 26. they may have time to provide themſelves in other farms, *Cr. lib.* 2. *dieg.* 9. § 13. Yet upon an action brought againſt them, they may be compelled to remove at that term, *Feb.* 16. 1628, *Thomſon.* In the caſe of a liferent-tack granted by the landlord, no action of removing was, prior to the late act of ſederunt, competent on the tackſman's death againſt his repreſentatives, without a previous warning, agreeable to the act 1555, *Feb.* 13. 1630, *L. Rowallan:* for in every caſe where a tack is granted by the proprietor, warning is neceſſary; and as warning muſt be uſed in order to remove a tenant in a common leaſe, even after the term of its endurance is elapſed, though the leaſe carries no proper right to the tenant beyond that term, it muſt be alſo uſed upon the death of a liferent-tackſman againſt his repreſentatives, though the right of ſuch leaſe is truly extinguiſhed by the tackſman's death. By a late judgement, however, *New Coll.* ii. 214. warning was found not to be neceſſary for removing the repreſentatives of a liferent-tackſman, who had been bound by his leaſe to pay the nominal duty of one merk, for a ſubject which might have been reaſonably let at the yearly rent of two hundred. But whether this deciſion was grounded on the eluſory duty payable by the tackſman, which brought it out of the common caſe of a leaſe, or upon what other medium, does not appear by the deciſion. Stair is of opinion, without exception, *b.* 2. *t.* 9. § 23. that a tackſman of a colliery may be ſued to remove ſummarily, or without warning *.

50. The action of removing was competent, in the opinion of Craig, *lib.* 2. *dieg.* 9. § 11. without previous warning, where the tenant became expreſsly obliged by his tack to remove, and deliver the void poſſeſſion to the landlord, againſt a preciſe day or term without warning: which opinion is ſupported by a late deciſion, *Jan.* 1736, *Dickſon.* But the diſpenſing with a ſolemnity eſtabliſhed on conſiderations of public policy, and for protecting poor tenants againſt the oppreſſion or ſeverity of their landlords, ſeems to elude the law, and counteract the rule, *Pactis privatorum publico juri derogari nequit.* And indeed the late act of ſederunt, 1756, ſeems to have conſidered the matter in this light: for though that act declares it lawful for the land-

* So it was lately decided, *Dec.* 15. 1767, *Wauchop contra Macdowal and Hope.*

lord, where the tenant has expreſsly bound himſelf to remove without warning, to charge him with horning on his obligation; yet it is only in the preciſe caſe, that he actually charges the tenant forty days before the Whitſunday, and produces the tack, and horning duly executed, in court, that the judge-ordinary is authoriſed to eject him in ſix days after the iſh. If the landlord ſhall ſuffer a tenant who is bound by a clauſe of this kind, to poſſeſs longer than the term expreſſed in his tack, the paction to remove without warning is no longer of force; and conſequently the tenant poſſeſſes from that time by tacit relocation. In all removings which require no previous warning the court of ſeſſion had the ſole cogniſance, becauſe ſuch removings are extraordinary remedies, *Pr. Falc.* 13.; whereas the judge-ordinary was always competent in thoſe common removings which were brought in conſequence of the ſtatute 1555.

51. A landlord's title to proſecute a removing, be it good or bad, cannot be queſtioned by a tenant who derives his poſſeſſion from him, if he has not been formerly decreed by the ſentence of a competent judge to acknowledge another landlord, *St. b.* 2. *t.* 9. § 41. Thus a proprietor, tho' he hath a bare perſonal right to the lands by a grant not perfected by ſeiſin, may ſue tenants to remove whoſe tacks have flowed immediately from himſelf; for however defective his title may be, it is the only foundation of theirs. But if a proprietor is to inſiſt againſt tenants or poſſeſſors who derive their right from others, ſeiſin is, by our cuſtoms, a neceſſary title in removing: and in that caſe he muſt make thoſe others parties to the removing, if they have been in the poſſeſſion; but if not, the purſuer need not regard them. Seiſin is not neceſſary where the purſuer's right is founded on the terce or courteſy; theſe being legal rights, which are perfected without ſeiſin. A ſeiſin is of itſelf a ſufficient title for removing poſſeſſors who cannot ſhew a better; but if the defenders have a real right in the lands, the ſeiſin is not held as ſufficient, without producing the relative charter. The purſuer muſt be infeft, not only before the action of removing be commenced, but alſo from the date of the precept of warning: for if the landlord's right in the lands be not completed by ſeiſin at the time he iſſues his orders for warning the tenant, the precept itſelf is null, as proceeding *a non habente poteſtatem*; and conſequently the removing, which is grounded on it. This however admits of an exception in the caſe of an apparent heir: for though he be not ſerved heir at the date of the precept, yet if he be ſerved, and infeft on his ſervice, before commencing the removing, the bare right of apparency, which law accounts a ſufficient title for poſſeſſing the anceſtor's eſtate, ſerves to ſupport the warning on which the removing is grounded, *July* 28. 1637, *E. Hadinton.* It would ſeem that a ſeiſin upon a precept of *Clare conſtat*, is not a good title in a removing, unleſs either the predeceſſor of the heir in whoſe favour the precept is granted, or the ſuperior himſelf, had been in poſſeſſion; becauſe a purſuer who enters to the lands upon ſuch precept, brings no other evidence of his being heir, than the ſuperior's affirmation in the precept, *St. b.* 2. *t.* 9. § 41. *verſ. Though infeftment.*

52. The common opinion, that ſeiſin is a neceſſary title in all removings where the tacks have not flowed from the purſuer, is not clear of difficulties. It is doubtleſs true, that thoſe who have barely perſonal rights to land, cannot, by the genius of the Scottiſh law, hold courts, not even for the payment of rent; becauſe the holding of courts is an act of juriſdiction, which being incident to a feudal tenure, cannot be exerciſed without ſeiſin. But tho' for that reaſon a proprietor not infeft cannot inſiſt in a removing before his own court, he ſeems intitled by common law, in conſequence of his property, to bring a removing againſt tenants before the ſheriff, whether their leaſes have flowed from himſelf, or from others, in every caſe where they cannot

cannot ſhew a better right than his: for as a diſpoſition to lands carries an expreſs right to mails and duties, or to the rents, the right of removing tenants appears to be a neceſſary conſequence reſulting from thence.

53. A proprietor who has no more than a joint intereſt with another in a land-eſtate *pro indiviſo*, cannot by himſelf remove tenants from his part of the land, without the concurrence of the joint proprietor, as long as the land is undivided; becauſe every inch of the ground belongs to both proprietors *pro indiviſo* in determinate proportions; and conſequently it is impoſſible for the tenant to remove from the ſhare of the lands belonging to the purſuer in the removing, without alſo removing from that which is veſted in the other proprietor; to which the law cannot compel him, unleſs that other concur in the ſuit. This is the caſe of co-heireſſes, of joint purchaſers, and of a widow intitled to a terce, till there be an actual diviſion of the lands.

54. The tenant, before he be admitted to plead any defence againſt the removing which cannot be inſtantly verified, muſt give ſecurity to pay the violent profits to the purſuer in caſe his defences ſhould be repelled, 1555, *c.* 39. *Violent profits* are ſo called, becauſe they become due on the tenant's forcible or unwarrantable detaining the poſſeſſion after he ought to have removed; for whatever is done without proper warrant or authority, is, by the law, accounted violence, *l.* 13. *Quod. met. cauſ.* In tenements of houſes within borough, they are eſtimated to the double of the rent or tack-duty; in lands, it is the full profits the purſuer could have made, either by poſſeſſing them himſelf, or letting them to others: ſo that, in either caſe, the violent profits are made higher than the rent payable before the warning, the more effectually to diſcourage the holding of poſſeſſion where the right to poſſeſs hath ceaſed. But if the tenant has had a *probabilis cauſa litigandi*, the decree will be reſtricted to the yearly tack-duty payable by the tack. It is a uſual defence againſt a removing, That the defender has given obedience to the warning by removing voluntarily. But this is not ſufficient by itſelf, if he hath not alſo given timely notice of it to the landlord, that he may either enter into the poſſeſſion of it himſelf, or give it to another; for if, by neglecting this, a ſtranger hath been ſuffered to intrude, the tenant will be liable in damages, *July* 21. 1713, *Budge*. It is no good defence againſt paſſing judgement in this action, That no judgement ought to be pronounced againſt the tenant till the term at which he is bound by the leaſe to remove, *Nov.* 21. 1671, *Riddel:* for if that plea were good, there could be no ready execution, when that term came on, againſt tenants who ſhew a backwardneſs to remove; and thus the new tenant might be diſappointed: but the execution of the ſentence muſt, in this caſe, be ſuſpended till after the term. If the action of removing ſhall be paſſed from, or if the landlord ſhall, at any time after uſing warning, accept of rent or ſervices from the tenant for years or terms poſterior to that at which he was warned to remove, he the landlord is preſumed to have changed his mind, and tacit relocation takes place; for his acceptance of ſuch rent implies his conſent, that the tenant ſhall continue tenant for that year, or term, in conſideration of which he has received part of the rent or ſervices: but the landlord's accepting of ſervices which the tenant is not obliged to perform by the tack, infers no prorogation of it, and ſo can afford no defence againſt removing; for in theſe, the tenant cannot be conſidered as fulfilling an obligation under which his tack laid him to his landlord, but as making a preſent to one whom he was willing to oblige.

55. It is declared by the aforeſaid act of ſederunt 1756, that in all leaſes where the tenant had ſubſet the lands, or where they have been aſſigned, and the aſſignation not intimated to the landlord, warning uſed againſt the principal

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or original tackſman, and action of removing brought, and decree recovered thereupon, ſhall be effectual alſo againſt the aſſignees and ſubtenants, though neither warned, nor made parties to the removing. By the ſame act, no bill of advocation, or of ſuſpenſion, in a removing, can be paſſed, but by three Lords in vacation-time, or by the whole Lords in time of ſeſſion: and all removings, whether brought before the ſeſſion originally, or by advocation or ſuſpenſion, are intitled to a ſummary diſcuſſion, without abiding the courſe of the roll.

56. The landlord has, in ſecurity of his tack-duty, not barely the tenant's perſonal obligation expreſſed in the leaſe, but a real right in the fruits of the ground, and in the cattle brought upon it by the tenant. A ſubject may be given to a creditor in ſecurity, either when it is put under his power; and this ſort was called by the Romans *pignus*, and by us *a pledge*; or the debtor may, notwithſtanding the ſecurity, be allowed to retain the poſſeſſion of the ſubject; and then the right is called *an hypotheck*. Hypothecks are either expreſs, conſtituted by the explicit convention of parties; or tacit, otherwiſe ſtyled *legal*, which, without any poſitive covenant, are eſtabliſhed by the law itſelf from preſumed conſent. Of this laſt kind is the landlord's hypotheck for his rent. It is not only competent to the landlord himſelf, but to any to whom he may aſſign the rents; for the aſſignation of rents is, in the judgement of law, a conveyance of every legal right, by which the payment of thoſe rents is ſecured, *July* 23. 1707, *Wedderburn*. But an adjudger hath no title to it, unleſs he be infeft, and hath uſed diligence to attain poſſeſſion upon his adjudication, *July* 29. 1675, *E. Panmure*.

57. All fruits, while growing, belong truly to the proprietor of the ground, in conſequence of his right of property: and though they become the tenant's by his reaping, or otherwiſe ſeparating them from the ground, with the landlord's conſent; yet by the Roman law, they continued, even after being reaped, to be charged with the payment of the yearly tack-duty, and ſo became the ſubject of the landlord's hypotheck; becauſe his conſent to the reaping implied a condition, that the ſtipulated rent ſhould be paid out of thoſe fruits to himſelf, *l.* 7. *pr. In quib. cauſ. pign.*; *l.* 61. § 8. *De furt.* By that law, the landlord had no hypotheck on the cattle paſturing on the ground, without expreſs covenant, *l.* 4. *pr. In quib. cauſ. pign.*; becauſe theſe never belonged to the proprietor. Nevertheleſs, not only the fruits, but the cattle brought on the ground, are, by the law of Scotland, ſubjected to this hypotheck, partly for the landlord's greater ſecurity, and partly becauſe, in graſs-grounds, where little or no corn is ſown, the ſubject of the hypotheck would be frequently reduced to a trifle if there were none upon the cattle. Theſe two, as they have different properties and effects, ſhall be handled ſeparately.

58. In virtue of the hypotheck upon the corns, and other fruits, the landlord can, either, *firſt*, retain them on the ground, againſt all who ſhall attempt to carry them off, whether purchaſers, or even creditors upon legal diligence ready to be executed by poinding; or, *2dly*, he can recover them from thoſe who have intermeddled with them. The firſt right, *viz.* of retention, is confined to the fruits which remain in the tenant's poſſeſſion, that are by law impignorated for that year's rent only that is current, when the landlord exerciſes his right. All theſe fruits, whether yet growing, or in the tenant's granaries, are, by the preſent practice, without diſtinction of crops of which they are the growth, underſtood to fall under the landlord's hypotheck, as a ſecurity for that year's rent, in ſo far as relates to this right of retention. Thus a landlord may ſtop a creditor who offers to poind his tenant's corns, from carrying off, even ſuch of them as

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are the growth of a year the rent of which has been already paid, unleſs he ſhall leave a quantity ſufficient for the payment of the rent of that year in which the creditor uſeth his diligence.

59. The right to retain is much ſtronger before the term of payment of the tenant's rent than after it. If a creditor of a tenant ſhall attempt to poind any part of the fruits for the payment of his debt *currente termino*, the landlord can ſtop the poinding, though the creditor ſhould leave as much on the ground, whether cattle, or even corns, as would be ſufficient for the year's rent; becauſe, before the term of payment, the landlord can barely retain the ſubject of the hypotheck, but cannot put forth his hand to make it his own; and the cattle left on the ground may die, the fruits may be rotted with rains, or both may be clandeſtinely carried off before that term. His right of retention therefore continues till the creditor ſhall either make payment to him of the current year's rent, which neceſſarily extinguiſhes the hypotheck; or ſhall offer him ſufficient perſonal ſecurity for it, which the law, from a conſideration of equity, obliges the landlord to accept, *Home*, 49. But if the rent be payable in kind, *ex. gr.* in wheat, barley, &c. the landlord may ſtop the poinding, though a general offer ſhould be made by the creditor of ſecurity for the rent; becauſe he hath a right by his leaſe to demand the *ipſa corpora:* and if he has already ſold his farms, he may be made ſubject to the damage ſuſtained by the purchaſer by his not delivering the full quantity of grain ſold. The creditor, therefore, in that caſe, cannot lawfully proceed to poind, unleſs he ſhall give to the landlord ſecurity to deliver, in kind, the quantities of grain ſpecified in the leaſe granted to the tenant, againſt the day or term therein ſtipulated, *Falc.* i. 252. After the term of payment of the rent is come, the landlord has not only a right of retention, but he may, like any other creditor, appropriate to himſelf, by his diligence, as much of the ſubject of the hypotheck as amounts to the rent: from that period, therefore, *i. e.* after Candlemas, when the rent is payable in grain, the creditor, if he leaves on the ground a quantity of corns ſufficient for that purpoſe, may proceed to poind the reſidue, and the tenant's other goods.

60. The landlord hath, in virtue of his hypotheck on the fruits, not only a right of retention, but of recovery: for though they ſhould be carried off from the ground, whether by a purchaſer or a creditor, he may bring them back to the tenant's granaries, there to remain for his own ſecurity, if the term of payment of the rent be not come; and if that term be paſſed, he may appropriate them to himſelf, *July* 25. 1623, and *Feb.* 3. 1624, *Hay*. Though it ſeems inconſiſtent with equity to ſuſtain this right of recovering the fruits in a corn-farm where the tenant pays nothing but money-rent, ſince the chief fund for the payment of ſuch rent muſt ariſe from the ſale of his corns; yet, *de praxi*, the landlord is intitled, even in that caſe, to an action againſt the purchaſer, for recovering either the corn ſold or their price: And an old deciſion carried the point ſtill farther, againſt purchaſers in a public market, *March* 29. 1639, *Hay*. But that judgement is juſtly cenſured by writers, ſeeing the very ſubſiſtence of fairs and markets depends on the ſecurity of purchaſers, who cannot poſſibly know the condition of every man they may happen to deal with there. If the landlord uſe this right of recovery *de recenti*, he may bring back the corns *via facti*, without the authority of a judge; becauſe, in ſuch caſe, the law conſiders them as ſtill in the tenant's poſſeſſion, *Dec.* 11. 1672, *Crichton*, unleſs where the tenant's creditor has made them his own by complete lawful diligence, *Falc.* i. *June* 24. 1745, *Curry*. But after the corns have been carried to and ſettled on the grounds of the purchaſer or creditor, by which he acquires the lawful poſſeſſion, the landlord cannot *ſibi jus dicere*, by forcibly recovering

them out of his hands; but muſt make good his right upon the hypotheck, by an action againſt the poſſeſſor before the judge-ordinary, *Feb.* 9. 1676, *Park.* This right for the recovery of the corns is not reſtricted, as that of retention is, to a ſecurity for any one year's rent; but the ſeveral years corns ſtand hypothecated for the rent of that year of which they are reſpectively the crops, though the landlord ſhould not have attempted their recovery by an action for many years together, *July* 25. 1623, *Hay*; ſee alſo the ſtyle of a ſummons on the hypotheck, *St. b.* 4. *t.* 25. § 5. It is a good defence againſt this action, that the defender, when he pointed or intermeddled with the corns of a particular crop, belonging to the tenant his debtor, left upon the ground, at the term of Candlemas, as many fruits as might fully ſatisfy the landlord for the rent of that year of which theſe corns were the crop, *Feb.* 3. 1624, *Hay.*

61. The landlord has an hypotheck, not only on the fruits, but on the cattle. As this kind does not, like the Roman hypotheck on the corns, ariſe *ex natura*, but is an arbitrary conſtitution introduced by cuſtom, our lawyers are agreed, that it is not ſo ſtrong as that on the fruits, *St. b.* 1. *t.* 13. § 15. &c. The chief difference between the two ſeems to lie in this, that the hypotheck on the cattle is not, like that on the corns, ſpecial, ſo as to affect every cow, or ſheep, or lamb; but is general, upon the whole flock or herd; and is, by its nature, ſubject to the adminiſtration of the tenant; who, upon the one hand, may enlarge the ſubject of the hypotheck, by purchaſing a new parcel of cows or ſheep, and, on the other, has a diſcretionary power of diminiſhing it, by ſelling part of his ſtock: and if the landlord ſuſpects the tenant's management, he may, by ſequeſtration or pointing, make his right, which before was general on the whole ſtock, ſpecial upon every individual. Hence, though the landlord hath the ſame right of retention, in virtue of his hypotheck, on the cattle as on the fruits; (for that is a right common to all hypothecks, *June* 30. 1736, *Pringle*), yet where any number of the tenant's cattle is carried off in conſequence of a purchaſe, the landlord has no right of recovery, the property of the goods purchaſed being by the ſale lawfully transferred to the purchaſer, unleſs where ſpecial circumſtances may preſume colluſion between the buyer and ſeller to the landlord's prejudice. As the tenant has not the ſame power of diſpoſing of the cattle for the payment of debt, as he hath in the way of a proper ſale, it is more doubtful whether a creditor who hath carried off the tenant's cattle by pointing, be ſecure againſt the landlord's action of recovery. Though no action for recovery lies againſt a pointer after the term, if he has left ſufficiency of corns for payment of the year's rent, he is not ſecure, if he has left nothing but cattle on the ground, though exceeding in value the year's rent; for the landlord is not obliged to accept the payment of his rent in cattle, which waſtes the tenant's ſtock that may be neceſſary for the farm, *St. b.* 4. *t.* 25. § 6.; ſee *March* 31. 1624, *La. Dun.*

62. The cattle, when conſidered as an *univerſitas*, are not the produce of any one year, and ſo cannot be hypothecated for the crop of a particular year. They are therefore ſubject to the landlord's hypotheck, only for one year's rent, at one and the ſame time, which is the rent of the current year, and when that is paſt, for the rent of the next year, and ſo ſucceſſively, one after another. This right cannot be exerciſed by the landlord before the conventional term of payment of the year's rent, becauſe he can have no pretence to apply the hypotheck to the payment of a debt which cannot yet be demanded; and if he were tied down to apply it preciſely on the term-day, under the penalty of forfeiting his right, the conſequence might be, both the laying waſte his farms, and the ruin of his tenants. Practice therefore hath fixed on three months after the laſt conventional term of payment

payment of the rent, as a reaſonable time to avail himſelf of his right, with ſome forbearance to the tenant; which three months being expired, the hypotheck ceaſeth for the rent of that year, *Kames*, 76. Yet caſes may occur, where this rule cannot be conveniently applied; *ex. gr.* where a leaſe contains very diſtant terms of payment, perhaps two or three years after the legal term.

63. As a tackſman cannot hurt his landlord's right by ſubſetting part of the lands, the hypotheck, both on the fruits and the cattle, is as ſtrong over the grounds ſubſet, as if the whole lands had been poſſeſſed by the principal tackſman, unleſs the landlord hath, by ſome deed, acknowledged the ſubtackſman, *Fount. June* 25. 1700, *Lo. Saltoun:* and even as to the tack-duty payable by a ſubtackſman whom the landlord had accepted of, it was adjudged, that though the ſubtackſman was liable directly in payment of his tack-duty to the principal tackſman, whoſe tenant he is; yet the landlord falls to be preferred upon it, in ſo far as it is yet unpaid, in a competition with the other creditors of the principal tackſman, *Jan.* 31. 1665, *Anderſon.* He ſeems to have the like ground of preference on the graſs-rent due to the tenant by ſtrangers whoſe cattle have been paſtured upon the tenant's grounds. But the opinion, that the landlord hath as proper an hypotheck on the cattle themſelves belonging to the ſtrangers, as on thoſe which are the tenant's own property, appears neither to be founded in equity, nor ſupported by practice. The ſuperior hath alſo an hypotheck on the fruits for his feu-duty, of the like general nature with that of the landlord, *Mack.* § 12. *h. t.*: but, in a competition between the two, the ſuperior's right prevails over the other; for where a vaſſal lets his land to a tenant, it is to be underſtood with the burden of all feu-duties payable to the ſuperior, whoſe right cannot be impaired by any fact of the vaſſal.

64. The landlord of a *prædium urbanum* has an hypotheck on the goods brought into it by the tenant for a year's rent, *Dec.* 7. 1630, *Dick*, which is called by the Romans the hypotheck of *invecta et illata*, *l.* 6. *In quib. cauſ. pign.* This right is competent, not only in tacks of dwelling-houſes, but of all tenements which have no natural fruits, as mills, ſhops, breweries, collieries, &c. In tacks of dwelling-houſes, it extends to houſehold ſtuff, plate, paintings, books, and whatever elſe is brought into the houſe, *Fount. June* 12. 1702, *Count. of Callander*, ſtated in *Dict.* i. 419. In mills, breweries, collieries, &c. it includes all the utenſils and inſtruments brought thither by the tenants, for carrying on their reſpective branches of buſineſs. But this right in the *invecta et illata* is not accounted a ſpecial hypotheck: for all the tenants of thoſe ſeveral tenements may diſpoſe of ſuch pieces of houſehold furniture, or other goods brought into the houſe, as they have no farther occaſion for; and in the caſe of a ſhop, the tenant muſt, from the nature of the leaſe, have an unlimited power of ſelling his ſhop-goods; for he rents the ſhop for that very end, that he may have it as a place of ſale. By the ſhopkeeper's alienation of his goods, therefore, the property of them is lawfully transferred from him to the purchaſer, and ſo remains no longer part of the hypotheck: and if the landlord entertain any ſuſpicion that the tenant is diſpoſing of the ſhop-goods to his prejudice, he may, as in the caſe already ſtated, § 61. ſecure for his own payment, by ſequeſtration or arreſtment, what yet remains in the ſhop not ſold. Hence alſo it follows, that purchaſers of ſhop-goods from a ſhopkeeper are ſecure againſt any action for reſtitution at the ſuit of the landlord.

TIT.

TIT. VII.

Of the Tranſmiſſion of Rights by Confirmation or Reſignation.

AFTER having conſidered the nature and extent of the right acquired by the vaſſal in conſequence of the feudal contract, the forms of tranſmitting that right may be explained. A vaſſal may tranſmit his right, either, upon his death, to heirs, of which afterwards; or, while he is yet alive, to thoſe who acquire by gift, purchaſe, adjudication, or other particular title. He who thus tranſmits a feudal right in his lifetime, is called *the diſponer*, or *author*; and he who acquires it, *the ſingular ſucceſſor*, becauſe he ſucceeds to that ſubject by a ſingular title; in oppoſition to an heir who ſucceeds to the whole eſtate of the deceaſed by the title of univerſal repreſentation. Tranſmiſſion *inter vivos*, by one perſon alive to another perſon alive, is either voluntary, by diſpoſition, which is treated of in this title; or neceſſary, by adjudication.

2. Though the terms *diſpoſition* and *aſſignation* may be either of them apt enough to expreſs the alienation of any right whatever; yet in their common uſe, conveyances of debt, or of particular moveable ſubjects, go by the name of *aſſignations*. The property indeed of a number of moveable ſubjects, conſidered as an *univerſitas*, *ex. gr.* houſehold ſtuff, is ſometimes ſaid to be tranſmitted by diſpoſition; but that word, in its proper ſenſe, is applied only to the grant of heritable ſubjects, and is a deed containing procuratory of reſignation, and precept of ſeiſin. It is a rule in all conveyances of heritable rights, whether real or perſonal, that he who makes over the property, makes over virtually all leſſer rights in the ſubject, as ſervitudes, liferents, reverſions, &c. though none of theſe ſhould be expreſſed: and though the diſponer ſhould not himſelf be veſted with the property, ſtill theſe leſſer rights, in ſo far as they are truly in him, are carried to the diſponee by ſuch tranſmiſſion; for *majori minus ineſt*, *Dec.* 5. 1665, *Beg.*

3. By a ſecond rule, common to all voluntary tranſmiſſions in which abſolute warrandice is either expreſſed or implied, *jus ſuperveniens auctori, accreſcit ſucceſſori*; every right in the ſubject that the author or diſponer may acquire after the tranſmiſſion, accrues to the grantee. The ſupervening right is, by a fiction of law, conſidered to have been in the diſponer at the date of the tranſmiſſion, and at that time made over by him to the diſponee; and therefore it accrues *ipſo jure*. Hence, though the author, after having acquired the ſupervening right, ſhould transfer it to a third party, ſuch conveyance could not hurt the firſt acquirer. This rule is founded in the nature of warrandice: for if a right by which a ſubject may be evicted from the diſponee, infers warrandice againſt the diſponer while it is veſted in a third party; ſuch right, after it is acquired by the diſponer himſelf, ought not to hurt the diſponee, to whom he is bound in warrandice: and it holds even without a formal clauſe of warrandice, where the granter diſpones *for all right which he hath acquired or ſhall acquire*; for ſuch clauſe implies a conveyance of all ſupervening rights.

4. Where the diſpoſition is granted for a ſum below the full value, and ſo is limited to a *particular* title of property, or to *the titles preſently in the diſponer*; or where the warrandice is barely from fact and deed; the abovementioned rule fails, and the diſponer may lawfully uſe any title he may afterwards acquire in the ſubject againſt the diſponee, *July* 19. 1664, *Douglas*. Neither does it hold againſt a bare conſenter to a diſpoſition, if he hath not expreſsly bound himſelf in warrandice; for no warrandice can be

be fixed by implication againſt a conſenter, whoſe implied obligation can only be underſtood to bar him from objecting to the diſpoſition upon any right then in his perſon, *Dirl.* 128.; *July* 7. 1681, *Steuart*. Nor is there place for it in legal tranſmiſſions by adjudication: for the debtor or his heirs from whom the lands are adjudged, though they may be ſaid in ſome ſenſe to be the judicial diſponers, yet are by no means bound to warrant the tranſmiſſion; becauſe the law, when it tranſmits a right by adjudication, tranſmits it barely as it ſtands at the time of the diligence, *Fount. Jan.* 11. 1699, *Duncan*, ſtated in *Dict.* i. *p.* 515.; *July* 1746, *Hunter*. Theſe rules ſerve to fix the true extent of a grant in a diſpute between the granter and grantee. In grants of the ſame ſubject to two different grantees, a queſtion may frequently occur, To which of the two the ſupervening right acquired by the granter ought to accrue? which, where the right made over is a perſonal right of lands, depends chiefly on rules to be explained below, § 26.

5. By the genuine principles of the feudal ſyſtem, no vaſſal had a power to transfer the right of his feu to another without the ſuperior's conſent; for in rights merely gratuitous, the grant, together with all its conditions and limitations, muſt depend entirely on the granter's pleaſure: and agreeably to thoſe rules the ſuperior was not bound to receive any perſon in the lands, other than the heirs to whom he himſelf had limited the deſcent by the inveſtiture, though the greateſt ſum ſhould have been offered him in the name of entry, *Fount. Feb.* 24. 1685, *Cleland*. Hence Craig with reaſon affirms, *lib.* 2. *dieg.* 16. § 20. that no entail is effectual without the ſuperior's conſent; becauſe the fee is thereby made to devolve on a different order of heirs from that which was contained in the original grant: and even where the lands are made over in the ſuperior's grant to the vaſſal and his aſſignees, the ſuperior is obliged to receive the aſſignee only while the right continues perſonal, *i. e.* before ſeiſin be taken upon it, but not after perfecting it by infeftment; for the word *aſſignee*, in a feudal grant, ought to be applied only to perſonal rights, *Feb.* 5. 1663, *La. Carnegie*.

6. This right of refuſal in the ſuperior was diſallowed or taken away by ſpecial ſtatute in the following caſes: *Firſt*, That creditors might have free acceſs to affect the eſtates of their debtors, ſuperiors were required, by 1469, *c.* 37. to receive creditors-appriſers as their vaſſals, on payment by the appriſers to them of a year's rent of the lands; and after adjudications were ſubſtituted in the room of appriſings, the benefit of that ſtatute was communicated to adjudgers, on payment of a year's rent, by 1672, *c.* 19. *2dly*, Purchaſers of bankrupt eſtates at judicial ſales before the ſeſſion, are, by 1681, *c.* 17. (joined with 1690, *c.* 20.), intitled to the ſame method of infeftment as adjudgers. Notwithſtanding theſe particular ſtatutory reſtrictions on the ſuperior's right, which were enacted merely for the behoof of creditors, the general right of refuſal competent to ſuperiors in the caſe of voluntary tranſmiſſions by the vaſſal, long continued from the moſt early times of our feudal plan, unimpeached by ſtatute, except one in the reign of Robert I. ſoon to be taken notice of. But from the period that commerce began to be attended to as a point eſſential to the public intereſt, vaſſals were conſidered in a more favourable light, not as ſimple beneficiaries, but as proprietors, who ought to have full power over the feudal ſubject contained in their charters. Hence our ſovereigns did, by ſeveral acts of privy council, mentioned in 1578, *c.* 66. give up this right for the public utility; ſo that purchaſers of lands holden of the crown were from that period ſecure of being received as vaſſals by the King, upon their reaſonable expence, *i. e.* on a compoſition to be paid by them to the treaſury, which is fixed by practice to a ſixth part of the valued rent of the lands. In like manner, in lands holden of ſubject-ſuperiors, expedients were fallen upon which received

ved the countenance, or at leaſt the indulgence of law, for evacuating the ſuperior's right, and enabling the vaſſal to ſell the lands to a ſtranger without his conſent. One uſual way was, by a bond granted by the vaſſal to him who intended to purchaſe, for a ſum fully equal in value to the lands; on which bond the creditor deduced an adjudication of theſe lands againſt the granter; for it behoved the ſuperior to enter ſuch creditor as his vaſſal, under the character of adjudger. Another method, which was univerſally conſidered as a new limitation of the ſuperior's right, was eſtabliſhed by act 1685, *c.* 22. authoriſing entails: for ſince it is made lawful to the vaſſal to alter the order of ſucceſſion contained in the inveſtiture granted by the ſuperior, and to ſettle it on a different ſeries of heirs, the ſuperior is not left at liberty to refuſe the entering of thoſe heirs whom the vaſſal hath named under the authority of a public law.

7. The neceſſity that purchaſers from a vaſſal were laid under, of purſuing indirect methods to obtain themſelves entered by the ſuperior, is now removed, by 20° *Geo. II. c.* 50.; by which it is made lawful, not only to heirs, but to any perſon who ſhall purchaſe lands from a proprietor by a diſpoſition containing procuratory of reſignation, to apply for letters of horning for charging the ſuperior to grant new infeftment in his favour. The ſuperior is however allowed by the act, to offer ſuſpenſion of that charge, if the charger ſhall not tender to him ſuch fees or caſualties as he hath by the law a right to receive on the vaſſal's entry: by which muſt be meant a year's rent of the lands; for that was the proportion which appriſers were to pay for their entry by the act 1469, and which was, from the analogy of that act, demanded from voluntary purchaſers by ſuch ſuperiors as were willing to enter them. This Britiſh ſtatute appears to have been enacted merely for the more expeditious completing the titles of purchaſers, without the leaſt intention of impairing any of the juſt rights of ſuperiority: and therefore it may be doubted, whether it ought to be ſo interpreted as to lay ſuperiors under an obligation of receiving incorporations or communities, which never die; the conſequence whereof muſt be the loſs of all the caſualties of ſuperiority; more eſpecially as the words of the act, *any perſon who ſhall purchaſe*, do not, in their proper acceptation, include corporate bodies. Though ſingular ſucceſſors, whether adjudgers or voluntary purchaſers, are liable in payment of a year's rent to the ſuperior for changing the former inveſtiture; yet where a proprietor entails his lands, the ſuperior is not intitled to the compoſition of a year's rent from every ſucceſſive heir of entail, who is not heir of line to him who ſtood laſt infeft, on pretence that he is a ſingular ſucceſſor. The heir of the laſt inveſtiture cannot be called a ſingular ſucceſſor; and he is founded in a right to demand an entry, upon payment to the ſuperior of the ſum due to him by law, in name of relief, upon the entry of an heir, *New Coll.* ii. 231.

8. The general nature of tranſmiſſions by ſubject-ſuperiors, whether *a me* or *de me*, hath been already explained, *t.* 3. § 20. Though Mackenzie affirms, § 4. *h. t.* that the granting of rights to be holden baſe, or of the diſponer, is repugnant to the principles of the Feudal law; it is certain that ſubinfeudations were allowed as early as the written uſages of the feus, *lib.* 2. *t.* 34. § 2. &c. It appears, that before the reign of Robert Bruce thoſe ſubaltern rights were not only frequent, but ſo highly favoured by our cuſtoms, that effects were aſcribed to them quite inconſiſtent with feudal maxims, no leſs than depriving the ſuperior of the caſualties of ward, marriage, eſcheat, &c. that might be incurred by the granter. To remove this hardſhip, an act paſſed, *St.* 2. *Rob. I. c.* 25. which, though it ſtill allowed to vaſſals the ſame power that they had before, to ſell their lands to whom

whom they would, yet entirely aboliſhed ſubinfeudations; and declared, that the purchaſer ſhould hold the lands, not of the granter himſelf, but of the granter's ſuperior, by the ſame manner of holding, and upon performing to him the ſame ſervices, that the granter himſelf formerly did. But this ſtatute, if ever it was in obſervance, fell ſoon into diſuſe, not having been ſo much as once mentioned in any poſterior ſtatute or law-book, notwithſtanding the great alteration it muſt have made in our law-ſyſtem: and the act 1469, *c.* 37. requiring ſuperiors to enter appriſers, affords the ſtrongeſt evidence that it had loſt its force before that time: for if ſuperiors had, by the then uſage of Scotland, been obliged to enter voluntary purchaſers from the vaſſal into the lands, (which was a neceſſary conſequence of Robert's ſtatute), they muſt have been alſo obliged, without any new enactment, to receive thoſe who had appriſed the vaſſal's lands; appriſers being of all ſingular ſucceſſors the moſt favoured. It is nevertheleſs probable, that though ſubaltern infeftments ſoon recovered force after the ſtatute of Robert which aboliſhed them, yet the rectifying of our former erroneous notions concerning their effects has been owing to the authority of that ſtatute; for it hath been admitted by all our writers, that the rights of ſuperiors have ſuffered no incroachments ſince that time, by the ſubinfeudations of the vaſſal, unleſs where ſpecial ſtatute hath directed the contrary; as to which ſee *ſupr. t.* 5. § 79.

9. Baſe or ſubaltern rights are tranſmiſſions merely of the property; for the ſuperiority is reſerved by the granter; and conſequently the granter's ſuperior continues to have the ſame immediate vaſſal in the lands as formerly. And this makes a conſiderable difference between the effect of baſe and of public infeftments. In a public right, the ſeiſin taken by the diſponee is null, or rather its effect is ſuſpended, till the granter's ſuperior ſhall, by a deed confirming the grant, acknowledge the diſponee as vaſſal; a doctrine clearly deducible from the rule explained *ſupr.* § 5.: whereas baſe rights did at no time require ſuch confirmation by the granter's ſuperior to give them validity; becauſe in theſe, there is no change of the vaſſal, the diſponer ſtill continuing vaſſal in the lands in regard to his ſuperior, notwithſtanding the ſubaltern right granted by him to the ſubvaſſal. Nevertheleſs, as the ſubvaſſal's property is expoſed to the hazard of all the caſualties falling by the death or delinquency of his immediate ſuperior where there is no confirmation, it is frequently applied for; and ſuch confirmation, when granted, effectually ſecures the ſubvaſſal againſt all caſualties falling as aforeſaid, which entirely exhauſt the property, *ex. gr.* recognition, while that caſualty was received; but it can hardly be explained into a renunciation by the ſuperior, of his other caſualties ariſing from the nature of the feudal contract, which infer only a temporary right to the rents, or to any part of them, *ex. gr.* nonentry, *St. b.* 2. *t.* 3. § 28.; *ſupr. t.* 5. § 44.

10. Baſe rights had, by our ancient law, as ſtrong effects as public; but as, before eſtabliſhing the regiſters, they might have been kept quite concealed from all but the granter and the grantee, a device became frequent among proprietors, of firſt ſelling their eſtates for a valuable conſideration, and afterwards granting a baſe infeftment to a confident perſon; to which they gave a falſe date prior to the ſale, with a view to defraud the firſt onerous purchaſer. To put a ſtop to ſuch fraudulent practice, it was enacted by 1540, *c.* 105. that whoever purchaſed lands on an onerous title, and attained peaceable poſſeſſion, ſhould be preferred to thoſe who claimed under a private or baſe right, though it ſhould bear a date prior to the other. Though the oppoſition runs, by the words of this act, between onerous rights followed by poſſeſſion, and private rights, it was ſo explained by ſubſequent cuſtom, that an onerous and public right, whether followed by poſſeſſion

poſſeſſion or not, was preferred to a private right on which no poſſeſſion had followed. Becauſe the preſumption of ſimulation or fraud, ariſing from the latency or private manner of executing baſe rights, loſt its force by the diſponee's poſſeſſion, a baſe right was from that period, *i. e.* as ſoon as the diſponee attained poſſeſſion, as effectual as a public one: and hence poſſeſſion was, to a baſe right, while this diſtinction continued, what the ſuperior's confirmation was to a public; for the preference in a competition between the two, depended, not on the dates of their reſpective ſeiſins, becauſe neither of the rights was truly perfected by ſeiſin, confirmation being neceſſary to complete the one, and poſſeſſion the other.

11. Baſe rights were not ſimply annulled by this act; they were only declared ineffectual in competition with rights followed by poſſeſſion; which were by cuſtom interpreted to be public rights. When therefore theſe were out of the queſtion, the old law took place; which conſidered baſe rights as completely valid. Hence alſo they were ſuſtained, to force production of all ſeiſins, whether public or private. They alſo continued effectual, in competition with poſterior gratuitous infeftments, even public: and in a competition between two baſe rights, neither of which was accompanied with poſſeſſion, the firſt ſeiſin was preferable.

12. Natural poſſeſſion, by cultivating the ground, and receiving the rents for a year, is made an eſſential requiſite, by the letter of the ſtatute, for making baſe rights effectual; and this continued neceſſary by the ſubſequent practice, till regiſters were eſtabliſhed: but from the 1617, when all ſeiſins were ordained to be publiſhed in the records, the ſlendereſt acts, even of civil poſſeſſion, were ſuſtained for that purpoſe; ſuch as, a ſimple citation in a ſuit commenced on the title of a baſe infeftment, or payment of intereſt, by the debtor in a baſe right of annualrent, to the creditor. Thus alſo, the poſſeſſion of the principal lands was conſtrued to be the poſſeſſion of the warrandice-lands; becauſe till the principal lands be evicted, there can be no acceſs to the warrandice-lands. The huſband's poſſeſſion was, upon the ſame ground, deemed the wife's: for the wife cannot attain the natural poſſeſſion of her jointure-lands during the huſband's life; and the liferenter's poſſeſſion was accounted that of the fiar, becauſe the fiar was excluded from the natural poſſeſſion by the liferenter. Yet this doctrine was not applicable to the caſe of a baſe right granted by a father to his ſon with the reſervation of his own liferent, though the ſon was excluded from the poſſeſſion by the father's liferent, *June* 14. 1666, *Home*; becauſe a deſign to diſappoint creditors was preſumed, both from the nearneſs of the relation between the diſponer and diſponee, and from the father's manner of executing the deed, by reſerving his own liferent, and under that title continuing his former poſſeſſion, which naturally inſnared creditors into the belief that he had made no alienation which might be hurtful to them. Thus the rules of preference ſtood, where baſe rights were competing with public, in conſequence of the act 1540. But by that diſtinction, the right of lands became precarious, and was frequently made to depend upon an uncertain proof by witneſſes of the diſponee's poſſeſſion; and there was no pretence for continuing it after the eſtabliſhment of our public records; wherefore it was enacted, by 1693, *c.* 13. That all ſeiſins ſhould, for the future, be preferable, according to the dates of their ſeveral regiſtrations, without reſpect to the former diſtinctions of baſe and public, or of being clad or not clad with poſſeſſion.

13. Public rights to be holden of the granter's ſuperior, may be perfected, either, *firſt*, by the ſuperior's confirmation of them; or, 2*dly*, by his granting a charter to the diſponee upon the reſignation of the former vaſſal; of which *infr.* § 17.; and for this reaſon, the grant by him to the grantee

grantee contains both procuratory of reſignation and precept of ſeiſin. When the grantee intends to perfect his right in the firſt way, by confirmation, he takes ſeiſin on the precept, and then procures the ſuperior's confirmation; by which, and no ſooner, the granter is diveſted, and the right eſtabliſhed fully in the grantee; *vid. ſupr.* § 9. This confirmation uſed formerly to be written on the back of the charter or diſpoſition granted by the vaſſal: but doubts having ariſen ſince the ſtatute impoſing certain duties on deeds written on ſtamped paper or parchment, that the ſuperior's confirmation, were it now written on the back of the charter, might be ſet aſide as a ſeparate deed annexed to the ſame ſheet of parchment, it has been thought neceſſary, for removing all grounds of challenge, to make out the confirmation in a charter apart; in which the ſuperior recites, at full length, the charter confirmed, and then ſubjoins his own confirmation or ratification of it.

14. Where two ſeveral public rights of the ſame ſubject granted by a vaſſal to different grantees, are confirmed by the ſuperior, the preference between the two muſt, by the general rules of law, be determined by the dates, not of the rights confirmed, but of the confirmations; becauſe, as public rights have no validity till confirmation, it is the confirmation which perfects them; and the right firſt perfected ought to be preferred. This was expreſsly declared in confirmations by the crown, 1578, *c.* 66. But as that act was barely declaratory of our former law, without introducing any new rule, therefore though the letter of it be limited to confirmations by the crown, the ſame doctrine holds in thoſe granted by ſubject-ſuperiors, that the confirmation firſt obtained is preferable to the ſecond, tho' that ſecond ſhould have confirmed the firſt infeftment. The ſame ſtatute directs, that no double confirmation of lands holden of the crown ſhould be granted for the future: but this injunction was improper; for the Barons of Exchequer, not being competent judges in the queſtion of double confirmations, nor to the nullities that may be objected to a firſt, cannot refuſe granting ſecond and third confirmations, *periculo petentum.* As to the queſtion, What is to be deemed the firſt charter of confirmation by the crown? it is evident, that as the preſenting a ſignature to the Barons, and the procuring it to be paſſed by them, are only previous ſteps to a charter, neither of theſe are to be regarded, unleſs it appear that the grantee who preſented the firſt ſignature, has uſed all due diligence to perfect his right, and hath been obſtructed by the indirect practices, or, as it is commonly expreſſed, by the nimious diligence of his competitor, *Dec.* 6. 1678, *Mill.* Upon this ground, not even the date of the charter of confirmation can afford any ground of preference, becauſe the dates are inſerted in charters by the crown according to the time that the ſignatures on which they proceed are paſſed in exchequer. It is therefore that charter which firſt paſſes the great ſeal that is to be preferred; for it is the ſeal which perfects the confirmation, and ſerves in place of the royal ſuperſcription, *Feb.* 26. 1680, *L. Clackmannan*; *Harc.* 589.

15. The charter which confirms a public right, has effect from the date of the right confirmed, and gives that right the ſame force as if it had been confirmed immediately after making the grant; for it is of the nature of all confirmations to operate *retro*, *St. b.* 2. *t.* 3. § 28. But if any mid impediment ſhall intervene between the date of the charter granted by the vaſſal, and that of the confirmation, it hinders the confirmation from having that retroſpective quality. Thus, if the vaſſal, after he had granted a charter to one to be holden of the ſuperior, has granted a ſecond to another to be holden of himſelf, on which ſecond charter ſeiſin has been taken by the diſponee before the ſuperior's confirmation of the firſt, that confir-

mation has no operation upwards to the date of the charter confirmed, being obſtructed by the intervention of the baſe right, which was fully perfected by the ſeiſin taken upon it, but has effect only from its own date; and conſequently the baſe right will carry the property of the lands preferably to the public. Yet the public right muſt, in the caſe ſuppoſed, carry the ſuperiority; becauſe, as to that, the baſe right, which is incapable of tranſmitting the ſuperiority to the diſponee, can be no impediment, *Hope, Min. Pr. p.* 62. § 151. 152.: for the obtainer of the public right is, upon its confirmation by the ſuperior, fully ſubſtituted in the place of the vaſſal who made it over to him; and conſequently he becomes ſuperior to the receiver of the baſe right, who before held the fee of that vaſſal. A right which is not perfected prior to the ſuperior's confirmation, cannot hinder the retroſpective effect of the confirmation, *ex. gr.* a baſe right on which ſeiſin hath not been taken, or an adjudication which hath been neither followed by ſeiſin, nor by a charge againſt the ſuperior, previouſly to the confirmation of a public right: far leſs can the heir of him who has granted a public right, plead his anceſtor's death, as an impediment to prevent the effect of a confirmation granted by the ſuperior after that period; for though the diſponer's ſingular ſucceſſor may object to a public right granted by his author to another, as not properly confirmed, that plea is by no means competent to the diſponer's heir, who is bound to fulfil the deeds of his anceſtor: yet Craig ſeems to approve of a contrary deciſion, *lib.* 2. *dieg.* 4. § 19.

16. By the more common ſtyle of diſpoſitions, the diſponer grants an obligation to infeft, and a precept of ſeiſin, both *a me* and *de me*, in the option of the diſponee; and ſeiſin is generally taken upon ſuch diſpoſitions indefinitely, without ſpecially referring to either of the two precepts. In that caſe, the law, which conſtrues the ſeiſin in the manner moſt beneficial to the diſponee, who has the right of option to aſcribe it to either of the two kinds, conſiders it as a ſeiſin *de me*, or baſe right; becauſe if it were accounted a public right, it would be ineffectual until the ſuperior's confirmation. But if the ſuperior afterwards confirm the right, it is held from that period, as if it had been from the beginning a public right; ſee *July* 15. 1680, *Biſh. of Aberdeen.* It is univerſally agreed, that a right which only holds baſe of the granter, is not by the ſuperior's confirmation rendered public, ſo as to make the grantee whoſe right is confirmed, immediate vaſſal to the ſuperior confirming; for the ſuperior's confirmation of baſe rights is intended for purpoſes quite different, *vid. ſupr.* § 9. It is to the difference here ſtated between baſe and public rights that the frequent uſe of baſe rights in our practice has been owing: for many purchaſers avoided taking a public infeftment, not chiefly to avoid the expence of confirmation, but the better to ſecure their purchaſe; becauſe a purchaſer, by accepting a public right from the diſponer, which is not effectual till it be confirmed by the ſuperior, was in danger of being excluded by a ſeiſin taken before his, upon a baſe right in the perſon of another. The numerous ſubaltern rights deſcending from one down to the other, which are ſometimes to be found affecting the ſame lands, are the ſource of great intricacy in the conveyances, and of difficulty in completing the proper titles: and, notwithſtanding the Britiſh ſtatute before cited, directing charges againſt ſuperiors, which was the remedy long ago propoſed by Lord Stair againſt this evil, *b.* 2. *t.* 4. § 6. baſe rights have abated little of their frequency.

17. Public rights, or tranſmiſſions *a me*, may be alſo perfected by reſignation, which is that form of law by which a vaſſal ſurrenders the feudal ſubject to his ſuperior. This act is ſometimes performed by the vaſſal himſelf, which is called *reſignation propriis manibus*; but moſt frequently by his attorney,

attorney, in virtue of the procuratory or warrant to reſign contained in the grant, and is the warrant of all reſignations which are not made *propriis manibus*. The proper ſymbols of reſignation are ſtaff and baton; but a pen has, by immemorial cuſtom, been made uſe of to repreſent that ſymbol in the act of reſignation. Reſignation of borough-tenements in the city of Edinburgh was, by a long erroneous cuſtom, made in the hands of one of the bailies, by the ſymbol of earth and ſtone; which was ſuſtained upon account of the univerſal error, *Fount. Feb.* 7. 1708, *Young:* but by an act of ſederunt the 11th of that month, the uſe of any ſymbol in reſignation, other than ſtaff and baton, is prohibited under the ſanction of nullity.

18. The neceſſity of uſing ſpecial ſymbols in reſignation, is owing to the genius both of the Roman and Feudal laws, which, in general, refuſe to admit either the acquiſition or tranſmiſſion of property without tradition. As feudal rights cannot be acquired without ſeiſin, which imports a delivery of the ſubject to the diſponee, neither can they be tranſmitted or extinguiſhed without reſignation; by which the ſubject is underſtood to be redelivered to the ſuperior. And hence ſimple renunciations, being only perſonal, have no operation in the tranſmiſſion of real rights followed by ſeiſin, *Craig, lib.* 3. *dieg.* 1. § 21. *&* 22.; *Nov.* 23. 1627, *Dunbar*; except perhaps in ſuch redeemable infeftments as are not ſo truly rights of property as burdens on it; as to which, *vid. infr. t.* 8. § 34. *&* 36. The form of reſignation is extremely ſimple: The vaſſal, or his procurator, appears before the ſuperior or his commiſſioners, and on his knee ſurrenders the lands to him by the delivery of a pen, which is accepted by the ſuperior; and upon this act a notorial inſtrument is taken by him in whoſe favour reſignation is made, called the *reſignatary*; which the notary reduces into writing, and ſigns before witneſſes. But there is no written inſtrument of reſignation extended in the tranſmiſſion of burgal tenements, as the whole facts relative to the ſurrender are recited in the inſtrument of ſeiſin following on it. Though ſeiſin muſt be taken on the ground of the lands, reſignation may be made any where.

19. Lands are reſigned, either *ad perpetuam remanentiam*, or *in favorem*. Where the ſuperior is to purchaſe the property, the vaſſal reſigns the feu to the ſuperior to remain with himſelf; by which ſurrender the property is conſolidated with the ſuperiority; *i. e.* he who, before the lands were ſurrendered to him, was veſted with the bare ſuperiority, acquires by the reſignation the property alſo of the lands ſurrendered. And as the ſuperior's original ſeiſin ſtill ſubſiſted, notwithſtanding the right by which he had given the property to the vaſſal, the ſuperior's former right of property revives on the vaſſal's reſignation, and conſequently is united to the ſuperiority without the neceſſity of a new infeftment. The vaſſal, on the other hand, where he purchaſes the ſuperiority from his ſuperior, muſt perfect his right upon his diſpoſition by ſeiſin, as any ſtranger purchaſer muſt have done who was not the proprietor: and after it is thus veſted in the vaſſal, he muſt reſign the lands *ad perpetuam remanentiam* to himſelf as ſuperior, if he wants that the property and ſuperiority ſhould go to the ſame ſeries of heirs. But as the ſame perſon cannot act in the reſignation under the two inconſiſtent characters of ſuperior and vaſſal, the purchaſer as vaſſal muſt grant a procuratory to another for ſurrendering the lands to himſelf as ſuperior; and the reſignation proceeding thereupon conſolidates *eo ipſo* the rights of property and ſuperiority. It is obvious that reſignations *ad remanentiam* are, in either of thoſe views, extinctions rather than tranſmiſſions of the property.

20. Since a reſignation *ad remanentiam* veſts the property fully in the ſuperior,

perior, without any ſubſequent ſeiſin, it muſt be a real right in the ſtricteſt ſenſe. Nevertheleſs, when the regiſtration of real rights was made neceſſary by the act 1617, inſtruments of reſignation *ad remanentiam* were not expreſſed in the ſtatute; by which omiſſion the ſecurity of purchaſers was left imperfect, who, though they might diſcover from the records whether the vaſſal diſponing ſtood infeft in the lands, could not know by the narroweſt inquiry whether he had not again ſurrendered them to the ſuperior. This defect is now ſupplied, by 1669, *c.* 3. which declares reſignations *ad remanentiam* null, if they be not regiſtered within ſixty days from their date, in the ſame manner as ſeiſins and reverſions. Reſignations *ad remanentiam*, of tenements holden in burgage, are excepted from this laſt ſtatute, provided they be recorded in the court-books of the borough; but if they are not ſo regiſtered, they are null, according to the general rule of the act. In reſignations *ad remanentiam*, made, not by a procurator, but by the reſigner himſelf, a ſpecial ſolemnity is introduced, by 1555, *c.* 38. not eſſential to other reſignations, viz. that the reſigner, as well as the notary, muſt ſign the inſtrument of reſignation. This rule was perhaps intended to be limited to that caſe only where the reſigner had ſubſcribed no previous obligation or warrant for reſigning, that the reſignation might not reſt ſolely on the credit of the notary; and Stair, leaning to this conjecture, gives his opinion, that though the ſtatutory words be general, expreſſing no limitation, yet the inſtrument given *propriis manibus* of the reſigner, even without his ſubſcription, is ſufficient, where he has granted any previous obligation to reſign; which opinion, abſtract from its equity, may derive ſome ſupport from 1563, *c.* 81.

21. Though upon the emerging of feudal caſualties the property returns to the ſuperior, by the nature of the feudal contract, as free from burden as when the right was firſt granted, *t.* 5. § 79.; yet when it returns to him upon his own acceptance of a voluntary reſignation by the vaſſal, his conſent to the ſurrender is deemed equivalent to a confirmation of all ſuch burdens charged upon the feu by the vaſſal as would have been effectual againſt his ſingular ſucceſſors, as ſubfeus, leaſes, rights of annualrent, &c.; for the right ariſing to the ſuperior from ſuch reſignation, ſince it flows, not from the nature of the feudal grant, but from an act of the vaſſal conſented to by the ſuperior, can be no better than the vaſſal's right: and if the law ſtood otherwiſe, all ſecurities competent to the real creditors of the vaſſal or his tackſman might be evacuated at once by his reſignation.

22. Reſignations *in favorem* are thoſe which are made, not with an intention that the property of the lands reſigned ſhould remain with the ſuperior, but that it may be again given by him, either to the reſigner himſelf, or to a third party. When the reſigner ſurrenders the lands in favour of himſelf, without propoſing any alteration in the former inveſtiture, there is no proper tranſmiſſion; becauſe the right immediately returns in its former condition to him from whom it came: but if he reſigns from himſelf and a certain order of heirs, in favour of himſelf and a different order of heirs, or if he reſigns a ward-holding, that it may be returned to him feu or blanch, the right changes its nature in theſe reſpects, and ſo is truly a tranſmiſſion. In reſignations *in favorem*, the ſuperior, after receiving the ſymbol of reſignation from the vaſſal, muſt again deliver it, either to the reſigner himſelf, if he reſigned in his own favour, or to any third perſon in whoſe favour the lands were truly reſigned; whereas in reſignations *ad remanentiam*, the bare acceptance of the ſymbol by the ſuperior completes the act of reſigning.

23. The inſtrument which bears the ſuperior's acceptance of the vaſſal's reſignation *in favorem*, creates a perſonal obligation on the ſuperior to perfect

feet the right, by giving charter and ſeiſin to the reſignatary: but till it be thus perfected, the reſignation cannot have the real effect of a reſignation *ad remanentiam*, ſo as to eſtabliſh the property in the reſignatary; becauſe ſeiſin is eſſential to the completing of the feudal right of heritable ſubjects. Neither can the property be transferred to the ſuperior by the ſurrender of the lands to him; becauſe delivery itſelf, if it be not accompanied with an intention, or *animus*, to transfer the property upon ſome ſufficient or habile title, as ſale, donation, &c. can have no ſuch effect; and in reſignations *in favorem* there is not only no *habilis cauſa transferendi dominii*, but, on the contrary, the ſurrender is made with a ſpecial view to convey the property to another, and under the expreſs quality, that the right ſhall not remain with the ſuperior. The fee, therefore, continues veſted in the reſigner, in the intermediate period between the reſignation, and the perfecting the reſignatary's right from the ſuperior by ſeiſin, *Cr. lib.* 3. *dieg.* 1. § 17.; for the reſigner cannot poſſibly be diveſted, till he in whoſe favour the reſignation is made be inveſted. It is becauſe our law has conſidered ſuch reſignations as perſonal and incomplete rights, till ſeiſin, that when inſtruments of reſignation *ad remanentiam* were ordained to be regiſtered, becauſe theſe were real rights, no ſuch proviſion was made for reſignations *in favorem:* and from hence it follows, that the firſt ſeiſin on a ſecond reſignation is preferable to a poſterior ſeiſin upon the firſt reſignation. Yet as the ſuperior's acceptance of a firſt reſignation lays him under an obligation to perfect the reſignatary's right, he becomes liable to him in damages, if he ſhall counteract this obligation by accepting a ſecond ſurrender, on which a prior ſeiſin may be taken to the prejudice of the firſt reſignatary.

24. If the reſigner is not truly diveſted by the reſignation, and conſequently continues vaſſal, till ſeiſin, the caſualties of ſuperiority muſt neceſſarily fall by the death or delinquency of the reſigner, *ex. gr.* ward and recognition, while theſe ſubſiſted, *Nov.* 14. 1677, *Purves*. And from the ſame doctrine one might be apt to conclude, that the lands cannot fall in nonentry by the reſignation; for nonentry is excluded while there is a vaſſal in the lands not diveſted: yet all our writers aſſert the contrary, upon this ground, that the ſervices due by the vaſſal cannot be exacted from the reſigner by the ſuperior, who has accepted a reſignation from him; and as no ſuperior ought to be deprived of the feudal ſervices, merely for doing an act at the vaſſal's own deſire, the ſuperior therefore is intitled to the nonentry-duties from the reſigner, till he get a vaſſal from whom he can with congruity demand theſe ſervices. But if any obſtruction is thrown in the way of the reſignatary's ſeiſin by the ſuperior himſelf, he can, from that period, have no claim to the nonentry-duties; for he has himſelf to blame that he is not provided with another vaſſal, *Cr. lib.* 3. *dieg.* 1. § 16. *et ſeqq.*; *Dirl. v. Reſignation*; *St. b.* 3. *t.* 2. § 12.

25. If one who ſtands infeft in lands or annualrents, and has been in the poſſeſſion of them for forty years, ſhall be afterwards called in queſtion, for want of procuratories to reſign, or of warrants to take ſeiſin, it is declared by 1594, *c.* 214. that the poſſeſſor cannot be compelled to produce any of thoſe in the action brought againſt him after the forty years; and that the want of them ſhall be no ground for ſetting aſide his right, if the charter and ſeiſin on which his poſſeſſion proceeded be extant. By the uniform cuſtom about the date of that act, procuratories or precepts were written on paper or parchment apart from the charters or diſpoſitions, of which they were truly a part; and the view of the act was, that the validity of ſeiſins which had taken effect by forty years poſſeſſion, ſhould not depend on the preſerving detached writings that conſiſted moſtly in form, and might therefore be thought by the parties little worth the keeping.

Though therefore procuratories for reſigning, and precepts of ſeiſin, muſt by the preſent law be ingroſſed in the charter, or other deed of alienation, a ſeiſin cannot by itſelf conſtitute a valid right on the footing of this act, upon pretence that it lays no neceſſity on the poſſeſſor to produce theſe procuratories or precepts; for the ſtatute, far from diſpenſing with the production of the fundamental deeds which diveſt the granter, or from reſting the whole grant on the faith of a notary, requires the exiſtence of the charter, of which the procuratory or precept make a part, as an expreſs condition of the enactment. Nay, though an eſtate ſhould be ſettled by a bare procuratory of reſignation, without any charter or diſpoſition, which is now frequently practiſed, the procuratory muſt be produced to ſupport the right, even after the forty years; becauſe the procuratory is in that caſe the only deed of conveyance, and ſo ſupplies the place of the charter. This ſtatute relates only to reſignations *in favorem*; for reſignations *ad remanentiam* are of themſelves effectual to extinguiſh the right of the reſigner without any ſubſequent ſeiſin. In burgage-tenements, a ſeiſin which bears reſignation to have been made, is always ſuſtained without producing any inſtrument on which it proceeded; becauſe in theſe no written inſtrument is extended upon the act of reſigning; *vid. ſupr.* § 18. This act 1594 is not rendered uſeleſs by the poſterior ſtatute of preſcription in 1617, which in certain events ſecures the poſſeſſor after forty years, upon production of a ſeiſin or ſeiſins, though he ſhould not produce the charters, or other warrants, on which they have proceeded: for that laſt act requires peaceable and uninterrupted poſſeſſion, upon ſucceſſive ſeiſins, ſtanding for forty years together; whereas poſſeſſors may be intitled to the benefit of the firſt act, without either of theſe requiſites, *St. b.* 2. *t.* 3. § 19.—Hitherto of tranſmiſſions executed voluntarily by the granter. But creditors in real rights may be ſometimes compelled by law to make conveyances of them, either to judicial purchaſers or poſtponed creditors; as to which ſee *infr. t.* 12. § 66.

26. Not only complete feudal rights, but incomplete perſonal ones, as diſpoſitions or charters not perfected by ſeiſin, are ſubjects capable of tranſmiſſion. Upon this article the following obſervations may be proper. *Firſt*, Where one who has a bare perſonal right of lands makes it over to another, the diſponee is not by that conveyance veſted in the feudal or real right of the ſubject diſponed. As the granter's right was perſonal, ſo muſt that of the diſponee be; for one cannot transfer a right to another which is not in himſelf: and though diſpoſitions granted by thoſe who are not themſelves infeft, uſually contain precepts of ſeiſin, as if the granters could give ſeiſin; yet ſuch precepts, being granted *a non habente poteſtatem*, muſt be ineffectual to the diſponees. *2dly*, Though ſeiſins proceeding on ſuch precepts are originally invalid, they may acquire validity upon ſeiſin taken by the diſponer; becauſe from that moment he is in a capacity to infeft the diſponee; ſo that his ſeiſin accrues to the diſponee by the rule explained above, § 3.; *St. b.* 3. *t.* 2. § 2. *3dly*, By our former practice, where a perſon not infeft in lands, diſponed his right, firſt to one, and afterwards to another, the firſt diſponee was preferred to the ſubject, upon this ground, that one whoſe right to lands was merely perſonal, which is no more than a *jus obligationis*, may diveſt himſelf fully by any perſonal deed properly expreſſing his will to transfer the right; ſo that, after the firſt diſpoſition, no right is left in the diſponer which can be carried by the ſecond, *Dec.* 8. 1710, *Rule*; *Dec.* 19. 1710, *Erſkine*. But this rule, beſide that it is not juſtly applicable to feudal rights, which require ſeiſin to perfect them, rendered the ſecurity of ſingular ſucceſſors precarious, ſince there is no neceſſity of regiſtering any perſonal right. It is therefore fixed by the later practice, that the granter of

of a perſonal right of lands is not ſo diveſted by a firſt diſpoſition, but that he may effectually make over the right to another, either by voluntary or judicial conveyance; and that the preference between the two diſponees ought to be ſettled, not according to the dates of the ſeveral grants, becauſe theſe cannot be diſcovered by the records, but according to the priority of the ſeiſins following on them, *Home*, 59. Nor can it hurt the preference of the diſponee firſt infeft, though his author's right ſhould continue perſonal till ſeiſin be alſo taken by his competitor, *Home*, 111. Nor even though it ſhould remain perſonal till the competition: for it is in his power to infeft his author when he will; and at what time ſoever the author's right is thus perfected, his ſeiſin accrues, not equally to both diſponees, but to him alone who obtained the firſt ſeiſin upon his diſpoſition.

TIT. VIII.

Of Redeemable Rights.

FEUDAL rights have been hitherto diſcourſed of as they are ſimple and abſolute: but becauſe ſundry heritable rights are conditional, or limited, it may be proper to explain in what reſpects theſe differ from abſolute rights. The conditions moſt uſually inſerted in charters, either regard the order of ſucceſſion; or, 2*dly*, they are limitations impoſed on the grantee in the uſe of his property; or, 3*dly*, they ſet bounds to the duration of the right. The firſt two ſhall be afterward handled, under the head of tailzies, *b.* 3. *t.* 8. The laſt ſort, which is applicable only to rights which in the law of Scotland are called *redeemable*, is to be the ſubject of this title.

2. A redeemable right is defined by Mackenzie, that which returns to the diſponer or granter on payment of the ſum for which it was granted. But this definition is formed *ex eo quod plerumque fit:* for rights may be granted redeemable upon the payment of any determinate ſum by the granter, though no value whatever hath been given for them; *ex. gr.* a gratuitous diſpoſition by a father to his ſon, redeemable on payment of a roſe-noble. Nay, nothing hinders a right to return to the granter without the payment of any ſum; as if one ſhould make over lands to a ſtranger, with a clauſe of return to himſelf on the exiſtence of iſſue of his body. And though a right of this ſort cannot be called redeemable in the ſtrict grammatical ſenſe of the word, ſince no price is paid for recovering it, it carries with it all the properties of a redeemable right. Under the appellation, therefore, of *redeemable rights*, all thoſe may be included, in which a power or faculty is, in a certain event, or within a certain period of time, or without any reſtriction in point of time, competent to the debtor, or the granter of the right. This power to redeem is called *a right of reverſion*, becauſe it is by that power that the ſubject granted is made to revert to the granter. Reverſions are either legal, which ariſe from the law itſelf, as in appriſings or adjudications, which by ſtatute are declared redeemable within a certain term after their date; or conventional, which are conſtituted by the agreement of the parties, whether they be incorporated in the body of the right, or granted in ſeparate writings. A reverſion, when adjected to a proper ſale, is truly the *pactum de retrovendendo* of the Roman law, by which it is ſtipulated, that the ſeller have a power of buying back his property within a time particularly ſpecified, at the price he got for it. But reverſions were, by the uſage of Scotland, uſed moſt frequently in rights granted by a debtor in ſecurity of the ſums advanced to him by his creditor;

tor; which are chiefly three, wadſets, infeftments of annualrent, and thoſe which get the ſpecial appellation of *rights in ſecurity*.

3. The nature of a wadſet may be known by its name. *Wad*, in the old Saxon language, ſignified a pledge; and *ſet* is a word made uſe of to denote a temporary right of lands, or its fruits. Thus tacks are called *ſets*; ſo that a wadſet is a temporary right, by which lands or other heritable ſubjects are impignorated by the proprietor to his creditor in ſecurity of his debt. A wadſet differs in nothing, as to its conſtitution by ſeiſin, from other heritable rights: its ſpecialties lie only in the right of reverſion. As the names of *debtor* and *creditor* are ſeldom made uſe of but in the caſe of moveable debts, the debtor, who receives the money, and grants the wadſet, is called *the reverſer*, becauſe he is intitled to the right of reverſion; and the creditor, to whom the wadſet is granted, gets the name of *wadſetter*, becauſe the right of the wadſet is veſted in him.

4. Originally the property of the lands wadſet remained with the debtor, agreeably to the genuine nature of impignoration; it was the poſſeſſion only which was transferred to the creditor for his ſecurity, *Reg. Maj. l.* 3. *c.* 2. 3. &c. Wadſets continued to be proper pledges for ſome centuries. It appears from the ſtyle of a right of wadſet granted in the year 1419, preſerved by Skene, *v. Reverſion*, that they were then executed in the form of a charter; by which the reverſer impignorated the lands to his creditor, to be enjoyed by him till payment of the ſum lent; ſo that the debtor was ſufficiently ſecured in his right of reverſion, it having been expreſſed *in gremio* of the charter granted by himſelf. But not long after, the form changed gradually from a right of pledge to a deed of alienation; the property of the lands was given by the charter abſolutely to the creditor; and the debtor, in place of being ſecured in his right of redemption by a clauſe in the charter, as was the former practice, got letters of reverſion from the creditor in a ſeparate writing. By theſe means, wadſetters, who appeared from the face of their rights to be the irredeemable proprietors of the wadſet-lands, had it in their power, by alienating them in favour of a ſtranger, to evacuate the reverſion competent to the debtor; which being in its genuine nature a perſonal right, was indeed obligatory on the wadſetter and his heirs, but could have no force againſt his ſingular ſucceſſors. To obviate this fraudulent practice, all reverſions, though granted in writings apart, were, by 1469, *c.* 28. to be afterwards explained, declared to be effectual to the reverſer againſt all ſingular ſucceſſors in the wadſet right. Creditors ſeldom chuſe, by the preſent practice, to ſecure their debts by way of wadſet; but when they do, the right is commonly executed in the form of a mutual contract; in which the reverſer does not barely impignorate, but alienate the lands, in conſideration of the ſum borrowed by him; and the wadſetter, on the other part, grants the right of reverſion.

5. The opinion delivered in general terms by all our writers, that rights of reverſion are *ſtricti juris*, and that therefore they go neither to heirs nor aſſignees where they are not expreſſed, *Cr. lib.* 1. *dieg.* 9. § 33. *verſ. Sed ut*, and *lib.* 2. *dieg.* 6. § 3.; *Hop. Min. Pr.* §. 171.; *St. b.* 2. *t.* 10. § 7.; *Mack.* § 4. *h. t.* is hardly reconcileable, either, *firſt*, to the known rules of law, or, *2dly*, to our practice. Though a reverſion adjected to a proper ſale of lands, ought not perhaps to be ſtretched beyond the words expreſſed in it, becauſe it tends to weaken or ſuſpend the right of property, which the purchaſer hath acquired for a valuable conſideration, *infr. b.* 3. *t.* 3. § 12.; yet in wadſets, where the value of the lands ſeldom fails greatly to exceed the amount of the debt for which they ſtand impignorated, a right of redemption ought to receive the moſt liberal interpretation; becauſe the favour lies altogether for

for the reverſer: and hence the *actio pignoratitia* of the Romans, for making the redemption of a pledge effectual, was deemed an *actio bonæ fidei*.

6. As to our practice in this article, it has been adjudged by repeated deciſions, that reverſions need not, like rights of a ſtrict interpretation, be fulfilled in their preciſe terms, *Dec.* 11. 1638, *Finlayſon*; *Feb.* 1. 1667, *Cred. of Murray*. And in a late caſe, where the reverſion required conſignation in gold and ſilver, conſignation upon an order of redemption, though in bank-notes, was adjudged effectual to found the reverſer in a right of redeeming the lands at the next term, upon payment of the redemption-money in current ſpecie, without the neceſſity of uſing any new order, *New Coll.* i. 194. Thus alſo, though the reverſion ſhould not expreſs a power of redeeming from the heir of the wadſetter, as well as from himſelf, redemption is competent againſt the heir, if the words can admit of that conſtruction, *Feb.* 6. 1630, *Muir*. And reverſions, even when they are adjected to proper ſales, are found to be deſcendible to the reverſer's heirs, if there be no clauſe diſcovering the intention of parties, that the right of reverſion ſhould be perſonal to the reverſer himſelf, *Jan.* 9. 1662, *E. Moray*. Thus, laſtly, tho' the clauſe of reverſion ſhould be explicit, that the reverſer ſhall have no right to redeem but with his own proper money, ſuch clauſe is diſregarded, as catching an undue advantage of the debtor's neceſſities; and conſequently it is competent to him to redeem the wadſet, either with his own, or with borrowed money, *New Coll.* ii. 182.

7. It cannot be diſſembled, that our ſupreme court have, in their deliberations upon this point, aſſumed the poſition, that reverſions are not tranſmiſſible by any voluntary conveyance, unleſs they bear expreſsly to aſſignees, *Dec.* 6. 1661, *Home*; *Fount. Jan.* 2. 1696, *Burnet*; upon this medium, that reverſions are mere faculties, which are perſonal, and conſequently not tranſmiſſible by thoſe who are intitled to them till they be exerciſed. But, *firſt*, if rights of reverſion be truly perſonal to the reverſer, why has our practice made them deſcendible to his heirs? for the reaſon why leaſes, though they deſcend to heirs, cannot be tranſmitted by aſſignation, *ſupr. t.* 6. § 31. is by no means applicable to reverſions. *2dly*, The diſtinction between rights and faculties appears, in ſo far as relates to this particular, to be without a real difference: for what are the moſt part of our predial ſervitudes, and numbers of other rights, but powers veſted in one perſon over the property of another? which rights are nevertheleſs univerſally underſtood to go to aſſignees, though aſſignees ſhould not be mentioned.

8. But however this point might be determined, the following poſitions are inconteſtable. *Firſt*, That where an order of redemption is uſed by the reverſer, in conſequence of which the redemption-money is conſigned, that order is aſſignable, though aſſignees ſhould not be expreſſed in the reverſion, ſaid *Dec.* 6. 1661, *Home*; becauſe the faculty to redeem is by the conſignation actually exerciſed, and ſo is converted into a proper and eſtabliſhed right: and as the conſigned money is tranſmiſſible to an aſſignee, the aſſignee muſt be intitled to a proſecution of the redemption by an action of declarator. *2dly*, It is a fixed point, that reverſions, though they ſhould not bear to aſſignees, may, out of favour to creditors, be carried by adjudication, which is a legal aſſignment, *Fount. July* 30. 1680, *Bruce*, obſerved *Dict.* ii. *p.* 79. Nay, it may be maintained, though Hope inclines to the contrary opinion, *Min. Pract.* ſaid § 171. that even where aſſignees are excluded, reverſions may be adjudged by creditors: for as the reverſer hath it in his power to uſe an order of redemption upon his right, by which all are agreed that the right of reverſion becomes tranſmiſſible, if he ſhall refuſe to exerciſe that faculty for the benefit of the creditors, the law ought

to ſupply that defect by the proper diligence of the creditor himſelf. This diſtinguiſhes the caſe of reverſions, from leaſes where aſſignees are excluded: for the reaſon why ſuch leaſes are not adjudgeable is, that the tackſman's right to poſſeſs is, by the leaſe, made perſonal to himſelf; ſo that he cannot, by any circuit, transfer that poſſeſſion to another; nor, conſequently, be accuſed of injuſtice for not conveying to his creditor a right which that creditor cannot hold.

9. Sir George Mackenzie, in his obſervations upon act 1469, *c.* 28. which firſt declares reverſions, though not ingroſſed in the body of the wadſet, effectual againſt the wadſetter's ſingular ſucceſſors, contrary to their genuine nature, affirms, that it behoves the reverſer to record his reverſion, in order to give it the effect conferred on it by the ſtatute. But that doctrine ſeems to have no foundation in the enactment: for the firſt part of it gives to reverſions the force of real rights, without the leaſt mention of regiſtration; and the laſt part of it contains barely an injunction to the clerk-regiſter, to receive them into his record, if the reverſer ſhall demand it, in order to preſerve his right from periſhing, together with a declaration, that the production of an extract of them from the regiſter ſhall be as effectual to the reverſers as if their principal rights were produced. By this means, though the reverſer was by that ſtatute ſecured againſt the fraudulent alienation of the lands by the wadſetter in favour of a ſtranger, the ſecurity of purchaſers was rendered moſt precarious; who, after having acquired lands on the faith of a right which appeared *ex facie* irredeemable, might nevertheleſs have been obliged to yield them up to a reverſer; whoſe right they could not, after the narroweſt ſearch, find out, by the records. And it was on account of this inſecurity, that reverſions were, by a later ſtatute, 1617, *c.* 16. not only allowed, but directed, to be regiſtered in the regiſter of ſeiſins and reverſions; without which regiſtration, they continue ineffectual againſt ſingular ſucceſſors: ſo that now a purchaſer of lands from one whoſe right appears to be abſolute, is ſafe in his purchaſe, though his author ſhould have granted a reverſion in a writing apart, if he perfect his diſpoſition by a ſeiſin duly regiſtered before the regiſtering of the reverſion; becauſe a reverſion unregiſtered being merely a perſonal right, cannot come in competition with a right thus completed by ſeiſin, which is real.

10. This laſt ſtatute, 1617, requires the regiſtration of reverſions, aſſignations, and diſcharges of reverſions, renunciations of wadſets, and grants of redemption; and it even injoins the regiſtering of bonds or obligations for granting reverſions; which proves, that the legiſlature underſtood bonds of reverſion to be, in conſequence of the act 1469, real rights, in as proper a ſenſe as formal reverſions. Reverſions themſelves muſt, by the ſtatute, be recorded within ſixty days after their date; but it is declared ſufficient, that bonds of reverſion be regiſtered within ſixty days after ſeiſin taken by the wadſetter upon his wadſet; becauſe till then the wadſet continues a right merely perſonal, and conſequently may be affected by any deed, tho' not regiſtered. Grants of redemption, (*i. e.* grants declaring the lands to be redeemed), and renunciations of wadſets, when conſigned in an action of declarator, may, by the ſtatute, be regiſtered at any time within ſixty days after the date of the decree by which they are ordained to be given up to thoſe having intereſt in them. An eik, or addition, to a reverſion, does not, as one might conjecture from its name, enlarge the right of the reverſer; but is, on the contrary, a limitation of it. It is a deed granted by the reverſer, acknowledging the receipt of a farther ſum borrowed from the wadſetter, and declaring, that the wadſet ſhall not be redeemable, till the payment of the laſt debt as well as the firſt. Theſe eiks, though they are not

not ſpecially mentioned in the ſtatute, yet being conditions adjected to the reverſion, muſt be governed by the ſame rule that governs the reverſion itſelf, of which they make a part; and are therefore real rights affecting the reverſer's ſingular ſucceſſors, provided they be regiſtered according to the directions of the act.

11. An aſſignation of a reverſion, if it be intimated to the wadſetter, interpels ſufficiently the wadſetter to whom the intimation is made, from renouncing the wadſet in favour of the original reverſer, though he ſhould offer payment. But to make the aſſignation effectual againſt the wadſetter's ſingular ſucceſſors, it muſt be regiſtered in the ſame manner as the reverſion itſelf; and in that caſe it requires no intimation, *Dec.* 5. 1665. *Beg.* This regiſtration founds a preference to the aſſignee, in competition with eiks, diſcharges or aſſignations granted by the reverſer, whether before or after his right, if they have not been regiſtered before it. Thus a ſecond aſſignation of a reverſion firſt regiſtered, is preferable to an aſſignation prior in date which is laſt regiſtered: and thus an eik granted by the reverſer after he is diveſted of his right by an adjudication, the abbreviate of which is on record, or by a regiſtered conveyance, is not effectual to the wadſetter againſt the adjudger or aſſignee, whoſe tranſmiſſion was made real by regiſtration before the granting of the eik.

12. The act 1617 excepts two kinds of reverſions which are declared real without regiſtration: *firſt*, reverſions inſerted in the body of the right granted to the wadſetter; becauſe the ſingular ſucceſſor in the wadſet is ſufficiently certified of the reverſion, though it ſhould not be regiſtered, by looking into his own right, which bears it *in gremio*. *2dly*, Reverſions of lands within borough are likewiſe excepted from the act; the reaſon of which is not ſo obvious. Mackenzie's conjecture, that the exception from the ſtatute of ſeiſins of burgage-lands was founded on the exactneſs of town-clerks in recording them in the borough-books, is not applicable to reverſions; for theſe may be granted without the knowledge of the common clerk. But that exception, whatever its reaſon may have been, was ſoon perceived to weaken the ſecurity of the purchaſers of burgage-tenements. This occaſioned the paſſing of the act 1681, *c.* 11. which extended the neceſſity of regiſtration to reverſions of tenements within borough. A doubt may be moved, which has not been hitherto cleared by any deciſion, whether rights of reverſion, when duly regiſtered, fall under the act 1693, *c.* 13. intitled, *Act concerning the preference of real rights*, ſo as to be preferred according to the dates of their ſeveral regiſtrations? or whether their preference ought to be governed by their own dates? The words of the act, *real rights whereupon ſeiſins ſhall be taken*, have the appearance of excluding reverſions from the rule of preference thereby eſtabliſhed, ſince theſe admit not of ſeiſin; yet the extenſion of the act to reverſions is favoured, not only by the rubric of the title, but by the reaſon of the law, which is explained above, *t.* 3. § 42. and is alike applicable to all real rights. Neither is this extenſion inconſiſtent with the clauſe of the act deſcriptive of the rights falling under it, the firſt words whereof may be reaſonably interpreted to comprehend every real right, whether of property, annualrent, ſervitude, &c.; the taxative words which follow having been poſſibly added for no other reaſon, but that real rights, for the greateſt part, are conſtituted by ſeiſin.

13. It was uſual in wadſets to add a condition to the reverſion, that even after the redemption of the lands, the wadſetter ſhould hold them in leaſe for a certain number of years, for payment of a tack-duty equal to the intereſt of the ſum lent. As this tack-duty was moſt frequently far below the rent of the lands, it was enacted by 1449, *c.* 18. that where lands were granted

granted in wadſet, and afterwards taken in leaſe by the wadſetter for a fixed term of years, for half mail, or thereby, ſuch leaſes ſhould not be valid, if they were not ſet for the very mail, or thereby. Though there be an apparent incongruity, or rather inconſiſtency, in the words of this act, its intention is obvious, that leaſes granted to continue after redemption, ſhall not be valid, if the tack-duty be not in ſome degree proportioned to the value of the rent; and by comparing the two expreſſions, it would ſeem, that ſuch leaſes are to be ſuſtained as are granted for more than the half of the true rent. In thoſe leaſes, the rent of the lands is to be conſidered, not as it ſtood at the time of the redemption, but the time of granting the wadſet: for wadſetters, in the view of ſuch low leaſes, frequently improve the lands at a conſiderable expence during the ſubſiſtence of the wadſet; and it would be hard to deprive them of the benefit of that improvement made with their own money and induſtry; eſpecially ſince that benefit is to accrue to the reverſer at the expiration of the tack, *Feb.* 17. 1672, *Douglas.* Leaſes thus granted, being in effect eiks to a reverſion, are effectual, not only againſt the heir, but againſt the ſingular ſucceſſors of the reverſer who grants them, provided they be recorded as the law directs.

14. Rights of reverſion are for the moſt part perpetual, leaving the reverſer at liberty to redeem, at what time ſoever he pleaſes, without reſtriction. Theſe being mere faculties, can be exerciſed *quandocunque*, and therefore are not loſt by any preſcription of time, *infr. b.* 3. *t.* 7. § 10. But a condition is adjected to ſome reverſions, called in the Roman law *pactum legis commiſſoriæ in pignoribus*, by which it is ſtipulated, that if the debt be not paid againſt a determinate day, the right of reverſion ſhall be irritated, and the ſubject impignorated become the irredeemable property of the creditor-wadſetter. This condition was accounted by the Romans *contra bonos mores*, and therefore abſolutely reprobated by their law, *l. ult. C. De pact. pign.* But as ſuch clauſes, however rigorous they may be, cannot be called unlawful, it was declared by act of ſederunt *Nov.* 27. 1592, that they were to be explained according to their expreſs words and meaning; ſee alſo 1661, *c.* 62. *verſ. And as to.* Agreeably to this act of ſederunt, no conventional irritancy could be purged by our old practice, even by the offer of payment before ſentence, *Had. Feb.* 19. 1611, *L. Barſkeoch.* But by the more modern deciſions, a diſtinction hath been made between irritant clauſes, penal and not penal. Where the clauſe is not penal, as in an irritancy adjected to a ſale for a juſt price, it is ſtrictly adhered to, and the irritancy is incurred without any previous declarator, *Jan.* 17. 1679, *Beatſon*; *ſupr. t.* 5. § 25.: but in penal irritancies, and particularly in thoſe adjected to wadſets, where the ſum lent falls always ſhort of the value of the lands, the law has leſs regard to the words of the contract, than to that equality which ought to be preſerved between the parties, and therefore ſoftens the rigour of the act of ſederunt, by indulging to the reverſer a power to redeem, even after elapſing of the term of redemption, as long as the irritancy is not declared, *Feb.* 1. 1667, *E. Tullibardine.* Yet the reverſer may be cut out of his right without any previous declarator, by preſcription, whereof the courſe begins to run from the expiration of the term of redemption; for if he do not redeem for forty years after, and ſuffer the wadſetter to continue for that whole ſpace in the poſſeſſion of the lands, he is for ever forecloſed by preſcription, though the wadſetter ſhould have obtained no declarator, *Home*, 102.

15. Rights of reverſion, where they are ſubjects capable of being conveyed, are tranſmitted ſometimes by ſimple aſſignation, and ſometimes by diſpoſition and ſeiſin. If the wadſet be executed in the old form of impignoration to the creditor, which is quite conſiſtent with the right of property in the debtor, the reverſion, becauſe it includes in that caſe the right of

property,

property, ought to be tranſmitted by a deed bearing precept of ſeiſin: but where it is granted in the form of an alienation, and the reverſion founded ſolely on the wadſetter's obligation, the wadſetter is proprietor; and the only right remaining in the reverſer being a right to redeem, which is perſonal, may, like other perſonal rights, be tranſmitted by aſſignation. Hence an adjudication of a reverſion of a wadſet of this kind, though not followed by ſeiſin, or by a charge againſt the ſuperior, carries the full right of the ſubject adjudged; and is therefore preferable to a poſterior adjudication of that reverſion upon which a charge hath been given to the ſuperior, *Kames*, 91.

16. Rights of wadſet are extinguiſhed, either, *firſt*, when the wadſet lands become the irredeemable property of the wadſetter; *ex. gr.* when the wadſetter obtains a diſcharge or renunciation of the right of reverſion from the reverſer, and regiſters it in the manner preſcribed by act 1617; or where the reverſer forfeits his right, by not redeeming the wadſet within the time limited by the deed, or indulged by the law. *2dly*, A wadſet is extinguiſhed by the reverſer's redemption of the lands, on payment of the ſums for which it was granted. This redemption proceeds, either on the reverſer's own motion, when he offers to the wadſetter the payment of his debt, by which his property may be diſburdened of the wadſet, or upon the wadſetter's demand or requiſition of the wadſet-ſums from the reverſer.

17. When the reverſer wants to redeem his lands by payment, he muſt uſe an order of redemption againſt the wadſetter; the firſt ſtep of which is premonition. This premonition is an act of the law, by which the reverſer, or his procurator, gives notice to the wadſetter under form of inſtrument, to appear at the place, and upon the day and hour ſpecified in the right, then and there to receive payment of his debt. If the wadſetter receive his money upon this intimation without compulſion, and renounce his right in favour of the reverſer, the redemption is voluntary. In the redemption of wadſets which have not yet been made real by ſeiſin, a ſimple diſcharge or renunciation by the wadſetter, though not regiſtered, is a proper extinction of the right; becauſe as long as a right remains perſonal, it may be effectually renounced by a perſonal deed. But where ſeiſin has proceeded on the wadſet, it muſt be diſtinguiſhed, whether the right be holden baſe of the reverſer who grants it, or of the reverſer's ſuperior.

18. When the wadſet is holden of the reverſer, it is uſual to inſert in the wadſetter's renunciation a procuratory for reſigning the lands to the ſuperior, granter of the wadſet, *ad remanentiam*; and after the ſurrender is made, to regiſter the inſtrument of reſignation, together with the renunciation, in the regiſter of ſeiſins; which, without any new infeftment, extinguiſhes the wadſet, and conſolidates the property with the ſuperiority in the reverſer: but a ſimple renunciation properly regiſtered has the ſame effect, even without reſignation; becauſe the reverſer, who is ſuperior, continues infeft in the lands, notwithſtanding the wadſet with which his ſeiſin is burdened; and conſequently as ſoon as his ſeiſin is diſcharged of that burden, by the wadſetter's regiſtered renunciation, he muſt of courſe be reinſtated in the full right of the lands, *Hop. Min. Pr.* § 170. In a wadſet holden of the reverſer's ſuperior, the reverſer is, by the ſeiſin proceeding upon it, diveſted of all right in the lands; and therefore the ſuperior, to whom the reverſer is after that period no better than a ſtranger, lay under no obligation, as the law formerly ſtood, to receive him again as vaſſal, though the wadſetter ſhould have been willing to renounce, or diſpone in his favour. For obviating this inconveniency, letters of regreſs were frequently obtained from the ſuperior, by which he became obliged to give the reverſer his former vaſſal full regreſs to the property, upon his redeem-

ing the lands. The neceſſity of theſe letters is now in a great meaſure ſuperſeded, by 20° *Geo. II. c.* 50. obliging ſuperiors to receive every one as vaſſal, who ſhall produce a grant by the former vaſſal, containing procuratory of reſignation, upon payment of the compoſition due by long cuſtom. The only benefit, therefore, that can now accrue to the reverſer by letters of regreſs is, that the ſuperior muſt in that caſe receive him without any compoſition. But if theſe letters be not regiſtered in the ſame record, and within the ſame time, as is preſcribed by ſtatute in the caſe of reverſions, the ſingular ſucceſſor in the ſuperiority is not obliged to regard them, but will be intitled to the uſual compoſition of a year's rent, for again receiving the reverſer, as if no ſuch letters had been granted.

19. If the wadſetter appear not at the time and place to which he was cited by the premonition, or if he refuſe to accept of payment and renounce, the reverſer muſt conſign it in current ſpecie in the hands of the perſon named in the right for that purpoſe; and if none be named, in the hands of a reſponſal perſon, *infr. b.* 3. *t.* 1. § 31. On theſe facts, a notorial inſtrument muſt be taken by the reverſer: which ought to bear, *firſt*, the production of the right of reverſion; and where the reverſion is contained *in gremio* of the wadſet-right, which is in the poſſeſſion of the wadſetter, and ſo cannot be produced by the reverſer, that ſpecial fact ought to be related in the inſtrument. *2dly*, It muſt alſo bear the production and conſignation of the wadſet-ſums. Bonds of borrowed money, or other liquid obligations for debt due by the wadſetter to the reverſer, cannot be ſuſtained as grounds of compenſation, ſo as to ſupply the place of conſignation *pro tanto*; becauſe all ſuch equivalents are excluded by the tenor of the reverſion, which requires conſignation to be made in current money. But compenſation, where it is grounded, not upon an extrinſic obligation, but on an article contained in the right of wadſet, will be received as conſignation *pro tanto*, *Jan.* 2. 1667, *Hodge*. An inſtrument of conſignation, though it affords legal evidence that all the proper ſolemnities were uſed in depoſiting the redemption-money, *infr. b.* 4. *t.* 2. § 5. yet being but the aſſertion of a notary, cannot fix the receipt of it on the conſignatary, without a written acknowledgement of it ſigned by himſelf. But though, where no receipt is taken, the conſignatary will get free, by denying upon oath that he received the conſigned ſums, the law pays ſuch regard to the inſtrument, that the reverſer is not laid under the neceſſity of renewing his order of redemption; the order already uſed will be ſuſtained, on his again producing and conſigning the redemption-money judicially. This inſtrument of conſignation completes the order of redemption, ſtops the further currency of the intereſt of the wadſet-ſums againſt the reverſer, ſubjects the wadſetter to account for the rent of the wadſet-lands, from the time the order was uſed, and founds the reverſer in an action for declaring the order to be formal, and the lands to be redeemed in conſequence of it.

20. This kind of redemption therefore requires the ſentence of a judge to its full conſummation, and may on that account be called judicial, or neceſſary. The declaratory action on which this decree proceeds, is competent to the reverſer, not only againſt the wadſetter himſelf, but, upon his death, againſt his heir, though he be not entered: for the reverſer's right of action ought not to be evacuated, without any fact done by himſelf, merely becauſe the wadſetter's heir declines to enter; and in chuſing a defender, no more is neceſſary than that he have an intereſt to oppoſe the ſuit. At the ſame time, becauſe an heir before entry is not veſted with the right of his anceſtor's lands, and ſo cannot effectually paſs them over to another, the wadſetter's apparent heir, againſt whom a decree of declarator is obtained, hath no claim to the redemption-money till he ſerve himſelf heir,

heir, and afterwards renounce the wadſet, and make over the lands to the reverſer, *Jan.* 10. 1665, *Campbell.* And for the ſame reaſon, if ſuch heir ſhould die before the right of wadſet is veſted in him, the redemption-money would belong, not to his executors, but to ſuch heir as ſhould make up a complete title to the lands, and ſo be capable of reinſtating the reverſer in them.

21. Lord Stair, *b.* 4. *t.* 5. § 3. affirms, that, in the general caſe, the wadſetter's apparent heir may be made a party to this action, without a previous charge againſt him to enter, becauſe charges are not neceſſary in thoſe declarators which have neither any petitory or poſſeſſory concluſion againſt the heir. According to the reaſon of this rule, the action of declarator may, in wadſets holden baſe of the reverſer, be proſecuted againſt the wadſetter's heir, without charging him to enter, becauſe the libel in ſuch action contains nothing perſonal againſt him; ſeeing the ſentence declaratory of itſelf relieves the reverſer's ſeiſin from the burden of the wadſet, and ſo reſtores him fully to his former right in the lands. But where the wadſet is holden of the reverſer's ſuperior, by which the reverſer is entirely diveſted, the ſcope of the action is to compel the defender to reinſtate him in the right of the lands; who therefore muſt be previouſly charged to enter heir, without which he cannot be in a capacity to transfer any right to the purſuer. Though action of declarator be ſuſtained againſt the wadſetter's apparent heir, it is not competent to the apparent heir of the reverſer, who has no title to ſue upon his anceſtor's rights before he enters heir to him. Nay, it is not ſufficient for founding the action, that he has been ſerved heir before commencing it, if he was not alſo ſerved at the time of uſing the order of redemption, *Jan.* 19. 1672, *Lo. Lovat.*

22. Where the lands have been conveyed by the wadſetter to a ſingular ſucceſſor, it has been made a queſtion, who ought to be cited by the reverſer as parties to the declarator? Craig affirms, *lib.* 2. *dieg.* 6. § 13. that by the old practice it was ſufficient, if premonition in the order of redemption was made to the preſent poſſeſſor for receiving the redemption-money; neglecting the original wadſetter and his heirs. This doctrine ſeems to be taken for granted, in a caſe ſoon after Craig's death, *July* 9. 1630, *Fiſher*; but it was adjudged in the ſame deciſion, that in the action of declarator proceeding on that order, it behoved alſo the reverſer to cite the heir of the original wadſetter, or at leaſt the perſon whom the preſent poſſeſſor alledged to be his heir; but that it was unneceſſary to take notice of any of the intermediate poſſeſſors.

23. The reverſer may paſs from his order of redemption, and again demand the conſigned money, at any time before declarator, *June* 21. 1626, *Sir J. Murray*: for if that order be conſidered as an offer of the redemption-money made by the reverſer, all offers may be retracted before acceptance by him to whom they are made; or if it be looked upon as a ſtep of diligence, every one may at pleaſure paſs from any diligence uſed by himſelf. From this poſition another flows, that the conſigned ſum continues the property of the reverſer till declarator, otherwiſe he could have no right to redemand it from the conſignatary; and as long as the property of the conſigned money remains with the reverſer, ſo long muſt the wadſetter's intereſt in the wadſet continue heritable. If therefore the caſe be put, that the wadſetter ſhould die after an order of redemption uſed by the reverſer, and that, upon his death, a decree ſhould be obtained againſt his heir, declaring the lands redeemed in conſequence of the order, the conſigned money, which comes in place of the lands, would belong, not to the wadſetter's executor, but to his heir; becauſe at the time of his death, while there was yet no declarator, the wadſetter's intereſt in the lands was heritable, *ſupr. t.* 2.

t. 2. § 20.; *Jan.* 21. 1673, *Nicol.* This poſition is alſo ſupported by a ſeparate ground of law, viz. that the intention which the wadſetter has diſcovered to make his money heritable by ſecuring it on land, cannot be defeated by a deed of the reverſer, to which the wadſetter himſelf is no party; and conſequently the conſigned money muſt continue heritable till the law changes its nature; *i. e.* till either the wadſetter renounce his right, or there be a ſentence of the ſupreme court declaring the wadſet redeemed. After that period, the feudal right of wadſet is diſſolved, and the conſigned money becomes moveable, becauſe it is no longer ſecured on land. The moment, therefore, that the decree of declarator is obtained againſt the wadſetter's heir, the money continues no longer heritable in the perſon of that heir; and conſequently it deſcends on his death, not to his heir, but to his executors. As a corollary from the above doctrine, a wadſet-ſum conſigned by a reverſer in conſequence of an order of redemption, cannot be arreſted by any creditor of the wadſetter till a declarator of redemption be actually obtained; becauſe it is not till declarator that the ſum conſigned is accounted the property of the wadſetter, deſcendible to his executors, *St. b.* 3. *t.* 1. § 37.; *New Coll.* ii. 102. The foregoing obſervations may be applied to orders of redemption uſed in appriſings and adjudications. After decree of declarator is obtained by the reverſer, the wadſetter, who thereby becomes proprietor of the conſigned money, may charge the conſignatary, upon letters of horning, to deliver it up to him.

24. Orders of redemption, together with decrees of declarator proceeding upon them, are undoubtedly of the nature of renunciations, being judicial deeds appointed by the law to ſupply the room of voluntary renunciations; and as ſuch, have the effect of evacuating the right of wadſet in queſtions even with the wadſetter's ſingular ſucceſſors, *Mack. Obſ. on* 1617, *c.* 16. The ſecurity, therefore, of purchaſers appears to call for the regiſtration of the one as well as of the other; ſince it cannot be known but by the records, whether lands which appear veſted in a wadſetter, are redeemed from him, or continue ſtill in his perſon. Yet orders of redemption are neither expreſſed in the act 1617, nor have been in uſe to be recorded by the reverſer; and the decrees of declarator proceeding upon them enter into no record, other than the common regiſter of decrees; ſo that in this reſpect the records afford little or no ſecurity to ſingular ſucceſſors in wadſet-rights.

25. Hitherto of the redemption of wadſets when it proceeds on an order of redemption uſed by the reverſer. When the wadſetter chuſes to have his money rather than the wadſet-lands, he muſt demand from the reverſer the ſums due upon the wadſet under form of inſtrument; and this is, in the moſt proper ſenſe, an inſtrument of requiſition, though the inſtrument taken by the reverſer when he intimates to the wadſetter to receive his money, paſſes ſometimes by the ſame name. It is obvious, that requiſition cannot be made by the wadſetter, if either the reverſer may redeem *quandocunque*, without reſtriction in point of time, or if the term to which the reverſion is limited be not yet expired. Though requiſition of the wadſet-ſums ſhould be made by the wadſetter, he may, without doubt, upon changing his mind, and chuſing to let his money continue with the reverſer, paſs from it, either directly by an expreſs declaration in writing, or indirectly, by intermeddling with the rent of the wadſet-lands, or doing any other act inconſiſtent with the requiſition. But it has been doubted, whether he can paſs from it in the ſpecial caſe where the reverſer hath, in conſequence of the wadſetter's requiſition, conſigned the redemption-money: for by the conſignation, *res non fit integra*; the reverſer comes to have a joint intereſt in the requiſition with the wadſetter, ſeeing conſignation,

tion, when lawfully made, imports, in the judgement of law, a releaſe of the debtor, and an extinction of his obligation; and if his obligation be once extinguiſhed, it ought not to be revived againſt him by a fact of the wadſetter not conſented to or approved by him. By a deciſion, *Nov.* 14. 1710, *Roſs*, the wadſetter was allowed to paſs from his charge, reſerving to the reverſer liberty to follow out a declarator of redemption in common form. The queſtion, Whether requiſition by the wadſetter makes the ſum contained in the right of wadſet moveable? has been fully explained, *t.* 2. § 16.

26. Wadſets are, by the uſage of Scotland, either proper or improper. A proper wadſet is truly of the nature of a redeemable right of property, and not barely of pledge; by which it is covenanted, that the uſe of the lands poſſeſſed by the wadſetter ſhall, during the not redemption, go for the uſe or intereſt of the money lent by him to the reverſer; ſo that the wadſetter enjoys the rents without accounting, in ſatisfaction, or *in ſolutum*, of his intereſt. As, on the one hand, ſuch wadſetter ſubjects himſelf to all the croſs accidents which may hinder theſe rents from being effectual to him; and conſequently is obliged, let them be ever ſo deficient, to diveſt himſelf of his right, upon payment by the reverſer of the bare principal ſum, without any claim for paſt intereſt: ſo, on the other, he ought to have the whole benefit that may reſult from the increaſe of the fruits by his induſtry or otherwiſe; and therefore, though they amount to more, he is not obliged to impute any part of the ſurplus towards payment of the capital, but appropriates the whole to himſelf. An improper wadſet is nothing more than a *pignus*, or right of ſecurity; in which the wadſetter is accountable to the reverſer for the neat yearly ſums which he hath, or might have, received out of the wadſet-lands. He undertakes no part of the hazard of the rents on himſelf: he is ſecured by the nature of his contract, that if they do not fully amount to the intereſt of the ſum lent, the deficiency ſhall be made up to him, and that he ſhall not be compelled to renounce, or diveſt himſelf, in the reverſer's favour, till the whole ſums, principal and intereſt, ſhall be cleared off by his intromiſſions. When therefore the rent exceeds the yearly intereſt, equity will not allow him to pocket up the excreſcence for his own uſe. He muſt ſtate it to the reverſer's credit, as payment *pro tanto* of the capital. Upon this ground, a clauſe adjected to a proper wadſet, providing that the wadſetter ſhall not be ſubjected to the hazard of the rents, is juſtly declared uſurious by 1661, *c.* 62. *verſ. And in regard.* Where a lender runs no riſk of loſing any part of his intereſt, he ought to have no chance of getting more: and the wadſetter in a proper wadſet undertakes the *periculum* of the rents in ſo high a ſenſe, that though he ſhould be forcibly turned out of the poſſeſſion by the reverſer, the wadſetter's claim for the rents, from that period downwards, would be barely perſonal againſt the reverſer who did the wrong, but not real againſt the lands, ſo as to prejudice the ſingular ſucceſſors or creditors of the reverſer, who ſhould affect them by proper diligence, *New Coll.* ii. 22. The ruling difference, therefore, between an improper and a proper wadſet, is this, that, in the firſt, the wadſetter acts merely in the reverſer's name, and muſt account to him for what he receives, as if he were his ſteward or factor; whereas, in a proper wadſet, the wadſetter acts *tanquam interim dominus*, as a temporary proprietor; what he receives of the rents is his own, with this only deduction, that every year's rent received by him, be it high or low, extinguiſhes a year's intereſt of the debt due to him by the reverſer.

27. The ſubjecting of the wadſetter to the payment of the public burdens chargeable on the lands, does not appear to be a character eſſentially belonging to a proper wadſet, though Mackenzie has made that a part of its

definition, § 12. *h. t.*: for where lands are ſuſpected not to be ſufficient to produce a rent anſwerable to the intereſt of the wadſet-ſum over and above the public burdens, it is moſt equitable, even though the parties intend a proper wadſet, that the reverſer ſhould undertake the payment of thoſe burdens, otherwiſe the wadſetter muſt loſe part of his intereſt, *Dirl.* 436.; *Pr. Falc.* 114. Neither is it inconſiſtent with the nature of property, as ſome have affirmed, that the purchaſer ſhould agree with the ſeller, to be relieved by him of particular yearly burdens affecting the ſubject of his purchaſe, as feu-duties, land-tax, miniſter's ſtipend, &c.; and frequent inſtances of ſuch ſtipulations occur in ſales by feu holding, where the public burdens continue a charge upon the ſeller. Becauſe the reverſer, in an improper wadſet, lies under an obligation, flowing from the nature of his right, to uphold the rent to the intereſt of the wadſet-ſum, it has been maintained, that where he is bound to uphold it, not preciſely to that intereſt, but to a determinate quantity of corns, whoſe value may, at the ordinary converſions, be expected to amount to it, a proper wadſet is conſtituted; becauſe, though the full quantity ſpecified in the right ſhould be delivered to the wadſetter, the price may fall ſhort of the intereſt; and conſequently, as the wadſetter runs ſome degree of riſk, *viz.* that of a low market, that riſk ought to be compenſated, by giving him the chance of an high market. But ſuch wadſet was adjudged improper, *Kames*, 12. as it might be of bad conſequence to give the wadſetter a pretence to ſecure himſelf from all accounting, by undertaking an inconſiderable hazard.

28. All wadſets which are made redeemable upon payment of the principal ſum and intereſt, muſt be improper, *Dirl.* 57.; becauſe in theſe the wadſetter has the reverſer bound for the payment of his whole intereſt, and therefore muſt account to the reverſer for the excreſcent rent over and above what correſponds to that intereſt. Wadſetters, even in a proper wadſet, ſometimes chuſe, in place of poſſeſſing the lands by themſelves, to grant a back-tack of them to the reverſer, which is made to continue during the not redemption of the wadſet, for payment of the intereſt of the wadſet-ſum as the tack-duty. After granting ſuch back-tack, the wadſet becomes improper; for the wadſetter, in that caſe, has no chance of getting more of the rent than anſwers the intereſt of his debt. Where the right of reverſion bears expreſsly, that all the back-tack duties ſhall be paid up before the lands are redeemed, the payment of them, as well as of the capital ſum, becomes a real burden upon the redemption, effectual againſt the reverſer's ſingular ſucceſſors. But though theſe ſingular ſucceſſors cannot redeem the lands, without paying off all the arrears of tack-duty, that being a condition of the reverſion; yet if they chuſe not to redeem, they are liable for nothing more than the payment of the current tack-duties during their own poſſeſſion; the arrears incurred before that period not being *debita fundi*, but barely a perſonal ground of debt againſt the reverſer and his repreſentatives, except only in the event of redemption, *Jan.* 16. 1677, *Haliburton.* Back-tacks granted by a wadſetter, if they be neither ingroſſed in the wadſet, nor regiſtered in the regiſter of reverſions, are ineffectual againſt the wadſetter's ſingular ſucceſſors; for no real right can be charged with any burden, which is not either incorporated *in gremio juris*, or recorded in the above regiſter according to the directions of 1617, *c.* 16.

29. It was provided by 1661, *c.* 62. *verſ. And becauſe before*, that whereas many proper wadſets had been granted, both before and after the year 1650, in which unreaſonable advantages had been taken of the debtors, the wadſetter in the ſaid wadſets ſhould, during the not requiſition of the ſum lent, be obliged, upon an offer of ſecurity made to him by the reverſer for the payment of his intereſt, either to quit his poſſeſſion of the lands in favour

of

of the reverſer, or to impute the excreſcent rents, after payment of the intereſt, towards extinguiſhing the capital. This clauſe of the act has, not without the appearance of reaſon, been conſtrued by ſome to be limited to ſuch wadſets as had been granted previouſly to the act, both from the recital of the clauſe, and the enacting words. However, *de praxi*, all reverſers have, by an extended and equitable interpretation of it, been admitted to ſue for poſſeſſion in purſuance of that ſtatute, without diſtinguiſhing whether the wadſets were dated before or after it. It is the reverſer who is intitled to make this offer of ſecurity, and all who come in his right, *ex. gr.* an aſſignee or adjudger of the reverſion; but his perſonal creditors cannot compel the wadſetter to quit the poſſeſſion in their favour, becauſe their debts are no titles of poſſeſſion, *Feb.* 10. 1713, *E. Leven.* If the wadſetter, on ſuch offer, chuſe to retain the poſſeſſion, the wadſet becomes improper; for from that period he muſt account for the ſurplus rents, *Goſf. June* 16. 1671, *Lo. Lovat.*

30. An eik adjected to the reverſion of a wadſet which had been burdened previouſly to the eik with a back-tack to the reverſer, was adjudged not to have the effect of a real right againſt the ſingular ſucceſſors of the reverſer; becauſe it did not expreſs an augmentation of the back-tack duty in proportion to the farther ſum lent to the reverſer. And hence a wadſetter, againſt whom an action was brought for declaring his right extinguiſhed by poſſeſſion, was not allowed to aſcribe his intromiſſions to the ſums contained in the eik; upon this ground, that the eik was to be conſidered as a mere perſonal obligation, which was not a proper title of poſſeſſion; and that as the wadſetter's right to the rents was limited to the tack-duty expreſſed in the back-tack, the reverſer's ſingular ſucceſſor might, to the world's end, fruſtrate or poſtpone the payment of the ſum in the eik, if, in place of redeeming, he ſhould chuſe to continue his poſſeſſion upon the footing of the back-tack, *Feb.* 18. 1708, *Sir H. Dalrymple.*

31. Infeftments of annualrent, the riſe and nature of which have been already explained, *t.* 2. § 5. are alſo redeemable rights. Though they had their origin from the prohibition of the Canon law againſt the taking intereſt for the uſe of money, they have continued in practice even ſince the taking of intereſt became lawful; becauſe the creditor, or, as he is called, the *annualrenter*, gets not only a perſonal ſecurity from the debtor, but a real ſecurity, or a right of hypotheck on his lands. Craig, *lib.* 1. *dieg.* 10. § 37. conſiders this right as a proper feu, not indeed of lands, but of an annual payment out of lands: but it is truly no more than a burden or ſervitude affecting the feudal ſubject over which it is conſtituted. Nevertheleſs it has ſome effects of a feu; for the annualrenter infeft is not only ſaid to have died in the fee, as well as the proprietor, but, which is more material, he enjoys the privileges of a baron; by which his heirſhip moveables deſcend, not to his executors, but to his heir.

32. Though a right of annualrent does not carry the property of the lands, or other heritable ſubject, it creates a *nexus* or burden upon the rents, for payment of the intereſt contained in the right: and hence the arrears of intereſt become, after ſeiſin, *debita fundi.* The annualrenter may therefore inſiſt for the payment of the paſt intereſt, not only in a perſonal action againſt the debtor or his repreſentatives, but in a real action of poinding the ground, before the court of ſeſſion or ſheriff. On the decree pronounced in this action, letters of poinding the ground iſſue of courſe; in virtue of which the annualrenter may diſtrain the corns, cattle, or other moveables, on the lands burdened, that had been the property of the debtor, though he be diveſted of them in favour of a ſingular ſucceſſor; but in ſo far as the goods on the ground belong to the debtor's tenants, the creditor can poind them

them only to the extent of the rent due by them to their landlord; *vid.* next ſection; to which extent he may, if he pleaſes, ſue them in a perſonal action towards the payment of his paſt intereſt; and all other poſſeſſors whomſoever, to the extent of their intromiſſions. Yet the preference of the right of annualrent, in a competition with other creditors, depends not on the annualrenter's actual poinding: for he is intitled to the poinding by the antecedent preference which his ſeiſin had acquired to him; of which he cannot be deprived, though he ſhould not exerciſe his right; which is *meræ facultatis* as to the annualrenter, and quite unneceſſary, if payment can be otherwiſe got. Hence in a competition between an annualrenter and arreſter, the annualrenter was preferred, though he had only inſiſted in a perſonal action, as if he had been purſuing upon a poinding of the ground, *Falc.* ii. 1. Where different annualrenters on the ſame lands, are inſiſting at the ſame time in the diligence of poinding the ground, the preferable annualrenter is allowed to uſe his diligence for a certain number of days fixed by the judge; after which, the ſecond, for a like number; and ſo ſucceſſively through the reſt, *Feb.* 15. 1662, *La. Mouſewell*; *July* 26. 1662, *Sir J. Ayton.* As it is no more than the intereſt of the ſum lent which is a burden affecting the lands, the annualrenter, if he want his principal ſum, cannot recover it by poinding, or by a perſonal action againſt the tenants, or other poſſeſſors of the lands; but muſt demand it from the debtor himſelf, upon the perſonal obligation in the bond, either by a formal inſtrument of requiſition, or by a charge on letters of horning, according as the right is framed; or he may adjudge on the bond in common form.

33. By our ancient practice, all creditors, whether by real rights, as infeftments of annualrent, or even by perſonal bonds, might have carried off by poinding, on a brief of diſtreſs, not only ſuch fruits, or other moveables, upon the ground of their debtors lands, as belonged to himſelf, but thoſe alſo which belonged to his tenants; both corns, cattle, and implements of huſbandry, brought by him upon the ground, to the full amount of his debt, though the tenant had not been ſo deep in arrear to his landlord the debtor as the value of the poinded goods amounted to. By theſe means, tenants were frequently ruined by debts contracted, not by themſelves, but their landlords. To put a ſtop to ſo rigorous and unjuſt a practice, it was provided by 1469, *c.* 37. that the goods of tenants ſhould not be poinded for the landlord's debt, farther than their term's mail extended to. As this act was corrective of our former law, it was at firſt ſtrictly interpreted, ſo as barely to prevent the unlimited poinding of the goods of tenants upon perſonal debts; and upon this interpretation of the act, real creditors continued their former courſe of poinding to the full extent of their debts, *July* 11. 1628, *La. Ednam:* but by the later practice, the reſtriction has been, from equity, extended alſo againſt *debita fundi*, *Feb.* 4. 1674, *La. Pitfoddels.* The words of the act are, that the tenant ſhall not be poinded for more than his term's mail; by which, in the proper ſenſe of the words, the current year's rent muſt be underſtood: but, *de praxi*, tenants are poinded by real creditors, not only for the current rent, but for all the arrears of rent which are due by them to their landlord; becauſe the law was deſigned merely to protect the goods of tenants from being ſubjected to the diligence of creditors for debts due by their landlords, farther than the rent they owed for paſt terms, and that which ſhould become due at the next. There can be no doubt, but that an annualrenter may poind the ground in the landlord's natural poſſeſſion, to the full extent of the intereſt due upon his right, agreeably to the known rules of obligations and diligences; neither does the act 1469 ſtand in his way.

34. As

34. As the debtor in a right of annualrent continues proprietor, notwithſtanding the impignoration of the rents to the creditor, it is not neceſſary, nor indeed congruous, for the creditor, to make over or ſurrender the lands after his right is extinguiſhed by payment; for reſignation cannot be made, nor a diſpoſition granted, but by him who is at the time veſted with the property of the lands to be made over or reſigned. Rights of annualrent therefore may be extinguiſhed by a ſimple diſcharge or renunciation of the annualrenter. Theſe renunciations were, by our former uſage, ineffectual againſt the creditor's ſingular ſucceſſors, unleſs they were regiſtered in the regiſter of reverſions; becauſe rights of annualrent conceived in the old form, were not truly bonds, but rights of wadſet, by which a yearly intereſt payable out of the debtor's lands was ſecured to the creditor; and all renunciations of wadſets were ordained to be ſo regiſtered by the act 1617. Partial diſcharges indeed, if they contained no more than the arrears of intereſt due on the right, were always good without regiſtration, even againſt ſingular ſucceſſors: but where the payment incroached on the capital, regiſtration was neceſſary, ſince the diſcharge upon ſuch payment imported an extinction of part of the original right of annualrent, *Jan.* 7. 1680, *Maclellan.* But as thoſe rights have, by a variation in the ſtyle, now become acceſſory to perſonal obligations, they are no longer conſidered as wadſets, but bonds; ſo that they cannot fall under the act 1617; and of courſe may be extinguiſhed, as other proper debts, not by renunciations or diſcharges only, though not regiſtered, but by payment or intromiſſion with the rents of the debtor's eſtate, *July* 8. 1680, *Rankine*; which intromiſſion being *facti*, can enter into no record, and may even be proved by parole-evidence. Hence the purchaſer of a right of annualrent cannot be ſecure by any ſearch into the records, but muſt reſt on the ſeller's warrandice, if he does not, as Lord Stair adviſes, *b.* 2. *t.* 3. § 22. procure the conſent of the debtor to the purchaſe.

35. Infeftments in ſecurity are another ſpecies of redeemable rights, now frequently ſubſtituted in the room of annualrent-rights, by which the granter becomes obliged to infeft the creditor, not barely in an annualrent or intereſt payable out of the lands contained in the right correſponding to the principal ſum lent, but alſo in the lands themſelves, for ſecurity of the principal, intereſt, and penalty; and he aſſigns to the creditor the whole rents during the not redemption. Theſe rights, becauſe they contain a warrant for ſeiſin in the lands themſelves, and an aſſignation to the rents, not only intitle the creditor to poind the ground for the intereſt, but afford him a proper title of poſſeſſing the lands, for payment both of the capital and intereſt; which makes a conſiderable addition to his ſecurity. Rights of the ſame nature are alſo granted to cautioners, for making their relief effectual againſt the debtors for whom they have become engaged; and then they get the name of *infeftments of relief*. But in the following reſpect the two ſecurities differ, that where ſuch right is granted to a proper creditor, it has full effect from its date, or at leaſt from the term of payment of the debt, ſo as the creditor may enter into the immediate poſſeſſion of the rents for his payment; whereas ſuch ſecurity granted to a cautioner is conditional; it is only intended for ſecuring the cautioner's recourſe in the event of his ſuffering; and therefore, till he either pay the debt, or be diſtreſſed by diligence for payment, he cannot be intitled to the poſſeſſion of the rents, except in the ſpecial caſe to be explained, *b.* 3. *t.* 3. § 65.

36. Infeftments of relief are granted ſolely for the ſecurity of the cautioner. The creditor to whom the debt is due, acquires no right by it: for ſince he took not care to get the ſame ſecurity for his debt that the cautioner got for his relief, he may blame himſelf; and cannot profit by a

right granted, not for his behoof, but for that of his cautioner, who may therefore renounce it at pleaſure, *Harc.* 617. Yet the creditor, by adjudging the right from the cautioner, may make it his own, ſo as it ſhall be no longer in the cautioner's power to renounce it, to the prejudice of the creditor who has affected it by legal diligence. Where a right of ſecurity is granted, either for payment or for relief, not only of debts already contracted, but of debts to be contracted, by the granter, the effect of it as to future debts is, by 1696, *c.* 5. limited to ſuch as may be contracted previouſly to the date of the ſeiſin upon the right; ſuch rights having been by experience found to be frequently uſed as covers to fraud. Rights in ſecurity, and infeftments of annualrent, as they have the ſame general nature and properties, are alike extinguiſhable, not only by renunciations, but by intromiſſion with the rents of the debtor's eſtate, without the neceſſity of any ſeiſin, or new conſtitution of the right of property in favour of the debtor.

37. Stair lays it down, *b.* 4. *t.* 35. § 24. that an adjudication upon an infeftment of annualrent, infeftment in ſecurity, or whatever conſtitutes a real burden on the property, is preferable to all adjudications, or other diligences, intervening between the date of the right, and of the adjudication deduced on it, not only for the principal ſum, and intereſt remaining due on the right, but for the intereſt of the accumulate ſum in the adjudication. This preference, in ſo far as concerns the intereſt of the capital, is due to the creditor in an infeftment of annualrent from the real nature of his right, though he have deduced no adjudication upon it, becauſe that intereſt is, after ſeiſin, *debitum fundi*: yet when the *pari paſſu* preference of adjudications was eſtabliſhed by 1661, *c.* 62. there was an expreſs reſervation in favour of *debita fundi*, and adjudications proceeding on them, that there might be no doubt that the legiſlature did not mean to incroach on the preference naturally due to real rights, by the *pari paſſu* preference of adjudications eſtabliſhed by that ſtatute. In order to obtain preference to the creditor in a real right, for the intereſt of the intereſt accumulated in his adjudication, the adjudication muſt be founded on a real action, a poinding of the ground, and not merely on the perſonal obligation in the original right, *Dalr.* 12. *.

TIT. IX.

Of Servitudes.

AFTER having explained how heritable or feudal rights are conſtituted, either abſolutely or under reverſion, the law of ſervitudes may be fitly conſidered, by which the proprietor of an heritable ſubject may be, in certain reſpects, fettered in the exerciſe of his property for the benefit of another. A ſervitude may therefore be defined, a burden affecting lands or other heritable ſubjects, by which the proprietor is either reſtrained from the full uſe of his property, or is obliged to ſuffer another to do certain acts upon it, which, were it not for that burden, would be competent ſole-

* In the ranking of the creditors of Auchinbreck, the adjudgers upon perſonal obligations in preferable heritable bonds having inſiſted, that after drawing their principal ſums and intereſt in virtue of their infeftments, they ſhould be ranked *pari paſſu* with the adjudgers upon perſonal bonds for their whole accumulated ſums, ſo as to intitle them to draw their full penalties and accumulations, the Lords of Seſſion, July 12. 1769, found, That the heritable creditors-adjudgers were intitled to be ranked upon the funds *pari paſſu* along with the other adjudgers, only for what ſhould remain due of their accumulated ſums, after deduction of what they ſhould draw in virtue of their infeftments.

ly

ly to the owner. Hence it may be perceived, that he whoſe tenement is ſubject to a ſervitude is not, in the common caſe, bound to perform any act for the benefit of the perſon or tenement to which it is due: his whole burden conſiſts, either in being reſtrained from doing, or in being obliged to ſuffer ſomething to be done upon his property by another. In the firſt caſe, in which the proprietor is barely reſtrained from acting, the ſervitude is called *negative*; in the laſt, *poſitive*.

2. This burden ariſes ſometimes from the natural ſituation of the ground, ſometimes from ſtatute, or *ex lege*, and ſometimes from covenant; and hence civilians divide ſervitudes into natural, legal, and conventional. Where two contiguous fields belong to different proprietors, one of which ſtands upon higher ground than the other, nature itſelf may be ſaid to conſtitute a ſervitude on the inferior tenement, by which it is obliged to receive the water that falls from the ſuperior. If the water which would otherwiſe fall from the higher grounds inſenſibly, without hurting the inferior tenement, ſhould be collected into one body by the owner of the ſuperior, in the natural uſe of his property, for draining his lands, or otherwiſe improving them, the owner of the inferior tenement is, without the poſitive conſtitution of any ſervitude, bound to receive that body of water on his property, though it ſhould be endamaged by it. But as this right may be overſtretched in the uſe of it, without neceſſity, to the prejudice of the inferior grounds, the queſtion, How far it may be extended under particular circumſtances? muſt be arbitrary. Legal ſervitudes are thoſe which are conſtituted by ſtatute, or by long cuſtom, from the conſideration of public neceſſity or utility. Of this kind may be reckoned a regulation, by which no houſe within the city of Edinburgh can be built higher than five ſtories from the ground, 1698, *c.* 8.; and another, by which the proprietors of that city are prohibited to cover their houſes with thatch or ſtraw, 1621, *c.* 26. The terce and courteſy may be alſo numbered among the legal ſervitudes. But ſervitude, in the more common acceptation of the word, denotes that kind only which is eſtabliſhed, either by the expreſs or the preſumed agreement of parties: and of thoſe conventional ſervitudes there may be as great variety, as there are ways by which property can be burdened, or the exerciſe of it reſtrained, in favour of another.

3. Conventional ſervitudes are conſtituted either by grant, where the will of the party burdened is expreſſed in a written declaration by which the ſervitude is impoſed; or, 2*dly*, by preſcription, where his conſent is preſumed, from ſuffering the party claiming the ſervitude to continue in the exerciſe of it for forty years together, without any attempt to interrupt him. No right affecting land, though it be incapable of proper poſſeſſion, can be completed without ſuch uſe as the ſubject can admit of. As ſervitudes are incorporeal rights, affecting lands which belong to another proprietor, few of them are capable of proper poſſeſſion. Thus, where one has acquired the ſervitude of a road through his neighbour's grounds, ſuch right cannot be properly apprehended or poſſeſſed. The lands indeed which are charged with the ſervitude may be poſſeſſed, but it is the owner of the ſervient tenement who poſſeſſes theſe, and not he who claims the ſervitude. The uſe, therefore, or exerciſe, of the right, is in ſervitudes what ſeiſin is in a right of lands; which exerciſe we improperly call poſſeſſion, and is in the Roman law ſtyled *quaſi poſſeſſion*, *l.* 10. *pr. Si ſerv. vind.*; and conſequently a grant or obligation of ſervitude, though it be, like all other obligations, good againſt the granter and his heirs, without the leaſt uſe had by him who claims it, can have no effect againſt his ſingular ſucceſſors, unleſs the grantee has been in the exerciſe of the right. A ſervitude conſtituted by preſcription,

preſcription, or by the uninterrupted exerciſe of it for forty years, may be acquired without any deed or title in writing, other than a charter and ſeiſin of the lands to which the ſervitude is claimed to be due; for the long acquieſcence of the owner of the lands burdened, fully ſupplies the want of a written declaration conſtituting the ſervitude.

4. The following differences may be obſerved between a ſervitude by grant and by preſcription. A ſervitude by grant is not effectual to the grantee, in a queſtion with the ſuperior of the lands charged with the ſervitude, unleſs he has conſented to it, *Dec.* 11. 1666, *E. Caſſillis*; for no ſuperior is bound to acknowledge a burden impoſed on the lands by his vaſſal, when they return to him in conſequence of any feudal caſualty: But when the ſervitude is acquired by preſcription, the ſuperior's conſent is preſumed, from his not uſing acts of interruption; for his right of ſuperiority gave him a good title to interrupt. *2dly*, A ſervitude by grant, tho' accompanied only with a partial poſſeſſion, muſt be governed, as to degree, by the tenor of the grant, ſo as to intitle the poſſeſſor to the exerciſe of the right, as ample as it was firſt granted, when he thinks fit to uſe it in its full extent: But a ſervitude by preſcription is generally limited to the meaſure of the uſe had by the acquirer of it, agreeably to the rule, *Tantum præſcriptum quantum poſſeſſum.* Yet a ſervitude by preſcription may be ſometimes juſtly extended beyond former uſage, if, without ſuch extenſion, the right would be unprofitable to the acquirer. Thus, where one has acquired by preſcription a ſervitude of building a damhead, as a reſervoir for water, on the property of another, he may raiſe it higher than any former uſage; or he may extend the bank farther on the ſervient grounds than it had reached before, if the ſervitude would be otherwiſe ineffectual, *July* 20. 1677, *L. Garleton*; *Bruce of Kennet*: for, in ſuch caſe, the ſervitude truly acquired is a right of collecting water; and that of building a damhead is only a conſequential right, the true meaſure of which, therefore, is the utility of the mill, colliery, or other ſubject to which the ſervitude is due.

5. Servitudes are either real or perſonal. The firſt kind is alſo called *predial*, from *prædium*, a tenement of lands or of houſes. In all ſervitudes, whether predial or perſonal, the ſubject burdened is a *prædium*, or *res*; in which reſpect, both branches of the diviſion may be alike termed *predial*: but the names of *predial* and *perſonal* are taken, not from the ſubject burdened, but from that in favour of which the burden is impoſed: ſo that the ſervitudes ſtyled *perſonal*, are conſtituted principally in favour of a perſon; and the real or predial, principally in favour of a tenement, and only by conſequence to a perſon, as the owner of that tenement. In predial ſervitudes, therefore, there muſt be two tenements; a dominant, to which the ſervitude is due, and a ſervient, which owes the ſervitude, or is charged with it. And hence predial ſervitudes cannot paſs by ſale, or other juſt title, from the proprietor of the dominant tenement to another, unleſs the acquirer ſhall either purchaſe that tenement, together with the right of ſervitude, or has already the property of another tenement capable of receiving benefit by it, *Nov.* 24. 1732, *Town of Dunſe*. Perhaps the only inſtance where a ſervitude is conſtituted upon a predial tenement, without a proper dominant tenement to which it is due, is in the caſe of paſturage, fuel, feal, divot, and the other rights to which miniſters are intitled by ſtatute, 1593, *c.* 161.; 1663, *c.* 21.; not as the proprietors or poſſeſſors of any dominant tenement, but ſimply in the right of their benefices; for which reaſon, theſe privileges, if they are to get the name of ſervitudes, fall more properly under the claſs of thoſe that are perſonal.

6. Predial

6. Predial ſervitudes may be divided by the law of Scotland, after the example of the Romans, into *ruſticæ* and *urbanæ*, rural and city ſervitudes. City ſervitudes, or of houſes, are thoſe which are conſtituted in favour of a tenement of houſes, though ſuch tenement ſhould not be within the gates of any city. Rural ſervitudes, or of land, are acquired for the uſe of a rural or country tenement, as a farm, field, incloſure, garden, though they ſhould be ſituated within the liberties of a city; for it is not the place, but the matter and uſe of the tenement, which makes this diſtinction, *l.* 198. *De verb. ſig.*; and for this reaſon, dwelling-houſes, and offices built for the uſe of a farm, are the ſubjects, not of city ſervitudes, but of rural.

7. The chief ſervitudes of houſes in the Roman law, were *oneris ferendi*, and *tigni immittendi*; both of which may be called ſervitudes of ſupport. The firſt was the right one had of reſting the weight of his houſe upon his neighbour's wall or pillar, *l.* 33. *De ſerv. pr. urb.*: ſo that it nearly reſembled that of *tigni immittendi*; by which one was obliged to receive into his wall a beam, or joiſt, from his neighbour's houſe. The general nature of both was the ſame. The eſſential difference between them lay in the preciſe form of words that the Romans uſed in conſtituting the ſervitude *oneris ferendi: Paries oneri ferundo, uti nunc eſt, ita ſit.* By which expreſs words, the owner of the ſervient tenement became obliged, not only to ſuffer the weight of the neighbouring houſe to reſt on his wall, but to repair that wall when it became unable to ſupport the load, *l.* 6. § 2. *Si ſerv. vind.*; *l.* 33. *De ſerv. pr. urb.*; contrary to the general nature of ſervitudes, which laid the proprietor of the ſervient tenement under no obligation to do any poſitive act, but barely to ſuffer. Yet he who owed the ſervitude had an option to abandon his property, if he did not chuſe to uphold it in a condition fitted for the uſe of the dominant tenement, *d. l.* 6. § 2. *Si ſerv. vind.*

8. Where a ſervitude of ſupport is conſtituted in writing, by which the wall of one tenement is ſubjected to bear all or any part of the weight of another, Stair, *b.* 2. *t.* 7. § 6. with reaſon, holds it to be the law of Scotland, that the owner of the ſervient tenement is not bound to repair it for the uſe of the dominant, unleſs an obligation to repair be inſerted in the right; conformably to the Roman law, which laid the expence of repairing upon the ſervient tenement, not from any anomalous property in the nature of that ſpecial ſervitude, but from the words expreſſed in the ſtipulation. He alſo affirms, from the ſame principle, that where ſuch ſervitude is conſtituted, not by grant, but by preſcription, it imports no more than a tolerance to lay the weight of the dominant tenement on the ſervient, and a power to the owner of the dominant to repair the ſervient for his own uſe: for the owner of the ſervient tenement is not obliged to do, unleſs he has bound himſelf by paction; and ſervitudes, being *ſtrictiſſimi juris*, ought not to be extended by implication. This doctrine is confirmed by practice, *Br.* 108. & 117.

9. *Stillicidium* is the rain-water that falls from the roof or eaves of an houſe by ſcattered drops; when it is gathered into a ſpout, it is called *flumen:* the ſervitudes, therefore, by which one is obliged to receive on his property the water which falls from his neighbour's houſe, are called in the Roman law *ſtillicidii*, or *fluminis*. Without the conſtitution of one or other of theſe ſervitudes, no proprietor can build ſo as to throw the rain that falls from his houſe directly on his neighbour's grounds: for it is a reſtriction upon all property, *Nemo poteſt immittere in alienum*; and he who in building breaks through that reſtraint, truly builds on another man's property; becauſe to whomſoever the area belongs, to him alſo belongs whatever is above it: *Cujus eſt ſolum, ejus eſt uſque ad cœlum.* But every proprietor may

build, be it ever ſo near his own boundary, provided the rain deſcending from the roof fall within his own property; becauſe there the builder, without incroaching on his neighbour, is making the natural uſe of what belongs to himſelf; and therefore the ſtillicide, or *flumen*, after falling on the builder's property, muſt be ſuffered to run whither the ſituation of the ground ſhall carry it. Yet as the building too near another's property may be attended with inconvenience, the Roman law obliged proprietors to keep at a certain diſtance within their own property in building; ſee *l.* 14. *De ſerv. pr. urb.* We have no ſtatute regulating this matter; but by the uſage of ſeveral boroughs, proprietors are obliged to keep a foot, or a foot and a half, within the extremity of their ſeveral properties: And where the uſage is not fixed, the dean of guild, or other magiſtrate who is charged with the police, appears to be truſted with a diſcretionary power of directing the buildings within borough, ſubject to the review of the court of ſeſſion; ſee *New Coll.* ii. 226.

10. A proprietor may raiſe an houſe, or other building, within his own property, to what height he pleaſes, though he ſhould ever ſo much obſcure the light or obſtruct the proſpect of his neighbour's houſe. To prevent this, two ſervitudes were introduced by the Roman law: *firſt*, the ſervitude *Non officiendi luminibus vel proſpectui*, *l.* 4. *De ſerv. pr. urb.*; by which a proprietor is reſtrained from raiſing any building, if it were but a garden-wall, that may either darken the light, or break the view, of his neighbour's houſe or pleaſure-grounds: And a ſervitude of this kind is ſometimes conſtituted, rather for obſtructing the proſpect of the ſervient tenement, than for enlarging that of the dominant; *ex. gr.* when the owner of the ſervient tenement is tied up from ſtriking out a window in any building which may look into the houſe or garden of the dominant. The other is, *Altius non tollendi*, *l.* 12. & 21. *De ſerv. pr. urb.*; by which a proprietor could not add to the height of his houſe to the prejudice of the dominant tenement. The Romans had a city-ſervitude quite diſtinct from this laſt, called *Altius tollendi*; which, in the opinion of Donellus, Baro, and ſome other interpreters of note, was that by which one had a right from the owners of the neighbouring houſes, to raiſe his houſe higher than was permitted by the regulations made by Auguſtus, and ſome of the ſucceeding Emperors, againſt the exceſſive height of buildings in Rome, to prevent the miſchievous conſequences of accidental fire, *Strab. Geogr. l.* 5.; *Tacit. Annal. l.* 15. *c.* 43.; *Sext. Aurel. Epit. c.* 13. But it is moſt unlikely, that the Romans ſhould have given countenance to a right of ſervitude, by which enactments ſo eſſential to public policy might have been evacuated by the private conſent of individuals, contrary to the rule, *l.* 38. *De pact.* And it will hardly be affirmed, that ſuch conſent, granted by any proprietor of houſes in Edinburgh to his neighbour, to build beyond the ſtatutory height, could authoriſe the grantee to act in defiance of a ſtatute, made, not in favour of private men, but for the benefit of the public.

11. Where a houſe is divided into different floors or ſtories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the property of the houſe cannot be ſaid to ſuffer a full or complete diviſion. The proprietor of the ground-floor is bound, merely by the nature and condition of his property, without any ſervitude, not only to bear the weight of the upper ſtory, but to repair his own property, that it may be capable of bearing that weight: for in that caſe, as the roof remains a common roof to the whole, and the area on which the houſe ſtands ſupports the whole, a communication of property neceſſarily ariſes; by which the proprietor of the ground-ſtory is obliged to uphold it for the ſupport of the upper, and the owner of the upper muſt uphold that as a roof

roof or cover to the lower, *St. b. 2. t. 7. § 6.* Where the property of the higheſt ſtory is divided into ſeparate garrets among the different proprietors, each proprietor muſt, by this rule, uphold that part of the roof which covers his own garret.

12. The chief rural ſervitudes of the Roman law are, *iter*, *actus*, *via*, *aquæductus*, *aquæhauſtus*, and *jus paſcendi pecoris*. *Iter* is a right that a landholder has of a horſe or foot paſſage for himſelf, his family, and tenants, through his neighbour's property. *Actus* is a right alſo of carriages drawn by men, and of driving cattle. *Via* comprehends the other two; and, beſides, includes a right of driving carriages, with horſes, or other beaſts of draught. The road which made the *via* was conſiderably broader than that of the *iter* or *actus*. There are ſervitudes by the uſage of Scotland analogous to thoſe; of a foot-road, an horſe-road, a cart or coach road, and ways or loanings by which cattle may be driven from one field to another: but an horſe-road is not, by our practice, included in a foot-road, as it was by the Roman law. The right of a public road, or King's highway, is not properly a ſervitude, but *publici juris*, common to all the members of the ſtate, whether they are, or are not, proprietors of any tenement; and indeed to all ſtrangers who have the freedom of trade, or of travelling through the country: And if they are to be conſidered as ſervitudes, they fall under that kind of them which get the name of *legal*; for ſundry ſtatutes have been enacted for preſerving highways, and regulating them, both as to their breadth, as to thoſe liable to repair them, as to the grounds through which they may be carried, and as to the magiſtrates who are charged with the care of them, and veſted with the powers neceſſary for that purpoſe, 1669, *c.* 16.; 1670, *c.* 9.; 1686, *c.* 8.; 5° *Geo. I. c.* 30. * Though a right of private roads, in ſo far as they are neceſſary, be the genuine conſequence of property, *ſupr. t.* 6. § 9.; yet after they have been ſettled and fixed by cuſtom, they ought not, without the expreſs conſtitution of a ſervitude, to be enlarged, under the pretence of greater conveniency. Where the right of a private road is conſtituted by way of ſervitude through the grounds of a neighbouring proprietor, it cannot be altered to the prejudice of the dominant tenement; yet if it be only a foot-road, the owner of the ſervient may incloſe the ground through which the road paſſes, provided he leave a ſtile at each end of the incloſure for the foot-paſſage.

13. The ſervitude of aqueducts is the right that one has of carrying water in conduits or canals, along the ſurface of the ſervient tenement, for the uſe of one's own property. Much like to this is the ſervitude of a dam or damhead; by which one acquires a right of gathering water on his neighbour's grounds, and of building banks or dikes for containing that water. Theſe ſervitudes are generally conſtituted for the uſe of water mills or engines; and the owner of the dominant tenement, as he has the benefit of the ſervitude, is obliged to preſerve the aqueducts and damheads in ſuch condition, that the adjacent grounds may ſuffer no prejudice by the breaking out of the water. *Aquæhauſtus* is a right competent to a landholder of watering his cattle at any river, brook, well, or pond, that runs through or ſtands upon his neighbour's grounds. Where a running water is the boundary which divides between two tenements belonging to different proprietors, the one cannot divert the courſe of it without conſent of the other, though that other ſhould not alledge any prejudice by it to himſelf but the depriving him of the pleaſure of trouting, and the chance that he may have occaſion for the water at ſome future time, *June* 25. 1624, *Bannatyne*. Nay, the proprietor of both ſides of a running water, though he be ſubjected to no ſervitude in favour of the inferior tenement, cannot alter its

* See alſo 11° Geo. III. c. 53.

its bed, if the alteration ſhould bring any real prejudice to the owner of that tenement, *Hop. Action. in factum*, *Bairdy*.

14. The *jus paſcendi pecoris*, a ſervitude well known in the Roman law, *l.* 4. *De ſerv. pr. ruſt.* is a right by which the owner of the dominant tenement is intitled to the uſe of the graſs-grounds of the ſervient, for paſturing a determinate number of cattle proper to the dominant. This right is not to be ſo ſtretched as to exclude the owner of the ſervient tenement from paſturing his own cattle on them, if there be graſs enough for both, unleſs where the full and excluſive benefit of the graſs, is, by the expreſs conſtitution of the ſervitude, granted to the dominant tenement. This right of common paſturage may be eſtabliſhed either by grant or by preſcription. In the firſt caſe, it is ſometimes conſtituted by a perſonal obligation granted by the owner of the ſervient tenement, which, when it is followed by poſſeſſion, is effectual againſt his ſingular ſucceſſors; but moſt frequently, by a clauſe of common paſturage, contained in the charter of the dominant tenement. This clauſe, *cum communi paſtura*, is often indefinite, without mentioning any ſervient tenement to be burdened with the paſturage; and is merely intended to convey all paſturage which had been appropriated to the lands diſponed previouſly to the date of the charter, whether it was due out of the lands belonging to the granter, or out of other lands. If the clauſe be ſpecial, expreſſing the particular lands which are to be burdened, the ſervitude is effectually conſtituted on theſe lands, if the granter of the charter was proprietor of them, and ſo had a power to burden them: but if they were the property of a third party, the clauſe carries no farther intereſt in them to the grantee than the granter himſelf was intitled to.

15. Moſt frequently common paſturage obtains, in the caſe of ſeveral proprietors of lands adjacent to the ſame heath or common, all of whom claim a right of paſturage againſt the proprietor of that common. Where different purchaſers of different farms lying contiguous to the common, get a right of common paſturage upon that tenement, indefinite as to the number or kinds of cattle to be fed upon it, each purchaſer is not underſtood to have got an unlimited right; but the extent of their ſeveral claims is to be proportioned to the rent of their ſeveral farms, and to the number of cattle that each of them can fodder in winter upon his own dominant farm. The action by which theſe proportions are to be aſcertained is called *an action of ſowming and rowming*, two old words denoting the form of law by which the number of cattle that each proprietor may put on the common is fixed, according to the different kinds of cattle that are to paſture upon it: and this action lies, even againſt ſuch of the claimants upon the common as have had an indefinite promiſcuous poſſeſſion, without challenge, for forty years together; becauſe ſuch poſſeſſion is contrary to the nature of the right, and if carried by any one of the dominant tenements to a certain height, without controul, muſt make the ſervitude quite unprofitable to the reſt. But it lies not againſt the proprietor of the ſervient tenement, who, it is preſumed, will be careful not to overſtock, and ſo to impoveriſh his own property, *Jan.* 23. 1679, *Dunlop*.

16. Common paſturage may be conſtituted by preſcription alone, *i. e.* by the acquirer's uninterrupted exerciſe of that right for forty years together, upon lands contiguous to his own, under no other title than a general clauſe in his charter, *cum communi paſtura*, even though no ſuch right had been competent to his author in thoſe lands. Nay, a right of paſturage may be effectually conſtituted by the common clauſe of *part and pertinent*, without the aid, either of preſcription, or of a clauſe of paſturage. Thus, where a baron ſold part of his lands, the former poſſeſſors of which had a right of paſturage on a common belonging to the barony, the purchaſer

was

was adjudged to have acquired by the ſale a right of paſturage on the common equal to what had been appropriated to the tenement ſold before the ſale, *Feb.* 14. 1668, *Borthwick:* for though the right competent to the baron upon his own common was not exerciſed as a right of ſervitude, *infr.* § 36.; yet by ſelling the lands with the privileges formerly annexed to them, that right became due to the purchaſer as a ſervitude, which was before exerciſed by the baron or his tenant in conſequence of his property. And this rule is alike applicable to lands not erected into a barony; for it ariſes from the plain import of the grant.

17. Two predial ſervitudes are received by the uſage of Scotland, to which there was nothing ſimilar in the Roman law; feal and divot, and thirlage. The ſervitude of feal and divot is the right one has of turning up feals or divots from the ſurface of the ſervient tenement, and carrying them off, for thatch to his houſe, or for the other uſes of the dominant tenement. Much like to this is the ſervitude of feuel, which is a right of raiſing turf or peats from the ſervient moſs or peat-land, for feuel to the inhabitants of the dominant tenement. Both theſe ſervitudes imply a right to uſe the neareſt grounds of the ſervient tenement, on which to lay and dry the turf, peats, or feal; and to a way or paſſage by which they may be carried off to the dominant. Though it be affirmed in general terms by writers, *Cr. lib.* 2. *dieg.* 8. § 35. &c. that all the leſſer ſervitudes of feuel, feal, and divot, are included under the greater one of common paſturage; thoſe ſervitudes are nevertheleſs quite diſtinct: for it is not in every caſe that the greater or heavier ſervitude comprehends the leſſer; it is only where the greater is of the ſame kind with the leſſer, ſo that the one cannot be figured to ſubſiſt without the other. But though one ſhould grant to his neighbour a right of paſturing cattle upon his common, he is not for that reaſon underſtood to have alſo given him the right of breaking up the ſervient tenement for feuel to his fire, or for a cover to his houſe; and there are many inſtances of grants of paſturage with an expreſs ſecluſion of the leſſer ſervitudes. Nay, though ſuch grant ſhould be indefinite, the queſtion, Whether the leſſer ſervitudes are included? muſt depend on the nature of the poſſeſſion; for they will be excluded, if either he who is intitled to the paſturage has never attempted to extend his right to the caſting of feal, &c. or if he has been interrupted in that attempt, *Feb.* 15. 1668, *L. Haining.*

18. Thirlage is that ſervitude by which lands are aſtricted or thirled to a particular mill, to which the poſſeſſors muſt carry the grain of the growth of the aſtricted lands to be grinded, for the payment of ſuch duties as are either expreſſed or implied in the conſtitution of the right. Wheat, corn, or other grain, was at firſt grinded by hand-mills, or querns; which are not quite in diſuſe at this day in ſome of the highland parts of Scotland. It was ſoon perceived, after the uſe of water-mills was introduced, that that manner of grinding not only ſaved much labour, but made better flour or meal: hand-mills were therefore prohibited, except in time of froſt, or in places where water-mills were not erected, *St. Gild. c.* 19.; and the twenty-fourth peck, *i. e.* a peck out of ſix firlots, was by that regulation ſettled as a reaſonable price for grinding. But no lands were then aſtricted to any particular mill: the grinding of corns conſtituted the proper contract of *locatio operarum*, the miller letting out his labour for a certain hire to all who ſhould be willing to employ him. Thirlage, however, was ſoon introduced into moſt countries which received the Feudal law, whereby a multure or hire was exacted far exceeding the value of the work. Its origin was owing to the proſpect of the great benefit which landholders imagined was to accrue to themſelves, by drawing thereby a conſiderable rent for their mills, and ſo raiſing the value of their lands. But this was a vain

conceit; for the heavier the rate of multures was that tenants were obliged to pay for manufacturing their grain, the leſs rent they were able to pay to the landlord. And in truth thirlage is a great obſtruction to the improvement of land by agriculture: for beſides the money and time ſpent in law-ſuits for recovering abſtracted multures, tenants, however induſtrious, cannot but grudge laying out money in meliorating their farms, when the profits are ſo heavily taxed in favour of thoſe who bear no part of the expence. In this ſervitude, the ſervient tenement is bound, not only to ſuffer, but to do: for the poſſeſſors of the lands aſtricted muſt carry their corns to the dominant mill; and in the general caſe muſt alſo perform ſeveral ſervices neceſſary for upholding the mill in ſufficient repair.

19. In thirlage, the mill is the dominant tenement, and the lands aſtricted the ſervient. The duties to which thoſe lands are liable are, multures, ſequels, and ſervices. The multure is a quantity of grain, ſometimes in kind, as wheat, oats, peaſe, &c.; and ſometimes manufactured, as flour, meal, ſheeling, due to the proprietor of the mill, or his tackſman, the multurer, for manufacturing the corns. The ſequels are the ſmall parcels of corn or meal given as a fee to the ſervants, over and above what is paid to the multurer; and they paſs by the name of *knaveſhip*, (from *knave*, which in the old Saxon language ſignified a ſervant), and of *bannock*, and *lock*, or *gowpen*. As the quantum of theſe is not uſually expreſſed in the conſtitution of the right, it is regulated by cuſtom. Services are a kind of acceſſory to thirlage; and conſiſt in thoſe duties or obligations to which the ſervient tenement is liable for the uſe of the dominant; as bringing home the mill-ſtones, upholding the mill-houſe, with the dams and aqueducts, &c.

20. The aſtricted lands are called *the thirl*, or *the ſucken*; and the perſons ſubjected to the aſtriction get the name of *ſuckeners*. Hence the duties payable by thoſe who come voluntarily to the mill are called *outſucken*, or *outtown multures*; and thoſe that are due by tenants within the ſucken, *intown* or *inſucken multures*. The rate of outſucken multure, though it is not the ſame every where, is more juſtly proportioned to the value of the labour than that of the inſucken, except in thoſe parts of the country where the tenants, from the penury of mills, have no choice of any other nearer to which they may carry their corns. It generally continues what it was originally fixed to by the *St. Gild. c.* 19. the twenty-fourth peck. The rate of inſucken is frequently a peck in the boll, and at ſome mills conſiderably higher. Thoſe who carry their grain to a mill voluntarily, are preſumed to agree, if no ſpecial bargain be made, to pay the accuſtomed outſucken multures of that mill.

21. Thirlage is conſtituted by writing, either directly or indirectly. It may be conſtituted directly, *firſt*, by the proprietor thirling his tenants to his own mill by an act or regulation of his own court, *St. b.* 2. *t.* 7. § 16. But this kind of thirlage is ineffectual without the tenant's conſent: for tenants who have written tacks prior to that regulation, are intitled to hold their lands, while their tacks are current, free from every burden which is not ſpecified in them. And even in the caſe of verbal leaſes, which ſubſiſt only from year to year, the landlord cannot make the condition of the tenants worſe, by impoſing new burdens on them, while they continue in their farms, which they had not agreed to. It muſt appear that they have conſented, therefore, either by an expreſs written obligation to comply with that act of court, or by conſtantly carrying their corns to the mill to which the act directs them, and paying the accuſtomed multures. Tenants who have either entered to the lands, or have begun to poſſeſs by tacit relocation, after ſuch acts of court, may poſſibly be tied down by the

the regulations made previouſly to their entry, if they be properly intimated, and not objected to by them when they enter. 2*dly*, Thirlage is conſtituted directly, when, in the grant of lands to a purchaſer, the thirlage of the lands diſponed is expreſsly reſerved by the granter to his own or any other mill: and the ſervitude may be conſtituted in this way, though the lands diſponed ſhould be holden of the granter's ſuperior; for it is not neceſſary that the proprietor of a mill be ſuperior of all the lands aſtricted to it. 3*dly*, It is a moſt direct and indubitable way of conſtituting thirlage, when the proprietor of a mill makes it over to a purchaſer, together with the multures of his own lands *per expreſſum*. The grant of a mill, with the multures uſed and wont, though it ſhould not ſpecify the lands aſtricted, is ſufficient to conſtitute a thirlage over ſuch of the granter's lands as were, at the date of the grant, in uſe to pay inſucken multures to the mill diſponed; and it alſo imports a conveyance of the thirlage of all lands belonging to others which were at that date aſtricted to the mill diſponed, *St. b.* 2. *t.* 7. § 16. But it extends to no part of the granter's property which was then in his own natural poſſeſſion; and which therefore, by a rule to be explained, § 36. was not at that time ſubject to any ſervitude, *Harc.* 728. It is unneceſſary to mention other methods of eſtabliſhing thirlage directly, ſince every landholder can aſtrict his own lands by any proper obligation, even in a writing apart, with the conſent of ſuch of his tenants as have ſubſiſting leaſes: and though ſuch perſonal deeds cannot hurt ſingular ſucceſſors in the lands, without the poſſeſſion of the dominant tenement, acquired previouſly to the right of the ſingular ſucceſſor, *Harc. App.* 3. yet the moſt ſlender acts of poſſeſſion have been adjudged ſufficient for that purpoſe, *July* 26. 1712. *Blair*.

22. Thirlage is ſaid to be conſtituted by writing indirectly, where the words of the grant bear no explicit conſtitution of that ſervitude, but nevertheleſs imply it in the conſtruction of law. It appears that all barony-lands had been formerly underſtood to be naturally aſtricted to the mill of the barony, in conſequence of the union formed between the lands and the mill, by the erection into a barony, without any written conſtitution. Hence it was found, *July* 17. 1629, *L. Newliſton*, that a feuer of part of a barony was ſubjected to thirlage for the lands feued, in a queſtion with one who had afterwards purchaſed the mill itſelf from the baron *cum aſtrictis multuris*, notwithſtanding the feuer's right, which, too, bore the *Reddendo* of a ſpecial duty *pro omni alio onere*, in reſpect that it did not bear *cum molendinis et multuris*. But as this conſtructive ſervitude appeared inconſiſtent with the legal preſumption for liberty, it ſoon ſuffered limitations. *Firſt*, Though the mill of the barony be made over as ſuch, yet if the grant bear *with multures uſed and wont*, thoſe taxative words confine the ſervitude to former uſage, and therefore import a bare conveyance of the former thirlage; and even that is not preſumed, without ſome proper conſtitution previouſly to the defender's right, *July* 13. 1632, *E. Morton*. 2*dly*, If before the baron's conveyance of the mill of the barony *cum multuris*, the baron ſhould have feued part of the barony to another, for a ſpecial feu-duty in the *Reddendo*, *pro omni alio onere*, and with a clauſe of multures, though only in the *Tenendas*, the feuer will enjoy his lands free from aſtriction, notwithſtanding the poſterior grant of the mill of the barony; becauſe a right of lands with multures naturally imports, that they are not ſubject to thirlage; and no landholder, after he is diveſted of the property of lands, can afterwards charge them with a ſervitude from which they were formerly free, *Harc.* 721. 722. If this doctrine is well founded in the grant of a barony-mill, it muſt obtain *a fortiori* where there is no erection.

23. Thirlage, when conſtituted by writing, differs conſiderably in its extent

tent and effects, according as the grant happens to be conceived. The grant uſually expreſſes what part of the corns are aſtricted; but ſometimes it is made out in general words, aſtricting the lands. In the *firſt* caſe, where the nature or quantity of the corns aſtricted is expreſſed, thirlage is either of all growing corns, *omnia grana creſcentia*; or, 2*dly*, of grindable corns; or, 3*dly*, of *invecta et illata*, all corns brought within the thirl. The thirlage of all growing corns comprehends the whole grain of the growth of the aſtricted lands, even barley, unleſs where it is ſpecially excepted, or where an exemption of that grain is proved for a full courſe of preſcription, *Goſf. July* 3. 1673, *Oliphant*; *Harc.* 730. Nevertheleſs, certain parts of the corns are underſtood to be excepted without a ſpecial clauſe: *firſt*, the ſeed-corn, and that which is neceſſary for feeding the horſes or other cattle employed in cultivating the ground; for both theſe are deſtined for raiſing corns for the next crop, which is a uſe inconſiſtent with grinding. 2*dly*, The farm-duties or rent payable in grain to the landlord; for it is not preſumeable, that the landlord, who muſt diſpoſe of at leaſt part of his farms for money, meant to burden the grain deliverable to himſelf with any ſervitude. Yet in this matter, practice has made a reaſonable diſtinction: Where the corn-rent is deliverable to the proprietor in grain not grinded, as in wheat, oats, barley, peaſe, &c. there is no aſtriction. The proprietor is left at liberty to ſell that grain to perſons without the ſucken, unmanufactured, as he received it from the tenants; and though he diſpoſe of it within the thirl, the purchaſer has the ſame power to ſell it to whom he will that the proprietor had, without being ſubjected to any multure. But where the rent is deliverable to the landlord in grain already manufactured, as flour, meal, &c. the tenant muſt grind the corn of which that meal is made, at the mill to which he is aſtricted. If the landlord, after receiving his corn-rent unmanufactured, conſume any part of it within the thirl, in meal or in malt, ſuch part falls under the thirlage; ſince when, in place of ſelling it, he grinds it for his own uſe, he ought to carry it to that mill, *Fount. Feb.* 1. 1709, *L. Rathillet.* Though the tenant's whole rent ſhould be payable in money, he muſt not ſell his corns unmanufactured without the ſucken, under the colour of raiſing a fund for the payment of his rent; otherwiſe he is liable in the ſame rate of multure to the dominant mill as if he had grinded them there.

24. Thirlage may be conſtituted, 2*dly*, of all the grindable corns growing on the lands; which, in the proper ſenſe of the words, is preciſely of the ſame import with the former; but is, from the unfavourableneſs of thirlage, reſtricted to ſuch of the corns as the tenants have occaſion to grind, whether for the ſupport of their families, or their other uſes within the thirl; all which muſt be ground at the dominant mill: but the ſurplus may be lawfully exported by the tenant in kind, without ſubjecting him to any multure, *Feb.* 1731, *Lockhart*; *Feb.* 17. 1736, *Lockhart.* The tenant whoſe corns are aſtricted in either of thoſe ways, may, notwithſtanding the ſervitude, lay his grounds in graſs, if it be not done *in fraudem* of the thirl; for he is laid under this only obligation by the thirlage, to carry his corns, when he has corns, to the dominant mill, *July* 1731, *Macfadzean; New Coll.* i. 166.

25. By a *third* kind of thirlage, the *invecta et illata* are aſtricted; by which are underſtood all corns that are brought into the thirl or ſervient tenement, though they be not of the growth of the aſtricted lands. This thirlage is commonly impoſed on the inhabitants of a borough or village, and binds them to grind all the corns imported thither at the dominant mill. When this thirlage is conſtituted, the words of ſtyle deſcribing the ſubject aſtricted are, *all grain brought within the ground that tholes* (or ſuffers) *fire or water*

water therein. Stair, *b.* 2. *t.* 7. § 19. 20. and Mackenzie, § 26. *h. t.* interpret theſe words of ſteeping and kilning, that is, of malting and drying, the corns within the thirl, but not of baking and brewing; for though grain ſuffers fire and water in baking and brewing, as truly as in malting and kiln-drying, the clauſe can only be underſtood of ſuch uſe of fire and water as prepares the grain for the mill; and ſo cannot be applied to baking and brewing, which is not done till after the corns are grinded. In Sir R. Spottiſwoode's opinion, *v. Mills and multures*, baking and brewing ought alſo to be included; becauſe otherwiſe the ſervitude might be eaſily evacuated, by grinding malt or wheat at a mill without the thirl, and afterwards importing it to the ſervient borough to be brewed or baked. Our deciſions favour the firſt opinion, *Fount. Feb.* 22. 1707, *Heriot's hoſp.* And on this principle, multure is not due in the thirlage of *invecta et illata*, for flour or oat-meal brought into the ſervient tenement, unleſs where the importer himſelf has bought it in grain, and grinded it at another mill, *Falc.* ii. 61.; for ſuch act is preſumed to be done *in fraudem* of the ſervitude.

26. It happens frequently that the ſame grain is ſubjected to a double thirlage. It may firſt pay multure, as *granum creſcens*, to that mill to which the lands where it grew are thirled; and if afterwards it ſhall be carried into a thirl where the *invecta et illata* are aſtricted, it muſt there pay a ſecond multure as *invectum*. But where the owner of a mill has got the right of thoſe two thirlages conſtituted on different tenements, that individual grain which has already paid the firſt multure to the dominant tenement, is not liable to the ſame mill in the ſecond: for multure, in the conſideration of law, conſiſts either in the price paid at a mill for manufacturing the grain, or in the penalty inflicted for carrying it elſewhere; and as the ſame corns cannot be twice manufactured at a mill, the rational conſtruction of theſe two ſervitudes, when veſted in the ſame proprietor, muſt be, that not only the corns growing on the one tenement, but thoſe brought into the other, ſhall be grinded by the dominant mill; but not that the ſame individual corns ſhould pay multure twice to that mill, *Kames*, 30.

27. In thirlage conſtituted in indefinite terms, aſtricting lands to a mill, without mentioning by what kind of thirlage, uſage muſt determine the nature and degree of the ſervitude; and where there has been no ſufficient time to diſcover its nature by the ſubſequent poſſeſſion, *præſumendum eſt pro libertate*, that meaning ought to be received which forms the lighteſt ſervitude. But where the words of aſtriction are capable only of one meaning, the extent of it muſt be fixed ſolely according to that meaning; ſo that the ſervitude, if not entirely loſt by a total nonuſage for forty years, will be preſerved in its full extent, though, during all that time, the dominant tenement poſſeſſed only a lighter degree of thirlage, *June* 26. 1635, *L. Wauchton.* When a village or borough is aſtricted, the thirlage of *invecta et illata* muſt be neceſſarily underſtood; for in a village, there are no *grana creſcentia* which can poſſibly be the ſubject of thirlage, *Dec.* 27. 1717, *L. Grange*, ſtated in *Dict.* ii. *p.* 466. 467.; *Falc.* i. 133.

28. It is a general rule, That thirlage cannot be acquired by preſcription alone, without the aid of ſome title in writing: for, *in iis quæ ſunt meræ facultatis nunquam præſcribitur*; mere faculties, or powers to act, cannot be loſt by not exerciſing thoſe powers. Corns muſt be grinded at ſome mill to make them fit for uſe; and therefore, though a landholder ſhould have carried his corns to one particular mill, and even paid the high inſucken multures for time paſt memory, the preſumption is, that he did ſo, becauſe he could not be better ſerved elſewhere; and therefore ſuch uſe cannot lay him under any ſervitude. But thirlage may, contrary to this rule, be conſtituted by mere preſcription, without a title in writing; *firſt*, in mills belong-

ing to the King in property, *Balf. p.* 494. *c.* 9.; in which immemorial poſſeſſion muſt of itſelf be ſufficient to conſtitute thirlage, ſince the ſovereign can have no title-deeds to produce, his original right to all feudal ſubjects being eſtabliſhed *jure coronæ*, *Jan.* 8. 1662, *Stuart.* Nay, though the King ſhould have purchaſed the thirlage from another on the ſeller's reſignation, *tanquam quilibet*, it is preſumed from his poſſeſſion, that the title-deed has been loſt, and the ſovereign muſt not ſuffer through the negligence of his officers. This exception hath been, from parity of reaſon, extended to mills of church-lands, *Jan.* 22. 1740, *Lo. Maxwell*, marked in *Dict.* ii. *p.* 462.; becauſe churchmen were preſumed to have loſt their title-deeds at the Reformation; which gave riſe to an act of ſederunt, *Dec.* 16. 1612, preſerved by Spottiſwoode, *v. Kirkmen*, declaring, that a churchman's right to church-lands is to be ſuſtained without written titles, upon a poſſeſſion of thirty years, to be computed backward from the time of bringing the action againſt him. The *ſecond* exception is of dry multures; by which is meant a yearly ſum of money, or quantity of corns, paid to a mill, whether thoſe liable in payment ſhould grind any grain at it or not; for ſuch payment cannot be conſtrued voluntary, ſince no man is to be ſuppoſed fool enough to pay, for forty years together, a duty for which he receives no work, if he could not be compelled to it, *July* 23. 1675, *Kinaird.*

29. There are certain titles, which, though they are ſo lame that they cannot of themſelves conſtitute thirlage, yet have that effect when they are followed by long poſſeſſion. The conſtant acts of going to the ſame mill for forty years together, are in ſuch caſe conſtrued to have been in conſequence of a proper antecedent right of ſervitude. The *aliqualis* title therefore, and the long poſſeſſion together, do eſtabliſh the thirlage, though neither of them could do it alone. Thoſe imperfect titles are ſtyled *titles of preſcription*; and the thirlage thus conſtituted gets the name of *preſcriptive thirlage.* If the ſervient tenement be in uſe to pay only the outſucken multures, which are accounted barely as a ſuitable reward for the grinding, it ought to require a ſtronger title to conſtitute preſcriptive thirlage: but where the inſucken multures have been paid, the ſlendereſt titles are ſuſtained; *ex. gr.* a decree againſt tenants, in which the owner of the grounds was not made a party to the ſuit, *June* 24. 1665, *Montgomery;* or an act of thirlage of a baron-court, *Jan.* 11. 1678, *Lo. Balmerino*; becauſe perſons are hardly to be preſumed willing to pay thoſe heavy multures for forty years together without a ſervitude. Hence the ſeiſin of a mill, with the multures of certain lands, joined with forty years poſſeſſion of the inſucken multures of theſe lands, was adjudged ſufficient to conſtitute a preſcriptive thirlage againſt the owner, though he was, previouſly to that ſeiſin, infeft in his own lands *with mills and multures*, which in the general caſe imports a freedom from thirlage, *June* 29. 1665, *L. Keithick*, as ſtated by Stair in his *Inſtitutions*, *b.* 2. *t.* 7. § 17. Indeed it is not always neceſſary that there be a title of preſcription in writing: payment, for inſtance, of the inſucken multures, when it is accompanied with the conſtant performance of mill-ſervices during a whole courſe of preſcription, is as little capable of bearing a conſtruction conſiſtent with the freedom of the lands, as the payment of dry multure, and therefore may be juſtly accounted ſufficient to conſtitute preſcriptive thirlage, *June* 1745, *L. Broughton.* In this kind of thirlage the courſe of preſcription is not conſidered as interrupted, though the aſtricted corns ſhould be ſometimes carried to another mill; for abſtractions are too frequent, even where the thirlage is not diſputed. The ſervitude, therefore, is effectually eſtabliſhed, where the abſtractions have been few, and commonly performed in a clandeſtine manner, *d. June* 29. 1665, *& Jan.* 11. 1678; *Dec.* 7. *&* 11. 1677, *Henderſon.*

30. Though

30. Though thirlage itſelf cannot, in the general caſe, be eſtabliſhed by mere poſſeſſion, the quantity of multure due by the ſervient tenement may, where the rate of the multure is not ſpecified in the deed of thirlage; for in ſuch caſe uſage is the only rule left for determining the queſtion. Yet the owner of the mill will not be put to prove, what the uſage was *retro* to the date of the right; for when cuſtom is proved as far back as the memory of man, the ſame cuſtom is preſumed beyond memory, upwards to the conſtitution of the ſervitude. If in ſuch indefinite thirlage the rate of multure be proved for the laſt forty years, that muſt be the rule of judgement, though before that period the rate had varied, and will accordingly either increaſe or diminiſh the ſervitude from what it had been before.

31. The ſervices of thirlage deſcribed above, § 19. may be claſſed among the *naturalia* of that ſervitude: for in thirlage conſtituted by writing, mill-ſervices are always implied as an acceſſory, without a ſpecial clauſe; and may therefore be exacted by the dominant tenement, if they be not taken off either by paction or preſcription, *Feb.* 27. 1668, *Maitland.* And even in preſcriptive thirlage, where the ſuckeners have been in uſe to perform a particular kind of mill-ſervices, ſuch partial uſe implies an obligation to perform all thoſe that are uſually demanded in that ſervitude, *Dec.* 16. 1732, *Craufurd.* But where there is neither written conſtitution of thirlage, nor evidence of ſervices of any kind performed by the thirl, the ſuckeners are bound to no ſervices whatever; for in ſuch caſe the rule holds, *Tantum præſcriptum quantum poſſeſſum*; the dominant tenement may claim what it hath acquired by poſſeſſion, and no more, *Kames, Rem. Dec.* 12.; *Tinw. Dec.* 1744, *L. Inches.*

32. Two diſtinct actions are competent to thoſe who have a right of thirlage, viz. a declarator of aſtriction, and an action of abſtracted multures. Where the owner of the ſervient tenement queſtions the right of thirlage, and perhaps directs his tenants to carry their corns to another mill, an action for declaring the aſtriction of the lands to the purſuer's mill is neceſſary; to which the owner of the ſervient tenement muſt be cited as defender, *Feb.* 9. 1628, *L. Wardhouſe.* If the right of thirlage be acknowledged, but nevertheleſs the tenants clandeſtinely abſtract or with-hold part of their corns from the dominant mill, the proprietor of the mill may, without bringing a declaratory action, which is proper to the court of ſeſſion, be relieved by ſuing the abſtracting tenants before the judge-ordinary. But even in that proceſs it may be prudent to cite the owner of the aſtricted lands for his intereſt; becauſe a decree for abſtractions, if the proprietor be not made a party to the ſuit, cannot have the effect of barring him from preſcribing an immunity from the thirlage. The quantity of abſtractions is commonly referred to the oaths of the abſtracters, becauſe by the nature of the offence no other full evidence can be had of the different abſtractions, and of the extent of them. Not only the multures, but the ſequels, or the ſmall quantities of grain or meal due to the multurer's ſervants for their work, may be ſued for in this action; becauſe, though the ſervants perform no work to the tenant when he carries his corns to another mill, yet the multurer muſt hire ſervants, whoſe only buſineſs it is to give attendance, and to ſerve the ſuckeners when they are called upon. The owner of the aſtricted lands is not accountable to the multurer for the abſtractions made by the tenants without his knowledge; for as the tenants are the only offenders, they alone ought to ſuffer: and even though the abſtractions have been made by the proprietor's warrant or connivance, the tenants are primarily liable, and ſo muſt be firſt ſued, *Dec.* 10. 1667, *E. Caſſilis.* In one caſe of abſtractions the multurer had, by our ancient law, a remedy which he might apply without the interpoſition of a judge: Upon intelligence

telligence that any of the aſtricted corns were to be carrried to another mill, he might ſeize them by the way, together with the ſacks, *brevi manu*, not merely to detain them as a ſecurity for the payment of his multure, but to be adjudged in a proper court as lawful prize to himſelf, or at leaſt to his landlord, *St. Gul. c.* 9. § 8. This doctrine obtained in Craig's time, with little variation, *lib.* 2. *dieg.* 8. § 9. 10.; and it appears, that the remedy was not quite in diſuſe in certain counties or diſtricts in Scotland ſo late as a century ago, *Jan.* 22. 1635, *Menzies*; *Pr. Falc.* 72. It is indeed cenſured as harſh and oppreſſive by ſome writers; but both the nature and frequency of the crime, and the difficulty of a full diſcovery of abſtractions, call for a ſevere penalty.

33. After having enumerated the ſeveral predial ſervitudes which are moſt in uſe, a few obſervations may be ſubjoined, relating to the general properties and effects of ſervitudes. As all ſervitudes are reſtraints upon property, they are *ſtricti juris*, and ſo not to be inferred by implication. Neither does the law give them countenance, unleſs they have ſome tendency to promote the advantage of the dominant tenement. No man, therefore, who has not acquired an intereſt in his neighbour's grounds by an antecedent right of paſturage, can, by any ſtipulation, reſtrain him from paſturing on his own property as many cattle as he ſhall think fit to ſet upon it; for *malitiis hominum non eſt indulgendum.* Upon this ground, the Roman law required, towards the conſtitution of a ſervitude, vicinity in the dominant and ſervient tenements, *l.* 5. § 1. *De ſerv. pr. ruſt.* Yet this is not always preciſely neceſſary; for though the two tenements be not contiguous to one another, a ſervitude may be conſtituted, if the diſtance between the two be not ſo great as to obſtruct all benefit from the ſervitude, *l.* 38. 39. *De ſerv. pr. urb.*; *l.* 5. *l.* 6. *pr. Si ſerv. vind.* Thus a proprietor of land may acquire a right of paſturing his cattle upon another's common, though the dominant tenement ſhould not be contiguous to the common, if he has a ſervitude of paſſage upon the interjacent grounds, through which he may drive the cattle from the one tenement to the other.

34. As ſervitudes are limitations of the property, it is a rule, that they muſt be uſed in the way leaſt burdenſome to the ſervient tenement. Thus the ſervitude of a road, whether a coach or foot road, conſtituted through the grounds of another indefinitely, without deſcribing through what particular part of the ground the road ſhall paſs, muſt be continued in that line in which it has either been uſed before by the owner of the ſervitude, or which has been marked out for the road by authority of the magiſtrate; and the reſt of the ſervient tenement is free, *l.* 13. § 1. *verſ. At ſi. De ſerv. pr. ruſt.* And even though the whole grounds appear to be ſubjected, the owner of the dominant tenement muſt uſe his right *civiliter*, with moderation; ſo as not to carry the road through his neighbour's garden or orchard; nor, after having made choice of one road, and uſed it for ſome time, can he abandon it, and wantonly carry a new one through another part of the field, *l.* 9. *De ſerv.* Hence it follows, that the owner of the dominant tenement can do no act, by which the burden may become heavier on the ſervient: he cannot, *ex. gr.* in a ſervitude of ſupport, lay a greater weight on the ſervient tenement than is expreſsly ſtipulated in the right. He muſt likewiſe confine himſelf to the ordinary uſes of his dominant tenement, and not ſtretch the right to extraordinary purpoſes which were not in the eye of parties at conſtituting it. Thus, in a ſervitude of peats or feuel, the dominant tenement ought not to exhauſt the ſervient moſs, by uſing it in carrying on an iron-work, or any other manufacture which may require an extraordinary ſupply of feuel, and which was not erected till after acquiring the ſervitude. On the other hand, the owner of the ſervient tenement may

may make every uſe of his property conſiſtent with the purpoſes of the ſervitude: he may, notwithſtanding the ſervitude of feuel, or of feal and divot, to which his common is ſubjected, open the ground for minerals, limeſtone, coal, &c.; for the ſervitude affects only the ſurface. Nor can he be deprived of this right, on pretence that by breaking the ground, he makes part of the ſervient ſurface unfit for the ſervitude. Nay, though the right of the dominant tenement extends, ſtrictly ſpeaking, over the whole ſervient heath or moſs, according to the rule, *Unaquæque gleba ſervit*, the proprietor of the ſervient tenement may till part of it, if he leave as much in graſs as is fully ſufficient for the ſervitude, *June* 21. 1667, *Watſon*. And even in a right of paſturage on a tenement, part of which had been under tillage before the ſervitude was impoſed, the owner of the ſervient grounds was allowed to till farther parts of it; yet ſo as that the grounds tilled, when they ſhould be again laid down in graſs, might remain ſubject to the ſervitude, *Jan.* 20. 1680, *E. Southeſk*.

35. Negative ſervitudes, *ex. gr. altius non tollendi*, or *non officiendi luminibus*, as they conſiſt merely in the reſtraint laid on the proprietor in the uſe of his property, cannot poſſibly be accompanied with any exerciſe of the right by the dominant tenement. It may, however, be juſtly concluded, both from their being ranked by writers among the conventional ſervitudes, and from the frequent inſtances of them in practice, that they are, by the law of Scotland, accounted effectual againſt the ſingular ſucceſſors of the granter, without uſe, by the bare agreement of parties. It flows alſo from the nature of negative ſervitudes, that they cannot be acquired by mere preſcription, or without the expreſs conſent of the proprietor of the ſervient tenement. Though one ſhould, for a century of years together, have, in the exerciſe of his property, applied himſelf to one particular uſe of it; tho', for inſtance, he ſhould, during that whole period, have kept his lands in graſs, or contented himſelf with an houſe thirty feet high; he cannot be thereby precluded from building on thoſe lands, or raiſing any houſe already built, to what height he pleaſes, however prejudicial it may prove to the light or proſpect of the neighbouring tenement. His having before confined himſelf to one uſe, is to be aſcribed, not to obligation or ſervitude, which is never to be preſumed, but to choice. Indeed the queſtion, Whether any ſervitude be conſtituted by preſcription? depends much on the nature of the uſe which was firſt had by the owner of the tenement, ſaid to be ſubjected to the ſervitude. Where that uſe began in conſequence of an act done by him in the natural exerciſe of his property, ſuch uſe, be it ever ſo long and uninterrupted, cannot eſtabliſh a ſervitude againſt him. Put the caſe, that one had collected a body of water within his own property, for a particular purpoſe; and that the water, after ſerving that purpoſe, hath been ſuffered, for forty years together, to fall down upon an inferior tenement belonging to a different proprietor; the owner of the inferior grounds, though he may have received an accidental benefit by the water falling upon his property, cannot bar the proprietor of the water, who was all the while making that uſe of his property which he judged moſt beneficial to himſelf, from making another uſe of it afterwards, either by altering the courſe of the water within his own grounds, or by draining the ſource of it.

36. It is a rule common to all ſervitudes, That *res ſua nemini ſervit*, *l.* 26. *De ſerv. pr. urb.* This is obviouſly founded in the reaſon of the thing. The having the property of a ſubject, imports a right to uſe that ſubject in every way of which it is capable; the proprietor, therefore, can have no need of a ſervitude. It may be objected againſt this rule, That one of the methods formerly mentioned of eſtabliſhing thirlage, ſeems to contradict it,

viz. that a proprietor may thirl his own tenants to his own mill; in which caſe, the owner of the mill, which is the dominant tenement, and of the lands aſtricted, which is the ſervient, is the ſame perſon. And to ſpeak freely, the conſtitution of a thirlage upon one's own lands, has the appearance of a deviation from this rule: the anſwer, however, may be, That in this ſpecies of thirlage, it is not the lands themſelves which are aſtricted, but their fruits or produce; and theſe belong, not to the proprietor of the mill, but to his tenants.

37. Servitudes may be extinguiſhed, *firſt*, *confuſione*, when the ſame perſon becomes owner both of the dominant and ſervient tenements; for the uſe which the proprietor afterwards makes of the ſervient, is not *jure ſervitutis*, but an act of property. And a ſervitude thus extinguiſhed revives not, though the right of the two tenements ſhould be again divided, unleſs the ſervitude be conſtituted *de novo*, *l.* 30. *pr. De ſer. pr. urb.* *2dly*, A ſervitude falls with the right of him by whom it is granted, where his right is only temporary: *Reſoluto enim jure dantis, reſolvitur jus accipientis.* Thus a ſuperior may ſubject his vaſſal's lands to a ſervitude while he holds them by nonentry; but as ſoon as the vaſſal returns to them, they become free. *3dly*, Servitudes are extinguiſhed by the diſcharge or renunciation of the owner of the dominant tenement; which renunciation is effectual againſt his ſingular ſucceſſors. *4thly*, By the extinction either of the dominant or ſervient tenement; for upon that ſuppoſition, nothing remains to be the ſubject of a ſervitude. But if the dominant tenement, in place of being utterly deſtroyed, ſhall be rendered unfit for the purpoſes of the ſervitude for a time only, the ſervitude is ſuſpended during that period. By our older practice, when a mill became ſo inſufficient that it could not ſerve the thirl, the obligation upon the ſervient tenement was not even ſuſpended; for the ſuckeners, though they were under a neceſſity of carrying their corns elſewhere, were liable in multure to that mill which was incapable of grinding it, and were only exempted from the burden of the ſmaller perquiſites due to the ſervants, *Fount. Feb.* 28. 1684, *Macdougal.* As this was contrary to the obligation implied in thirlage, by which the owner of the mill is, in conſideration of the ſtipulated multure, bound to uphold it in ſufficient repair, the ſuckeners are, by the preſent uſage, free from all multure while the dominant mill cannot ſerve them; but they muſt not, during ſuch temporary inſufficiency, carry a greater quantity of their corns to other mills than what they have immediate neceſſary occaſion for, *Jan.* 1736, *E. Wigton.* *Laſtly*, Servitudes are loſt *non utendo*, or by the negative preſcription; that is, if the owner of the dominant tenement neglect to uſe his right for forty years together, or if the owner of the ſervitude do acts repugnant to the ſervitude, without interruption made by him who claims it. Where the owner of the ſervient tenement is bound either to do, or to ſuffer ſomething to be done, on his property, as in the ſervitude of thirlage, roads, &c. it is ſufficient if he ſhall have forborn thoſe acts which the ſervitude had bound him to, or if the owner of the dominant tenement ſhall have neglected to uſe his right, for a full courſe of preſcription; but where the owner of the ſervient is barely reſtrained in certain reſpects from the uſe of his property, as in the ſervitude *altius non tollendi*, he cannot preſcribe an immunity from the ſervitude, otherwiſe than by doing that very act from which the ſervitude reſtrained him, *l.* 6. *De ſerv. pr. urb.* Hence the preſcription of immunity from thoſe negative ſervitudes begins to run, not from the conſtitution of the ſervitude, but from the time that the perſon ſubjected did the firſt act repugnant to it, *Harc.* 780. A ſervitude is not loſt, or even impaired, *non utendo*, though he to whom it is due forbear at certain ſeaſons the full exerciſe of his right, provided that ſuch forbearance

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can admit of an interpretation conſiſtent with an *animus* of preſerving the right entire. Thus a right of paſturage conſtituted upon an adjacent common, ſuffers not the leaſt diminution, though the owner of the ſervitude ſhould regularly, for the ſummer months, have carried his cattle from the ſervient tenement to a field of his own; becauſe ſuch act is *meræ facultatis*, and preſumed to be done, not with any view of relinquiſhing his right, but of feeding his cattle upon grounds which he thinks the moſt proper for them, that they may give a higher price in the market, *New Coll.* ii. 208. Not only may ſervitudes which are eſtabliſhed by preſcription, be loſt by a contrary preſcription, agreeably to the rule, *l.* 35. *De reg. jur. Nihil tam naturale eſt, quam eo genere quidquam diſſolvere quo colligatur;* but though they ſhould be conſtituted by grant, they may be extinguiſhed in the ſame manner, by the ſervient tenement enjoying an immunity from the ſervitude for forty years, as in thirlage; or by the claimant's forbearing to uſe it, as in the ſervitude of a road. In either caſe, the ſervitude is ſuppoſed to be abandoned or relinquiſhed; becauſe all grants whatever loſe their effect by diſuſe for forty years. If thirlage may be totally loſt by preſcription, *a fortiori* the *modus* and extent of it may be limited by poſſeſſion; and conſequently, if the poſſeſſor of the ſervient tenement has, during the years of preſcription, enjoyed an exemption from the thirlage as to any particular ſpecies of grain, ſuch long uſage will be ſufficient to reſtrict the extent of the ſervitude in all time coming, without regard to the poſſeſſion had by the dominant tenement preceding that period. This at leaſt is the rule where the thirlage is conſtituted in general terms, without deſcribing either the ſpecial *modus* of the aſtriction, or the rate of multure, *ſupr.* § 30.

38. The ſpecial ſervitude of thirlage may be alſo extinguiſhed by a clauſe in the charter of the lands aſtricted, granted by one who is both proprietor of the lands and of the mill, *cum molendinis et multuris.* This clauſe does not therefore barely create a preſumption, that the lands diſponed were not ſubject to thirlage at the date of the charter, but even when they appear to have been formerly burdened with that ſervitude, it implies a diſcharge or immunity from it, *Fount. Jan.* 26. 1705, *Sir J. Graham.* It is ſufficient for this purpoſe, if ſuch clauſe be inſerted in the *Tenendas* of the charter; though all ſubjects deſigned to be conveyed to the grantee ought to be inſerted in the diſpoſitive clauſe; becauſe exemption from ſervitude is not a ſubject diſtinct from the lands diſponed, but barely a quality annexed to them, *Dirl.* 1. For this reaſon, the words *cum molendinis et multuris* are ſeldom thrown into the diſpoſitive clauſe, unleſs where a mill, which may be ſometimes accounted a ſeparate tenement, is intended to be conveyed. In rights granted by the crown, the clauſe of multures, where it is only in the *Tenendas*, is altogether ineffectual; becauſe when ſignatures are preſented in exchequer, great part of the *Tenendas* is left blank, which is afterwards filled up at the diſcretion of the chancery-clerk, or the framer of the ſignature; and therefore whatever appears in that clauſe to the hurt of the crown, is preſumed to have crept in *per incuriam*, *Jan.* 8. 1662, *Steuart*; *Fount. Nov.* 24. 1708, *Halkerſton.* Where the vaſſal has, after his charter *cum multuris*, continued to pay the inſucken multures of his lands to the mill to which they had been formerly aſtricted, the thirlage is underſtood ſtill to ſubſiſt, *St. b.* 2. *t.* 7. § 24. And indeed, though a clauſe of multures in the *Tenendas* do, in general, import a diſcharge of the ſervitude; yet it ought to be diſregarded, where either the poſſeſſion ſubſequent to the charter, or the other circumſtances of the caſe, cannot admit of a conſtruction conſiſtent with the freedom of the lands, *New Coll.* ii. 126. & 198. A charter, containing a feu-duty in the *Reddendo*, *pro omni alio onere*, or in full of all burdens upon the vaſſal, has not, like a charter *cum multuris*, the effect of exempting him from

from a thirlage to which he was before ſubject, unleſs there be ſome ſpecial circumſtance favouring that interpretation. The clauſe of *Reddendo* is only meant to aſcertain the duty, either in money, corns, or ſervices, which muſt be paid or performed by the vaſſal, in conſideration of the property of the lands: though therefore the words *pro omni alio onere* may import a releaſe from all burdens on the property, other than what is expreſſed in the *Reddendo*, they cannot be explained into a diſcharge of a ſervitude to which the lands had before been ſubject.——Hitherto of predial ſervitudes.

39. Perſonal ſervitudes are burdens on feudal ſubjects, conſtituted chiefly in favour, not of a tenement, but of a perſon. Of theſe the Romans reckoned three; uſufruct, uſe, and habitation. All of theſe might, without impropriety, be called liferent-rights; for they all fell on the death of him who had the right of them. The ſervitude of *uſus* was limited to ſuch part of the fruits of the ſubject burdened, as might be made uſe of by the *uſuarius* or his family; but he could diſpoſe of none of the fruits by ſale. Habitation was a ſervitude on a dwelling-houſe; and was indeed a ſpecies of the other: he who had the right, might either poſſeſs the houſe by himſelf during life, or transfer his right to another; but neither he nor his aſſignee could uſe it for any other purpoſe than a dwelling-houſe. The only one of theſe ſervitudes which has been received into our law is uſufruct; which is defined by the Romans, a right that one has to uſe and enjoy a ſubject during life, without deſtroying or waſting its ſubſtance; which definition is well enough adapted to the nature of our liferents. He whoſe property is thus burdened, is, in our law-language, called *the fiar*, and the naked property *the fee*.

40. The laſt words of the definition, *without waſting its ſubſtance*, point out a quality eſſentially neceſſary in the ſubject burdened: it muſt be ſuch as by its nature is capable to be uſed *ſalva ſubſtantia*, as a field, a fiſhing, &c. An uſufruct, therefore, cannot be conſtituted on corns, wine, or other fungibles, which periſh in the uſe, *quorum uſus conſiſtit in abuſu:* but it may be conſtituted on ſubjects, which though they wear out by time, yet waſte by ſo ſlow degrees, that they may continue fit for uſe for the full courſe of an ordinary life, *ex. gr.* houſehold ſtuff. The Romans admitted a *quaſi* uſufruct, or improper liferent, even in fungibles. The liferenter was allowed to conſume them; but he gave ſecurity, that upon his death the heir ſhould deliver to the fiar as much of the ſame kind, and of as good quality, *l.* 7. *De uſufr. ear. rer.* But the word *liferent* is, by the uſage of Scotland, applied only to heritable ſubjects, or to money. As to the laſt, one might conclude, that it could not be the ſubject of a proper liferent, ſince it cannot be uſed without transferring its property to another, which is inconſiſtent with preſerving it for the fiar: and indeed the Romans conſidered the matter in this light, *l.* 5. § 1. *eod. t.* Nevertheleſs money may be as properly liferented as lands; for as the liferenter's uſe of lands conſiſts in enjoying the natural fruits of them during his life, his uſe of money conſiſts in enjoying the civil fruits, or intereſt due upon it, without any right to demand or diſpoſe of the principal ſum, which is reſerved entire for the fiar.

41. Liferents are divided into conventional and legal. Conventional liferents are either ſimple, or by reſervation. A ſimple liferent is formed by a new or ſeparate right, for which reaſon it is alſo called *a liferent by a new conſtitution*; and is that right by which a proprietor of land or money makes over the bare liferent to the grantee during his life, ſo that the right of fee ſtill remains in the granter. A ſimple liferent, where the ſubject is heritable, requires a ſeiſin duly regiſtered to make the right effectual againſt the granter's ſingular ſucceſſors; and becomes not real, as predial

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ſervitudes do, by the natural uſe or exerciſe of the right. For a liferent of lands, though it be doubtleſs a burden upon the ſubject liferented, is truly a feudal right, much reſembling property, which conſtitutes the liferenter *interim dominus*, or proprietor for life. This right cannot, properly ſpeaking, be tranſmitted to another; *oſſibus uſufructuarii inhæret*, as the lawyers expreſs it; ſo that though the liferenter ſhould make over the rents and profits ariſing from it, the proper right of liferent remains in himſelf. The aſſignee is not by the conveyance intitled to the profits during all the days of his own life, but only during the life of his cedent or author. Hence the aſſignee's right being merely perſonal, cannot be tranſmitted by charter and ſeiſin, which is a method of conveyance proper to real rights, but muſt be executed by a ſimple aſſignation.

42. A liferent by reſervation is that right of liferent which a proprietor reſerves to himſelf, in the ſame deed by which he conveys the fee or property of the ſubject to another. This ſort of liferenter needs no ſeiſin to perfect his right: for he ſtood originally infeft in the property, and the right by which he diveſts himſelf of the fee reſerves his liferent; as to which therefore his former ſeiſin, which virtually includes the liferent, ſtill ſubſiſts. It flows from the favour with which the law regards a liferenter who had once the fee of the lands in himſelf, that his right is interpreted more amply than a liferent conſtituted to one who had no prior right in them. It is conſidered as a limited fee or property, rather than a liferent. Hence a liferenter by reſervation has been indulged with the power of entering the heirs of vaſſals, either on precepts of *Clare conſtat*, or on retours, as if the fee ſtill remained in him. Craig extends this right to the entering of the ſingular ſucceſſors of vaſſals on reſignation, *lib.* 2. *dieg.* 22. § 5. But our practice after his death confined it to the entry of heirs, *Had. Jan.* 11. 1611, *La. Crawfordjohn.* The reaſon of the diſtinction was, that the fiar himſelf might have been compelled to enter heirs, and ſo could ſuffer nothing by the liferenter entering them; but no fiar was under a neceſſity, as the law then ſtood, to receive a ſingular ſucceſſor. The liferenter's aſſuming a power, therefore, to enter a ſingular ſucceſſor, was in effect the claiming a right to obtrude a vaſſal upon the fiar, who could not by any law be compelled to receive him. It can hardly be doubted, that now ſince the act 20° *Geo. II.* explained formerly, *t.* 7. § 7. a liferenter by reſervation can enter both: and in conſequence of this right he muſt alſo be intitled to all the caſualties of ſuperiority ariſing during his life; for the receiving of a vaſſal into the lands, being the firſt act of ſuperiority, ought to include all the conſequential rights. One who has a bare perſonal right of lands, and makes it over to another, with the reſervation of his own liferent, cannot enter vaſſals; becauſe, as he had no real right in his own perſon, he cannot tranſmit it to another, and of courſe is intitled to none of the other rights proper to ſuperiors, *Mack.* § 38. *h. t.* Though in conjunct fees granted to huſband and wife, the wife's right is, in the general caſe, conſidered merely as a liferent, which dies with herſelf; yet as ſhe is by the form of the right intitled to the fee equally with the huſband, her liferent is as amply extended as a liferent by reſervation. But of conjunct rights more *infr. b.* 3. *t.* 8. § 34. *et ſeqq.*

43. Life-annuities ſecured on land are truly conventional liferents. Theſe are rights of a yearly ſum of money, or quantity of grain, made payable by a proprietor out of his lands, and conſtituted by ſeiſin, which ſubſiſt during the life of the annuitants. They are generally granted to widows, either in place of, or as an addition to, their legal proviſions; and ſometimes they are purchaſed by the annuitant for a price preſently paid. They are *debita fundi*; and differ from rights of annualrent chiefly in this, that they have

no relation to a capital ſum or ſtock. Where lands are, in a marriage-contract or other deed, provided by the father to himſelf in liferent, and to the heirs of his body, or the heirs of the marriage, in fee, the father's right has improperly got the name of a liferent, for no other reaſon than that the lands cannot deſcend to his iſſue during his life; but he has in the judgement of law the full right of the fee; *vid. infr. b.* 3. *t.* 8. § 39. *et ſeqq.*

44. Legal liferents are thoſe which are eſtabliſhed by the mere diſpoſition of the law. Of this kind two are received by our uſage; the terce, and the courteſy; both of which are proper feudal rights affecting heritage, and conſtituted without either covenant or ſeiſin. The terce, *tertia*, is a liferent competent by law to widows who have not accepted of a ſpecial proviſion, of the third of the heritable ſubjects in which their huſbands died infeft. It is ſtyled *the terce*, and the widow, *the tercer*; becauſe this legal proviſion has been always fixed to a third part of the huſband's heritable eſtate. It obtained by our moſt ancient cuſtoms, *Reg. Maj. l.* 2. *c.* 16.; and owed its origin to the natural right a wife has to a reaſonable ſettlement out of the huſband's eſtate in caſe of her ſurvivorſhip, as ſhe ought not to be left deſtitute, though the huſband neglect to provide for her.

45. Formerly the legal proviſions of widows were regarded in ſo favourable a light, that though the huſband had amply provided his wife in caſe of his predeceaſe, ſhe was intitled to her terce, over and above the conventional proviſion, unleſs it had been expreſſed in the ſettlement, that it was granted in ſatisfaction, or in full of the terce. As this appeared inconſiſtent with the huſband's intentions, and to the rule of law, by which ſpecial proviſions are interpreted to cancel legal ones, it was enacted by 1681, *c.* 10. that where a huſband grants a ſpecial proviſion to his wife, either before or after marriage, ſhe ſhall be excluded from the terce, unleſs ſuch proviſion ſhall contain a clauſe, that ſhe is to have right to both. Originally the wife had a liferent only of a third of the heritable ſubjects in which the huſband ſtood infeft at the marriage; and the huſband could not have given her more, even by a conventional proviſion, *Reg. Maj. l.* 2. *c.* 16. § 5. 6. 7. In thoſe days, marriage was conſidered as a liferent charter and ſeiſin of that third in favour of the widow; and though this was no bar to the huſband's power of alienating his whole land-eſtate, *ibid.* § 14. yet the widow's proviſion was not, by this rule, juſtly proportioned to her huſband's eſtate; for ſhe could not claim the terce of any lands which he might perhaps acquire by her induſtry and good œconomy during the ſubſiſtence of the marriage. The later practice has therefore, with greater juſtice and equality, fixed the terce to a third of the lands in the property of which the huſband ſtood ſeiſed at his death, whether acquired before, or ſtanding the marriage.

46. The huſband's ſeiſin is both the meaſure and the ſecurity of the widow's terce; wherefore every right which excludes the huſband's ſeiſin, is alſo preferable to the terce, and in ſo far as it extends muſt diminiſh it: and, on the other part, whatever is excluded by the huſband's ſeiſin cannot affect the terce. By this rule, ſuch debts alone as conſtitute a real burden on the terce-lands, will prevail over the terce. Thus, neither an heritable bond, nor a diſpoſition of lands granted by the huſband, if death has prevented him from giving ſeiſin to the creditor or diſponee, can hurt the terce, ſince they are rights merely perſonal; nor an adjudication which has not been completed by ſeiſin before the huſband's death, though a charge had been given on it to the ſuperior, *Kames*, 56.; ſince an adjudication is no better than a legal diſpoſition, till ſeiſin proceed on it. From this doctrine it follows, that no terce is due out of lands in which the huſband

was

was not ſeiſed at his death, *Jan.* 29. 1706, *Carruthers*, except in the caſe of fraud or wilful omiſſion. Fraud is, in the opinion both of Craig, *lib.* 2. *dieg.* 22. § 27. and of Stair, *b.* 2. *t.* 6. § 16. preſumed, *firſt*, where the huſband, not having provided his wife by marriage-contract, diveſts himſelf in favour of his eldeſt ſon or other heir; ſee *Fount. Dec.* 1. 1711, *M. Annandale: 2dly*, where a father is, by his ſon's marriage-contract, obliged to infeft him in certain lands, and has not fulfilled his obligation: but the widow cannot, in either of theſe caſes, be ſerved to her terce; becauſe the inqueſt cannot declare, as the brief requires, that the huſband died infeft in the lands: the only remedy competent to her is a perſonal action againſt her father-in-law, or her huſband's repreſentatives; and therefore the onerous creditors of the father-in-law, or huſband, will, in a competition with the widow, be preferred to her in the lands out of which the terce is claimed.

47. Our practice has diſtinguiſhed between a greater and a leſſer terce. A leſſer terce is that which is due out of lands that are charged with a prior terce ſtill ſubſiſting, due to the widow of ſome of the huſband's anceſtors or authors in the lands. If, *ex. gr.* a fiar, whoſe lands are already charged with a terce, ſhould die, leaving a widow who is alſo intitled to a terce, the laſt widow cannot claim her terce out of all the lands in which her huſband died infeft; for a full third of them is, by an antecedent right, ſet apart for the firſt tercer. The laſt is intitled to the liferent only of a third of the two thirds which remain unaffected by the firſt terce. But on the death of the firſt widow, the leſſer terce becomes enlarged, as if the firſt had never exiſted; becauſe after that period the huſband's ſeiſin, upon which the meaſure of the widow's right depends, is no longer burdened with any prior terce, *Reg. Maj. l.* 2. *c.* 16. § 64.; *St. b.* 2. *t.* 6. § 16.

48. The right of the widow to the terce-lands is as ample as that of the heir to the remaining two thirds; and therefore, if thoſe lands have a right of paſturage, or other ſervitude, on a neighbouring tenement, the widow is intitled to a third of it, as a pertinent of the lands in which the huſband died infeft, *Jan.* 18. 1628, *contra Mackenzie:* and her right is not confined to the lands themſelves, but reaches to the houſes built on them; to the tithes of land when conſtituted by ſeiſin, *Feb.* 13. 1628, *C. of Dunfermline*, though tithes are in other reſpects conſidered as a ſeparate ſubject from the ſtock; to infeftments of annualrent forth of lands; to rights in ſecurity; and to wadſets, whether proper or improper. In improper wadſets the terce is the liferent of a third of the ſum contained in the wadſet. In proper wadſets, the tercer enjoys in liferent a third of the wadſet lands, while the right ſubſiſts; and after redemption from the huſband's heir, a third of the redemption-money, *Cr. lib.* 2. *dieg.* 22. § 26. If the huſband had two manor-places or country-ſeats, the widow is intitled to the ſecond or worſt of the two. If he had but one, it was, by the law of the Majeſty, *l.* 2. *c.* 16. § 62. 63. excluded from the terce, as a ſubject incapable of partition. Craig gives it as his opinion, that a third of it ought to go to the widow, *lib.* 2. *dieg.* 22. § 29. By the practice ſince his death, the heir has been intitled to the ſole poſſeſſion of it; but if he chuſe to reſide elſewhere, the widow may claim it, preferably to any other tenant, upon payment to him of a reaſonable rent for his two thirds, *Jan.* 26. 1665, *Logan.*

49. Cuſtom hath, in reſpect of other ſubjects, limited the terce: for rights of reverſion, ſuperiority, and patronage, are excluded from it; becauſe none of thoſe have fixed yearly profits, and ſo are not proper funds for the widow's maintenance: neither is a terce due out of leaſes; becauſe a leaſe is not a feudal right: and though feu-duties yield a conſtant rent, it has not been thought congruous to extend the terce to them, becauſe it does

does not extend to the right of ſuperiority, from which the feu-duties cannot be ſeparated. It is a poſition laid down by all our writers, That no burgage-tenements, whether of lands or houſes, fall under the terce, *Cr. lib.* 2. *dieg* 22. § 34.; *St. b.* 2. *t.* 6. § 16. &c. The reaſon is not ſo obvious; that which ſome have aſſigned is, that they ſeem to be reſerved for the heir's reſidence, and are ſubjects that do not ſo eaſily admit of a diviſion.

50. The widow hath no title of poſſeſſion, and ſo cannot receive her third of the rents in virtue of the terce, till ſhe be ſerved to it. In order to this, ſhe muſt obtain a brief from the chancery, directed to the ſheriff of the ſhire where the lands lie; who thereupon calls a jury of fifteen ſworn men, to inquire into the truth of the two facts or heads contained in the brief; and on their being proved, to cognoſce or enter the widow to her terce. The firſt head of the brief is, Whether the widow was lawful wife to the deceaſed? as to which, poſitive ſtatute has, from favour to the widow, directed the ſervice to proceed, if it ſhall appear that ſhe was held and reputed to be his lawful wife, though the heir ſhould offer to prove that ſhe was not lawfully married, 1503, *c.* 77. The heir's objection againſt the marriage, if he is to inſiſt on it, muſt be afterwards diſcuſſed before the commiſſaries of Edinburgh. The other head, which is, That the huſband died ſeiſed in the lands ſpecified in the brief, is ſufficiently proved by his ſeiſin. The ſentence, or ſervice of the jury, by which the widow is thus ſerved to her terce, need not be returned to the chancery whence the brief iſſues; for the brief of terce is not retourable. This ſervice intitles the widow to ſue the tenants for her juſt third of the rents of every farm, *March* 15. 1632, *Relict of Veitch*, and to poſſeſs the lands jointly with the proprietor *pro indiviſo*; but ſhe cannot remove tenants, *ſupr. t.* 6. § 53. or poſſeſs any lands excluſive of the heir, till the ſheriff ken her to her terce, by dividing the lands between the heir and her. In this diviſion, after determining by kavel or lot, whether to begin by the ſun or the ſhade, *i. e.* by the eaſt or the weſt, the ſheriff ſets off the firſt two acres for the heir, and the third for the widow; and on the diviſion of the whole in this manner, the widow, by herſelf or her procurator, takes inſtruments in the hands of a notary-public. But another method of diviſion may be ſubſtituted in the place of this, where parties agree to it, by the valuing of entire farms, and ſetting one apart for the widow, and one or more double in rent to the firſt for the heir. Which laſt method may be executed more to the advantage of both parties, than if their intereſt were to lie promiſcuouſly over the whole eſtate, by alternate acres. Stair, *b.* 2. *t.* 6. § 13. affirms, that the brief of terce may be directed, not only to ſheriffs, but to bailies, and that bailies may alſo ken widows to their terce: but this is ſaid inadvertently, if his Lordſhip meant to include bailies of boroughs; for he himſelf admits, *ibid.* § 16. that no terce is due out of burgage-lands. Though the widow cannot force payment of the rents till ſhe be ſerved, the ſervice is not to be regarded as the conſtitution of her right; for that was conſtituted before by the huſband's ſeiſin, and fixed by his death: the ſervice only declares it, and ſo has a retroſpective quality to the term immediately enſuing the huſband's death, by which ſhe is intitled to the full payment of her third from that term downwards, preferably to any real rights or burdens that may have affected the lands in the intermediate period between his death and her own ſervice, *Nov.* 25. 1624, *Tenants*. The terce carries right merely to the fruits, but cannot affect the fee. The widow has doubtleſs a right as *interim domina*, after her ſervice, either to poſſeſs the terce-lands in her own name, or to let them to tenants: but though ſhe ſhould not have received the full rents, ſhe cannot, under colour of that deficiency, affect the property of the lands to the heir's prejudice, as ſhe might do for the ſhortcoming of a conventional

conventional jointure, granted to her by way of annuity out of her huſband's eſtate; her only remedy is an action againſt the poſſeſſors of the lands, or the intromitters with the rent.

51. The terce is excluded, *firſt*, by a decree, declaring the marriage null; which neceſſarily voids all conſequential rights. 2*dly*, By the diſſolution of the marriage, before the elapſing of year and day, without iſſue, if there is no ſpecial clauſe in the marriage-contract providing the contrary, *ſupr. b.* 1. *t.* 6. § 38. 3*dly*, By the delict of the tercer. Thus a decree of divorce, grounded on the wife's adultery or wilful deſertion, excludes the terce: And in Craig's opinion, *lib.* 2. *dieg.* 22. § 35. the wife's abandoning her huſband's houſe, and cohabiting with the adulterer, has the ſame effect, though there ſhould be no decree or ſentence of conviction, *Q. Attach. c.* 85.; *St.* 2. *Rob. I. c.* 13. *Laſtly*, It has been already obſerved, that the terce is excluded by every deed by which the huſband is diveſted of the fee: but the ſuperior cannot plead, that it is excluded by the nonentry of the heir of the deceaſed huſband; becauſe the terce, being a legal proviſion, has the ſame effect as if the ſuperior had expreſsly conſented to it.

52. The right of courteſy, or curiality, has been alſo received by our moſt ancient cuſtoms, and is accurately deſcribed *Reg. Maj. l.* 2. *c.* 58. *et ſeqq.*; *Leg. Burg. c.* 44. It may be defined, a liferent given by the law to the ſurviving huſband of all the wife's heritage in which ſhe died infeft, if there was a child of the marriage born alive. Craig is of opinion, *lib.* 2. *dieg.* 22. § 40. that it was introduced to prevent the huſband's falling into poverty or contempt on his wife's death: but this reaſon is not adequate, as the right reaches to the wife's whole heritage, and ſo exceeds the meaſure of an alimentary proviſion. The huſband may, on the wife's death, enter inſtantly into the poſſeſſion of her lands, without any ſuch ſolemnity of ſervice or kenning as is required in the terce; for his right of courteſy is, after that period, completed *ipſo jure*. As he had, in conſequence of his *jus mariti*, a right to the rents of his wife's lands, ſtanding the marriage, that very right is continued with him after her death by an act of the law itſelf, though under another name.

53. The right of courteſy does not, like the terce, depend in any degree upon the duration of the marriage, but entirely on the exiſtence of iſſue. Put the caſe, that no child has been born alive of a marriage which has ſubſiſted for twenty years, there is no courteſy, *Reg. Maj. l.* 2. *c.* 58. § 1. tho' the widow would in that caſe have been intitled to her terce. On the other hand, if a living child has been procreated of the marriage, the courteſy is due, though the marriage ſhould not have ſubſiſted for a year, and though the child ſhould have expired immediately on his birth, whether before or after the mother's death. The child born of the mother muſt be the mother's heir, in order to intitle the huſband to the courteſy; for if there be a child exiſting of a former marriage who is to ſucceed to her eſtate, the ſecond huſband has no right to the courteſy while that child is alive, though there ſhould be alſo children procreated of the ſecond marriage. Hence it appears, that the law confers this right on the ſurviving huſband as the father of an heir, rather than as the widower of an heireſs, *Fount. Dec.* 1. 1702, *Darleith*. This indeed is contrary to Craig's opinion, *lib.* 2. *dieg.* 22. § 43.; but it is moſt agreeable to the Roman law, *l.* 1. *C. De bon. mat.* which gave to the father the liferent of all that the child ſucceeded to by the mother.

54. Heritage is not, in the definition of courteſy, ſet in oppoſition to moveables, as if the liferent of the wife's whole eſtate which is not moveable fell to the huſband. It is to be underſtood of thoſe heritable rights to which ſhe had ſucceeded as heir of line, tailzie, or proviſion, to her anceſtor,

ceſtor, whether before or during the ſtanding of the marriage, in contradiſtinction to conqueſt, *i. e.* to the heritage ſhe had acquired by purchaſe, donation, or other ſingular title, *Home*, 138. It would ſeem, that in this particular, the modern uſage has varied from the old law of the Majeſty, *l.* 2. *c.* 58. § 1.; which, in general terms, admits the right of courteſy in lands received by the huſband with his wife *in maritagio*, without diſtinguiſhing whether ſhe had them by ſucceſſion or by ſingular titles. And the only reaſon that has been given for this alteration is, that where lands come to the wife by deſcent, the dignity of her family muſt be ſupported by her huſband. It has in all periods been the law of Scotland, that the courteſy extends to heritage, by whatever title it may be holden, even to burgage-lands, *Leg. Burg. c.* 44.; *Skene*, *v. Curialitas*; *Cr. lib.* 2. *dieg.* 22. § 43.; *St. b.* 2. *t.* 6. § 19. I cannot therefore help ſuſpecting, that the deciſion, *Br.* 101. excluding burgage-tenements from the courteſy, has been inaccurately obſerved; more eſpecially becauſe the judgement, in that caſe, as ſtated in the deciſion itſelf, might have been better ſupported on another medium, viz. That the lands in queſtion had been acquired by the wife *titulo ſingulari*. By our ancient uſage, the huſband enjoyed alſo, in the right of the courteſy, all honours and dignities belonging to the wife, or which would have belonged to her had ſhe been a male, even a ſeat in parliament as a peer. To this day, the huſband, if a commoner, is intitled, not only in the right of courteſy after his wife's death, but ſtanding the marriage, to the capacity of electing, or being elected, member of parliament upon her freehold, 1681, *c.* 21.; but whether any argument may be drawn from that ſtatute for extending the courteſy (as a more favourable or ample ſpecies of liferent, like that by reſervation) to any of the rights of ſuperiority, has not been decided.

55. As, in the terce, the huſband's ſeiſin is the foundation of the widow's right; ſo, in the courteſy, the wife's ſeiſin is the ground and meaſure of that of the huſband: and hence every real burden or diligence which is preferable to her ſeiſin, muſt alſo be preferable to the courteſy. But in the following reſpect, the two rights differ: The terce is in no degree affected by the perſonal debts of the huſband; whereas the huſband, who has right by the courteſy, as he enjoys the liferent of his wife's whole heritage under a lucrative title, is conſidered as her temporary repreſentative, and ſo is liable in the payment, not only of all the yearly real burdens charged on the ſubject, but of the current intereſt, even of perſonal debts, while his right ſubſiſts, to the extent of the benefit he enjoys by the courteſy, *Kames*, 2.; for he ought to leave the eſtate in as good condition as he found it. And were it not for this obligation, the wife's eſtate might be run out before it devolved on her heir, by the growing intereſt during the life of the huſband. A right of recourſe, however, was juſtly reſerved, by the laſt-cited deciſion, to the huſband, who had paid up all the intereſt fallen due in his time, againſt the wife's executors, or others, who ſucceeded to any part of her eſtate which did not fall under the courteſy: Another difference may be obſerved between the terce and the courteſy. A tercer, if ſhe has once declared her right by ſervice, tranſmits it on her death to her executors, who may ſue the poſſeſſors of the terce-lands, in an action for recovering her third of the rents; whereas if a huſband, whoſe right of courteſy is perfected without a declarator, ſhall never have exerciſed his right, by receiving the rents of his wife's heritage, his executors will have no action for recovering them; becauſe that right is of the nature of a privilege perſonal to the huſband; who therefore, by ſuffering his wife's heir to gather in the rents during his life, is underſtood to have renounced his claim in the heir's favour, *Jan.* 19. 1636, *Macaulay*. In all particulars not

not before mentioned, the two rights of terce and courteſy have the ſame nature and properties.

56. Liferenters, whether by law or paction, are intitled to all the fruits of the ſubject liferented, both natural and civil. They may poſſeſs, not only by themſelves, but by their ſervants and tenants; they may aſſign or ſell the profits of it ariſing during their lives to others, *l.* 9. *pr. l.* 12. § 1. *&* 2. *De uſufr.*; and they are intitled to the full uſe of whatever is part of that ſubject, though it has been intended merely for ornament, ſo as they cannot be deprived of that uſe by any act of the fiar. Thus a fiar cannot cut down trees in an avenue or park, by which the liferenter muſt loſe the pleaſure reſulting from their beauty or proſpect.

57. But, on the other hand, liferenters muſt uſe their right *ſalva rerum ſubſtantia*, ſo as to leave the ſubject liferented in as good condition as they found it, without incroaching upon or diminiſhing any part of the fee. Hence, *firſt*, no liferenter, even by reſervation, can grant a leaſe of the liferented lands, to ſubſiſt longer than his own life, though the tack-duty ſhould exceed the former rent; for ſuch limitation upon the proprietor would in ſo far impair his right of fee. *2dly*, Whatever is *pars ſoli*, part of the fee itſelf, cannot fall under the right of liferent. Coal, free ſtone, limeſtone, minerals of all kinds, &c. are indubitably *partes ſoli*, (though quarries are ſaid by the Roman lawyer to grow again, after they are wrought, in certain parts of Aſia and Gaul, *l.* 7. § 13. *Sol. matr.*); no liferenter, therefore, has a right to thoſe, inſomuch that though a colliery has been opened by the proprietor previouſly to the commencement of the liferent, the liferenter cannot continue it without an expreſs right, *July* 13. 1677, *La. Preſton*; *June* 1727, *Heirs of Roſeburn*. Nay, though the privilege of coal ſhould be expreſſed, the liferenter cannot exceed the meaſure formerly accuſtomed by the proprietor, either as to the number of colliers, or quantity of coal to be brought up from the pit or ſhaft. Yet tercers, whoſe right, conſtituted by the law itſelf, does not admit of being limited or extended by writing, are allowed to bring up ſuch a quantity of coal as is neceſſary for their family, if the colliery has been opened before the death of the huſband, *Feb.* 14. 1628, *La. Lamington*.

58. Growing timber, when it is of that kind that does not ſhoot up from the root after cutting, *ex. gr.* firs, is juſtly accounted part of the lands, and not a fruit; and ſo cannot fall under liferent. And even a copſe wood, when it is not divided into hags, but has been wont to be cut at once, at the diſtance perhaps of twenty or twenty-five years, cannot be cut by the liferenter, though it ſhould arrive at the proper maturity during the liferent; becauſe ſuch wood does not appear to have been intended for yearly profit; and it is only what yields conſtant yearly profits that can be the ſubject of a liferent: but where it has been divided into different hags, one of which has been annually cut by the proprietor, the liferenter may continue the courſe of the former yearly cuttings; becauſe theſe are underſtood to be the conſtant annual fruits which the proprietor intended the ſubject ſhould yield to him. A liferenter has alſo right to the windfalls, and to the underwood; and he was, by our older deciſions, intitled to cut as much of the growing timber as was neceſſary to uphold the liferented houſes, *Fount. July* 16. 1680, *Stamfield*, cited in *Dict.* i. *p.* 548. Not long after, that privilege was denied to a liferenter, where the right did not expreſsly bear *cum ſylvis*, *Fount. July* 3. 1696, *La. Borthwick*. But by the preſent practice, a liferenter infeft *cum ſylvis*, though he cannot diſpoſe of any of the timber for ſale, may uſe it for keeping in tenantable condition the houſes ſtanding on the liferented lands, *Jan.* 25. 1722, *D. Hamilton*; *New Coll.* i. 49. Liferenters by reſervation ſeem to have no ſtronger right than ſimple liferenters,

ers, as to woods, minerals, and quarries; ſince all liferenters muſt, by the common nature of the right, uſe the ſubject liferented *ſalva ſubſtantia*. Yet by a deciſion, *Home*, 73. carried by the narroweſt majority, a liferenter by reſervation was allowed to cut woods, though not divided into hags, that had come to a proper maturity ſince the commencement of the liferent, according to the common uſage of that part of the country where the woods were.

59. To ſecure the fiar's right againſt waſte or incroachment, liferenters were, by the Roman law, obliged to give ſecurity, *cautio uſufructuaria*, to preſerve the ſubject in the ſame condition in which it ſtood at the time of their entry, *l.* 13. *pr. De uſufr.* By the law of Scotland alſo, ſheriffs, and other judges, are ordained, at the ſuit of the perſons intereſted, to take ſecurity from liferenters and conjunct fiars, for preſerving the buildings, woods, parks, and other ſubjects liferented by them, without deſtruction or waſte, 1491, *c.* 25.; and if they ſhall refuſe, the judge is, by 1535, *c.* 15. directed to charge them to it, under the penalty of being excluded from the yearly profits of the ſubject liferented till ſecurity be given. Yet where waſte is already committed, no action is competent to him who ſtands preſently in the fee for recovering damages: for the damage is due to that perſon alone to whom the fee ſhall open after the liferenter's death; and it is poſſible, that if the preſumptive heir, proſecuting ſuch action, ſhould die before the liferenter, his executor, to whom the ſum recovered upon that action in name of damage would fall, might not be fiar of the liferented ſubject at the expiration of the liferent.

60. As for the liferent of houſes, the liferenter, after having entered to the poſſeſſion, is without doubt obliged, like a liferenter of lands, to preſerve the ſubject in as good condition as he got it, and to diſburſe the expence neceſſary for refitting it. But if in the courſe of the liferent the houſe become quite unfit for habitation by the waſte of time, he cannot be compelled to make any diſburſements towards its reparation, *l.* 7. § 2. *De uſufr.* Yet if he chuſe to repair it by the warrant of the proper judge, the fiar muſt, at the iſſue of the liferent, pay to the liferenter's executors the expence of reparation, if it do not exceed the value of the ſubject; ſee *New Coll.* i. 148. Neither can the fiar of a decayed houſe be compelled by the liferenter to put it in tenantable repair; becauſe a liferent being a ſervitude, binds the perſon burdened no farther than to *nuda patientia*. If the the houſe ſhould be actually repaired by the fiar, the liferenter might, by the Roman law, reſume the poſſeſſion, *d. l.* 7. § 2.; but equity ſuggeſts, that in ſuch caſe the liferenter ought, while his right ſubſiſts, to pay to the fiar the intereſt of the ſum expended in repairing it. It is provided by ſpecial ſtatute, 1594, *c.* 226. that where a houſe within a borough, ſubject to a liferent, falls into decay, the fiar may, at any time while the right ſubſiſts, apply to the magiſtrates for taking cognition of the ſtate of the houſe by an inqueſt, and for requiring the liferenter to repair it; and if he refuſe, the fiar is authoriſed to enter into the poſſeſſion, upon giving ſecurity to pay to the liferenter, during his right, the rent which might reaſonably have been expected for a leaſe of the ſubject as it ſtood at the time of the cognition.

61. Liferenters, as they are intitled to the profits, muſt alſo bear the burdens attending the ſubject liferented; as taxations, duties payable to the ſuperior, miniſters ſtipends, and the other yearly payments chargeable on the lands, which may fall due during the liferent. A widow, therefore, who is infeft for her liferent-uſe in the lands ſpecified in the grant, ought to be burdened with that proportion of the land-tax which is impoſed on the lands liferented. Where ſhe is infeft in a liferent-annuity of a ſum of money

money out of lands, it would ſeem that ſhe ought not to be ſubjected, for the ſame reaſon that the creditor in a right of annualrent is not charged with any proportion of the public taxations; for there is nothing, either in the preſumed intention of the parties, or in the ſtyle of the two rights, that can make a difference: yet by an uniform tract of deciſions, *Harc.* 378.; *Fount. Dec.* 13. 1704, *La. Valleyfield*, and the more ancient ones there quoted, ſuch annuitants are found chargeable with the land-tax, unleſs where they are by expreſs ſtipulation exempted from it. The court ſeems to have been determined in thoſe judgements by the equity of the act, *Dec.* 10. 1646, *c.* 3. (notwithſtanding it had loſt its authority upon paſſing the reſciſſory act of Charles II.), and by the act of convention 1667, and ſubſequent acts of ſupply, which ſubjected all thoſe annuitants to the payment of the land-tax: though a clauſe inſerted in ſubſidy-acts, *ubi id non agebatur*, to declare or illuſtrate the nature of real rights, appears to be but an improper method of altering their eſtabliſhed legal effects.

62. A liferenter is alſo burdened with the maintenance of the heir when he has no other fund of ſubſiſtence, *Feb.* 13. 1662, *Birnie*. This burden took its riſe from an extenſion of the act 1491, *c.* 25. by which the ward ſuperior was obliged to maintain the heir when he could not maintain himſelf. The former part of the ſtatute had enacted, that both wardatars and liferenters ſhould give ſecurity to uphold, in good condition, the ſubject of the ward or liferent; which gave occaſion to interpret the laſt part of the act, which concerns the alimony of the heir by the wardatar, as if it had alſo included the maintenance of fiars by liferenters. This interpretation is cenſured by Mackenzie, *Obſerv. on ſaid act* 1491, as contrary to the rule, That no ſtatute ought to be extended by implication againſt onerous or rational rights; and more eſpecially againſt liferenters, whoſe rights are commonly founded on ſolemn marriage-contracts. It has probably been received from compaſſion to neceſſitous heirs, who might ſtarve before the fee opened to them, if the liferenter were not laid under that obligation; and from the preſumed intention of the granter of the liferent, that the heir ſhould not be left altogether deſtitute, while he was excluded by the liferenter. An inclination to ſupport ancient families may have alſo contributed to it; and upon this ground the liferenters of money are exempted from this burden, *Kames*, *Rem. Dec.* 3. Heirs, though of perfect age, are by the preſent practice intitled to this claim, if they have no other way of earning their bread; and the bare name of an employment which brings the heir little or nothing, is no good defence againſt it, *July* 25. 1705, *Ayton*. Though part of the liferented lands ſhould be either evicted from the liferentrix, or voluntarily given up by her; yet if what remains be more than neceſſary for her own ſubſiſtence, ſhe muſt contribute to the heir's alimony, in proportion to that ſhare which ſhe ſtill retains, *Br.* 115. But if her liferent ſhould be reduced ſo low that it affords her bare ſuſtenance, no part of that neceſſary pittance ought to be transferred from her whoſe right is onerous, to one whoſe only title to any part of it ariſes from favour. The bare right of apparency founds this action againſt the liferenter, *Feb.* 12. 1635, *Hepburn*; but the heir is not intitled to alimony, either after he has renounced the ſucceſſion, *Jan.* 16. 1712, *Lyon*, or after he has ſold the eſtate, *Fount. Jan.* 27. 1700, *Sandilands*; becauſe by the renunciation or alienation he loſes the character of heir, under which character alone he can claim it.

63. This burden of maintaining the heir is perſonal to the liferenter, and cannot be thrown upon his creditors who come in his place by adjudging the right of liferent, 1737, *Cr. of Blair*; for as the heir would have had no claim of alimony from his own creditors, if the eſtate had been carried

off by them after the liferenter's death, he ought to be ſtill leſs intitled to it from the creditors of the liferenter. Where the heir's grandfather has a reſerved liferent of the whole eſtate, out of which the heir's immediate mother, who was married to the grandfather's ſon, enjoys a partial annuity, the mother is ſubject to the alimony of the heir in the firſt place, *Jan.* 1729, *Hay*, as quoted in *Dict.* i. *p.* 30.; but if no part of the mother's proviſion ariſes out of the eſtate liferented by the grandfather, the burden falls primarily on him, *June* 27. 1662, *Ruthven.* One who enjoys an eſtate under a ſtrict entail, is bound, as a liferenter, to maintain the next heir: and he cannot get free from that obligation, by offering to receive the heir into his own family, as parents may do, when they are only bound *ex jure naturæ*; for all perſons intitled to alimony, either by ſtatute or paction, have a right, at leaſt if they be of perfect age, to maintain themſelves where they judge moſt convenient, *Jan.* 27. 1736, *Moncrief*, ſtated in *Dict.* i. *p.* 34.

64. Liferents are extinguiſhed by the death of the liferenter or liferentrix. Doubts have been frequently moved, what part of the rents not received by the liferenter himſelf, belong to his executors, and what part to the fiar. The following rule, on which theſe queſtions depend, ſerves alſo to fix the different intereſts of the heir and executor, in relation to the rents of that year, or crop, in which the proprietor dies. That part of the rents to which the liferenter had a proper right before his death, falls to his executors; the reſidue, as never having been *in bonis* of the deceaſed, muſt be ſtill accounted part of the lands, and ſo devolves on the fiar. Cuſtom has fixed on two terms in the year as the periods from which the rents of that year are to be accounted *in bonis* of the liferenter; the one half at Whitſunday, when the corns are preſumed to be fully ſown; and the other half at Martinmas, when they are reaped. If the liferenter ſurvive Whitſunday, he has by this rule a right conſtituted to himſelf, and therefore deſcendible to his executors, in the half of the rent payable for that year, becauſe that half was due before his death; the other half, the term of which was only current at his death, and which for that reaſon had not become his property, falls to the fiar. If he ſurvive the term of Martinmas, his executors have, on the ſame footing, a right to the whole of that year's rent. Thoſe legal terms of the payment of rent are the rule for determining ſuch caſes, though the conventional terms ſhould be made later than the legal. The liferenter, therefore, who ſurvives Martinmas, tranſmits to his executors the whole rent of that year, though part of it could not have been demanded from the tenant till after the liferenter's death: for ſtill the whole of it was due, in the conſideration of law, while he was yet alive; and the delay of payment, which is granted merely out of favour to the tenant, cannot hurt or impair the right of the executors, *Goſ. July* 23. 1668, *Carnegie.* And this holds in graſs as well as in corn farms, *Feb.* 1727, *Sir W. Johnſton*, ſtated in *Dict.* ii. *p.* 453.; *Home*, 165. By the former practice, a liferenter muſt have outlived the noon of the term-day, in order to tranſmit the rent of that term to his executors; but, by our preſent cuſtom, they are intitled to it if he lives till the morning of that day, *Fount. Dec.* 8. 1704, *Paterſon.*

65. This rule concerns only the caſe of lands let to tenants: for if the liferenter was in the natural poſſeſſion, and had before his death tilled and ſowed the ground, his executors are intitled to the whole crop, free from the payment of any rent to the fiar; becauſe the right of the crop belongs to him who beſtows the ſeed and induſtry, *Meſſis ſementem ſequitur*, *Dec.* 14. 1621, *Macmath*; which obtains, whether the liferenter died before or after Whitſunday, *July* 25. 1671, *Guthrie*; *Falc.* ii. 9. But the liferenter's executors have no right to the natural graſs after his death; for that is a fruit which requires no yearly ſeed or induſtry, *ſupr. t.* 2. § 4.

66. It

66. It is the general opinion, that the duration of the liferent of fiſhings, collieries, ſalt-works, and ſuch other ſubjects, the profits whereof ariſe from continual daily labour, is not governed by any legal terms, but muſt be computed *de die in diem*. And as the whole profits of a mill ariſe from the daily uſe of it, Sir James Steuart affirms, *v. Mill, & v. Liferenter*, that on the death of the liferenter of a mill, his executors are intitled to the rent down to the very day of his death: Yet it was adjudged, *Dec.* 8. 1671, *Guthrie*, that the ſame terms govern the duration of the liferent of mills and of lands, at leaſt, where the mill has either mill-lands or aſtricted multures belonging to it. In the liferent of a ſum of money due on a perſonal bond, the liferenter's executors are intitled to the arrears of intereſt due on the capital, down to the day of the liferenter's death; and the whole intereſt ariſing from the bond after that day falls to the fiar, without regard to any terms; becauſe the intereſt of money is due *de die in diem*, and by the uſual ſtyle of bonds is made payable, not only yearly and termly, but continually. But in the caſe of an heritable bond, or of a liferent-annuity of money ſecured upon land, the ſame rules are obſerved as in a proper liferent of lands, where the different intereſts of the heir and executor, and of the liferenter and fiar, are fixed according to the legal terms of land-rent, Whitſunday and Martinmas, *Home*, 81. though the conventional terms ſhould be Lammas and Candlemas. The ſame is the caſe as to an annuity of grain, though payable between Chriſtmas and Candlemas, *Jan.* 12. 1681, *Trotter*; and that though the annuity be conſtituted by a moveable bond, having no relation to land, in regard that the ſubject of the annuity is the product of land, *Fount. Feb.* 14. 1684, *Baillie*.

67. The commencement of a liferent, or jointure, is governed by the ſame rule as its duration. If therefore the huſband whoſe lands are to be liferented by his widow, ſhall die after Whitſunday and before Martinmas, his executors are intitled to the half-year's rent due at Whitſunday; and the liferentrix, who is in this view conſidered as the huſband's heir for life in the liferented lands, gets the other half, the rent of which was current at the huſband's death, *Jan.* 21. 1629, *Ayton*. It is proper here to obſerve, that the liferent provided to widows being alimentary, is paid *per* advance before it is due; for they have a ſum allowed them by law for alimony from the day of their huſband's death to the firſt term at which the liferent becomes payable, *ſupr. b.* 1. *t.* 6. § 41.; and conſequently, that firſt term's payment is made in conſideration of the annuity or jointure due from that to the next enſuing term, and ſo forward while the liferent ſubſiſts.

68. Liferents are alſo extinguiſhed by renunciations or diſcharges granted by the liferenter, though they ſhould not be recorded in the regiſter of reverſions; for as the infeftment of liferent cannot be transferred by any conveyance, the liferenter's ſimple renunciation muſt exclude poſterior aſſignees whoſe right is barely perſonal.

TIT.