TIT. X.

Of Teinds or Tithes.

THE doctrine of tithes falls naturally to be explained after that of ſervitudes, tithes being truly a ſervitude or burden affecting lands. But as nothing has been hitherto ſaid of church-lands, in ſo far as they differ from temporal, the general doctrine of church-benefices may be taken under conſideration in this title; and to throw the greater light on the ſubject, a ſhort account may be premiſed of the funds by which the clergy were ſupported in the firſt ages of the Chriſtian church.

2. Chriſtians are commonly thought to have had originally all things in common; but it may be juſtly doubted, whether the text upon which that opinion is grounded, *Acts* iv. 34. 35. is to be taken in the full extent of the words: for if it had been an univerſal Chriſtian duty, it is not likely that the Evangeliſt would have made ſpecial mention of the ſingle inſtance of Barnabas diſpoſing of his eſtate for the common benefit, verſ. 36. 37. Neither is that notion favoured by the Apoſtle Peter's ſevere reprehenſion of Ananias, *Acts* v. 3. who it appears was at full liberty to hold his eſtate as his own property. His crime conſiſted in lying to the Holy Ghoſt, and impoſing on his brethren; as if, after the ſale, he had given up the whole price to be divided by the apoſtles, when in fact he retained a part for private uſe. Thus much may be certainly affirmed, that if they had any proper communion of goods, it was of exceeding ſhort duration; for we find weekly oblations made, as early as the apoſtolical age, for the ſaints, by every man according to his abilities, *Acts* xi. 29.; 1 *Cor.* xvi. 1. 2. 3. which preſuppoſed a right of property. Theſe donations, while Chriſtians were perſecuted by the ſtate, conſiſted chiefly of money, which could be more eaſily concealed than land; for by the Roman law no bequeſt could be made to any community or corporate body without the Emperor's licence, *l.* 8. *C. De her. inſt.*; and ſeveral of the perſecutions raiſed againſt the Chriſtians were owing to the view of profit that the Emperors propoſed to receive by the confiſcation of the lands that had been bequeathed to the church. But immediately after Chriſtianity became the eſtabliſhed religion of the Empire, the church were allowed to hold whatever ſhould be left to them by teſtament, *l.* 1. *C. De ſacroſ. eccl.*; and they were ſoon enriched by the large donatives of land-eſtates granted to them, proceeding either from the devotion or from the vanity of the donors. All thoſe lands were put under the management of the biſhop of the dioceſe; and the yearly rents diſtributed by the deacons, according to his direction, for the ſupport of the clergy and the poor. To prevent the abuſes which even then were beginning to be committed in the application of the church-revenues, it was ordained by Pope Simplicius, *anno* 475, that they ſhould be divided into four parts; one to the biſhop himſelf, one to the inferior clergy, one for preſerving the fabric of the ſeveral churches within the dioceſe, and the remaining fourth to the poor, *Cauſ.* 12. *q.* 2. *c.* 28.; the proportions of each diviſion to be fixed by the biſhop, *ibid. c.* 23. But the corruption of the clergy ſtill growing from evil to worſe, moſt of the biſhops, ſenſible how neceſſary an inſtrument money was to church-preferments, appropriated the whole to themſelves; and ſo left the inferior clergy deſtitute of all ſupport or proviſion, but what depended on the voluntary contributions of thoſe who were under their charge.

3. Great

3. Great murmurings having been occaſioned by this additional burden on the laity, churchmen bethought themſelves ſeriouſly of an expedient, which had been formerly recommended by St Auſtin, a father of the fourth century, of laying in a claim to the tenth of the fruits of every real eſtate, after the example of the Levites in the Jewiſh law. We find accordingly, in ſome of the church-councils held in France, in the ſixth century, the payment of tithes preſſed by the warmeſt exhortations; and ſome donations of tithes were, according to Mezeray, freely made by perſons of great eſtates in that century, and about the beginning of the ſeventh, chiefly to monaſteries, and but a few to the ſecular clergy, who, if the church's claim had been well grounded, would have had the moſt equitable right to them. But all this was voluntary: for the right of tithes is not once mentioned among the many conſtitutions enacted by Juſtinian, and the Chriſtian Emperors, his predeceſſors, for fixing and preſerving the rights and privileges of the church; nor is ſuch right declared by any law of the Viſigoths, Lombards, or other nations, which emerged out of the ruins of the Weſtern Empire, till Charles the Great eſtabliſhed it in general terms, towards the end of the eighth or beginning of the ninth century, *leg. Lang. l.* 3. *t.* 3. *c.* 1. *&* 2. And in fact, tithes were not before that period exacted, either in France, Africa, or the Eaſtern Empire; ſee *Padr. Paolo's treatiſe of benefices*, and *L'eſprit des loix*, *l.* 31. *c.* 12. At what time this right was acknowledged in Scotland is uncertain: for the affirmation of Hector Boetius, *lib.* 9. that K. Convallus injoined their payment by an act about the year 570, long before it was received by any nation in Europe, is neither probable in itſelf, nor ſupported by authority. David I. made two grants of lands with the tithes to particular churches; copies of which are preſerved in Anderſon's *Diplom. Scotiæ*; and there is an expreſs ſtatute of David II. *c.* 42. § 3. inflicting the pains of excommunication upon thoſe who ſhould refuſe to pay their tithes.

4. Thus, after the right of tithes came to be univerſally allowed to the church by Chriſtian princes, the church's patrimony conſiſted of two branches: *firſt*, Of the property itſelf of ſuch lands as had been gifted or deviſed to them from time to time; which was called the *temporality of benefices:* but lands given to, or acquired by a biſhop *tanquam quilibet*, are no part of the church's patrimony; for they deſcend to the biſhop's heirs, and not to his ſucceſſors in office. *2dly*, The tithes of all lands; which get the name of the *ſpirituality of benefices*, becauſe they were accounted, in a more proper ſenſe, their patrimony; though it is certain that tithes, in their infancy, were given, not to the clergy alone, but to lay monks, who took on themſelves the name of *pauperes*, and to other indigent perſons. The word *benefice*, which was originally uſed to ſignify a grant of temporal lands to a vaſſal for military ſervice, was afterwards transferred by canoniſts to church-livings; becauſe theſe were alſo gratuitous rights in favour of churchmen, in conſideration of their ſpiritual warfare.

5. The ſeveral diviſions of benefices ſtated by writers, into ſecular and regular, cathedral and parochial, &c. have been ſufficiently explained, *ſupr. b.* 1. *t.* 5. It is common to all benefices, that they are not the property of the beneficiaries, whoſe right is only temporary, and who ought therefore to uſe it without deſtruction or waſte, that their livings may be preſerved entire to their ſucceſſors. Hence it was by the Canon law declared unlawful for biſhops to do any acts relating to their churches, without the conſent of the chapter, *Decretal. l.* 3. *t.* 10. *c.* 4.; or to exchange or diſpoſe of any part of their benefices, even with the concurrence of the chapter, unleſs the deed appeared evidently profitable to the church, *Cauſ.* 12. *q.* 2. *c.* 52. Nor could the heads of religious houſes, as monaſteries or priories, alie-

nate, without conſent of the conventual brethren. As to the law of Scotland, it appears by the preamble of 1606, *c.* 3. that the conſent of the chapter was, from the earlieſt times, required in all alienations or leaſes granted by the biſhop of any part of his benefice; and that on the ſame ground of law, the conſent of the biſhop, and of the majority of the chapter, was eſſential to all deeds granted by the dean, or any ſingle member of the chapter, as to his particular benefice, *Spottiſw. v. Kirkmen, p.* 186. *College of Aberdeen.* But this incapacity did not ſtrike againſt their power of receiving the heirs of vaſſals; for though the entry of heirs be a *renovatio*, it is not an *alienatio feudi.* Craig acquaints us, *lib.* 1. *dieg.* 13. § 14. that before the Reformation, it behoved the chapter to give this their conſent to the biſhop's deed in a meeting aſſembled for that very purpoſe; or, according to the phraſe of thoſe times, in a meeting *chapterly* convened; but by the ſaid act 1606, the ſubſcription of the majority, however procured, and though adhibited at different times, and in different places, was declared ſufficient. Yet it was ſtill neceſſary that the majority ſhould ſign their conſent during the biſhop's life, and while he continued in that church, without having revoked the deed; for either the death, tranſlation, or revocation of the biſhop, was a mid impediment or bar hindering the chapter's conſent from being connected with the deed conſented to. Hence a poſterior deed granted by the biſhop, to which the chapter's conſent was preſently obtained, excluded a prior, though the prior ſhould have got the full number of ſubſcriptions to it, after the poſterior deed was conſented to by the chapter, *Cr. ibid.*

6. When a vacancy happened in the epiſcopal ſee, by the death, deprivation, or tranſlation of the biſhop, the chapter ſupplied the place of the biſhop, or repreſented him, both in ſpiritual matters, except in conferring benefices, the collation of which belonged to the biſhop, *Decretal. l.* 3. *t.* 9. *c.* 2.; and even in temporal, 6*to Decretal. l.* 1. *t.* 8. *c.* 3. But Craig's opinion, *lib.* 1. *dieg.* 13. § 16. *ſub fin.* is probable, and appears agreeable to our practice, that this right in the chapter extended not to deeds of alienation, but was confined to ordinary acts of adminiſtration, as letting leaſes for a moderate endurance, removing tenants, &c. *Spottiſw. v. Kirkmen, p.* 187. *Erſkine.*

7. By our ancient uſage, parſons, and other of the inferior clergy whoſe benefices did not depend on the biſhop, might feu out the lands belonging to them, *Cr. lib.* 1. *dieg.* 13. § 17. notwithſtanding the text in the *Conſ. Feud. l.* 1. *t.* 1. *pr.* But no feudal grant of church-lands, whether by them, or by the dignitaries of the church, was valid, either by the Canon law or our uſage; unleſs, *firſt*, the condition of the benefice was thereby made better, *i. e.* unleſs the yearly feu-duty exceeded the rent of the lands feued, *Cr. l.* 1. *dieg.* 13. § 18.; 2*dly*, unleſs the patron gave his conſent, *Cauſ.* 16. *q.* 7. *c.* 34.; for every one might reclaim a donation made by himſelf or his anceſtor to the church, if the beneficiary, whoſe right was only temporary, ſhould, by alienating it without his concurrence, attempt to invert it to a purpoſe different from what the donor had expreſſed in his grant, *St.* 2. *Rob. I. c.* 1. § 4. 5. And hence the King's confirmation was neceſſary in the alienation of church-lands belonging to biſhops or abbots, *Reg. Maj. l.* 2. *c.* 23. § 1. becauſe the law preſumed the King to be the donor, and of courſe the patron of thoſe benefices, *ibid.* § 2. After the Papal power was grown to its greateſt height, the Pope, in 1468, wreſted this right from the patrons, whether the King or ſubjects, and declared all alienations of church-lands or goods void which were granted *inconſulto Romano pontifice*, *Extr. Com. l.* 3. *t.* 4.; ſee *Craig, lib.* 1. *dieg.* 15. § 29. When churchmen, on the firſt appearance of a reformation in this kingdom, began to ſuſpect that they might ſoon be deprived of their church-revenues, they

they frequently feued their lands at a yearly duty conſiderably below their true value, for which they received large ſums from the feuers in name of fine or entry; and the Pope, from the ſame apprehenſions, readily ſtrengthened thoſe grants by his confirmation. To remove the hurtful conſequences of this kind of dilapidation, and prevent it for the future, it was enacted by 1564, *c.* 88. and 1584, *c.* 7. That all feus of church-lands ſhould be confirmed by the ſovereign; and that all ſuch feus already granted, which had not been confirmed by the King or Pope, or which ſhould not be confirmed by the King within a determinate day, ſhould be null. And thus the ſovereign's power in that matter, as coming in place of the Pope, was not only revived, but enlarged above what it had been formerly: for by the two laſt-quoted acts, his right of confirming reached over all church-lands, whether he was patron of the churches or not; whereas his original right was confined to the ſpecial lands of which the crown was either the real or the preſumed patron. As ſeveral feus had been granted by biſhops in the reign of James V. to which that king had conſented by his ſuperſcription and privy ſeal, but which were not formally confirmed either by the King or Pope, theſe are declared by 1593, *c.* 187. to have full force, and to be preferable to poſterior grants of the ſame lands confirmed by the King in conſequence of the act 1584.

8. Churchmen were, by acts paſſed early after the Reformation, reſtrained not only from granting feus of church-lands, but from charging them with burdens to the prejudice of the benefice. Thus, by 1585, *c.* 11. it behoved all who were to be provided to biſhopricks, abbacies, or other benefices in the King's gift, to give ſecurity that they ſhould leave them in as good condition as they found them at their entry; and all leaſes, penſions, or other deeds hurtful to the benefices, were declared null. More particularly, biſhops, by 1606, *c.* 3. were prohibited to grant penſions out of their benefices, to endure longer than their own right; by 1594, *c.* 200. no beneficiary, under a prelate, was allowed to grant leaſes of a longer duration than three years, without conſent of the patron; and by 1617, *c.* 4. no prelate was to let any part of his patrimony for a longer term than nineteen years, nor any churchman, under a prelate, for a longer term than their own lives, and five years after, under the pains of deprivation and infamy. As ſeveral churchmen under prelates took occaſion, from this laſt act, to grant leaſes for the term thereby indulged to them, without conſent of the patron, it was declared, by 1621, *c.* 15. that the act 1617 was not intended to derogate from the former law, which required the conſent of the chapter or patron to the leaſes of church-lands in which they had a legal intereſt, but merely to reſtrain the unbounded liberty that churchmen aſſumed, in granting leaſes to laſt for many lives, and many nineteen years; and that therefore all leaſes that had been granted by any inferior clergyman, to continue longer than three years, ſhould be void where the patron had not interpoſed his conſent. Leaſes granted by churchmen, though they ſhould have exceeded the legal terms of endurance, were ſuſtained for the term allowed by law, and ſet aſide as to the remainder, *July* 18. 1668, *Johnſton*. How churchmen might acquire a right to church-lands by poſſeſſion, ſee *infr. b.* 3. *t.* 7. § 33. 34.

9. The teind, or tithe, which is called *the ſpirituality of benefices*, may be defined, that proportion of our rents or goods which is due to the Chriſtian clergy, for performing divine ſervice, or exerciſing the other functions proper to their ſeveral offices. We are taught by natural, as well as revealed, religion, that a part of our ſubſtance is due for the ſupport and maintenance of the worſhip of God, and that thoſe who ſerve at the altar ought to live by the altar. But whether the ſpecial proportion of a tenth of our yearly

yearly revenues is due to the Chriſtian clergy by a divine and unalterable right, is a point which has been agitated with great heat. It is affirmed by all the Canoniſts, by moſt of the Popiſh clergy, and by no inconſiderable number of the Proteſtant, among whom our firſt reformers from Popery may be reckoned; and it is denied by moſt of the Proteſtant princes and ſtates of Europe. The topics urged in proof of the affirmative are chiefly drawn from that article of the law of Moſes, by which God himſelf ordained the tenth of the fruits of the ground to be given to the prieſts and Levites, *Numb.* xviii. 21. *et ſeqq.* But, *firſt*, This argument is improper in a queſtion, What the divine law is in the Chriſtian church? for the Moſaical law, in ſo far as related to the policy of the Jewiſh church, was not given forth as a rule to other nations; and being but temporary in reſpect even of the Jews, loſt its force at the coming of our Saviour, when the order itſelf of the prieſts and Levites was aboliſhed. *2dly*, The Popiſh clergy, who offer this plea, do themſelves diſclaim the obligatory force of the Jewiſh law, where it interferes with their views of power or intereſt; for they have, in ſpite of an ordinance of Moſes, which prohibits the Levites to poſſeſs lands in their own right, *Numb.* xviii. 23. 24. drawn to the church, beſides the tithes, a conſiderable property in land, in all the countries that acknowledge the ſee of Rome. There can be no doubt of the ſentiments of the Scottiſh legiſlature on this point ſince the Reformation; for our ſovereigns, in place of transferring the tithes from the Popiſh to the Proteſtant clergy, have aſſumed the power of beſtowing grants of the greateſt part of them to laymen, with the burden of reaſonable ſtipends to the clergy; which grants have been, either expreſsly, or by conſequence, ratified in parliament.

10. The Canon law divides tithes into predial and perſonal, *Decretal. l.* 3. *t.* 30. *c.* 20. Predial tithes ariſe from the product of lands, whether merely natural, or in part induſtrial; the whole of which is tithable, without any deduction or abatement given to the poſſeſſor, *propter culturam et curam.* That law does not ſtate mixed tithes as a branch of this diviſion, as Stair has done, *b.* 2. *t.* 8. § 5. 6. and Mackenzie, § 4. *h. t.*: for the tithe of animals, which anſwers to the deſcription of mixed tithes given by theſe authors, is truly predial, as it is payable without the deduction of any charges laid out in rearing it; and as it belongs to the church of the pariſh where the paſture-lands lie, and not of that in which the proprietor reſides, which is the diſtinguiſhing character of predial tithes, *Gloſſ. in Lancel. Inſt. jur. Can. l.* 2. *c.* 26. § *Decimarum.* Perſonal tithes include all profits which ariſe not from lands, but are made by induſtry alone, whether by handicraft trades, commerce, hunting, war, &c. But they have never been acknowledged in Scotland. A deciſion obſerved by Stair, *Nov.* 29. 1678, *Birny*, by which certain perſonal tithes were adjudged to be part of a benefice, when ſupported by immemorial poſſeſſion, is no evidence of the right of our clergy to perſonal tithes; and is founded merely upon a preſumption, that no man would ſubject himſelf to any ſervitude or payment, for time paſt memory, had he not been obliged to it by an anterior poſitive conſtitution.

11. That proportion of the fruits of the ground which is due for the ſervice of God, ought naturally to belong to him who diſcharges the office of paſtor in the pariſh where the lands lie. Hence a rule is laid down, *Decretal. l.* 3. *t.* 30. *c.* 29. that tithes are due to parochial churches *de jure communi*; and the equity of this rule ſeems to be acknowledged by our ſtatute-law, both in the times of Popery, by 1489, *c.* 7. which makes the receiving of tithes, without a leaſe from the parſon or vicar, criminal; and after the Reformation by repeated acts, 1593, *c.* 163. & 165. by which, miniſters who

who were lawfully provided to benefices, are ſecured in the enjoyment of the tithes belonging to them, againſt all grants, made, or to be made, to their prejudice, even in parliament, *parte inauditâ*; ſee *June* 27. 1665, *Ferguſon*; *Jan.* 14. 1674, *Johnſton*. Yet it muſt be admitted that this rule, *Decimæ debentur parocho*, never obtained univerſally at any period of time. At firſt, the payment of tithes was voluntary; and thoſe that were willing gave them, not always to the incumbent of the pariſh where the tithe was drawn, but perhaps to ſome church at a conſiderable diſtance from it; ſometimes to poor laymen; and moſt frequently to monks, to whom devout Chriſtians were for many ages more liberal in their donations than to the ſecular clergy, on account of the high opinion conceived of their ſanctity, from their profeſſion of poverty, and auſtere rules of penance. And even after the right of tithes was fully eſtabliſhed in the church, that right was moſt unjuſtly wreſted from the parochial clergy, *firſt*, by the conſecration or appropriation of the tithes to other churches or churchmen; *2dly*, by Papal exemptions; and, *3dly*, by the infeudation of tithes to laymen.——As to the *firſt*, Patrons, who conſidered themſelves, upon the emerging of every vacancy, as the abſolute proprietors of the benefice, *ſupr. b.* 1. *t.* 5. § 10. aſſumed frequently a power of appropriating or annexing the whole endowments of it to a cathedral church or monaſtery, both that part which was given by themſelves, and even the tithes. By this annexation, the patron conveyed from himſelf to the donees, not only the right of preſenting an incumbent, but all the fruits of the benefice; ſo that the donees became in effect the perpetual beneficiaries of the church annexed, and of conſequence the titulars of all the tithes belonging to it. In appropriations to a cathedral church the patron made the grant ſometimes to the biſhop himſelf; and when that happened, the church annexed became part of the biſhop's own benefice, and was called *menſal*; either from *menſa*, which in the middle ages ſignified whatever was in one's patrimony or property, *Du Cange*, *v. Menſa*, or becauſe it enabled the biſhop to ſupport his table with hoſpitality. Sometimes the church was given, not to the biſhop, but to the chapter; and then it was called *common*, becauſe all the members of the chapter had a common intereſt in it. See however a different account of the origin of menſal churches, *Cr. lib.* 1. *dieg.* 15. § 7.; *Forbes on tithes*, *p.* 35. Many inſtances of ſuch annexations, by which the parochial miniſters were in effect robbed of their livings, occur with us, as early as our moſt ancient records or chartularies carry us: and the abuſe became at laſt, by its frequency, ſo flagrant over all Chriſtendom, that it was prohibited in the ninth century, not only by church-councils, *Cauſ.* 16. *q.* 1. *c.* 56. but by an ordinance of Louis le Debonaire, *Cap. Lud. Addit.* 3*tia*, *c.* 72.; and in the fifteenth century, by a Scottiſh ſtatute, 1471, *c.* 44.; by which all ſuch appropriations were forbidden under the ſevere pains of treaſon. Nevertheleſs the practice ſtill prevailed, till the reformation from Popery put an effectual ſtop to it, in all the ſtates which in the ſixteenth century ſhook off the Papal authority.

12. As the prelate, or monaſtery, to whom a parochial church was thus made over by annexation, could not by themſelves ſerve the cure in the annexed church, they did it by a deputy, who got the name of a vicar, becauſe he held the benefice, not in his own right, but in the vice and place of the prelate or monaſtery: for ſuch vicar had no right to the tithes, or to any ſettled maintenance out of the benefice; he depended wholly on his employers; who gave him ſuch ſhare of the tithes as they thought fit to aſſign to him for his living, and who could remove him at pleaſure. Sometimes the patron in his grant annexed only the greater tithes, of corn, to the cathedral church, and reſerved the leſſer for a vicar

who ſhould be preſented by himſelf to ſerve the cure in the parochial church. Sometimes he reſerved for that purpoſe, not the leſſer tithes only, but certain lands belonging to the benefice, called for that reaſon *vicar's lands*, of which mention is made, 1593, *c.* 161.; and ſometimes he retained for the vicar's behoof, part even of the greater tithes, under the name of *the vicar's penſion*. Theſe laſt vicars, who were named to the pariſh-church by the patron in virtue of his reſervation, held the benefice during life; and as they had a right to the leſſer tithes, or to the vicar's lands, or to ſome other ſtated ſhare of the benefice, *jure proprio*, they were proper beneficiaries. Hence aroſe the diviſion of benefices into parſonages and vicarages; and the diviſion of tithes into parſonage and vicarage tithes. And hence it may be perceived, that the ſame church might have been both a parſonage and a vicarage; a parſonage, in regard of the cathedral or monaſtery, which had got a right by the annexation to the parſonage-tithes; and a vicarage, in reſpect of the vicar who ſerved the cure, and was intitled either to the vicarage-tithes, or to that part of the benefice which the patron had in his grant expreſsly reſerved for the vicar's ſubſiſtence.

13. Parſonage-tithes, which belong to the parſon, comprehend by the uſage of Scotland only the tithe of corns, as of wheat, barley, oats, peaſe, &c. They are called in our Latin charters *decimæ rectoriæ*, from *rector*, a parſon; and ſometimes *decimæ garbales*, (though Craig gives another meaning to that epithet, *lib.* 1. *dieg.* 15. § 10.), from *garba*, or *gerba*, a vocable of the middle age, ſignifying a ſheaf or handful of corn, *Du Cange*, *v. Garba:* and hence the French to this day expreſs the drawing of the tithe, or the carrying it off from the field, by *enlevement du gerbe*, *Dict. de l' academie Franc.* The leſſer tithes, which get the name of vicarage, are appropriated to the vicar, and compriſe all the predial tithes, except the *decimæ garbales*, whether they be the immediate fruits or product of the ground, as graſs, flax, hemp, or whether they be other profits, which the land brings up by the poſſeſſor's induſtry, as calves, fiſh, eggs, milk, &c. The chief difference between parſonage and vicarage tithes, in their effects, is, that parſonage-tithes are every where the ſame, the law having made them, in the general caſe, a burden upon all lands; whereas the payment of vicarage-tithes is governed by cuſtom, and cannot be exacted where there has been no uſe of payment. Thus the tithe of eggs, if it has been accuſtomed to be paid to the vicar of one pariſh, is due to him; but the vicar of another pariſh, if he has not had that uſe, cannot demand it. Nay, in the ſame pariſh, one landholder may be liable in a certain kind of vicarage-tithe, if he has been wont to pay it, and another who never paid it will be free, *July* 7. 1677, *Parſ. of Preſtonhall.* By our older practice, the right of all vicarage-tithes indiſcriminately was local, and depended upon cuſtom, *Feb.* 11. 1665, *Scot.* But ſome later deciſions ſeem to make a diſtinction. The tithe of animals, and of things produced from animals, as lamb, wool, milk, cheeſe, &c. has been adjudged to be due, though not accuſtomed to be paid, *Fount. July* 24. 1678, *L. Grant*, ſtated in *Dict.* ii. *p.* 438.; *St. b.* 2. *t.* 8. § 6. But flax, plants, roots, with the other product of gardens, are not ſubject to tithe, unleſs uſe of payment be proved, *June* 9. 1676, *Burnet.* For the preſcription of tithes, ſee *infr. b.* 3. *t.* 7. § 14.

14. The right of tithes was inverted from the parochial clergy; 2*dly*, by Papal exemptions. Biſhops and religious houſes to whom donations of land had been made, were originally ſubjected to the payment of the tithe of thoſe lands to that church where they lay, in the ſame manner that the donor himſelf was previouſly to the donation. To get free from this burden, application was frequently made to the Pope; who, from the plenitude of his power, took upon him to grant exemptions from the payment of tithes, in favour of any churchman or religious ſociety. This he did with

with ſo liberal an hand, that there was hardly a religious order in the church which was not, about the beginning of the 12th century, exempted from the payment of the tithe of their own property-lands. To relieve in ſome meaſure the parochial clergy from ſuch oppreſſive acts of power, firſt, Pope Adrian IV. *anno* 1156, and after his example, Alexander III. *anno* 1170, confined thoſe exemptions to the lands in the natural poſſeſſion of the three orders of Ciſtertians, Templars, and Hoſpitallers; and decreed, that all other religious houſes ſhould pay the tithe of their own property, except of the *novalia*; that is, lands that were newly brought under tillage at their own expence, *Decretal. l.* 3. *t.* 30. *c.* 10. This privilege of exemption indulged to the Ciſtertians was, by our ſupreme court, communicated to the lords of erection, who ſucceeded in their place, *Gilm.* 110. But, *firſt*, that exemption was a perſonal privilege, granted to the monks, as *pauperes*, which ought not to have deſcended to their ſucceſſors, *Mack. Obſ.* on 1587, *c.* 29. *2dly*, The exemption granted by that canon to the Ciſtertians, was limited to ſuch of their lands as they had acquired before the date of the canon, without any privilege as to *adquirenda*, *Decret. l.* 3. *t.* 30. *c.* 34.; and it does not appear that the Ciſtertian order had any property in Scotland ſo early as the pontificate of Adrian IV. No lands, therefore, which formerly belonged to any of theſe privileged orders, are now exempted from the payment of tithes, *June* 15. 1737, *Miniſter of Barry*.

15. *Laſtly*, The clergy loſt many tithes by their infeudation, or grants of them made to laymen, by which they were ſeculariſed, and became in a proper ſenſe temporal rights. Lay patrons, not contented with diſpoſing of the revenues of the parochial churches which they had founded, in favour of cathedrals or monaſteries, ſometimes made grants of the tithes to a poor lay friend; which grants were frequent in the eleventh century. Churchmen too, when the perſons liable in tithes were backward in their payments, or hard to be come at, choſe rather to feu them out to the owner of the land at a neat yearly duty, than undergo the trouble of collecting them, or run the hazard of not making them effectual; and ſometimes they made an abſolute grant of part of them to their prince or ſovereign, the more readily to engage his intereſt or aſſiſtance for recovering the reſt. As the church felt its power and intereſt conſiderably leſſened by theſe and ſuch other infeudations to laics, the diſpoſing of tithes to laymen, under whatever pretence, was prohibited by ſeveral Lateran councils, and particularly one held by Alexander III. in 1180, and another by Innocent III. in 1215, under the heavy penalty of the want of Chriſtian burial, and the yet heavier one of eternal damnation: and laymen were even forbidden to hold tithes, without diſtinguiſhing whether they claimed them under a grant prior or poſterior to the date of theſe councils. Becauſe it appeared inconſiſtent with equity, that prior rights ſhould be cut off by any ſubſequent church-canon, ſeveral Popiſh ſtates, and particularly France, have ſecured the poſſeſſors of tithes which had been feued by churchmen to them before the Lateran councils, *D'Acoſta in Decretal. l.* 1. *t.* 36. § *ult.*

16. Many lands in Scotland are enjoyed *cum decimis incluſis et nunquam antea ſeparatis*. All our writers agree, that ſuch lands are free from the payment of tithes; but they differ about the true meaning of thoſe words. Lord Stair, *b.* 2. *t.* 8. § 10. and Sir George Mackenzie, § 6. *h. t.* are of opinion, that the *decimæ incluſæ*, are thoſe which were never known to have been ſeparated from the ſtock, and which therefore were preſumed to have been feued out along with the lands before the Lateran councils above mentioned, when as yet there was no church-canon prohibiting their infeudation. Craig, on the other hand, who holds it for certain, *lib.* 1. *dieg.* 15. § 9. that no tithes were feued in Scotland ſo early, underſtands by

decimis

decimis incluſis, thoſe which at any period, even after thoſe councils, were feued by churchmen who had right both to ſtock and tithe; and who, as they gathered the whole fruits indiſcriminately, tithe as well as ſtock, when the lands were in their own poſſeſſion; ſo when they came to make over the property to others, they included the ſtock and tithe in one charter. And indeed a feu of that ſort is not properly a feu of tithes, but a feu of lands which had never been ſubject to tithes; ſo that though the Lateran councils had been obligatory in Scotland, ſuch feu fell not under the prohibition. This opinion ſeems not only agreeable to the general plan of our law, by which prelates and other churchmen were, as early as the year 1457, allowed to feu their lands by the 71ſt act of that year; but is alſo favoured by the act of annexation, 1587, *c.* 29. which ſuppoſes, that feus of lands *cum decimis incluſis*, are valid, without diſtinguiſhing the period in which they might have been granted. Lands, therefore, feued *cum decimis incluſis*, are exempted from the payment of tithe, though the grant had been poſterior to the Lateran councils, if it was prior to the act of annexation, *Dirl.* 229.; *Dec.* 7. 1737, *Arrot.* A caſe may be figured, where the right of lands *cum decimis incluſis*, carries no privilege as to the vicarage-tithes; for where the cure happened to be ſerved by a vicar, the parſon, though he might feu the lands *cum decimis incluſis*, in ſo far as concerned the tithes of corn, which were his own, and which he had never ſeparated from the ſtock, had no power over the leſſer tithes, which belonged to the vicar.

17. From the above hiſtory, it appears, that though the Popiſh clergy had, by various devices, ingroſſed to themſelves a conſiderable part of the property of Chriſtendom, their riches were moſt unequally divided. While the dignitaries of the church, and the regular clergy, lived in the greateſt affluence, the ſcanty pittance, which remained for the inferior ſecular clergy, hardly afforded them bread. Upon the ſuppreſſion of Popery, the Reformed clergy, who were entirely made up of parochial miniſters, and a few ſuperintendants, flattered themſelves, that the nobility and gentry, who appeared ſo zealous for the Reformation, would have been alſo forward to redreſs the grievances of the clergy, by reſtoring the appropriated tithes and benefices to the pariſh-churches: but that method of proviſion ſuited not with the views of ſuch of our men of intereſt as wanted to ſhare in the ſpoils of the Popiſh church. The firſt ſtep taken towards eſtabliſhing a legal maintenance for them, was an act of privy council, dated Feb. 15. 1562, declaring, that the third of all the Popiſh benefices ſhould be ſet apart for the ſervice of the government, and the ſupport of preachers and readers; and that the old beneficiaries who had exhibited rent-rolls of their benefices in compliance with a former act of council, ſhould enjoy the remaining two thirds during their lives, *Keith*, *Hiſt. App. p.* 178. But this ordinance contributed little to the benefit of the clergy, both becauſe moſt of the Popiſh churchmen had given up their rent-rolls far below their true values, and becauſe Q. Mary, ſoon after her return from France on the death of her huſband Francis II. had granted to many of them a releaſe of their thirds, or given leaſes of them to others; for which ſee 1592, *c.* 121. This gave riſe to an act, 1567, *c.* 10. directing the whole thirds, without exception, to be paid to the collectors of the miniſters ſtipends; and for the more ſure payment of them, particular localities were aſſigned in every benefice to the extent of a third, which were called *the aſſumption of thirds*: but no third was to be aſſigned out of any benefice of cure, which had never been appropriated to other uſes, and had been provided to the miniſters ſerving the cure at the churches to which theſe benefices belonged, 1592, *c.* 158. That the above fund might be more juſtly diſtributed among

mong the clergy, a commiſſion paſſed the great ſeal, ſtyled *the commiſſion of plat*, authoriſing commiſſioners to modify ſtipends out of it. But this fund proved as ineffectual as the former, having been rendered quite precarious by 1606, *c.* 2. reſtoring biſhops to the whole of their benefices; and tho' the biſhops were, by that act, laid under an obligation to maintain the miniſters within their ſeveral dioceſes out of the thirds, they made ſhift to elude that obligation.

18. As for the benefices of abbacies, priories, &c. proper to the regular clergy, James VI. accounted himſelf in a particular manner abſolute proprietor of them, not only in conſequence of the reſignations which he had obtained from the greateſt part of the beneficiaries, but becauſe the purpoſe for which they had been granted, viz. the maintenance of the regular clergy, having been, upon the Reformation, declared ſuperſtitious, the benefices themſelves fell, as *bona vacantia*, to the crown. The Reformed clergy had indeed put in a claim to the whole of the benefices of the Popiſh church, not only to the tithes, but to the church-lands, either as their proper patrimony, or as ſubject to their ſole adminiſtration, for the ſupport of the poor, and for other pious uſes, *Firſt book of diſcipline*, *head* 6. But his Majeſty, unwilling to part with ſo valuable an acquiſition, firſt exerciſed a power, upon the reſignation or death of any abbot or prior, to appoint a lay commendator for life to the vacant benefice, who was as little liable to account for the fruits as thoſe whom the Pope frequently named before the Reformation, *ſupr. b.* 1. *t.* 5. § 4. And moſt of theſe commendators, not ſatisfied with a grant which died with themſelves, prevailed at laſt with his Majeſty to change their liferent into a perpetual or heritable right; which he did, by ſecularising, or, in our law-ſtyle, erecting moſt of the monaſteries and priories into temporal lordſhips; the grantees of which were ſometimes called *lords of erection*, and ſometimes *titulars of the tithes*; becauſe they had, by their grants, the ſame title to the erected benefices, both lands and tithes, that the monaſteries had formerly. As the abbots and priors had before been wont to name their vicars to ſerve the cure in thoſe annexed churches, the lords of erection, as coming in their place, aſſumed the right of preſenting miniſters to them, upon the emerging of a vacancy, even where their charters did not expreſsly bear the right of patronage. A few of thoſe grants of erection were charged with preciſe ſtipends, particularly ſpecified, to be paid to the churches that ſtood within the grantee's erection; but commonly the obligation to pay the thirds was diſcharged in favour of the grantee, and only a general clauſe inſerted, burdening them with the proviſion of thoſe churches in competent ſtipends; which, in many caſes, was ſhamefully diſregarded by the grantees. A ſmall relief was given to the Reformed miniſters ſoon after the Reformation, by a grant of Q. Mary in their favour, to take place on the death or reſignation of the Popiſh incumbents, of all the benefices below 300 merks Scots, which was confirmed by parliament, 1572, *c.* 52.; but that could go but a ſhort way towards the maintenance of the clergy of a whole nation.

19. To put a ſtop to the erections above mentioned, by which both the revenue and the dignity of the crown ſuffered conſiderably, all church-lands, whether belonging to biſhops, abbots, or other beneficiaries, were annexed to the crown, by 1587, *c.* 29. to remain for ever with it unalienably. The following ſubjects however were, by the ſtatute, excepted from this annexation: *Firſt*, All lands which had been before the ſtatute erected by the crown into temporal lordſhips; becauſe, before paſſing that act, the King was abſolute proprietor of all thoſe benefices, and had full power over them. *2dly*, Such lands made over to hoſpitals, otherwiſe call-

ed *maiſondieus*, or to ſchools and univerſities, as had not been inverted to other uſes than they were originally appropriated to; becauſe the purpoſes for which thoſe grants had been made, in place of being ſuperſtitious, were lawful, and even laudable. But, in truth, lands granted to colleges or hoſpitals could not, with any propriety, be called church-lands; and ſo fell not within the act, though they had not been excepted. 3*dly*, Benefices of laic patronage, *i. e.* the patronage of which was veſted in laymen before the Reformation. Theſe were excepted upon this ground, That one who made a grant of lands to a church, or who purchaſed a patronage from the proprietor, was underſtood to ſecure to himſelf the rights of preſenting incumbents, ſuperintending the management of the fund, &c.; which rights were therefore reſerved entire to the patron, as the legiſlature had no intention to cut off, or incroach upon, any private rights acquired by laymen before the Reformation.

20. The manſes and glebes which belonged to the Popiſh churchmen were alſo excepted from the annexation; becauſe every miniſter was accounted to have, if not a divine, at leaſt a natural right to a manſe and glebe; which were therefore to be conſidered as part of the ſpirituality of benefices, and ſo not to be annexed to the crown more than the tithes themſelves. The act therefore declared, that all theſe ſhould remain with the preſent poſſeſſors, or with the churchmen who ſhould be afterwards provided to the benefices. *Laſtly*, Grants of penſions out of benefices were, in certain caſes, excepted from the ſtatute. Penſions of a determinate yearly ſum were frequently granted out of inferior benefices, either by the Pope, or by the biſhop, with conſent of the incumbent, to indigent clergymen, or even to laics, to laſt for the life of the grantee; at other times, ſuch grants were made upon a vacancy, to endure till the vacancy ſhould be ſupplied: and after the Reformation the King exerciſed this right, as coming in the Pope's place. All ſuch penſions, whether granted by the King, or by churchmen, are excepted from the annexation, where they were either authoriſed by the Lords of Council, or followed by poſſeſſion. Biſhops are, by a poſterior act, 1606, *c.* 3. prohibited to grant penſions to endure beyond the time of their own incumbency.

21. Feus and leaſes that had been granted by churchmen are, by this act, ſecured to the feuers or tackſmen, for payment of the ſeveral duties formerly paid by them. The ſuperiority of the lands thus feued, which was before in the church, is now declared to belong to the King; and the heirs of the feuers are directed to make up their titles to the property, by brieves iſſuing from the King's chancery. Where churchmen had feued out ſtock and tithe together, *i. e.* had feued their lands *cum decimis incluſis*, the crown's ſuperiority is declared to extend over the whole tenantry, both ſtock and tithe; but nine tenths only of the feu-duties payable for ſtock and tithe are made payable to the crown, the remaining tenth being reſerved for the churchman, in place of his tithe. After the death of the beneficiaries who were alive at paſſing this act, the full right of the lands feued *cum decimis incluſis*, devolved upon the King, and was by him afterwards transferred, in the poſterior erections of thoſe lands in favour of the grantees, without any exception of the tenth of the feu-duties that had been, by the act 1587, reſerved to the beneficiaries.

22. It is extremely doubtful, whether the lands only which belonged to the church, were intended to be annexed by this ſtatute, or alſo the tithes. On the one part, the act is intitled, "Annexation of *the temporality* of be-" nefices;" the annexing clauſe alſo enumerates moſt anxiouſly, baronies, fiſhings, and all the other appurtenances of land that can be well figured, but without the leaſt mention of tithes; and a ſubſequent clauſe of the act

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is introduced with a recital, that neither the teind-ſheaves, *i. e.* the parſonage-teinds, nor the ſmaller tithes of any lands within the kingdom, are included in the annexation. On the other hand, the very firſt article excepted from the ſtatute is the teind-ſheaves, and other tithes of all lands pertaining to parſonages or vicarages; all which are to remain with the preſent poſſeſſors, or with thoſe who ſhall be afterwards provided to the benefices; which exception imports in common ſenſe, that the tithes of the lands not belonging to thoſe benefices, fall under the annexation. And it ſeems to be affirmed in a poſterior ſtatute, 1593, *c.* 189. that the tithes of all the prelacies of the kingdom are annexed to the crown by the general act of annexation in 1587.

23. Notwithſtanding this ſtatute of annexation, the King continued to make farther erections of church-benefices; which produced another ſtatute, 1592, *c.* 119. declaring all erections made after the act 1587 void; excepting ſuch as had been granted to perſons who had received, ſince that act, the honour of Lords of Parliament. On the reſtitution of biſhops, the annexation was reſcinded, in ſo far as concerned the benefices of biſhopricks, by 1606, *c.* 2.; and the benefices belonging to the biſhops chapters were, in like manner, reſtored to them by 1617, *c.* 2. After the re-eſtabliſhment of Preſbytery in 1690, the benefices belonging to prelates returned of courſe to the crown; and all lands which were formerly holden of them are declared, by 1690, *c.* 29. to be holden for the future of the crown. But as thoſe benefices were not annexed *de novo* to the crown, the ſovereign may diſpoſe of them at pleaſure; and has actually made conſiderable donations out of their tithes, to univerſities, and for other public uſes; and he ſometimes grants penſions out of that fund to private men of decayed fortunes to laſt during their lives.

24. For the better underſtanding the alterations made in the condition of tithes in the reign of Charles I. a brief account may be premiſed, of the methods by which church-beneficiaries, and other titulars, made their right to the tithes effectual, from the time they were firſt poſſeſſed by the clergy. The moſt uſual and natural way was, by the titular's ſeparating the tithe or tenth from the ſtock, or remaining nine tenths, of the crop, after the corns were reaped, and his carrying it off from the field to his own granaries. This got the name of *drawn teind*; and was frequently attended with grievous hardſhips on the owner of the ground, or his tenant: for every poſſeſſor of land who preſumed, after reaping his corns, to carry off any part of them from the field, till the titular had drawn his tithe, was, from the firſt eſtabliſhment of the church's right, ſubjected to ſevere penalties; and the titular, ſometimes from indolence, but moſt frequently with a view of compelling the proprietor to purchaſe the leading of his tithes at an high price, delayed the drawing of his tithe till great part of the crop was rotten. For redreſſing, or at leaſt alleviating this grievance, the tithing of corns was, after the Reformation, regulated by ſundry ſtatutes, 1606, *c.* 8.; 1612, *c.* 5.; 1617, *c.* 9. By the laſt of which, the owner of the crop is directed to require the titular, or tithe-maſter, eight days after cutting the ſeveral kinds of corn therein ſpecified, to draw his tithe in four days after; upon the elapſing of which he may complete his harveſt. But he is not at liberty, by that laſt act, as he was by the two former, to neglect the tithe, after having ſet it apart for the titular; he muſt alſo preſerve it from being eaten by cattle, for eight days after the expiring of the time contained in the requiſition; which, if he do, he is by the act declared free from ſpuilzie, or wrongous intromiſſion. The remedy provided by theſe acts however was far from being adequate to the evil it was intended to cure.

25. Some-

25. Sometimes the titular, in place of drawing his tithes, was prevailed on to grant a leaſe of them to the proprietor for a neat yearly tack-duty; and ſometimes he accepted of a ſtated quantity of corns yearly, commonly called *rental-bolls*, either in virtue of a written rent-roll, or barely by the uſe of payment; which rent-roll, or rental, was preſumed to be the full value of the tithes. In this laſt caſe, the proprietor was obliged to continue the payment to the titular of the accuſtomed number of bolls, though exceeding the true value of the tithe, till he offered the tithe in kind, and made intimation that he would no longer ſubmit to the payment of the rental-bolls, *March* 22. 1626, *Lennox*; *Feb.* 20. 1633, *Coll. of Glaſgow*. And, on the other hand, though the rental-bolls ſhould have fallen ſhort of the true tithe, the titular was bound to accept of them, in full ſatisfaction of the tithe, till he uſed an inhibition of tithes in the manner ſoon to be explained; after which the titular might draw the tithes *ipſa corpora*, *March* 18. 1628, *Lo. Blantyre*.

26. Charles I. ſenſible of the great loſs which his revenue ſuffered by the before-mentioned erections, and being alſo deſirous to provide the parochial clergy in reaſonable ſtipends out of the tithes, executed, ſoon after his advancement to the crown, a revocation of all grants of church-lands, or of tithes, made by his father to the crown's prejudice; and the year after brought an action of reduction, both of the erections granted before and after the act of annexation. The ground of ſetting aſide the erections prior to the annexation was, That they proceeded on the reſignations of the beneficiaries; and that theſe reſignations could only be made uſe of for preſenting new incumbents, but by no means to ſink the benefices. Againſt the erections made poſterior to the annexation, the objection was, That property, once annexed, could not be alienated by the crown without a previous diſſolution in parliament. In January 1627, his Majeſty appointed commiſſioners to confer with thoſe who had any intereſt in church-lands or tithes, towards bringing matters to a reaſonable ſettlement; and authoriſed them to value the tithes, and to name ſubcommiſſioners under them for that purpoſe.

27. As perſons of the higheſt rank and diſtinction were defenders in this action of reduction, it created great heats and animoſities. Conceſſions, however, were ſoon made on both ſides in the way of communing; on the part of the King, that he might not raiſe to a greater height the general ferment of the nation; and on the part of the lords of erection, that they might not loſe all by being caſt in the ſuit. The King demanded, in behalf of the crown, that the titulars, in whoſe favour the erections had been made, ſhould ſurrender to him the ſuperiorities of the church-lands, of which they had obtained the grants, as was preſcribed by the act 1587; and that the crown ſhould have a fixed yearly annuity payable out of all tithes. But the article the King chiefly inſiſted on was calculated, not to ſerve his own intereſt, but to correct the abuſes which continued to be committed in the drawing of tithes, notwithſtanding the aforeſaid ſtatutes; and which his Majeſty propoſed to effect, by obliging the titular to ſell to the proprietor the tithes of his lands at ſuch a yearly value, and ſuch a number of years purchaſe, as ſhould be agreed upon: and where the tithes were deſtined as a perpetual fund for the maintenance of the clergy, or for the ſupport of univerſities, ſchools, or hoſpitals, it was propoſed, that they might be valued at the ſuit of the proprietor; who, upon paying the valued yearly duty to the titular, was to have the abſolute management of the whole crop, ſtock and tithe.

28. After ſome progreſs made in this communing, all parties having intereſt in the tithes entered into ſubmiſſions, or bonds of arbitration, for referring

referring their ſeveral claims to the King's own determination, all dated *anno* 1628. The firſt and fourth ſubmiſſions were ſigned, on the one part, by the lords of erection, and the tackſmen claiming under the erections; and, on the other, by the landholders, who wanted either to purchaſe their own tithes, or to have them valued; and theſe ſubmiſſions contained procuratories of reſignation by the titulars, for ſurrendering their right of ſuperiority to the King *ad remanentiam*, (on which account they were called alſo *the ſurrenders of teinds*); referring to his Majeſty what conſideration ſhould be given to them for the feu-duties, or other conſtant rent of theſe ſuperiorities, and alſo what ſums ſhould be ſettled as the yearly rate and value of the tithes. The ſecond ſubmiſſion was ſigned by the biſhops and clergy, in relation to all the tithes payable by them, of which they were not then in the poſſeſſion: and the third, by the commiſſioners of ſeveral royal boroughs, for all the right they could claim to the tithes which had been granted for the ſuſtentation of miniſters, colleges, ſchools, or hoſpitals, within their reſpective boroughs. Upon each of theſe, the King pronounced a ſeparate award, or decree-arbitral; all of them dated Sept. 2. 1629, and ſubjoined in our ſtatute-book to the acts of Ch. I. The firſt and fourth decrees run in the ſame ſtrain: they declare the crown's right to the ſuperiorities of erection, which had been reſigned to the King by the ſubmiſſions. The ſum of 1000 merks Scots was thereby to be given by the King himſelf to the lords of erection, in ſatisfaction or full payment of each chalder of feu-farm, and for each 100 merks of feu-duty, or other conſtant rent of theſe ſuperiorities; and the feu-duties were to be retained by them till ſuch payment ſhould be made. This part of the above decrees is confirmed by 1633, *c.* 14.; in which there is a proviſo, that it ſhall not extend to the ſuperiorities of the lands belonging to biſhops or their chapters, who had been reſtored in 1606. But by a poſterior act, 1690, *c.* 29. which paſſed after the laſt ſuppreſſion of Epiſcopacy, it is declared, that all theſe ſuperiorities ſhall for the future belong to the crown; and that it ſhall not be lawful to interpoſe any ſuperior between the King and the vaſſals who formerly held of the biſhops or their chapters. The right reſerved to the King by the two decrees-arbitral before mentioned, to redeem the feu-duties from the lords of erection, was renounced by 1707, *c.* 11. Though the vaſſals of erection were, by thoſe decrees, to hold their lands immediately of the crown; yet if any vaſſal once conſents to hold them of the lord of erection, it ſhall not afterwards be in his power to recur to the crown as his immediate ſuperior; ſee 1661, *c.* 53.

29. The moſt important article in theſe two decrees-arbitral is that which directs the valuation of the tithe at a certain yearly rate; after which the landholder is intitled to the whole crop, upon payment to the titular of that yearly duty. The rules which the commiſſioners appointed for that purpoſe are directed to obſerve in the valuation, are different, according to the different condition of the tithes. The words of the decree are, that *the rate of all tithes, where they are valued jointly with the ſtock, ſhall be a fifth part of the conſtant yearly rent that is paid for the lands, ſtock and tithe*; and that where they are valued apart, or ſeverally, the rate ſhall be ſuch as it has been already, or ſhall be valued by the commiſſioners or ſubcommiſſioners, deducting from the tithes ſeverally valued a fifth part for the eaſe of the proprietor. It muſt be acknowledged, that thoſe rules might have been delivered with greater perſpicuity and preciſion; but the meaning appears to be this, that where tithes are let to the landholder for a determinate duty, either in money or in kind, they are poſſeſſed by the ſame perſon who poſſeſſes the ſtock, without the ſeparation of one from the other; and becauſe it is impoſſible, while the ſtock and tithe are thus jumbled together, to fix

the value of the tithe by itſelf, that ſort appears to be the tithe which is ſaid to be valued with the ſtock; and therefore its value is the fifth of the rent payable for both ſtock and tithe; which is accounted a reaſonable *ſurrogatum*, in place of a tenth of the increaſe. On the other hand, where the tithe is drawn, or ſeparated from the ſtock, every harveſt, by the titular, its value is capable of a ſeveral or ſeparate proof, to be fixed according to the quantity of the corns which are drawn as the tithe: and upon this account, that kind is ſaid to be valued ſeverally, and its rate to be fixed, as it has been already, or ſhall be valued by the commiſſioners; that is, the commiſſioners, after taking proof of what was drawn as tithe, were to conſider its value *communibus annis*, and determine accordingly. But in this laſt caſe, the proprietor was to be allowed a deduction of a fifth part of that yearly value; ſo that four fifths of the yearly value of the drawn tithe is the proportion of corns, which is by that rule to be delivered to the titular as the valued tithe. This deduction is commonly called the *King's eaſe*; becauſe it is given by the King in his ſeveral awards as an eaſe to the proprietors. Agreeably to this interpretation of the rule, it has been adjudged, that where the tithe has been poſſeſſed by the proprietor jointly with the ſtock, for payment of a ſtated yearly duty to the titular, the rate of it is fixed at a conſtant yearly rent, *New Coll.* ii. 18.; and that the value of drawn tithe muſt be fixed to what it ſhall be proved by the teſtimony of witneſſes to have been worth one year with another, *Jan.* 28. 1708, *Doul*; *Feb.* 7. 1711, *Hume*; both which judgements are entered into the regiſter-book of the tithe-office.

30. Lord Stair explains this clauſe differently, *b.* 2. *t.* 8. § 14.; and the opinion of that great lawyer muſt have carried double authority with it, in the conſtruction of a ſtatute which had paſſed ſo near his own time, if it did not infer a manifeſt abſurdity. He affirms, that tithes let in leaſe, or in rental, are thoſe which are ſaid by the act to be valued ſeverally; becauſe their values are ſeverally known by their tack-duties, or by the number of rental-bolls; and that therefore the tack-duty, or rental-bolls in uſe to be paid, muſt be the legal valued tithe. But it is obvious, that the value of the tithes cannot be juſtly aſcertained, either by the tack-duty of leaſes, or by rental-bolls: for leaſes laſt no longer than for the term of years expreſſed in them; and the payment of rental-bolls may be diſcontinued at the pleaſure, either of the titular or proprietor, in the manner explained *ſupr.* § 25.; and therefore is never conſidered as the rule for valuing tithes, except where none of the parties oppoſe it; ſee *New Coll.* i. 69. Beſides, if tithes let in leaſe or rental are thoſe which in the ſenſe of the decrees-arbitral are valued ſeverally, nothing remains to fall under the denomination of tithes valued jointly with the ſtock but drawn tithe; and if drawn tithes are to be valued jointly with the ſtock, they muſt, according to the expreſs direction of the decrees-arbitral, be valued at a fifth part of that rent that is paid both for ſtock and tithe: which is abſurd; for no rent is, or can poſſibly be, paid to the proprietor, jointly for ſtock and tithe, where the tithe is drawn by the titular.

31. The proprietor was, by the aforeſaid decrees-arbitral, intitled, not only to an action of valuation, but of ſale, of his tithes, againſt the titular or his tackſman. The price was to be nine years purchaſe of the valued tithe-duty, if the ſeller had an heritable right to the tithes; if, for inſtance, he himſelf was the titular. Where the ſeller was but tackſman, and ſo had a bare temporary right, the purchaſer was to get an abatement of the price, in proportion to the endurance of the tack; and where the purchaſer had already got a leaſe of his own tithes, which was yet current at the time of the ſale, an abatement of the price was alſo to be allowed to him, in proportion

tion to the number of years in the tack yet to run, the amount of all which deductions was to be ſettled by the commiſſioners; but in practice the commiſſioners, in place of abating any part of the price, where the ſeller's right is merely temporary by a leaſe from the titular, direct the intereſt of the price to be paid to the ſeller while his leaſe ſubſiſts, and the capital ſum to be paid to the titular himſelf, upon the expiration of it: and by the ſame rule, where the proprietor who ſues for a ſale, has a leaſe of his own tithes not yet expired, he ought to be allowed retention of the intereſt of the price while the leaſe is current. This part of the awards concerning the valuation and ſale of tithes was ratified in parliament, by 1633, *c.* 17.

32. Several rules have been eſtabliſhed by deciſions, for fixing the particulars which are or are not to be accounted part of the conſtant yearly rent of land in the valuation of tithes. *Firſt*, Every article is to be conſidered as rent which is truly paid by the tenant out of the growth of the lands, (except a reaſonable part of what gets the name of *kains* or *flying cuſtoms*), tho' the landlord ſhould, with a view to diſappoint the titular, diſguiſe it in the tenant's leaſe as paid upon another conſideration than that of rent. Nay, the converted prices of fowls, butter, tallow, weathers, lambs, &c. where the landlord has reſerved an option, either to demand theſe articles in kind, or the valued prices of them, are conſidered, not as kain, but as rent; and for that reaſon accounted part of the rent of the lands, and chargeable with tithe, *Tinw. July* 15. 1752, *Miniſter of Cuſhney*. It is not however a rule without exception, That all rent paid to the landlord for the fruits of the ground is ſubject to tithe, and ſo to be accounted rent in the valuation of tithes; for as orchards produce no fruits that are the ſubjects either of parſonage or vicarage tithes, the rent due by the tenant for an orchard is not to be computed in the valuing of the tithe, *New Coll.* ii. 18. *2dly*, Where the proprietor draws annual profits from the ſale of ſubjects which are more properly part of the land than of the fruits, ſuch profits are not conſidered as rent in the valuation of the tithe, becauſe tithes are a proportion of the fruits only. Thus neither lead-ore brought up from a ſhaft, nor ſtones dug out of a quarry, nor clay out of a pit for making brick or earthen ware, are tithable, becauſe they cannot with any propriety be called fruits. A moſs is deemed to be *pars fundi*, and of courſe is not a tithable ſubject, *Dec.* 11. 1734, *Her. of Calder*. *3dly*, The expence of culture, though heavier than ordinary, if it be annual, ought not to be deducted from the rent. No deduction is therefore to be allowed on the account of dung, though the tenant ſhould purchaſe it at a high price from the inhabitants of a neighbouring village, *Feb.* 6. 1745, *D. Buccleugh*; and far leſs on account of ſea-ware, which generally coſts the tenant no more than its carriage from the ſhore, *New Coll.* ii. 18.: for no rent can be produced without the expence of ſervants, cattle, manure, utenſils, farm-houſes, &c. And as the tack-duty payable by tenants is upon the account of this expence made leſs than it would otherwiſe be, (which was without doubt in the eye of the legiſlature when they fixed the rate of tithe to a fifth part of the rent), the deducting of that expence alſo in the valuation of the tithe would be in effect to deduct it twice, to the diſadvantage of the titular. *4thly*, Where the proprietor has improved or raiſed his rent, the improved or new rent, if it had not been impoſed more than ſeven years before bringing the action of valuation, was not reckoned in the computation of rent by the older practice; probably from the uncertainty, whether the lands would continue able to bear that addition; but by the later deciſions, ſuch part of it is accounted rent as the commiſſioners of tithes, from the circumſtances of the caſe, judge equitable, *Feb.* 1. 1738, *D. Douglas*. Where the improvement of rent was made at an uncommon expence, on lands which would otherwiſe have

have produced little or no rent, *ex. gr.* by draining a lake, the proprietor was allowed a reaſonable abatement on that account, *July* 18. 1739, *Her. of Calder*, though the drained grounds ſhould appear to be truly worth the rent that the proprietor had put on them in his leaſe to the tenant: but by a later deciſion, in 1759, *New Coll.* ii. 175. grounds gained from the ſea by expenſive walls or fences, are not ſubject to the leaſt proportion of tithe. *5thly*, If the proprietor ſhould undertake any burden which the law had impoſed on the tenant, and thereby get an higher rent for his farm; if he ſhould, *ex. gr.* by a ſpecial article in the leaſe, diſcharge the obligation which lies on the tenant of upholding the farm-houſes in good repair, ſuch advanced rent payable to the proprietor is not ſubject to tithe, as it is not paid in conſideration of the fruits, but of the landlord's ſpecial bargain with the tenant, *Dec.* 11. 1734, *Her. of Calder*. *6thly*, As tithes are due only out of the fruits of the earth, and not from the rent of houſes, which are not tithable ſubjects, the rent paid for the ſupernumerary houſes over and above what is neceſſary for the farm, is to be deducted from the rent-roll in the valuation, *ibid.* *7thly*, Mill-rent muſt be alſo deducted from the rental, both becauſe the profits ariſing from mills are merely induſtrial, and ſo not tithable; and becauſe corns manufactured at mills ſuffer a valuation, in fixing the rent payable by the tenant whoſe corns they are, and therefore ought not to be valued againſt the titular a ſecond time in the valuation of the tithe, as mill-rent. This rule is without doubt equitable, where no greater hire is payable to the multurer than is adequate to his labour in grinding the corns; but a proprietor may, under that colour, cut off the titular from the greateſt part of the tithes due out of his lands, by ſubjecting the tenants to heavy rates of multure; for the rent paid by the tenants to the landlord muſt by that device be made conſiderably leſs than what the lands are truly able to bear; and the whole difference of rent which is thus thrown on the mill, is by this rule loſt to the titular; ſee *Falc. Feb.* 6. 1745, *Sir J. Maxwell*. *Laſtly*, Neither is the tenant's obligation to relieve his landlord of the land-tax to be conſidered in the valuation of the tithe, as an increaſing of the rental, becauſe the rate impoſed by parliament on that ſcore is liable to conſtant variations, and the endurance of the tax itſelf not abſolutely certain, *Dec.* 2. 1730, *Baillie;* ſtated in *Dict.* ii. *p.* 440. The general rule, in which all the others relative to this head muſt center, is, That where the lands are in the manurance of the proprietor, the tithe is a fifth part of that rent which they are truly worth, and might have paid had they been rented to a tenant; and when they are actually let, it is a fifth of the rent which they now pay, and may pay in all time coming, in conſideration of the fruits.

33. Where the vicarage of a church is a diſtinct benefice from the parſonage, each belonging to a different titular, the parſonage and vicarage tithes are to be valued ſeverally, 1633, *c.* 19. In this caſe, the yearly ſum to which the vicarage is to be eſtimated on a proof, is to be held as the valued vicarage-tithe-duty; and upon a deduction of this ſum from the fifth of the rent of the lands, which is the legal value of the whole tithe, parſonage and vicarage, the remaining ſum is the valued parſonage-tithe-duty, *Fount. Jan.* 29. 1706, *E. Galloway*. The rule fixing the rate of tithes which are valued jointly with the ſtock, to a fifth part of the conſtant rent, is limited to queſtions brought before the commiſſion-court between the proprietor and titular. Where the titular is not a party, the court of ſeſſion, who are not fettered by any rules preſcribed by the aforeſaid decrees-arbitral, have juſtly raiſed the price of the tithe to what they judge to be the true value of it, viz. to a fourth part of the rent payable for ſtock and tithe, *Dalr.* 29.

34. For carrying the decrees-arbitral in all their branches into full execution under the authority of a proper court, a commiſſion was appointed

ed by 1633, *c.* 19.; with power to the commiſſioners to value and ſell tithes, and to name ſubcommiſſioners for valuing them over all the pariſhes and preſbyteries of the kingdom; to receive reports from the ſubcommiſſioners that had been firſt named by the King in 1627, of the valuations taken before them, and to allow or diſallow the ſame; and to rectify all valuations led, or to be led, which ſhould appear hurtful, either to the titular, to the maintenance of the miniſters, or to the King's annuity. Valuations of the greateſt part of the lands over Scotland had been completed under the authority of the commiſſions of 1627 and 1628, by their ſubcommiſſioners: but unfortunately many of them were loſt, *firſt*, by the carrying off of the whole records of the kingdom to England, during Cromwell's uſurpation, of which the greateſt part periſhed in the veſſel that was bringing them back to Scotland after the Reſtoration; and, *2dly*, by the great fire in the parliament-cloſe in 1700, which conſumed the records of the tithe-office. Of the ſubvaluations that have been preſerved from thoſe calamities, few appear to have been approved of by the principal commiſſioners. This afforded a pretence for titulars to object, that as the powers of the ſubcommiſſioners were barely miniſterial, to take trial of the values, and to report, their reports could have no effect till they had received the approbation of the principal commiſſioners. But the court of ſeſſion, as commiſſioners of tithes, conſidering that the ſubcommiſſioners had expreſs powers given them to value, and that the approbation of the principal commiſſion paſſed of courſe, where no objection was immediately offered againſt the report of the ſubcommiſſioners, have ſupplied that defect in form; and by reiterated deciſions, *Falc.* i. 139. *&c.* have, in the character of principal commiſſioners, approved thoſe valuations, agreeable to the powers granted to the commiſſion 1633, and now veſted in the ſeſſion by 1707, *c.* 9. The laſt of theſe judgements was affirmed upon appeal, in the caſe of the Duke of Montroſe, *March* 15. 1758. But when a proprietor appears to have deſerted or innovated ſuch valuation, by accepting a leaſe of his tithes from the titular, for a higher, or even for a different tack-duty from that in the valuation by the ſubcommiſſioners, he cannot afterwards take the benefit of it, or ſet it up as a defence againſt the titular inſiſting for the full tithe, *Jan.* 24. 1753, *Presb. of Kirkcaldy*; *New Coll.* i. 69.

35. In actions of valuation brought before the ſeſſion as the commiſſion-court, the titular or his tackſman, and the miniſter of the pariſh, muſt be made parties to the ſuit: for both have an intereſt in it; the titular, that the tithe be not valued too low, becauſe all the tithes belong to him after payment of the miniſter's ſtipend; and the miniſter, becauſe the more tithes there are in a pariſh, he is the better ſecured in his ſtipend, and in a fund for a future augmentation. Where an action of valuation is brought during a vacancy in a church, the proprietor muſt cite the moderator of the preſbytery as a defender. So ſoon as a proprietor commenced his ſuit againſt a titular who was in uſe to draw his tithes, he obtained of courſe a warrant for the leading of his own tithes. This enactment was made to encourage actions of valuation, that all landholders might get their tithes valued: but it gave riſe to a device frequently practiſed, by which that benefit of leading each his own tithes, was frequently procured by ſuch as the law did not intend to favour with it; for many of them commenced the action of valuation againſt their titular, with the ſole view of obtaining an order for leading their own tithes; and after they had got that end accompliſhed, they let fall their proceſs. To put a ſtop to this, it was provided by 1693, *c.* 23. That where a proprietor who had brought an action of valuation, ſuffered proteſtation to be extracted by the titular againſt him for not inſiſting, the warrant he had got for leading his tithes ſhould

be of no force after ſuch proteſtation. In this action the titular, or his tackſman, had the ſole prerogative of bringing a proof of the value, where he was in uſe to draw the tithe, partly from the favour given to poſſeſſion, and partly becauſe the titulars were by that action conſidered as loſing a point of right which they were before intitled to, viz. the drawing of the tithe: but where the purſuer had a leaſe of his own tithes for the payment of a determinate duty, he was allowed a conjunct proof with the titular; becauſe the poſſeſſion or management which he had of the whole crop, tithe included, before commencing his ſuit, threw more favour on his ſide. It is now become unneceſſary to enter into a diſcuſſion of the queſtions that may be moved on this head, ſince, by 1690, *c.* 30. the proprietor is in every caſe allowed a joint proof with the titular in the valuation. Though every landholder has had it in his power, ſince the year 1633, to get the leading of his own tithes, by ſuing for a valuation; yet if he neglect that method of relief, he muſt ſubmit to all the inconveniencies of the former law, and ſuffer the titular to draw the tithe, unleſs he has procured a leaſe of them in the manner explained § 25.

36. Beſides the two ſubmiſſions by the titulars and their tackſmen, one was ſigned by the biſhops and remanent clergy, for ſettling the value of the tithes, belonging either to the biſhops themſelves, or to the miniſters ſerving the cure at their churches. In this there was a proviſo, That the ſubmitters ſhould enjoy the rents of their ſeveral benefices, as they were then poſſeſſed by them, whether by drawing the tithe, or receiving payment in rental-bolls, without any diminution either in quantity or quality. The only tithes therefore belonging to churchmen which fell under the ſubmiſſion, and which the King had a power of valuing, were thoſe which, as Stair explains it, *b.* 2. *t.* 8. § 35. *verf. K. Ch. I.* were in tack, or other uſe of payment; and of which the beneficed perſons were not then in poſſeſſion by rental-bolls or drawn tithe. Accordingly his Majeſty confined the award proceeding on the ſubmiſſion by the clergy, to the ſpecial tithes falling within the compaſs of it; the rate of which he declared to be the ſame as of thoſe belonging to titulars; and he ordained the ſubmitters to grant rights of them to the proprietors of the lands ſubjected to the payment of them, upon their giving ſecurity for that yearly valued duty. As ſeveral tithes poſſeſſed by churchmen at the date of the ſubmiſſion, were valued during the Uſurpation, from the year 1641, downwards to the Reſtoration, ſuch valuations were declared void by 1662, *c.* 9. There was a ſeparate award, on a ſubmiſſion ſigned by the magiſtrates of ſeveral royal boroughs, relative to the tithes under their adminiſtration, in which the clauſes fixing the rate of theſe tithes, and obliging the boroughs to grant rights of them to the proprietors, are the ſame as in the former.

37. Neither of the two laſt-mentioned decrees contains any proviſion for the ſale of the tithes; for the tithes belonging to churchmen, and thoſe granted to certain boroughs, for public and pious uſes, were deſtined to continue as a perpetual fund for the maintenance of the clergy, or of the ſocieties for whoſe uſe they were appropriated, which is inconſiſtent with their being ſold. They only direct how theſe tithes ſhall be valued, and ſecure the proprietors of the land in the full enjoyment of their tithes, on payment of the yearly valued duty. That no doubt may remain on this article, it is declared, by 1690, *c.* 30. That tithes belonging to miniſters may be valued, but cannot be ſold: and the commiſſion of tithes which was renewed by 1693, *c.* 23. is reſtrained from ſelling, *i. e.* authoriſing the ſale, either of tithes which belonged formerly to the biſhops, and now to the King, ſo long as they remain in the crown, or of thoſe granted in favour of colleges or hoſpitals, or for other public uſes; reſerving a right to the

the proprietor liable in payment of ſuch tithes, to ſue for a valuation of them. It is provided by another clauſe of the laſt-quoted act, That where one having acquired a right to the tithes of his own lands, ſhall afterwards ſell or feu out the lands, either without diſponing the tithes, or with an expreſs reſervation of them to himſelf, the purchaſer or feuer may ſue for a valuation, but not for a ſale of ſuch tithes; becauſe the ſeller who had an equal title to both, and who has in the ſale of the lands reſerved the tithes to himſelf, or has not expreſsly diſponed them, ought not to be compelled to ſell them, more than a ſuperior can be, to ſell his feu-duties, or any other intereſt in the lands, excepted from, or not included in the feu-grant.

38. A proprietor, who has got his tithes valued by a decree of the commiſſion-court, is bound, if the titular require it, to infeft him in the lands in ſecurity of the yearly valued duty, *Mack.* § 16. *h. t.* Where tithes are ſold, either judicially, in conſequence of an action of ſale, or voluntarily by the titular, the purchaſer's right is perfected by a conveyance of them granted by the titular, containing precept of ſeiſin. The purchaſer is by this grant burdened with all future augmentations of ſtipend, and with all impoſitions laid, or to be laid, on the ſubject made over: and the ſeller is, by the decree-arbitral, laid under no obligation to warrant his right, except from the facts of himſelf and his anceſtors. But as equity ſuggeſts, that a ſeller ſhould, in every caſe where he receives value for his right, grant abſolute warrandice, in ſo far as extends to the price paid to him by the purchaſer; therefore the ſettling of the ſecurities, both in regard of the purchaſer, that he may have a valid right, and of the titular, that he may be ſecured in the payment of the price, is, by 1633, *c.* 19. left to the diſcretion of the commiſſioners appointed by that ſtatute. In practice, abſolute warrandice is always granted by the titular, to the extent of the price paid by the purchaſer.

39. In compliance with the demand of Charles I. that the crown ſhould be intitled to an annuity out of all erected tithes, a commiſſion appointed by him in 1627 declared, that particular yearly ſums ſpecified by them, ſhould be paid to the crown out of every boll of teind-grain, and out of every hundred merks Scots of ſilver-duty, by way of annuity. An act of convention of eſtates, July 1630, authoriſed letters of horning for the more effectual levying of it; and the crown's right to it was ratified by 1633, *c.* 15. All tithes paid to miniſters on account of ſtipend, and to colleges, ſchools, or hoſpitals, are, by that ſtatute, exempted from the annuity. But if the whole of the tithes granted to boroughs for the ſuſtentation of colleges, &c. ſhall exceed the ſums expended by them for the purpoſes of the grants, the ſurplus or excreſcence is, by the decree-arbitral relative to the boroughs, ſubject to that burden. Though ſome lawyers ſeem to be of opinion, that this right of annuity is due only out of valued tithes, *St. b.* 2. *t.* 8. § 13.; *Bankt. b.* 2. *t.* 8. § 156.; the above-quoted act, 1633, expreſsly declares, That it is payable out of all tithes, unvalued as well as valued. Mackenzie affirms, § 20. *h. t.* that the annuity is *debitum fundi*; becauſe the ſtatute declares, that the King ſhall have right to all the annuities of tithes, paſt and future; from which he concludes, that it is a real burden impoſed on tithes by ſtatute: yet ſince the tithe itſelf is admitted by all to be *debitum fructuum*, *infr.* §. 42. it is not ſo obvious how a law declaring the crown's right to the annuity, which is a certain proportion of the tithe, ſhould have the effect to alter the nature of that proportion. As the annuity was declared by the aforeſaid act not to be annexed to the crown, the King might diſpoſe of it at pleaſure; and he actually made a grant of that right, to one Livingſton, in ſecurity of a debt of L. 10,000 Sterling. Livingſton transferred it to the Earl of Loudon; who obtained a commiſſion from the crown,

crown, after the Reſtoration, to tranſact for the arrears then due, and diſpoſe of them with conſent of two Lords of Exchequer; and ſeveral annuities were purchaſed in conſequence of it. But a ſtop was put to the farther progreſs of that commiſſion, by a warrant of Charles II. in 1674, *St. b.* 2. *t.* 8. § 13.; and the annuity has not been demanded, either by our Kings or their donataries, ſince that time.

40. A due attention to the hiſtory of tithes, a ſummary of which has been here attempted, muſt contribute much towards a diſtinct knowledge of their nature: It ſtill remains to add ſome obſervations on the ſame ſubject, which could not have been made before, without too much interrupting the thread of that hiſtory. Tithes were, by their original conſtitution, a ſubject quite diſtinct from lands; for they did not belong to the owner of the lands, but to the church. The rights of the two were alſo conſtituted differently. The lands themſelves paſſed by ſeiſin, but churchmen enjoyed their tithes *ex lege*, both before and ſince the Reformation: their right was a neceſſary conſequence of their being inveſted with their ſeveral church-offices; and ſo no form of law was required to the perfecting of it. When indeed entire church-benefices, belonging to religious houſes, were, after the Reformation, erected into temporal lordſhips in favour of laics, the grantees completed their titles, not only to the temporality, but to the tithes or ſpirituality of the erected benefices, by ſeiſin; becauſe the tithes became by thoſe erections proper feudal ſubjects, and the charters of erection feudal grants. For this reaſon, the conveyance of theſe tithes by the titulars to others, muſt alſo be by diſpoſition, containing precept of ſeiſin: but a right to tithes at this day, even to laymen, when it is conferred, not by ſpecial grant or erection, but by ſtatute, is perfected *ex lege*, or without ſeiſin. Thus the tithes granted to patrons by 1690, *c.* 23. which is ſoon to be explained, are fully veſted in them without ſeiſin; but when theſe tithes are tranſmitted by the patron to others, they muſt, like erected tithes, paſs by ſeiſin. Though landholders may now, in the general caſe, compel titulars to ſell them the tithes of their own lands; yet lands and tithes are to this day accounted ſeparate tenements, and paſs by different titles; inſomuch that a right to lands, though granted by one who has alſo right to the tithes, will not carry the tithes, unleſs it ſhall be preſumed, from ſpecial circumſtances, that a ſale of both was intended by the parties, *Feb.* 27. 1672, *Scot*; *Fount. June* 29. 1698, *Callander*.

41. The thirlage of lands could not, in the times of Popery, infer the thirlage of the tithe; for the landholder, though he might aſtrict the lands which belonged to himſelf, had no power over the tithes which belonged to the beneficiary. But where the ſame churchman had right both to ſtock and tithe, without having ſeparated the one from the other, the tithe was truly included in the ſtock; and for that reaſon the thirlage of the lands extended to the tithe of theſe lands. And this muſt alſo be the neceſſary effect of the thirlage of lands *cum decimis incluſis*, by our preſent law. No ſervitude can be enlarged, or made more burdenſome, than it was in its firſt conſtitution, by any ſupervening law or accident, which does not infer the conſent of the owner of the ſervient tenement to bear ſuch additional burden, *ſupr. t.* 9. § 33. 34. The aſtriction, therefore, by a proprietor of his lands to a neighbouring mill, while he had as yet no right to the tithes, cannot be made heavier by his afterwards purchaſing his tithes, ſo as to include both ſtock and tithe under the ſervitude; for ſuch acquiſition by the proprietor of the ſervient tenement, poſterior to the conſtitution of the ſervitude, is not to be preſumed to have been made for the benefit of the dominant, or to ſubject the acquirer himſelf to a burden, directly contrary both to his own intention in the purchaſe, and to the nature of his right.

Hence

Hence a thirlage conſtituted on the lands alone, before the year 1633, was conſtrued not to extend to the tithes, after paſſing the act of that year, which granted to landholders a right of purchaſing their own tithes, nor even after the landholder had actually purchaſed the tithes from the titular in virtue of that ſtatute, *July* 7. 1635, *L. Innerweik.* But if one who has already purchaſed his tithes, and who of courſe carries his whole corns to the ſame mill, without diſtinguiſhing between ſtock and tithe, ſhall afterwards aſtrict his lands, it may be juſtly preſumed the intention of parties that the aſtriction ſhould reach to both. Nay, where a ſuperior had by his charter aſtricted the *grana creſcentia* of his vaſſal to the mill of the barony, the vaſſal's uſe of carrying the whole corns of his lands for forty years together to that mill, without demanding any abatement on account of the tithe, was adjudged ſufficient to infer the aſtriction of the whole of his corns, though the tithe had never belonged to the ſuperior who conſtituted the thirlage, *July* 5. 1727, *Macleod*, obſerved in *Dict.* ii. *p.* 107.

42. The tithe is a proportion only of the fruits; and is therefore *debitum fructuum*, not *fundi*. Hence the arrears of tithe create no real burden or charge on the lands, and ſo have no operation to the prejudice of ſingular ſucceſſors. Nor could churchmen ſuffer by this doctrine; for they had the ſame right to draw the tenth ſheaf, which was their proportion of the fruits, from the ſeveral crops of which they were the product, that the owner of the lands had to the property of the reſidue, or of the ſtock; and ſo might make their right effectual without the aid of any real ſecurity. And tithes, even after valuation, continue to be *debita fructuum*; for the valuation does no more than aſcertain the value of the tithe, without altering its nature, *Feb.* 20. 1662, *E. Callander*; unleſs where the valued tithe-duty is ſecured to the titular, by his taking ſeiſin of the lands. The action, therefore, competent to the titular, for recovering the arrears of tithe-duties, is only perſonal againſt thoſe who have intermeddled with them, whether it be the owner of the lands himſelf, or tenants under him. Where the tenant who intermeddles is bound by his leaſe to pay a ſeparate duty for the tithe, he is without all doubt liable; for he ought to have paid that duty to the titular, who alone had right to it: but where he pays a duty for ſtock and tithe, without diſtinguiſhing the rent of each, he may plead, that he has already paid the whole tack-duty to his landlord *bona fide*; becauſe he could not poſſibly diſtinguiſh between the rent due for the tithe and that which was due for the ſtock. This plea has been over-ruled in a queſtion with church-titulars or miniſters, whom the law ſpecially favours, *Feb.* 19. 1629, *Kirk*; but ſuſtained when the purſuer was a lay titular, *March* 21. 1628, *Murray*. The landlord who receives a joint duty from his tenant for ſtock and tithe, is in every caſe liable to the titular as intromitter: and even when he lets his land to a tenant for a determinate duty, without mentioning either ſtock or tithe, he ought to be liable, if it appear that the tack-duty payable by the tenant is adequate to the rent which might reaſonably be expected for both; becauſe, in ſuch caſe, he is truly intromitter with the tithe in and through his tenant. But if the proprietor, conſcious that the tithe belongs to another, lets his land merely for the rent which the ſtock will bear, his defence is ſtronger, that he only let to the tenant the intereſt that he himſelf had in the lands; and that if the tenant has intermeddled with the tithe, he did it without any authority or warrant from him; ſee *Kames*, 86.

43. If tithes are a debt ariſing out of the fruits, it follows, that no tithe can be due where there are no fruits. Hence a landholder who turns his lands into graſs, without any fraudulent intention to hurt the titular, is not liable to him in any ſum, as a *jurrogatum* in place of the parſonage-tithes. The titular's right to the tithes cannot impair the landholder's right of property; in virtue of which he may, as has been already obſerved,

t. 9. § 24. uſe his lands in the manner moſt profitable or convenient for himſelf. It only lays him under an obligation to pay the legal proportion of corns to the titular, when his lands produce corn, *Dirl.* 355.; *Fount. Jan.* 21. 1696, *Bruce.*

44. The churchman, or titular, hath a right of hypotheck upon the fruits, in ſecurity of his tithes; which, when applied to parſonage-tithes, is of the ſame general nature as the hypotheck on the corns for the landlord's rent. But the titular has no hypotheck on the horſes, oxen, ploughs, and implements of huſbandry brought on the ground, or on the other *invecta et illata*; becauſe he is not proprietor of the ground. The doctrine which is maintained by ſome writers in too general and indefinite terms, that this hypotheck extends to all tithable ſubjects, ought to be underſtood with ſome limitations. Where indeed a merchant buys the crop on the ground, either before it is reaped, or while it lies yet in the fields, though at a public ſale, he is liable for the tithes; becauſe every man ought to know, that a tithe is due out of the product of all lands; and muſt preſume, that it is not drawn by the titular, ſo long as the crop is not carried off; ſee *June* 24. 1662, *Vernor.* And for a like reaſon, a buyer of tithable fiſh newly caught, was condemned to pay the tithe, *Dec.* 13. 1664, *Biſh. of Iſles.* But where corns are bought in a public market, the buyer's plea is good, that he had no reaſon to ſuppoſe that the tithe had not been already drawn, *Dec.* 20. 1664, *Reid.* There can be no hypotheck for tithes after valuation; for landholders whoſe tithes are valued, have the entire management of the whole crop, which is inconſiſtent with a right of hypotheck; and hence it follows, that that right is competent to ſuch churchmen or titulars only as have the drawing of the tithes.

45. Where tithes are let to the landholder for a fixed number of years, the tackſman may, on the expiration of the leaſe, continue to poſſeſs for the former tack-duty by tacit relocation, if the titular ſhall not then declare his intention of removing him. As in a leaſe of lands, the landlord ſignifies his reſolution to remove the tackſman by a warning, which interrupts tacit relocation, the titular expreſſes the ſame intention by an inhibition of tithes; which is a writ, iſſuing either from the ſignet, or from the commiſſary-court, at the ſuit of the titular; by which not only tackſmen and poſſeſſors, but all perſons whoſoever, are interpelled from meddling with the tithes. This writ therefore does not mention any particular defenders, as ſummonſes do, and ſo is executed only edictally againſt all and ſundry. An inhibition of tithes, as it interrupts tacit relocation, intitles the titular to an action, either for declaring his right to a fifth part of the rent of all ſubſequent years, in place of the former tack-duty, or for a warrant to draw the tithes *ipſa corpora.* And if the tackſman, or any other, continue to poſſeſs the tithe, after the inhibition is executed, he is liable in a ſpuilzie *. This kind of inhibition therefore differs much from an inhibition of lands; which, as ſhall be explained next title, is a diligence that lays a real imbargo on the ſubject, and ſo muſt be regiſtered before it can interpel ſingular ſucceſſors from purchaſing; whereas inhibition of tithes ſerves merely as an intimation by the titular to ſtop any farther intermeddling with them; and ſo need only be publiſhed in the pariſh where the lands lie. A bare inhibition of tithes gives no right to the titular to turn any perſon out of poſſeſſion: for as warning uſed againſt a tenant is not a ſufficient ground for the landlord to remove him ſummarily, without a previous decree of removing; neither can a titular, even after inhibition, debar his tackſman,

* It has been found, that a citation, in an action at the inſtance of the titular, againſt the landholder poſſeſſing the tithe by tacit relocation, concluding for payment of a yearly ſum as the ſuppoſed amount of the free tithe, did not ſubject the landholder to an higher payment than the former tack-duty; though the Lords at the ſame time ſubjected the landholder to the payment of the full tithe from the date of their interlocutor, *Nov.* 16. 1765, *E. March contra Leiſhmans.*

or

or any other who had been formerly in the lawful poſſeſſion, from retaining it, till he be authoriſed to turn him out by the ſentence of a judge, without incurring a ſpuilzie, *Jan.* 27. 1665, *L. Bearford.*

46. This title may be concluded with an account of the proviſions of ſtipend made by law for the maintenance of the Reformed clergy, and of the other legal rights and privileges to which parochial miniſters, or their executors, have been intitled, after all the former expedients enacted for their ſupport had proved ineffectual, in the manner related, *ſupr.* § 17. 18. Beſide the other powers granted to the commiſſion of tithes, by 1633, *c.* 19. they were authoriſed to modify reaſonable ſtipends to the parochial clergy out of the tithes, *ſupr. b.* 1. *t.* 5. § 21. By a former commiſſion, which had been appointed by parliament for the ſame purpoſe, 1617, *c.* 3. the loweſt rate of ſtipend that was to be modified to any miniſter was 500 merks Scots, or five chalders of victual, unleſs where the whole fruits of the benefice fell ſhort of that quantity; and the higheſt was 1000 merks, or ten chalders of victual *. By the act 1633, *c.* 8. the minimum was raiſed to eight chalders of victual, where victual-rent was paid, or proportionally in money; which proportion is, by a poſterior clauſe in the ſtatute, declared to be 800 merks, unleſs where there ſhall be a reaſonable cauſe for giving leſs. But neither that, nor any ſubſequent commiſſions of tithes, were limited, as to their powers of altering the old maximum fixed by the act 1617. And therefore, now that the expence of living is ſo much heightened, the commiſſion-court exerciſe a diſcretionary power of augmenting ſtipends conſiderably above that maximum, where there is enough of free tithes in the pariſh. The reaſons which chiefly move the court to grant augmentations are, that the pariſh is a place of more than ordinary reſort, or that the cure is burdenſome, or that the neceſſaries of life give an high price in that part of the country, or that the ſcanty allowance of ſtipend in that pariſh bears too ſmall a proportion to the weight of the charge.

47. Where a determinate quantity of ſtipend, either in money or corns, is modified to a miniſter out of the tithes of the pariſh, without proportioning the ſtipend among the ſeveral landholders, the decree is called *of modification:* but where that quantum is alſo localled or proportioned among the different landholders liable in the ſtipend, it is ſtyled a decree *of modification and locality*. The whole tithes of the pariſh, out of which the ſtipend is modified, are underſtood to be a ſecurity to the miniſter, till, by a decree of locality, the proportions payable by each landholder be aſcertained. Where therefore a ſtipend is only modified, the miniſter may ſingle out any proprietor he ſhall think fit, who will be liable in the firſt inſtance, in ſo far as his tithes extend; though that ſhould exceed the quota of ſtipend which might juſtly fall to his ſhare, in proportion with the other landholders in the pariſh, *Dec.* 3. 1664, *Hutchinſon.* After a decree of locality, no landholder is liable in more than the proportion that he is charged with by that decree. An action of recourſe however is competent to the landholder, who, in a modified ſtipend, is thus made liable in the firſt place, againſt the reſt, *ibid.* Modified ſtipends, though part of them be generally decreed to be paid in money, are in effect payable out of the tithes, and come in place of them: for the commiſſion-court has no power to modify ſtipends beyond the extent of the tithes in the pariſh. They are therefore, like the tithes themſelves, *debita fructuum;* ſo that ſingular ſucceſſors cannot be ſued for the arrears of ſtipend due previouſly to their right; nor ſiars, for the arrears thereof which had become due during the ſubſiſtence of a liferent that excluded them.

* Victual is the name given in our law to any ſort of grain or corns; and a chalder of oatmeal is ſixteen bolls, at eight ſtone weight to each boll.

46. As

48. As the ſubmiſſion by the clergy to Charles I. gave him no power to determine concerning the tithes that were then poſſeſſed by the biſhops, the commiſſion-court erected in 1633, was not authoriſed to modify a ſtipend to the incumbents in the biſhops patrimonial churches, which therefore continued to depend ſolely upon them. By 1641, *c.* 30. biſhops churches were put on the ſame footing with others: but it would ſeem, that upon the reſtitution of Epiſcopacy in 1662, the miniſters ſerving the cure in the patrimonial churches were brought back to their former dependence on the biſhops, and that this dependence is now transferred from the biſhops to the King, who, by the abolition of Epiſcopacy in 1690, has come in their right. In proceſſes for a legal ſtipend inſiſted on by theſe miniſters ſince that period, the commiſſion-court for ſome time did not adventure to modify a ſtipend to them out of the tithes. They barely recommended to the Lords of Treaſury, and, ſince the Union, to the Barons of Exchequer, to procure for the purſuers a royal gift of ſuch part of them as might be ſufficient for their maintenance; ſee *Forbes on tithes*, *p.* 386. But the commiſſion-court are now in uſe to modify ſtipends to the miniſters of menſal churches out of biſhops tithes; becauſe the general ſcope of the law is, that the miniſter of each pariſh ſhould have a competent ſtipend modified out of the tithes of his pariſh.

49. Notwithſtanding the ſeveral particulars before mentioned, by which parochial tithes were miſapplied, both during Popery, and ſince the Reformation, ſome few benefices remained entire in the hands of the parſons, where the tithes had been neither erected into temporal lordſhips, nor otherwiſe charged with any burdens. The miniſters planted in thoſe churches after the Reformation, had the ſame proper right to them that the beneficiaries had in the times of Popery; and they might grant leaſes of them under the ſtatutory limitations above ſtated, § 8. But when, by 1649, *c.* 39. the right of preſentation was taken from patrons, that act, to compenſate for their loſs, declared the right of all tithes not formerly diſpoſed of to be in the patrons, with the burden of reaſonable ſtipends to the miniſters; by which all miniſters were in effect made ſtipendiary. And though that act was reſcinded upon the Reſtoration, a power was again granted to patrons, by 1690, *c.* 23. and 1693, *c.* 25. to redeem from the proper beneficiaries who ſtill remained, their whole tithes, upon providing them with competent ſtipends; reſerving a right to them to continue in the full poſſeſſion of their benefices till legal ſtipends ſhould be modified to them. The landholders liable in the tithes may, by the aforeſaid act 1690, compel the patrons to ſell to them the tithes thus redeemed from the beneficiary, at ſix years purchaſe; whereas other titulars lie under no obligation to ſell theirs under nine.

50. Though tithes ſeem to be appropriated by law to the ſubſiſtence of the clergy, and on that account ought not to be applied for providing communion-elements, more than for purchaſing communion-cups, or repairing the wall of a church-yard, the commiſſion-court are in uſe, when they pronounce decrees of locality, to modify a fixed ſum to the miniſter out of the tithes, in name of communion-elements. It is true, that that burden is expreſsly laid on the parſons, by 1572, *c.* 54.; but that ſtatute ought probably to be underſtood of the few miniſters who were proper parſons or beneficiaries; for the ſtipends of ſtipendiary miniſters were ſoon after declared free from all burdens, by 1593, *c.* 162. And all our miniſters are now become ſtipendiary ſince the acts quoted under the preceding ſection. The ſum thus awarded for communion-elements, as it is ſpecially deſtined for defraying the expence neceſſary in adminiſtering that holy ſacrament, is no proper part of the ſtipend, though it be contained in the miniſter's decree of locality; and therefore is not due to him for the years

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in which he has not adminiſtered the ſacrament, but ought to go to the poor, *July* 21. 1713, *Pariſh of Abdy*.

51. Though miniſters have not now a right to the tithes themſelves, yet all tithes may be at this day affected with the burden of a ſtipend, or of an augmentation of ſtipend to the miniſter, to ſuch extent as the commiſſion-court ſhall think reaſonable; ſome more directly, and others only *ſubſidiariè*, according to the different titles under which they are enjoyed. In this matter the following rules are eſtabliſhed by practice. Tithes are either ſuch as were never erected, *i. e.* never granted by the crown to any layman; or, 2*dly*, They have been erected, and are yet in the hands of the lay titular; or, 3*dly*, They are let in leaſe by the titular; or, 4*thly*, They have been heritably diſponed by him. Where the tithes of a pariſh have not been affected with any grant in favour of a layman, theſe ought, in the *firſt* place, to be applied to the maintenance of the miniſter, to which all tithes were originally deſtined. In default of theſe, the tithes which are yet in the hands of the lay titular, fall, in the *ſecond* place, to be allocated; for as the titular of a benefice, who himſelf cannot ſerve the cure, is bound to employ a perſon who can, the burden of the ſtipend ought to fall on ſuch titular, as long as he has a ſufficient fund in his own hands, rather than upon thoſe to whom he has granted leaſes or heritable rights of the tithes. And if the titular does not draw the tithe in kind, but receives a tack-duty from the landholder, ſuch tack-duty is burdened, ſince that is the benefit ariſing to the titular from his right. Theſe two kinds are uſually called *free tithes*.

52. If there is a ſhortcoming in theſe, the tithes let in leaſe by the titular to the landholder are allocated in the *third* place: and where this happens, it is the tack that is charged with the burden, and not the tack-duty; for where the tack-duty payable to the titular, which is his intereſt in the tithe, falls ſhort of the ſtipend or augmentation, the tackſman's intereſt in it, or in other words the ſurplus tithe over and above the tack-duty, is ſubject to the allocation. But where the tackſman is thus loaded in conſequence of an augmentation, the commiſſioners are directed, by 1690, *c.* 30. as a compenſation to the tackſman for this ſupervening burden, to prorogate his leaſe for ſuch a term of years as they ſhall find juſt; which prorogations are as valid as if they had been made by the titular himſelf, provided he be cited as a party by the tackſman, in his ſuit for the prorogation; and prorogations have, in virtue of this power, been granted to tackſmen for ſuch a number of years as made their leaſes nearly equivalent to perpetual heritable rights. But upon an appeal to the houſe of Lords from one of thoſe ſentences, which was pronounced *July* 5. 1732, *E. Galloway*, the tackſman was adjudged not intitled to a prorogation, in conſequence of voluntary augmentations fixed by private agreement between the miniſter and himſelf; there muſt be a judicial ſentence of the commiſſion-court, augmenting the ſtipend. 4*thly*, The tithes that are heritably diſponed by the titular to the landholder, muſt be appropriated to the ſtipend, if all the funds formerly mentioned ſhould prove deficient; for a competent ſtipend to a miniſter is a burden that tithes carry always about with them, even againſt onerous purchaſers; a diſpoſition of tithes by a titular not being underſtood to exempt the grantee from the burden of future augmentations. And it is upon this, among other conſiderations, that the law has obliged titulars to ſell tithes at nine years purchaſe; which is a rate greatly below their true worth, were they not ſubjected to that burden. In this caſe, however, the tithes of the titulars own lands are allocated proportionably with the tithes of the other landholders, *December* 21. 1757, *Edmonſtone of Duntreath contra Duke of Montroſe*. But if the titular hath ſpecially warranted his grant againſt future augmentations, or if he has got a price for them

equal to what he might have expected though they had not been ſubject to augmentations, equity ſuggeſts, that the tithes of the titular's own lands ought in ſuch caſes to be allocated, to the entire exemption of the tithes ſold by him to the diſponee, *Feb.* 1. 1738, *D. Douglas* *. As lands *cum decimis inclusis* are, by the law of Scotland, free from tithe, they muſt of courſe be exempted from the burden of any augmentation of ſtipend, *Dirl.* 229.

53. Where there is ſufficiency of free tithes in a pariſh, the titular, ſince he has right to the whole, has a power of appropriating or allocating any part of them that he ſhall think proper for the payment of the ſtipend, unleſs there has been a previous decree of locality. And this holds, though the ſtipend ſhould have been paſt memory paid out of the tithes of certain particular lands; for ſuch uſe of payment is as much a voluntary act in regard to the titular, as it would be in an owner of land liable in ſtipend, to throw the proportion of it payable by himſelf, ſometimes on one tenant, and ſometimes on another, *Feb.* 1731, *E. Galloway*. The abuſe of this power fruſtrated in a great meaſure the privilege competent to landholders of purchaſing their own tithes; for as ſoon as a landholder brought his action of ſale againſt the titular, he frequently allocated the purſuer's whole tithes towards payment of the ſtipend *pro tanto*, after which they could not be ſold. For this reaſon few adventured to proſecute that action, from the apprehenſion that the titular might load them with the burden of the ſtipend to the full extent of their tithes. But the fear of this was altogether removed, by 1693, *c.* 23. renewing the commiſſion of tithes, which declares, that it ſhall be unlawful to a titular or his tackſman, after citation given to him by a landholder in an action of ſale, to make an allocation of the purſuer's tithes ſolely, but only in proportion with the other tithes in the pariſh.

54. By our ancient cuſtom, the beneficiary ſeems to have had no intereſt in the fruits of the benefice, till he could, by laying hold of them, appropriate them to himſelf. And hence, if he died before the corns were reaped, he could tranſmit no part of that year's crop to his executors; ſee *Balf. p.* 220. *c.* 5.; *March* 21. 1628, *Murray*. But by our later practice, which was at laſt approved of, by ſtatute 1672, *c.* 13. Whitſunday and Michaelmas have become the legal terms at which ſtipends fall due to the incumbents. At Whitſunday, the corns are preſumed to be fully ſown; and at Michaelmas, to be fully reaped. If therefore the incumbent was admitted to his church before Whitſunday, he is intitled to that whole year's ſtipend, becauſe his entry was prior to the ſowing of the corns: and by parity of reaſon, if his intereſt in the church hath ceaſed before that term, by death or otherwiſe, he hath right to no part of the fruits of that year. If he was admitted after Whitſunday, and before Michaelmas, he is intitled to the half of that year's ſtipend; becauſe, though his entry did not commence till after completing the ſowing, yet it began before the term at which the corns are preſumed to be reaped, *July* 24. 1662, *Wemyſs:* and by the ſame rule, if he was removed from the benefice after Whitſunday, and before Michaelmas, he hath alſo right to the half of that year; and if he was not removed till after that term, he is intitled to the whole of it. The reaſon why one of the legal terms in benefices is Michaelmas, and not Martinmas, as in liferents, ariſes from the different natures of the two rights. All church-benefices did originally, and are ſtill, in the conſideration of law, accounted to conſiſt of tithes, that were drawn by the churchman, at the ſeparation of the corns from the ground, which was, according to the legal preſumption, completed at Michaelmas: and the modified ſtipends, that are now come in place

* Where part of the tithes of a pariſh belong to the biſhop, and part to the landholders by virtue of heritable rights from lay titulars, the tithes belonging to the landholders muſt be exhauſted before any part of the ſtipend can be localled upon the biſhop's tithes, becauſe biſhops are conſidered as a ſuperior order of miniſters, *July* 13. 1715, *Miniſter of Arngoſk contra the Heritors; March* 7. 1770, *Officers of State contra Campbell of Lochnell.*

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of the tithes, retain the ſame quality as to that particular with the tithes themſelves, in the place whereof they were ſubſtituted. But in liferents the term is Martinmas, becauſe the rents of lands are not due by the tenant to the landlord till Martinmas at ſooneſt, before which term the corns are not preſumed to be fully brought to the tenant's granaries. That part of the ſtipend which has fallen due to the incumbent, according to thoſe legal terms, deſcends, in as far as it is unpaid at his death, to his executors, though the whole of it ſhould conſiſt in money, or though the incumbent ſhould, by agreement with thoſe who are liable in the ſtipend, poſtpone the term of payment from Michaelmas to Martinmas; ſee *Falc.* i. 182.: for though ſuch agreement muſt regulate the time at which the demand is to be made from thoſe debtors, it cannot affect the queſtion, At what term each year's ſtipend becomes legally due, and conſequently deſcendible to executors?

55. As no churchman could live comfortably without a dwelling-houſe, and a reaſonable portion of ground in his own manurance, for the uſe of himſelf and his family, Charles the Great directed, that he ſhould be furniſhed with theſe out of the tithes, which he had immediately before declared to belong to the church, *Leg. Lang. l.* 3. *t.* 3. *c.* 2.; *Capit. Kar. l.* 1. *c.* 91. But that proviſion of tithes, in ſo far as concerned parochial benefices, was frequently evacuated by their impropriations to cathedrals or monaſteries in the manner already explained. By the law of Scotland alſo, ſince the Reformation, miniſters, beſide the ſtipend modified to them by the commiſſion-court, are intitled, in conſequence of ſpecial ſtatutes, to an houſe and glebe. The houſe which is ſet apart for the churchman's habitation is in our law-language called *a manſe*. It appears, from a variety of authorities cited by *Du Cange*, *v. Manſus*, that that term was made uſe of in the middle ages to denote a determinate quantity of ground, the extent of which is not now known, fit either for paſture or tillage. In the before-quoted capitulary of Charlemagne, it ſignifies the particular portion of land which was to be aſſigned to every churchman; and it has been by degrees transferred from the churchman's land to his dwelling-houſe.

56. Few of the Reformed miniſters were at firſt provided with dwelling-houſes; moſt of the Popiſh clergy having, upon the firſt dawn of the Reformation, let their manſes in feu, or in long leaſes: miniſters therefore got a right, by 1563, *c.* 72. notwithſtanding thoſe feus or leaſes, to as much of the manſes as would ſerve them; otherwiſe the Popiſh churchman, or other perſon poſſeſſing them, was to build a competent dwelling-houſe for the incumbent. Where the poſſeſſors were unwilling, and refuſed to remove, the biſhop or ſuperintendent was authoriſed, by 1572, *c.* 48. to deſign or mark out the ſaid manſe for the miniſter's uſe during his incumbency; upon which deſignation letters of horning paſſed againſt thoſe who ſtill continued obſtinate in holding the poſſeſſion. In the caſe of abbey and cathedral churches, the miniſter might, by 1592, *c.* 116. inſiſt for a manſe within the precincts of the abbey or cathedral, unleſs the proprietor of ſuch precinct ſhould provide him in a commodious manſe elſewhere. Where a pariſh-church, notwithſtanding theſe acts, continued ſtill unprovided of a manſe, the landholders or heritors of the pariſh were, by 1649, *c.* 45. revived by 1663, *c.* 21. directed to build one at their own charge, at the ſight of the biſhop, with ſome of the moſt diſcreet men of the pariſh; the expence not exceeding L. 1000 Scots, nor below 500 merks: and in purſuance of this ſtatute, preſbyteries, who are now come in the biſhop's right, are in uſe to proportion among the heritors the ſums falling to be paid by each; not according to their real rent, becauſe that is more uncertain; but according to their ſeveral valuations: and letters of horning iſſue of courſe againſt them, for the payment of thoſe proportions.

57. This obligation upon landholders to build a manſe, is ſo extended by an equitable interpretation, as to include ſtable, barn, and byre, with

a garden; for all which it is uſual to allow half an acre of ground. But where ground has been already deſigned or marked out for a manſe, and the other appurtenances of it before mentioned, the miniſter has no right to demand a new deſignation, on pretence that the ground formerly marked out for it did not amount to half an acre. The burden, both of building and repairing miniſters manſes, is, by 1663, *c.* 21. impoſed upon heritors: and the juſt rules of interpretation require, that the word in the ſtatute *heritors*, be taken in the ſame ſenſe throughout; and that therefore, if liferenters were not to be conſidered as heritors in the obligations relative to the building of a manſe, neither could they be liable in any proportion of the expence of repairing it. It would appear from a deciſion, *Nov.* 14. 1679, *Min. of Moreham*, that the court of ſeſſion did not underſtand the term *heritors* to include liferenters in the ſenſe of that act; who of courſe were entirely exempted from any ſhare of the expence of building a manſe, both in reſpect of the term uſed in the ſtatute, which in its moſt obvious meaning excludes thoſe who have bare liferents; and becauſe the building of a manſe, being a work intended to laſt for ſome generations, no part of the burden ought to be laid on thoſe whoſe only intereſt in the lands is a right of liferent. But as this act is, from the generality of the expreſſion, of doubtful interpretation, it is poſſible that in the reparation of the manſe, which has leſs of the nature of perpetuity than building it, and is frequently reiterated during the ſubſiſtence of the ſame liferent, our judges might be moved, by conſiderations of equity, to burden a liferenter, who has a real right in the lands, though it be but temporary, with the intereſt correſponding to the ſum impoſed upon the fiar for theſe repairs, while the liferent ſubſiſts.

58. Before the Reformation, the whole expence of upholding the manſes of churchmen was paid out of the public funds of the church, and no part thereof by the beneficiaries or incumbents. But not long after the eſtabliſhment of the Proteſtant doctrine, it was enacted, 1612, *c.* 8. That all miniſters who had received ſufficient manſes, ſhould be bound to keep them in tenantable repair; in default of which, they, or their executors, were declared liable in damages to their ſucceſſors in office. The form of declaring a manſe ſufficient, or free, is this: The incumbent, who at his entry is intitled to a commodious manſe in ſufficient repair, applies to the preſbytery; who appoint a viſitation of it by proper craftſmen, as maſons, ſlaters, houſe-wrights, &c. Theſe are directed by the preſbytery to make up, and report to them, eſtimates of the ſums neceſſary for the reparation; which ſums, if the preſbytery approve of the eſtimates, they proportion among the ſeveral heritors by the rule before ſet forth; and letters of horning will paſs on a bill to the court of ſeſſion, for carrying the ſentence of the preſbytery into execution. Where the manſe is completely repaired, the heritors may apply to the preſbytery for a ſecond viſitation; and if the report of the viſitors, that the manſe is now ſufficiently repaired, be approved of by the preſbytery, they declare it a free manſe, which, by the aforeſaid ſtatute, lays the burden of upholding it on the incumbent or his executors. The act, however, which impoſes this burden on miniſters, does not appear to reach to an houſe gifted to the church, which is intended by the donor, not for an habitation to the miniſter, but as an addition to his ſtipend; and therefore any obligation which lies on the miniſter in that caſe, is grounded merely upon an implied condition in the donation, that the incumbent, who enjoys the profits, ought to beſtow part of them in upholding the ſubject in good repair. But it would ſeem, that if ſuch houſe was in a ruinous condition when the incumbent entered into the poſſeſſion of it, he is not bound to expend the ſmalleſt ſum towards its reparation; for the expence of refitting thoſe houſes, frequently amounts nearly

nearly to that of rebuilding, and ſometimes even exceeds it. When the manſe becomes uninhabitable from the neceſſary decay of the building, through the waſte of time, the incumbent, though the manſe has been already declared free ſince his entry into the church, may demand to have it rebuilt, or ſufficiently repaired a ſecond time, at the charge of the heritors.

59. The glebe, which is that portion of land that is aſſigned to the miniſter by ſtatute over and above his proper ſtipend, muſt contain four acres of arable ground; and is to be deſigned in the ſame manner, and the decree of the preſbytery carried into execution againſt the former poſſeſſors in the ſame way, by charging them upon letters of horning, as is provided in the deſignation of manſes, 1572, *c.* 48. Though all miniſters, whether in town or country, ſeem by our ſtatutes intitled to a manſe, or to a ſum of money in conſideration of it; yet all cannot claim a glebe: for there are many pariſhes, particularly among the royal boroughs, which have no lands in them proper for a glebe; ſee 1663, *c.* 21. But the miniſters even of royal boroughs, where any part of the pariſh lies in the country, have right to a glebe. Some ſtatutes after the Reformation, reſtricted the ſubject of glebes to church-lands, 1593, *c.* 161.; and by a poſterior act, 1606, *c.* 7. which in its preamble refers to the former, the ſubject of them is farther limited to arable lands lying near the church, partly for the incumbent's conveniency, and partly to prevent partiality in burdening one heritor more than another; after which, it is enacted by a ſeparate clauſe, that where there are no arable lands in the pariſh near the church, the incumbent ſhall, in place of the glebe, be intitled to ſixteen ſoums of graſs; which are to be in like manner deſigned, not out of temporal lands, but out of the beſt paſture church-lands lying next adjacent to the church *. As the benefit intended by theſe ſtatutes to the miniſter, was altogether evacuated when there were no church-lands in the pariſh, it was provided by 1644, *c.* 31. That in default of church-lands, the glebe was to be deſigned out of any other arable lands lying eweſt, or moſt convenient, for the church. This act, though falling under the act reſciſſory of Charles II. appears to have been regarded as ſtill in force, by the aforeſaid act 1663, *c.* 21. in which it is plainly taken for granted, that every miniſter hath right to a glebe, except thoſe in ſome royal boroughs; and deſignations of glebes are by that act directed to proceed in general terms, with the ſingle exception of incorporated acres in boroughs; but without diſtinguiſhing between church lands and temporal; ſee *St. b.* 2. *t.* 3. § 40. *verſ. If there be.*

60. A right of relief or recourſe is competent to the heritors whoſe lands are ſet off for the manſe or glebe, againſt the other heritors in the pariſh. The act 1594, *c.* 199. which provides this relief, grants it only to the heritors of church-lands; and limits it to the ſpecial caſe, where all or the greateſt part of the lands in the pariſh conſiſt of church-lands; ſo that the landholder whoſe grounds have been marked out for the manſe or glebe, is, by the words of that ſtatute, loaded with the whole burden of ſuch deſignation, without recourſe, if the half of the lands of the pariſh be not church-lands; contrary to the ſpirit of the act, which was deſigned to preſerve an equality among all the heritors. The act already quoted, 1644, which authoriſed the deſignation of glebes out of temporal lands, equitably extended this right of recourſe, in favour of the heritors whoſe temporal lands were deſigned, againſt the other heritors of the pariſh; and if the firſt part of that act, allowing ſuch deſignations, has been received as our

* A ſoum is a quantity of ground ſufficient for paſturing ten ſheep, or one cow.

law ſince the Reſtoration, the laſt part of it, which extends the recourſe, ought alſo to be received, being a juſt, and indeed a neceſſary, conſequence of the other. If this reaſoning be concluſive, recourſe is by our preſent law competent to every heritor whoſe lands are deſigned, though the whole of the pariſh ſhould conſiſt of temporal lands. This right of recourſe is not real. againſt the lands themſelves; it is barely perſonal, againſt thoſe who were heritors at the time of the deſignation, and their heirs, *June* 24. 1675, *Snow*.

61. Where two pariſhes are united into one, the miniſter of the united church is intitled to both the glebes that belonged to the two churches before the union or annexation: but if the united glebes, when joined together, make at leaſt one legal glebe, the miniſter cannot plead, that the glebe belonging to the manſe in which he actually reſides, ſhould, in ſo far as it is deficient, be brought up to the legal ſtandard, on pretence, that all miniſters are by ſtatute intitled to a full glebe next adjacent to their manſes, *New Coll.* i. 165. Glebes pay no tithe. This was at firſt a neceſſary conſequence of the rule, That tithes are due only to the parochial paſtor; for whatever tithe was due out of the glebe poſſeſſed by him, could belong to no other but himſelf. But when, after the Reformation, laic titulars were made capable of enjoying tithes, a titular who had obtained a grant of the whole tithes of a pariſh, might have laid his claim againſt the miniſter of that pariſh for the tithe of his glebe; to prevent which, the glebes of miniſters, 1578, *c.* 62. and alſo their ſoums of graſs where they have no arable glebe, 1621, *c.* 10. are declared free from the payment of tithe. Manſes and glebes are declared to be, after their deſignation, unalienable by the incumbent; who therefore can neither ſell, nor let them in feu, or in leaſe, to the prejudice of his ſucceſſors, 1572, *c.* 48. This ſtatute was neceſſary for putting a ſtop to a fraud practiſed by churchmen at the Reformation, who feued out their lands at an undervalue, upon receiving conſiderable ſums from the feuers at their entry, in name of fine or purchaſe-money, which they pocketed up for their own uſe. That it was not intended to ſtrike againſt ſuch alienations as were profitable to the benefice, appears not only from the reaſon of the thing, but the words of the act, which expreſsly limit the enactment to *alienations detrimental to the ſucceſſor*: yet the act has been explained into an abſolute prohibition to feu, though the yearly feu-duty ſecured by the grant to the benefice, ſhould be quadruple of what could reaſonably be expected in the way of tillage. This, however, is certain, that upon the tranſportation of the church to another part of the pariſh, the old manſe or glebe may be ſold or exchanged for a more commodious one; and ſuch ſales or excambions have been authoriſed by the court.

62. Beſide the glebe, the miniſter had right to graſs for an horſe and two cows, by 1649, *c.* 45. This act was revived by the above-cited ſtatute 1663, which ſeems to make the miniſter's right to his graſs, and to his glebe, equally broad; for it enacts, that every miniſter, except thoſe of ſuch royal boroughs as have no right to a glebe, ſhould have graſs: and yet it mentions church-lands as the only ſubject out of which his graſs is to be deſigned; ſo that whether a miniſter whoſe pariſh conſiſts only of temporal lands, hath a legal claim for graſs, may admit of doubt. Thus far the act is clear, that where there are church-lands in the pariſh, if they either lie at ſome diſtance from the church, or conſiſt of arable ground which has ſeldom been paſtured upon, the landholders are ſubjected to pay to the miniſter L. 20 Scots, as an equivalent for his graſs; and in that caſe all the heritors were declared to be burdened equally with the payment, *Kames*, *Rem. Dec.* 63. But as this method put the miniſter to the neceſſi-

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ty of receiving the L. 20 in as many ſmall ſums as there were landholders in the pariſh, which, in pariſhes where the property was divided among fifty or ſixty, brought great inconveniencies on the incumbent, it was adjudged, *New Coll.* i. 171. that the burden of the whole ought to be laid, in the firſt place, on the proprietor of the neareſt church-lands: and this rule appears to be founded in the ſtatute itſelf, which gives recourſe to the landholder who pays it, againſt the other heritors of church-lands in the pariſh. Where the miniſter has no fixed legal manſe from the heritors, and the queſtion is, What heritor is liable to make payment to the incumbent, as poſſeſſed of the neareſt church-lands? thoſe are conſidered as the neareſt which lie at the ſmalleſt diſtance from the glebe, without any regard had to their diſtance from the miniſter's dwelling-houſe; which being in this caſe frequently rented from year to year, is liable to frequent changes; and of conſequence, the proprietor of the church-lands lying neareſt to the glebe, is the perſon immediately liable in payment of the whole L. 20 to the miniſter for his graſs, ſaving to him his action of recourſe in manner before mentioned, *Tinw. March* 2. 1756, *Min. of Dunfermline.* Lands of a poor ſoil, which by nature ſeem more fitted for paſture than the plough, may be deſigned for the miniſter's graſs, though they may have ſometimes been brought under tillage, *New Coll.* i. 192. Though the lands which have been deſigned by the preſbytery properly for a glebe, ſhould be of ſuch an extent as to be ſufficient alſo for the miniſter's graſs; yet if he has poſſeſſed it as his glebe in virtue of that deſignation, without any action brought by the heritors for voiding it, the miniſter appears not to be barred from inſiſting alſo for his graſs, in purſuance of the act 1663, *c.* 21.; becauſe that act gives the miniſter a right to graſs over and above his glebe. Yet the miniſter of an united pariſh who was poſſeſſed of glebes to that extent, but without any evidence of an actual deſignation of graſs by the preſbytery, was found to have no ſeparate claim upon that ſtatute; becauſe it was preſumed, that the ground was marked out both for glebe and graſs, no record being kept of deſignations of graſs; and miniſters might, if ſuch preſumption were not admitted, get ſecond and third deſignations of graſs in the ſame pariſh, at ſome diſtance of time from each other, *New Coll.* i. 165. Beſides all this, miniſters have, by 1593, *c.* 161. *freedom of foggage, paſturage, feuel, feal, divot, loaning, and free iſh and entry, according to uſe and wont of old*; which act is ratified by the poſterior act in 1663. What theſe privileges are, muſt be determined by the local cuſtom in the ſeveral pariſhes *.

63. Beſides the above-mentioned burdens of ſtipend, communion-elements, manſe, glebe, and graſs, impoſed on the landholders of a pariſh, certain burdens were, by ſtatutes enacted ſoon after the Reformation, laid on the whole inhabitants or pariſhioners. The upholding of churches and church-yards was, by 1563, *c.* 76. remitted to the privy council; who accordingly ſettled the manner of repairing churches, by an act Sept. 13. that year, which is ratified by 1572, *c.* 54. The ratifying ſtatute does not recite the tenor of the act of council; but it appears by a copy of it preſerved in *Statute-law abridged, Append.* N° 2. that two thirds of the expence were charged on the pariſhioners, and the remaining third on the parſon; and the pariſhioners were to be taxed for their ſhares by ſtentmaſters choſen by themſelves. Pariſhioners are, by 1597, *c.* 232. ordained to repair the church-yard walls of their own pariſhes; and by 1617, *c.* 6. they muſt provide communion-cups, lavers, and other utenſils neceſſary for adminiſtering the ſacraments. But now, by long cuſtom, thoſe burdens, at leaſt

* It has been decided, that a preſbytery cannot deſign feuel to a miniſter out of a moſs over which he or his predeceſſors had not formerly exerciſed that ſervitude, *March* 1. 1769, *Duff.*

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that of repairing churches and church-yard-walls, are transferred from the pariſhioners and parſon to the landholders, who muſt bear the expence of repairing, and even rebuilding, the pariſh-church, according to the valuations of their ſeveral lands *.

64. It ſometimes happens, that lands, where they lie at too great a diſtance from the church to which they originally belonged, are, by the commiſſion-court, annexed *quoad ſacra* to another pariſh, the church whereof lies at a leſſer diſtance from theſe lands. By annexing *quoad ſacra*, is underſtood, that the inhabitants of the annexed lands are, for their greater conveniency in attending divine ſervice, brought under the paſtoral care of the miniſter of the church to which they are annexed. But ſuch annexation affects only the inhabitants; the lands continue in all civil reſpects part of the old pariſh; and therefore they remain burdened with the payment of the ſtipend to that church from which the inhabitants were disjoined: and it was adjudged, that the owners of thoſe lands do not, by the annexation, become liable in any part of the expence neceſſary for upholding the manſe, or even the church, of the pariſh to which they are annexed, and which the inhabitants conſtantly reſort to for divine ſervice; but that they continue, even in that reſpect, to be accounted part of the old pariſh, *Falc.* i. 274.

65. After the death of a parochial miniſter, his executors have right to the annat or ann. Writers differ much about the meaning of this word. *Polydor. Virgil. l.* 8. *c.* 2. *De rer. inv.; Greg. Tholoſan. Partit. l.* 1. *t.* 25. *c.* 1. and others, give that name to the right reſerved to the Popes out of the fruits of vacant benefices, under the colour of ſupplying the general neceſſities of the church, of which mention is made, *Extr. Comm. l.* 3. *t.* 2. *c.* 11.; and which right Walſingham affirms to have been received in England in 1305, *Ypod. Neuſtr. ad hunc annum.* Du Cange, *v. Annata*, defines it to be a year's rent of every biſhoprick or abbacy, granted to the Pope by the biſhop or abbot, on his entry to the benefice. The annat, when taken in this laſt ſenſe, was only exacted from thoſe churchmen who had received conſecration from the Apoſtolical ſee; and ſeems to have taken riſe from an ancient cuſtom, of an honorary paid by thoſe who entered into holy orders, to the biſhop who ordained them, *Nov.* 123. *c.* 3. & 16. The firſt Scottiſh ſtatute which mentions the annat, is 1547, *c.* 4. by which the fruits of the benefice then on the ground, and the annat afterwards, were, upon an invaſion threatened by England, declared, notwithſtanding this Pontifical right, to belong to the executors of ſuch churchmen as ſhould fall in the defence of their country. And the ſame encouragement was renewed on a like occaſion, by 1571, *c.* 41.

66. The right of ann, as that term is now underſtood in Scotland, was borrowed from Germany. In ſeveral Proteſtant churches there, as of Pomerania, Francfort, &c. a year's rent of each parochial benefice was, ſoon after the reformation by Luther, given on the incumbent's death, as a gratuity to his wife and children, beſide what was due to himſelf for his incumbency; to which they gave the name of *annus gratiæ.* In Saxony, Brunſwick, Magdeburg, &c. only ſix months ſtipend was allowed, *Boehmer. Jus Eccleſ. l.* 3. *t.* 5. § 298. *et ſeqq.* James VI. after this example, recommended to the biſhops to make an ordinance, that the half of the year's benefice next enſuing the incumbent's death, ſhould belong to his widow and children; which appears to have been complied with, from a deciſion, *July* 19. 1626, *E. Mariſchal.* The extent of this right was not however preciſely fixed till 1672, *c.* 13. which declares it to be a half-year's ſtipend given by the law, on the death of all churchmen, whether

* As to the caſe where a pariſh is partly landward, and partly within borough, ſee *New Coll.* iii. 17.

biſhops

biſhops or parochial miniſters, to their executors, beſide what may have been due to the deceaſed himſelf for his actual ſervice; ſo that if the incumbent die after Michaelmas, his executors are intitled to the whole of that year's ſtipend for his incumbency, and to the half of the next in name of ann; and if he die after Whitſunday, they have the firſt half of that year for his incumbency, and the other half as ann. The ann is due, though the incumbent had been before his death ſuſpended by a ſentence of the church from the exerciſe of his office; for ſtill he died incumbent in the benefice, the right of which cannot be affected by any church-ſentence, other than that of deprivation, 1592, *c.* 115.; *Jan.* 26. 1670, *Relict of Shiels*. As the law has given this right to the executors of all miniſters indiſcriminately, it is due, not only in pariſhes where the ſtipend is made up of the tithes, but though it ſhould be paid out of the revenues of a borough, or conſiſt of a fund raiſed by voluntary ſubſcriptions, *Falc.* i. 182.

67. Writers differ about the proportions by which the ann is to be divided between the incumbent's widow and children. Some affirm, that the widow ought to draw no more than an equal ſhare with any one of the children; and ſome, that the one half of the ann goes to the widow by herſelf, and the other to the children, among whom it is proportioned *in capita;* which laſt opinion is ſupported by a deciſion, *July* 1747, *Childr. of Macdermet*. But if we ſet aſide that authority, a third opinion may perhaps be more agreeable to the act 1672, which gives the right to executors, without the leaſt mention either of widow or children; for if it be given to executors, it ought to be governed by the rules of ſucceſſion in executry, by which one third of the ann would, like other moveable ſubjects, go to the widow, where there are both widow and children, and the remaining two thirds be divided among the children *per capita*. All are agreed, that where there is a widow without children, the widow gets the one half, and the next of kin to the deceaſed the other. If there be children, and no widow, the children get the whole, to the entire excluſion of the other kinſmen of the deceaſed; and where he has left neither widow nor child, the whole ann goes to his next of kin, *July* 6. 1665, *Colvil*.

68. Since the ann never belonged to the deceaſed churchman, but is a legal gratuity, chiefly intended for the behoof of his widow and children, who, for the moſt part, are but poorly provided by the deceaſed himſelf, it requires no confirmation; for confirmation is the method the law has appointed for perfecting titles to the moveable eſtate belonging to the deceaſed, in the perſon of his next of kin. This however was doubted, ſee *July* 19. 1664, *Scrimgeour*, till the aforeſaid act 1672, by which the incumbent's executors are declared to have right to the ann without confirmation. It alſo follows, from the ann's having never been *in bonis* of the incumbent himſelf, that it is not affectable by his debts, nor aſſignable by him to any ſtranger, to the prejudice of thoſe for whoſe benefit the law intended it, *Fount. March* 18. 1686, *Alexander; Fount. Feb.* 20. 1694, *Donaldſon*.

TIT. XI.

Of Inhibitions.

AFTER having treated of the conſtitution and tranſmiſſion of feudal rights, with their ſeveral limitations, and the burdens with which they are chargeable, it remains to be conſidered, how thoſe rights may be affected at the ſuit of creditors by legal diligence. Diligences are certain forms of law, by which a creditor endeavours to make good his payment, either by laying hold of and impriſoning the perſon of the debtor, or by ſecuring his eſtate from alienation or embezzlement, or by carrying the property of it directly to himſelf. Diligence is either real or perſonal. Real is that which is proper for attaching heritable or real rights. Perſonal is that by which the debtor's perſon may be ſecured, or his perſonal eſtate affected. Of the firſt kind, the law of Scotland has received two: *Firſt*, Inhibition, to be explained under this title; and, *2dly*, Adjudication, which the law has ſubſtituted in the place of appriſing, and which is to be conſidered under the next.

2. Inhibition is a perſonal prohibition, which paſſes by letters iſſuing from the ſignet, prohibiting the party inhibited to contract any debt, or grant any deed, by which any part of his lands may be alienated, or carried off, to the prejudice of the creditor inhibiting. This diligence was introduced to ſecure creditors who are in danger of loſing their debts through the profuſe diſpoſition of the debtor: the prohibition therefore contained in it is barely perſonal againſt the debtor himſelf, whoſe character and turn of mind give the creditor ground to ſuſpect him of an intention to alienate. Hence the debtor's heir, who has, after the anceſtor's deceaſe, perfected titles to the eſtate, lies under no reſtraint, if the inhibition be not renewed againſt him. This method of ſecuring creditors againſt the debtor's deeds of alienation, is more effectual than that by the *actio Pauliana* of the Roman law: for there evidence was required of an actual intention in the debtor to diſappoint his creditors, in order to annul the alienation; whereas a *præſumptio juris et de jure* ariſes from the diligence of inhibition, that every deed done by the debtor counteracting the prohibition contained in that diligence, is fraudulent, *Cr. lib.* 1. *dieg.* 12. § 31.

3. Inhibition may proceed, according to Mackenzie, § 2. *h. t.* either upon a decree, or on a regiſtered bond, which is, in the conſtruction of law, a decree. This carries a ſtrong inſinuation, as if inhibition could not be grounded upon any unregiſtered deed: but it is nevertheleſs daily admitted, upon the title of bonds, or other liquid obligations to which the creditor hath right, whether regiſtered or not. An inhibition may alſo be ſerved by a creditor upon his debtor, where his only title is an action which he has commenced, for making good a claim not yet ſuſtained or aſcertained by the judge, which is called *inhibition upon a dependence*, or *on a depending action*. In this laſt kind, it had been the general practice, for the creditor who was to inhibit, to raiſe a ſummons againſt his debtor for conſtituting the dependence, and ſo ſoon as that ſummons had paſſed the ſignet, to raiſe letters of inhibition againſt him, as upon a depending action; and it was thought ſufficient if the ſummons was executed againſt the defender before ſerving him with the letters of inhibition. But beſide that no action can be properly ſaid to depend againſt one till he be cited in it as a defender, the ſtyle of all inhibitions ſuppoſes, or aſſumes, that the ſummons, by which the dependence is conſtituted, has been already executed againſt the defender

defender, at iſſuing the letters of inhibition. Notwithſtanding this univerſal *communis error*, therefore, an inhibition was declared void, becauſe it was raiſed, and had paſſed under the ſignet, before executing the ſummons on which it was grounded, *Br.* 9. * An inhibition upon a depending action can have no effect towards annulling deeds granted by the debtor after that diligence, till the dependence be cloſed by a decree in favour of the purſuer, ſuſtaining the debt, and declaring its extent; becauſe until ſuch decree be recovered, it is uncertain whether the inhibiter be truly creditor to the party inhibited, or to what amount. If the claim depending ſhould be tranſacted by the voluntary agreement of parties, in conſideration of a determinate compounded ſum to be paid by the debtor, without a judicial ſentence, the inhibition, which could no longer be ſaid to be grounded on a depending action, would probably fall, and the creditor be put to the neceſſity of renewing his diligence upon the debtor's obligation for the compounded ſum. Inhibition may proceed, not only on debts already payable, but on thoſe the term of payment of which is not yet come, *Hope*, (*Inhibit.*), *March* 19. 1622, *Napier*; ſee *New Coll.* ii. 52.; and even on conditional debts, though theſe are not proper obligations till the exiſtence of the condition under which they are granted, *Dirl.* 116. But if an inhibiter upon a conditional debt ſhall bring an action of reduction *ex capite inhibitionis*, before that period, the decree of reduction can have no preſent effect: it is barely declaratory; and its operation is ſuſpended till the obligation be purified by the exiſtence of the condition.

4. The legal forms required in carrying on the diligence of inhibition, regard either, *firſt*, The perſonal execution of it againſt the debtor; or, 2*dly*, Its publication; which, in ſeveral of our ſtatutes, gets alſo the name of *execution*; or, 3*dly*, Its regiſtration. The ſolemnities relative to the perſonal execution of the letters, which ſerves as an intimation to the debtor, are the ſame which are preſcribed in the execution of ſummonſes, and letters of horning, by 1540, *c.* 75.; which have been already explained, *t.* 5. § 55.——The explaining the manner of publiſhing and regiſtering interdictions has been hitherto poſtponed, becauſe the eſſential forms are preciſely the ſame in interdictions and inhibitions; and therefore what ſhall be here ſaid of the one is to be underſtood alſo of the other.——And firſt, as to publication: By our ancient cuſtoms, obſerved by Balfour, *p.* 186. *c.* 2. it behoved inhibiters to publiſh their diligence at the market-croſs of the head brough of the ſhire where the debtor reſided, by a meſſenger reading the letters at the croſs, after three Oyeſſes made for convocating the lieges, in the ſame manner as in the publication of hornings; and by his afterwards affixing a copy of the letters, and of his own execution, to the croſs. The only ſtatute which mentions the publiſhing of inhibitions in expreſs terms, 1597, *c.* 264. has plainly had an eye to that cuſtom; and directs, that where the party inhibited reſides within a ſtewartry, or other ſeparate juriſdiction, the diligence ſhall be publiſhed at the head borough of that juriſdiction, in place of the head borough of the ſhire. But this branch of the act is now rendered uſeleſs, by the abolition of ſeparate juriſdictions. An inhibition executed againſt the debtor perſonally in an houſe where he has reſided only occaſionally for forty days, may be publiſhed at the head borough of the juriſdiction, either of that dwelling houſe, or of the debtor's proper and fixed domicil, *Tinw. Dec.* 2. 1748, *Cred. of Kinminity*. An inhibition uſed by an interdicter againſt the interdicted, and duly regiſtered, has been adjudged to ſupply the want of publication of the interdiction, *Nov.* 10. 1676, *Steuart*; which is an evidence, that the formal publi-

* See alſo *July* 19. 1706, *Cred. of Strichen*; *New Coll.* ii. 169.

cation

cation of the interdiction by a meſſenger is not accounted an eſſential ſolemnity, (for ſolemnities cannot be ſupplied by equipollencies), but is injoined barely as a rational and proper method of notifying it to the lieges.

5. As experience ſoon taught, that the executions and publications of this diligence might be eaſily concealed from purchaſers and creditors, or forged to their prejudice, all interdictions and inhibitions, with their executions, were, by 1581, *c.* 119. N° 1. ordained, for the ſecurity of ſingular ſucceſſors, to be regiſtered in the books, both of the ſhire where the debtor reſides, and, if he has lands in another ſhire, in the books alſo of that ſhire where the lands lie, within forty days after publication, under the ſanction of being declared null. This act was in part repealed by that clauſe of the poſterior one in 1597 formerly recited, which enacts, That where the party dwells within a ſeparate juriſdiction, the diligence is to be regiſtered in that ſeparate juriſdiction. But the clauſe of the act 1581, which required regiſtration in the books of the ſhire where the lands lay, continued in force notwithſtanding the poſterior act 1597, till the abolition of ſeparate juriſdictions by the act 20° *Geo. II.*

6. By 1597, *c.* 265. letters of interdiction, inhibition, and ſome others therein mentioned, were to be regiſtered in the books of the proper juriſdiction, in preſence of a notary and witneſſes; and if the ſheriff, bailie, or ſteward, refuſed, he who preſented them for regiſtration might get them recorded in the books of ſeſſion. But by 1600, *c.* 13. the preſence of a notary and witneſſes is diſpenſed with, and an option given to regiſter thoſe writs in the general regiſter of the ſeſſion, though the regiſtration ſhould not be refuſed by the judge of the inferior juriſdiction. From the injunction given by act 1581, to regiſter inhibitions, both in the books of the juriſdiction where the inhibited reſides, and where his lands lie, meſſengers took occaſion to publiſh them alſo in both juriſdictions, which became a cuſtom almoſt univerſal: but the omiſſion of this form, which was ſuperadded by meſſengers, only for their own advantage, makes no nullity in the regiſtration, *St. b.* 4. *t.* 50. § 10. *verſ. The next reaſon*; *Feb.* 14. 1710, *Lo. Gray*. It is becauſe regiſtration is a ſurer way to certify the lieges, than publication at the market-croſs, that regiſtration is required, both where the party reſides, and where his lands lie; whereas publication is ſufficient if it be uſed at the juriſdiction of the party's reſidence. Regiſtration in the general regiſter ſecures all the lands of the inhibited from alienation, in whatever part of the kingdom they may lie; but where the inhibition is recorded in the regiſter of a particular ſhire, it covers no lands but what are ſituated in that ſhire; and for this reaſon it may be prudent for a creditor who is not fully appriſed of the extent and ſituation of the whole eſtate of his debtor, to record his diligence in the general regiſter. Though an inhibition ſhould be regiſtered in the books of a ſhire where part of the lands belonging to the debtor lies, within forty days after it has been, in compliance with the aforeſaid cuſtom, publiſhed in that ſhire; yet if it be not regiſtered alſo, within forty days from the publication, in the ſhire of the debtor's domicil, it can have no effect as to thoſe particular lands, *Tinw. Dec.* 2. 1748, *Cred. of Kinminity*; becauſe publication in the ſhire of the domicil being that which is directed by the law, the omiſſion to regiſter the letters of inhibition in it within forty days from that publication, muſt be fatal to the diligence.

7. To prevent inhibiters, to whom the principal executions are returned after they are regiſtered, from altering them, in caſe they ſhould be found informal, the clerk of the record is, by 1581, *c.* 119. N° 1. required to mark them with his ſubſcription before returning them to the inhibiter who preſents them for regiſtration. An execution, therefore, which was not

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ſo marked, was declared void, as wanting the proper legal check preſcribed by the law againſt falſe executions, *Br.* 90. But by a later deciſion in a ſimilar caſe, *June* 16. 1727, *Duch. Argyle*, obſerved in *Dict.* ii. *p.* 329. the objection, That the execution was not marked by the clerk, was repelled, becauſe the injunction of the act ſtood on the footing of a bare ordinance, not enforced with any ſanction. It is a general rule in all diligences which require ſeveral acts to perfect them, That they are not complete till the laſt ſtep: an inhibition therefore muſt run through all the forms of publication and regiſtration before it become a complete diligence. Nevertheleſs the eſtate of the debtor is, after publiſhing the inhibition, rendered litigious, as lawyers expreſs it; which has this effect, that the creditor who had begun the diligence is ſecured againſt all voluntary deeds granted by his debtor after the publication, though proceeding upon a cauſe truly onerous, provided he ſhall, within the time preſcribed by ſtatute, perfect his diligence by regiſtration, *Dirl.* 254. Nay, if the debtor ſhall, at any time after being cited upon an inhibition uſed by one of his creditors, though previouſly to its publication, grant a voluntary right to another creditor, ſuch right is voidable at the ſuit of the inhibiter upon the act 1621, afterwards to be explained, *Harc.* 639.; *vid. infr. t.* 12. § 16.

8. At firſt, inhibitions, becauſe they reſtrained the inhibited from the full exerciſe of his property, were accounted unfavourable, as carrying with them a certain degree of reproach, and therefore were never granted except *cauſa cognita*, *Balf. p.* 476. *c.* 1. They are upon this ground not allowed, even by the preſent practice, when they proceed on conditional debts, unleſs it appear that the debtor is *vergens ad inopiam*, or that the inhibiter has ſome other juſt and ſufficient cauſe for uſing that diligence, *July* 17. 1713, *Weir*. Hence inhibitions grounded upon obligations of warrandice, which are truly conditional debts, ought not to paſs, unleſs the creditor who is demanding the diligence ſatisfy the court, that it is not without ground that he apprehends ſome danger of having the ſubject warranted carried off from him by an action of eviction, *St. b.* 4. *t.* 20. § 29. Though inhibitions now paſs generally of courſe, without oppoſition from the debtor; yet if he appear, and offer a good reaſon why the diligence ought not to paſs the ſignet, the court is in uſe to ſtay it, *Fount. Feb.* 15. 1699, *Murray*. This happens moſt frequently where the depending action upon which the inhibition is grounded appears calumnious. But even where the debt is confeſſedly juſt, the court of ſeſſion have ſometimes ſtopped this rigorous diligence as emulous, where the ſolvency of the debtor was notorious, *July* 11. 1728, *Royal Bank*. It is not however likely that this judgement, which muſt be confeſſed to incroach on the legal right of creditors, will be drawn into example, unleſs where there is the ſtrongeſt evidence that the creditor intends ſomething elſe by his demand of diligence than the ſecurity or recovery of his debt. Inhibition may be refuſed *ex officio judicis*, though the debtor make no oppoſition, if any exception to the diligence ſhall occur to the court from the creditor's own ſhewing. Thus inhibition demanded by a wife on her marriage-contract againſt her huſband, was not allowed to proceed till inquiry was made into the huſband's circumſtances and profuſe diſpoſition, *Fount. Feb.* 9. 1706, *Wiſhart*.

9. As to the extent and effect of inhibition, it appears by the oldeſt ſtyle of this diligence, which continues down to this day, that it ſecured originally the moveable as well as the heritable eſtate of the debtor from alienation. But as this imbargo upon moveables proved a great interruption to the free courſe of trade, the effect of inhibition has been long limited by the uſage of Scotland to heritage: ſo that debts, though contracted after inhibition, are held to be a ſufficient foundation of diligence, both againſt

the perſon and the whole moveable goods of the debtor, not only in a queſtion with his other creditors, but with inhibiters themſelves, *March* 22. 1623, *L. Braco.* And hence the arrears of intereſt due to a perſon inhibited, upon a right of annualrent, or other *debitum fundi*, though they are heritably ſecured, yet being moveable ſubjects, fall not under inhibition, which is a diligence proper to heritable rights, *Falc.* ii. 138. Since inhibitions anciently ſecured moveables from alienation, our preſent law, by which it has loſt that effect, ought to be explained ſo as to make the leaſt deviation poſſible from our ancient uſage; and conſequently all ſubjects ought to be ſecured at this day by inhibition which are not moveable in a proper ſenſe. It is agreed by all, that proper rights of land, ſuch as charters or diſpoſitions, may be ſecured by inhibition againſt the deeds of the inhibited, though they continue *in nudis terminis* of perſonal deeds, without actual ſeiſin: but Stair, *b.* 4. *t.* 50. § 2. maintains, that inhibitions do not reach to bonds or obligations, though they bear a clauſe of ſeiſin, if ſeiſin has not actually followed; and conformably to this poſition, it was found, that the conveyance of an heritable bond upon which no infeftment had proceeded, was not voidable *ex capite inhibitionis*, *Dalr.* 45. This diſtinction, however, hath not been ſince ſupported by practice. Neither indeed hath it any ſolid foundation in nature. The reaſon offered by Bankton in ſupport of the judgement, that ſuch rights cannot be ſaid to lie in any county, *b.* 1. *t.* 7. § 137. is by no means ſatisfactory; for the lands deſcribed in the heritable bond or diſpoſition, may be ſaid with the greateſt propriety to lie in the county ſpecially mentioned in the deed, whether ſeiſin be taken on it or not.

10. Inhibition ſecures to the inhibiter, not only thoſe heritable rights which were veſted in the debtor at the date of the diligence, but ſuch as he may afterwards acquire; becauſe it is the true deſign of inhibitions, to prevent the leaſt degree of commerce with the debtor for the future, in relation to his heritage, that may tend to the inhibiter's detriment, *Dec.* 15. 1665, *Eleis:* yet as all inhibitions muſt be regiſtered in the juriſdiction where the debtor's heritage lies, no inhibition can extend to after purchaſes made by the debtor, which lie in a juriſdiction where the diligence was not regiſtered; for to ſuch purchaſes the inhibition could not have been extended though they had been made of a date prior to it.

11. This diligence ſtrikes againſt the voluntary debts or deeds of the inhibited, *i. e.* againſt all rights granted by him, to which he was not obliged, anterior to the inhibition. Therefore a ſale of lands, however onerous, made by the debtor after publiſhing the inhibition, or a voluntary ſecurity upon land granted by him to a creditor even after citation upon the diligence, though antecedently to its publication, may be annulled by the inhibiter, ſuppoſe that creditor's debt ſhould have been contracted previouſly to the inhibition. But this reſtraint goes no farther. If, *ex. gr.* the debtor was, antecedently to the diligence, bound either to grant to his creditor a ſpecial debt or ſubject, or even, in general terms, to make over his lands to him for his farther ſecurity, the granting of ſuch right becomes neceſſary: he was compellable to it before the creditor who excepts to the deed, had acquired any right by inhibition; and therefore the right ſo granted cannot be hurt by that diligence, *July* 22. 1675, *Gordon.* On this ground inhibition does not ſtrike againſt judicial rights, *ex. gr.* againſt an adjudication of the debtor's eſtate, recovered after inhibition, upon a debt contracted before it; becauſe adjudication is not truly the deed, either voluntary or neceſſary, of the debtor who lies under the inhibition, but of the law. But an adjudication led upon a bond poſterior in date to the inhibition,

hibition, is ſubject to reduction, becauſe its only foundation is a bond granted voluntarily by the debtor after that diligence.

12. By this rule, if a wadſetter or annualrenter ſhall, after he has been inhibited, be required to renounce his right of wadſet or annualrent, on conſignation of the ſums therein contained, the renunciation following upon it, being a neceſſary deed, cannot be affected by the prior inhibition; for every debtor has a right, on payment or conſignation of his debt, to demand a renunciation or releaſe from his creditor, *Jan.* 7. 1680, *Maclellan.* This bore hard on creditors who had wadſetters or annualrenters for their debtors, and who had no effectual way by any diligence, even that of inhibition, to hinder them from renouncing their right on payment, and from ſquandering away the redemption-money. To ſecure inhibiters againſt the effect of ſuch renunciations, it is declared by act of ſederunt, *Feb.* 19. 1680, That after the inhibiter has intimated to the reverſer his diligence by a notorial inſtrument, and produced, in preſence of the notary and party, the inhibition duly regiſtered, it ſhall not be lawful to the reverſer to make payment to his creditor, otherwiſe than by way of action, to which the inhibiter muſt be made a party: and in this action it is competent to the inhibiter to demand, that the redemption-money may be paid, not to the wadſetter or annualrenter, but to himſelf, in virtue of his ground of debt and diligence.

13. Inhibition is only a negative or prohibitory diligence: it gives the creditor a right to reduce all poſterior voluntary deeds granted by the debtor; but it has no poſitive effect towards transferring either the property or poſſeſſion of the debtor's eſtate to himſelf. His debt, if it was perſonal before, continues ſuch after the diligence. Nay, though the inhibiter ſhould recover a decree voiding poſterior deeds, or contractions, *ex capite inhibitionis*, ſuch reduction, of deeds granted to others, cannot alter the nature of the debt due to himſelf, or give him acceſs to the poſſeſſion of his debtor's eſtate, which he cannot attain, till he make his debt real by adjudication. Hence an inhibiter can claim no proper preference on account of his diligence, and can only be ranked, after he has led his adjudication, according to the rules laid down with regard to the competition of adjudgers; inſomuch that if debts be contracted by the party inhibited on heritable ſecurity, though after the inhibition, (and which are conſequently ſtruck at by that diligence), the inhibiter's debt, which ſtill continues perſonal, has no title to any degree of preference in a queſtion with thoſe real creditors, in an action of ranking; for perſonal debts cannot be ranked in a competition with real. Yet as the inhibiter's diligence cannot be hurt by thoſe poſterior debts, he has a right to draw back from the creditors ranked, whoſe debts fell under the inhibition, the ſums contained in that diligence.

14. Deeds, even when they are granted by a perſon inhibited, contrary to the reſtraint he is laid under by the inhibition, are not *ipſo jure* null: for though that diligence prohibits him to grant deeds hurtful to the creditor; yet as ſuch prohibition is impoſed merely for the inhibiter's behoof, he may uſe the benefit of the law, or not, at his pleaſure; and if he make no uſe of it, the deed continues valid; ſo that the inhibiter acquires only a right to reduce it in ſo far as it tends to his detriment. And even where a deed is actually voided *ex capite inhibitionis*, the reduction has no effect, but in favour of the inhibiter himſelf. The deed continues in full force with regard to every other creditor of the inhibited, ſince the only ground of reduction is, that the deed was granted to the inhibiter's prejudice; according to the rule, *Res inter alios acta, aliis neque nocet neque prodeſt.* The inhibition is not therefore pleadable by any of the inhibiter's co-creditors, who are third parties;

ties; nor can it alter the natural preference of their ſeveral debts. And, on the other hand, as the inhibiter cannot be hurt by debts contracted after his diligence, neither can he, avail himſelf of them, ſo as to enlarge his own preference beyond what his grounds of debt naturally intitle him to: he draws from his debtor's funds as much as he would draw if thoſe poſterior debts or deeds were not in the field, and no more.

15. From the doctrine of the preceding ſection, it follows, that where ſeveral infeftments of annualrent of different dates have been granted by the debtor after inhibition, for the ſatisfying of all which, after payment of the ſums due to the inhibiter, the debtor's eſtate is not ſufficient, the deficiency of the fund of payment does not affect all thoſe poſterior annualrents *pro rata*, (though this had been the former practice), but muſt fall entirely on the leaſt preferable, *Falc.* i. 160.; *Kames*, *Rem. Dec.* 78.: for though the inhibiter cannot be hurt by any of thoſe poſterior debts and ſecurities, and conſequently has a right to draw back his whole debt from the annualrenters; yet no part of it ought to be drawn back from thoſe whoſe debts were firſt contracted after the inhibition, while the fund of payment was ſufficient both for the inhibiter and them: it is only the deeds granted after exhauſting the creditor's fund of payment which can be ſaid to be granted to the inhibiter's hurt, and which are therefore ſubject to reduction. The ſame judgement, founded on the ſame grounds, was pronounced in a caſe entirely ſimilar, *New Coll.* ii. 209.

16. Hence alſo debts, though contracted after the inhibition, cannot be voided *ex capite inhibitionis*, if the inhibiter could have drawn nothing from the debtor's eſtate even ſuppoſing thoſe poſterior debts had not been contracted; becauſe the inhibiter ſuffers nothing by ſuch debts, ſince, though they had never exiſted, the fund of the inhibiter's payment would have been exhauſted by debts preferable to his, *Feb.* 15. 1698, *Mill*, obſerved in *Dict.* i. *p.* 184. Let the caſe, therefore, be put, that adjudications have been deduced againſt the debtor's eſtate, on debts contracted before the inhibition; that theſe adjudications exhauſt the whole fund; and that other creditors have, upon debts contracted after the inhibition, adjudged the ſaid eſtate within year and day from the firſt adjudication; the inhibiter, whom we ſuppoſe not to have adjudged, would have drawn nothing, though the poſterior debts had not been contracted, being cut off by adjudications on debts contracted previouſly to his diligence: the poſterior creditors, therefore, will draw *pari paſſu* with the prior, in conſequence of the rule of preference to be explained next title, while at the ſame time the inhibiter will be excluded from the ſmalleſt part of the debtor's heritable eſtate.

17. As for the ways of extinguiſhing inhibitions, that diligence may be not only ſtayed by the court of ſeſſion upon ſufficient grounds, before its paſſing the ſignet, but it may be reduced on good reaſons, after it is completed by publication and regiſtration. The uſual reaſons for the reduction of inhibitions ariſe from nullities, either in the ground of debt on which the diligence has proceeded, or in the form of carrying it on; of which laſt, Stair furniſhes us with many inſtances, *b.* 4. *t.* 50. § 13. *et ſeqq.* Where the ſum contained in the inhibiter's ground of debt is either paid to the inhibiter by the debtor, or offered to be paid to him under form of inſtrument, the law compels the inhibiter to diſcharge the debt and diligence; which ſpecial manner of extinction is called *a purging of the inhibition*. But any co-creditor of the inhibited whoſe debt is ſtruck at by the inhibition, or a purchaſer from him, has a right, on payment to the inhibiter of the debt due to him, to demand, in his own favour, a conveyance thereof, and of the diligence following on it, that he may the more effectually ſecure his purchaſe, or recover the debt due to himſelf by the common debtor. Yet if the inhibiter

biter ſhall have led an adjudication againſt his debtor's eſtate, upon a juſt and legal ground of debt, an offer to purge by one who has bought lands from the debtor, made after expiring of the legal term of redeeming the adjudication, may be rejected by the inhibiter; becauſe the irredeemable property of the debtor's eſtate, which he hath acquired by the expired adjudication, cannot be wreſted from him on the title of a voluntary diſpoſition granted by the debtor, after inhibition, to his prejudice, *Falc.* ii. 122.

TIT. XII.

Of Appriſings, Adjudications, and the Judicial Sales of Bankrupt Eſtates.

AFTER having treated of inhibitions, which is a diligence merely prohibitory, we are naturally led to explain in what manner the property of heritable rights may be carried directly from the debtor to the creditor. Two or three diſtinct kinds of diligences have been inſtituted for this purpoſe by our law: *firſt*, Appriſings; in place of which adjudications have been ſubſtituted for near a century: 2*dly*, Certain adjudications, which were received at firſt by our moſt ancient uſages, and which are uſed to this day; but as they were originally meant for very different purpoſes from appriſings, ſo they ſtill differ, both in their nature and properties, from the adjudications introduced in place of theſe: and, 3*dly*, Judicial ſales of bankrupt eſtates, made and declared by the court of ſeſſion. By appriſing, or compriſing, (for theſe are ſynonymous terms), we underſtand the ſentence of a ſheriff, or of a meſſenger ſpecially appointed ſheriff for that purpoſe, by which the heritable rights belonging to the debtor were ſold for payment of the debt due to the appriſer, redeemable by the debtor within the term indulged by the law. Though adjudications have been long ſubſtituted in place of appriſings, yet this diligence muſt be particularly conſidered and explained; not only becauſe ſeveral of our moſt conſiderable eſtates are at this day enjoyed under the title of expired appriſings, but becauſe there is ſo near a reſemblance in the nature and effects of the two diligences, that the firſt cannot be thoroughly underſtood without a diſtinct knowledge of the laſt.

2. Where a debtor who is unable or unwilling to pay his creditors, refuſes to diſpoſe of his eſtate for their payment, he may be compelled by law to do that juſtice to them which he cannot be brought to voluntarily. The diligence of appriſing, when taken in this general view, is *juris gentium*; for methods have been laid down by the laws of all civilized nations, for taking the debtor's eſtate, whether real or perſonal, into execution, for the payment of his debts. By the Roman law, *l.* 15. § 2. *De re judic.* the debtor's moveable eſtate was firſt to be ſold; and if that was not ſufficient, his immoveable. In the ſame manner, a creditor was not permitted, by the ancient law of Scotland, to attach any of his debtor's lands or heritages, ſo long as he had moveable goods ſufficient for ſatisfying his debts, *St.* 2. *Rob. I. c.* 9.; and at firſt, not only the goods belonging to the debtor himſelf, but thoſe of his tenants, were ſubjected to diligence upon a brief of diſtreſs, *St. Alex. II. c.* 24. § 1. In default of moveables, the ſheriff was directed to give notice to the debtor, that it behoved him to diſpoſe of as much of his heritage within fifteen days after, as might ſatisfy his creditor; and if the debtor neglected, or refuſed, the ſheriff was authoriſed to do it for him, *ibid.* § 2. 3. Appriſings, therefore, were, by their

original conſtitution, proper ſales of the debtor's land to any purchaſer who offered. At that period, the ſuperior might, without any gratification, have been compelled to receive the purchaſer as vaſſal, § 7. unleſs he choſe to purchaſe the lands himſelf, § 5.: and the debtor appears to have been intitled to a legal right of redemption within a year, at leaſt in burgal tenements, *Leg. Burg. c.* 95. We learn from a decree of appriſing, pronounced in 1450, a copy of which is annexed to *Hiſt. Law-tracts*, *Append.* N° 6. that lands continued to be appriſed in the form thus preſcribed by Alex. II. for many centuries after.

3. This ſtatute of Alex. II. received conſiderable alterations, and indeed improvements, by 1469, *c.* 37. The goods belonging to the debtor's tenants could not be diſtrained for any higher ſum than they owed to their landlord; the ſuperior was intitled to a year's rent of the lands for receiving the purchaſer as his vaſſal, on the payment of which it behoved the ſuperior to enter him; and the term within which the debtor might redeem his lands from the purchaſer, upon repayment of the purchaſe-money, together with the expence of infeftment, and the compoſition to the ſuperior, was lengthened out to ſeven years. If the debtor had not lands ſufficient for the creditor's payment within the territory of the ſheriff before whom decree was firſt recovered againſt him, the crown iſſued letters to the ſheriff of the ſhire where his other lands lay, to expoſe theſe alſo to ſale, in ſo far as there was a ſhortcoming. If no purchaſer could be found, the ſheriff was required to appriſe or tax the value of the lands by an inqueſt, and to make over to the creditor ſuch a proportion of them as correſponded in value to the amount of the debt: and hence thoſe judicial ſales got the name of *appriſings*; ſee Mackenzie's obſervations on this act, 1469, *c.* 37. The ingenious author of Hiſtorical Law-tracts, obſerves, *tit. Securities upon land*, that, prior to this ſtatute 1469, creditors who were ſecured upon lands, had the privilege of diſtraining their debtor's rents at ſhort hand, without the decree of a judge obtained in conſequence of a brief of diſtreſs. This he proves by a bond, dated in 1418, ſubjecting certain lands of the granter's property to the diligence of his creditor, in the ſame manner that the creditor or he might diſtrain their proper lands for their rents, without the authority of any judge: and from thence he concludes, *firſt*, That the poinding authoriſed by the act 1469, which is ſaid to proceed on a brief of diſtreſs, relates only to executions upon perſonal debts, and not on thoſe which proceed on real ſecurities. *2dly*, That that branch of the ſtatute which indulges debtors in a right of redeeming the appriſed lands within ſeven years, is confined to appriſings on perſonal debts, leaving the law, in ſo far as concerned thoſe which proceed upon *debita fundi*, upon its former footing.

4. To prevent the expence of double diligences where the debtor's lands lay in different ſhires, appriſings, in place of being executed by ſheriffs, whoſe juriſdiction was limited each to his own county, came in the courſe of time to be intruſted to meſſengers, who were, by letters iſſuing from the ſignet, conſtituted judges or ſheriffs in that part, and whoſe powers extended over the whole kingdom. And this practice, after it was once introduced, maintained its ground, notwithſtanding an expreſs ſtatute prohibiting it, upon a complaint exhibited by the ſheriffs of an incroachment thereby made on their juriſdiction, 1540, *c.* 82. A blank was left in the letters of appriſing, for inſerting the name of any meſſenger whom the creditor ſhould chuſe to employ; and the meſſenger was thereby commanded to paſs to the ground of the debtor's lands, and ſearch for moveables; and in default of them, to denounce the lands to be appriſed, *i. e.* to make publication, both on the ground of the lands, and at the market-croſſes of the head

head boroughs in the ſeveral juriſdictions in which they lay, that the lands themſelves were to be appriſed; and copies thereof were to be left by him both on the lands and on the ſaid market-croſſes. Of theſe letters of appriſing, ſearch for moveables, denunciation, and day and place of appriſing, the meſſenger was, by a copy, to give notice to the debtor, either perſonally or at his dwelling-houſe: and by act of ſederunt, June 27. 1623, preſerved by Spottiſwoode, *Pract. p.* 44. fifteen free days muſt have intervened between the denunciation and the actual ſale or appriſing of the lands, excluding both the day of denunciation and of the ſale. If the meſſenger's execution did not ſpecially mention, that, before denouncing the lands, he made a previous ſearch for moveables, but had found none ſufficient for clearing off the debt, the decree of appriſing was ſubject to reduction. Upon the day prefixed for the appriſing, the creditor exhibited a claim of his debt to the meſſenger, who remitted the examination of it to a jury or inqueſt. After the claim was ſuſtained by them, an offer of the lands to be appriſed was made to the debtor upon payment; and on his failure to appear, or to make payment, the meſſenger interpoſed his authority to the verdict of the inqueſt, by his decree, adjudging ſuch a proportion of the debtor's lands to belong to the appriſer, as was taxed by the jury to amount to the principal ſum, penalty, compoſition to the ſuperior, and ſheriff-fee: but no part of the debtor's lands was ſet off to the appriſer in name of intereſt before the Reformation; becauſe the exacting of intereſt was prohibited by the Canon law.

5. The meſſenger at firſt held his court in the tolbooth or court-houſe of the head borough of the ſhire where the lands lay; but by a diſpenſing clauſe, which was afterwards inſerted of courſe in all letters of appriſing, he was left at liberty to hold his court at Edinburgh, as the *communis patria*; and, upon ſpecial emergencies, at other places, *July* 12. 1671, *Heirs of Lundy*. This cuſtom was probably introduced for the conveniency of the clerks to the ſignet, who alone could be clerks to the proceſs of appriſing, and moſt of them had their fixed reſidence at Edinburgh. As long as the rule preſcribed by the act 1469 was obſerved, of appriſing the lands by an inqueſt of men of the ſame county, who knew their value, the effect of the diligence was confined to ſuch a proportion of the lands as was enough for clearing off the debt; but after appriſings were by diſpenſation allowed to be deduced at Edinburgh, where perſons came frequently to be ſet on the inqueſt who were utter ſtrangers to the value of the ſubject, the debtor's whole lands fell under the decree of appriſing at large, without comparing their value with the extent of the debt; and by this means great eſtates were ſometimes carried off from debtors for the moſt inconſiderable ſums. Mackenzie, § 3. *h. t.* aſſigns a different reaſon for this rigorous practice, viz. That the debtor, as a compenſation for the appriſing his whole eſtate, was indulged with a right to redeem it at any time within ſeven years from the date of the appriſing. But this reaſoning proceeds from a miſtake in fact; for the ſame ſtatute 1469, which grants that right of redemption to the debtor, expreſsly confines decrees of appriſing to ſuch a proportion of his lands as ſhall correſpond in value to the debt.

6. No moveable right, or ſubject, could either be appriſed by our ancient law, or can now be adjudged: for though letters of appriſing contained a power to poind moveables, yet that which was properly called *appriſing* was a ſale of the debtor's heritable ſubjects, moſt commonly lands; and whatever was intimately connected with, or united to land, as fiſhings, annualrents, reverſions, liferents, &c. Every right, therefore, which was of its own nature heritable, might have been appriſed, though it ſhould not have been perfected by ſeiſin, as a charter, diſpoſition, heritable bond; or though it

it ſhould not have required ſeiſin to its completion, as a right of courteſy, of reverſion, &c.; and even a leaſe, though aſſignees ſhould not have been mentioned in it, if they were not expreſsly ſecluded. Nay, mere faculties or powers relative to heritage were appriſable by creditors. If, for inſtance, a perſon had on his deathbed diſpoſed of, or burdened, his eſtate to the prejudice of his heir, the privilege or faculty competent to the heir to reduce the deathbed-deed *ex capite lecti*, might have been appriſed, or may now be adjudged, from him by his creditor, if he himſelf wilfully ſtands off from reducing it, and thereby enlarging the fund of his creditor's payment; for every pecuniary or patrimonial intereſt belonging to debtors, ought to be ſubjected to the diligence of creditors; *vid. Steu. Anſ. v. Adjudication.*

7. This rule, That all heritable rights may be appriſed or adjudged, extends not however to offices of truſt conferred during pleaſure, or even during life, upon perſonal regards; for though ſuch offices bear that character of heritable, that they have a tract of future time, they imply a *delectus perſonæ*, for which there is no room in appriſings or adjudications, ſince perſonal qualities are not communicable to creditors by legal diligences.—— How our ancient law ſtood with reſpect to grants of titles of honour, may admit of a diſtinction. When titles of honour were granted by patent to a patentee, and a certain order of heirs, without any grant of lands, ſuch titles have been ever underſtood to be conferred *ex delectu familiæ*; ſo as not to be tranſmiſſible from that family to a ſtranger, by any conveyance either voluntary or legal: but where large tracts of land were given of old by charter, with the dignity of Earl, or Lord, or Baron, or the right of a ſeat in parliament, annexed to the lands, it can hardly be doubted, that ſuch grants lay open to the diligence of creditors; ſince it is certain that they were frequently carried from the grantees, or their heirs, even by voluntary tranſmiſſion; in which caſes, the conveyance could receive no ſupport from the favour due to creditors, as legal conveyances did. Thus the grants of the earldoms of Roſs, Wigtoun, and ſeveral others, made by Robert I. and his ſucceſſors, appear to have been tranſmitted by the grantees to ſtrangers, who, under the title of the aſſignments made in their favour, enjoyed them as fully, both lands and honours, as the original grantees had done, without oppoſition either from the crown or the grantee's heirs, *MS. Eſſay on Territorial Honours by the late ingenious Mr George Chalmers* *.—— The queſtion, Whether offices of dignity and truſt may be adjudged? was brought before the ſeſſion in 1743. An adjudication of the office of King's Uſher was deduced againſt the apparent heir-male of the family of Langton, to one of whoſe anceſtors an heritable grant of that office had been made. In that caſe a variety of inſtances having been laid before the court, taken from our public records, by which it appeared, that offices of conſiderable dignity, as ſheriffſhips, and even ſome of the higheſt, as the high conſtabulary of Scotland, had been tranſmitted from hand to hand by voluntary conveyance; the judges rightly found, *a fortiori*, that the office in queſtion was ſubject to the legal diligence of creditors, *Falc.* i. 203.; *Kames, Rem. Dec.* 82.; ſee alſo *Kames, Rem. Dec.* 104. It cannot therefore admit of the leaſt doubt, that a patent or grant of an office is affectable by adjudication, where the patent itſelf authoriſes a voluntary tranſmiſſion, *ex. gr.* an office expreſsly granted to the patentee and his aſſigns; for there is no ſubject which the owner has a power of aſſigning voluntarily, which may not be alſo carried off by the diligence of creditors.

8. If appriſing be proper to heritable ſubjects, a decree of appriſing of a right of annualrent, or any other *debitum fundi*, can carry no arrears due upon the right appriſed for terms prior to the decree; becauſe though ſuch

* See the late caſes of Stair, Caſſilis, and Sutherland, particularly the laſt of them, in which the queſtion concerning territorial dignities was very fully treated.

arrears

arrears be heritably ſecured, yet having been ſeparated from the ſubject affected by the appriſing before leading it, they are no longer part of it, but are moveable, and as ſuch are affectable only by diligence proper to moveables, *ex. gr.* by arreſtment or poinding, *March* 13. 1627, *Macghie*. For the ſame reaſon, appriſing does not carry ſuch of the rents of the lands appriſed as have fallen due at any time prior to the decree of appriſing, *Feb.* 16. 1633, *Harper*. All the ſubjects appriſed muſt be ſpecially mentioned in the decree; an appriſing therefore of ſuch of the debtor's lands as are deſcribed by no other character than that of being ſituated in a certain pariſh or county is ineffectual: but where a barony is appriſed, all the ſubjects that are reputed to be parts of the barony are carried under that appellation. If the lands are ſpecially deſcribed in an appriſing, every right competent to the debtor in them, though not a right of property, will be carried by the general clauſe of *all right and intereſt belonging to the debtor in the ſaid lands*; ſuch appriſing therefore is preferable to all poſterior appriſings, though theſe ſhould expreſs the ſpecial right competent to the debtor, *Nov.* 21. 1673, *Fairholm*; *Fount. Nov.* 20. 1711, *Brown*. But tithes are not carried by a general clauſe of all right, petitory or poſſeſſory, competent to the debtor; becauſe ſuch clauſe is only meant to include all right in the lands, and ſo cannot extend to the tithe, *Fount. Feb.* 17. 1702, *Home*.

9. It was not upon every kind of debt that appriſing could proceed. *Firſt*, In an heritable bond granted according to the old form, the lands contained in the bond were the proper debtor, and not the granter, who lay under no perſonal obligation to pay, except in the ſpecial caſe of requiſition; no appriſing therefore could be deduced upon ſuch bond againſt the granter as debtor, till he truly became ſuch by requiſition. *2dly*, The debt on which the creditor led his diligence muſt have been liquid, *i. e.* either aſcertained by the obligation itſelf to a preciſe ſum, or eſtimated to a certain value in money by a judicial ſentence, before leading the appriſing. Thus a creditor in a quantity of corns, could not deduce an appriſing upon his obligation, till, by the previous ſentence of a judge, the corns had been converted to a fixed price, and the debtor decreed to pay that price to the creditor: for no more than a juſt proportion of the lands, correſponding to the value of the debt, was ſuffered to be appriſed by the act 1469; and meſſengers, who were judges in appriſings, though they might judge the value of the lands appriſed, had no power to convert or liquidate a debt of an uncertain value to a money-debt. And though the court of ſeſſion are now the only judges in the adjudications which have come in the place of appriſings, ſtill the debt on which the creditor adjudges muſt be liquid, that the preciſe ſum may be known, on the payment of which the debtor can redeem his lands. *3dly*, Neither could appriſing proceed on a debt where the term of payment was not yet come; becauſe it behoved the meſſenger, before appriſing the lands, to make a ſearch for moveables, that theſe might be diſtrained in the firſt place; and it would be highly unjuſt, to ſuffer a creditor to carry off his debtor's moveable goods by poinding, before the obligation to pay took place. This rule holds to this day in adjudications; and it is grounded on the ſame maxim: for no creditor can, by any diligence whatever, transfer to himſelf the property of his debtor's eſtate till the term of payment; ſee *Feb.* 11. 1680, *Gordon*. Such adjudications are indeed ſometimes paſſed by the ſeſſion; but as they cannot be carried into execution till the term of payment of the debt due to the adjudger, they have been conſidered as an extraordinary remedy, founded ſolely in equity, and not in any poſitive principle of our law. Hence they are admitted only in caſes where the debtor is *vergens ad inopiam*, or where the creditor, if his hands were tied up from diligence, would run the hazard of

loſing his debt, by the other creditors adjudging year and day before him, *New Coll.* ii. 173.

10. Though the debtor's right to redeem, called *the legal reverſion*, or *the legal*, was, by the act 1469, reſtricted to ſeven years from the date of the appriſing, it is made lawful, by 1621, *c.* 6. to minors, from whom lands may be appriſed, to redeem them at any time before their age of twenty-five years, whether the common legal reverſion of ſeven years be expired or not: and minors ſucceeding to ſuch minors are intitled to this privilege, in the ſame manner as if the lands had been appriſed from themſelves. Practice has extended this act, ſo as to include under it the caſe of a minor heir ſucceeding during the legal even to a major, from whom lands had been appriſed, *St. b.* 3. *t.* 2. § 14. *verſ. Thus it*; ſo that the legal of an appriſing can in no caſe expire in the perſon of a minor, whether he be the original debtor from whom the lands were appriſed, or whether he ſucceed as heir to the debtor. By the ſame act, where a debtor from whom lands are appriſed, dies before his age of twenty-five, but after expiring of the common legal of ſeven years, his heir, though he be major, is allowed a year after the debtor's death for redeeming the lands, becauſe otherwiſe he could not avail himſelf of the privilege competent to his anceſtor of keeping open the right of reverſion. But if the common legal be not expired before the minor's death, the major ſucceeding has no more time indulged to him, than happened to be unexpired of the legal when the minor died; which he would have been intitled to, in the common right of an heir, though the lands had been appriſed from a major. This, however, is to be ſo underſtood, that the major heir ſhall in all events have a full year for the redemption, though ſo much ſhould not have remained current of the ordinary legal at the minor's death; for it would be abſurd, to indulge him in a longer time when the common legal was expired at the death of the anceſtor, than when the legal was yet current at that period.

11. Lands may be appriſed, not only by the original creditor, but by any perſon who ſhall, either as aſſignee, or as heir to him, have the right of the debt eſtabliſhed in himſelf: and, on the other hand, whoever ſtands in the right of a debt may lead an appriſing of his debtor's lands, not only in the debtor's lifetime, but after his deceaſe.—— The methods which are by our uſage purſued in this laſt caſe, deſerve a more particular diſcuſſion. By our ancient law, creditors might have attached the lands belonging to their deceaſed debtor, without any previous charge againſt his heir to enter, *Leg. Burg. c.* 94. And in fact, ſuch decrees of appriſing were, about the year 1500, recovered by creditors, after their debtor's death, upon a bare edictal citation againſt the heir, *Hiſt. Law-tracts*, *Append.* N° 8. But as it was probably thought too great a ſtretch, to attach lands for payment of debt which lay *in hereditate jacente*, and truly belonged to no man till the heir had made up titles to them, it was made lawful to creditors, by 1540, *c.* 106. to charge the heir to enter, and, on his failing to comply, to appriſe the lands as if he had entered. The author of Hiſtorical Law-tracts has urged ſeveral ingenious arguments to prove, that the remedy provided by this act was intended for the creditor of the heir, not of the anceſtor, *vol.* 2. *p.* 120. *&c.* But though it ſhould be admitted, that the words of the act are capable of this conſtruction, and though the hiſtory of our ancient law ſhould favour it; yet the legiſlative power, whoſe opinion, though it were erroneous, muſt in ſuch queſtions be deciſive, hath declared by a poſterior act, 1621, *c.* 27. that the firſt ſtatute is to be underſtood of the anceſtor's creditor, and for that very reaſon hath amplified it, ſo that its benefit may extend to the creditor of the heir.——For the better underſtanding this head of our law, the doctrine of ſucceſſion muſt be anticipated, ſo far as to explain the

the general properties of a ſervice or entry as heir, and of charges given to the heir to enter.

12. Services are intended to give to the heir an active title, or a proper right to the heritable eſtate belonging to his anceſtor. A general ſervice eſtabliſhes in him who enters heir, the right of ſuch part of the heritage of the deceaſed, as either requires no ſeiſin, or in which the deceaſed was not actually ſeiſed: and a ſpecial ſervice carries the right of thoſe heritable ſubjects in which the anceſtor died veſt and ſeiſed. Though the two beforementioned ſtatutes, authoriſing the appriſing of lands after the debtor's death, upon a charge uſed againſt the heir to enter, do not diſtinguiſh between a general and a ſpecial charge to enter, our uniform practice has been careful, not to confound the one with the other. A ſpecial charge fully ſupplies the want of a ſervice; it ſtates the heir, *fictione juris*, in the right of the ſubjects to which he is charged to enter, and conſequently makes thoſe ſubjects liable to the ſame execution at the ſuit of the creditor, as if the heir had entered to them, and been infeft upon his ſervice. A general charge is, on the other hand, intended barely for fixing the repreſentation of the heir, or ſubjecting him to that debt which was formerly due by his anceſtor; but it does not eſtabliſh in him the right of ſuch heritable ſubjects as are carried by a general ſervice, ſo as they may be affected by the creditor's diligence, *July* 10. 1737, *Monro*, ſtated in *Dict.* i. *p.* 131.; ſee *Spottiſw. p.* 43. *Macmartin.* This difference appears from the different ſtyles of the two charges. In a ſpecial charge, the certification or penalty threatened againſt the heir, in default of his entry, is, that the creditor ſhall have the ſame action, both againſt the heir, and againſt the lands, as if he had been ſerved and entered to them; but the certification in a general charge is barely, that the creditor ſhall have the ſame action againſt the heir as if he had entered, without the leaſt mention of the lands.

13. When therefore the debt is due by the anceſtor, it imports the creditor to know, in the firſt place, whether the heir is to repreſent his anceſtor, and ſo ſubject himſelf to the debt; for which purpoſe he muſt give him a general charge to enter to his anceſtor the debtor. If the heir fail to give obedience to the charge within the time ſpecified in the letters, the creditor may bring an action of conſtitution againſt him; in which, if the heir do not renounce the ſucceſſion, decree paſſes of courſe, ſubjecting him to the debt, as lawfully charged to enter heir to his anceſtor, which conſtitutes the debt againſt him *paſſivè*. It ſtill remains, that the heritable rights belonging to his anceſtor be veſted in him, ſo as they may be ſubjected to the creditor's diligence. For this purpoſe, if they are rights in which the anceſtor died infeft, the heir muſt be charged to enter in ſpecial to them; and if the deceaſed's right was perſonal, not perfected by ſeiſin, and therefore to be carried by a general ſervice, then what our lawyers diſtinguiſh by the name of a *general-ſpecial* charge muſt be given to the heir. This kind of charge has the name of *ſpecial*, becauſe it is not only directed againſt ſubjects ſpecially contained in the letters of charge, but becauſe it hath the veſting effect of a proper ſpecial charge; and it is called *general*, becauſe it relates to ſuch ſubjects alone as a general ſervice can carry. As this charge, whether ſpecial or general-ſpecial, is made equivalent to the heir's actual entry, by the ſtatute 1540, an appriſing led by the creditor, after the days of the charge are expired, effectually carries to him the ſubjects to which the heir was charged to enter.

14. Where the apparent heir, and not the anceſtor, is the debtor, there is no occaſion for giving him a charge to enter in general. It imports nothing to the creditor, whether the debtor ſhall, or ſhall not, ſubject himſelf to the debts of the anceſtor. His only concern is, that titles be completed by

by the debtor to the heritable ſubjects which belonged to his anceſtor. In order to this, letters muſt be raiſed and executed at his ſuit, againſt the heir, either of ſpecial or of general-ſpecial charge, according to the different natures of the ſubjects to be affected by the creditor, in the manner now explained. After the elapſing of the days of this charge, the ſubjects contained in it are as effectually carried to the creditor by his decree of appriſing, in conſequence of the ſtatute 1621, as if the heir had actually entered to them.

15. The act 1540 ordains, That letters ſhall iſſue under the authority of the ſeſſion, at the ſuit of any creditor, to charge the heir, if he be of perfect age, year and day being paſſed after the anceſtor's death, (which is allowed to the heir as a *tempus deliberandi*), to enter to the lands, within forty days next after the charge; and that, in default of compliance with the charge, letters ſhall iſſue for appriſing. Theſe words have been ſo explained by ſubſequent cuſtom, that the creditor may charge the heir immediately after the death of the anceſtor, provided that letters of appriſing be not raiſed, till after the expiring, both of the year of deliberating, and of the forty days next enſuing that year within which the heir is charged to enter. Soon after adjudications came in the room of appriſings, a cuſtom was beginning to be introduced by ſome writers to the ſignet, of raiſing ſummonſes of adjudication againſt the heir before elapſing of the forty days mentioned in the ſpecial charge; to ſtop the progreſs of which, writers to the ſignet are, by act of ſederunt, *Feb.* 18. 1721, prohibited to write or form any ſuch ſummonſes till the forty days be fully expired; and an adjudication begun to be led before the expiration of theſe days, contrary to the injunctions of that act, was poſtponed to an adjudication regularly led, *New Coll.* i. 27. It appears, however, that the ſtatute 1540 relates only to thoſe charges againſt the heir on which the anceſtor's lands are to be appriſed. In charges which are to be merely the foundation of a common ſummons, or proceſs upon the paſſive titles, the action will be ſuſtained, if the ſummons on which it proceeds, was not executed till a year after the anceſtor's death, though the forty days were not alſo elapſed at the date of the execution, *June* 19. 1628, *Macculloch*. To this caſe the act of ſederunt is to be applied, mentioned both by Aikman, *MS. Compend of books of ſederunt*, and by Mackenzie, *Obſerv. on ſaid act* 1540, declaring, that apparent heirs may be charged within the year after their anceſtor's death; but that the year muſt be elapſed before any action which is founded on that charge can be purſued againſt him. Though this ſtatute authoriſes no charges againſt heirs who have not attained their perfect age, yet immemorial cuſtom has extended it alſo againſt minors.

16. The diligence of appriſing hath ſtronger or weaker effects, according to the different lengths to which it has been brought. As ſoon as the lands, or other ſubjects to be appriſed, are denounced, they become litigious; ſo that no voluntary deed granted afterwards by the debtor, though previouſly to the decree of appriſing, can hurt that begun diligence; *vid. ſupr. t.* 11. § 7. This doctrine is received by all our writers, and ſupported by an uniform tract of deciſions, in the caſe, not only of deeds granted for the ſecurity of creditors, but in leaſes, diſpoſitions, or other voluntary rights granted to ſtrangers, for a price preſently paid, or other valuable conſideration, *Pr. Falc.* 19.; ſee *Feb.* 8. 1681, *Neilſon, &c.* It was without doubt introduced, that the debtor might not have it in his power to defeat or evacuate his creditor's diligence, by taking the hint on the denunciation, and diſpoſing of the lands in favour of his own kinſmen and truſtees, to the excluſion of the creditor appriſing. But the giving ſo ſtrong effects to any imperfect diligence whatever, affecting heritage, is deſtructive of the ſecurity intended by

by the records to purchaſers, who cannot diſcover by the moſt accurate ſearch into them, whether the lands they are to purchaſe have been denounced; and who therefore muſt loſe both the lands they have purchaſed, and the price they have paid for them, if they were denounced ſo much as one day before the purchaſe, by any creditor of the ſeller. This cenſure is equally applicable againſt the doctrine of litigioſity in inhibitions. The rule, however, That lands are, after denunciation, rendered litigious, admits of exceptions: *Firſt*, If the debtor ſhould, after the denunciation of his lands, enter into marriage, which doubtleſs is a voluntary deed, a right of terce is thereby conſtituted to the wife, in the third part of the lands in which the huſband ſtood infeft at the marriage, not only though they had been denounced to be appriſed, but though decree of appriſing had been recovered, unleſs infeftment had alſo followed on that decree before the marriage; *vid. ſupr. t.* 9. § 46. This exception ariſes from the very favourable caſe of widows, whoſe deſtitute ſituation calls for the ſpecial protection of the law. *2dly*, If the uſer of the diligence be *in mora*, *i. e.* if he hath taken no ſtep for a conſiderable time to perfect his diligence, he is conſtrued to have relinquiſhed or abandoned it; and conſequently the debtor may afterwards grant voluntary deeds, which will be effectual to the grantee, *July* 23. 1674, *Johnſton*.

17. It may be thought, that a decree of appriſing recovered by the creditor, does not extinguiſh the quality of litigious, which the ſubjects appriſed had received by the denunciation; yet if the appriſer ſhall, even after decree, neglect for any conſiderable time to perfect his right by ſeiſin, or at leaſt by a charge againſt the ſuperior to enter him, voluntary deeds may afterwards be granted by the debtor, which the law will prefer to the appriſer, *Spottiſw. p.* 43. *in fin. Hamilton.*; *St. b.* 3. *t.* 2. § 21. A neglect of four years after the date of the decree, has been adjudged ſufficient to conſtitute the debtor *in mora*, *March* 29. 1636, *E. Galloway.* * A decree of appriſing, being a judicial or legal diſpoſition, includes, according to the common nature of diſpoſitions, even before it be perfected by ſeiſin, a right to ſuch of the rents of the lands appriſed as fall due after its date; for which the appriſer may ſue the tenants and other poſſeſſors, 1621, *c.* 6. And becauſe all legal conveyances are complete *ex ſua natura*, without intimation, therefore an appriſer is equally preferable on the rents, in competition with poſterior arreſtments, or other perſonal rights, as an aſſignee whoſe right was perfected by intimation would be, *infr. b.* 3. *t.* 5. § 5. Neither can it be objected in ſuch caſe againſt the appriſer, that he has deſerted his diligence by failing to obtain infeftment; becauſe his right to the rents, in competition with arreſters, was fully perfected by the decree itſelf; and a right already complete as to certain effects, cannot be made more complete, as to thoſe effects, by any farther ſtep of diligence, *Feb.* 23. 1671, *Lo. Juſtice-Clerk.* But though an appriſer was thus intitled, by his decree, to enter into the immediate poſſeſſion of the rents; yet *de praxi* he was not indulged with the right of removing tenants; which, however, is a practice that has been already obſerved to be hardly reconcileable to the other legal rights, included in the common notion of diſpoſitions, *ſupr. t.* 6. § 52.

18. Appriſers muſt, as the old law ſtood, have ſuffered conſiderably, if they did not exerciſe this their right of poſſeſſing the lands, and gathering the rents; for as the exaction of intereſt was not lawful before the Reformation, their right was redeemable, by 1469, *c.* 37. whether they poſ-

* An annualrenter was preferred to a creditor whoſe debt was ſecured by adjudication near three years prior to the infeftment of annualrent, and within year and day of an adjudication made effectual by ſeiſin, the adjudger during that period having neither been infeft, nor taken any ſtep to obtain infeftment, *Nov.* 26. 1764, *Walter Scot contra Ducheſs of Douglas.*

ſeſſed or not, on payment of the bare principal ſum, with the expence of diligence; and when an appriſer allowed another to poſſeſs, the only remedy competent to him was an action againſt the poſſeſſor, which might have proved fruitleſs through the poſſeſſor's bankruptcy. But, by 1621, *c.* 6. the debtor's right of reverſion is burdened with the payment both of the principal ſum and intereſt: which obtains, though the not payment of the intereſt ſhould have proceeded from the choice made by the appriſer not to poſſeſs when it was in his power; for the law gives him the option of either alternative.

19. As creditors were, after the Reformation, intitled not only to their principal ſum, but to the paſt intereſt due upon it, where the ground of debt bore a clauſe of intereſt; the principal ſum and intereſt were, in the caſe of appriſing, accumulated by the decree into one ſum, which carried intereſt during the not redemption of the lands. Appriſers, therefore, being truly purchaſers under reverſion, *ſupr.* § 2. enjoyed the rents of the appriſed lands, in ſatisfaction or *in ſolutum* of the intereſt, in caſe they choſe to poſſeſs during the legal, without any obligation to account to the debtor for the rents, in ſo far as they exceeded the intereſt, towards payment of the capital. And this was moſt equitable, as long as ſuch a proportion only of the debtor's lands was appriſed as correſponded to the debt. But after appriſings had the effect of carrying off the whole of the debtor's lands, this doctrine became the ſource of groſs oppreſſion; for the debtor was, after the elapſing of ſeven years, deprived thereby of his property for ever, though the appriſer had received more of the rents during the currency of the legal than amounted to his whole claim, principal and intereſt: it was therefore enacted by the aforeſaid ſtatute 1621, that appriſers ſhould have right, during the legal, to no more of the rents than correſponded to the intereſt of the debt; that the ſurplus rents ſhould be applied towards the extinction of the principal ſum; and that, in caſe the whole rents received by the appriſer during the legal amounted to the principal ſum contained in the appriſing, with the intereſt, compoſition to the ſuperior, and expence of diligence, the lands ſhould return to the debtor. The ſame ſtatute provides, that if the lands be appriſed from a minor, the appriſer ſhall have right to the full rents, after the expiring of the common legal of ſeven years, till the debtor's age of twenty-five, without any account, though theſe yearly rents ſhall exceed the yearly intereſt of the debt; but this part of the act was repealed by a poſterior ſtatute, 1663, *c.* 10. By the conception of this laſt act, one may be apt to take it for a declaratory law; for the words are, *Ratifies the act* 1621, *and declares its meaning to be*, &c. But it truly abrogates it; for it enacts, That minors ſhall be obliged only for the intereſt of the ſums contained in the appriſings led againſt them, and that they ſhall not loſe the right to the ſurplus rents of the lands during their minority of twenty-one years. From this expreſſion in the act 1663, limiting the debtor's minority to twenty-one years, a doubt may ariſe, whether the debtor is intitled, by the preſent law, to the ſurplus rents between his age of twenty-one and twenty-five, to which laſt term the legal reverſion had been prorogated in favour of minors by the act 1621; which queſtion has not yet, that I know of, received the determination of our ſupreme court. Becauſe it behoved the appriſer, by the act 1621, where the rents exceeded the intereſt of the debt, to apply the excreſcence towards payment of the capital, it is equitably provided, that if, on the contrary, the rents ſhall not amount to the intereſt, the debtor muſt pay the whole debt, principal and intereſt, before redemption; ſo that all the intereſt unpaid is a charge on the right of reverſion. If the ſmalleſt part of the claim ſhall remain due at the expiration of the legal, the whole ſubjects appriſed are, in ſtrict law, carried irredeemably from the debtor: yet the court of ſeſſion, where it appears that the

the debt is paid off to a trifle, may poſſibly, from their pretorian power, ſoften that rigour, and declare the appriſing extinguiſhed.

20. If an appriſer ſhall, in virtue of his prior diligence, debar another creditor from poſſeſſing while the legal is yet current, he is accountable, while he continues his poſſeſſion, for thoſe rents from which he has excluded the competing creditor by the force of his own title, not only for what he hath actually received, but for what he might have received, *Feb.* 11. 1636, *Colquhoun.* Nay, he muſt account in the ſame manner to the debtor, where he has begun to poſſeſs on his appriſing, without any decree preferring him to another creditor; for his bare poſſeſſion excludes the debtor from receiving the rents, *Jan.* 4. 1662, *Seton*; and the creditor's title of poſſeſſion, which in its nature excludes all other creditors, is equivalent to a decree of the judge, preferring him to the full and total poſſeſſion. The appriſer therefore, during this excluſive poſſeſſion, muſt be charged, as a ſteward, for the rents of his debtor's eſtate, according to a full and complete rent-roll, and get credit only for ſuch of them as he ſhall not be able to make effectual after uſing the proper diligence. As the debtor, when he makes a payment to his creditor in caſh, has a right to demand credit for the full ſum paid to him; ſo payment, when it is made to the creditor, (no matter whether he be an appriſer or not), out of the rents of the debtor's eſtate, muſt be eſtimated by its real value at the time of delivery: and, for that reaſon, he muſt charge himſelf with the rent received by him; not merely at the rate of the ſheriff-fiars, or according to the prices at which he may have thought fit to diſpoſe of it to another; but at the full value of it at the time the delivery was made; the extent of which cannot, by any ſubſequent act, be affected to the prejudice of the debtor, on whoſe account it was delivered. If the appriſer, or other creditor, after having entered into the ſole and total poſſeſſion of his debtor's eſtate, be afterwards diſturbed in it, either by the methods of law or force, or by the promiſcuous intromiſſions of the debtor, or any co-creditor, he is accountable, not by a full rental, as in the former caſe, but barely for what he hath received, till he again recover the peaceable and total poſſeſſion, *Jan.* 20. 1681, *Burnet.* If an appriſer ſhould, inſtead of applying the ſurplus rents towards the extinction of his capital ſum, pay them to the debtor, the debtor who received them muſt give the appriſer credit for them, in the account of his intromiſſions; but in a queſtion with a poſterior appriſer, who hath an intereſt that the debt due to the firſt ſhould be paid off *quamprimum*, theſe ſurplus rents, which the firſt appriſer paid to the debtor, muſt be applied to the payment of his own principal debt.

21. The court of ſeſſion is authoriſed, by 1661, *c.* 62. to reſtrict the appriſer's poſſeſſion, at the ſuit of the debtor, to ſuch part of the lands appriſed as anſwers the intereſt of the debt due to him, if the debtor be willing to ratify the appriſer's poſſeſſion, and deliver to him the title-deeds of the lands to which the poſſeſſion is reſtricted. Though the firſt clauſe of this ſtatute, relative to debtors in perſonal debts, was without doubt temporary, the clauſe by which the appriſer's poſſeſſion is thus reſtricted was found to be perpetual, *Pr. Falc.* 84. This reſtriction was, by the practice immediately ſubſequent to the ſtatute, adjudged to be a privilege perſonal to the debtor, which could not be pleaded by poſterior creditors, *July* 28. 1671, *Murray*; yet by a later deciſion, *Nov.* 1728, *La. Kirkhouſe*, the poſſeſſion of an appriſer was reſtricted at the ſuit of a widow who could not otherwiſe have acceſs to the debtor's funds, for the payment of a perſonal claim of alimony, which was excluded by the appriſer's preference.

22. The right to the lands after elapſing of the legal reverſion, is carried irredeemably to the appriſer, who therefore poſſeſſes from that period without

without account, not as creditor in a debt, but as proprietor of the ſubject appriſed; ſee 1690, *c.* 10. Though therefore the legal right of reverſion ſhould be kept open through ſome defect or informality in the diligence, yet the appriſer, poſſeſſing after the expiration of the legal term, is not bound to reſtore the intermediate rents which he has *bona fide* received as proprietor, between the expiration of that legal term, and his being interpelled by a citation at the ſuit of the debtor, or ſome competing creditor, though his debt ſhould be overpaid by ſuch intromiſſions: but he is obliged to impute them towards the payment or extinction of his debt, *Kames*, 18.

23. Though an appriſing, without ſeiſin, where it is not relinquiſhed by the creditor, is preferable to the voluntary deeds of the debtor granted after the denunciation of the lands, it cannot come in competition with real rights or diligences, which are founded on deeds granted, or debts contracted by him, previouſly to the denunciation, if they be completed before infeftment taken by the appriſer; becauſe ſuch rights are truly neceſſary, the debtor having been laid under a neceſſity of completing them by an antecedent obligation. Thus a right of annualrent proceeding on a bond granted before denunciation, if perfected by a ſeiſin prior to that which is taken upon the appriſing, is preferable to the appriſing, *St. b.* 3. *t.* 2. § 21. To give full effect, therefore, to an appriſing, as a proper feudal right, in competition with ſuch real rights, or with appriſings proceeding on debts contracted before the denunciation, the appriſer muſt obtain charter and ſeiſin from the ſuperior of the lands appriſed; and in ſuch competitions, the right firſt completed by ſeiſin is, in the common caſe, preferable. Yet if the appriſer has done all in his power to obtain ſeiſin, *ex. gr.* if he has charged the ſuperior to receive him, he will be preferred to an appriſer whoſe charge is poſterior to his, though he who gave the laſt charge ſhall have obtained the firſt ſeiſin: for the law has not put it in the power of the ſuperior, partially to prefer whom he pleaſes, by poſtponing the infeftment of one creditor, and receiving another; but has juſtly granted the preference to thoſe who appear to have been firſt in diligence, *Jan.* 31. 1632, *Ferguſon.* Neither is it in the debtor's power, more than in the ſuperior's, to diſappoint or fruſtrate the preference of a creditor who is inſiſting in his diligence of appriſing, by any indirect device, from partial favour to another creditor, *Nov.* 28. 1628, *Borthwick.* In appriſings of lands holden of the crown, the appriſer ſometimes takes a notorial inſtrument, upon offering his ſignature in exchequer, to prevent the officers of that court from ſtaving off the paſſing of his charter: and where, after ſuch proteſtation by one creditor, a charter ſhall nevertheleſs be granted to another, it cannot hurt the right of the proteſter, unleſs he ſhall afterwards abandon his diligence.

24. The year's rent payable by the appriſer to the ſuperior who enters him in purſuance of the act 1469, is called the *compoſition to the ſuperior*; and it is in ſtrict law due, without regard to the extent of the debt on which the diligence is led. But as this fell heavy upon appriſers whoſe debts were ſmall in proportion to the value of the lands, it is frequently modified, *ex æquitate*, far below its true worth, according to circumſtances, *March* 30. 1637, *Paterſon.* In computing it, all the real burdens affecting the lands, whether conſtituted by the law, or confirmed by the ſuperior, ought to be deducted. Where an appriſer is excluded from the rents by a liferenter, he is not bound to pay the compoſition while the liferent ſubſiſts; becauſe, during that period, he can get nothing by his diligence, *July* 18. 1633, *Baird.* If the right appriſed from the debtor be a bare ſuperiority, it has been decided, that the debtor's ſuperior is intitled only to a year's feu-duty for entering

tering the appriſer; becauſe in theſe the feu-duty is the only rent reſerved to the appriſer's debtor, and conſequently the only rent to which the appriſer is intitled in virtue of his diligence, *Feb.* 15. 1634, *L. Monkton*. Though many appriſers ſhould charge the ſuperior to infeft them, the ſuperior has right to no more than one year's rent for all of them put together; for all of them conſtitute only one right to the lands appriſed; ſince, if any one of them ſhall carry the full right, that one muſt exclude all the reſt. If the appriſer who has paid the year's rent for his entry, ſhall afterwards have his appriſing caſt upon a nullity, the ſecond appriſer, ſince he has, in that caſe, the ſole benefit of the diligence and infeftment, ought to repay to the firſt the whole compoſition paid by him to the ſuperior, *July* 22. 1628, *Lo. Borthwick*. Superiors, by our more ancient practice, did not conſider themſelves as bound to enter ſuch appriſers as could not inſtruct the right of their author, from whom they had appriſed: but this is not admitted as a ſufficient defence by the later deciſions; becauſe an appriſer is not preſumed to be maſter of his debtor's title-deeds. Nay, a ſuperior muſt enter the appriſer on a charge, though the ſuperior himſelf ſhould be in poſſeſſion of the lands, or ſhould claim the property of them under a ſeparate title, *July* 17. 1632, *Black*. But this act of the ſuperior not being voluntary, but an act of obedience to the law, does not weaken or incroach upon any right formerly competent to himſelf in the ſubject; for he enters the appriſers with this quality, which, though it ſhould not be expreſſed, is always implied, *Reſerving his own right, and that of every other perſon*. In lands holden of the crown, the compoſition is regulated, not according to the rent of the lands, but in proportion to the principal ſum appriſed or adjudged for. Where that ſum does not exceed 10,000 merks Scots, one *per cent.* is only demanded, though that compoſition ſhould be leſs than the ſixth part of the valued rent, which the crown exacts from ſingular ſucceſſors by voluntary purchaſe, *ſupr. t.* 7. § 6.; and where the capital exceeds that ſum, the compoſition falls ſtill lower, to an half *per cent.*

25. Where a ſuperior refuſed to enter the appriſer, the appriſing was, by the old practice, preſented to the court of ſeſſion to be approved by them, *Hop. Mm. Pr.* § 274. upon which approbatory decree, or, as it was called, allowance, three conſecutive precepts were ordained to be directed to the ſuperior, commanding him, in different ſtyles, to receive the appriſer, *Cr. lib.* 3. *dieg.* 2. § 20.; the laſt, under this certification or commination, that if he did not give obedience, the appriſer, paſſing him by, might purſue the ſame method againſt the next higheſt ſuperior; whom it behoved, in that caſe, *ſupplere vices*, to fill up the place of the immediate one, and receive the ſubvaſſal. But ſuch entry by the mediate ſuperior, being barely an act of obedience to the law, like the one ſtated in the preceding ſection, cannot be conſidered as voluntary, more than that other; nor deprive him of the caſualties which may afterwards happen to fall by the death or delinquency of his immediate vaſſal; or abridge him of any other right that might have been competent to him if the ſubvaſſal had been entered by his own immediate ſuperior. That thoſe precepts deſcribed by Craig were no other than letters of four forms, appears from 1647, *c.* 43. which, upon a recital, that appriſers were put to unneceſſary expence, by uſing letters and charges of four forms againſt their ſuperiors, ſubſtitutes in their room ſimple charges againſt them, upon letters of horning on twenty-one days: and though this ſtatute fell under the reſciſſory act of Charles II. and was not revived by any law after his reſtoration, the uſage thereby introduced has been in obſervance ever ſince. If the next higheſt ſuperior alſo refuſed, it behoved the appriſer to apply to the next after him in order, and ſo from

one ſuperior upward to another, till he came to the ſovereign; who never refuſes to receive any vaſſal, upon payment of the compoſition eſtabliſhed in exchequer.

26. As it is of the higheſt importance to creditors and purchaſers to know what appriſings are led againſt thoſe to whom they are to lend their money, or from whom they intend to purchaſe lands, the privy council, by an act February 1636, directed the full tenor of appriſings to be recorded. This having been attended with great expence, it was prohibited, by 1641, *c.* 54.; and in its place the clerks to the bills were ordained, for the information of the lieges, to enter into a record, within ſixty days after their dates, a note, or as Stair explains it, *b.* 3. *t.* 2. § 25. the allowance of every appriſing, containing the ſum for which it was led, the lands appriſed, the names of the appriſer, debtor, ſuperior, and meſſenger, and the dates of the executions. That act was revived, by 1661, *c.* 31. with this certification annexed to it, that poſterior appriſings, if allowed and recorded within the ſtatutory time before prior ones, ſhould be preferable, according to the dates of the allowance and regiſtration. And thus allowances, which were firſt calculated for the ſingle purpoſe of compelling refractory ſuperiors to their duty, came at laſt to be conſidered as a proper method of making all appriſings public, and as a ground of preference in a competition with co-appriſers. The laſt words of this act 1661 contain a ſaving clauſe, in the following words: *Without prejudice to any farther diligence, by infeftments, or charges againſt the ſuperiors, according to the priority or poſteriority thereof*, prout de jure: and indeed by the nature of the right, the regiſtration of a ſeiſin that follows upon an appriſing, muſt fully make up for the want of the regiſtration of an allowance.

27. The court of ſeſſion have by repeated deciſions explained the above ſtatute 1469, obliging ſuperiors to receive appriſers as their vaſſals in the lands appriſed, in the utmoſt extent the words could bear; and have found, that that obligation loſt nothing of its force, even in the caſe of corporations who had adjudged their debtor's lands, and in that character demanded an entry from the ſuperior, *Dalr.* 96.; *July* 24. 1713, *Univ. of Glaſgow*. By theſe judgements ſuperiors might, by the fact of another not conſented to by themſelves, ſuffer the loſs of all their caſualties; for a corporation never dies, nor marries, nor is minor. But as the laſt of theſe deciſions was reverſed upon appeal, it would ſeem that ſuperiors are not obliged, even at this day, to enter corporations who have adjudged, notwithſtanding the ſtatute 20° *Geo. II.* obliging them to receive all diſponees; which, as hath been already obſerved, was enacted merely for the more expeditious making up the titles of ſingular ſucceſſors. Lord Stair's propoſal, *b.* 2. *t.* 3. § 41. of compelling the adjudging corporation to make over their right to a truſtee, by whoſe death or delinquency the ſuperior may be intitled to his caſualties, is particulary cenſured in the pleadings upon the deciſion laſt quoted in 1713. A ſuperior may get free from the obligation he lies under of receiving an appriſer, by making payment to him of the debt on which the appriſing proceeds; and if the debt exceed the value of the lands appriſed, by paying him a ſum equal in value to the lands, and taking a conveyance of the appriſing in his own favour, 1469, *c.* 37. For where the ſuperior, who is the *dominus directus* of the lands, offers to the creditor the juſt value of the ſubject affected by his diligence, the obligation ought to ceaſe. But this privilege, called *retractus feudalis*, is not competent to the ſuperior after the legal of the appriſing is expired; for the appriſer's right becomes from that period irredeemable; and as the vaſſal, who is the debtor, cannot afterwards redeem the lands, neither can the ſuperior, who comes in his place.

28. Certain

28. Certain kinds of appriſing are complete without ſeiſin. *Firſt*, A bare decree of appriſing carries the full right of thoſe heritable ſubjects belonging to the debtor, which were not perfected by ſeiſin, though capable of it, but continued perſonal in him; for there can be no warrant for granting ſeiſin on ſuch appriſings. *2dly*, In like manner, when the ſubject appriſed from the debtor requires no ſeiſin to perfect it, *ex. gr.* a leaſe, or a right of reverſion, it muſt be carried by a ſimple appriſing: for where ſeiſin is not neceſſary to the firſt conſtitution of a right, it cannot be neceſſary to its conveyance; and appriſing is nothing but a judicial conveyance of the right appriſed. On this ground, ſecond appriſings, *i. e.* appriſings of ſubjects which have been already appriſed by another creditor, require no ſeiſin, even where ſeiſin would have been neceſſary to veſt the right appriſed in the firſt appriſer. For underſtanding this it muſt be obſerved, that by the old law the firſt appriſing, when perfected by ſeiſin, diveſted the debtor of the property, and conſequently excluded all poſterior appriſings: but becauſe it was competent to the debtor to redeem the firſt appriſer's right by payment, ſecond appriſers who appriſed all the right competent to their debtor in the lands, carried to themſelves by their diligence the right of reverſion, or faculty to redeem; and as rights of reverſion, being merely perſonal, required no ſeiſin, therefore poſterior appriſers were, without the neceſſity of taking infeftment, preferable according to their dates, *Goſf. July* 22. 1675, *Boyd.* Yet it might have been prudent, even for ſecond appriſers to take infeftment. The firſt appriſing might have been null, or it might have been paid by intromiſſions within the legal; and where the firſt appriſing was either declared void, or extinguiſhed by payment, the ſecond appriſing came in place of the firſt; upon which ſecond, if ſeiſin was not taken, the creditor in an appriſing poſterior to that ſecond might get himſelf firſt infeft, and ſo be preferred: and though there ſhould be no hazard from any ſubſequent appriſing, it has been already obſerved, that no purchaſer of lands, whether voluntary or judicial, can by the practice of our courts remove tenants before he be infeft.

29. Stair is of opinion, that an appriſing led by a ſuperior requires no ſeiſin; becauſe the ſuperior's ſeiſin of the lands, which ſtill ſubſiſts notwithſtanding the right of property granted by him to the vaſſal, recovers its full force when that right is again brought back to himſelf by the judicial ſentence of appriſing; which therefore has the effect of conſolidating the property with the ſuperiority: and hence his Lordſhip infers, that an appriſing or adjudication by the ſuperior is, without farther diligence, preferable to all appriſings of a poſterior date, though perfected by ſeiſin, *b.* 3. *t.* 2. § 23. But, *firſt*, Conſolidation, when applied to this caſe, appears inconſiſtent with feudal rules: for appriſing is no better than a legal conveyance; and as no voluntary conveyance of the property to the ſuperior hath the effect *per ſe* of conſolidation, without a reſignation of the property *ad remanentiam* by the vaſſal in his favour, duly regiſtered; neither can it be affected by the ſuperior's appriſing, which admits not of reſignation till he be firſt infeft upon his own precept. *2dly*, The act 1661, to be explained next ſection, requires either infeftment, or a charge againſt the ſuperior to make an appriſing effectual, without diſtinguiſhing between appriſings led by the debtor's ſuperior and by his other creditors: ſo that, from the paſſing of that act, the ſuperior who appriſes has no colour for pleading any peculiar privilege or ground of preference over other appriſers.

30. Though ſecond appriſers had a right to redeem their debtor's lands from the firſt, few had money ſufficient for that purpoſe; and hence it frequently happened, that the firſt appriſer either carried the debtor's whole eſtate to himſelf, or he conveyed his right, perhaps for a trifling conſideration,

tion, in favour of the debtor's apparent heir, or of a truſtee for his behoof, to the utter excluſion of all the other creditors, though equally onerous. To cure theſe two evils, reſulting from the unequal preference of creditors, and from the devices of apparent heirs, the act 1661, *c.* 62. was enacted; by one branch of which all appriſings led, either before the firſt effectual appriſing, or within year and day after it, are made preferable *pari paſſu*; and ſuch appriſing as is preferable to others in reſpect of the firſt infeftment, or of the firſt exact diligence for obtaining it, is declared to be the firſt effectual appriſing. The year and day runs from the date of the decree of appriſing, and not from the date of the ſeiſin, or of the diligence to obtain ſeiſin, *July* 4. 1671, *L. Balfour*; which interpretation is favoured, not only by the words of the act, but by the intention of the legiſlature, to allow a reaſonable time from the date of the firſt effectual appriſing, to creditors living at a diſtance, for carrying on their diligence againſt the common debtor. The deſcription given in the ſtatute of the firſt effectual appriſing has been explained by ſome lawyers ſo as to exclude all appriſings of rights which require no infeftment, or on which no ſeiſin has followed, from being included under this *pari paſſu* preference; becauſe no ſeiſin can proceed on ſuch appriſings, by which they may be made effectual. But as the reaſon inductive of this enactment is equally applicable to all appriſings, the character there given of an effectual appriſing is not to be accounted adequate, but rather as an inſtance or example taken from the moſt common caſe. Our deciſions have therefore extended this *pari paſſu* preference to the appriſings or adjudications even of perſonal rights: and as in theſe the firſt in date is, by the nature of the right, the firſt effectual adjudication, all adjudications within year and day of that firſt are preferred with it *pari paſſu*, *Dec.* 1725, *Sir Th. Moncreiffe*; *Nov.* 19. 1734, *Jackſon*.

31. The exact diligence to obtain infeftment, by which an appriſing may be rendered effectual, is different, according to the different ſuperiors of whom the lands are holden. If they are held of the crown, the preſenting of a ſignature in exchequer is ſufficient; if of a ſubject, a charge given to that ſubject to enter the appriſer makes the diligence effectual. The ſtrong effect given by this act to the preſenting of a ſignature, or to a charge uſed againſt a ſubject-ſuperior, is intended merely to regulate the preference of appriſers among themſelves, but by no means to alter the nature or condition of feudal rights. Hence, though a charge given to the ſuperior is by the ſtatute made equivalent to a ſeiſin, in a queſtion between co-appriſers, it has no ſuch effect in a competition with an infeftment of annualrent, or any other voluntary right perfected by ſeiſin, *Pr. Falc.* 58.; *Kames*, 48. Hence alſo a widow's terce is preferable to an adjudication upon which the ſuperior has been charged, *Kames*, 56. And on the ſame ground, ſuch adjudication, being but a perſonal right, muſt be carried by a general ſervice notwithſtanding the ſtatute. Nay, though an appriſing or adjudication ſhould be perfected by ſeiſin within year and day after the date of an infeftment of annualrent, the annualrent-right is by the ſame rule preferable, to the utter excluſion of the appriſing.

32. On this head, a caſe occurred, not a little perplexing, obſerved by Lord Stair. An appriſing was led againſt a debtor's lands, on which ſeiſin followed immediately; a right of annualrent was ſoon after granted by the debtor on the ſame lands; and after ſeiſin was taken on that right, a ſecond appriſing was deduced againſt them within year and day from the date of the firſt. By a known feudal rule, the firſt appriſing which was perfected by ſeiſin, prior to the right of annualrent, is preferable to it; and the right of annualrent, though totally excluded by the firſt appriſing, is, by the ſame rule, preferable to the ſecond; nevertheleſs, the ſtatute 1661 expreſs-

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ly prefers the firſt and ſecond appriſings *pari paſſu*. The court, in a queſtion that appeared ſo involved in contradictions, preferred all the three *pari paſſu*, *Feb.* 6. 1673, *L. Calſton*. It muſt appear, however, on a due conſideration of the ſtatute, that the right of annualrent ought not to have been brought under the *pari paſſu* preference eſtabliſhed among appriſers. It ſhould have been ranked after the firſt appriſing, and before the ſecond, as if no ſuch enactment had been made. The firſt appriſer, on the other hand, ought to have been decreed to communicate to the ſecond, only ſuch part of the ſum for which he was ranked, as he would have been cut out of, if no right of annualrent had been in the field; ſince the ſecond appriſer had himſelf to blame for ſuffering that right to intervene between the firſt appriſer and him, which he might have prevented by a more early diligence. The later deciſions have reduced this matter to its true principles, *Jan.* 20. 1709, *Cred. of Langton; Feb.* 1730, *Campbell*, obſerved in *Dict.* i. *p.* 184.; ſee *Eſſay upon* Vinco vincentem.

33. The act 1661 declares, That all appriſers within year and day of the firſt effectual one, ſhall be preferred *pari paſſu*, as if one appriſing had been led for the whole ſums contained in all of them: the ſeiſin therefore, or charge, which makes the firſt appriſing effectual, is by the law itſelf communicated to the reſt; and ſo becomes a common right, and is conſidered, *fictione juris*, as if it had proceeded upon every one of them. As a conſequence of this, the firſt appriſer cannot at pleaſure paſs from his diligence, to the prejudice of the other appriſers, to whom the law gives an equal intereſt in it with himſelf, *Jan.* 28. 1676, *Maclurg*: and though the debt due to him ſhall be paid off, his appriſing is not extinguiſhed as to all effects, but ſubſiſts as to the other appriſings within year and day of it, *Nov.* 7. 1679, *Straiton*. All the appriſers within year and day of the firſt effectual one, have the benefit of the diligence uſed on it, as well after as before the expiring of the legal; for neither our ſtatutes nor deciſions diſtinguiſh between theſe two periods, *Kames*, 19. Hence an appriſing, after the legal is expired, muſt be a quite different kind of right, in regard of the debtor, and with reſpect to co-appriſers. In a queſtion with the debtor, it is an irredeemable right of property; but in a competition with co-appriſers, it reſolves into a ſimple ſecurity, as if the legal were not expired; for all the appriſers joined together are but ſo many creditors, equally intitled to the poſſeſſion of their debtor's eſtate. Nevertheleſs, if one of the appriſers ſhall actually enter into the poſſeſſion, he has the ſole benefit of his own intromiſſions, without any obligation to account to his co-appriſers; for though all of them have an equal title to poſſeſs, yet whoever does not inſiſt for poſſeſſion upon his title, has himſelf to blame, *July* 17. 1675, *Boyd*; *Fount. Jan.* 4. 1695, *Wallace*. The whole expence diſburſed by the firſt effectual appriſer, in leading his appriſing, and carrying on the diligence for making it effectual, including the compoſition to the ſuperior, muſt by the ſtatute be replaced to him, by the poſterior appriſers within year and day, who claim the benefit of that firſt appriſing; and not barely ſuch a proportion of it as correſponds to the amount of their ſeveral debts; for that is all the recompence the firſt gets for bringing in thoſe others *pari paſſu* with himſelf, *Feb.* 5. 1663, *Graham:* and though only one of many poſterior appriſers ſhould claim the benefit of the firſt diligence, that one muſt pay the whole expence, reſerving his recourſe againſt the reſt, in caſe any of them ſhould afterwards claim it. The ſtatute regards ſuch appriſings only as are within year and day of the firſt; the preference of thoſe that are not led till after the year, is governed by the former law, (ſtated *ſupr.* § 28.), relative to the preference of ſecond and poſterior appriſers; ſo that the firſt of them in date excludes the ſecond, the ſecond excludes the third, &c. *Goſf. July* 22.

1675, *Boyd.* And this doctrine hath been confirmed in a late caſe, where, after the firſt effectual adjudger was infeft, three or four adjudications were deduced of different dates, without year and day of the firſt, upon none of which diligence was uſed for obtaining ſeiſin; and, laſtly, an adjudication was recovered, upon which charter and ſeiſin followed. The court preferred the adjudgers not infeft according to their dates, before the adjudger infeft, in regard his adjudication was the laſt in date, *Tinw. Jan.* 27. 1756, *Cred. of Bayne of Tulloch.*

34. By another clauſe in the ſame ſtatute, all expired appriſings affecting the debtor's eſtate, and purchaſed by his apparent heir, are declared redeemable within ten years after the purchaſe, by poſterior appriſers, for the ſums truly paid for them by the heir. This part of the act, being deſigned to diſcourage and obviate the fraudulent devices of apparent heirs, has been, by a liberal interpretation, extended to caſes not expreſſed in the letter of it. Thus the enactment has been declared to ſtrike againſt purchaſes made by an apparent heir during the life of his anceſtor, though no heir is in a legal ſenſe apparent till the death of the anceſtor, *June* 19. 1668, *Burnet*; and againſt appriſings purchaſed within the legal, though the enacting words are limited to expired appriſings, *Fount. Feb.* 26. 1685, *Campbell.* Thus alſo the right of redemption hath been extended to perſonal creditors, *July* 11. 1671, *Maxwell;* and the ten years allowed to the appriſers for redeeming, have been conſtrued to commence, not from the date of the purchaſe, but from the publication of it by ſeiſin, or ſome other open deed, by which the purchaſe might be known, *Pr. Falc.* 67. But all the doubts which might have been moved on this branch of the act, are now obviated by 1695, *c.* 24. by which an apparent heir's poſſeſſion of his anceſtor's eſtate, or his voluntary purchaſe of rights affecting it, is declared to infer a paſſive title. A further guard is alſo ſet againſt colluſive devices between debtors and their near kinſmen, by a ſeparate clauſe of the laſt-cited act 1695, by which adjudications, or other rights affecting the debtor's eſtate, acquired by any ſuch near relation of the debtor, to whom the debtor's apparent heir may ſucceed as heir, are declared to have no effect beyond the extent of the ſums truly paid for them, though they ſhould not be redeemed to the world's end. To conclude this account of the act 1661, the legal reverſion of all appriſings was thereby prorogated from ſeven to ten years. As to the clauſe in that ſtatute, ſaving the preference of appriſings led upon rights of annualrent, or other *debita fundi*, *vid. ſupr. t.* 8. § 37.

35. The ſeveral grounds of ſetting aſide, reſtricting, and extinguiſhing appriſings, may be now explained. The effect of them is altogether loſt by a decree of reduction; which commonly proceeds, either where the appriſer's debt is not juſtly due, or where nullities or eſſential defects appear in the form of the diligence. But though, by the ſtrict rules of law, diligence, where it is not regularly carried on in every ſtep, is good for nothing; yet becauſe it would be too rigorous to overthrow the diligence of a lawful creditor *funditus*, for every ſlight omiſſion in point of form, therefore where the objection is of leſſer moment, *ex. gr.* where the intereſt due upon the principal ſum is accumulated, and ſo made to carry intereſt from a ſhort day or term prior to the decree, the appriſing, though it is not allowed to have full force, is ſuſtained, *ex æquitate*, as a ſecurity for the ſums truly due; or, as it is uſually expreſſed, the appriſing is reſtricted to a ſecurity. Generally the creditor is in this caſe cut off from his claim of accumulations, the expence of leading the diligence, and the compoſition to the ſuperior, if he has paid it: yet ſometimes the appriſing or adjudication is ſuſtained, not only for the principal ſum and intereſt, but for the accumulations;

mulations; eſpecially where the queſtion is not with a co-creditor, but with the debtor himſelf, as in the caſe of an aſſignee who leads an adjudication *bona fide* for the whole debt aſſigned, though a partial payment has been made to the cedent, which could not be known to the adjudger, *Nov.* 3. 1738, *Balfour*. Appriſings and adjudications led by Papiſts, are declared, by 1700, *c.* 3. incapable of expiring, ſo that they only ſubſiſt for the principal ſum and intereſt; but when they come to be veſted in a Proteſtant, they are governed by the common rules. In theſe reſtricted appriſings, the right of redemption is not cloſed by the elapſing of the ten years, but continues open, and never expires againſt the debtor, who may therefore redeem the appriſed lands at any time.

36. How far appriſings or adjudications may be reſtricted or affected by the perſonal declarations of the creditor, may be doubted. It is certain, that the public records were calculated chiefly for fixing the abſolute and irredeemable property of land, to purchaſers, which is, of all others, the moſt valuable ſubject of commerce; for the purchaſe of appriſings, or of other temporary and redeemable rights, in ſecurity of debt, is neither of ſuch importance to the community, nor in its nature capable of receiving ſo much benefit from regiſters. An appriſer, for inſtance, when he uſes diligence, conſults no records, but affects the ſubject appriſed *tantum et tale* as it was veſted in his debtor. And in the ſame manner, a purchaſer from him cannot be ſaid to act on the faith of the records, ſince the appriſing might, previouſly to his purchaſe, have been extinguiſhed by the appriſer's diſcharge, or by his intromiſſions with the rents of his debtor's eſtate, which can enter into no record; *vid. infr.* next ſection. It might therefore ſeem, that he who purchaſes an appriſing, *utitur jure auctoris*, and conſequently lies open to all the objections which may be pleaded againſt the cedent. In practice, backbonds, or other perſonal declarations, reſtricting an appriſing, if granted by the appriſer before he be infeft, are effectual during the currency of the legal, even againſt his ſingular ſucceſſor infeft upon his conveyance, though ſuch backbonds ſhould continue latent deeds, *St. b.* 3. *t.* 2. § 39.; *July* 12. 1670, *Kennedy*; becauſe an appriſing without ſeiſin is a perſonal right, which therefore may be reſtricted or charged with perſonal declarations. But ſuch declarations by an appriſer after he is infeft, can have no effect againſt his ſingular ſucceſſors, even within the legal, *July* 6. 1661, *Tailfer*; *Harc.* 310.

37. An appriſing, when it is redeemed from a prior, by a poſterior appriſer, is not extinguiſhed; the right of it is only tranſmitted from one creditor to another. In order to its extinction, payment muſt be made by the debtor, or by others on his account, either to the original appriſer, or to his aſſignee. Appriſings are thus extinguiſhed *ipſo facto*, without the neceſſity of any decree of declarator, *firſt*, By the creditor's intromiſſion, during the currency of the legal, with the rents of the lands appriſed, to the full extent of his claim, 1621, *c.* 6. *2dly*, By bonds to the amount of the debt due originally to the debtor, of which the appriſer hath received payment, by himſelf or others, within the legal, *Falc. June* 7. 1745, *La. Crowdie-knows*. *3dly*, By the creditor's diſcharge or acquittance, granted in conſequence of payment made in caſh by the debtor himſelf. And in this manner appriſings may be extinguiſhed without the neceſſity of recording the acquittance in the regiſter of reverſions, *July* 23. 1662, *Lo. Fraſer:* for tho' appriſings bear ſome reſemblance to wadſets, the renunciations or diſcharges of which muſt be regiſtered, by 1617, *c.* 16.; yet no right that is extinguiſhable by bare intromiſſion, (which is not capable of entering into any record), can be conſidered as a wadſet, ſo as to fall under the enactment of that ſtatute.

38. What

38. What has been already obſerved ſerves to ſhew the different ſources from which the inſecurity of a ſingular ſucceſſor, in the purchaſe of an appriſing or adjudication, may flow, though his right ſhould be perfected by feiſin. It may be extinguiſhed by the appriſer's written renunciation or diſcharge, which need not be regiſtered; or by his intromiſſion with the debtor's effects, which cannot be regiſtered; or, laſtly, the feiſin, which has proceeded on the adjudication purchaſed, may poſſibly be a common right to ſupport other adjudications led within year and day, to the greateſt extent, in an equal degree of preference with that adjudication itſelf. To prevent the legal of an appriſing from expiring, and thereby preſerve the right of reverſion, either to the debtor or poſterior appriſer, it behoves them, while the legal is yet current, to make premonition or intimation to the firſt appriſer, that he may receive his debt, and to conſign the ſums due under form of inſtrument. The order of redemption, and the action of count and reckoning conſequent upon it, are, in their general nature, the ſame that are uſed in wadſets. But as in appriſings there is no determinate time mentioned for premonition, nor any place expreſſed where the ſums contained in them are to be conſigned, queſtions upon thoſe points muſt be arbitrary, *St. b.* 2. *t.* 10. § 15. An action of count and reckoning, and declarator of extinction, brought within the legal, by the debtor againſt the appriſer, has the effect of prorogating the legal reverſion, or keeping it open, *June* 26. 1677, *Kincaid*. In this action, the debtor muſt charge himſelf, not only with the principal ſum itſelf, and intereſt which is due by him, but with the whole expence of diligence incurred by his creditor in recovering that debt, viz. the ſheriff-fee, the expence of infeftment, and the compoſition due to the ſuperior, together with a ſalary to a factor or ſteward, if one has been employed for collecting the rents. Nay, the appriſer is intitled to the compoſition due to the ſuperior, and to the ſheriff-fee, from the debtor, though the ſuperior and meſſenger ſhould, from a perſonal regard to the appriſer, have paſſed from their ſeveral claims in his favour; ſince the benefit of ſuch gratuities or preſents ought not to be transferred from the perſon favoured, to another for whoſe uſe they were never intended, *July* 2. 1625, *Kincaid*. The debtor need not, after redemption, be again infeft in the lands; for an appriſing is the ſale of lands to a creditor, redeemable by the debtor upon payment. And as all redemptions operate *retro*, ſo as to avoid the ſale, as if it had never exiſted, the debtor's ſeiſin muſt revive, and recover all the force that it had originally before the appriſing was led.

39. The legiſlature, conſidering, that the greateſt eſtates were, as the law ſtood formerly, carried off by creditors appriſing for inconſiderable debts; that meſſengers, who were the only judges in appriſings, ought not to be intruſted with matters of ſuch importance; that by the length of the legal reverſion of ten years, the cultivating of the ground lay too long neglected both by the debtor and creditor; and that the diligence of appriſing was moſt expenſive, by loading the debtor with penalties and ſheriff-fees, did, by 1672, *c.* 19. in the room of the old form of appriſing by meſſengers, ſubſtitute adjudications, which, by that ſtatute, are ordained to be carried on, as ordinary actions, before the court of ſeſſion. By this ſtatute, not the whole of the debtor's eſtate is to be adjudged, but ſuch part of it only as ſhall be eſtimated to the principal ſum, and intereſt then due; from which this new diligence has got the name of a *ſpecial* adjudication. And becauſe the creditor is, by the ſtatute, laid under the neceſſity of accepting land in the place of money, a fifth part is added to the capital on that account, over and above the compoſition due to the ſuperior, and the expence of infeftment; but without penalties or ſheriff-fees. Upon this decree, the

the creditor may immediately enter to the poſſeſſion of the ſpecial lands adjudged, and receive the rents. And becauſe the law conſiders theſe rents as preciſely commenſurated to the yearly intereſt of the debt, they therefore extinguiſh the current intereſt, without ſubjecting the adjudger to account for any ſurplus rents. The legal reverſion, which in appriſings was ten years, is in the caſe of theſe ſpecial adjudications reſtricted to five. The debtor is obliged, by the ſtatute, to exhibit a valid title to the lands adjudged, and to deliver it, or tranſumpts of it, to the adjudger, to renounce the poſſeſſion of theſe lands, and to ratify the decree of adjudication, that ſo the creditor may have a clear right, and a quiet poſſeſſion. The *pari paſſu* preference of appriſings eſtabliſhed by the act 1661, does not obtain in the ſpecial adjudications founded on the act 1672. Where no more is adjudged than that preciſe proportion of the debtor's lands which is ſufficient for ſatisfying his debt, the adjudger ought to retain all that proportion to himſelf, in caſe the debtor ſhall not redeem. A ſpecial adjudication therefore carries the ſole and entire property of the ſubject adjudged to the adjudger, with this only reſtriction, that the debtor may redeem it at any time within five years.

40. It was in part foreſeen, what hath ſince moſt commonly happened, that the debtor either could not, or through wilfulneſs would not, produce a valid right, or ratify the adjudication. It was therefore enacted by the ſame ſtatute, That the creditor might, in that caſe, adjudge all or any right belonging to his debtor, in the ſame manner, and under the ſame reverſion of ten years, as he might by the former law have appriſed it. This laſt kind is called a *general* adjudication; and ought to be deduced only for the principal ſum, intereſt, and penalty; for the fifth part is not to be added to the capital, except in ſpecial adjudications. By miſtake, however, general adjudications were frequently extracted for a fifth part, over and above the debt and penalty: and ſuch were for a while ſuſtained as a ſecurity for the ſums truly due, in regard of the *communis error*; but by act of ſederunt, *Feb.* 26. 1684, all general adjudications which ſhall be ſo extracted for the future, are declared altogether null. No general adjudication can be inſiſted in, without libelling, in the ſummons, the other alternative of a ſpecial adjudication: for ſpecial adjudications are introduced by this act 1672 in the room of appriſings; and it is only where the debtor refuſes to comply with the terms required of him in a ſpecial adjudication, that the act authoriſes the leading of a general one. But this libelling of both alternatives is now become a point almoſt of mere form; for debtors ſeldom produce a progreſs in conſequence of the firſt alternative; ſo that it only gives occaſion to the debtor to get the pronouncing of the decree put off for a few days or weeks, by taking a day to produce a progreſs, according to the directions of the act. General adjudications paſs of courſe, without inquiring into the grounds of debt, unleſs the debtor ſhall appear, and except to them: and after one creditor has obtained and extracted decree of general adjudication, ſentence is paſſed ſummarily upon all poſterior adjudications, unleſs ſufficient objections, inſtantly verified, are offered againſt them; that ſo none of the adjudgers may, by the expiring of year and day, loſe the benefit of the *pari paſſu* preference eſtabliſhed by the act 1661. The *inducia legales* are even ſhortened in favour of creditors who are in danger of being deprived of that benefit; but where the *inducia* are thus ſhortened, all defences competent to the debtor, though they be repelled *hoc loco*, are reſerved entire, and muſt be diſcuſſed, before the decree can be carried into execution; ſee *New Coll.* iii. 48.

41. Adjudications led on the act 1672, differ little from the old appriſings, except in form. The eſſential properties and legal effects of the two diligences

gences are the ſame, as to their power of transferring the property of the ſubject affected to the creditor, the right of redemption in the debtor, the right in the minor of keeping the legal reverſion open, the obligation the ſuperior lies under to receive the creditor as his vaſſal, the title he has to a year's rent in name of entry, the effect of a charge againſt him, the *pari paſſu* preference of appriſings eſtabliſhed by the act 1661 when applied to general adjudications, &c. Hence alſo a citation in a ſummons of adjudication, renders the ſubject to be adjudged litigious, as denunciations did in appriſings, *Harc.* 278.; *vid. ſupr.* § 17. For though by the words of the act 1672, ſuperiors and adjudgers are declared to be in the ſame caſe after citation in an adjudication, as if an appriſing had been led againſt the lands, and a charge given upon it, the legiſlature meant no more, than to make citation upon a ſummons of adjudication equal to denunciation upon letters of appriſing; for the ſuppoſition, that the legiſlature intended to give the ſame force to a citation on a ſummons of adjudication as was formerly given to a decree of appriſing followed by a charge, would not be barely adverſary to the nature of the two diligences, but involve that part of the enactment into the groſſeſt abſurdities and contradictions, *Mack. Obſerv. on* 1672, *c.* 19.

42. Though appriſings, becauſe they were judicial ſales, could not be led on debts whereof the terms of payment were not yet come; yet adjudications, which are as truly tranſmiſſions of property as appriſings were, have been ſuſtained by our ſupreme court, *ex nobili officio*, upon debts before their term of payment, in the ſpecial caſe where the debtor was *vergens ad inopiam*, *July* 12. 1711, *Blaw.* But ſuch adjudications, as they are grounded ſolely upon equity, ſubſiſt only as ſecurities; and cannot, by any length of time, become irredeemable rights. They ſeem, however, to be intitled equally with other adjudications to the *pari paſſu* preference eſtabliſhed by the act 1661, as to the principal ſum and intereſt.

43. In place of the former allowances already explained, a ſhort abbreviate of every adjudication was directed to be made by *Reg.* 1695, *art.* 24. which, after being ſigned by the Lord Ordinary who pronounced the adjudication, was to be recorded by the clerk to the bills within ſixty days after the date of the decree. In purſuance of this regulation, adjudgers were in uſe to take up the principal abbreviate after recording it; by which others having intereſt might happen to ſuffer, either if the abbreviate were loſt, or if partial rights of the ſame adjudication were conveyed to different diſponees; all of whom could not have the ſame abbreviate in their keeping. It is therefore ordained by act of ſederunt, *Jan.* 18. 1715, That one principal abbreviate, ſigned by the judge, ſhall be retained by the clerk as a warrant for any poſterior extract; and for the adjudger's farther ſecurity, the judge is to ſign two or more abbreviates of the ſame adjudication, as the creditor ſhall deſire, that he may have one or more duplicates in his own keeping.

44. By the more ancient practice, an appriſer in poſſeſſion of the whole lands appriſed, could not uſe perſonal diligence againſt his debtor, unleſs he firſt renounced the appriſing, *Jan.* 22. 1631, *L. Cloverhill*; becauſe the poſſeſſion of that ſubject was accounted ſufficient ſecurity for the debt: but after paſſing of the act 1661, by which appriſers, though in poſſeſſion, might be compelled to quit with part of their preference to poſterior appriſers within year and day, neither appriſings, nor general adjudications, which have been introduced in their room, could be conſidered otherwiſe than as partial and imperfect ſecurities, which ought not to preclude the creditor from uſing other diligence. But the act 1672 juſtly provides, in the caſe of ſpecial adjudications, where no more than a ſtated proportion of the debtor's lands is adjudged to the creditor, no part of which is communicable to others,

others, that the adjudger in poſſeſſion ſhall uſe no farther diligence againſt his debtor, unleſs the lands ſo adjudged ſhall be evicted from him; for poſſeſſion upon a ſpecial adjudication implies an acceptance by the adjudger of the ſpecial ſubject adjudged, in full ſatisfaction of his claim, if the debtor ſhall not redeem it in the terms of the ſtatute.

45. Since appriſings and adjudications of the debtor's eſtate are truly ſales under reverſion, towards payment of the creditor's debt, the creditor's whole claim, both principal and intereſt, muſt be extinguiſhed, in ſo far as the ſubject adjudged goes, by the judicial conveyance of it in his favour. The debtor, therefore, whoſe lands are ſold, cannot be ſaid to continue debtor, either in the capital ſum, or the arrears of intereſt due upon the accumulate ſum in the adjudication; though indeed his right of reverſion is burdened with the payment both of the one and the other: and if he whoſe lands are adjudged, be not debtor in theſe ſums, neither can the adjudger be creditor; nor conſequently his executors. Hence the adjudger's executors have no right to theſe arrears of intereſt; the right of adjudication deſcends *cum omni cauſa*, after his death, to his heir, as a *jus individuum*, the paſt intereſt being truly part of the right of property, conſtituted to the judicial purchaſer by his adjudication, *Feb.* 3. 1738, *Ramſay*; and his executors are intitled to no more than the rents of the ſubject adjudged fallen due before his death, in ſo far as they were not recovered by himſelf, in caſe he was in the poſſeſſion; which the executors of every proprietor would have a right to, by the known rules of ſucceſſion in moveables.

46. But though an adjudication be conſidered, in queſtions of ſucceſſion, as a right of property, it does not conſtitute the adjudger vaſſal in the lands during the legal, though he ſhould be infeft: for an adjudger, though he be a purchaſer, is not a voluntary one; he is brought under the neceſſity of inſiſting for that decree which makes him a purchaſer, that he may recover his debt; ſo that, with regard to him, the adjudication is to be accounted a ſtep of diligence which he may abandon, if he ſhall judge any other method more effectual for his payment, *St. b.* 3. *t.* 2. § 30.; *March* 15. 1628, *Lo. Blantyre*. Nay, this obtains, though the adjudger ſhould be both infeft, and in poſſeſſion; for as the adjudication is led for the ſpecial purpoſe of the payment of debt, redemption by payment made within the legal takes off all the effects of the diligence *retro*, as if it had never been uſed: the reverſer therefore continues vaſſal in the judgement of law as long as the right of reverſion is competent to him; becauſe ſo long it is in his power to extinguiſh the adjudication by payment. Sir James Steuart, *v. Compriſing*, obſerves, in ſupport of this poſition, that it was anciently the practice of exchequer, in the caſe of an appriſer of lands holden of the crown, to take him bound at his entry that he ſhould renew his ſeiſin upon the expiration of the legal, as judging that it was only from that period that he became the King's vaſſal. And agreeably to this doctrine the caſualties of ſuperiority were found to fall during the legal, by the death, not of the appriſer, though he ſhould be both infeft and in poſſeſſion, but of the reverſer, *July* 24. 1739, *Cred. of Bonhard*. Upon the ſame medium, ſums ſecured by adjudication were found to be carried by a general clauſe in a diſpoſition, of all debts, real and perſonal, due to the granter, notwithſtanding the defence pleaded by the diſponer's heir, that an adjudication is a legal ſale of the debtor's lands, redeemable upon payment of his debts, which muſt be extinguiſhed by the judicial conveyance of the lands to the creditor, and ſo could not be comprehended under a general deſcription of debts. The court conſidered, that adjudication ought not to have the effect of extinguiſhing the debtor's obligation to the prejudice of the creditor, who frequently judges that ſtep of diligence neceſſary for his ſecurity, but

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may nevertheleſs, if he find it ineffectual, betake himſelf to any other lawful method of recovering his debt; and where legal diligence can be uſed by the adjudger upon the debt, for the payment or ſecurity of which adjudication is led, it is impoſſible to maintain that that debt is extinguiſhed, *New Coll.* ii. 257.

47. The general and ſpecial adjudications hitherto explained were ſubſtituted by the act 1672, in the place of appriſings; but there are two other kinds of adjudication which were received in our old law at the ſame time with appriſings, viz. adjudications on a decree *cognitionis cauſa*, otherwiſe called *contra hereditatem jacentem*, and adjudications in implement. As to the firſt, the method preſcribed by 1540, *c.* 106. to creditors, for attaching the heritage of their deceaſed debtors, by charging the apparent heir to enter to his anceſtor, firſt in general, and then in ſpecial, and upon his failure to appriſe the lands, has been explained above, § 11. *et ſeqq.* But where the debtor's apparent heir, after being charged in general, renounces all benefit which might accrue to him by the ſucceſſion, he cannot with propriety be charged to enter heir in ſpecial to an eſtate which he has already renounced; nor did the act 1540 make any proviſion how the right of the lands belonging to the deceaſed debtor might in that caſe be carried to the creditor. This defect was ſupplied by the following expedient, which being introduced by neceſſity, was approved by our judges without a ſtatute. Though the heir renouncing could not be ſubjected to the payment of his anceſtor's debts, the creditor was allowed to ſummon him for form's ſake, in a ſuit for proving the debt due by the deceaſed; in conſequence of which a decree was recovered, not againſt the defender, who was abſolved from the ſuit in reſpect of his renunciation, but againſt the *hereditas jacens* of the deceaſed, which was thereby ſubjected to the creditor's diligence. This decree got the name of *cognitionis cauſa*, becauſe it was intended for the ſingle purpoſe of declaring or cognoſcing the extent of the debt due by the deceaſed, that adjudication might proceed upon it againſt the lands. By the old practice, the creditor, where the debt was liquid, proteſted for adjudication in the proceſs of cognition; and a decree of adjudication was granted ſummarily in conſequence of the proteſtation, *St. b.* 3. *t.* 2. § 46; but now adjudication cannot paſs without a previous ſummons for that purpoſe. The creditor however ſometimes inſerts a concluſion of adjudication in his ſummons of conſtitution following upon the general charge, in caſe the heir ſhall in that proceſs renounce the ſucceſſion; and a decree of adjudication proceeding on that alternative in the ſummons, is effectual to the creditor. This diligence, grounded on the renunciation of the heir, was ſtyled, not an appriſing, which was an appellation proper to the decrees pronounced by meſſengers on the appretiation of an inqueſt, but *an adjudication*, becauſe it was a ſentence of the court of ſeſſion, or other judge-ordinary, adjudging the *hereditas jacens* of the debtor deceaſed, to the creditor purſuer.

48. Though no adjudication can, in the common caſe, carry any rents due out of the ſubject adjudged previouſly to the date of the decree, for the reaſon aſſigned *ſupr.* § 8.; yet in the ſpecial caſe of adjudications *contra hereditatem jacentem*, ſuch rents may be adjudged. Put the caſe, that a debtor dies to whom ſome paſt rents were due by the tenants, and that after his death the tenants have run into a farther arrear of rent; it muſt be admitted, that the rents which were fallen due before the debtor's death cannot be carried by adjudication, becauſe they were ſeparated from his heritable eſtate before his death, and ſo deſcended to his executors as a moveable ſubject which was *in bonis defuncti:* but the rents incurred after his death cannot be ſaid to have belonged to him, ſince they did not even exiſt at his death; and are truly a rent grown out of his heritable eſtate ſince his death, which

which for that reaſon would have accrued to his heir if he had entered. As therefore, by the heir's renunciation of the debtor's ſucceſſion, the adjudger comes in the heir's place, theſe rents muſt, *neceſſitate juris*, be carried by the creditor's adjudication againſt the *hereditas jacens*, though fallen due previouſly to the date of it, there being no other method known in law by which they may be affected by diligence, *Cr. lib.* 3. *dieg.* 2. § 23. This rule does not, in the opinion of ſome lawyers, extend to an adjudication led upon a ſpecial charge againſt the heir; becauſe that kind of adjudication proceeds on a *fictio juris*, holding the heir as entered, and therefore ought to carry none of the rents fallen due before the decree, more than it could have done if it had proceeded on the heir's actual entry, *Bankt. b.* 3. *t.* 2. § 43. Yet the contrary was decided, *Feb.* 13. 1740, *L. Kilbucho*; which ſeems to have proceeded on this ground, That there was no other way for the creditor to come at theſe rents, if the apparent heir abſtained from the poſſeſſion, which has been thought reaſon enough for eſtabliſhing this rule in adjudications *contra hereditatem jacentem* *. On the ſame ground of law, heritable ſums which have become moveable ſince the debtor's death, perhaps by an order of redemption, are carried by an adjudication againſt the *hereditas jacens*, becauſe theſe ſubjects can be reached by no other form of law, *St. b.* 3. *t.* 2. § 48.

49. Adjudications *contra hereditatem jacentem* are, by 1621, *c.* 7. declared redeemable by any poſterior co-adjudging creditor, either of the deceaſed debtor, or of the heir renouncing, on payment of the debt due to the firſt adjudger, within the term of ſeven years from the date of the adjudication, which was then the legal alſo of appriſings. This right of redemption was granted to co-adjudgers, from a conſideration of the loſs ſuſtained by creditors, who, by the firſt adjudger's diligence againſt the *hereditas jacens*, were excluded from the whole of the eſtate belonging to their deceaſed debtor, though they were creditors equally onerous with him. And it was from the ſame equitable conſideration, that the act 1661, which eſtabliſhes the *pari paſſu* preference of appriſings within year and day, did expreſsly extend that preference to adjudications for debt: by which nothing can be meant but adjudications *contra hereditatem jacentem*; for at that time no other adjudications were known in our law, except adjudications in implement; and theſe are led, not for the payment of debt, but for the performance of a fact. It was made a doubt before the act 1621, whether the heir himſelf who had renounced, might not, in ſpecial caſes, be reſtored againſt his renunciation, and conſequently redeem adjudications deduced againſt the eſtate of the anceſtor. Craig inclines to think, *lib.* 3. *dieg.* 2. § 24. that even a major, though he had renounced, might have redeemed within the legal, if no perſon was hurt by his being reſtored: but this queſtion was ſoon after reſolved in the negative, by the aforeſaid act 1621, in which it is taken for granted that minors may be reſtored, but no ſuch right is either expreſſed or implied in the act as competent to majors; and ſubſequent practice hath ſo explained it, *Jan.* 27. 1680, *Macaulay*. Yet cuſtom hath eſtabliſhed an indirect method, by which majors alſo may redeem after renunciation, viz. by granting a truſt-bond for a ſum, amounting to the full value of the anceſtor's eſtate, upon which the truſtee charges the heir who grants it to enter in ſpecial, and afterwards adjudges in common form. The conveyance of this adjudication in favour of the heir, intitles him not only to redeem prior adjudications, but alſo to ſet them aſide upon nullities,

* The court likewiſe found, in a late caſe, *July* 23. 1760, *Anderſon and others, claimants on Strowan*, that an adjudication on a ſpecial charge carried the intereſt of an heritable bond from the death of the predeceſſor laſt infeft. At the ſame time it will be obſerved, that theſe deciſions were prior to the judgement of the Houſe of Peers, in the caſe of Hamilton of Roſehall, *April* 8. 1767, finding unuplifted rents to belong to the apparent heir.

or to prove that they have been ſatisfied by intromiſſions. But the uſing ſuch conveyance ſubjects the heir to a paſſive title; *vid. ſupr.* § 34.

50. Adjudications in implement are deduced againſt thoſe who have granted diſpoſitions, without procuratory of reſignation or precept of ſeiſin, and refuſe to diveſt themſelves, to the end that the ſubjects diſponed may by that diligence be effectually veſted in the grantees; and they are called *in implement*, becauſe their purpoſe is, to implement or give full force to the granter's imperfect deeds. The diſponee could not, by our more ancient practice, adjudge in implement, till he had uſed diligence againſt the granter by decree, and regiſtered horning; becauſe ſuch adjudication, being an extraordinary remedy, introduced by neceſſity without the authority of a ſtatute, was not admitted till all other means had proved ineffectual, *Newbyth*, *Feb.* 8. 1666, *Cruikſhanks*; but by our later cuſtoms, it may be led without any ſuch previous ſteps. This kind of adjudication may be directed either againſt the granter himſelf or his heir. Where it was pointed againſt the heir, there was formerly no neceſſity to charge him to enter, *St. b.* 3. *t.* 2. § 53.; becauſe the diſponee does not, in ſuch caſe, inſiſt againſt the heir, to make him perſonally liable in any ſum, but barely to make effectual a ſpecial deed granted by the anceſtor: yet by the preſent practice, the granter's heir muſt be previouſly charged to enter. If the heir ſhall, in the action brought againſt him upon that charge, renounce his claim to the debtor's ſucceſſion, the purſuer is to proſecute the ſame method which is preſcribed in an adjudication for debt.

51. In an adjudication in implement, there is no place for a legal reverſion, or a right to redeem within a certain time; for it is led, not for the payment of a debt, but to give full effect to an imperfect grant made voluntarily in favour of the adjudger. It therefore carries from the granter the ſubject diſponed abſolutely and irredeemably, in the ſame manner as if the diſpoſition had been voluntarily perfected by the granter himſelf; and ſo leaves no room for any reverſion, unleſs a reverſion had been ſtipulated in the deed, for the fulfilling of which the adjudication is led; in which caſe the conventional reverſion muſt ſubſiſt, as being an original condition of the right. On the ſame principle, the *retractus feudalis*, or option competent to the ſuperior to redeem upon payment of the debt to the value of the lands, can have no place in theſe adjudications. This is alſo peculiar to them, that no adjudication of any other kind can be preferred *pari paſſu* with them, nor they with others, *St. ibid.*: for though the act 1661, relative to the *pari paſſu* preference of appriſings, is, by a ſpecial clauſe, extended to adjudications for debt, or, as has been already explained, to adjudications upon decrees *cognitionis cauſa*; yet adjudications in implement cannot fall under that appellation: and indeed this laſt ſort, being led for one ſpecial purpoſe, and affecting one ſpecial ſubject, appears not to have come within the view of the legiſlature. It has, however, been found, that in a competition between two adjudgers in implement, where both the parties were *in pari caſu*, the laſt in date was preferred, becauſe he had given the firſt charge to the ſuperior, *Dalr.* 49.

52. This account of the two adjudications after the old form, may be concluded with ſome obſervations common to both. The act 1469, *c.* 37. which obliged ſuperiors to enter appriſers, could not, by the juſt rules of interpretation, be applied againſt adjudgers after the old form; becauſe the ſtatute itſelf confines the enactment to appriſings, and ſo ought not to include adjudications, which are a diſtinct ſort of diligence; and beſides, it may be doubted, whether adjudications in implement were known in our law ſo early as the year 1469. There appears indeed the ſame reaſon in the nature

nature of things, why ſuperiors ſhould be intitled to a year's rent for the entry of adjudgers againſt the *hereditas jacens*, as of appriſers, becauſe both theſe are diligences for the payment or ſecurity of debt. Nothing, however, is ſaid of the year's rent due to the ſuperior by an adjudger *contra hereditatem jacentem*, in the act 1621, *c.* 7. which particularly relates to that ſubject, though the ſtatute immediately preceding, which concerns appriſings, plainly ſuppoſes him intitled to it upon the entry of an appriſer: as therefore there was reaſon to think the legiſlature had purpoſely avoided to mention adjudgers, the court would not aſſume a power of extending the ſuperior's right againſt them, *St. b.* 3. *t.* 2. § 49. But now, by 1669, *c.* 18. it is declared, without inſinuating the ſmalleſt diſtinction between adjudgers in implement, and *contra hereditatem jacentem*, That all adjudications ſhall for the future be in a like condition with appriſings, as to the ſuperior; and conſequently ſuperiors ſeem, ſince that act, to be under an obligation to enter both, and to be intitled to the compoſition of a year's rent from both upon their entry. It may be doubted, however, whether the ſuperior would, at this day, be compelled to enter an adjudger in implement, who could not inſtruct his author's right, though he would, in ſuch caſe, be obliged to enter an adjudger for debt. The ground of the ſuperior's obligation in the laſt caſe, is by no means applicable to the firſt. An adjudger in implement is preſumed to have received from the granter of the deed, who is a voluntary diſponer, the title-deeds of the ſubject diſponed along with the grant; whereas an adjudger for a liquid ſum, as he leads his diligence without being poſſeſſed of his debtor's writings, may loſe his debt, in a competition with any adjudger whom the ſuperior ſhall think fit to enter before him, if his entry were to be put off till he ſhould be able to recover thoſe title-deeds.

53. Though now by the act 1672, ſubſtituting adjudications in the room of appriſings, the ſeſſion is declared the only court competent to adjudications, excluſive of all inferior judges; yet ſince no adjudications are there meant, but that kind which came in the place of appriſings, which were pronounced by meſſengers, ſheriffs, as they had by the former law, have at this day the cogniſance of adjudications *contra hereditatem jacentem*, *Jan.* 4. 1709, *Ker.*— Whether the cogniſance of adjudications in implement is, by the preſent law, proper to the court of ſeſſion, ſeems to depend upon the practice prior to the act 1672. If before that ſtatute ſuch adjudications might be purſued before inferior courts, they may be ſo ſtill, ſince they are not comprehended under the act. It is probable they might, as they import no higher or more eminent juriſdiction, than adjudications *contra hereditatem jacentem*, which have been ſubject to the cogniſance of ſheriffs; but this is a fact which hath not been fixed either by our writers or deciſions.

54. The abbreviates of adjudications, which, by *Regul.* 1695, *art.* 24. are injoined to be ſigned by the Lord Ordinary, are there ſaid to be ſubſtituted in the place of the former allowances. Of conſequence, that regulation was limited to ſuch adjudications as had formerly been in uſe to be allowed, to the excluſion of adjudications againſt the *hereditas jacens*, upon which allowances had in no period of time proceeded. But that injunction is now, by *Addit. regul.* 1696, *art.* 3. expreſsly extended to adjudications *contra hereditatem jacentem*. Since that time, it has been the general practice, where ſuch adjudications are pronounced by the ſheriff, to get the abbreviates of them ſigned by him: and where they have no abbreviates, the court of ſeſſion refuſe to grant letters of horning upon them againſt ſuperiors, *Act of ſederunt*, *Dec.* 2. 1742; ſee *Kames*, *Rem. Dec.* 34. Adjudications in implement do not however fall under this article of regulations, which makes

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not the leaſt mention of them; nor does it appear that that kind of adjudication was ever in uſe to be allowed.

55. After having diſcuſſed the ſubject of appriſings and adjudications, which are judicial ſales redeemable by the debtor, it falls to he explained, how lands which have been affected by the diligence of creditors, may be brought to an abſolute and irredeemable ſale for their payment. —— But it may be proper to premiſe a ſhort account of the ſequeſtration of land-eſtates, both becauſe it is a diligence competent to real creditors, and as it commonly prepares the way for the actions of ranking and ſale. Sequeſtration of lands (under which may be comprehended every heritable ſubject) is a judicial act of the court of ſeſſion, whereby the management of the ſubject ſequeſtered is taken from the former poſſeſſor, and intruſted to the care of a factor or ſteward named by the court; who gives ſecurity for his adminiſtration, and is, by his commiſſion, accountable for the rents to all having intereſt. This diligence is competent, either where it is doubtful in whom the property of the lands is veſted, if ſequeſtration be demanded before either of the competitors has attained poſſeſſion, or where the eſtate is charged with debts equal, or nearly equal, to their value.

56. Sequeſtration of lands, as it is a rigorous diligence, is not to be granted ſummarily, without deſcending into an inquiry concerning the foundation and extent of the claims affecting the ſubject. If the meaſure appears not to be either neceſſary, or evidently profitable to the creditors, it ought to be refuſed: And upon this ground, ſequeſtration appears not to have been admitted by the Roman law, where the debtor offered reaſonable ſecurity to the creditors for their payment, *l.* 7. § *ult. Qui ſatiſd. cog.*; *l. ult. C. De ord. cogn.* Neither ought ſequeſtration to be granted of ſubjects that are not brought before the court by the diligence of creditors; for it is the dependence in court of the competition among the ſeveral creditors who have affected the ſame diſputed ſubject by their diligences, which alone founds a juriſdiction in the judges, to take that ſubject into their poſſeſſion, till the right of the competitors be determined. Hence neither the debtor's conſent to ſequeſtrate, nor even a voluntary grant executed by him in truſt for his creditors, can ſupport a ſequeſtration, ſo as to ſtay the diligence of ſuch creditors as are unwilling to accede to the truſt-deed. Nay, arreſtment of the whole rents from year to year, hath no further effect than to procure a ſequeſtration of the ſpecial rents attached by that diligence. It is only when, by a total diligence, the right which is in the debtor to the rent of the lands in all time coming, or at leaſt during his life, if his right be a bare liferent, is brought before the court, that the eſtate itſelf can be ſequeſtered, *Feb.* 13. 1745, *Crea. of Ochtertyre:* And as a conſequence of this, no creditor whoſe debt is not made real upon the eſtate, has a title to demand ſequeſtration.

57. The court of ſeſſion, who decree the ſequeſtration, have the naming of the factor; in which they are commonly directed by the recommendation of the preferable creditors, as of the perſons who have the firſt and higheſt intereſt in the ſubject, though the poſterior creditors may appear to have in many caſes a more equitable intereſt in the choice of a factor than the preferable, ſince theſe ſeldom run any danger of loſing their debt, let the factor's management be what it will; whereby the preſerving of the fund entire for the payment of the poſterior creditors, depends in a great meaſure on his probity and diligence. Writers were, by act of ſederunt, *Nov.* 23. 1710, declared incapable of the office; and though a nomination is ſeldom excepted to on that ſcore, the objection, when it is offered, is ſuſtained by the court, 1757, *Cred. of Maclauchlan.* The apparent heir of the debtor may alſo be conſidered as an improper factor, both on account of his

his neceſſitous circumſtances, and of the reaſon there is to ſuſpect deſign or contrivance to defraud the creditors: but where no oppoſition is made, there is nothing to hinder him from being named. A factor appointed by the ſeſſion, though the proprietor had not been infeft in the lands, has the power of removing tenants, *New Coll.* ii. 41. contrary to the generally received opinion, ſtated *ſupr. t.* 6. § 51.

58. The rules by which a judicial factor on a ſequeſtered eſtate ought to conduct himſelf, are contained in ſeveral acts of ſederunt. By act of ſederunt, *Nov.* 22. 1711, § 6. 7. 8. factors muſt, within ſix months after extracting their factory, make up a rent-roll, or rental, of the eſtate, and a liſt of the arrears due by tenants, to be put into the hands of the clerk of the proceſs, as a charge againſt themſelves, and a note of ſuch alterations in the rental as may be made afterwards; and muſt alſo deliver to the clerk annually a ſcheme of their accounts, charge and diſcharge, under heavy penalties. They are, by the nature of their office, bound to the ſame degree of diligence that a prudent man employs in his own affairs; the obligation to which the Roman law expreſſed by *præſtatio culpæ levis*; and by act of ſederunt, *July* 31. 1690, they are accountable for the intereſt of the rents, which they either have, or by proper diligence might have recovered, from a year after their falling due. As it is much in the power of judicial factors, to take advantage of the neceſſities of creditors, by purchaſing the debts at an undervalue, all ſuch purchaſes, made either by the factor himſelf, or for his behoof, are declared equivalent to an extinction or diſcharge of the debt, by act of ſederunt, *Dec.* 25. 1708. No factor can warrantably make payment to any creditor without an order of the court of ſeſſion: for he is, by the tenor of his commiſſion, directed to pay the rents to thoſe who ſhall be found to have the beſt right to them; and of that the court, who are his conſtituents, are the only proper judges. Judicial factors are intitled to a ſalary; which is generally ſtated at the rate of five *per cent.* of their intromiſſions; but is ſeldom aſcertained till their office expire, or their accounts be ſettled, that the court may modify a greater ſalary, or a ſmaller, or none, in proportion to the factor's integrity and diligence, *June* 22. 1711, *Heriot*; ſee alſo *Act of ſederunt, Nov.* 23. 1711, Many inſtances occur, where the court of ſeſſion, without ſequeſtration, name a factor to preſerve the rents from periſhing; *ex. gr.* where an heir is deliberating whether to enter, where a minor is without tutors, where a ſucceſſion opens to one who reſides abroad, &c. *St. b.* 4. *t.* 50. § 28.; in all which caſes, the perſon named to the office, who is ſometimes called factor *loco tutoris*, or *curator bonis*, is ſubjected to the rules preſcribed by act of ſederunt, *Feb.* 13. 1730.

59. Though adjudications were judicial ſales of the debtor's eſtate, carried on *invito debitore*; yet in a competition of adjudgers, either among themſelves, or with other real creditors, no method was known in our law by which the eſtate might be ſo brought to ſale, that the price might be divided according to the intereſts of the ſeveral competing creditors, before the act 1681, *c.* 17. That ſtatute authoriſes the court of ſeſſion, upon an action of ſale brought by any real creditor upon an eſtate, the proprietor whereof is bankrupt, to cognoſce and try its true value, and to appoint commiſſioners for ſelling it to the higheſt bidder. *Bankrupt* is a word of French original, denoting a banker who ſtops payment: and in our law-language, that term is ſometimes applied to a debtor whoſe funds are not ſufficient for his debts; and ſometimes not to the debtor, but to his eſtate. The debtor's previous conſent to the ſale was required by this ſtatute, where the right of reverſion competent to the bankrupt was yet current: but that conſent was ſeldom obtained; and the commiſſioners appointed by the

court were ſeldom found willing to undertake an office, troubleſome in itſelf, and ungrateful to the debtor. To remove theſe obſtructions, decrees of ſale of bankrupt eſtates are, by 1690, *c.* 20. directed to be pronounced by the court of ſeſſion itſelf, who are impowered to proceed in all caſes where the debtor appears to be bankrupt, whether the legal of the creditors adjudications be expired or not.

60. No action of the ſale of lands can be carried on, but either by a creditor of the proprietor, or by his apparent heir. As to the firſt, the purſuer of the ſale muſt be a real creditor upon the debtor's eſtate, 1681, *c.* 17. The ſummons of ſale muſt include the whole lands belonging to the debtor; and if any part of his eſtate be omitted, even though he poſſeſſes it only as apparent heir, the ſale cannot proceed, *Falc.* ii. 29. By our former practice, it was neceſſary to enumerate ſpecially the whole lands belonging to the bankrupt; but as this was attended with many inconveniencies, it is declared ſufficient, by act of ſederunt, *Jan.* 17. 1756, § 12. after enumerating all the lands which have come to the knowledge of the purſuer, to add a clauſe, mentioning in general all other lands and heritable eſtate belonging to the bankrupt, or to which he may ſucceed as heir of any of his predeceſſors. The reaſon of including the debtor's whole lands in the ſummons, is becauſe the debtor's bankruptcy and notorious inſolvency is expreſsly required in all judicial ſales, by 1681, *c.* 17.; 1690, *c.* 20.; *Act of ſederunt*, *Feb.* 24. 1692; and unleſs the whole of the debtor's heritage be brought before the court, the debtor's bankruptcy cannot be proved. Lord Stair affirms, *b.* 4. *t.* 51. § 6. that by the words *notorious inſolvency* in the ſtatute, it is not underſtood, that the debts due by the proprietor muſt exceed the value of his eſtate, but merely, that it muſt be ſo heavily charged with debt, that prudent perſons will not purchaſe from him: and it is believed, that notwithſtanding the ſtrong expreſſion in the ſtatute, the court, for the ſake of expediency, would allow a ſale to proceed, where the intereſt of the debts exceeds the rents of the eſtate, though the debts might perhaps fall ſhort of the total value.

61. Apparent heirs may, by 1695, *c.* 24. bring the eſtate of their anceſtor to a ſale, whether it be bankrupt or not: for though creditors cannot bring their debtor's eſtate to a ſale without the debtor's conſent, unleſs it be bankrupt; yet where the debtor's apparent heir is himſelf the purſuer of the ſale, no other can have the colour of any intereſt to except to it. This privilege is however to be underſtood only of a judicial ſale; for the ſtatute was not meant to authoriſe heirs, before they had made up valid titles to their anceſtor's eſtate, to diſpoſe of it, as if they were proprietors, by a voluntary ſale, without the authority of the proper judge, perhaps with a fraudulent intention to diſappoint creditors. This privilege in the ſtatute, of a judicial ſale, is competent, even to ſuch apparent heirs as have incurred the paſſive title of behaviour as heir, *Feb.* 28. 1733, *Blair*. Actions of this kind ought to be purſued at the heir's own expence, where a ſurplus price ariſes to him from the ſale, after the payment of all the creditors; for in ſuch caſe he is conſidered as acting for his own behoof, that he may make ſuch ſurplus price effectual to himſelf. But if the eſtate ſhall appear to be bankrupt, the expence ought to be paid out of the price, which is the fund of the creditors payment; ſince, in that event, the creditors alone can be gainers by the ſale; ſee *New Coll.* iii. 31. & 46. Though the reaſons are as ſtrong for a previous ranking, in ſales brought by apparent heirs, as in thoſe that are carried on at the ſuit of creditors upon a bankrupt eſtate; yet ſeeing the 26th article of the regulations 1695, requiring an antecedent ranking in the laſt caſe, for which ſee next ſection, makes no mention of the firſt, it would ſeem that the purchaſer in a ſale purſued by an apparent heir, where there has been no ranking of creditors prior to the ſale, muſt retain the price in his hands, till a decree of ranking be extracted. And if there be

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an excreſcence after payment of the debts, warrant would, it is thought, be granted to pay it to the apparent heir, even though he ſhould decline to enter; for his entry might expoſe him to a paſſive title, to which there is no ground to ſuppoſe that the ſtatute intended to ſubject him.

62. In actions of ſale of bankrupt eſtates brought at the ſuit of a creditor upon the act 1690, the debtor, or, if he be dead, his apparent heir, and all the other real creditors in poſſeſſion, muſt be made proper parties to the ſuit; but it is ſufficient if the perſonal creditors be called by an edictal citation, *Act of ſederunt, Nov.* 23. 1711, §. 1. The ſummons of ſale contains alſo a concluſion of ranking of the bankrupt's creditors; and the ſame term or day which is aſſigned to the purſuer in this ſale, for proving the debtor's bankruptcy, with the yearly rent and value of the lands, is alſo aſſigned to the creditors, for exhibiting or producing in court their grounds of debt and diligences, in order to a ranking. To force the creditors to this the more effectually, a ſeparate action of reduction-improbation was uſually carried on by the purſuer againſt them, alongſt with the proceſs of ranking and ſale, calling for the production of their ſeveral rights, under certification that they ſhould be declared falſe, if not produced at, or before the term aſſigned: but the neceſſity of this ſeparate action is now ſuperſeded by a late act of ſederunt, *Jan.* 17. 1756, declaring, That the firſt and ſecond terms aſſigned in the action of ranking and ſale to the creditors, ſhall have the ſame force as if they had been aſſigned in an action of reduction-improbation; and that if they be duly publiſhed in the Edinburgh Evening Courant, a decree of certification, proceeding upon that publication, againſt the writings called for and not produced, after the terms are elapſed, ſhall have the ſame effect in favour of the whole creditors, as if each of them had purſued a reduction-improbation, and had obtained decree of certification in that action. After finiſhing the ranking, with the proof of the yearly rent of the lands, and of the other facts for which a proof was granted, the court fix the price at which the lands are to be ſet up at the ſale, either entire, or in different parcels or lots, as the creditors ſhall deſire; they appoint the day of ſale; and grant warrant for iſſuing letters of intimation under the ſignet, ſpecially deſcribing the lands to be ſold, and expreſſing the price they are to be put up at, and the time and place of ſale. Theſe letters muſt be publiſhed, according to the directions of the ſaid act 1681, at the market-croſs of the head borough of the juriſdiction where the lands lie, and at the pariſh-church, and at ſix other adjacent pariſh-churches, after diſmiſſing the congregation: and the real creditors who are in poſſeſſion are to be thereupon ſpecially cited, upon twenty-one days; and all others having intereſt, at the market-croſs of the head borough of the juriſdiction, and at the market-croſs of Edinburgh, and pier and ſhore of Leith, on ſixty days; at all which places, copies of the letters of intimation are to be affixed. At the day appointed, the Lord Ordinary puts up the lands to ſale; and, upon his report, the court, by their decree, adjudge the irredeemable property of them to the higheſt bidder; on which decree, infeftment may be obtained in the ſame manner as upon other adjudications, 1690, *c.* 20. Though the court, where there is no offerer, are authoriſed, by that ſtatute, to parcel out the eſtate among the creditors, according to their ſeveral intereſts; yet, as that method is attended with conſiderable inconveniencies, they have ſeldom or never atempted it; but are ready, at the ſuit of the creditors, to bring lower the price formerly ſet on the lands; after which, a ſecond day is appointed for the ſale. As purchaſers had it in their power, by obſtructing the ranking of the creditors upon affected reaſons, to enjoy the eſtate for years together, without paying any part of the price; pretending that, till the ranking was cloſed, it could not be known which of the creditors were intitled to the price, and in what proportions; it is declared, by *Regul.* 1695, *art.* 26. that the preference

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of the creditors ſhall be concluded by an extracted decree, at leaſt to the extent of the price ſet on the lands by the court, before they be actually put up to ſale. Hence, though the concluſions of ſale and of ranking are contained in the ſame ſummons; yet, as the ranking muſt be finiſhed by a decree previous to the ſale, the two decrees of ranking and of ſale muſt be extracted ſeparately.

63. The creditors preferred upon the price are, for the ſecurity of the judicial purchaſer, required by act of ſederunt, *March* 31. 1685, to make over their debts and diligences to him, upon payment, in corroboration of the purchaſe, with abſolute warrandice to the extent of the ſums received by them out of the price; by which obligation the creditors become liable, if the lands ſhould be evicted from the purchaſer, to reſtore theſe ſums to him, with intereſt from the date of the ſentence of eviction. Every purchaſer of a bankrupt eſtate, who ſhall pay the price to the creditors ranked, or, in caſe of their refuſal to receive payment, ſhall after a year from the ſale, conſign it in the hands of the magiſtrates of Edinburgh, is, by 1695, *c.* 6. declared to be diſcharged of his obligation, and the lands are declared diſburdened of all the debts and deeds of the bankrupt, or his anceſtors or authors: and the only remedy provided by that act to ſuch of the bankrupt's creditors as judge themſelves prejudiced by the ſale and diviſion of the price, is an action for recovering their ſhare from the creditors who have received it; but no action lies at their ſuit, though they ſhould be minors, againſt the purchaſer himſelf. Yet this cannot be underſtood, as if ſuch payment or conſignation conferred any ſtronger right to the lands upon the purchaſer, than was competent to the bankrupt: which was nevertheleſs explicitly adjudged, *Dalr.* 182. plainly contrary to the common rules of law, and indeed to common equity; for though the purchaſer acquires all right veſted in, or deſcendible to the bankrupt from his anceſtors or authors, it cannot hurt third parties, who may have had a right preferable to that of the bankrupt; and who, not being called as defenders, had no acceſs to know of the ſale, and, upon that account, no opportunity of appearing for their intereſt, *New Coll.* i. 84.

64. The court of ſeſſion, upon the application of the purſuer in a judicial ſale, grant warrant of courſe to the factor to advance to him a ſum ſufficient for defraying the expence of that action, out of the rents received by him: and the ſum ſo advanced by the factor was, by our older practice, allowed to his credit in his factory-accounts, without proportioning it among the ſeveral creditors according to the ſhares they were to draw of the price; by which means the fund of the creditors payment was diminiſhed to the extent of that whole expence; and conſequently the burden fell entirely on the poſterior creditors. This method of accounting was altered by act of ſederunt, *Nov.* 23. 1711, § 9.; and the burden of the expence of the ſale ordained to be proportioned among all the creditors, prior as well as poſterior, according to the ſeveral ſhares falling to them of the price; in regard that proceſſes of ranking and ſale were intended for, and did actually redound to the common benefit of all of them. But as, by this laſt regulation, real creditors who, by the preferable nature of their diligences, had their debtor's lands charged with the payment, not only of their principal ſum and intereſt, but of the expence of diligence, were cut off from that claim by debts confeſſedly poſterior to their own, the court, upon occaſion of a queſtion moved by the creditors of Invergordon, concerning the import of that act of ſederunt, Whether judicial ſales, purſued by apparent heirs on the ſtatute 1695, fell under it? brought matters back to the firſt uſage, by act of ſederunt, *Aug.* 10. 1754, which directs, that the expence of judicial ſales, in ſo far as it ſhall have been advanced by the factor, ſhall be allowed to him

him in his accounts; that in ſo far as he ſhall not have advanced it, it ſhall be paid out of the firſt of the price; and that the reſidue of the price ſhall be divided among the creditors, in terms of the decree of ranking. And this act of ſederunt is expreſsly extended to the caſe of ſales brought at the ſuit of apparent heirs.

65. This title may be concluded with a general obſervation or two, concerning the effect of diligences uſed againſt bankrupt eſtates. After rights are rendered litigious by an action of ranking and ſale, which is calculated for the common intereſt of all the creditors, the rule is, *Pendente lite nihil innovandum*; no diligence carried on or perfected while the ſale is pendent, in order to create a new preference to the uſer of it, in competition with other creditors, ought to have any legal effect. Hence, in a queſtion between a creditor who had adjudged pending an action of ſale, and another, who, that he might not be excluded by the firſt adjudger, had led a ſecond adjudication within year and day of the firſt, but after the lands were *de facto* ſold, the two diligences were preferred *pari paſſu*; though the laſt, having been led after the right of the lands had been transferred from the debtor, was an improper diligence, *Falc.* i. 233. and as ſuch would have had no effect in a competition with the fair and lawful diligence of any co-creditor. It may be obſerved, however, that this inhabile diligence, of adjudging a debtor's lands after they have been judicially ſold, hath full effect, where, without hurting the preference of any co-creditor, it is uſed merely to ſupply a defect in form, and to enable the adjudger to draw the payment of a juſt debt out of the bankrupt's funds. Thus adjudications led after the ſale of the bankrupt's eſtate, are uniformly ſuſtained in favour of perſonal creditors who are ranked *ultimo loco*, and who cannot draw from the purchaſer what remains of the price without adjudging the lands ſold.

66. It is a rule in all real diligences, That where a creditor is preferable to others on ſeveral different ſubjects belonging to his debtor, he cannot uſe his preference arbitrarily, by favouring one of his co-creditors more than another, where his own intereſt is not concerned, but muſt allocate his univerſal or catholic debt proportionally againſt all the ſubjects or parties whom it affects. If it be material to ſuch creditor to draw his whole payment out of any one of thoſe ſubjects, *ex. gr.* if the eſtate of one of the obligants in his debt ſhall be brought to a ſale before the reſt, he may apply his whole debt againſt the ſubject ſold, without being obliged to truſt to his ſecurity upon the other ſubjects. That inequality however will be rectified, as to the poſterior creditors who had alſo by their rights and diligences affected the ſubject out of which he drew his payment, by obliging him to aſſign over to them his right on the ſeparate ſubjects, which he made no uſe of in the ranking, by which they may recur againſt thoſe ſeparate ſubjects for the ſhares which the debt preferred might have drawn out of them. As this obligation to aſſign is founded merely in equity, the catholic creditor cannot be compelled to it, if his aſſigning ſhall weaken the preference of any ſeparate debt veſted in himſelf, affecting the ſpecial ſubject ſought to be aſſigned. But if a creditor upon a ſpecial ſubject ſhall acquire from another a catholic right, or a catholic creditor ſhall purchaſe a debt affecting a ſpecial ſubject, with a view of creating to the ſpecial debt any higher degree of preference than was naturally due to it, by an arbitrary application of the catholic debt, equity cannot protect him from granting aſſignation to the creditor who is excluded by ſuch application; eſpecially if previouſly to the purchaſe the ſubject had become litigious by a proceſs of ranking; for tranſmiſſions ought not to hurt creditors who

are no parties to them, nor to give the purchaſer any farther right than was formerly in himſelf or his cedent; ſee Eſſay on the *beneficium cedendarum actionum*.

67. It ſhall be laſtly obſerved on the head of adjudications, or other diligence uſed by creditors for ſecuring their debts in caſe of the debtor's bankruptcy, that though a creditor adjudging upon his debt ſhould have thereafter recovered payment of part of it, not under the title of his adjudication, but out of a ſeparate fund belonging to his debtor, over which his adjudication had not reached; yet the ſecurity of ſuch creditor acquired by his adjudication, remains entire and undiminiſhed, ſo as to intitle him to a preference on the whole ſums contained in it, in ſecurity of the balance ſtill due to him after the ſeparate payment, as if no ſuch payment had been made. The ſecurity is as broad for the laſt ſhilling, as for the whole ſum; becauſe it is the nature of the ſecurity which intitles him to the preference, and not the amount of the ſum which is ſecured. This doctrine was expreſsly eſtabliſhed in the caſe between the Earl of Loudon and Lord Roſs, *Feb.* 16. 1734, ſtated by Lord Kames in his Remarkable Deciſions; and has been ſince obſerved in queſtions of preference, *New Coll.* ii. 127. And it holds, not only in ſecurities affecting heritable rights, as adjudications; but in thoſe which are proper to moveables, as arreſtments; whence it appears, that a creditor may proceed in either caſe to take other collateral ſecurities, without diminiſhing or incroaching upon the firſt *.

* In the ranking of the creditors of Auchinbreck, the adjudgers upon perſonal obligations in preferable heritable bonds having infiſted, 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, it was found, *July* 12. 1769, That the heritable creditors adjudgers were intitled to be ranked upon the funds *pari paſſu* along with the other adjudgers, only for what remained due of their accumulated ſums, after deduction of what they ſhould draw in virtue of their infeftments. By this deciſion the court ſeem to have departed from the rule formerly eſtabliſhed in rankings, as laid down in the above ſection.