

Chap. I. *Law of Scotland.* 215

PART II.


Of criminal Jurisdiction; the Courts both sovereign and subordinate, wherein Offenders are tried for Crimes; and the Order of judicial Proceedings against them.

BOOK I.

Concerning criminal Jurisdiction, and the Courts wherein Offenders are tried for Crimes.

CHAP. I.

Of criminal Jurisdiction.

1. RIMINAL Jurisdiction, termed the Power of the Sword (*a*), is a Power of judging and punishing Crimes.

2. This Jurisdiction is, 1. Either cumulative, or privative.

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[1.] Cuz

(*a*) L. 3. ff. de jurisd.

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[1.] Cumulative or concurring Jurisdiction is, that which different Judges may separately exercise within their respective Districts. In which Case the one may bar the other by first citing or apprehending the Delinquent (*b*), which is termed *jus præventionis*. In a Competition for the Right of Prevention, the first Attacher of the Criminal, whether by apprehending or citing him, has the Right to judge him. And where he is apprehended by Order of one Judge, and cited by another's Warrant at the same Time; the former is preferred. But if a Judge give the first Citation, only as a Sham to cover and protect the Offender, from being effectually prosecuted before another Court; that collusive Prevention will not hinder the other Judge having a cumulative Jurisdiction, to try the Crime, when the first Attacher delays to do it. Nor will Prevention used by one Judge competent, annul the Trial of a Crime before another, if not objected before Sentence.

Cumulative Jurisdiction arises to a Judge, 1. From the Offender's dwelling within his Territory: Partly, because every Judge should purge his own Bounds of Malefactors, who may infect others by their Example, and react the same Crimes where they dwell; partly, for that it would encourage Wickedness, if a Person, having committed a Crime in a foreign Jurisdiction, could not, upon his returning home, be punished.

(*b*) L. 7. ff. de judic. Act 29. Parl. 11. Jam. VI. Verf. and further the said heritable Stewart.

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punished by the Magistrate there, who may best know his Life and Conversation. 2. A Criminal may be cited and tried before the Judge of the Place where the Crime was committed, albeit he dwell elsewhere, and is not apprehended (c), not only to terrify others from offending in such Manner, and to gratify those injured; but also, because the Trial there is more easy, and less expensive. 3. A Criminal may be tried in the Jurisdiction where he was taken, according to the Rule, *ubi te invenio, ibi te punio* (d). But such a Judge can only proceed against him, if he be present, and cannot cite him, if absent. 4. A Judge acquires Jurisdiction over Criminals by Prorogation. Prorogated Jurisdiction is what a Judge gets over a Criminal not subject to his Cognizance, by the Criminal's waving his Privilege, and submitting himself to a Trial before such a Judge. Which is done either expressly, or tacitely, by appearing and offering dilatory or peremptory Defences; for *primus actus judicii est judicis approbatorius*. But an incompetent Jurisdiction is not prorogated, by proposing declinatory Defences.

[2.] Privative Jurisdiction is, a Power of judging appropriated to one, who excludes others, and takes from their Cognizance what otherwise would naturally fall under it: As when Lords of Regality repledge from the Court

(c) L. 1. C. ubi de crim. Act 34. Parl. 2. Act 90. Parl. 6. Act 148. Parl. 13. Jam. 1. (d) L. 1 & 2. C. ubi de crim.

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Court of Justiciary, or from Sheriffs, Offenders dwelling within their Regalities.

2. Criminal Jurisdiction is either ordinary, or extraordinary.

[1.] Ordinary criminal Jurisdiction is that which belongs to the ordinary criminal Courts:

[2.] Extraordinary criminal Jurisdiction is,
1. That peculiar and privative Jurisdiction, which is exercised over Peers. 2. The Jurisdiction of temporary Courts, as Commissions of Oyer and Terminer.

C H A P. II.

Of criminal Courts.

COURTS wherein criminal Jurisdiction is exercised, are either extraordinary, or ordinary.

Extraordinary criminal Courts are those where Peers are tried, and temporary Commissions of Oyer and Terminer.

Ordinary criminal Courts are, the Justice-court, or Court of Justiciary, the Circuit-courts, the Court of Justiciary of the Admiralty, the Courts of Sheriffs, Stewarts, Bailies of Royalty and Regality, Justices of Peace, and Barons. The Nature of all which extraordinary and ordinary Courts I shall consider in Order as they ly.

T I T.

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T I T. I.

Where Peers are to be tried.

1. PEERS of *Scotland* and *England* at the Union, and Peers of *Great Britain* created since, and the Successors to their Dignities (a), must, upon Indictments of High Treason or Felony, or Misprision of either, be tried either out of Parliament by their Peers, before one of that Body, whom the King, by Commission under the Great Seal of *Britain*, doth constitute Lord high Steward of the Kingdom *pro re nata*; or tried in Parliament by the House of Peers; at whose Desire his Majesty grants a Commission to one of their Number (commonly the Lord Chancellor) to be Lord high Steward, who presides in the Trial.

2. A Queen Consort, and Queen Dowager, whether she continue sole after the King's Death, or take a second Husband, be he a Peer or Commoner, and all Peeres by Birth, whether single or married, to Peers or Commoners, are intitled to Trial as Noblemen (b); but a Lady ennobled only by Marriage, forfeits her Dignity and the Privilege of such a Trial by the Peers, if she marry a Commoner. And no Lord of *Ireland*, or of any foreign Country, nor the Son and Heir apparent of any Peer, hath Right to such a Trial in *Britain*.

3. Tho'

(a) Magna Charta Cap. 29. junct. Artic. 23. of the Union.
 (b) 20 H. VI. Cap. 9.

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3. Tho' a Peer hath the Privilege of Trial out of Parliament by his Peers, upon Indictments of High Treason, or Felony, or Misprision of either : Yet it seems, that regularly he is to be tried for all other Crimes, as a Commoner, by the Country, or an ordinary Jury.

T I T. II.

Concerning Commissions of Oyer and Terminer.

THE Sovereign may issue out Commissions of Oyer and Terminer (q. d. *ouir & terminer*) in *Scotland* under the Great Seal of *Britain*, naming always therein Three of the Lords of Justiciary, and one of them of the *Quorum*, to hear and determine High Treason and Misprision thereof committed in *Scotland* (*a*). But a Person having Right of Justiciary in Cases of such Crimes *Anno* 1708. certified by the Lords of Session to the Lord Chancellor of *Great Britain*, within any District where the Commission of Oyer and Terminer is to be executed, must be in the Commission and one of the *Quorum* (*b*). Treasons and Misprisions of Treason committed by any Native of *Scotland* upon the high Sea, or in any Place out of *Great Britain*, may be enquired of, heard and determined before Commissioners of Oyer and Terminer, to be named by the King in any Shire or Stewartry of *Great Britain* his Majesty shall appoint, by
good

(*a*) 7 A. Cap. 21. § 1. (*b*) *ibid.* § 2.

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good and lawful Men of the same Shire, as if the Crimes had been there committed (c).

T I T. III.

Of the Justice Court, or Court of Justiciary.

1. **T**HE Justice Court or Court of Justiciary is, by its Constitution, the sovereign Judicature of all Crimes in *Scotland*; and many of the higher Nature can be tried no where else. Such as, 1. The four Pleas of the Crown, viz. wilful Fire-raising, Ravishing of Women, Murder and Robbery ought to be tried there, and not by any inferior Court (a) without an exprefs Commission from the King. And the high Treason, and Misprision thereof may not only be tried in the Justice Court, but also in the Circuit Courts, and before Royal Commissions of Oyer and Terminer, under the great Seal of *Britain*: Yet the Lord Chancellor, or Lord Keeper of the great Seal of *Britain*, may, upon Request of the King's Advocate general, award his Majesty's Writ of *certiorari*, under the said great Seal, directed to any Justices of Oyer and Terminer, or the Justices of the Circuits, or other Court having Power to judge in Cases of high Treason, or Misprision thereof in *Scotland*, commanding them to certify Indictments

(c) 7 A. Cap. 21. § 5.

(a) Leg. Malcolm II. Cap. 13. Quon. attach. Cap. 76. Stat. Alex. II. Cap. 14.

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ments of such Crimes brought before them into the Justice Court; which Court may proceed upon, hear and determine the same; as the Court of King's Bench in *England* may do upon Indictments removed or certified into the said Court (*b*). The Justice Court may also hear and determine Treasons, and Misprisions of Treason, committed by any Native of *Scotland* upon the high Sea, or in any Place out of *Great Britain* (*c*). 2. The Crimes of railing upon, or cursing God, or any of the Persons of the blessed Trinity (*d*); the second Neglect of Ministers to pray in express Words for the King, Queen and royal Family (*e*). The third Fault of denying the Being of God, or any of the Persons of the Trinity, or the Authority of the Scriptures, or the Providence of God (*f*), notorious Adultery in order to the Punishment of Death (*g*), fall only under the Cognizance of the Court of Justiciary. 3. This Court is authorized to inflict the same Punishments upon Jesuits, Priests and trafficking Papists, as the Privy Council of *Scotland* was (*h*) impowered to do (*i*). And tho the high Admiral of *Scotland* hath the sole Jurisdiction of all maritime criminal Causes in the first Instance (*k*); the Judges of this Court may advocate criminal Causes from him, as not being maritime. The whole

(*b*) 7 A. Cap. 21. § 3. (*c*) Ibid. § 5. (*d*) Act 21. Parl. 1. Sess. 1. Ch. 11. (*e*) 10 A. Cap. 7. § 11. (*f*) Act 11. Sess. 5. Parl. K. W. (*g*) Act 105. Parl. 7. Jam. VI. (*h*) Act 3. Sess. 8 & 9. Parl. K. W. (*i*) 12 A. Sess. 2. Cap. 14. § 12. (*k*) Act 16. Parl. 3. Ch. 11.

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whole Rights, Powers and Privileges of this Court are ratified (1).

2. But a Lord or Bailie of Regality, may, in the Case of Crimes falling under his Cognizance, repledge from this Court an Offender dwelling within the Regality, *i. e.* may crave and get him to be remitted to be judged in his Court, upon Sureties found by the Repledger to do Justice there within Year and Day; and by the Person repledged, to appear there to underly the Law for the Crime laid to his Charge. In which Case the Repledger, if he fail to do Justice upon him in due Time, *tines his Court*, for Year and Day, the Surety, who borrowed the Criminal, is liable to an Unlaw or Amerciament, and the Lords of Justiciary (out of whose Hands he was taken) may proceed to try him (*m*). Criminals dwelling within any of the Isles of *Scotland*, except *Orkney* and *Zetland*, and a Part of the Isle of *Arran*, are, upon Application made in the Name of the Duke of *Argyle*, (who is hereditary Justice General in those Parts) remitted to be tried by his Grace and his Deputies. However, there is this Difference betwixt laick Regalities, and ecclesiastical Regalities which were reserved to the Election Lords, after Suppression of those religious Houses, they formerly belonged to: That the Lords of laick Regalities may always repledge; whereas the repledging Privilege is allowed to eccle-

(1) A^t 4. Sess. 5. Parl. K. W. (*m*) Quon. attach. Cap. 3 & 17. Form of Baron Courts, Cap. 25.

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ecclesiastical Regalities, only when they prevent the Court of Justiciary, by first citing the Criminals, with whom otherwise they can only sit upon the Trial; tho without preventing, or concurring, they have Right to the Escheats and Fines of those condemned by the Justices (*n*).

3. Appeals ly from the Sentences of this Court, to the House of Peers in Parliament.

4. The Justice Court hath no stated Terms of sitting, nor any Vacation, except that necessary one when the Lords go in Circuit; but sit constantly at *Edinburgh* each *Munday* in Time of Session, or oftner *pro re nata* when Business offers, in a House called the Tolbooth, because it was formerly the common Prison in that City. And continue doing Business in a Diet of Court so long as they think convenient; for they are not tied to sit so many Hours, as the Lords of Session are. To strike or hurt any Person within the Court, while the Judges are sitting, is punishable with Death (*o*).

5. Causes are here advised and voted with open Doors, in Presence of the Pannel and Assize, and all others; tho none dare speak unless desired, or make any Disturbance, upon pain of Imprisonment: But in Cases of Rape, Adultery and the like, all Persons, except Parties and their Procurators, may be removed,

while

(*n*) Act 29. Parl. 11. Jam. VI. Verf. And farther, the said heritable Stewart. (*o*) Act 173. Parl. 13. Jam. VI.

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while the Proof is leading (*p*). The Diets are peremptory, so that if an Indictment or criminal Summons be not called on the precise Day in the Citation, it falls, and a new Indictment or Letters must be raised. Sentences after Trial, and Evidence given, are not reviewed on reclaiming Bills. Nor can the Lords prorogue Days once appointed by them for the Execution of such Sentences. And, in Cases where Bills are allowed, as for reponing Persons against Acts of Fugitation, or Fines for Contumacy in not appearing to underly the Law, or to pass upon Affizes, or to bear witness in Trials, or for not reporting criminal Letters; when a Petition is refused, a second Petition for the same Thing cannot be offered, unless the Petitioner obtain Leave to withdraw his refused Petition, by giving in a Bill for that Liberty.

6. Fines, Amerciaments or Unlaws inflicted upon Offenders, or Persons guilty of Contumacy, are sometimes ordained wholly to be paid to the King, and sometimes only a Part of them, and the rest appointed to be given to private Parties injured, or applied to such other Uses as the Judges think fit. For Payment of which Fines, Horning and Caption may be issued forth of course upon the Acts of Adjournal. And Denunciation at the Market-cross of *Edinburgh*, head Burgh of the Shire within which the Court sits, will as effectually make Ef-
 Vol. H. P cheat

(*p*) Act 28. Sess. 4. Parl. W. & M.

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cheat fall, as if made at the head Burgh of the Shire where the Parties dwell (*q*). Estreats, *i. e.* Extracts of Fines and Unlaws, and of escheat Goods, wherein the King has Interest, are yearly given up by the Clerk of Court, upon Oath, to the Remembrancer of Exchequer, in order to be levied for his Majesty's Use.

7. Advocates here are not only appointed, as Occasion requires, to plead in Defence of poor Criminals, upon their Application for Lawyers: But also *gratis* Warrants are granted to poor Pursuers, that Clerks, Macers and others may serve without Money, for bringing their Suits to a Conclusion.

8. The Records of this Court are termed the Books of Adjournal; and Persons concerned in the Management of Trials here, are the Judges, Advocates, Clerk, Assize, Macers, and Dempster.

S E C T. I.

Of the Judges in the Court of Justiciary.

1. THESE were formerly a Justice-general, Justice-clerk, and Justice-deputies. Which Justice-deputies (tho not limited to any definite Number) were commonly two, appointed by a Gift from the King under the privy Seal. These Judges used to determine the Punishment of Criminals, in difficult and important Cases,

9) A& 126. Parl. 12. Jam. VI.

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Cases, by Advice of the Lords of privy Council; who often ordered Assessors to joyn with, and assist them. But in the Year 1672 (a) the ambulatory Office of Justice-deputies was quite suppressed: In lieu whereof, five Lords of Session were adjoynd to the Justice-general and Justice-clerk, with equal Power, called *Commissioners of Justiciary*, because they sit by special Commission.

2. The Office of Justice-general (called chief Justice, and principal Justiciar) flows, by Commission from the Sovereign, under the great Seal, either for Life or during Pleasure, as his Majesty thinks fit. This great Officer of Justice sits only in the Justice Court, when he thinks fit to come, and may go, or not, to the Circuits, as he pleases.

3. The Justice Clerk (who, before the Union of the Nations, was an Officer of State) has his Place also by Gift under the great Seal, either during Pleasure or for Life, as the King pleases. He names the Clerk of Court, who is called his Deputy.

4. The other five Lords of Justiciary are, by Letters from the Sovereign, admitted *ad vitam aut culpam*.

5. The Judges aforesaid hold Court at *Edinburgh* each *Munday*, or oftner, if Businets so require. They meet at Nine of the Clock in the Morning, when the Court Bell rings. They sit in Scarlet Robes faced with white Sattin, that of the Justice General being distin-

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guished

(a) Act of Regul. of the Justice Court 1672. Artic. 1.

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guished from the rest, by Lining of Ermin; and the Justice Clerk's by a Facing of white pinked Sattin. The Justice General, if present, presides, and, in his Absence, the Justice Clerk, who takes his Chair. Where both these are absent, the Lords present elect one of their Number to preside for that Time. Four of these Judges are a *Quorum* in Time of Session (*b*), and three in the Vacation (*c*). Their *Quorum* is determined according to the Terms, and Vacation of the Court of Session: For, as hath been already observed, this Court hath no fix'd Terms of sitting, or Vacation. It is high Treason, to kill any Lord of Justiciary sitting in Judgment (*d*). They are authorized to regulate the inferior Officers of Court, and to order every other Thing concerning it. A *Quorum* of the Lords is necessary to sign a List of any grand Jury (*e*), or for judging. But one Lord may adjourn the Court, or continue a Diet of Compearance till another certain Day; or may pass Bills for raising criminal Letters or Summons, or Letters of Intimation, or Letters of Diligence, for citing Criminals, Witnesses, and Affizers, in the Case of Indictments; or Bills for raising Letters of Exculpation, or Recrimination.

S E C T.

(*b*) Act of Regul. of the Justice Court Art. 1. (*c*) Act 22^d Parl. 3. Ch. II. (*d*) 7 A. Cap. 21. § 8. (*e*) d. Act of Regul. Art. 3.

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S E C T. II.

Of the Advocates, Clerk, and Assize.

1. T H E King's Advocate or Solicitor, or both, plead for the Pursuer in a criminal Trial, it being the Sovereign's Cause; and other Advocates for the Pannel: And sometimes the King's Lawyers employ other Advocates to assist them. Lawyers are not allowed for private Persons, whether Pursuer or Defender, unless they be present. But albeit an Advocate for a Criminal cannot, in Absence of his Client, enter upon, or dip into the Merits of the principal Cause, he may plead the Excuse of his Absence (a). The Advocates on both Sides, first debate the Relevancy of the Libel *viva voce*; and thereafter Informations on the pleading *hinc inde*, signed by the respective Lawyers, are given to the Clerk, and recorded in the Books of Adjournal. After the Proof is closed, the Advocates make Speeches to the Jury upon the whole Cause. The Advocate for the Pursuer begins, and is answered by the Pannel's Advocate, who is privileged to be the last Speaker, except in the Case of Treason,

2. The Clerk of Court is admitted, upon a Commission for Life from the Lord Justice Clerk, empowering him to officiate as Clerk in the Court of Justiciary at *Edinburgh*, or in

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the

(a) L. pen. § 1. de Judic. l. 3. C. de Accus.

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the circuit Courts, or in other Commissions of Justiciary. He keeps the Records and the Seal of the Court, which is appended to all Letters and publick Acts. He receives from the Raifer of criminal Letters, Caution to report them duly executed and indorsed (*b*), and from those against whom they are raised, Caution to appear, to underly the Law; from the Pursuer of a Cause advocated to the Justices, new Caution to insist, and from the Raifer of the Advocation, new Surety to appear before their Lordships. Such Bonds of Caution are entred in a Book appropriated for that Use; and the Clerk is answerable for the Sufficiency of the Sureties. All Letters, Precepts and Diligences are subscribed by him, that pass under the Seal of Court. He marks the Sederunts of the Judges, writes the Depositions of Witnesses, Deliverance of Bills, interlocutory and definitive Sentences, records the Informations of Parties, and Verdicts of Assize, and minutes any additional Debate, that may happen in open Court after the Informations, before advising the Relevancy; and, in short, writes all the Steps of judicial Proceeding in this Court. On *Saturday* he makes up a Roll of Causes, to be called on *Munday* thereafter, of which every Lord gets a Copy. The Clerk, his Deputy and Servant are exempted from all Burdens and Services, from which Members of the College of Justice are free.

3. The

(*b*) Act 78. Parl. 6. Jam VI.

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3. The Affize or Affise, are 15 good Men, of the same Rank or Class with a Person against whom a Crime is charged, sworn to enquire of Matter of Fact sustained relevant by the Lords to infer the Crime, and to declare the Truth upon such Evidence as shall be delivered them touching it. They are called an ordinary *Affize*, from the French *Affis*, sitting, and that from *affideo*, because they sit together and examine the Proof. They are term'd also a *Jury*, from their being sworn; and an *Inquest*, because they enquire into the Truth of Facts. Such 15 are picked by the Judges out of a large List of 45 summoned for that end, and therefore called the grand Affise: Who, if the Pannel can take no just Exception or Challenge to any of them, are sworn, and the rest of the 45 dismissed. This ordinary Affise, after hearing the Pleading, and Evidence given in the Trial against and for the Pannel, are shut up in a Chamber by themselves, to consider the Proof laid before them, without Freedom to see or speak to any Person, till they return their Verdict of it, *i. e.* Report to the Court what they find proved or not proved, upon which the Judges pass the Sentence prescribed by the Law.

S E C T. III.

The Macers, and Dampster.

1. THE Macers of this Court (who are
P 4 three

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three at present) hold their Places for Life by Commission from the Justice General. Each of them wears a black Gown, and carries an iron Rod as the Badge of his Authority. Their chief Business is, to execute Warrants of Imprisonment, Indictments, criminal Letters, and Letters of Exculpation ; to cite Assizers, and Witnesses ; to bring Pannels from Prison to the Bar, and carry them back again ; to inclose, and attend upon Juries, while they are drawing up their Verdict ; to pronounce all Sentences not capital ; and to wait on the Judges during all the Diets of Court. These Macers are free of all Burdens and Services, from which Members of the College of Justice are exempted. If a Macer, or other Officer Executor of criminal Letters presume to charge Complices not specially expressed in the Letters, or to summon (without special Warrant) more Persons upon an Assize than 45 given him up in List signed by a Quorum of the Justices, or not to annex them and the Witnesses to be produced against the Party accused, to the Copy of the Letters given to him : The Executor's Surety incurs the Pain of 500 Merks, and the Officer is liable to Deprivation, and farther Punishment, at the King's Will (a).

2. The Dempster (*i. e.* Doomster) is, he who pronounceth capital Sentences against Offenders, with the Addition of these Words, *And this*

(a) Act 76. Parl. 6. Jam. VI. junct. Act of Regul. of the Justice Court, Art. 3 & 11.

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this I give for Doom. A Dempster in *Edinburgh* is furnished to the Court of Justiciary, by the Magistrates, from whom he derives his Commission, with a certain Fee.

T I T. IV.

Of the circuit Courts.

I. **T**HAT Justice may be brought home to their Doors, who are not in a Condition to prosecute at *Edinburgh* Injuries done to them ; and also for the general Ease and Exemption of the Lieges from Trooping out of the Corners of *Scotland* on all Occasions to pass upon Juries, or bear witness in Trials at *Edinburgh*, where the Court is often continued : A Justice Air according to our ancient Law was held twice yearly, once on the Grass, and once on the Corn (*a*). Which Court was called *Iter Justiciarum*, the Justice Air or circuit Court, because the Judges do punish Crimes in their Journey through the Country. *Anno 1672.* the keeping of Circuits was restricted to once a Year (*b*). Thereafter the Lord Justice Clerk and other five Commissioners of Justiciary, were ordained by Two and Two to hold circuit Courts yearly, twice a Year in three several Districts in the Months of *May* and *October* (*c*). But now again circuit Courts are kept only once yearly

(*a*) Stat. Rob. III. Cap. 30. Act 94. Parl. 13. Jam. III.
 (*b*) d. Act of Regul. Art. 5. (*c*) 6 A. Cap. 6. § 4.

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yearly in the Month of *May*; and none to be held in *October*, without Order from the King by Proclamation in *July* preceeding (*d*).

2. These circuit Sessions commence on the first lawful Day of *May*,

At the Burgh of *Inverness*, for the

Shires of	}	<i>Inverness,</i>	}	and Stew-	}	artries of	}	<i>Orkney</i>
		<i>Rofs,</i>						<i>and</i>
		<i>Elgin,</i>						<i>Zetland.</i>
		<i>Cathness,</i>						
		<i>Sutherland,</i>						
		<i>Cromerty,</i>						
and								
<i>Nairn,</i>								

At the Burgh of *Air*, for the

Shires of	}	<i>Air,</i> and Jurisdctions within the same,
		and
		<i>Wigtoun.</i>

And at the Burgh of *Dumfries*, for the

Shires of	}	<i>Dumfries</i>	}	and Stew-	}	artries of	}	<i>Anandale</i>
		and						<i>and</i>
		<i>Nithsdale,</i>						<i>Kirkcudbright</i>
								<i>The</i>

(*d*) 10 A. Cap. 33.

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The circuit Sessions begin on the 10 *May*, or, that being an unlawful Day, on the next lawful Day thereafter,

At the Burgh of *Aberdeen*, for the

Shires of { *Aberdeen,*
Kincardine and
Bamff.

At the Burgh of *Glasgow*, for the

Shires of { *Lanerk,*
Argyle,
Dumbartoun,
Bute and
Renfrew.

And at the Burgh of *Jedburgh*, for the

Shires of { *Roxburgh,*
Selkirk,
Berwick and
Peebles, } and Bailiary of *Lawder-*
dale.

The circuit Sessions commence on the 20 *May*, or, that being an unlawful Day, on the next lawful Day,

At

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At the Burgh of *Perth*, for the

Shires of $\left\{ \begin{array}{l} \textit{Perth}, \\ \textit{Forfar} \text{ and} \\ \textit{Fife}. \end{array} \right.$

And at the Burgh of *Stirling*, for the

Shires of $\left\{ \begin{array}{l} \textit{Stirling}, \\ \textit{Clackmanan} \text{ and} \\ \textit{Kinross}. \end{array} \right.$

3. The Judges so paired and coupled hold always Circuit-courts together, but change their Districts *per vices*. The Justice General is supernumerary (*e*), and may go, or not, as he pleases, to any Circuit. In respect some of the Lords may be indisposed, or otherwise justly excused from attending the Circuits, one Lord present at any Circuit, may proceed and do Business by himself.

4. The King's Advocate grants Commissions to Three Advocates, to officiate as his Deputies, or Procurator-fiscals in the Circuit-courts, *viz.* one in each District. And the Clerk of Justiciary grants Deputations to Three Clerks, to serve there respectively; if the said Lord Advocate or Clerk of the Justice-court do not attend one District himself: But either of them
whom

(*e*) Act of Regul. of the Justice Court, Art. 59

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who gives personal Attendance, will need but Two Deputies.

5. The Six Judges set out from *Edinburgh* in their Formalities, some Days before the holding of their respective Circuits, each attended by the Advocate and Clerk-deputies, the Sheriff, or his Deputy, Two of the King's Trumpets, and a Macer of Court. No Person is obliged to attend the Lords in going to, or coming from the respective Places where the Circuits are held, except the Sheriff or his Deputies, and their Officers; nor they neither out of their respective Counties, except at the Place, and during the Time, of holding the Circuit-courts of the respective Districts. Again, no Person is bound to attend at the Place where the Circuit is held, during the Sitting thereof, except he be summoned upon a Jury, or to give Evidence, or is bound over to appear there, or those who are obliged by the Nature of their Office or Trust, to attend (*f*), as the Magistrates of the City and Borough where the Circuit-court is held (*g*); or such as shall make any Presentment in order to Trial at the Circuit. And Justices of Peace, who make Presentments at their Quarter Sessions, or at their yearly Meetings in *July* and *February*, may depute one or more of their Number, to attend in place of the whole (*h*).

T I T.

(*f*) § A. Cap. 16. § 1 & 2. (*g*) *Ibid.* § 5. (*h*) *Ibid.* § 2.

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T I T. V.

The Court of Justiciary of the Admiralty.

1. **T**Here being now since the Union of the Kingdoms, one Lord high Admiral of *Great Britain*, our Lord Admiral bears only the Character of Vice-admiral of *Scotland*. Who never sits in Judgment, but has a Deputy Judge in the high Court of Admiralty at *Edinburgh*, and appoints Deputy-admirals in several Places of the Country, that hold inferior Courts of Admiralty.

2. The Judge of the high Court of Admiralty hath both a civil and criminal Jurisdiction, the latter whereof only is my present Business to notice. The Court, wherein he judges Crimes, is termed the Court of Justiciary of the Admiralty. He may punish Breakers of his Arrestments, and Deforcers of his Officers, and hath Right to the Fines and Amerciaments of his own Court (a). Persons injured are admitted as Witnesses for proving Crimes committed at Sea where other Witnesses cannot be had.

3. The Admiral is the King's Lieutenant and Justice General upon the Seas, and in all Ports, Harbours and Creeks thereof, and upon fresh Waters or navigable Rivers below the first Bridges, or within the highest Flood Mark, or Wash of the highest Tide (b). But albeit his

(a) Act 16, Parl. 3. Ch. II. (b) *Ibid.*

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his Jurisdiction be limited inwardly, as to the Land, it is illimited outwardly as to the Seas, in whatever Part of the World. And he hath the sole Jurisdiction of all criminal maritime Causes foreign and domestick in the first Instance (c). Under such criminal Causes I comprehend Forestalling and Regrating of Corn, Fish, Drink, Firewood, carried over Sea; exporting Traitors, Rogues and Fugitives from Justice; throwing Sand or Balast in Harbours or Channels, to choke them; Extortion used by Ship-wrights or Boat-makers; taking away Buoys, or cutting Cables; using false Weights or Measures at Sea, Causes relating to Pirates, and their Abettors, Out-traders and Refetters, &c. But Treasons and Misprisions of Treason, committed by any Native of *Scotland* upon the high Sea, or in any Place out of *Great Britain*, is to be tried before the Justice-court, or Commissions of Oyer and Terminer (d).

T I T. VI.

The Courts of Sheriffs, Stewarts, Bailies of Royalty and Regality, and Magistrates of Burghs.

1. **S**heriffs, are Magistrates having Power over Counties and Shires. Whereof some are heritable Sheriffs; others enjoy their Offices only for Life, or during the Sovereign's Pleasure. They may sit and give Judgment themselves,

(c) Act 16. Parl. 3. Ch. II. (d) 7 A. Cap. 21. § 5.

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selves, but commonly do it by Deputies. They may fine for Contumacy in Ten Pounds, and for Bloodwits in Fifty Pounds, and no higher. They may judge within Three Suns Murderers or Manlayers, if taken *red Hand*, *i. e.* in hot Blood, or immediately committing the Murder, or pursued instantly and taken (*a*). Who, if apprehended in *alieno territorio*, must be sent back to be tried before the Sheriff, where the Crime was committed (*b*). But tho' formerly the Execution of such Sentences against Murderers taken red Hand, or after immediate Pursuit, could not be delayed longer than Nine Days after Sentence (*c*): No Sentence importing a capital or corporal Punishment, pronounced in any Place to the Northward of the River *Forth*, can now be put to Execution within less than Forty Days, or pronounced in any Place to the Southward of the said River, within less than Thirty Days, after Date of the Sentence (*d*). A Sheriff may try a Thief taken with the Fang, tho' no private Party concur in the Pursuit. But whether a Sheriff ought to judge a Thief upon Citation where no Fang is found, hath been much disputed, and is not sufficiently cleared; so far as I know. Sheriffs account in Exchequer, for the Escheats of Persons condemned in their Courts. They are bound to meet and receive the Circuit Judges,

at

(*a*) Act 90. Parl. 6. Jam. I. junct. Act 28. Parl. 3. Jam. IV. Act 4. Sess. 5. Parl. K. W. (*b*) Act 28. Parl. 3. Jam. IV. (*c*) *d*, Act 4. Sess. 5. Parl. K. W. (*d*) 11 Geo. I. Cap. 25. §

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at their Entry into their respective Shires; to convey and accompany them during their Stay there, to cause sufficient and legal Men appear before them to be Affizers and Witnesses, and to cause serve and execute Indictments against the Persons accused; and to give all due Respect and such special Assistance to the said Judges, as their Office obliges them to when required by them.

2. The King's Sheriff in some of his proper Lands is called a Stewart, whose Power comes up to that of a Lord of Regality; and his Jurisdiction is termed a Stewartry. His Majesty's Sheriff in other Lands of his Property is called a Bailie of Royalty, and his Jurisdiction a Bailyary. Magistrates of some royal Burghs are Sheriffs within themselves.

3. A Person who hath Lands, whereof he is Proprietor or Superior, erected into a privative heritable Jurisdiction, excluding the Sheriff's Cognizance, is called a Lord of Regality. He doth not sit personally in his Court, but doth Justice by a Bailie. Some Bailies of Regality have only simple Commissions for Life, and some are heritable. Bailies of Regality are accounted inferior Judges, when compared with the Lords of Justiciary (e). But are more absolute in their Procedure than other inferior Judges: For they may fine in 200 Pounds; whereas Sheriffs and others cannot go so high; may re-
 Vol. II. Q pledge

(e) Act 137. Parl. 13. Jam. VI,

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pledge either from the Justices, or Sheriffs, Malefactors residing within their Regalities at the Time when the Crimes were committed (*f*); and have Right to the single Escheats of Criminals within their Jurisdiction; albeit condemned by the Lords of Justiciary. A Bailie of Regality hath a cumulative Jurisdiction with the Bailies of the Burgh of Regality.

4. Sheriffs, Stewarts, Bailies of Royalty and Regality, and Magistrates of Burghs (who have both a civil and criminal Jurisdiction, and whose Courts are Courts of Record, wherein Writs may be registred) are to shew themselves active in apprehending and punishing Scorners, strong Vagabonds and Beggars going under the Name of Egyptians (*g*), Forestallers (*h*), Destroyers of Planting (*i*). They punish Riots, and Breaches of the Peace, execute the Laws against Profaneness and Immorality, unlawful Gaming, and many other penal Statutes falling under their Cognizance, which it were tedious to set forth. Dittay is taken up, and Information exhibited against Delinquents to be tried in the Circuit Courts by Sheriffs, Stewarts, Bailies of Regality, Magistrates of Burghs and other inferior Judges, on the 22 Days of *July* and *February* yearly being lawful Days, or upon the next lawful Day there-

(*f*) Vide supra, Tit. 3. § 2. & infra, Book II. Chap. 2. Tit. 2. Sect. 2. N. 2. § 2. (*g*) Act 21. Parl. 6. Jam. II. Act 124. Parl. 12. Jam. VI. (*h*) Act 21. Parl. 4. Jam. V. (*i*) Act 84. Parl. 6. Jam. VI.

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thereafter. Which Information signed by the said Sheriffs, Stewarts, &c. and their Clerks, are to be transmitted to the Clerk of the Court of Justiciary at *Edinburgh*, forty Days before the holding of the respective Circuit-courts (k). The Judges aforesaid are also obliged to receive and incarcerate Persons attached by the King's Letters for Crimes and Debts (l).

5. Crimes are prosecuted in inferior Courts, at the Instance of a Procurator Fiscal for the publick Interest, either with, or without the Concurrence of the private Persons injured. And the Judges proceed in Trials, much the same Way as the Lords of Justiciary do in their Circuits. And tho' they cannot judge civil Actions in a Vacation of the Court of Session; yet they try Criminals then. But criminal Causes may be advocated from them to the Justice-court.

T I T. VII.

Of Justices of Peace, and their Courts.

1. **J**USTICES of Peace (so called, because the doing of Justice to preserve the publick Peace is expected from them) have a criminal Jurisdiction. Some are heritable, as those royal Burghs who, by their Charters ratified in Parliament, are constituted perpetual Justices of

Q 2

Peace

(k) 3 A. Cap. 16. § 4. (l) Act 273, Parl. 15, Jam, VI.

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Peace within their Bounds and Liberties. Others are temporary, that is, so many lawful Men as the King thinks fit to name from Time to Time, by Commission under the great Seal, for keeping the Peace in the County or District where they live. But all Noblemen and Lords of Session are Justices of Peace every where within *Scotland*. Some of those temporary Justices of Peace, whom the Sovereign doth most respect and confide in, are called Justices of the *Quorum*, from these Words in the Commission, *Quorum A. B. C. D. unum esse volumus*; without whose Concurrence several Affairs of Importance cannot be done. Some Persons, by the Nature of their Office, are incapable to exercise any Part of the Function of a Justice of Peace; as one cannot be a Justice of Peace of that County where he is Sheriff (*a*): Others are debarred only from exercising some Part of it; as Commissioners or Farmers of Excise, who cannot act as Justices of Peace in Matters of the Excise (*b*). Every Justice of Peace must, before he enter upon the Office, take the following Oath *de fideli*: You swear, that as a Justice of Peace of the Shire of, &c. in all the Articles of the King's Commission to you directed, you shall do equal Right to the Poor and Rich, after your Cunning, Wit and Power, and after the Laws, and Customs of this Realm, and Statutes thereof made; you shall not be of Counsel with any Person in any Quarrel depending before you; and that you hold your Sessions after the Form of the Statutes thereof

(*a*) 1 *Mag. Sess.* 2, Cap. 8. (*b*) 15 *Car. II.* Cap. 11.

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thereof made ; and the Issues, Fines and Amerciaments, that happen to be made, and all Forfeitures which shall fall before you, you shall cause to be entered without Concealment or embezzling, and truly send them to the King's Exchequer ; You shall not let for Gift or other Cause, but well and truly you shall do the Office of a Justice of Peace in that Behalf ; and that you take nothing for your Office of Justice of the Peace to be done, but of the King, and Fees accustomed, and Costs limited by the Statute : You shall not direct, nor cause to be directed, any Warrant (by you to be made) to the Parties, but you shall direct them to the Bailiffs of the said County, or other the King's Officers or Ministers, or other indifferent Persons to do Execution thereof. So help you God,

2. Their Court is called the Court of Sessions of Justices of Peace held by two or more *quorum unus*, at any Place of the County they think fit. But Justices for Counties at large, are not authorized to hold their general Quarter Sessions, in Cities or Towns that are Counties of themselves (c). The Sessions of the Peace are either general or special Sessions. Special or private Sessions, are those holden on a special Occasion for the Execution of some particular Branch of their Authority. General Sessions are of two Sorts, 1. Such as are holden in the Four Quarters of the Year, *viz.* The first Tuesdays of March (d), May, and August, and the last Tuesday of October (e). Which are

Q 3 called

(c) 9 Geo. I. Cap. 7. § 3. (d) March is put here by Mistake for February. (e) Act 38. Parl. 1. Sess. 1. Ch. II.

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called the *general Quarter Sessions*, and sometimes termed principal Sessions (*f*), sometimes open Sessions (*g*). 2. Sessions holden at any other Time, for the general Execution of the Authority of Justices of Peace, which are called *general Sessions* simply. They appoint a sufficient Collector for levying the Fines and Penalties imposed by them upon Offenders, and cause him find Surety. But the Power of naming the Clerk of the Peace, who is *custos rotularum*, *i. e.* keeps the Rolls of the Sessions, belongs to the Secretaries of State (*h*). The Orders of Justices of Peace are executed by Constables appointed from Six Months to Six Months by themselves in their Quarter Sessions, and by the Magistrates of Royal Burghs. But Constables have always an intrinsic Authority inherent in their Office: *Viz.* To apprehend Persons guilty of recent capital Crimes; or in case of their Escape, to raise the Hue and Cry, and call the Country's Assistance in the Pursuit of them; to seize suspected Persons, Night-walkers, who cannot give a good Account of themselves, Haunters of Bawdy-houses, Vagabonds, sturdy Beggars, Egyptians, &c. and carry them to the next Justice of Peace; to rid Frays, and call the Assistance of Neighbours for that End; to force open in the Day-time, close Doors, within which an Affray or Riot happens to be, for keeping the Peace, and apprehending the

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(*f*) 4 Hen. VII. Cap. 12. § 1. (*g*) 27 Eliz. Cap. 19. § 2. (*h*) Act 20. Sess. 2. Parl. Jam. VII.

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Rioters. But a Constable cannot, after a Fray or Riot is over, arrest the Persons guilty, without Warrant from a Justice of Peace; unless some Person is dangerously wounded therein. Justices of Peace under the Degree of a Lord of Session, are allowed 40 Shillings *per diem* for their Attendance at the Sessions (not exceeding Three Days at one Time) to be paid by the Collector of the Fines. And these who have this Allowance, are liable to the Penalty of 40 Pounds for Absence not excused from every ordinary Quarter Sessions, or from other Meetings when lawfully required to assist thereat (*i*). Clerks of the Peace, and Constables are also paid for their Labours out of the Fines. Where these fall short, the Barons of Exchequer are to see to their Payment. And the Overplus of Fines, if any be, after the Payments aforesaid to the Justices, their Clerk and Constables, ought to be brought into the Exchequer,

3. The Commission of the Peace assigns them, and every one of them jointly and severally the King's Justices to keep the Peace in such a County, and to cause to be kept all Statutes made for the Good of the Peace, and quiet Government of the People; as well within Liberties, as without, and to punish all them that shall offend against any of the said Statutes; and to cause all those come before them, or some of them, who shall threaten any of the People,

Q 4

as

(*i*) Act 38. Parl. 1. Sess. 1. Ch. II.

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as to their Persons, or the burning of their Houses, in order to compel them to find Surety for the Peace or good Behaviour ; and if they refuse to find such Surety, to commit them to Prison, and cause them to be safely kept there till they find it. Then it goes on, and assigns them and every two or more of them (of which Number such or such a particular Person is required to be) Justices to enquire of, hear and determine all Felonies, Witchcrafts, Inchantments, magical Arts, Sorceries, Fore-stalling, Re-grating, Engrossing, Extortion, Conventicles, the Abuse of Weights or Measures ; Trespasses, that is, personal Wrongs or open Violence, that disturb the Peace, or Offences that have a direct and immediate Tendency to cause Breaches of the Peace, as Libels, and the like ; the Misbehaviour, Remifness or Negligence of Sheriffs, Stewarts, Bailies, Constables, Keepers of Prisons, and others in their Offices ; conform to the Law of *Scotland* : Provided, that, in case of Difficulty, they proceed not to give Judgment, except in the Presence of one of the Lords of Justiciary, or one of them holding a circuit Court in the County. And regularly the King may, by his Commission, authorize whom he pleases, to execute an Act of Parliament. Tho' Felonies be within the Commission of the Peace, it is generally thought advisable for Justices of Peace, to proceed no further in relation to any capital Crimes, than to examine and commit the Offenders, take the Information

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mation of all those who can give material Evidence against them ; and bind the Informers over to the Court of Justiciary, and certify their Proceedings to that Court. Justices of Peace have also Authority to proceed the same Way in relation to Treason, Præmunire, and Misprision of Treason, tho' not within the Letter of the Commission. But they have Jurisdiction of all other Crimes not capital within their Commission, whether these Crimes be mentioned in any Statute concerning them or not ; for that all such Crimes are either directly, or at least by Consequence, and in the Judgment of Law, against the Peace.

4. The Justices of Peace hold Cognizance also of Pleas upon many penal Statutes, by an express Power given them by such Statutes. It were endless to enumerate all the Offences falling under their Jurisdiction by Statutes. Such are Riots, Breaches of the Peace, the being sturdy Beggars, Vagabonds or Egyptians, Resetting them, letting out Houses to them ; wronging the Highways, or refusing to concur to mend them ; cutting and destroying of green Wood, Planting, Orchards, Gardens, Hainings ; breaking of Dove-houses, and Cunnigairs, *i. e.* Coney Warrens ; Stealers of Bees, or Hives ; Offences against the Laws for preserving the Game of Hunting and Hawking, and for preserving the Breed of Fishes ; the making Muir-burn and Moss-burn, and other common Nufances ; contravening their Orders about
what

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what is fit to be done in the Time of a Plague ; Drunkenness, or haunting of Taverns or Ale-houses after 10 a Clock at Night ; despising Church Censure ; Cursing and Swearing, or mocking of Piety ; Fornication ; Profanation of the Lord's Day ; Offences relating to the King's Customs and Excise ; unlawful Gaming ; burying in any other Thing than woollen Cloth ; Offences committed by Masters, Servants, and Apprentices against one another (*k*). In short Justices of Peace in *Scotland* are farther authoriz'd to do, use and exercise over all Persons within their several Bounds, whatever pertains to the Office of a Justice of Peace, by virtue of Laws and Acts of Parliament made in *England* before the Union of the two Nations in relation to the publick Peace (*l*), and by the Laws of *Great Britain* since the Union : Over and above the Powers and Authorities they are vested with by the Laws of *Scotland*.

5. Justices of Peace exercise their Authority, partly, out of Sessions, partly, in Sessions. Any Justice may bind Persons to the Peace, or good Behaviour. How, and in what Cases that is done, hath been already explain'd (*m*). One Justice may raise the *posse comitatus*, the Power of the County, that is, all betwixt 60 and 16 for seizing and imprisoning capital Offenders, and such as break
or

(*k*) A^ct 8. Parl. 22. Jam. VI. A^ct 38. Parl. 1. Sess. 1. Ch. II. & many other Statutes concerning the Duty and Powers of Justices of Peace in particular Matters, which it were tedious to set down. (*l*) 6 A. Cap. 6. (*m*) Vide supra Part I. Book III. Chap. 8. Tit. 1. Sect. 2.

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or go about to disturb the King's Peace, and for suppressing Riots. Matters of small Moment, some Preliminaries of greater, sudden Accidents whereby the Peace is broken, or which have a Tendency to the Infraction or Disturbance thereof, may be tried out of Sessions by private Justices, supposed to be ready at Hand ; because the Case might perhaps be past Remedy before a Session could be summoned. But there lies in several Cases, an Appeal to the Sessions from what is done by private Justices, whose wrong Steps may be got rectified at the Sessions. Affairs of higher Consequence require to be heard and determined at the Sessions. What is done at special Sessions, ought to be returned and certified in the general Quarter-sessions. But the Court of Sessions hath no Authority to amerce a Justice of Peace for his Non-attendance at any such Court : Because, the Punishment of Persons in a judicial Office, in relation to their Behaviour in that Office, ought to be referred to other Judges of a superior Station, rather than to those of the same Rank with themselves. From the express Authority given to the Justices of Peace of a County by their Commission, *as well within Liberties, as without* ; it seems to follow, that they may execute their Office within a Town, which has a special Commission of the Peace for its own Limits, unless such a special Commission hath a Clause, that no other Justices except those named in it, shall any ways concern themselves in the keeping of
the

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the Peace within the Liberties of such a Town, and that restraining Clause be notified to the Justices for the County : Who otherwise seem to be under no Necessity of informing themselves of the Contents of a Commission which they have nothing to do with, But tho' where Justices for the County, having express Notice given them of such an exclusive Privilege in a Town's Charter or Commission of the Peace, proceed to act within such Town in Defiance of it, may perhaps be punished for their Contempt of the King's Prohibition ; Yet it may be questioned, whether their Acts within such Town be void ? since the Commission for the County seems as fully to give those named in it a Jurisdiction over all such Towns within the Precincts of it, as such Commission for a Town doth exclude them. Whatever be in this, no Justice of Peace of any County, can exercise his Authority without the County, where he hath no coercive Power : Tho' it is said, that Recognizances and Informations voluntarily taken before them in any Place, are good. But a Justice of Peace for any County at large, who dwells in a City, that is a County of it self, situate within the County at large, for which he is appointed a Justice, tho' not within the same County, may grant Warrants, take Examinations, and make Orders, for Matters which any one Justice may act in at his own Dwelling-house, tho' it be out of the County where he is authoriz'd to act as a Justice of Peace, and in some

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some City or Precinct adjoining that is a County of it self: Provided, that Justices, or Peace-officers of the County at large, shall not be thereby impower'd to act or intermeddle in any Matters arising within such Cities or Towns which are Counties of themselves (n).

6. Justices of Peace in *Scotland*, advise Proof without Juries: And may sustain Proof by Writ, or Oath of Party; or *prout de jure*, that is, by all the Means that Law allows, viz. Writ, Witnesses, or Oath of Party. Albeit commonly, no Person can be holden as confest, unless personally cited: Yet Justices of Peace may punish and fine an Offender, as holden confest, upon a second Citation at his Dwelling-house, tho' not personally apprehended (o). They, as other inferior Magistrates, may take Security for the good Behaviour, and keeping the Peace; or imprison in order to Trial, for Indignities done to themselves, or Disobedience to Church Censures, or for Riots, or for being found in Tumults, or for Drunkenness, or may imprison Vagabonds or sturdy Beggars; without a Warrant in Writ expressing the particular Cause, and proceeding upon a subscribed Information: The Persons imprisoned having always Relief by offering Bail, and demanding a Trial (p). But Justices of Peace can bail no Prisoner, except such as is committed for Offences they are competent Judges of.

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(n) 9 Geo. I. Cap. 7. § 3. (o) Act 38. Parl. 1. Sess. 1. Ch. II. (p) Act 6. Sess. 2 & 9. Parl. K. W.

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The Iniquity of any Sentence of the Justices of Peace, may be corrected by Advocation, Suspension, or Reduction, before the Lords of Session or the Court of Justiciary: Except in Excise Matters, in which Case a Sentence of two or more Justices of Peace seems to be final (g).

7. The Authority of our Justices of Peace, with respect to Crimes, is not only judicative, so far as their Jurisdiction extends, regulated by the Commission of the Peace, and particular Statutes: But also it is in some Cases ministerial. Thus Dittay is taken up, and Information exhibited against Delinquents to be tried in the circuit Courts, by Justices of Peace, by Presentments at their Quarter-sessions, or by two of them at least, on the 21 Days of July and February yearly, being lawful Days, or upon the next lawful Day thereafter. Which Informations signed by two of the Justices of Peace, and their Clerk, are to be transmitted by the said Clerk, to the Clerk of the Court of Justiciary at *Edinburgh*, at least 40 Days before holding the respective circuit Courts (r). And Justices of Peace who make Presentments in order to Trials before the Circuit, may depute one or more of their Number to attend there, in place of the whole (s). Justices of Peace also by taking Precognition of capital Crimes, committing the Offenders to Prison, and

(g) 12 Car. II. Cap. 23. § 31 & 36. Cap. 24. § 45 & 49.
(r) 8 A. Cap. 16. § 4. (s) *Ibid.* § 2.

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and binding over the Informers to the Court of Justiciary, make preparatory Work in order to a Trial before that Court (*t*).

8. In some Cases Justices of Peace are fineable by the Lords of Session for refusing to do their Duty (*u*): And for malversing in their Office, may be tried and punished by the Court of Justiciary.

9. A temporary Commission of the Peace is revocable by the King, or determinable by his Death, or by his granting a new Commission. And the Power of a particular Justice is also determined by the Accession of another incompatible Office, as by his being made Sheriff of the same County (*x*). No Suit before any Justices of Peace, is discontinued by a new Commission of the Peace; but stands in Force; and subsequent Justices may proceed upon Indictments taken before their Predecessors (*y*).

T I T. VIII.

Of Barons, and Baron-courts.

1. **A** Baron, in a strict and proper Sense, is one who holds his Lands of the King, *cum furca & fessa*, with Power of Pit and Gallows. He hath both a civil and criminal Jurisdiction over the Inhabitants within his District, which is called a Barony. But his Court

(*t*) Vid. supra § 3. (*u*) Act 13. Sess. 5. Parl. K. W. (*x*) 1 Mar. Sess. 2. Cap. 8. (*y*) 11 Hen. VI. Cap. 6. 1 Edw. VI. Cap. 7. § 6.

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Court is not a Court of Record. He may, as the Sheriff, fine for Blood in fifty Pounds, and for Contumacy in ten Pounds; and may judge accidental Fire-raising within husband Towns of the Barony (*a*). He may try and punish Thieves apprehended in the Fang, within the Barony (*b*): And hath Right to the Issues and Profits of his own Court. But the Inhabitants of the Barony are not exempted from the Jurisdiction of the Sheriff, who may prevent the Baron, by first attaching the Malefactor. And tho a Baron may try Blood committed upon his own Ground, where both the Injurer and Person injured are his own Tenants: Yet one cannot be convicted and unlawed in his Master's Baron-court, for Blood drawn from the Tenant of another Heritor, upon that Heritor's Ground; where the Party hurt does not complain to the Baron, and seek Reparation in his Court. Bailies of a Burgh of Barony are not obliged to receive and imprison Persons attached by the King's Letters for Crimes or Debts: Because their Authority extends only to execute Decrees and Acts of their own Courts.

2. In the Trial of a Baron holding Lands of the King, for a capital Crime, the greatest Part of his Assize must be Barons, and the rest landed Gentlemen; unless he judicially wave his Privilege. But a Baron's apparent Heir, or an Heritor infest in Lands not erected in a Barony, cannot claim the Privilege of having only Barons

(*a*) Act 75. Parl. 4. Jam. I. (*b*) Quon. attach. Cap. 100.

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rons and landed Men upon his Affize. And a Baron may be tried by a common Jury for a Crime whereof the Punishment is only arbitrary.

BOOK II.

The Order of judicial Proceedings against Criminals and Offenders.

ALL Mens Lives not being alike precious in the Eye of the Law, Peers and Commoners are mostly proceeded against in different Manners. I shall begin with the former.

CHAP. I.

The Order of judicial Proceedings against Peers, who are charged with Crimes.

HAVING told before, what Persons are intitled to a Trial as Peers (a), I shall now set down the Form and Method of such Trial. But seeing Peers are tried as Commoners for all Crimes except high Treason, and Misprision thereof, or Felony, and

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(a) Vid, supra Book 1. Chap. 2. Tit. 1.