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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.

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Misprifion thereof, I shall content my self here to explain, how Peers are tried for these excepted Crimes. In order to which I shall first consider Things previous to the Trial, that is, the Method of finding Bills of Indictment against Peers, and then proceed to the Trial upon such Indictments.

T I T. I.

How Peers are indicted for high Treason or Felony, or Misprifion of either.

I. **A** Peer may be indicted for these Crimes, the same Way as a Commoner, by a grand Jury of Commoners. Where a Peer commits any such Crime in *Scotland*, a Commission may be issued forth under the great Seal of *Britain*, constituting Justices to enquire by the Oaths of good and lawful Men of any County of *Scotland* therein named, in the same Manner as Indictments are taken before Justices of Oyer and Terminer of any County in *England*. Which Justices issue Precepts to the Sheriff of the County, to return to them at such a Day and Place, as they shall appoint, so many good and lawful Men of the County, as may be sufficient to enquire of the Offence; and may fine the Sheriff, if he neglect to summon a sufficient Number of Men to appear, or fine any Person summoned, who fails to appear; which Fines are to be levied by Process out of the Exchequer.

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quer. Twelve or more returned, being sworn, are sufficient to make an Inquiry, and find any Indictment (a).

2. If a Peer, against whom an Indictment is found, absent himself, and keep out of the Way, he may be outlawed. But if he be in Prison, he may be tried either out of Parliament, or before the House of Lords in Parliament, when it is sitting.

T I T. II.

The Form and Method of Trial of Peers indicted for high Treason or Felony, or Misprision of either, out of Parliament.

1. **T**HE King, by a Commission under the great Seal of *Britain*, constitutes some temporal Lord of Parliament, high Steward of the Kingdom, *pro hac vice*, to receive and proceed on the Indictment, and requires the Peers to attend upon him. A *Certiorari* is awarded out of the Chancery, to certify the Indictment before him, and another Writ goes out of Chancery to the Keeper of the Prison to bring the Prisoner before him when and where he shall appoint. Whereupon the Lord high Steward directs one Precept under his Seal to these Justices, before whom the Indictment was found, to certify it on a certain Day, at such a Place; another to the Keeper of the Prison, to

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bring

(a) 6 A. Cap. 23. § 12. Vide infra Cap. 2. Tit. 1. § 1.

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bring up the Prisoner then and there; and a third Precept to a Sergeant at Arms, to summon the Peers before him at such a Place, Day, and Hour.

2. All Peers who have Right to sit and vote in Parliament, must be summoned to assist at the Trial of any Peer or Peeres, for Treason or Misprision thereof, twenty Days before the Trial (*a*). The sixteen elected Peers of *Scotland* must be summoned to pass not only upon the Trial of any Peer while the Parliament is sitting, but also upon any such Trial, as happens in Time of Adjournment or Prorogation of the Parliament: And in case of the Trial of any Peer, when no Parliament is in Being, the sixteen Peers of *Scotland* who sat in the last preceding Parliament, are to be summoned to such a Trial, in the same Manner, and have the same Powers and Privileges thereat, as any other Peers of *Great Britain* (*b*).

3. At the Time appointed for the Trial, the Lord high Steward, attended with six or seven Sergeants at Arms carrying Maces before him, and by the King at Arms, and the Usher of the black Rod, enters the Place of Trial uncovered, and ascends a Chair of State provided for that Purpose, and the Judges sit here to give their Advice, when required. Then the Clerk of the Crown delivers to the Lord high Steward his Commission, who returns it to the Clerk of the Crown. The Clerk of the Crown,

(*a*) 7 Will. III. Cap. 3. § 11. (*b*) Artic, 23 of the Union,

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Crown, after he hath caused a Sergeant at Arms make three Oyes, and a Proclamation for Silence, in the Name of the Lord high Steward of *Great Britain*, reads the Commission, while his Grace and the other Lords stand up uncovered. Then the Usher, on his Knees, delivers to the high Steward a white Staff or Rod, who redelivers it to him, or to a Sergeant at Arms, who holds it by him during the Trial. Again, an Oyes is made, and a Command given in the Name of the Lord high Steward, to all Justices and Commissioners to certify all Indictments, &c. which being delivered into Court, the Clerk of the Crown reads the Return. Another Oyes is made, that the Keeper of the Prison return his Writ and Precept, and bring the Prisoner to the Bar: Who is brought there having the Ax, that doleful Mace, carried before him, which is held up at the Bar, with the Edge turned from him; and the Clerk reads the Return. Another Oyes is made, that the Sergeant at Arms return his Precept, with the Names of Peers summoned by him. The Return of which is also read: And the Peers, when called, answer to their Names, and take the Oaths (c), and repeat and subscribe the Declaration against Popery (d).

4. The Lord high Steward may adjourn the Trial from one Day to another. But if he think fit to proceed, all Things being thus prepared;

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pared;

(c) Mentioned in the 1 W. & M. Cap. 8. (d) In the 30 Car. II. Cap. 1. St. 2. 7 W. III. Cap. 3. § 11.

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pared; his Grace acquaints the Prisoner, with the Nature of the Crime, and Matters proper for the Occasion. And then the Clerk of the Crown arraigns him, as is done to a Commoner (e): But is not to insist on his holding up his Hand. If he plead not guilty, the Clerk of the Crown asks how he will be tried. To which the ordinary Answer is, *By God and my Peers*. For if a Peer, upon an Arraignment before the Lords, refuse to put himself upon his Peers, he is dealt with as one that stands mute (f).

5. After the Prisoner hath pleaded, and put himself upon his Peers, the King's Council go thro' with their Evidence against the Prisoner. Who is allowed to have Council in Cases where a Commoner is indulged that Benefit; and to produce Witnesses upon Oath to prove his Defence.

6. When the Prisoner hath made his Defence, and the King's Council have been fully heard; the Lord high Steward, (who is the sole Judge that determines Matters of Law, and pronounces Judgment, and to whom all Speeches in the Trial are directed) sums up the whole in a Speech to the Lords, who are only Triers, and like a Jury of Peers. But they are not sworn; nor can the Prisoner challenge any of them: Because Law presumes that they, being all Peers, cannot be guilty of Iniquity or Partiality. After

(e) Vid. *infra* Chap. 2. Tit. 1. Sect. 2. N. 1. § 7. (f) *Ibid.* § 6.

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ter the Evidence is given for the King, and the Lords are charged with the Prisoner; the Lord high Steward doth not adjourn the Trial till another Day. But the Prisoner is withdrawn from the Bar, under the Custody of the Keeper of the Prison; and the Lords go together to some Place, to consider of the Evidence, leaving the Lord high Steward, who sits in Court till they return. The Peers who are the Triers, do not separate till they agree to give a Verdict. In case of Difficulty, they may confer with the high Steward, or the Judges in open Court, in Presence of the Prisoner, whose Interest it is, to see that any Case or Question be right put. But the high Steward may demand and get the Opinion of any of the Judges in face of Court, tho in Absence of the Prisoner; they being called to assist the Court.

7. When a Majority of the Lords are agreed, they return to the Place of Trial, and take their Seats. The Lord high Steward demands of them one by one, beginning with the youngest or lowest, publickly (but in Absence of the Prisoner) whether the Person arraigned be guilty or not guilty; who standing up, uncovered and laying his right Hand upon his Breast, answers *guilty*, or *not guilty*, upon my Honour. The high Steward hath no Authority to vote himself, but numbers up the Opinions of the Peers; and the Prisoner is acquitted or found guilty, according to the Determination

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of the Majority ; so be, that 12 or more Peers agree. After the Peers have given their Verdict, the Prisoner is brought again to the Bar, and acquainted therewith by the Lord high Steward: Who, if the Prisoner be found not guilty, discharges him of the Crime, whereof he had been indicted ; and, if found guilty, asks him, what he hath to say in Arrest of Judgment, or why Judgment should not pass upon him, according to Law ? If he hath nothing to plead, or if what he says be over-ruled, as of no Moment ; the Edge of the Ax is turn'd towards him, and some one of the King's Council prays or demands Judgment against him. Which the Lord high Steward pronounceth in the same Terms, as Judgment is given against a Commoner ; the Law being deaf to all Distinctions of Persons in this Case (g).

8. When the Trial is over, a Sergeant at Arms, by Direction of the Clerk of the Crown, proclaims aloud with Oyes, that my Lord high Steward of *Great Britain* doth strictly command all Persons here to depart in the Peace of God, and our sovereign Lord the King : For his Grace is going to dissolve his Commission. Then the Lord high Steward stands up, uncovered, pronounces it dissolved : And in token of its being at an End, takes the white Rod that had been held by him, during the Trial, in both his Hands, and breaks it in Two.

T I T.

(g) Vide supra, Part I. Book III. Cap. 1. Tit. 1. Sect. 2. N. 2. & Tit. 2. N. 4.

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T I T. III.

The Form and Method of Trial of Peers for the Crimes aforesaid before the House of Peers in Parliament.

I. **W**hen a Peer is tried before the House of Lords in Parliament for high Treason or Felony, or Misprision of either, upon an Indictment at the Suit of the King, or upon an Impeachment exhibited by the House of Commons: His Majesty, at the humble Desire of the Lords, grants Commission to one of their own Number (commonly the Lord Chancellor) to be Lord High Steward, and preside in the Trial.

2. At the Time appointed for the Trial, the Temporal Lords come from their own House, into the Place of Trial. For the Bishops don't interests themselves in the Trial of capital Crimes, when the House acts as a Court of Judicature. After the Lords have taken their Seats, and Proclamation for Silence made in the King's Name, his Majesty's Commission to the Lord high Steward is read, &c.

3. In this Trial all Speeches are directed to the Lords in general ; they being all Judges therein, and the Lord high Steward not the sole Judge, but as Chair-man of the Court. The Lords proceed in an extraordinary Manner, as both Judges and Triers, according to the Law
and

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and Usage of Parliament, without being tied to the Niceties of Form observed in other Courts. Persons impeached before them for high Treason inferring Corruption of Blood, and for Misprision thereof, seem not to have the Privilege of making their Defence by Council, and producing sworn Witnesses to vouch it, &c (a). The House may be adjourned, as often as there is Occasion, even after Evidence is given, or begun to be given; and the Proof may be taken by Parcels. When Points of Difficulty occur, the Lords retire out of Court, and the Lord high Steward goes along with them, to consult together in private: Where they may call the Judges to assist them in Absence of the Prisoner.

4. After the Evidence is over, the Lord high Steward collects and marks the Votes of the Peers *seriatim*, and last of all gives his own Vote, and informs the House, how the Plurality of Votes have gone. Then the Prisoner is brought to the Bar, and acquainted therewith by his Grace, who gives Judgment accordingly.

CHAP.

(a) 7 W. III. Cap. 3. § 12.

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C H A P. II.

*The Order of judicial Proceedings against
Criminals, who are Commoners.*

THe Procedure against Commoners, in Cases of high Treason and Misprision thereof, is not the same as for other Crimes. But since high Treason and Misprision thereof fall not only under the Cognizance of Commissioners of Oyer and Terminer ; but also of the Court of Justiciary, and the circuit Courts, where those and other Crimes may be tried : I shall first shew the Order of judicial Proceedings in Cases of high Treason and Misprision thereof before a Commission of Oyer and Terminer ; and then set forth the Order of judicial Proceedings before the Court of Justiciary, and the circuit Courts.

T I T. I.

*The Order of judicial Proceedings against Commoners,
in Cases of high Treason and Misprision thereof,
before a Commission of Oyer and Terminer.*

S E C T. I.

*How Commoners are indicted, or Bills of Indictment
found against them for high Treason, or Misprisi-
on thereof.*

I. **W H E N** a Commission of Oyer and Terminer is granted under the great Seal of
Britain,

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Britain, four of the Lords or other Commissioners (*unus quorum*) therein named, make a *Latin* Precept under their Hands and Seals directed to the Sheriff of the County, or Stewart of a Stewartry, that is not subject to, or independent upon, any County, wherein the Session of Oyer and Terminer is to be held and kept, bearing Date 15 Days, at least before the Day of holding the Session: For proclaiming the Session to be holden at such a Place on such a Day, and summoning 24 Jury-men, and the Justices of Peace, Mayors and Bailiffs of Liberties within the County or Stewartry, to appear then and there before the Commissioners, &c.

2. On the Day and Place appointed by the Precept for holding the Session, four of the Commissioners, and King's Justices (whereof one must be of the *Quorum*) assemble in the Session-house, and one of them learned in the Law is made Chair-man. The Clerk of Arraignments writes down the Names of the Commissioners present, and then calls the Court, bidding the Cryer make 3 Oyes, and repete after him the Proclamation thus: *My Lords, the King's Justices straitly charge and command all Manner of Persons to keep Silence, and hear his Majesty's Commission of Oyer and Terminer for the County of, &c. openly read, upon Pain of Imprisonment.* The Clerk reads the Commission, and that being done, bids the Cryer say, *God save the King*, and then to repete after him the Words following;

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following: *All Manner of Persons that have to do before my Loyds the King's Justices of Oyer and Terminer for this County of, &c. draw near, and give your Attendance. The Sheriff is called to return the Precept to him directed, and delivered for summoning a Session of Oyer and Terminer to be holden here this Day upon Pain and Peril shall fall thereon.* The Sheriff or Undersheriff delivers the Precept *propria manu* to the Chair-man indorsed thus, *Executio istius præcepti patet in quibusdam schedulis huic annexis, subscriptis with his Name, viz. a List in Parchment of the Names of the Justices of Peace, Mayors and Bailiffs of Liberties: And another List of the Names of the Jurors or Jury-men, with their Additions of Title and Places where they dwell. Which Men are called the grand Jury, because of the Extent of their Power, and in regard they may exceed the Number of 12. This Execution or Indorsment, is termed, The Return of the Precept. The Schedule or Roll of Parchment, in which are the Names of the Jurors summoned, is called a Pannel, or Panel, and the entering their Names into it, is termed the Empanelling a Jury.*

3. After the Precept and Sheriff's Return are delivered to the Chair-man of the Court, he gives it immediately to the Clerk, who orders, 1. *All the Justices of Peace.* 2. *All Mayors and Bailiffs of Liberties within this County, to be called to answer to their Names, as they shall be called, every one at the first Call, upon Pain and Peril*

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Peril shall fall thereon. And then marketh with a Dote or Stroke of Ink the Names of all that do appear. Such as make Default or appear not, may be either fined or spared, as the Court thinks fit.

4. The Clerk bids the Cryer call the grand Jury thus, *You good Men of the County of, &c. summoned to enquire for our Sovereign Lord the King, and the Body of this County, answer to your Names, as you shall be called, every one at the first Call, upon Pain and Peril that shall fall thereon:* And having marked the Names of all who appeared, bids the Cryer call the Defaulters thus; *You good Men that were even now called, and made Default, answer to your Names, and save your Fines. A. B. (without his Addition) come forth, or you lose 100 sh. in Issues.* And so of the rest. The Sheriff's Bailiff must prove the Summons given to those grand Jury-men, who make Default or do not appear. In order thereto the Clerk bids the Cryer swear the Bailiff (laying his right Hand on the New Testament) *a voir dire, (i. e. veritatem dicere)* thus, *you shall true Answer make to what the Court shall demand of you: So help you God. Kiss the Book.* Then the Clerk says, *Bailiff, by Oath you have taken, did you summon A. B. of, &c. to appear here this Day, to serve upon the grand Inquest?* The Bailiff answers when and how, *i. e.* what Day, or whether in Person or by Ticket left at his House, and with whom. And so of all that make Default. The Clerk of Arraignments
turning

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turning his Face to the Court, and acquainting them how many of the grand Jury have appeared, saith to the Chair-man, *Who will your Lordship please shall be Foreman?* The Chairman names the Foreman, and the Clerk calls him, and bids him lay his right Hand on the Book, and bids all the rest of the grand Jury, who did appear, hearken to the Foreman's Oath, which the Clerk administers to him thus: *You shall diligently enquire, and true Presentment make of all such Matters and Things, as shall be here given you in Charge, or otherwise come to your Knowledge, touching this present Service: The King's Majesty's Council, your own and your Fellows, you shall well and truly keep secret. You shall present no Man for Malice, Hatred or ill Will, nor leave any Thing unpresented for Fear, Favour or Affection, or for any Reward, Hope or Promise thereof: But, in all your Presentments, you shall present the Truth, the whole Truth, and nothing but the Truth, according to the best of your Skill and Knowledge. So help you God: Sir, kiss the Book.* The Clerk draws a Line from the Foreman's Name, and marks him sworn thus — *jur. prior.* Then he calls the rest of the grand Jury by three at a Time, and their right Hands being laid on the Book, swears them thus, *The same Oath that A. B. your Foreman hath now taken before you on his Part, you and every of you shall well and truly observe, and keep on your respective Parts: So help you God.* And they must severally kiss the Book. For avoiding the Inconveniency of the Jury's

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ry's splitting into an equal Number of Voices, for approving and disallowing any Bill, an odd Number, as 17, 19, 21, as the Court requires, use to be sworn. The Clerk strikes a Line from every one of their Names, and marks him sworn thus — *Jur.* No Quaker or reputed Quaker is permitted to be of any grand Jury (a). A Number of grand Jury-men, agreeable to the Court, being sworn, the Clerk asks the Court, if they will please to discharge those, who did appear on the grand Jury, and are not sworn, to depart the Court, about their own Occasions, and tells them as the Court directs.

5. The Clerk bids the Cryer make one Oyes, and to repeat after him : *My Lords, the King's Justices command all Justices of Peace and other Officers, that have any Authority to take any Inquisitions, Recognizances, Examinations, or Informations of Offences, enquirable by his Majesty's Commission of Oyer and Terminer within this County of, &c. that they shall forthwith deliver the Records of the same into this Court : And all others to keep Silence whilst the Charge is in giving upon Pain of Imprisonment.* The Clerk must file (*i. e.* fasten on a Thread or Wire) all Recognizances, and keep safe all Examinations, or Informations delivered in by the Justices of Peace, and Mayors or other Officers having Power to take them ; and those who give in such Examinations and

(a) 7 & 8 W. III. Cap. 34. § 6. junct. 1 Geo. I. Cap 6. & 8 Geo. I. Cap. 6.

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and Informations as happened to be taken before them, must prove the same.

6. The Chair-man gives the Charge to the grand Jury, setting forth their Duty, and the Matters enquirable by them, &c. While the Charge is in giving, the Clerk makes for the Foreman a Copy, in Paper, of the Names of all sworn on the grand Jury, that he may know his Fellows, and call them by their Names, at collecting their Voices, in agreeing to find, or not agreeing to find, any Bills brought before them; and delivers the whole Pannel returned to the Sheriff or Undersheriff, to ingross in Parchment a Pannel of those only who are sworn, with their Additions, putting the Foreman's Name first, and the rest according to their Quality, or as they are written in Order in the Pannel returned with the Precept, and draws down against the Names of all written in the small Pannel, a Column thus } and marks *Jur.*

To which Pannel the Sheriff or Undersheriff puts his Name, and delivers it to the Clerk to be filed on the Lace with the Precepts and Schedules therewith returned, for the more safe keeping thereof.

7. After the Charge is given to the grand Jury, the Clerk bids the Cryer swear a Bailiff (laying his right Hand on the New Testament) to keep the grand Jury thus, *You shall diligently attend the grand Jury, during this Session of Oyer and Terminer; you shall safely carry to them all such In-*
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dictments, Informations and other Writings, as shall be delivered to you by the Court : And the same when redelivered to you by the grand Inquest, you shall bring back again and deliver them safe to the Court, without any Alteration thereof. So help you God. The grand Jury use to go into some convenient Room provided for them, near the Court to hear the Evidence on the Bills of Indictment brought to them, and to proceed in their Business. The Clerk of Arraignments bids the Cryer call the Prosecutors (where any are bound to prosecute) to prefer their Bills thus, A. B. come forth and prosecute against C. D. or else you forfeit your Recognizance ; and to call those that are upon Bail, and bound to answer thus : F. H. come forth, and save thee and thy Bail, or else thou forfeits thy Recognizance ; and to call his Bail thus : I. K. bring forth F. H. whom you undertook should appear here this Day, or else you forfeit your Recognizance. Then the Clerk bids the Cryer swear the Witnesses whose Names are indorsed on any Bill of Indictment, thus, The Evidence which you shall give to the grand Inquest upon this Bill of Indictment against O. P. and Q. R. shall be the Truth and Nothing but the Truth. So help you God. Kiss the Book. And the Clerk adds to the Name of every Witness sworn, Jur. One of the grand Jury should come from his Fellows, to see the Witnesses sworn to every Bill, and bring the Bill and Witnesses along with him, to be examined before all the grand Jury. The Witnesses are to attend the Court again after

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after they have been examined by the grand Jury, and not to go away until the Court dismiss them. If the grand Jury, after hearing Evidence, find, *i. e.* approve, a Bill of Indictment exhibited against any Person or Persons (to which Twelve at least must agree) the Foreman or some of them indorse or write on the Back thereof, these Words, *Billa vera*. If the grand Jury disallow a Bill, they must indorse it *ignoramus*. But where several Persons are indicted in one Bill, and the grand Jury have Evidence to satisfy themselves to find the Bill against one or more, and not against others; they indorse the Bill thus, *Billa vera, quoad A. B. & C. D. Ignoramus, quoad E. F. & G. H.*

8. When the grand Jury have agreed upon the finding or not finding of any Bill before them, and indorsed it accordingly, they bring the same into the Court. To whom the Clerk saith, *You Gentlemen of the grand Inquest, answer to your Names*, and when he hath called them over by the Pannel, asketh, *Gentlemen, are you agreed of any Bills?* If they be agreed on any, he takes them, and saith, *You are content the Court shall amend the Matter of Form, and false Latin, altering no Matter of Substance without your Privy.* He separates the Bills indorsed *billa vera*, from those indorsed *ignoramus*: And then standing turneth towards the Judges, says, *Billa vera against A. B. for High Treason: Billa vera against C. D. for Misprison of High Treason: Billa vera against F. G. for High*

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Treason: Ignoramus quoad H. I. upon the same Bill for High Treason. And so forth, till the Indorsements of all the Bills delivered to him by the grand Jury be read. Where an Indictment is returned *Billa vera* against some of the Parties indicted, and *Ignoramus quoad* the rest: The Clerk strikes immediately a Score with Ink thro' the Names of those returned *ignoramus*, that, as if they had not been indicted, the Bill may be substantive *quoad* those against whom it was returned *Billa vera*. After a Bill of Indictment is, by Verdict of a grand Jury, found and presented before the Court to be true; the Party accused is said to be indicted, and the Clerk of Arraignments files the Bill. But such Bills of Indictment as are returned *iguoramus quoad* all the Parties therein accused, or quite disallowed by the grand Jury, are delivered to the Bench, and forthwith cancelled or torn.

9. If a Man indicted of High Treason appear not, to justify himself by Law, a *Capias* is directed to the Sheriff, to take and imprison him. If he cannot be apprehended, he shall be outlawed, that is, pronounced to be out of the King's Protection, and deprived of the Benefit of Law, that he reap no Advantage by his Contumacy, and absenting or absconding from a legal Trial. But a Woman is said to be *waived*, and forsaken of the Law, where a Man is outlawed. When the Offender appears, or is taken upon Process, in order to his Trial, he is committed to Prison; High Treason not beingailable. S E C T.

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S E C T. II.

The Form and Method of Trial of Commoners indicted of High Treason, or Misprision thereof.

THE Proceeding after Bills of Indictment found, is not altogether the same in all Cases of Treason: I shall therefore consider the different Forms and Methods of Trial in different Cases.

I.

The Method of Trial of Commoners indicted for High Treason, whereby Corruption of Blood to the Offender or his Heirs, is made, or for Misprision of such Treason.

1. A Person, against whom an Indictment of High Treason is found by the grand Jury, being in Custody, the Clerk of Arraignments calls to the Keeper of the Prison, to bring such a Prisoner to the Bar of the Court. If the Prisoner doth not understand the *British* Language, an Interpreter must be procured and sworn to explain to him what the Court says; and to them what he answers (a). Then the Clerk, to distinguish the Prisoner's Person, bids him hold up his Hand (but one indicted of Misprision of Treason is not bid hold up his Hand)

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and

(a) Ut infra N. 5.

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and may ask him what his Name is, or what Name and Title he is commonly known by. And if he own the Name and Addition of Title given him in the Indictment, tells him, He stands here indicted by that Name of High Treason. If the Name or Title of such Prisoner be mistaken, the grand Jury should be sent for into Court, and the Name of the Prisoner and his Title, which he owns before them, made right in the Indictment by and with their Consent, who, after the Bill is amended, must take it into some of their Hands and deliver it back into Court, indorsed *Billa vera*. Then the Clerk turning towards the Judges, repeats again, *Billa vera against A. B. for High Treason*, or *Billa vera against C. D. for Misprison of High Treason*, according to the Nature of the Indictment thus amended.

2. A Narrative of the Time and Place, when and where, the Judges before whom, the Jurors by whom the Indictment is taken, is called *A Caption of Indictment*. To which the Indictment itself is subjoyned. If the Prisoner desire Council, the Court will immediately, upon his Request, assign him such and so many Council, not exceeding two, as he desires: Who are to have free Access to him, at all reasonable Hours. He is also allowed to have a true Copy of the Indictment, and of the Caption thereof (upon paying for it) and a Copy of the Pannel of the Jurors returned by the Sheriff (but not of the Names of Witnesses to be produced for proving there.

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thereof) delivered to him, Five Days at least before the Trial (*b*). And after Decease of the Pretender, such Indicttee shall have a Copy of the Indictment, with a List both of the Witnesses to be brought against him, and of the Jury, mentioning their Names, Profession, and Place of Abode given to him in Presence of two or more credible Witnesses, ten Days before the Trial (*c*).

3. If there be no other Persons for the Time to be tried, the Court may adjourn for seven or eight Days. In order thereto the Clerk asks the Chairman, to what Time he is pleased the Court shall be adjourned, and sends for the grand Jury, whom he calls over, and adjourns to that Time thus: *Gentlemen of the grand Inquest, the Court dismisseth you for this Time, and enjoyns you, on pain of ten Pounds Sterling apiece, to give your Attendance here again on the — Day of — at Eight of the Clock in the Forenoon.* Then bids the Cryer make three Oyes, and repeat thus: *All Manner of Persons that have any more to do before my Lords the King's Justices, and other Commissioners of Oyer and Terminer, for this County of — may depart hence at this Time, and give their Attendance again on the — Day of — at Eight of the Clock in the Forenoon.* And God save the King, The Clerk writes an Entry exactly of the Time, and Place to which the Court is adjourned.

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4. When

(*b*) 7 W. III. Cap. 3. § 1 & 7. (*c*) 7 A. Cap. 21. § 11;

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4. When Four or more Justices and Commissioners (*unus quorum*) meet at the Time and Place the Court was adjourned to, the Clerk writes the Day and Place, and Names of the Justices which then meet, and bids the Cryer make three Oyes, and repeat after him thus, *All Manner of Persons that have any more to do before my Lords the King's Justices (or if no Lord there, before the King's Majesty's Justices) of Oyer and Terminer for this County of — and were adjourned over to this Time and Place, draw near and give your Attendance.* Then the Clerk bids the Cryer call over the grand Jury by the Pannel of their Names, and marks who appear, and desires them to go to some Room, near the Court, and keep together, that the Court may send to them upon any Occasion of Business. If Business be retarded or disappointed by any of the grand Jury-mens failing to appear, the Absents ought to be fined for such Default. The Clerk delivers the Chairman a Court-paper of the Day of sitting upon this Adjournment, the Names of the Commissioners present, and of the Persons indicted, and for what Offences.

5. Then the Clerk of Arraignments calls to the Keeper of the Prison, to set *A. B.* Prisoner to the Bar. Who, tho' his Crime be never so great, ought to be used with all Humanity and Gentleness, consistent with the Nature of the Thing, and should not be brought to the Bar in a contumelious Manner, as tied or fettered, or loaded with Irons; that he may make his
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Defence, and plead at Ease, unless there be some Danger of Rescue, or Escape. In Cases, where the Prisoner doth not understand the *British* Language, an Interpreter must be procured and sworn thus by the Clerk; *Sir, lay your right Hand upon the Book, and hearken to your Oath; you shall well and truly interpret unto A. B. now Prisoner at the Bar, the High Treason whereof he stands here indicted, as the Court shall direct you, and also the Questions and Demands which shall be made by this Court, concerning the same Treason; and also shall well and truly interpret to this Court, the Answers which the said A. B. the Prisoner shall thereunto give, so help you God. Kiss the Book.* The Chairman ordinarily makes a Speech to the Prisoner concerning his Behaviour during the Time of the Trial, assures him when it comes to his Turn to speak he shall be heard with all Patience and Indulgence the Matter will bear, or something to this Purpose.

6. If the Crime be High Treason, the Clerk bids the Prisoner hold up his Hand, and tells him by his Name, that he stands indicted of such a Crime by that Name, and the Addition of Title given him in the Indictment. But it is no essential Part of the Trial that the Prisoner hold up his Hand at the Bar, nor is there any Record made of it when done: The only Use of it being to shew the Court who the Prisoner is; and when that is apparent, they proceed against him, tho' he refuse to hold up his Hand. The Clerk reads the Indictment to the Prisoner
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in the Language of *Great Britain*, and not in the *Latin* Tongue, in which it is written. But if he desire, he may also have it read to him in *Latin*. A Witness attends the Court to prove the Delivery of a Copy of the Indictment to the Prisoner, if there should be Occasion. The Indictment being read, the Clerk asks, *How sayst thou A. B. art thou guilty of this High Treason, or not guilty?* If the Prisoner stand mute, or will not plead effectually, *i. e.* answer directly to the Fact, Judgment may be given against him, as if he were convicted by Verdict or Confession. But where the Court sees Reason to doubt, if the Prisoner stands mute wilfully, and contumaciously, or if he be naturally dumb, and want the Use of his Tongue, they order the Sheriff to return a Jury on a Pannel to try that Matter, Twelve of which must be sworn thus: *You shall diligently enquire, and true Presentment make for and on Behalf of our Sovereign Lord the King, whether A. B. Prisoner at the Bar, being now here indicted of High Treason, stands mute fraudulently, wilfully and obstinately, or by the Providence and Act of God, according to your Evidence and Knowledge. So help you God. Kiss the Book.* And if it be found, that the Prisoner is dumb by the Hand of God, the Judges of the Court will not only cause the Crime charged upon him to be enquired of, but also all other Matters which he might have pleaded in his Defence: Since it is no Way his Fault that he doth not plead. If the Prisoner confess the Fact, or that he is guilty,

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ty, the Confession is recorded thus, *Per adjournment. — die — 1730. cogn. i. e. cognovit indictmentum.* Then the Chairman asks him, What he can say in Arrest of Judgment, why Sentence of Death should not pass upon him : Because, he may perhaps have a Pardon to plead. If he can say nothing in Arrest of Judgment ; the King's Council, without more ado, pray Judgment upon the Confession, and the Chairman, or some other Commissioner pronounceth it according to Law. This is called *Attainder by Confession.*

7. When a Prisoner stands upon his Defence, he pleads either in Abatement, that the Suit ought to cease for that Time, because of some Informality in the Indictment ; which we call a dilatory Defence : Or demurs to the Indictment, that is, as we say, denies the Relevancy of it : Or pleads in Bar ; which answers to the proponing a peremptory Defence in our Law : Or he pleads the general Issue, that is, pleads over to the Crime, or pleads not guilty. If the Prisoner being asked by the Clerk, If he be guilty or not guilty, answer not guilty. The Clerk turns the Charge of Guilt upon him by this Replication, *Culprit, how wilt thou be tried ? Culprit, i. e. culpabilis es, paratus sum verificare.* *Cul.* being an Abbreviation of the *Latin culpabilis*, and *prit* (now *pret*) an old *French* Word for ready. So that, the Clerk's pronouncing that Word, is as much as to say, that the Prisoner is guilty of the Crime charged upon him, and the Crown

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Crown is ready to prove it. To the Question, *How wilt thou be tried?* the Prisoner answers, *By God and my Country.* The Clerk replies, *God send thee a good Deliverance;* and writes over the Prisoner's Name on the Indictment, the Time when he pleaded not guilty, thus, *Per adjournment. — die — po. se (id est) posuit se super patriam,* he put himself upon his Country, and then bids the Keeper take him from the Bar. The Prisoner having pleaded not guilty, and put himself upon his Country, is said to be *arraigned*: Because then those who sue for the King may orderly proceed. The Clerk doth not bid a Prisoner for Misprision of High Treason, hold up his Hand at the Time of his pleading to it (that Crime not being Felony) but tells him he stands indicted of Misprision of High Treason by the Name of — for that he — as in the Indictment. And asks him whether he be guilty of that Offence of Misprision or not guilty? If he answer, *not guilty,* the Clerk enters on the Indictment over his Name, *per adjournment — die — po. se.* Or if he confess, *cogn.* and then bids the Keeper take him from the Bar.

8. As soon as the Prisoner hath pleaded not guilty, Four of the Justices or Commissioners (*unus quorum*) may sign and seal a Writ or Precept, called a *Venire facias*, directed to the Sheriff of the County, or Stewart of the Stewartry, where the Crime was committed, for summoning a Jury of Twelve good and lawful Men
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of the Neighbourhood to appear before them, at a certain Day and Place, to pass upon the Trial. But tho' the Precept orders a Return only of twelve Men to be made, the Sheriff or Stewart usually returns sixty or eighty or so many, as that there may be a sufficient Number to make up a Jury of twelve, besides all those which may be duly challenged. Then the Clerk understanding from the Chairman, to what Time he is pleased the Court should be adjourned, sends for the grand Jury, and calls them over and adjourns them to that Time, as in the first Adjournment; or, if the Court please, he dischargeth them thus, *Gentlemen of the grand Inquest, the Court thanks you, for your good Service, and doth discharge you.* Upon which, he bids the Cryer make three Oyes, and repeat the Adjournment in Manner before mentioned, to such a Day, Hour and Place, as the Court doth direct.

9. When four or more Justices and Commissioners (*unus quorum*) meet at the Time and Place the Court was adjourned to, the Clerk writes down the Day and Place, and their Names; makes Proclamation, and calls the Court as at the Session, upon the first Adjournment; and calls over the grand Jury, unless they were discharged at the former Sitting. Then he causes the Cryer proclaim, *Sheriff of this County of, &c. return the Precept to you directed and delivered, for summoning a Jury to try between our Sovereign Lord the King, and the Prisoners that*

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that shall be at the Bar, retornable here this Day, on pain and peril will fall thereupon. The Sheriff or Undersheriff delivers the Præcept, indorsed thus, *Executio istius præcepti patet in pannello, huic annex.* Which Pannel is intituled, *The County ss. nomina jur. ad triand. inter Dominum Regem & &c. prisonar. ad barram,* or to that Effect: And contains the Names of all the Freeholders therein written, one under another, with the Additions of their Titles and dwelling Places. Such Ranking or Ordering of the Jurors Names is termed the Array. The Clerk bids the Keeper set the Prisoners to the Bar, as he shall name to him. Which being done, he bids the Cryer repeat, *You good Men that are impannelled to try between our Sovereign Lord the King, and the Prisoners at the Bar, answer to your Names, every one at the first Call, on Pain and Peril shall fall thereon.* He marks those who appear with a visible Speck or Dote, before their Names. And the Cryer calls those who appeared not, over again, thus, *You of the Jury who were even now called, and made Default, answer to your Names, and save your Fines.* The Clerk acquaints the Court how many Jurors appear in the whole: And calls the Witnesses for the King, whose Names are indorsed upon the Indictments against the Prisoners to be tried, to know if they be all ready. And then asks the Court, which Prisoner they intend shall be tried first. It is thought most expedient to try but one Prisoner for Treason at once: Because, if more should
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be tried together, every one having the Benefit of challenging Thirty five peremptorily, may challenge so many, and make such Confusion, as that, out of all who appear on the Pannel, there will not remain Twelve unexcepted against, to try the Prisoners, and so put off the Trial, till by a new Precept, a new Jury be got returned.

10. The Clerk bids the Keeper set the Prisoner to be first tried to the Bar, and take away the other Prisoners from it: And calls to know, if the Witnesses against him be ready? Then asks him who is to be tried, if he hath had a Copy of the Pannel of the Jury delivered to him two Days (or more) since: If he should deny his receiving of it, some Witnesses for the King, who delivered the Copy to him, must vouch or prove that he got it. The Clerk then says, *You A. B. now Prisoner at the Bar, these Men which you shall hear called, and personally appear, are to pass between our Sovereign Lord the King, and you upon Trial of your Life and Death: If you will challenge them, or any of them, you must speak unto them as they come to the Book to be sworn, before they be sworn.*

11. The Prisoner may, before any one Juror is sworn, but not after, except at once against all the Jurors impannelled, upon the Account of just Suspicion, Partiality or Default in the Sheriff who returned them, or because of Incompetency, for being Persons living without the County: Which is termed *a Challenge to the Array.* The Prisoner, tho he do not challenge to
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the Array, or tho his Challenge to the Array be found against him; may except against particular Jurors returned, that they should not pass upon his Trial: Which is called a *Challenge to the Polls*. A Challenge to the Polls is either *peremptory*, or for some special Cause or Reason. A peremptory Challenge, is when the Prisoner doth except against particular Jurors, without shewing any Cause, or other Reason, than to satisfy his own Fancy. No Person can challenge peremptorily any of the Jurors upon his Trial, for Misprision of high Treason. But any Person may, in his Trial for high Treason, challenge peremptorily thirty five of the Jury (*d*). But if he challenge peremptorily above that Number allowed him by Law; he is to be dealt with as one that stands mute upon his Trial. One suing for the King, cannot challenge any of the Jury peremptorily, but must assign the Cause of his so doing, to be tried by the Discretion of the Justices (*e*); tho' he needs not shew any Cause of his Challenge, till the whole Pannel be gone thro', and it appear, that there will not be a full Jury without the Person so challenged. A Prisoner who takes a Challenge for Cause, must shew it presently, and gets not Time (as one suing for the King hath) till the Pannel is perused. The special Causes or Reasons, why a particular Juror may be challenged, are, that he is an Alien;

(*d*) 1 & 2 Phil. & M. Cap. 10, (*e*) 33 Edw. I. St. 4 anno 1305.

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lien; or a Peer; or under twenty one Years of Age (*f*); or a Quaker, or reputed Quaker (*g*); or that he is not seised in his own Right, or the Right of his Wife, of an Estate of Inheritance in Lands or Tenements for his or her Life, or the Life of some other Person, within the County or Place whence the Jury comes, of the yearly Value of forty Shillings *Sterling* (*h*); or that he is an Outlaw; or infamous; or that he was one of the grand Jury, who found the Bill (*i*); or that he hath a Claim to the Forfeiture by the Prisoner's Attainder or Conviction. A Juror may be asked upon a *voir dire* (*i. e.* to declare upon Oath) whether he shall get or lose by the Prisoner's Attainder, or if he be qualified by having a sufficient Estate, or if he be an Alien or the like: But any Exception for setting him aside from serving on such a Jury, that may infer Punishment or Infamy against himself, as that he stands convicted of Perjury or Forgery, &c. must be proved otherwise, than by asking the Question at the Jury-man himself.

12. The first twelve Men returned upon the Jury that appear, are sworn to try the Prisoner, if none of them be challenged, and the rest in the Pannel depart. The Clerk calls *R. S.* the first Jury-man in the Pannel, bids him look upon the Prisoner, and lay his right Hand on

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(*f*) 7 & 8 W. III. Cap. 32. § 4. (*g*) 7 & 8 W. III. Cap. 24. § 6. 1 Geo. I. Cap. 6. junct. 8 Geo. I. Cap. 6. (*h*) 7 A. Cap. 21. § 6. (*i*) 25 Edw. III. St. 5. Cap. 3.

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the Book, and the Cryer swears him thus: *You shall well and truly try, and true Deliverance make, between our Sovereign Lord the King, and the Prisoner at the Bar, whom you shall have in Charge, and a true Verdict give according to your Evidence. So help you God. Kifs the Book.* And so others in the Pannel, one after another, to the Number of twelve, are sworn. The twelve being thus sworn, are called *the petit, or petty Jury*, who are the Jury of Life and Death. The Clerk gives the Undersheriff the large Pannel, to write out the Names and Additions of the Jury-men only who are sworn, upon a small parchment Pannel entitled thus, *Nomina jur. int. Dominum Regem & A. B. prisonar. ad barram*: And puts the Sheriff's Name to it. Then the Clerk bids the Cryer repeat, *If any one can inform my Lords the King's Justices, the King's Attorney or Advocate, before this Inquest be taken, between our Sovereign Lord the King, and the Prisoner at the Bar, let them come forth, and they shall be heard; for the Prisoner stands at the Bar, upon his Deliverance: And all others that are bound by Recognizance to give Evidence against the Prisoner at the Bar, come forth and give your Evidence, or else you forfeit your Recognizances.* The Clerk says to the Prisoner, *A. B. hold up thy Hand*, and, turning to the Jury, says, *You of the Jury look upon the Prisoner, and hearken to his Cause, he stands indicted in this County of, &c. by the Name of A. B. of, &c. as his Addition is in the Indictment, for that he, &c.* (reading all the Indictment in the *British Tongue,*

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Tongue, and not in *Latin* to the End of it.) Upon this Indictment he hath been lately arraigned, and thereunto pleaded not guilty, and for his Trial hath put himself upon God and his Country, which Country you are. Your Charge is to enquire, whether he be guilty of this high Treason, in Manner and Form, as he stands indicted, or not guilty. If you find him guilty, you shall enquire what Goods or Chattels, Lands or Tenements he had, at the Time of the said high Treason committed, or at any Time since. If you find him not guilty, you shall enquire, whether he fled for it: If you find that he did flee, you shall enquire of his Goods and Chattels, as if you had found him guilty. If you find him not guilty, and that he did not flee for it, say so, and no more, and hear your Evidence.

13. Now is the proper Time for the King's Council or Attorney to open and speak to the Cause, if they have a Mind to it, and if not, to produce their Evidence. Witnesses, whether for the King, or for the Prisoner, are brought to appear by *Subpœna's* and Procefs of Course taken out against them (*k*); and both must be sworn (*l*). I shall consider, 1. What is allowed as Evidence. 2. Who may, or may not be Witnesses. 3. In what Manner Witnesses are to give their Evidence.

[1.] The Confession of the Prisoner himself taken before any Magistrate out of Court, is allowed to be given in Evidence against the Par-

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(*k*) 7 W. III. Cap. 3. § 7. (*l*) 1 A. Cap. 9. § 35.

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ty confessing, but not against others: And such Confession must all be taken together, and not by Parcels. The Evidence given by a Witness at one Trial, cannot in the ordinary Course of Justice, be made Use of on the Death of such Witness, at another Trial. What a Stranger has been heard to say, is no Manner of Evidence for, or against the Prisoner: But what the Prisoner hath been heard to say at another Time, may be given in Evidence for him, as well as against him. And what a Witness hath been heard to say at another Time may be given in Evidence, in order either to invalidate, or confirm the Testimony which he gives in Court. Comparison of Hands, is no Evidence of a Man's Hand-writing in criminal Cases. High Treason whereby Corruption of Blood may be made, or Misprision of such High Treason, requires Evidence by two lawful Witnesses, either both to the same overt Act, or one to one, and the other to another overt Act of the same Treason (*m*).

[2.] It is a good Exception against a Witness, that he is an Infidel, that is, that he believes neither the Old nor New Testament to be the Word of God, on one of which Law requires the Oath to be administered. Husband and Wife, being as one and the same Person, in Affection and Interest, cannot give Evidence for one another; and regularly the one is not admitted to give Evidence against the other, by reason of the

(*m*) 7 W. III, Cap. 3. § 26.

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the implacable Diffension which might be caused by it, and the great Danger of Perjury, from taking the Oaths of Persons under so great a Bias, and the extreme Hardship of the Case. A Conviction, and, *a fortiori*, an Attainder or Judgment of Treason, Felony, Piracy, Perjury, Forgery, &c. is a good Exception against a Witness so long as it continues, if the Record of such Conviction or Judgment be actually produced in Court. But it hath been thought, that the King's Pardon will remove a Man's Disability to be a Witness, in all Cases wherein it is only the Consequence of the Conviction or Judgment against him; and not an express Part of the Judgment as it is in Perjury, in which Case, *pœnam licet tollas, semper litura manet*: However this Matter seems not to be fully settled. It is a good Exception against a Witness, that he is to be a Gainer or Loser by the Trial: But not that he hath received a Reward, for having made a Discovery of the Crime to be proved against the Prisoner. Nor is it a good Exception against a Witness, that he is an Alien; or outlaw'd in a personal Action; or that he is one of the Judges or Jurors, who are to try the Prisoner; or that he was Witness to the finding the Bill of Indictment against him. An Accomplice in a Crime charged against the Prisoner, may, tho' he hath confessed himself guilty of the same Crime, be admitted as a Witness, if he hath not been indicted for it. And Accomplices, who are indicted, are good Witnesses for the

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King, until they be convicted: Because the Discovery of such wicked Works of Darknes, come properly from the fellow Offenders; and if no Accomplices were admitted as Witnesses, it would be generally impossible to find Evidence to convict the greatest Offenders, and Treason or other clandestine Crimes could not be discovered. In short, many Exceptions that are good against Jurors, are not good against Witnesses: Because Jury-men are more easily to be had than Witnesses. Objections against Witnesses, that do not touch their Fame, or tend to subject them to legal Pains, may be asked at themselves upon a *voir dire*, that is, may be referred to their own Declaration upon Oath: But such as reflect upon their Reputation, or expose them to Punishment, if answered affirmatively, must be made good otherwise than by their own Acknowledgment. Exceptions against one's being admitted a Witness, must be taken before he is sworn.

[3.] In Cases where the Witnesses do not understand the *British* Tongue, the Clerk swears an Interpreter thus: *Sir, lay your right Hand upon the Book, and hearken to your Oath: You shall well and truly interpret to L. M. a Witness here produced in behalf of his Majesty against A. B. now Prisoner at the Bar, the Questions and Demands which shall be made by this Court concerning the High Treason, whereof the said Prisoner stands here now indicted, and you shall well and truly interpret to this Court, the answers which the said L. M. shall there-*

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thereunto give. So help you God. *Kiss the Book.* The Clerk calls the Witnesses for the King indorsed upon the Indictment, and bids them lay their right Hands upon the Book, and the Cryer swears them to give their Evidence thus: *The Evidence which you and every of you shall give to the Court, and the Jury now sworn for our Sovereign Lord the King against the Prisoner at the Bar, shall be the Truth, the whole Truth, and nothing but the Truth.* So help you God. After any Witness for the King hath done giving his Evidence, the Prisoner may cross examine him, and ask him any fair and pertinent Questions, but is not allowed to put extravagant ensnaring Questions to the Witness. When the Evidence for the King is finished, the Witnesses for the Prisoner, if any be, are produced, and sworn thus: *The Evidence which you, and every of you shall give on the Behalf of the Prisoner at the Bar, shall be the Truth, the whole Truth, and nothing but the Truth.* So help you God. The Prisoner may call Witnesses to redargue the Credit of the King's Witnesses, by giving an Account of their Characters at large, or the general Tenor of their Conversation: And may also bring Witnesses to his own Reputation and Behaviour, to satisfy the Court that he cannot be such a Person as the Indictment says, and as the Witnesses for the Sovereign have deposed. After any Witness for the Prisoner hath been examined, the Prosecutor may cross examine him, observing always the Rules of Pertinency and Fair-

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ness; and may bring Evidence to weaken the Credit of the Witnesses for the Prisoner. The Jury are Judges of the Weight and Import of Objections made *hinc inde* by the Prosecutor and Prisoner, to take off from the Testimony of Witnesses produced by one another. And to prevent all Suspicion of sinister Dealing, no Man dares talk to the Jury to instruct them, while the Evidence is giving, upon pain of Imprisonment. Nor is any Juror, after he is sworn, to go from the Bar, without Leave from the Court, for any Cause whatsoever, till the Evidence is finished, and the Directions of the Court given: And tho' he get Leave, he is attended with a Keeper. The Oaths of Witnesses are not recorded, but the Judges, Jury-men, Parties, and the Council on both Sides, do, for the Help of their Memories, take Notes from the Mouths of the Witnesses, of what they say.

14. The Evidence against and for the Prisoner being finished, he and his Council are allowed to make a Defence and Observations; and the Prosecutor to reply. Then the Chairman sums up the Evidence to the Jury, and directs them what is Law, or what is of Force in Law. Which being done, the Clerk bids the Cryer swear a Bailiff to keep the Jury thus: *You shall well and truly keep the Jury, without Meat, Drink, Fire or Candle; you shall not suffer any Person to speak unto them; nor you yourself, unless it be to ask them, whether they are agreed of their Verdict, until they shall be agreed of their Verdict.*

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Verdict. So help you God. But if the Jury be inclosed in the Night-time, the Word *Candle* is omitted out of the Bailiff's Oath. The Bailiff takes them to some convenient Room provided for that Purpose, locks them in, and attends at the Door, while they are considering the Evidence; and withholds from them Meat, Drink, Fire and Candle (unless they are shut up in the Night-time when they are allowed Candle) to oblige them the sooner to conclude their *Verdict*. They must be all unanimous and agreed before they can return it. They must give their *Verdict* in the general Terms of *guilty*, or *not guilty*, which is called a *general Verdict*, and determines both the Point of Law and Fact. But frequently, in case of Intricacy and Importance, they find the Matter specially, or report to the Court the Matter of Fact, referring to them the Point of Law, which is termed a *special Verdict*. When the Jury lets the Bailiff know they are agreed, he lets them out, and brings them back into the open Court when it is sitting, to give their *Verdict* there in Face of the Prisoner. The Clerk says, *Gentlemen of the Jury, answer to your Names*, and calls them over. After they have answered to their Names, he asks, *Are ye agreed of your Verdict?* and if they say *Yes*, asks, *Who shall say for you?* The Jury answer, *The Foreman*. The Clerk bids the Keeper set A. B. the Prisoner to the Bar; and then says, *A. B. hold up thy Hand. You of the Jury look upon the Prisoner: How say you, is A. B. guilty*

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*guilty of the High Treason of which he stands indicted, or not guilty? If the Foreman say guilty, the Clerk asks, What Goods or Chattels, Lands or Tenements had he at the Time of the said High Treason committed, or any Time since, to your Knowledge? If the Foreman answer, None to our Knowledge, the Clerk adds to the po. se before written over his Name in the Indictment, & die, &c. 1730. cul. ca. vel ter. null. i. e. culpabilis, catalla vel terra nulla. And then says to the Jury, Hearken to your Verdict, as the Court hath recorded it: You say, that A. B. is guilty of the High Treason whereof he stands indicted; and that he had no Goods or Chattels, Lands or Tenements, at the Time of the said High Treason committed, or at any Time since, to your Knowledge: And this you say all. When the Prisoner is found guilty by Verdict of the Jury, he is said to be convicted. And the Clerk says, Keeper, take A. B. the Prisoner from the Bar; and look to him, he stands convicted of High Treason. If the Foreman of the Jury, in answer to the Question of guilty or not guilty, do say, Not guilty; the Clerk asks, Did he flee for it? And receiving for Answer, Not that we know of, bids the Prisoner, Down upon your Knees, and say, God save the King, and the honourable Bench; and adds to the po. se over his Name in the Indictment, & die, &c. 1730. non cul. nec se retraxit, quietus. Then the Clerk says, Gentlemen of the Jury, hearken to your Verdict, as the Court hath recorded it: You say, that A. B. is not guilty of the High Treason whereof he stands indicted, and that he did not flee for it:
 And*

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And so you say all. Whereupon the Prisoner is acquitted forthwith and discharged.

15. When a Prisoner is found guilty, the Clerk asks the Court, *Will your Lordships please, that the Prisoner be called up to Judgment?* And if they direct so, he bids the Keeper set *A. B.* to the Bar. To whom, when brought there accordingly, the Clerk says, *A. B. hold up thy Hand: Thou hast been indicted of High Treason, and thereunto pleaded not guilty, and for thy Trial hast put thy self upon God and the Country, which Country have found thee guilty: What canst thou now say for thy self, why the Court should not give thee Judgment to die according to the Law?* If the Court signify their Pleasure to give Judgment, notwithstanding what the Prisoner hath alledged in his own Behalf, the Clerk bids the Cryer make Proclamation once, and repete thus, *My Lords, the King's Justices and other Commissioners straitly charge and command all Manner of Persons to keep Silence while Judgment is giving, upon pain of Imprisonment.* Then the Chairman, or some other Commissioner, having first spoken to the Prisoner standing at the Bar concerning the Crime he stands convicted of, gives Judgment against him (n). After this the Clerk bids the Keeper take the Prisoner from the Bar. Then the Clerk enters and adds over the Prisoner's Name in the Indictment, to what he had entred before, these Words, *habet judicium prout patet in dorso indictamenti,* and writes

(n) Ut supra, Part I. Book III. Cap. 1. Tit. 1. § 2. N. 2, & Tit. 2. N. 4.

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writes the Judgment on the Back of the Indictment. This is called *Attainder by Conviction*.

16. When a Woman is indicted and convicted of High Treason, and hath had Judgment given against her, the Clerk must call her to be fet to the Bar again, and then ask her what she can say for herself, in Stay of Execution of her, according to the Judgment given against her. If she say, that she is great with Child, and pray a Jury of Matrons or motherly Women to inspect and try whether she be so or not: The Desire will be granted, and thereupon the Clerk adds to the former Entry over her Name in the Indictment, *placitat pregnan'*. The Court useth to command the Sheriff of the County, immediately to cause Twelve good and motherly Women, not of Kindred to the Prisoner (by whom her Plea of Pregnancy may be tried) to come to handle and inspect her Body and secret Parts. When the Jury of Matrons aforesaid, and a Pannel of their Names are brought by the Sheriff into Court, the Clerk calls them by the Pannel, and causeth the Cryer swear Twelve of them, thus: *A. M. lay your right Hand upon the Book, look upon the Prisoner, and hearken to your Oath: You shall diligently enquire, search and try, whether E. L. now Prisoner at the Bar, be with quick Child or not, and thereof give a true Verdict, according to the best of your Skill and Knowledge. So help you God. Kifs the Book.* And so to proceed, till the Twelve are sworn as aforesaid. This being done, the Clerk bids the Cryer swear

 Ch. 2. *Law of Scotland.* Tit. I. § 2. 301

swear a Bailiff to keep the Jury of Matrons, thus: *You shall well and truly keep this Jury of Matrons, without Drink, Meat, Fire or Candle; you shall not suffer any Person but the Prisoner to speak unto them, nor you your self unless it be to ask them whether they are agreed of their Verdict.* So help you God. *Kiss the Book.* But if the Bailiff be sworn in the Night-time, the Word *Candle* is omitted out of his Oath. This Officer takes the Jury of Matrons to some convenient private Room, and the Goaler carries the Prisoner to be inspected by them. The Matrons having duly searched and inspected the Prisoner, and agreed of their Verdict, they and she must be brought again into the Court. Where the Clerk says to the Matrons, *You good Women of the Jury of Matrons, answer to your Names,* and having called them every one by her Name, and they made Answer, he asks them, *If they be agreed of their Verdict?* If they say *Yes,* he asks, *who shall say for you?* They answer, *The Forewoman.* The Prisoner is then called to the Bar, to whom the Clerk says, *E. L. hold up thy Hand: You of the Jury of Matrons, look upon the Prisoner: How say you, is E. L. with quick Child or not?* If the Forewoman answer and say, *She is with quick Child,* the Clerk adds to the Entry over the Prisoner's Name upon the Indictment, *jur. matron. dicunt quod est pregnans.* And then says, *You of the Jury of Matrons, hearken to your Verdict, as the Court hath recorded it: You say E. L. is pregnant with quick Child, and so you say all.* Whereupon the Court
 (out

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(out of Reverence to God, and that the Child in the Belly may not suffer for the Mother's Crime) orders the said *E. L.* to be recommitted to Goal, there to remain in safe Custody of the Sheriff of the County aforesaid, until she be delivered. But a Woman cannot demand such Respite of Execution, by reason of her being with quick Child, more than once. Nor shall she have any more than one Reprieve, tho' she prove again with quick Child. And a Woman can have no Advantage from being found with Child, unless she be also found with quick Child. If the Forewoman of Matrons answer and say, that *E. L.* the Prisoner is not with quick Child, the Clerk adds to the former Entry of Judgment over the Prisoner's Name upon the Indictment, *jur. matron. dicunt quod non est pregnans*, and says, *You of the Jury of Matrons, hearken to your Verdict, as the Court hath recorded it: You say that E. L. is not pregnant with quick Child, and so you say all.* Then the Clerk bids the Keeper take the Prisoner from the Bar, and look to her, she stands attainted of High Treason.

 II. *The*

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II.

The Specialties observed in the Trial of Persons indicted of High Treason for counterfeiting the King's Coin, great or privy Seal, Sign manual, or privy Signet, or other High Treasons whereof the Trial is not regulated by Statute, but according to the Course of the common Law of England.

SUCH high Treasons, if committed in that County, may be tried by the same Commission of Oyer and Terminer abovementioned, according to the Course of the common Law of *England*: And as it now stands, the Prisoners are to have their peremptory Challenges of Thirty five of the Jurors returned to try them, if they demand it (o). And Witnesses for them must be sworn in the Trial (p).

But the Specialties in the Trial are, 1. The Prisoner is not allowed a Copy of the Indictment, or of the Names of Jurors returned to try him. But if he take a legal Exception to the Indictment, it is said that the Court will grant him a Copy of so much of the Indictment as concerns his Exception. Also if he hath such Matter to plead as cannot be well put into Form, without Knowledge of the Charge against him, as laid in the Indictment, it is said, the Court will give the Heads of the Indictment,

(o) 1 & 2 Ph. & M. Cap. 10. (p) 1 A. Cap. 9. § 3.

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ment, to make his Plea so drawn as to suit the Charge against him. 2. He cannot demand of the Court to assign him Council to advise with, except in special doubtful Points of Law, arising at or after his Trial, and proposed or offered by him to the Court, when he prays Council to argue them. 3. He must plead to or confess the Indictment, so soon as the Bill is found against him by the grand Jury, if the Court then cause him to be arraigned, and require him to plead; or else the Court may give Judgment against him for refusing to plead, or standing mute. 4. He having pleaded not guilty, Four of the Justices or Commissioners (*unus quorum*) may sign and seal a Precept to the Sheriff of the County, or other Minister (whose Province it is to return Juries) to return a Jury of Freeholders, to appear at some Hour of the same Day in which the Bill was found, or at some Hour of the next or other Day, as the Court shall think fit. And when the Sheriff and they do appear, and the Witnesses for the King are ready; the Court may proceed to the Trial of such a Prisoner. 5. One Witness is sufficient Evidence of the Treason.

At the Close, or near the End of the Session of Oyer and Terminer, if there be any Prisoners in the Goal, who were committed for High Treason, or Suspicion thereof, and have not been prosecuted, and indicted for the same; or whose Indictment the grand Jury returned into Court *ignoramus*: The Court may, if it be thought fit, dif-

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discharge such Prisoners out of Custody. And in order thereto, the Clerk of Arraignments, by Direction of the Court, bids the Keeper of Goal, call those Prisoners by their Names, and set them to the Bar. When brought to the Bar, the Clerk causeth the Cryer proclaim thus: *If any one can inform my Lords, the King's Justices, the King's Attorney or Advocate, of any High Treason, or Misprision of High Treason, or other Misdemeanour committed or done by A. B. C. D. E. F. now Prisoners at the Bar, or any of them, let them come forth and they shall be heard; for the Prisoners stand at the Bar upon their Deliverance.* If upon this no Evidence appear against them, they are set free, paying the Goaler's Fees, which is called *Deliverance by Proclamation.*

T I T. II.

The Order of judicial Proceedings against criminal Commoners, before the Court of Justiciary.

THis Court hears and determines the Crimes of High Treason and Misprision thereof, whether committed in *Scotland*, or by any Native of *Scotland* upon the high Sea, or in any Place out of *Great Britain* in the same Manner, as the Court of King's Bench, or Justices of Oyer and Terminer may do by the Law of *England* (a).

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The

(a) 7 A. Cap. 21. § 3 & 5. concerning which vide supra Tit. 1.

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The ordinary Practice of the Court of Justiciary, with respect to all other Crimes, consists partly, in Things preliminary to Trials; partly, in the Form and Method of Trials.

S E C T. I.

The Preliminaries to ordinary Trials before the Justice-court, or Court of Justiciary.

THESE are, 1. How Criminals may be apprehended and committed to Prison. 2. Who may carry on a criminal Prosecution. 3. The bailing of Criminals: And how they may get themselves brought to a speedy Trial, or dismissed. 4. The transporting Criminals from one Prison to another; and the Fund appointed for defraying the Charges of apprehending, subsisting, and prosecuting them. 5. The raising and serving or executing of Indictments, criminal Letters, Letters of Exculpation, Letters of Recrimination, and Letters of Advocation.

I.

How Criminals may be apprehended and imprisoned.

1. SHERIFFS, Stewarts, Bailies of Royalty and Regality, Justices of Peace, and Constables, upon Intimation to them, that any Person is
slain

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slain or dismembred (*a*), or that Goods are stolen or robbed (*b*), within their Jurisdiction; or that Rebels are there (*c*); are obliged to raise the *Hue and Cry*, and go along with all *fencible Men* in pursuit of the Criminals; and if they escape into another Jurisdiction, should acquaint the Judge of that Jurisdiction, to do the like Diligence; and so from one Judge to another, till the Fugitives be apprehended, and committed to Prison.

2. All Informers of Crimes committed, must sign their Informations. And no Person can be imprisoned for Custody in order to Trial, for any Crime or Offence, without a Warrant in Writ, expressing the particular Cause, whereof the Executer, or Keeper of the Prison is to give immediately a Double under his Hand to the Prisoner. Warrants for Imprisonment on the Account aforesaid, proceeding either on Informations, not subscribed, or not expressing the Cause, are void: And the Subscriber of such a Warrant, and the Executer, or Keeper of the Prison detaining the Person so ordered to be imprisoned, or refusing a Double of the Warrant to the Prisoner, are liable to the Pain of wrongous Imprisonment. But this Nicety of a signed Information and written Warrant of Commitment is not necessary to the imprisoning of Coalziers, Salters, Vagabonds, or masterful

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Beg-

(*a*) Act 90. Parl. 6. Jam. I. jun^r. Act 28. Parl. 3. Jam. IV.
 (*b*) Act 21. Parl. 1. Jam. VI. Act 6. Parl. 1. Sess. 2. Ch. II. (*c*)
 Act 124. Parl. 12. Jam. VI.

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Beggars, or Persons disobedient to Church Censures, or found acting in Tumults; or to imprison for Riots, Blood, or Battery, or for Drunkenness, Sabbath-breaking, Swearing, Uncleaness, Pickeries and Thieving; or for Indignities done to inferior Magistrates, Judges, or Justices of Peace; or for Thefts, Robberies and Depredations in the Borders and Highlands; or to Commitments in the Case of imminent or actual Invasion, Rebellion or Insurrection, upon Suspicion of Accession thereto (*d*).

II.

Who may carry on a criminal Prosecution.

No Person has Right to carry on a criminal Prosecution, and sue for the Punishment of a Crime, except the Party who is injured, and the publick Officer to whom the Charge is committed, *viz.* the King's Procurator, who is his Majesty's Advocate or his Deputy in the Court of Justiciary, or circuit Courts, or in Commissions of Oyer and Terminer; and the Procurator-fiscal in inferior Courts. Steps therein made by the private Party, tend only to obtain a Sentence of Condemnation for Damages, or a civil Reparation of the Loss, which the Crime may have occasioned to him, which is called *vindicta privata*, or the civil Interest.

But

(*d*) Act 6. Sess. 8 & 9. Parl. K. W. Vid. *supra* Part I. Book 4. Chap. 10. Tit. 7. Sect. 8.

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But it is properly the Business of the King's Procurator, to demand that the Party should be condemned to undergo the Punishment, which the Crime may deserve with regard to the Publick, for breaking his Majesty's Peace and Laws, and injuring his Subjects, called *vindicta publica*. So that Crimes are prosecuted in the Justice Court, either at the Instance of the King's Advocate or his Deputy *ad vindictam publicam*, tho the particular Persons interested in the Crimes or Offences, do not joyn with him in the Prosecution (*e*); or at their Suit with his Concurrence for his Majesty's Interest, or without it, if his Majesty's Advocate refuse to joyn in the Prosecution. A Husband may prosecute an Injury done to his Wife, albeit she disclaim the Suit; and a Master may pursue for the Slaughter of his Servant. But a Minor cannot pursue criminally, unless he be authorized in the Prosecution by his Tutors or Curators (*f*); or by a Curator *ad litem* assigned to him by the Court. Because such might perhaps either easily, in the Heat of Youth, vex innocent Persons unjustly, or injure themselves or the Commonwealth, by suffering, thro' their Mismanagement of the Pursuit, a Person truly guilty to be cleansed by a Verdict.

U 3

III. *The*

(*e*) Act 140. Parl. 13. Jam. I. Act 76. Parl. 11. Jam. VI.
 (*f*) L. 8. ff. de accus. Reg. Maj. Lib. 4. Cap. 2.

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III.

The Bailing of Criminals: And how they may get themselves brought to a speedy Trial, or dismissed.

I. ALL Crimes not inferring capital Punishment, areailable. In which Case a Prisoner, or Person ordered to be imprisoned, for such a Crime, may apply by a Petition to the Committer, or Lords of Justiciary, or other Judge competent to the Trial, and offer Caution to answer for the Crime charged, at any Time within six Months, under such Penalty, as he shall modify within twenty four Hours. Which formerly could not have exceeded 6000 Merks for a Nobleman, 3000 Merks for a landed Gentleman, 1000 Merks for any other Gentleman or Burgefs, and 300 Merks for any other inferior Person (g). But the Sumsaforefaid have been found by Experience to be too small, and disproportioned to the Danger of Criminals escaping from the Punishment appointed by Law; Judges are now allowed to extend the Bail to be given in the said several and respective Cases, to double of the said Sums, if they, upon the Circumstances of the Case, shall think fit (h). On which Offer of sufficient Bail, under the said Penalty, and Instruments taken thereon, the Committer or Judge competent must order the

(g) Act 6. Sess. 8 & 9. Parl. K. W. (h) 11 Geo. I. Cap. 25. 9

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the Prisoner's Liberation, and discharge his Imprisonment, under the Penalty of wrongous Imprisonment. But this is without Derogation to the Laws requiring Bail to be given by Chieftains, Landlords or others in the Highlands; and doth not hinder inferior Magistrates or Justices of Peace, to take Security for the good Behaviour and Peace, as formerly (*i*).

2. Upon Application of any Prisoner for Custody in order to Trial, whether for capital, orailable Crimes, by a Petition to any Lord of Justiciary, or other Judge or Judicature competent, and Production of a Double of the Warrant of his Imprisonment, under the Keeper's Hand, the Judge or Judicature competent is ordained, under the pain of wrongous Imprisonment, to give out, within twenty four Hours, Letters or Precepts directed to Messengers, for Intimation to his Majesty's Advocate, or Procurator-fiscal, and Party appearing by the Warrant to be concerned, if any be within *Scotland*, to fix a Diet for the Trial within sixty Days after the Intimation; with Certification, that if they fail to do so, the Prisoner shall be discharged, and set at Liberty; which the said Judge or Judicature competent is required to do, without Delay, under the Penalty foresaid, unless the Delay be upon the Prisoner's Desire. The Diet of the Trial being prefixed, the Prisoner is to be sited before the

U 4 Judge

(*i*) d Act 6. Vid. supra Part 1. Book 4. Chap. 10. Tit. 7. Sect. 1.

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Judge competent, under a sufficient Guard provided by the Judge, his Majesty's Advocate, or Procurator-fiscal, and the Trial to be finally determined by the Lords of Justiciary within forty Days, and by any other Judge within thirty; or otherwise the Diet shall be *simpliciter* deserted, and the Prisoner immediately set at Liberty. If no Process be raised and executed, or if Process be not insisted in and concluded within the respective Times aforesaid, the Judge or Judicature competent is, upon the Prisoner's Application, and instructing thereof, and Instruments taken thereupon, obliged within twenty four Hours, to issue out Letters or Precepts to Messengers, for charging the Magistrates or Keepers of the Prison, to set him at Liberty, under the Penalty of wrongous Imprisonment, in case of Delay or Refusal to grant such Letters or Precepts, or to set him at Liberty, after the Charge, the Prisoner always paying the Keeper of the Prison's Dues (*k*).

3. When a Prisoner is thus liberate, it is not lawful, under the Penalty of wrongous Imprisonment, to put or detain him in Prison for the same Crime, if his former Liberation was made known to the Committer before he granted the Warrant, or he be detained after his former Liberation is sufficiently notified to the Keeper of the Prison, who, upon Production of the Warrant thereof, is obliged to set the Prisoner forthwith at Liberty, unless there be new

crim

(*k*) d. A& G.

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criminal Letters raised before the Commissioners of Justiciary, and duly executed against him. In which Case of new criminal Letters, tho raised for the same Crime, he may be apprehended and secured either at executing of the Letters, or at any Time thereafter before Trial, and detained in Prison till he be set at Liberty in the due Course of Law. Which Libel the King's Advocate is to insist in and prosecute to a final Sentence, within forty Days after the new Incarceration thereupon; unless the Prosecution be delayed at the Desire of the Prisoner; otherwise the Diet is to be simply deserted, and the Prisoner dismissed, and never to be questioned or tried for that Crime or Offence (1).

4. In case of Imprisonment for Treason, the Law of *Scotland* allowed forty Days to prepare the Process before the Prisoner could apply to have a Diet fixed for his Trial. After elapsing of which Time, any Lord of Justiciary was required, upon the Prisoner's Application, to issue forth Precepts, as in other Cases; and, in case of not insisting, or prosecuting the Process as aforesaid, the Prisoner was to be set at Liberty upon sufficient Bail, (not exceeding the Double of Bail in other Crimes) to appear at any Time when called, within twelve Months, and for his good Behaviour in the mean time (m). But, by the Law of *England*, if any Person committed for Treason plainly and specially expressed

(1) d. Act 6. (m) Ibid.

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expressed in the Warrant of Commitment, upon his Prayer or Petition in open Court, the first Week of the Term, or the first Day of the Sessions of Oyer and Terminer, or general Goal Delivery, to be brought to his Trial, shall not be indicted some Time in the next Term, Sessions of Oyer and Terminer, or general Goal Delivery, after such Commitment, the Judges of the Court of King's Bench, and Justices of Oyer and Terminer or general Goal Delivery, are required, upon Motion in open Court the last Day of the Term, or Sessions, to set at Liberty the Prisoner upon Bail; unless it appear upon Oath, that the Witnesses for the King could not be produced the same Term, &c. And if such Prisoner, upon his Prayer, &c. shall not be indicted the second Term, or Sessions, he shall be discharged from his Imprisonment (n). And the Justice Court, and other Courts having Power to judge in Cases of High Treason, and Misprision of High Treason in *Scotland*, are authorized to hear and determine the said Offences, whereof any Person shall be indicted before them, in such Manner as the Court of King's Bench, or Justices of Oyer and Terminer in *England* may do, by the Laws of *England* (o).

5. As Law thus favours Prisoners desirous to be brought to a speedy Trial: So it discourages all Courses taken for delaying of Justice and putting off Trials. Therefore the granting of Respites to Criminals for a Term of Years,

was

(n) 31 Car. II. Cap. 2. § 7. (o) 7 A. Cap. 21. § 2.

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was discharged (*p*), and the procuring from the King Precepts to the Judges in the Court of Justiciary, commanding them to continue their Diets against certain Criminals, or instructing them how to proceed, seems to be contrary to Law (*q*), and to the Claim of Right 1689.

IV.

The transporting Criminals from one Prison to another ; and the Fund appointed for defraying the Charges of apprehending, subsisting and prosecuting them.

1. WHEN a Criminal is seized and committed to Jail within a Jurisdiction, whereof the Judge does not incline to try him, or when there are other Reasons for removing him from one Prison to another, a Warrant may be procured from the Justice Clerk, or, in his Absence, from any Lord of Justiciary, ordering the Magistrates of the Place, who have him in Custody, to deliver up his Person to the Sheriff of the Shire, who is commanded to accept him off their Hands, and to transport him with a sure Guard, and deliver him over to the Sheriff of the next adjacent Shire, and he to the next Sheriff, and so forth from County to County, till the Criminal is brought to the Prison of *Edinburgh*, where the Magistrates are to receive and detain him till he be tried and liberated.

2. That

(*p*) Act 94. Parl. 13. Jam. III. (*q*) Act 47 & 49. Parl. 11. Jam. VI.

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2. That Criminals may not escape the Punishment due to their Offences, thro' Want of a sufficient Fund for defraying the Charges of apprehending, subsisting and prosecuting them; it is lawful to the Freeholders in every Shire, County or District in *North Britain*, to assess the several Shires or Stewartries, where their Estates ly, at their Meetings at any of the head Courts yearly, in such Sums, as they shall judge reasonable and sufficient for the Purposes aforesaid. Which Money so assessed is to be collected, received and accounted for, by such Person and Persons, and in such Manner, as these Freeholders shall from Time to Time appoint; and to be applied for defraying the Charges of apprehending Criminals, of subsisting them in Prison until Prosecution, and of carrying on the necessary Prosecutions against them for their several Offences by due Course of Law (*r*). Sometimes the Lords of Justiciary modify a Sum to be paid to the private Pursuer of a capital Crime, out of the escheat Goods of the Person condemn'd, for defraying the Expences of the Trial.

V.

The raising and serving, or executing of Indictments, criminal Letters, Letters of Exculpation, Letters of Recrimination, and Letters of Advocation.

I. CRIMES

(*r*) 11 Geo. I. Cap. 25. §

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I. CRIMES are tried upon Indictments, when the supposed Criminals are in Prison, and upon criminal Letters or Summons, when they are at Liberty. In order to know if there be Ground for a criminal Process, and how to libel Indictments or criminal Letters exactly, Persons who were present at the Commission of Crimes use to be examined, but not upon Oath, as to what they know of the Facts and Circumstances thereof, and their sign'd Declarations taken: Which is called a *Precognition*. But these Declarations are cancelled and destroyed before they be sworn as Witnesses at the Trials.

2. An Indictment, or Enditement (whether it comes from the *French* Word *enditer*, or from *dic tu*, because after reading the Indictment, the Judge asks the Pannel, what he can say to it) is a Schedule given to the Party accused, containing the Crime he is charged with, and runs thus. *A. B. Prisoner in the Tolbooth of Edinburgh, you are indicted and accused at the Instance of, &c. that notwithstanding by the Laws, &c. yet true it is and of Verity that you are guilty, Art and Part of the foresaid Crimes, charged upon you, or one or other of them; which being found proven by the Verdict of an Assize, before the Lords Justice General, Justice-clerk and other Commissioners of Justiciary, you ought to be punished with the Pains of, &c. to the Terror of others to commit the like in Time coming.* This Indictment, with a List of Witnesses thereto subjoyned, is subscribed by the King's Advocate or his Deputy. Upon which

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a Bill also signed by him, craving Letters of Diligence to summon the Party indicted to appear before the Lords Justice General, Justice-clerk, and Commissioners of Justiciary, within the Tolbooth or criminal Court-house of *Edinburgh*, on a certain Day, to underly the Law, &c. and summon an Affize not exceeding the Number of 45 Persons (*f*), and also Witnesses to appear the said Day; is offered to and past by any one of the Lords. At the same Time a List of 45 Assizers (called the grand Affize) is made up, presented to and sign'd by a Quorum of the Lords (*t*). For saving Expences, Assizers are seldom taken out of the Place where the Crime was committed, but are generally Inhabitants of *Edinburgh*, who are at a mighty Loss in their private Affairs, by such Diversion. But some are by Privilege, exempted from serving upon Juries. Noblemen were never put upon ordinary Juries, but only when Peers were tried. Others are excused from serving upon Juries, because of their Employment, as Clergymen, Advocates at Law, Chirurgeons, Officers and Workmen in the King's Mint. Letters of Diligence on the past Bill aforesaid, are raised under the Seal of Court, and subscribed by the Clerk.

3. In order to procure criminal Letters, or Summons, a Bill craving the same, is signed by the King's Advocate, or Deputy, or other Lawyer

(*f*) Act 76. Parl. 6. Act 88. Parl. 11. Jam. VI. (*t*) Act of Regul. of the Justice-court 1672. Artic. 3.

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yer for the Pursuer who draws it: And the Lord Advocate's Concurrence marked on the Back thereof, if he be not the sole Pursuer, and do not sign the Bill; but his signing the Bill is a sufficient Concurrence. Which Bill, with a List of 45 Assizers subscribed by a *Quorum* of the Lords, is presented to and pass'd by one Lord. Then the Pursuer enacts himself and finds Caution, according to the Character and Condition of the Defender, to report the criminal Letters indorsed and executed against the Day of Compearance, under the Pain of 2000 Pounds, if the Defender is a Peer, 1000 Pounds if a great Baron, 1000 Merks if a Freeholder, (or a *Burgess* holding Land *Burgage*) 500 Merks if a Feuar, 200 Merks if an unlanded Gentleman (or *Burgess*) and 100 Merks if a Yeoman (*u*): Which is called *ficker Surety* (*x*). But the King's Advocate, tho' he be sole Pursuer, is not bound to find Surety: Because, he pursues *ex officio*. And where a Pursuer makes Oath in Court, that he is not able to find Surety to report the Letters, the Lords dispense with it, and ordain the Clerk to raise the Letters, upon his enacting himself judicially to report them. After such Surety given, or dispens'd with, criminal Letters or Summons are raised in the King's Name, directed to Macers and Messengers at Arms, Sheriffs in that Part, setting forth the Defender's Crime, and the Pains of Law, and commanding to charge him

to

(*u*) Act 166. Parl. 13. Jam. VI. (*x*) Act 35. Parl. 4. Jam. V.

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to appear, and find Surety acted in the Books of Adjournal, within — Days after the Charge, that he shall compear before the Lords Justice-general, Justice-clerk, and Commissioners of Justiciary within the Tolbooth or criminal Court-house of *Edinburgh*, the — Day of — next to come, there to underly the Law for the Crime above specified. And the said — Days being bypast without finding Surety, immediately to denounce him Rebel, and put him to the Horn, &c. and within 15 Days thereafter to cause regiftrate the said Letters with the Executions thereof in the Books of Adjournal. But, if he come and find the said Caution and Surety (whereof Intimation is made to the said Macer or Messenger) then such Macer or Messenger is commanded to summon the Affize, not exceeding the Number of 45. and the Witnesses given in List by the Complainer. Which Letters, concluding with these Words: *Given under Our Signet at Edinburgh the — Day of — and of Our Reign the — Year: Ex deliberatione Dominorum Commissionariorum Justiciarum*, are subscribed by the Clerk, and pass under the Signet of the Court. The Person against whom criminal Letters are raised, is bound to find Surety for his Appearance to underly the Law, under the same Pains as the Raifer of the Letters finds Surety for reporting the same (y).

4. In

(y) d. Act 166. Parl. 13. Jam. VI.

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4. In the libelling Indictments and criminal Letters or Summons, it may be observed, 1. The Preamble oft-times runs in general Terms thus: *Albeit by the Laws of God, and the common Law, and the Laws of this and all other well governed Nations, the Crime of, &c. is strictly prohibited under the highest Pains*; because the Law is, and ought to be known by the Judges. But properly, it is conceived more especially, expressing the particular Laws or Acts of Parliament, whereupon the Accusation is founded. 2. That one Man may not be troubled for another, the Person accused ought to be certainly described, by his Name and Designation or Addition. And Letters are not to be directed against Accomplices in general, but Persons specially charged with particular Crimes expressed (2). 3. In Crimes depending upon Time, as the striking one in the Session-house while the Lords are sitting, &c. the particular Time must be libelled, as being the *medium concludendi*. But such Crimes as by their Nature depend not upon Time, are usually libelled to have been committed, *v. g.* in the Months of *June, July, August, &c.* or one or other of these Months, or one or other of the Weeks or Days of the said Months. In which Case, tho' such Latitude be allowed in libelling, the Witnesses must be positive as to the precise Day, where the Pannel offers to prove *alibi*. 4. Regularly Crimes ought to be particularly set

Vol. II. X forth,

(2) Act 76, Parl. 6. Act 85, Parl. 11. Jam. VI,

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forth, and described ; that the Affize be not left to judge in Matters of Law, and the Panel put to the Knowledge of an Inquest upon an irrelevant Libel. But some Crimes, as Art and Part of Crimes (*aa*), forestalling and regrating (*bb*), thieving, stealing, and cutting of Purfes at Fairs and Markets ; Robbery, Piracy, breaking of Prison and dismissing Prisoners out of it, are allowed to be libelled in general at the King's Advocate's Instance ; without descending to the Way and Manner of Accession as Art and Part, or of forestalling and regrating, and without naming the Persons whose Purfes were cut, or whose Goods were robbed, or the Prisoners who were let out of Prison. 5. In intricate Cases, Advocates should not libel Art and Part simply, but specially *quo modo* Art and Part. Or where no Proof can be had of a Crime secretly committed, but only Presumptions, it is proper to set forth the Presumptions in the Libel ; that the Justices may determine the Relevancy, and nothing remain to the Affize, but the Proof of Facts, from which Art and Part, or such Presumptions arise. 6. With us every Libel contains a Conclusion, either particular, or general. A particular Conclusion runs thus : *V. g.* That the Party ought to be punished with the Pains of Death, and Confiscation of his Moveables ; or with an arbitrary Punishment. A general Conclusion

(*aa*) Act 151. Parl. 12. Jam. VI. (*bb*) Act 148. Parl. 12. Jam. VI.

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Conclusion is, that he ought to be punished in his Person and Goods, or otherwise, with the Pains of Law, or as the Law directs: Which is understood, with respect to the Crime for which he stands accused, and leaves the full Extent of the Law to be applied by the Judges.

7. An alternative Libel, *v. g.* That *A.* beat, wounded and bruised *B.* of which Wounds and Bruises he died; at least wounded and bruised him, and that he ought to suffer Death for the Slaughter, and for the Wounding and Bruising an arbitrary Punishment; was sustain'd as not incompatible. Because, it may be uncertain, what the Proof will amount to; and the Pannel has no Prejudice by the Jury's finding according to what is prov'd.

5. A Messenger or Macer must serve and execute Letters of Diligence raised upon an Indictment 15 free Days before the Trial; by giving to the Prisoner a full Copy of the Indictment, with a List of the Names and Designations of the Affizers and Witnesses to be produced against him (*cc*) upon the same Paper, and subjoyning thereto a signed Charge or Citation, given to the Prisoner by virtue of the Diligence, to compear before the Lords of Justiciary on the Day appointed for the Trial. He gives also a signed Copy of Citation to each Affizer and Witness to appear then. Of which Charge and Citations he returns Executions subscribed by him and the

X 2

Witnesses

(*cc*) Act of Regul, of Justice-court 1672. Art, 3 & 11.

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Witnesses (*dd*). A Messenger or Macer doth also serve and execute criminal Letters against the Person accused 15 free Days before the Trial, by delivering to him, if personally apprehended, or, if not, to his Wife or Servants, or affixing on the principal Gate of his Dwelling-house, if he any has, and thereafter on the Market-cross of the head Burgh of the Shire, Stewartry or Regality where he resides, a full Double of the Letters (*ee*), containing annexed thereto a List of the Names and Designations of the Affizers and Witnesses (*ff*); and a short Copy under the Hand of the Macer or Messenger, commanding and charging the supposed Criminal, to find Surety within — Days after the Charge, that he shall compear to underly the Law the — Day of — With Certification, conform to the principal Letters. If there be not safe Access to the Criminal's Dwelling-house, he may be charged edictally at the Market-crosses of the head Burghs of the Jurisdictions where he haunts, conform to a Warrant allowed to be inserted in the Letters, when the Lords see Reason for it. After the Letters are duly served, the Macer or Messenger returns an Execution of the Charge subscribed by him and the Witnesses (*gg*). Indictees, and Persons against whom criminal Letters are served, must have a Double of the
 Indictment

(*dd*) Act 4. Sess. 2. Parl. Jam. VII. (*ee*) Act 33. Parl. 6. Q. M. junct. Act 85. Parl. 11. Act 264. Parl. 15. Jam. VI. (*ff*) d. Act of Regul. Art. 3 & 11. (*gg*) Act 4. Sess. 2. Parl. Jam. VII.

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Indictment or Letters 15 Days before the Trial, that they may come prepared to make Defences; or may raise Exculpation, and cite Witnesses for proving thereof. Lists of the Affizers and Witnesses are ordained to be given them, that they may know what to object against either, why they ought not to be admitted to pass upon their Affize, or to bear Witness against them; and may take out Diligence for proving their Objections. But the Pursuer is not obliged to give to the Person accused any Writs, he intends to found upon for proving the Libel. However it seems necessary to libel on such Writs, as lying in the Clerk's Hand, and to lodge them there some competent Time before the Trial, that the Party accused may see them and prepare Defences. There is no Necessity to cite a Man for his Interest, when his Wife is pursued for a Crime: Nor to cite the Curators of a Minor, to assist at his Trial. If the Party charged by virtue of criminal Letters, neglect to find Surety, acted in the Books of Adjournal, or don't intimate Surety found by him to the Macer or Messenger, within the Days of the Charge, the Macer or Messenger may denounce and put him to the Horn at the Market-cross of *Edinburgh*, where the Justice-court sits. Upon which Denunciation his single Escheat falls (*hb*), and he is disabled to stand a Trial. And the Letters with the Executions thereof being recorded in the Books

X 3

of

(*hb*) Act 126. Parl. 12. Jam. VI.

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of Adjournal within 15 Days after Denunciation, Caption may be issued forth against the Outlaw. But upon his Application by a Petition to the Lords, representing his Willingness to stand a Trial, and craving to be relaxed from the Horn: They will grant Warrant for Letters of Relaxation *ad hunc effectum* only, that he may have *personam standi in judicio*, for making Defences in his Trial; upon his finding Surety, not only to appear to underly the Law, but also to pay 20 Pounds for his escheat Goods (ii). Which Letters of Relaxation are executed and registred the same Way as the Denunciation. If the Person charged with criminal Letters, find Surety, and make Intimation of his having done so to the Executer thereof within the Days of the Charge; the Executer must cite the Assizers named by a *Quorum* of the Judges, and the Witnesses given up to him in a Roll subscribed by the Raifer of the criminal Letters, to appear on the Day of Trial.

6. A Party accused of a Crime being presumed innocent till it is proved against him, Law allows him to raise Letters of Exculpation by Warrant of the Deliverance on a Bill, past by one of the Lords: For citing Witnesses to prove his Defences or Allegations against the Libel, and Exceptions or Objections against the Assizers and Witnesses given him in List. Because he would otherwise (in respect of the Peremptoriness

(ii) Act 43. Parl. 6. Jam. III.

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ptoriness of criminal Diets) be under a Necessity to refer his Defences to the Pursuer's Witnesses, who might have seen him commit the Fact charged against him, and yet not have been present at the Beginning and the Occasion thereof, from which his Exculpation may arise : And seeing Defences are allowed to be made for Persons accused of Crimes (kk), they ought not to want the Means to prove such Defences. The Pursuer of the criminal Cause must be served with a Double of the Letters of Exculpation, and List of Witnesses cited by virtue thereof, a reasonable Time before the Day of Compearance, in case there ly any Objection against them (ll). Albeit Letters of Exculpation should be executed to the same Day, with the Indictment or criminal Letters : Yet the Lords grant sometimes a longer Time for executing the Letters of Exculpation, if they see Cause, as when any of the Witnesses to be cited by virtue thereof are at a great Distance, and continue the Diet of the Trial till then.

7. When there are no criminal Letters raised against one, who is obnoxious to a Prosecution, but hath a sufficient Ground of Exculpation ; he may raise a Summons and cite the Party having Interest to pursue, and the King's Advocate concluding that the Oaths of Witnesses in his Defence may be taken to ly *in retentis, ad futuram rei memoriam* ; that the Proof of his Exculpation

X 4

(kk) Act 90. Parl. 11. Jam. VI. (ll) d. Act of Regul. Art. 179

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Exculpation may not perish, thro' the Death of his Witnesses in the mean Time.

8. Sometimes a Person against whom a criminal Summons or Letters are raised, conceiving himself rather to have been injured by the Raifer, than to have injured him, doth throw the Crime upon him, and for his own Vindication and Reparation, apply for Letters of *Reconvencion*, or Recrimination against him : Which are raised, executed, and come in to be called in the same Manner as the principal Letters.

9. Not only are criminal Causes brought before the Court of Justiciary, in the first Instance as ordinary Actions ; but also in the second Instance, by *Advocation* from some inferior Court, where the Criminals were first listed, or cited to appear. In order to which a Bill is presented to and pass'd by any of the Lords upon some Reasons of Incompetency of the inferior Judge, or Suspicion of Prejudice from him, by Partiality, or Iniquity committed by him, as in civil Cases. Whereupon the Raifer of the Advocation enacts himself and finds Caution in the Books of Adjournment for his Appearance before the Court of Justiciary to underly the Law, under the Pains in the Act of Parliament, which are the same as for Appearance by virtue of criminal Letters (*mm*) ; and Letters of Advocation subscribed by the Clerk, are exped'd under the Signet of Court. Which Letters must be served and
executed

(*mm*) Act 166. Parl. 13. Jam. VI.

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executed by a Macer or Messenger not only against the Pursuer of the criminal Action, but also against the Judge from whom it is sought to be removed, by giving a full Copy of the Letters to them, that they may come ready to answer. If, at calling of the Letters of Advocation in the Justice Court on the Day of Appearance, the Cause be advocated, the Pursuer thereof must find Caution *de novo*, to prosecute before the Justices, or else they will desert the Diet. Because neither he, nor his former Cautioner is bound to insist before any other Court than where they enacted themselves; and the Cause is removed from thence. The Raiser of the Advocation is also bound to renew his Surety to appear before the Lords of Justiciary in obedience to a Charge to be given him, by virtue of the Letters to be raised against him, to undergo the Law, or go to Prison, and must intimate his Advocation to the Pursuer of the principal Cause, and to the King's Advocate, if the Procurator-fiscal was Pursuer before the Court advocated from.

S E C T. II.

The Form and Method of ordinary Trials in the Court of Justiciary.

ON *Saturday* before the Trial, the Pursuer gives in to the Clerk of Court, the Indictment or criminal Letters, with the Executions thereof

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of against the Defender, the Assizers and Witnesses : That the Prisoner or Defender and his Doers may see them, and prepare Objections, if they any have, against them. Who may also, for that same Purpose, call for and see in the Clerk's Hand, any Writs related in the Libel as lying there. The Doers for the Prisoner or Defender give in his Letters of Exculpation or Recrimination, with the Executions thereof, if he has any, that the other Party may see and sift them in the Clerk's Hand. The Clerk, at the same Time, makes up and gives to every Lord, a Roll of the criminal Causes to be called on the *Munday* thereafter. Seeing, tho' the Diets of this Court be peremptory (a), the Lords of Justiciary do not always begin to try Criminals on the very Day of Compearance, but frequently the Trial is put off, and the Diet continued or the Court adjourned to some other Day ; and sometimes the Diet is deserted, the Effect whereof is, that the Party accused cannot be brought to Trial, till a new Indictment or criminal Letters be served against him : I shall first shew how, upon what Occasions, and in what Cases the Diet of Court is continued, or deserted ; and the Punishment of Persons by reason of whose Contumacy Diets are necessarily continued. Secondly, I shall set forth the Order of proceeding in Trials.

I. *How,*(a) Vid. *supra* Book I, Ch. 2. Tit. 3. N. 5.

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I.

How, upon what Occasions, and in what Cases the Diet of Trials is continued, or deserted: And the Punishment of those, by reason of whose Contumacy Diets are continued.

1. UPON the Day appointed for the Trial, if there be not a *Quorum* of the Judges met, or if there be other Reasons why they cannot proceed to Trials that Day, one of them, if present, may adjourn the Court, or continue the Diet of Compearance till another certain Day.

2. When there is a *Quorum* of the Lords met, the Clerk marks the Sederunt of the Judges present. And the Justice General, or, in his Absence, the Justice Clerk, or, in absence of both, the Lord chosen to preside for the Time, orders the first Cause in the Roll given up to him by the Clerk, to be called. If the Pursuer of criminal Letters be present, and the Defender absent, the former and his Surety take Instruments upon reporting the Letters, the Defender's Surety is unlaw'd (*b*), and he himself is declared Fugitive, ordained to be put to the Horn, and all his moveable Goods and Gear to be escheat and brought in to his Majesty's Use, for his Contempt and Disobedience, which is called an *Act of Fugitation*. Upon this Act Letters of Denunciation may be raised against the
Fu=

(*b*) Act 166, Parl. 13. Jam. VI.

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Fugitive, which being executed at the Market-cross of *Edinburgh* (head Burgh of the Shire where the Justice-court sits) and registered with the Executions thereof within Fifteen Days thereafter in the Books of Adjournal, Caption may follow. For the Justices cannot proceed to try Persons absent by leading Proof against them. If the Defender appear, and the Pursuer be absent, the Clerk calls the Act for reporting the criminal Letters, and the Cautioner therein is unawed (c). The Cautioner for the Defender, takes Instruments upon his being duly presented, and the Lords desert the Diet. When the Pursuer of a criminal Cause insists not, the Defender may, if he hath a sufficient Ground of Exculpation, summon him and his Majesty's Advocate to hear and see the Oaths of Witnesses taken in his Defence, to ly *in retentis*, that the Proof of his Exculpation may not perish. But Witnesses for the Pursuer ought not to be so examined *ad futuram rei memoriam*, unless the Defender consent. Because the Proof of a criminal Libel ought to be led before an Assize in Presence of the Pannei (d): And the Pursuer may blame himself that the Trial is delayed; whereas the Defender must wait his Leisure. When neither Pursuer nor Defender appears, the former's Cautioner is unawed for not reporting the criminal Letters, the Defender is outlawed, and his Cautioner unawed for not presenting him, and the Diet is deserted.

3. In

(c) Act 166. Parl. 13. Jam. VI. (d) Act 90. Parl. 11. Jam. VI.

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3. In which Cases of the Defender's being denounced Fugitive and outlawed, or of the Sureties of either Party unlawed, an Act of Adjournal uses to be extracted, against which, before Denunciation, they may be released and relieved, upon Petitions to the Lords, setting forth sufficient Grounds to purge the Parties of Contumacy, as that they were necessarily detained by Sickness, or not in Condition to travel, &c. Which Effozie or Excuse of Sickness should be proved by Witnesses at the Bar, and not by Testificates upon Soul and Conscience. But if they suffer themselves to be denounced, they must be relaxed from the Horn in common Form:

4. When both Parties are present, the Assizers and Witnesses are called, and each Assizer (*e*), or Witness absent, fined in 100 Merks. These Assizers or Witnesses fined by Acts of Adjournal, may get themselves assolized, and their Fines discharged by giving in Bills to the Lords containing relevant Excuses of their Absence. But if no such Application be made, or if the Desire of their Petitions be refused; Horning and Caption for Payment will be issued forth of Course, upon such Acts of Adjournal.

5. Assizers (*f*), or Witnesses not cited, or forgot to be cited, may be cited *apud acta*, *i. e.* at the Bar, if their Names and Designations, or Additions be contained in the List given to the Party accused Fifteen Days before. If some of the

(*e*) Act 166. Parl. 13, Jam. VI. (*f*) Act 94. Parl. 6, Jam. IV.

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the Witnesses cited by the Pursuer be absent, the Lords may, at his Desire, continue the Diet to another Day, even tho' two Witnesses in the Pursuer's List be present: Because, albeit two Witnesses may prove a Libel, more are often necessary in respect of Circumstances to be proved; and there may be Objections against one or both. In which Case the absent Witnesses may be brought in betwixt and the next Diet, by Letters of Caption issued under the Signet of Court, upon a Warrant from the Lords craved by Bill. But if the Libel or Executions against the Witnesses or Affizers be informal, or if none be cited, the Diet will be deserted. For the Lords do not allow to alter or amend a criminal Libel at the Bar. Nor can the Pursuer of a qualified Libel, pass from the Quality, if that amount to a separate Crime, from what the Libel would have imported without such a Quality: As where notour Adultery only is libelled, the Pursuer cannot be allowed to insist for simple Adultery; because these are different Crimes. But an aggravating Quality or Circumstance of the Crime libelled may be past from. And in the Case of an alternative Libel, it is in the Option of the Pursuer to insist upon either of the Alternatives, and pass from the other.

6. If the Pannel hath a Counter-process of Recrimination, wherein the Day of Appearance is after that in the principal Process against him, the Lords will, upon his Application,

con-

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continue the Diet of the principal Process, till the Day of Compearance in the other Process, that the Trial in both, which are naturally connected, may go on together.

7. That it may not be in the Power of any Pursuer (whether in a principal Process, or in a Counter-process of Recrimination) to cut off the Defender from proving his Exculpation or other Defences, by citing as Accomplices all such as might be produced as Witnesses by him for that End ; the Justices will, at the Defender's Desire, ordain his Witnesses who are cited as Art and Part of his Crime, to be first tried ; that they, if found innocent, may be allowed to bear Witness for him. But he will not get those indicted as *socii criminis* to be previously tried in order to be Witnesses for him, without offering to prove some special Ground of their Innocence, as that they were *alibi*, &c.

8. If the Defender in one Cause be outlawed, or the Diet against him deserted or continued, the *Præses* or Chairman of the Court orders to call another Cause, conform to his Roll ; and so forth so long as the Judges can conveniently sit ; their Business in Court not being determined by any certain Hour.

II.

The Order of proceeding in Trials.

1. WHEN a *Quorum* of the Lords is met, and Parties, Affizers and Witnesses, called upon and found

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found present, the Defender enters the Pannel, that is, he is set to the Bar so called, whence he is, during the Trial, termed *The Pannel*. The bringing of Criminals to the Bar in sober Manner, is carefully provided for by our Law, which allows the Pursuer to appear only with Four, and the Defender only with Six of his Friends unarmed (g): And the Justices may lessen that Number, if they see Reason for so doing. The Clerk writes in the Court Book :

Curia Justiciarum S. D. N. Regis tenta in praetorio burgi de Edinburg. — die mensis — anno Domini — per — Commissionarios Justiciarum dict. S. D. N. Regis.

Curia legitime affirmata, that is, the Court is lawfully fenced.

Intran. A. B. that is, A. B. enters the Pannel.

A. B. indicted and accused at the Instance of — as guilty of the Crime of — committed by him in Manner mentioned in the Indictment or criminal Letters raised against him thereanent. Then a Macer, by Order of Court, commands Silence, and the Clerk reads the Indictment, or criminal Letters.

2. If the Pannel reside within a Regality, or dwelt there when the Crime was committed, tho' residing elsewhere at the Time he is tried, the Lord of Regality, or one having a Commission from him, may before any Defence is made

(upon

(g) Act 82. Parl. 14. Jam. II. Act 41, Parl. 6. Q. M. Act 140. Parl. 8. Jam. V

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(upon Production of his Charter of Erection and Seisin of the Regality, or of the Seisin where the Right of Regality is notour, or of an Act of Adjournal wherein it was formerly produced and sustained in his Favour) repledge the Pannel, that is, crave to have him remitted to a Trial in his Court. If the Lords allow him to be repledged, the Repledger must find Surety to do Justice upon him within Year and Day, and the Pannel must find Caution to appear before the Regality Court, to underly the Law for the Crime laid to his Charge. Which Caution is called *Culreach*, or *forthcomand Borgh*, or *back Borgh*, because left behind in the Court repledged from. But no Pannel can be repledged after making Defences: Because thereby the Jurisdiction of the Court is prorogated; tho' any Benefit belonging to the Judge of Regality upon Conviction of the Pannel, will be reserved to him, as accords. And it is said, that a Criminal cannot be repledged in a Trial for De-forcement.

3. When no Person claims to repledge the Pannel, or an Offer to repledge is rejected by the Lords, the *Præses* or Chairman of the Court, requires the Pannel to make answer to his Indictment. If he plead not guilty, a private Party being Pursuer, is bound (if required by him) to swear the Libel, that is, to give his Oath of Calumny upon the Verity of the Dittay. But the King's Advocate, who pursues *ratione officii*, is not obliged to give such an Oath; nor

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yet to discover his Informer. The Advocates for the Pannel make answer to the Indictment or Libel, and plead his Defence or Grounds of Exculpation. If the Pannel deny that he got a List of the Affizers and Witnesses with the Indictment or criminal Letters, and the Execution returned by the Macer or Messenger bear that a List was given him; Faith is given to the Executer, unless the Pannel vouch the contrary, by producing the Copy he received, on which no such List is set down. And for this End the List of the Witnesses and Affizers must be upon the same Paper with the Double of the Libel. It is not sufficient, that a List of the Names of Affizers and Witnesses were given, unless that List mention also their Designations: Because Names without Designations will not furnish the Pannel a sufficient Knowledge what to object against them, which is the Reason of giving them up in List to him. That the Pannel was *alibi*, or in another Place, than where the Crime is laid at the Time, or that he was already tried for it, and acquitted before another competent Court; are also common Defences against all Crimes. But the ordinary Defences against particular Crimes, are set forth in the respective proper Places, where these are treated of.

4. The King's Advocate or Solicitor or other Advocates for the Pursuer, reply to the Defences, or Grounds of Exculpation. It is a common Reply, that these ought not to be sustained,

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stained, or admitted to Proof, because contrary to the Libel. But albeit Defences directly contrary to such Part or Quality of a Libel, as must be proved by the Pursuer, are not sustained: Yet Defences contrary to any Quality of a Libel which Law presumes to be true, unless the Pannel prove the contrary, are daily admitted: *V. g.* Self-defence is received against a Libel for Murder, tho contrary to this Quality thereof, that the Fact was committed by Malice premeditated, or forethought Felony: Because Law presumes, that Quality to be true, without any Necessity upon the Pursuer to prove it, and so doth not hinder the Pannel to instruct the contrary, in order to take off such Presumption. And tho the Exception of *alibi* seems contrary to the Libel, and comes nearest to a Denial of it, yet, if it be strongly qualified, so as it was morally, if not simply, impossible, that the Pannel could have committed the Crime, it will be sustained. Because Witnesses might see a Crime committed, and yet be in a Mistake as to the Committer of it, whom perhaps they did not well know, and it were hard that an Innocent should suffer: But such a Defence of *alibi*, is ordinarily repelled, when not so qualified. Where Defences made by a Pannel upon Matters of Fact, by way of Exculpation, are repelled as contrary to the Libel; such Matters are allowed to be proved in an Action of Recrimination at his In-

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stance against the Pursuer of the principal Procefs.

5. In short, the Advocates for the Pursuer offer all the Arguments they can, to aggravate the Crime, and confirm the Relevancy of the Libel: And those for the Pannel deny the Crime, or endeavour to extenuate it, and impugn the Relevancy; advancing Reasons why the Libel ought not to go to the Knowledge of an Inquest. Which pleading the Affize (albeit not Judges of the Relevancy) ought to hear (*b*): Because the Proof may be much influenced by it, and the Justices sometimes remit particular Defences against the Relevancy, to their Discretion.

6. After the pleading of the Relevancy on both Sides *viva voce* is ended, the Lords ordain the King's Advocate or other Advocates for the Pursuer, to give to the Clerk, within Forty eight Hours, his Information of the Case and Pleading in Writ, subscribed by him, to be seen and answered by the Pannel's Advocates, in other Forty eight Hours, by another Information signed by the Drawer thereof: And then continue the Diet till another Day, at such an Hour for advising (*i*). In which Case the Parties must renew their Bail for their Appearance; and the Affizers and Witnesses are ordered to attend each one of them, sometimes under the Pain of Law in general, sometimes under

(*b*) Act 90. Parl. II. Jam. VI. (*i*) Act 4. Sess. 5. Parl. X. W.

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under the Pain of 200 Merks, and sometimes under a higher Penalty, tho Affizers or Witnesses absent from the Beginning, are unlauded only in 100 Merks conform to Act of Parliament: Because it is reckoned a greater Contempt to absent from Diets to which a Trial is continued, than not to appear at all. The Pannel, if a Prisoner, is carried back to Prison. When more Lawiers than one are employed on either Side, these ought to concert the Debate among themselves, and give it in extended in one signed Paper, and not in different Papers drawn by different Lawiers: For the Clerk is discharged to take in any additional Informations, whether for, or against the Pannel. Some Time before the Day to which the Trial was continued, Copies of the Informations on both Sides are given to each of the Lords for his Perusal, that all of them may be riper, and better apprised of the Case at advising. When the Court of Session is sitting, such Informations are put in the Lords Boxes in the Waiting-room of the Session-house; but, in the Vacation, are carried to their Lodgings, if the Parties have no Opportunity to present their Papers to them elsewhere. The Informations are entered and recorded by the Clerk in the Books of Adjournal.

7. On the Day to which the Trial was continued, the Lords being assembled, the Prisoner or other Party accused is again set to the Bar, Affizers and Witnesses are called, and Ab-

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sents, if any be, are unlauded or fined. Then the Clerk, by Order of the presiding Lord or Chairman, reads the Pannel's Libel, and the Informations of both Parties. If any Thing new on either Side is pointed at by the Judges, or by one of the Parties to be answered: The Lawiers *hinc inde* are heard thereon *viva voce*, and the Debate minuted by the Clerk in Presence of the Judges (k). Yea, the King's Lawier having, after the Pleading, and Informations given in upon an Indictment, caused execute the same Indictment a second Time, and given out to the Pannels an additional List of Witnesses; it was found, that he might insist in the second Indictment, without deserting the Diet of the first; and that the Advocates for the Pannel might plead against the second Indictment, what they thought fit, that the Lords Interlocutor might proceed upon both Indictments. Where some Persons accused in the same Libel, and formerly declared Fugitives for not appearing to underly the Law, have got themselves relieved from the Act of Fugitation, upon finding Surety in the Books of Adjournal to stand a Trial, and do now appear at the Bar; the Chairman asks the Lawiers, after reading of the Libel and Informations upon the former Debate, if they have any thing farther to plead in behalf of these new Pannels, than what was said before: And if they have any thing more to plead, they are heard. The
Lords,

(k) d. Act 4.

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Lords, upon advising the Informations, and additional Debate, if any be, pronounce their Interlocutor upon the Relevancy of the Libel, and either sustain or repel the Defence, or Ground of Exculpation offered for the Pannel, and find that accordingly he should, or should not go to the Knowledge of an Inquest. If the Libel be found not relevant, the Diet is deserted, and the Pannel dismissed from the Bar (1). Where a Diet is deserted *simpliciter*, any of the Lords may grant Warrant to raise new Letters against the Pannel. But if the Diet be deserted *simpliciter* with this Quality, that no Letters or Dittay shall be raised except by Warrant of the Lords in Presence, the Bill for raising such Letters must be past by a *Quorum* of the Justices. If the Libel is found relevant, and the Defence repelled; the Libel is referred to the Knowledge of an Affize. If the Libel be found relevant, and also the Defence sustained relevant to elide the Libel; both are referred to an Affize. The Interlocutor upon the Relevancy is signed by the Chairman of the Court, *I. P. D.* that is, *in presentia Dominorum*, tho it should be against his own Opinion in Law. Then the Interlocutor is read to the Pannel by the Clerk.

8. After the Pannel hath heard the Interlocutor read to him, the *Præses* calls for the List of Affize, and picks or marks Fifteen therein to pass upon the Inquest, called *an ordinay Affize*,

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(1) Act 6, Sess. 8 & 9, Parl. K. W.

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to distinguish it from the grand or extraordinary Affize. This Affize of Fifteen may be taken out of the List of Forty five given up to the Pannel, tho several Persons therein are dead since the upgiving; if there be still a sufficient Number remaining to pass upon the ordinary Affize. Nor was it sustained to stay a Trial, that Thirty nine only of the Forty five given out in List as Affizers to the Pannel, were cited. In respect the Law discharges only to cite more than Forty five Affizers (*m*), and doth appoint that the Pursuer may cite so many within that Number, as that he may have fifteen against whom the Pannel can have no Objection. The Power to cite more than fifteen, is a Privilege indulged to the Pursuer, that he may not be disappointed of an unexceptionable ordinary Inquest, and doth not concern the Pannel, who is secure by having Liberty to decline all in the List upon just Grounds, and by there being fifteen, whom he cannot challenge. And the Lords may, at their Discretion, excuse and score Persons out of the List, so be there are fifteen good Men behind to pass upon the Inquest. The fifteen Affizers are called to the Bar by fives, and turn their Faces to the Pannel, whom the Chairman asks, if he hath any Thing to object against these Persons why they ought not to pass upon his Affize. He, at whose Instance a Man is indicted, or who informs against him, or gives Advice to raise the Libel, or who hath

(*m*) Act 76, Parl. 6. Act 88. Parl. 11. Jam. VI.

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hath declared to Persons, that the Pannel was, in his Judgment, guilty, cannot be an Affizer. Nor can Officers in the Shire where any Person is indicted, be upon his Affize (n), perhaps from a Suspicion arising from the Interest they may have, by his Conviction, in a Share of his Escheat. And any Exception that lies either against a Judge or Witness, will be received for setting, *i. e.* for declining an Affizer. A Baron holding Lands of the King, may, in his Trial for a capital Crime, set his whole Affize, if it doth not consist mostly of such Barons, and the rest landed Gentlemen, holding either of the King or some other Superior. But he may pass from this Privilege, and renounce it judicially. And a Baron may be put to the Knowledge of a common Inquest, for a Crime, whereof the Punishment is neither Life nor Limb. If one or more of the 15 Affizers be cast by the Pannel, the Room of such Affizer or Affizers must be supplied by one or more of those cited in the grand List, who therefore must all attend, till the 15 are admitted and sworn without Objection. If no Objection be made against the Affizers, or if the Exception taken be repelled, the Clerk swears them holding up their right Hands thus: *Ye five swear, that ye shall all Truth tell, and no Truth conceal, in so far as ye are to pass upon this Affize, as ye shall answer to God at the great Day.* And so the other ten are sworn in like Manner by fives.

9. The

(n) Act 50. Parl. 3. Jam. I.

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9. The Jury being lawfully sworn, the Evidence against the Pannel is produced before the Assize in presence of the Pannel in face of Judgment (o), that he may have Opportunity to object against the same. Which Evidence is either by Confession of the Pannel, or Oath of Party, or Writ, or Presumptions, or Witnesses.

[1.] A Confession that appears to have been uttered out of Weariness of Life, or by Persons having distempered Brains, makes no Faith. And tho' the Import of extrajudicial Confession be much disputed by Lawiers, it seems to be the safest Course not to regard it, unless it be adhered to before the Assize; whatever Influence it may have upon their Consciences, when back'd with Presumptions of Guilt. But a clear judicial Confession of one no Way disordered in his Mind, made in face of Judgment before the Assize, is sustained as sufficient Evidence to condemn him. As to the Question, if Confession of a Crime with a Quality, may be sustained to prove the Crime, without Regard to the Quality, unless the Confessor can otherwise prove the same? It seems, 1. That if the Quality was added *ex intervallo*, it ought not to be regarded: Seeing it is not supposable, that a Man would confess a Crime, and at the same Time forget his own Defence. 2. If the Confessor be loaded, with strong Presumptions of Guilt, abstracting from his Confession, the Quality must be otherwise proved than by the Confession:

(o) Act 90. Parl. 11. Jam. VI.

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feſſion: Becauſe Preſumptions transfer the Burden of Proof on him againſt whom they ly. But, 3. In other Caſes a qualified Confeſſion can no more be divided than an Oath.

A Perſon cannot be tried for his Life upon his Confeſſion of a Crime made *ſpe veniæ*, or upon Aſſurance of his Life; tho' the Judge who promiſed him Impunity could not pardon the Crime: Becauſe ſuch a Confeſſion cannot be made Uſe of without performing the Condition on which it was made.

[2.] Albeit the Pannel may require, and get the Purſuer's Oath of Calumny, upon the Verity of the Libel, the Purſuer's Oath, in ſupplement of farther Evidence, is not regularly taken. Nor is a Pannel bound to ſwear againſt himſelf, where the Punishment of the Crime is corporal, tho' the Purſuer declare that he will not inſiſt for corporal Punishment: Becauſe ſuch a Declaration, tho' the King's Advocate ſhould concur therein, cannot wrong the Intereſt of his Majeſty, who only can pardon Crimes. And for the ſame Reason, tho' the Juſtices ſhould refer the Verity of a Crime to the Pannel's Oath, and he deny it, he might notwithstanding be again tried for the ſame, and be convicted upon clear Proof. Nor yet is Proof by Oath of the Pannel allowed in the Caſe of a Crime inferring Infamy, unleſs there be an expreſs Statute obliging them to ſwear, as there is in the Caſes of Uſury (*p*), and Simony (*q*),
which

(*p*) Act 247. Parl. 15. Jam. VI. (*q*) Act 1. Parl. 21. Jam. VI.

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which are odious clandestine Crimes. But Offences that are punishable only by Fining, may be proved by the Pannel's Oath.

[3.] Tho' Crimes use not commonly to be proved by Writ, some Crimes, as Falshood, Perjury, Usury, and a defamatory Libel, are proved in that Manner. But Comparifon of Hands is not good Evidence in criminal Cafes ; for it worketh only a Prefumption, which may be wrong.

[4.] Prefumptions are in many Cafes held for fufficient Proof. Thus, notour Adultery is concluded from the Prefumption arifing from Cohabitation after it was discharged (*r*). If a Woman hath brought forth a Child, which is found dead, or a miffing, fhe is condemned as having murdered it, upon a Prefumption arifing from her concealing her being with Child, and not calling for Help in the Birth (*f*). And capital Crimes, as Murder, wilful Fire-raifing, Robbery, &c. have been inferred from other violent and ftrong concurring Prefumptions.

[5.] When the Purfuer produces Witneffes to prove his Libel, they are called in, and sworn one by one, from a Room, wherein they were put at the fitting down of the Court, and kept till called, without any Body allowed to fpeak to them. The Pannel may object againft their being received, or cros examine them. All Exceptions which may caft Witneffes in civil Cafes,

(*r*) Act 74. Parl. 9. Q. M. (*f*) Act 21, Seff. 2. Parl. W. & M.

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tes, ly against them in criminal Trials. Farther, no Quaker, or reputed Quaker is qualified to give Evidence in criminal Causes (t). A Companion in the Commission of the Crime, or that was accessory to it, is rejected as a Witness against his Fellow-criminal, unless where the publick Security is immediately concerned, as in Treason, and in secret Crimes, where other Witnesses cannot be had, as Witchcraft, Falshood: Because he is under a Temptation to conceal Part of his own Guilt, or to lay it wholly upon his Companion. Nor are Women allowed to bear Witness, except for proving occult Crimes, as Witchcraft, threatning to burn an House, assaulting and beating one in an House, Homicide under Cloud of Night, or in some solitary Place, where no Men are present, murdering or changing Infants. Because Robbery is often privately committed, a Person robbed and his Servant were received as Witnesses to prove the Robbery. And for the same Reason, in a Trial for a Rape, the Woman ravished and her Parents were examined as Witnesses. The uttering of Words, as Promises, a verbal Commission to commit a Crime, Blasphemy, cursing of Parents, &c. may, in a criminal Trial, be proved by Witnesses: Because such Crimes would otherwise go unpunished. If no Objection be made against the Witnesses, or the Objections be repelled, they are called in one by one, and sworn,

(t) 7 & 8 W. III. Cap. 34. § 6. 1 Geo. I. Cap. 6. junct. 8 Geo. I. Cap. 6.

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sworn, as in civil Cases, by the Judge who examines him, thus: The Witness holding up his right Hand, says, *By God himself, and as I shall answer to God at the great Day, I shall declare the Truth, and nothing but the Truth, in so far as I know, and shall be asked at me.* Then the Judge asks him how old he is, and if he be married or not, and purges him, that is, if he bear any Ill-will or Malice to the Pannel, or if he hath got any good Deed, or Promise of good Deed or Reward, to swear against him, or if he hath been directed or instructed how to depone? To which Questions the Judge having received satisfying Answers, examines him concerning his Knowledge of the Facts libelled against the Pannel, and how he came to know such Things. The Oath given is reduced into Writ by the Clerk, after this Manner: *D. C. aged — Years or thereby, married (or not married) solemnly sworn, purged of Malice, Prejudice and partial Counsel, examined and interrogated upon the Points of the Libel, depones, &c. Causa scientiæ patet, (when it is manifest from the Narrative of the Fact) or Causa scientiæ patet, &c. And this is the Truth, as he shall answer to God.* The Preses of the Court swears and examines the first Witness, the eldest Lord the second, the next Lord the third, and so forth *seriatim*, so long as there are any Witnesses to be sworn. But sometimes one Lord will swear and examine two or three Witnesses, if their Depositions be short. Every Deposition is subscribed by the Witness, if he can write,

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write, and also by the Judge who examined him ; and if a Witness cannot write, that is mentioned, and the Judge Examiner signs the Oath. All the Depositions of Witnesses are entred and recorded by the Clerk in the Books of Adjournal. The Evidence against the Pannel being finished, he is allowed to prove his Defences, or Grounds of Exculpation, if any be sustained relevant for him to prove. After the Proof is entred upon or begun, the Court cannot be adjourned, nor the Trial continued to another Diet, till all be concluded : But the Parties must go through with their Evidence in order to a present Determination ; for preventing indirect Practices of influencing Witnesses, which sometimes puts the Judges under a Necessity to sit all Night in the Court. The Expences of Witnesses, at the Rate of 8 Shillings to each Footman, and 16 Shillings to each Horseman for every Day's Attendance and Travel, as in civil Actions, will, if not voluntarily paid, be ordered, upon a Petition to the Court, to be paid by the King's Solicitor, or private Parties who cited them. And where any Witnesses are cited by both Parties, each of them pays the Half. But where the Pursuer of a Recrimination doth, upon his Application, get the Diet of the principal Proceſs against him to be continued till the Day of Compearance in his counter Proceſs, that the Trial in both may go on together ; he is decerned to pay the Expences of the first Pursuer's Witnesses, from the first
Day

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Day appointed for the Trial in his Proceſs, till the Day to which it was prorogated.

6. Immediately when the Proof is cloſed, the Advocates on both Sides harangue the Affize under the Deſignation of Good Men (or Gentlemen) of Inqueſt. The King's Advocate, or Solicitor, or other Advocate for the Purſuer, begins, whoſe Buſineſs is to reſume the Libel with the Interlocutor paſt thereon, to apply his Proof, and ſet forth the Pregnancy thereof; and to impugn or weaken the Evidence, if any be, produced for the Pannel. The Pannel's Advocate, who is privileged to be the laſt Speaker, recapitulates the Defences, labours to take off the Weight, and ſhew the Lameneſs of the Purſuer's Proof as much as poſſible, for the Pannel's Exculpation, and illustrates the Evidence produced for him. For as the Lords are Judges of the Relevancy; ſo the Jury examine and try the Evidence. Tho', at the ſame Time, it muſt be owned, that Points of Relevancy are often referred to the Determination of an Affize, as the Qualifications of Art and Part libelled in general, which often dip *in apicibus juris*; the Hability of Witneſſes; the Import of Preſumptions and extrajudicial Confefſion. But *regulariter*, all that is libelled falls under the Conſuance of the Lords.

7. When the Diſcourſes to the Jury are ended, they (after they have got themſelves cleared of their Doubts by the Judges or Advocates openly in face of Court, and in Preſence of the Pan-

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Pannel) are immediately ordered by the Chairman of the Court to be inclosed, and to report their Verdict, if the Proof be short and clear, forthwith before the Court rise, and if otherwise, to return it the next Day at 12 a'clock. Because the Jury might be tampered with, or other Witnesses suborned by the Pursuer, finding that those produced by him prove nothing; if, after finishing the Proof, the Trial were continued to a new Day. When the Jury have got furnished to them what Things they want, as Meat, Drink, Paper, Pens, Ink, Candles and Wax, a Macer shuts them up in a locked Room, and waits at the Door, till they, having done their Business, call him to open and let them out. The Jury, after they are thus enclosed, chuse a Foreman, called *Chancellor*, and also a Clerk out of their own Number; the Clerk of the Court not being allowed to sit with them (u), because, perhaps, he might influence them too much. Then the Evidence laid before them is read, and reasoned upon: And their Determination about what is proved or not proved, is called *their Verdict*, q. d. *vere dictum*, or *dictum veritatis*, the Dictate of Truth. When the Matter is put to a Vote, the Plurality decides it: Their Verdict is formed thus: *At Edinburgh the — of — 1730 Years, The Assize having inclosed, did chuse — to be their Chancellor, and — to be their Clerk, and having considered the Indict-*
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(u) Act of Regul. of the Justice Court, Art. 8.

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ment (or criminal Letters) at the Instance of — his Majesty's Advocate, for his Highness's Interest (or at the Instance of — with the Concourse of his Majesty's Advocate) against A. B. Pannel, with the Lord Justice General, Justice Clerk and Commissioners of Justiciary their Interlocutor thereon, and the Depositions of the Witnesses (or the Pannel's judicial Confession, or other Evidence) adduced for proving thereof, they do, by the Plurality of Voices (or all in one Voice) find, &c. In witness whereof these Presents are subscribed by our Chancellor and Clerk in our Names, Place and Date foresaid. The Verdict, being voted and written, is subscribed by the Chancellor and Clerk of the Jury, and closed with this Direction on the Back of it, *To the Right Honourable, the Lord Justice General, Justice Clerk, and other Commissioners of Justiciary at Edinburgh, and the Seal of the Chancellor put upon it, who keeps it, till the Court meet. That all Occasion of practising the Jury may be taken away, if any of them come out of their Inclosure, or if any Person repair to them there, before they conclude the Verdict, i. e. determine what they find proved, or not proved, the Pannel is, eo ipso, in the Construction of Law, clean and innocent of the Crime laid to his Charge (x), and cannot be thereafter accused for the same Crime. But an Affizer's breaking out of his Confinement, after passing of the Vote, and Intimation thereof to the rest of the Jury by the Chancellor, who ga-*

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(*) Act 91. Parl. II. Jam. VI.

Ch. 2. *Law of Scotland.* Tit. 2. § 2, 355

thered the Votes, tho' before the Verdict was written and signed by the Chancellor, was not found sufficient to assilzie the Pannel. And one of two Persons charged in one Indictment for the same Crime, being first tried, and put to the Knowledge of an Inquest; the other is not free by inclosing and dissolving of the said Jury, as if it had been inclosed upon him: Seeing the whole Proofs against him are kept up and not brought to Judgment, till a new Jury be named out of the same 45. whether the former 15. or all new Members, or consisting partly of the former, and partly of others chosen out of the grand Jury. Affizers malversing by unwarrantably breaking out of their Confinement, or disclosing to others what they are doing, are liable to an arbitrary Punishment, and to repair the Loss incurred by annulling the Verdict. One of a Jury having come out of a Room, where they were shut up, and lookt out of a Window in the next Room, and told Persons on the Street, what Points the Jury had found proven, and what not; and that they could not proceed farther, till a certain Paper was brought them; was found punishable as a Contraveener of this Law; albeit he offered to prove that he was allowed and warranted by the rest of the Jury to do what he did: Because Wrong can have no Warrant. The Relevancy of such an Exception against a Verdict, is to be determined by the Lords, and the Matter of Fact to be tried by the Jury, who are to pronounce

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nounce the Pannel clean and innocent, if they find the Exception to be true. But sometimes the Lords advise also the Proof of such Misbehaviour of Jury-men, and find it sufficient to annul even a Verdict against a Pannel, and to absolve him from the Libel. And it may be absolutely necessary for their Lordships to do so, if the greatest Part of the Assize offend in this Manner, it seeming absurd to allow them to judge in their own Cause, and whether they themselves be guilty or not guilty of Misbehaviour.

8. When the Jury enter again into the Court at the Time appointed, their Chancellor delivers their sealed Verdict to the Preses or Chairman, who, before opening it, desires the Clerk to call the 15 Assizers to answer to their Names, and if any be absent, the Lords fine them for not attending at the Return of the Verdict; and delay opening it till all of them be present. The Reason why the whole Jury-men should be present at opening the Verdict, is, that, if any Thing be wrong or not clear therein, they be immediately inclosed again to rectify it, which cannot be done, where any one of the Jury is absent. In which Case the Lords behaved to give Judgment conform to the Verdict, if opened, as it stands, tho' never so wrong. If all the Jury-men be present, the Chairman opens the Verdict, and after the Lords have read it privately upon the Bench, gives it to the Clerk, who records, and then reads it to the Pannel
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in open Court. Upon which the Chancellor, in name of the Jury, owns the same to be their Verdict. Then the principal Verdict is sealed up again, never to be opened except by Order of a *Quorum* of the Lords; and committed to the Custody of the Clerk, who, if he open it unwarrantably, is to be deprived of his Office, and farther punished as the Judges shall think fit (y). Verdicts of Assize either find the Libel, or the Points found relevant by the Lords, proven, or not proven, or find the Pannel guilty, or not guilty, which are called *general Verdicts*; or they find only certain Points or Matters of Fact proven, whereof the Relevancy was not determined by any Branch of the Lords Interlocutor, which are termed *special Verdicts*.

9. After the Verdict returned by the Assize is recorded and read, and the principal Verdict sealed up again, the Lords either give Sentence presently; or delay pronouncing of it till some other Day, which is ordinarily done if the Libel be found proven, that in the mean Time they may think what Judgment to give, and the Pannel prepare for it. A Woman with Child convicted of a capital Crime, is allowed to plead her Belly, for obtaining a Delay of Sentence against her. Upon which the Lords grant Warrant to cite Midwives, to appear and try whether she be with Child or not. Which Midwives appearing are sworn, and removed out of Court

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(y) d. Act of Regul. Art. 9.

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to another Room with the Pannel ; and after some little Time re-enter into the Court, and give their Opinion in the Matter referred to them. According to which the Lords proceed, or delay, to give Sentence.

[1.] When Sentence is to be given, the Clerk reads the Verdict of the Assize out of the adjournal Book, which the Chairman resumes to the rest of the Lords, and asks their Opinion of it, and what Judgment should be given, which is determined by Plurality of Votes, and recorded by the Clerk. In the Case of a special Verdict returned by the Jury, finding only Facts or Things proven, whereof the Relevancy had not been determined in the Lords Interlocutor, the Justices reason among themselves, and vote what Punishment should be inflicted upon the Pannel, according to what is proven. The Judgment or Sentence is worded thus: *The Lords Justice General, Justice Clerk, and Commissioners of Justiciary, having considered the Verdict of Assize returned the — of — 1730 Years for (or against) A. B. Pannel, whereby it is found not proven (or proven) that, &c. The said Lords, in respect thereof, by the Mouth of — Macer (or Dempster) of Court, assoilzie the said A. B. and ordain him to be set at Liberty (or decern and adjudge the said A. B. to, &c.) which is pronounced for Doom.*

[2.] A Sentence absolviory, whereby the Pannel is assoilzied, or acquitted and dismissed from the Bar, is signed only by the Chairman,

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I. P. D. and the Clerk reads it in presence of the Pannel, to a Macer, who pronounces it. Whereupon the Pannel takes Instruments, and, if he had found Surety for his Appearance, protests for Relief of his Cautioner: Which Protestation the Lords admit, and ordain the Bailbond to be given up. Where a Criminal appears to have been calumnious and malicious, the Justices modify a Sum for Costs to the innocent Pannel (z), and may farther punish the Pursuer as they see Reason.

[3.] A Sentence condemnatory, whereby the Pannel is adjudged to underly the Pains of Law, whether Death, or an arbitrary Punishment, or Fine, is signed by all the Judges present, even by those who voted against it. Then the Clerk reads the Sentence, in presence of the Pannel, to the Dempster, if it inflict capital Punishment, or to a Macer of Court, if only a Fine or arbitrary Punishment be inflicted: Which Dempster, or Macer, respective, repetes and pronounces it, with the Addition of these Words, *And this I give for Doom.* Hence a condemnatory criminal Sentence is in our Law termed a Doom. When a pecuniary Punishment is inflicted, the Pannel is either committed to Prison till he pay his Fine, or ordained to pay it within six Days. After pronouncing a condemnatory Sentence importing a capital or corporal Punishment, the Pannel is remanded to Prison,

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(z) Act 87. Parl. 11. Jan. VI.

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and immediately a Copy of the Sentence containing an Order to the Magistrates of *Edinburgh* to see it put to due Execution in all Points, as they will be answerable at their highest Peril, is also subscribed by the Lords before they go off the Bench. Which Order given to the Magistrates, if the Sentence be capital, is called *The dead Warrant*.

[4.] A condemnatory Sentence mentions the Time and Place of Execution. Such Sentences are sometimes appointed to be executed in the Place where the Crime was committed, to terrify such as saw it from doing the like, and to afford some comfortable Reparation to the Persons injured, when Justice is executed in their Sight. That no Person convicted of any Crime importing a capital or other corporal Punishment, may be grieved by the over hasty Execution of such Sentence, without allowing Time to apply to the Sovereign for a Pardon: No Sentence or Judgment of any civil Magistrate or Court of Judicature, importing capital or any other corporal Punishment, if pronounced in *Edinburgh* or any other Part of *Scotland*, to the Southward of the Frith, or River of *Forth*, can be put to Execution within less than thirty Days after the Date of such Sentence, and if pronounced in any Place to the Northward of the said Frith or River of *Forth*, can be put to Execution within less than forty Days after the Date of such Sentence: Without Prejudice to such Magistrate or Court of Judicature,

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ture, to commit to Goal, and detain in Custody, in order to Trial, and in order to the Execution of Sentences as formerly (*aa*). The Lords of Justiciary cannot prorogue Diets appointed for Execution of Criminals, because they are *functi* by giving Judgment. Nor can they (tho' the Innocence of a condemned Person evidently appear before Execution) rescind or reverse their own Sentence; but all they can do in such a Case, is to intercede for a Remission to him. Executed Criminals are not denied the Benefit of Burial, unless where the Sentence appoints their Carcases to be exposed, for deterring others to commit the like in Time coming. But the Bodies of the baser Sort of Criminals are sometimes allowed by the Judges to go to anatomical Uses.

T I T. III.

The Order of judicial Proceedings against Criminals before the Circuit-courts.

S E C T. I.

Preliminaries to ordinary Trials before the Circuit-courts.

1. **FORMERLY** a Brieve or Precept was issued out of the Justice-court to each Sheriff of the several Shires, where the Circuit-courts were to be held, charging him to cite Persons from whom the best Intelligence of Crimes and

(*aa*) II Geo. I. Cap. 25. §

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and Delicts committed in the County, might be expected, particularly a Miller, a Wright, a Maltman and a Smith, out of each Parish within his Bounds to appear, each under the Pain of Ten Pounds, at the head Burgh of the Shire the Day mentioned in the Brieve, to give up upon Oath to a Clerk appointed by the Lord Justice Clerk, Dittay or Information of Persons guilty of Crimes or Delicts in use to be tried before the Circuit-courts: Such as Treason, Murder, Manslaughter, Blood-wit, Batteries, wilful Fire-raising, Ravishing of Women, Robbery, Theft, Adultery, Fornication, Forging or venting false Coin, making or using false Weights or Measures, raising of Mobs and Tumults, Riots, Blasphemy, beating and cursing of Parents, gross Profanation of the Lord's Day, slaying of red Fish, or fishing in forbidden Times, destroying green Wood or Planting, Breakers of Orchards, Parks or Ponds, De-forcement; Forestalling, regrating and keeping up Victual to a Dearth, intruding into Churches and Manfes, Disturbers of divine Service in the Church, swearing abominable Oaths, Oppression and Malversation committed by inferior Magistrates, their Clerks and Procurators, Muir-burn and Breakers of the Acts touching the Game, and the steeping of Lint in Lochs and running Waters, to the destroying of Fish, Egyptians, Vagabonds and Sorners, and generally all Crimes and Transgressions of the Laws and Acts of Parliament. The Articles of Dittay

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tay (which signifies the same as Indictment) being read over to the Persons cited to give Information, if they knew any were guilty thereof. The Clerk of Dittay enquired about the specifick Crimes, who committed the same, or were accessory thereto, where, in, or about what Place committed, the particular Time, Day, Month or Year when, Place where committed, and the aggravating Circumstances thereof; and his Expences were paid by the Sheriff, to whom they were allowed in his Account of the Issues and Profits of the Justice-air. The Information so taken up in Writing was sent to the Justiciary Court, at least Thirty Days before the Circuit, but the Names of the Informers were not to be discovered (*a*). The Clerk of Dittay returned, with the Information, a List signed by the Sheriff or his Clerk of Persons fit to pass upon Affizes, not under the Age of 25 Years, upon whom no Dittay was charged, whereof one Half was to belanded Men. Two Rolls were made, whereof one containing the Names of the Persons indicted to the Justice-air was called the *porteous Roll* (*b*), *a portando*, or from the *French portes vous*, another containing the particular Dittays charged upon them called the *Traistis Roll* (*c*), because it is committed to the Trust of the Justice Clerk, who should not reveal the Uppers of Dittay, nor alter any Thing therein (*d*);

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(*a*) Act 27. Parl. 6. Jam. II. (*b*) Act 139. Parl. 13. Jam. I. (*c*) Act 99. Parl. 14. Jam. III. (*d*) d. Act 27. Parl. 6. Jam. II.

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Traist being an old *Scottish* Word for Trust (e),

2. But the Method of taking up Dittay, and exhibiting Information against Delinquents by the Strefs and porteous Roll, being grievous and unnecessary, is now abolished. And Informations concerning Crimes to be tried in the Circuits containing the Names and Designations or Additions of the Offenders and Witnesses, the Facts committed, Circumstances that may serve to discover the Truth, and Titles of Writs to be made use of at the Trials, are taken up by the Justices of Peace, by Presentments at their Quarter Sessions, or by two of them at least, on the 21 Days of *July* and *February*, and by Sheriffs, Stewarts, Bailies of Regality, Magistrates of Burghs, and other inferior Judges on the 22 Days of the said Months yearly, being lawful Days, or upon the next lawful Day thereafter. Which Informations signed by two of the Justices of Peace and their Clerk, or by the said Sheriffs, Stewarts, &c. and their Clerks respectively, are to be transmitted by these Clerks with such Writs or other Evidence or Proof as are to be made use of in the Trials, to the Lord Justice Clerk, or his Deputy the Clerk of Court at *Edinburgh*, or at least Forty Days before the holding of the respective circuit Courts (f). And there are sent in to the Clerk of Justiciary by every Sheriff so many Lists subscribed by him of Forty five honest and substantial Men to be Juries, as there are Persons
against

(e) Act 15. Parl. 17. Jam. VI. (f) 8 A. Cap. 16. § 3 & 4.

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against whom Dittays are taken up in his Shire.

3. The Clerk of Justiciary records the Information in the black Book, and delivers the signed Information to the King's Advocate or Solicitor, or Advocate deputy for the Circuit, in which the Delinquents in such a Shire are to be tried, to draw Indictments conform. Which differ in nothing from Indictments before the Court of Justiciary, save in these conclusive Words: *Which being found proven or any Part thereof by the Verdict of an Assize before a circuit Court to be holden at — in May next, you ought to be punished with the Pains of Law.* Whereas the others bear: *Which being found proven or any Part thereof by Verdict of an Assize before the Lords Justice General, Justice Clerk, and Commissioners of Justiciary, you ought to be punished with, &c.* If the Lord Advocate, &c. find the Information not relevant, and sufficient to found an Indictment, he quashes it by a Writing signed by him on the Back thereof, and returns it to the Clerk. If an Information, tho' relevant, be given back thus quashed without an Indictment, he who does so, may be censured by the Lords. When his Majesty's Advocate, &c. draws an Indictment, he signs and delivers it with the Information to the Clerk, who puts the Indictment in the Roll of Delinquents in the Shire where the Indictee dwells, and draws out of all the Lists of Assizers given in to him by the Sheriff thereof, a List of Forty five, which is signed by a *Quorum* of the Justices:

4. The

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4. The Roll of Offenders in a Shire is made up by the Clerk thus,

A Roll of Delinquents within the Shire of Lanerk to be tried before the Lords Commissioners of Justiciary in a circuit Court to be holden within the Burgh of Glasgow in May — Years.

This Roll is distinguished in two Columns. In the first Column every Person indicted, and the Witnesses to be produced against him, are named and designed. Which is subscribed by the King's Advocate or such as discharge that Trust. The second Column contains the several Indictments, writ each directly opposite to the Names and Designations of the respective Indictees, and Witnesses against them, and signed in Manner aforesaid by his Majesty's Advocate, or his Deputy. If there be more Indictments in any Shire, than a Roll of one Sheet of Paper will contain, two or more Sheets are joyned and fastned together with some glutinous Matter, to hold them. To all which the Clerk of Court subjoyns a Precept to the Sheriff to cause execute the Indictments, running thus: *Sheriff of the Sheriffdom of Lanerk, your Deputes and Officers whatsoever, ye shall incontinent, after Sight hereof, with all Diligence lawfully summon, arrest, and cause to be arrested the hail Persons Delinquents particularly above named, dwelling within the Bounds of your said Jurisdiction, personally if they can be ap-*
pre-

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prehended, and failing thereof at their dwelling Places, and at the Market Cross of the head Burgh of the Shire where they dwell, and arrest their Goods and Gear, and take Caution of them, if need be, that they shall compear before the Lords of his Majesty's Justiciary, in a circuit Court to be holden by them, or any two of them, within the Burgh of Glasgow, upon the tenth, eleventh or twelfth Days of May next to come, in the Hour of Cause, with Continuation of Days, there to underly the Law for the several Crimes contained in their respective Indictments, and that ye affix Copies as effects: And also, that ye summon the haill Witnesses above named, to bear leill and soothfast Witnessing in so far as they know of the said Delinquents their Guilt of the Crimes foresaid, with so many honest and faithful Assizers as dwell within your Jurisdiction of the Number contained in the List of Assize, herewith delivered to you to pass upon the said Delinquents their Trial, all to compear Days and Place to the Effect aforesaid, every one of them under the Pain of One hundred Merks, and that ye deliver to every Delinquent a just Copy of his Dittay, with a List of Witnesses and haill Assizers, that are to pass upon their Trial. And also that ye, your Deputes and Officers be present at the said Justice Court before the Down-sitting and fencing thereof, bringing with you this Roll, upon the arresting of the said Delinquents, and summoning Witnesses and Assizers. The whilk to do commits to you conjunctly and severally full Power by this Precept given by Warrant of the Lords Justice General, Justice Clerk, and Commissioners of Justiciary at Edinburgh the — Day of April

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pril 1730 *Years, under the Hand of* — Clerk to the *Justiciary Court*, who signs the Precept. This Roll is transmitted by the Clerk to the Sheriff, who, in obedience to the subjoyned Warrant, causes Messengers or his Officers of Court cite the Persons accused to appear in such a circuit Court, upon any sitting Day thereof, by giving full Copies of their Indictments, with Lists of the Witnesses and Affizers on the same Paper, fifteen Days before their respective Trials; and causes such Messengers or Macers cite also the Witnesses and Affizers. Which Delinquents and Witnesses, that they may be effectually in Court at the Time appointed, are by the Sheriff either committed to Custody, or put under sufficient Bail to appear then. The Sheriff returns the Indictment duly served and executed against the Parties accused, and legal Executions against the Affizers and Witnesses, to the Clerk who is to serve in the Circuit, a reasonable Time before the Day appointed for its Meeting.

5. As in the Court of Justiciary at *Edinburgh*, Persons against whom Indictments or criminal Letters are executed, may by Warrant from any one of the Lords, raise Letters of Exculpation in the King's Name: So those who are indicted for Crimes to be tried before a Circuit, may, upon Application to the Judge or Judges of that Court, obtain Precepts of Exculpation in his or their Name signed by the Circuit Clerk, for citing Witnesses to clear their Innocence of the Crimes laid to their Charge. Of the

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the which Precepts, the Pursuers must get full Doubles, with Lists of all the Witnesses to be produced by virtue thereof, a competent Time before the Indictees are brought to their Trials.

6. His Majesty's Advocate, or any Person, is not restrained to inform and prosecute any criminal Action or Cause before the Circuit in the same Way as is in Use to be done before the Justiciary Court at *Edinburgh*; or to alter or innovate the Method of returning Jury-men or Assizers by the Sheriffs, upon Precepts directed to them as formerly (g).

S E C T. II.

The Form and Method of ordinary Trials in the Circuit Courts.

CRIMINALS are tried in the Circuits, much after the same Manner as before the Court of Justiciary at *Edinburgh*, except in some Particulars which I shall briefly hint at.

1. On the first Day of the Justice Air, the two Judges, or one of them if the other be absent, sit down at Eleven of the Clock in the Forenoon (a); the Law doth not anul Courts holden at any other Hour. Justices of Peace are allowed to sit on Benches, and have the same Privilege in Court, as Justices of Peace enjoy in *England* (b). The Court is fenced in, these Words: *I defend and forbid in our Sovereign Lord's*
 Vol. II. A a Name,

(e) 8 A. Cap. 16. § 6.

(a) Act 86. Parl. 11. Jam. VI. (b) 8 A. Cap. 16. § 5.

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Name, and in Name and Behalf of, &c. his Majesty's Justices (or Justice, if there be but one) here present, that no Person or Persons trouble or molest this Court of Justiciary, nor speak one for another, without Leave asked and given, under the Pain of Law. Then the Commissions of the Advocate and Clerk Deputies, are produced and read.

2. The Roll of Delinquents is called every Sederunt Day, and they will not be declared Fugitives, if they appear but on the last Day: Because they are cited to appear any of the Days in which the Judges sit in such a Place (c). Offenders called and appearing the first Day, are put to find Surety to present themselves at all the Diets of Court. Sickness is a relevant Excuse for not Attendance at the Justice Air, and is probable by two honest Men, or the Parish Minister deponing upon it (d). No Judge of Regality can repledge Pannels from the Justice Air, but only concur there in judging them (e). All Debate before the Circuit Courts is *viva voce*, which the Clerk doth minute: For there are no Informations, after the Pleading is over, given in to the Judge or Judges.

3. The Lords are to continue holding Courts at all the Places destined for their Circuit Courts for the Space of six Days from their Down-sitting, if the Business of their respective Circuits require so long Time to dispatch it.

APPEN-

(c) Act 39. Parl. 5. Jam. III. (d) Act 115. Parl. 9. Jam. I. (e) Act 29. Parl. 11. Jam. VI. Verf. And farther the said Heritable Stewart.