

The Society of Clerks to the Signet
Presented by Mr David Erskine the Editor

A N

I N S T I T U T E

O F T H E

L A W O F S C O T L A N D .

I n F O U R B O O K S .

In the Order of Sir GEORGE MACKENZIE'S
Institutions of that Law.

By JOHN ERSKINE, Esq; of Carnock, ADVOCATE,
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I n T W O V O L U M E S .

V O L . I .

E D I N B U R G H :

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T O
THE RIGHT HONOURABLE,
ROBERT DUNDAS OF ARNISTON,
LORD PRESIDENT OF THE
COURT OF SESSION,
THE FOLLOWING SHEETS
A R E
RESPECTFULLY INSCRIBED,
B Y
HIS LORDSHIP'S
MOST OBEDIENT, AND
MOST HUMBLE SERVANT,
THE EDITOR.



A D V E R T I S E M E N T.

THE principles of the law of Scotland, first published in the year 1754, were meant only for the use of the young gentlemen who attended the Author's public lectures.—The favourable reception given to that Essay, encouraged him to turn his thoughts to a larger work, which might be of greater use to the public. He accordingly employed the remainder of his days in reducing his prelections into the form in which they now appear, with a view to give them to the world.

The work had not received the finishing hand of the author at his death. The Editor, aware of the disadvantages attending a posthumous publication, and unwilling to hazard any part of the reputation the author had already acquired, declined to put it to the press till he had submitted it to the perusal of several gentlemen of the law, of singular knowledge and abilities in their profession, upon whose judgement he could rely. Encouraged by their approbation, he now offers it to the public.

Some inaccuracies observed in the language were corrected: no other alteration has been ventured on, though in some particulars the course of decisions has run contrary to the opinion laid down by the Author. A few notes have been added, referring to later decisions, which occurred to the gentlemen who took the trouble to revise the manuscript.

The reader will observe some references in the text to the last collection of decisions by a committee of the Faculty of Advocates, published some years after the Author's death. These decisions were quoted in the manuscript by their dates; but as they are now printed, it was thought proper to refer to them as marked in that collection.

A few original deeds are mentioned in the course of the work. These are added in an Appendix. To which are subjoined abstracts of the two late acts of parliament concerning entails and the personal estates of bankrupts, which have both passed since the Author's death.

The Editor takes this opportunity of returning his grateful thanks to the gentlemen who so obligingly took the trouble to revise the manuscript copy of the text. If this work shall be of any use, it is to them the public is indebted for it.

It is hoped the reader will excuse any small inaccuracies he may meet with, as it is impossible to avoid them in a posthumous work, unless the editor assume a greater liberty than belongs to him.

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NOTE

NOTE of ABBREVIATIONS, and of the manner of referring to authorities.

<i>Act of Sed.</i>	- -	Acts of Sederunt of the Session.
<i>Reg. Maj.</i>	- -	Books of <i>Regiam Majestatem</i> .
<i>Qu. Attach.</i>	- -	<i>Quoniam Attachamenta</i> .
<i>Leg. Burg.</i>	- -	<i>Leges Burgorum</i> .
<i>St. 1. Rob. I.</i>	-	<i>Statuta prima Roberti Primi</i> ; and so of the other statutes in Skene's collection.
<i>Cr.</i>	- - -	Sir Thomas Craig <i>De feudis</i> , quoted according to the edition 1732, <i>fol.</i>
<i>Hop. Min. Pr.</i>	-	Sir Thomas Hope's Minor Practices, sometimes by page and section, sometimes only by section, of edition 1726, 8vo.
<i>St.</i>	- -	Visc. Stair's Institutions, by book, title, and section, of edition 1759.
<i>Bankt.</i>	- -	Lord Bankton's Institute, by the book, title, and section.

Printed collections of decisions observed

<i>Dirl.</i>	- -	by Lord Dirleton,	} Referred to by the number of the decision.
<i>Gilm.</i>	- -	by President Gilmour,	
<i>Pr. Falc.</i>	- -	by President Falconer,	
<i>Harc.</i>	- -	by Lord Harcarfe,	
<i>Dalr.</i>	- -	by President Dalrymple,	
<i>Br.</i>	- -	by Mr Alexander Bruce,	
<i>Kames,</i>	- -	by Lord Kames, from 1716 to 1728,	
<i>Kames, Rem. Dec.</i>	- -	by Lord Kames, from 1730 to 1752,	
<i>Home,</i>	- -	by Mr Alexander Home,	} Referred to by the date of the decision and the pursuer's name.
<i>Falc. i. or ii.</i>	-	by Mr David Falconer, in 2 vols,	
<i>New Coll. i. or ii. or iii.</i>	-	by a committee of the Faculty of Advocates, in 3 vols,	
<i>Balf.</i>	- -	by Sir James Balfour, referred to by the page and section.	
<i>Spottif.</i>	- -	by Sir Robert Spottifwoode,	} Referred to by the date of the decision and the pursuer's name.
<i>Fount.</i>	- -	by Lord Fountainhall, in 2 vols,	
<i>Edg.</i>	- -	by Mr John Edgar,	
<i>Dict.</i>	- -	Dictionary of Decisions by the volume and page.	

Manuscript collections of decisions observed

<i>Had.</i>	- -	by the Earl of Haddinton.
<i>Hop. Maj. Pr.</i>	-	by Sir Thomas Hope.
<i>Gosf.</i>	- -	by Lord Gosford.
<i>Forbes MS.</i>	- -	by Mr William Forbes.
<i>Br. MS.</i>	- -	by Mr Alexander Bruce, now printed,
<i>Tinw.</i>	- -	by Lord Tinwald.

Steu.

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<i>Steu. Anf.</i>	-	-	Sir James Steuart's Answers to Lord Dirleton's Doubts.
<i>Skene,</i>	-	-	Sir John Skene <i>De verborum significatione</i> .
<i>Mack.</i>	-	-	Sir George Mackenzie's Institutions, referred to by the book, title, and section.
<i>Mack. Obf.</i>	-	-	Sir George Mackenzie's Observations on the acts of parliament.
<i>Mack. Crim.</i>	-	-	Sir George Mackenzie's treatise on the Criminal law, referred to by the part, title, and section.

The decisions from 1621 to 1713, referred to by the date of the decision and the pursuer's name, without any distinguishing mark, are to be found in the printed collections by Lord Dury, Viscount Stair, or Mr Forbes.

The decisions after 1719, which are neither to be found in any printed collection, nor in the Dictionary of Decisions, were observed by the author.

The acts of parliament before the reign of James VII. are quoted by the year of God, and number of the act, according to the edition 1681, fol.

The quotations from the Code of the Roman law, are marked in the usual way by the letter C. Those from the Pandects have no distinguishing letter.

The references from one part of this work to another, are marked by the book, title, and section; but if the reference is from one part of the same book to another, then it is marked only by the title and section.

E R R A T A.

Pag. lin.

- 118. 23. *for* received *read* revifed
- 139. 41. *for* managing affairs *read* managing their affairs
- 147. 45. *for* himfelf *read* one's felf
- 214. 46. *for* by vaffals *read* to vaffals
- 248. 6. *delete* he
- 267. 35. *for* landlord or *read* landlord nor
- 272. 33. *delete* one and
- 288. 9. *for* if they *read* if the instruments
- ibid.* 12. *for* they *read* the instruments
- ibid.* 13. *for* they *read* the refignations
- 364. 41. *read* of horning
- 424. *ult.* *for* t. 3. § 4. *read* t. 4. § 20. 21.
- 536. 11. *delete* This right, &c. — *to* his benefice. *the whole sentence, being the laft of* § 34.
- 540. 42. *delete* Obferve
- 556. 3. *of the note, for* Kinnaid *read* Kinnaird
- 561. 54. *delete* diftinct
- 568. 18. *for* the contrary, *read* on the contrary,
- 582. *ult.* *for* confequent *read* confequence
- 629. 4. *for* If this *read* As this
- 632. 17. *for* in either cafe; *read* in both;
- 641. 39. *delete* and current
- 644. 2. *for* given him *read* given to him
- 653. 52. *for* till with thefe *read* till within the
- 665. 29. *for* Burg. *read* Burgund.
- 673. 16. *delete* fhould
- 684. 20. *read* precarious,

A N
I N S T I T U T E
O F T H E
L A W O F S C O T L A N D.
B O O K I,
T I T L E I.
Of Laws in general,

THE word *law* is frequently made use of, both by divines and philosophers, in a large acceptation, to express the settled method of God's providence, by which he preserves the order of the material world in such a manner, that nothing in it may deviate from that uniform course which he has appointed for it; and as brute matter is merely passive, without the least degree of choice upon its part, these laws are inviolably observed in the material creation, every part of which continues to act, immutably, according to the rules that were from the beginning prescribed to it by infinite wisdom. Thus philosophers have given the appellation of *law* to that motion which incessantly pervades and agitates the universe, and is ever changing the form and substance of things, dissolving some, and raising others, as from their ashes, to fill up the void; yet so that amidst all the fluctuations by which particular things are affected, the universe is still preserved without diminution; *Gravima, De jure nat.* Thus also they speak of the *laws* of fluids, of gravitation, &c.: and the word is used in this sense in several passages of the sacred writings; in the book of Job, and in Prov. viii. 29. where God is said to have given his law to the seas, that they should not pass his commandment. But *law*, in the strict meaning of the word, is peculiar to intelligent beings, endued with consciousness, and liberty of will, and who consequently have an inward power of acting and forbearing; and, by disregarding the prescriptions of the law, contract guilt, and render themselves obnoxious to punishment. In this restricted meaning God directs his laws, either to pure spirits, or to the human race. But as the law of pure spirits has no immediate relation to the conduct of man, nor indeed

Vol. I. A falls

falls within the reach of human capacity, the subject of this treatise is to be confined to laws which are prescribed to mankind.

2. *Law*, even when it is thus limited, is an equivocal word, sometimes denoting the science which teacheth what things are or are not just, styled by the Romans *jurisprudencia*; and sometimes what is contained in that science; or, in other words, the particular rules to which the science is applied. In this last acceptation, *law* may be defined, the command of a sovereign, containing a common rule of life for his subjects, and obliging them to obedience. By a sovereign is understood the supreme power, whether it be lodged in the hands of one or of many.

3. Laws must be directed to those alone whom the lawgiver has a right to command; for the obligation to obey, on the part of the person commanded, can have no other foundation than his dependence on the lawgiver, and the lawgiver's just power of directing his actions. That cannot be a rule of life which is impossible or unintelligible, or of which one cannot be assured whether it be truly commanded. The thing prescribed as a law, therefore, must be in itself possible to be performed; it must be so distinctly exhibited, as to convey a precise knowledge of its meaning to those who are to be bound by it; and it must be notified to them in such a way, as they may know it to be the will of their sovereign. As the end of law is an equal distribution of justice, on which the happiness of every society depends, all laws ought to be in themselves just. This character is inseparable from the laws of God, who is justice itself; and human laws, when they prescribe any thing repugnant to natural justice, have no coercive force.

4. Justice, when it is ascribed, not to laws, but to persons, consists in the conformity of one's actions to law. Ulpian indeed, copying after the Stoic philosophy, has defined it, to be a constant and uniform disposition of mind to give every man his due, *l. 10. pr. De just. et jur.* But though this definition may pass without censure from the pen of a divine or a moralist, who considers persons according to the judgement of God, not merely by their actions, but by the inward springs which move to action, yet human tribunals cannot judge by the affections of the mind. If a man act conformably to law, he must be accounted just, whatever his motives to action may have been. On the contrary, if one fail to make good his engagements in any matter of civil right, *ex. gr.* to discharge his debts; though this may have been owing to unavoidable misfortune, yet he is in the judgement of law unjust, and therefore subjected to imprisonment, or such other penalty as the law has inflicted on that constructive transgression.

5. When laws have a tendency to promote the real happiness of the subjects, that alone creates an obligation to obedience, called by Heinecius and other writers *the internal obligation of law*. This, however, would be insufficient of itself for enforcing obedience, if these laws were not also guarded with a commination of some punishment or evil which is not the natural consequence of the transgression. That part of the law which inflicts the punishment upon disobedience is called its *sanction*, from *sancire*, "to confirm," because it is that which gives the enactment full force and authority, and chiefly preserves it from being violated by perverse men, who would disregard the true grounds of obedience. Hence it follows, that a sanction, though it should not be expressed in the law, is implied; so that the magistrate or judge to whom the execution of the law is committed may inflict a punishment on the transgressor, greater or less, according to the demerit of the offence. This doctrine seems to be admitted by all writers, even by Hobbes, *lib. 14. De cive*, § 8.; and is taken for granted in several of our statutes, enjoining certain things to be done for the police

police of the country, in which, though no special penalty is annexed to the enactment, it is recommended to the judge to see the law carried into execution, 1661, c. 41. &c. ; and how this can be done effectually, without punishing the breach of the law, is hard to imagine.

6. Under the sanction of the law may be also included that part of it which proposes rewards as encouragements to obedience. Cumberland, c. 5. *De leg. nat.* § 40. maintains, that this is the chief and most proper sanction of a law. But his reasoning appears too subtle, and it is certain that this species of sanction is but little in the power of earthly lawgivers. No state can possibly furnish out a stock sufficient for rewarding all who may live in the due observance of the laws: it is God alone, who can not only inflict the severest pains upon transgressors, but also, from the inexhaustible treasures of his power and goodness, animate his creatures to obedience by the highest rewards.

7. Law is divided into the law of *nature*, the law of *nations*, and *civil* or *municipal* law. The law of nature may be defined, after Grotius, the dictate of reason, by which we discover whether an action be morally good or evil, by its agreement or disagreement with the rational and social nature of man. That there is such a law, cannot be denied, without denying the essential attributes of the Deity. Man is endued by his creator with intellectual faculties, capable of distinguishing between truth and error, between real and apparent happiness, and with a power, either of acting immediately, if his judgement shall so direct him, or of suspending the execution of his purposes, in cases which require deliberation, till he shall, by a thorough examination, be satisfied of their rectitude. The infinitely wise and good God hath not thus enlightened the soul of man, merely to enable him, by an abuse of his understanding, to range more expertly, and with greater success, in the paths of violence and oppression, without being accountable for his wickedness. God necessarily wills what is just and good; and that divine will which we are capable of discerning by natural light, truly constitutes a law to us. The law of nature, therefore, has the God of nature for its author: and it is not made known to us by any formal or external notification of his will, but is impressed on our minds by the internal suggestion of reason; and is therefore elegantly said by St Paul to be written by God upon the hearts of every one of us.

8. The law of nature hath for its objects, God, our neighbour, and ourselves, according to Tully, *Tusc. Quest. l. 1. c. 26*. Its duties are known by attending to the relations in which man stands to his creator, to his fellow-creatures of mankind, and to the other beings that surround him, and by considering the nature and frame of the human constitution. Thus the essential reason of things teacheth us to reverence and obey God, who, as our creator and preserver, hath the highest title to our worship and obedience; to honour and obey our parents, to whom, under God, we owe our being; to adhere strictly to our obligations and engagements; to perform all the friendly offices we can to those with whom nature hath intended that we should live together in a state of society, as mutual helps to one another; to do to them whatever we might reasonably expect they should do to us in the like circumstances; to take a proper care of our own preservation; to restrain our natural passions and appetites within due bounds; and to cultivate and improve our faculties to the utmost of our power, &c.

9. As a necessary consequence of this, the law of nature lays an indispensable obligation to obedience on the whole human race who have the exercise of their reason, without exception; for all men are alike subject to the

the command of their maker, and the frame of the human constitution is the same in every individual. As that constitution therefore, and the relations of men to other beings, must always continue what God at first made them, the duties of natural law must also be of unchangeable obligation. "It is not therefore one law in Rome, and another in Athens; one to-day, and another to-morrow; but it is ever the same, exerting its obligatory force over all nations, and throughout all ages;" as Cicero expresses himself in a beautiful fragment preserved by Lactantius, *lib. 6. c. 8.*

10. The observance of the law of nature is strongly enforced by that faculty of the mind called *conscience*, by which we are not only informed of what we ought to do, but enabled to turn our eyes inward upon ourselves, and after recollecting and examining our past actions by the test of reason, to pass judgement, either approving or condemning them. The terrors which take fast hold of wicked men upon a sense of their guilt, though they should be placed beyond the reach of human censure, or concealed from the view of their fellow-creatures, clearly prove their knowledge, not only of the law itself, but of its being fenced with the heaviest penalties. On the other hand, that inward serenity of mind, on the reflection of having led a virtuous life, or of having performed any act of disinterested justice, humanity, or self-denial, is the reward which God hath been pleased to bestow, even in this life, upon those who give a willing obedience to his law.

11. The Romans have, with great impropriety, ascribed this law to the brute part of the creation, *l. 1. § 3. De just. et jur.* Creatures which are merely sensitive, have no faculties which can be influenced by motives above sense: they act from necessity, and so are not capable of proper obedience, nor consequently of the obligations of law. On this account also, infants, before they have attained the use of reason, and idiots, who either never had reason, or have lost the use of it, are not to be accounted moral agents, or subjected to punishment as transgressors; for where there is no law, there can be no transgression.

12. Writers divide the law of nature into the primary and the secondary. The primary is that which regards men, simply considered, or in their state of nature, previous to any human act or establishment. To this branch of the division the instances already given of natural law may be applied. The secondary respects men as they are formed into several distinct and independent states; and it arises from the nature of society, and from the necessities of mankind as members of it. Because this sort can have no room till men be placed in particular circumstances, Puffendorf, and some writers after him, have chosen to call it *the hypothetical law of nature*.

13. From this secondary law of nature the right of property hath arisen. By the first or original law, all things were common: the few who inhabited the earth were, for some time after the creation, served abundantly with such of its fruits as sprang up without culture or industry, so that no person needed take possession of more than served his present necessities. But as men multiplied, experience soon taught, that society could not long subsist if this common use of things continued: a right of property was therefore established, whereby every man had a certain portion of ground appropriated to him, which he might hold for ever, if he did not himself abandon it, or transfer it to another. From hence hath proceeded that mutual intercourse among men, which branches out into the contracts of barter, sale, hire, loan, and most of the others mentioned in law-books. It is evident that this secondary law is derived by necessary consequence from the primary; and that it is nothing more in effect than the first and most obvious principles of natural law applied to the state of civil society:

for

for civil government is so far from destroying the essential relations of men and things, that it enables us to discharge the duties of that primary law to one another, with greater advantage to the community.

14. The law of nations, in its proper sense, is that which comprises in it all the duties which one independent state or body-politic owes to another. Both the law of nature and of nations derive their coercive power from reason alone, and so both may be justly said to be prescribed by God himself: for as independent nations may be considered with respect to each other as so many political persons in a state of equality among themselves, the same duties which nature has laid on individuals, must be also binding upon states in their mutual intercourse: that, therefore, which is the law of nature when applied to men considered in their first condition, is truly the law of nations when applied to two or more independent kingdoms. Hence Mr Hobbes, not improperly, divides the law of nature into the natural law of men, and the natural law of states; which last is, in other words, the law of nations. Under this law may be classed the rights of war, the security of ambassadors, the obligations arising from treaties, &c.

15. But the law of nations is frequently understood in a very different sense. It is made to signify those rules that are generally received by sovereign powers for fixing the order of their mutual correspondence, whether in times of war or of peace; *ex. gr.* the form of declaring war previous to any acts of hostility; the regulations relating to reprisals, to contraband goods found aboard neutral ships, to the exchange of prisoners, and to suspensions of arms, or negotiations of peace; the ceremonial of receiving and entertaining ambassadors; the privileges indulged to their servants and domestics, &c. But these rules make no part of the law of nations in its proper acceptation; for they are arbitrary, and may, without violating the law of nature, be changed for others equally agreeable to right reason. If therefore they are to be accounted laws, they ought to be thrown into the class of positive, which derive their sole authority, either from express treaties, or from the tacit agreement of nations, and whereof the obligation can last no longer than the agreement on which it is grounded. And in fact, several of those rules, where they have been established merely by usage, without express stipulation, are frequently altered by a kingdom or state, without consulting with, or giving previous notice to the neighbouring powers.

16. There are certain laws of nature of the greatest importance to society, the observance of which is not enforced by the positive law of any country; either because they consist in the affections of the mind, which are beyond the reach of earthly judges; or because the wisest and best-constituted policy cannot settle their measures and degrees by special rules. Of this sort are benevolence to our neighbours, charity to the poor, protection of innocence, gratitude for benefits received, temperance, &c. All these are left entirely on the conscience, without any aid from human penalties; and are therefore said to have God alone for their avenger.

17. The law of nature, of which God is the author, must needs be perfect in its kind. The depravity of mens minds, however, often leads them to pervert that law in its application to particular cases. Hence it hath become necessary for the supreme power in all civilized states, to superadd certain rules to it for explaining its true extent, where that appears doubtful, and adapting it with some degree of precision to the several exigencies of the state; that so all the members of the community, instead of being left to their own partial reasonings, may be tied down by a set of laws that speak the same uniform language to every individual. To illu-

strate this by an instance or two : By one of the laws of nature, fathers are bound to leave on their death some part at least of their substance to their children ; and by another, every man has a right to dispose of his property to whom he will : that neither of those laws may be stretched beyond its just limits, it is highly expedient that special rules be prescribed, for fixing the particular proportions of the father's estate which he is disabled from leaving to strangers to the prejudice of his own issue, that so every member of the state may be taught to give to both of these laws their due weight. Again, it is without doubt a breach of the law of nature, to take the smallest advantage of the seller's necessity in a contract of sale ; but as the greatest human sagacity cannot discover whether the seller hath done so, unless in so far as outward circumstances may make it presumable, it was highly expedient for the supreme power to fix a standard, as has been done by most states, by which judges might presume, whether the bargain was fair or not.

18. That law which is thus superadded to the law of nature by the legislative power of any sovereign state, is called *civil*, and sometimes *positive*, or *municipal*. It hath the name of *civil*, because it is enacted by a *civitas*, or state. It is styled *positive*, in contradistinction to that law which is impressed on us by nature itself, without positive enactment. The appellation of *municipal* was, in the original acceptation of the word among the Romans, proper to such laws as obliged *municipia*, or dependent states, which, though they could of themselves claim no right of legislation, being subject to the Roman power, yet had certain magistrates invested with a limited power of enacting laws that were binding upon their own community, *l. 21. § 7. l. 25. Ad munic. ; l. 6. De decr. ab ord. fac.* But that word hath by degrees been drawn to signify also laws enacted by sovereign states.

19. The right of legislation is vested in the sovereign alone, or the supreme power of the state ; for none other but the supreme power has a right to exact our obedience. No independent state can subsist without a supreme power, or a right of commanding in the last resort ; and supreme power cannot refrain itself. No enactment, therefore, of the legislative power in one age, can fetter that power in any succeeding age : for the legislature of every age, as it has the unlimited power of *making* laws, must have the same right of *abrogating* or *altering* former laws ; otherwise it would cease to be supreme : and from hence the rule arises, *Posteriora derogant prioribus*, *l. 4. De const. princip.* Where the supreme power resides in one person, as in an absolute monarchy, the sovereign is the only lawgiver : if it be vested jointly in the king and the states of the kingdom, as in Britain, the people cannot be bound by any enactment in which the king and the states do not concur. A nation subject to the dominion of a foreign prince, can have no supreme power within itself ; and consequently no right of legislation, except in so far as the state on which it depends has granted a permission, *l. 9. De leg. Rhod.* Such was the case of the Roman *municipia*, and other tributary kingdoms ; and such also seems to be the case of Ireland, with respect to Britain. But this doctrine cannot be justly applied to feudatory kings or princes ; who, though they are bound to do homage for their crowns to the sovereigns of whom they are holden, have nevertheless an unlimited right of prescribing laws to their own subjects, so long as they take care not to forfeit that right by any feudal delinquency.

20. The supreme power may not only superadd, but even circumscribe or fet bounds to the law of nature, without violating its authority. On this head, doctors generally distinguish between the preceptive and the concessive

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concessive law of nature. By the preceptive is meant, that which the law of nature either expressly commands or forbids. Concessive is that which gives a man a right, without obliging him to exercise it. What the law of nature has commanded, cannot be forbidden, or even dispensed with, by positive law; and in like manner, what it prohibits, cannot be commanded, or even permitted, by human authority. The law of nature being indeed the command of God, to whom all his creatures owe absolute obedience, no earthly lawgiver, who is himself subject to that law, hath a right of abrogating or controlling it. Obedience therefore to any enactment which is plainly adversary to the preceptive law of nature, is rebellion against God. But where the law of nature is barely concessive, bestowing upon a person a right of acting, without obliging him to make use of it, he may not only give it up by compact, but, by entering into civil society, he is understood to vest the legislature with a power of taking it from him, either in whole or in part, if the common interest shall so require. Hence it may be concluded, that things which natural law has left mankind at liberty either to do or to forbear, and these only, are the matter of positive law; which is therefore defined by Aristotle, that which treats of things which were indifferent before the enactment, but become necessary afterwards. This points out the true reason why positive law is not, like the law of nature, immutable, but may, and indeed in many cases ought, to be altered or abrogated, according to the changes wrought by time on the riches, commerce, or manners of the people.

21. Though the laws of nature require no formal or external notification, *supr.* § 7. positive law, which, however agreeable it may be to reason, is not discoverable by it, cannot possibly be known, nor consequently serve for a rule of life, till it be promulged to those whose conduct it is to regulate, *l. 9. C. De legib.* After the law is promulged, no pretence of ignorance can justify the breach of it; according to the rule, *Ignorantia juris neminem excusat, l. 9. pr. et § 3. De jur. et fact. ign.* And though this may bear hard upon such individuals as, from their way of life, have no access to be apprised of it, even after its promulgation; yet if any such excuse were to be admitted, it would be pleaded by every transgressor.

22. Laws are given as a common rule of life for the whole people of a kingdom or state, and hence they are called *communia præcepta*, and *communes reipublice sponfiones*. Nor are they obligatory only upon the natural subjects of the state by birth, but likewise upon those who are merely temporary subjects, by residence: for the civil rights, even of foreigners, must be determined by the laws of that country where they reside for the time. From this property of law it follows, that rules made only for one person, or for a particular corporation, or body of men, are not proper laws; *l. 8. De legib.* Of this kind are gifts, pardons, exemptions, monopolies. They are commonly called *privileges*, *privæ leges*; and judges are not obliged to take notice of them if they are not pleaded upon in judgement by the party interested.

23. If laws are given for a rule of life, they must consequently look forward, and can regulate future cases only; for past actions are not in our power, and so admit no rule. Sir George Mackenzie, § 11. *b. t.* excepts from this conclusion laws which, without any new enactment, declare what was formerly law. But that exception is improper: for the only purpose of a declaratory law is, to explain the meaning of a prior statute in a doubtful point; so that it has no retrospect. It is the first law which obliges: the last does no more than give to that first a just interpretation; and it is included in the notion of interpretation, that it must draw back to the date of the law interpreted.

24. It

24. It has been doubted, whether statutes which, without either commanding or forbidding, simply allow persons to do certain things, are proper laws; because all laws lay by their nature an obligation upon those to whom they are directed; whereas, in actions which the law declares indifferent, no necessity is laid upon any one to act. Nevertheless, even permissive laws imply a positive right in certain persons to have or enjoy the use of certain things, which necessarily draws after it a prohibition that no other shall hinder or obstruct the exercise of it; so that a law of this sort, though it lays no obligation on him to whom the permission is granted, is still a prohibitory law as to others.

25. Civil law is either barely such, mere civil, or mixed. That is barely civil, which derives its whole force from the arbitrary will of the lawgiver, without any obvious foundation in nature; as the Roman laws of adoption, and most of those which have been calculated for the forming and perfecting of the feudal system. Mixed civil law is that which is plainly founded in the law of nature, but which, by adding to, or varying from, that law, gives a particular modification to things which nature had left undetermined. Of this sort are the laws of marriage, tutory, testaments, contracts, &c. which are, by the peculiar civil law of each state, clothed with proper forms, that their use may become fixed and certain to the whole community.

26. Positive or civil law may be also divided into divine and human. God himself delivered to the Jews a law, distinct from the law of nature, not only in relation to their ritual observances, but with respect to their public polity, and private right, the last of which is called the *judicial law of Moses*. Some have affirmed, that this law, being enacted by an infallible lawgiver, ought to be copied, in so far as it goes, by every other state: and it must be admitted, that no part of it is contrary to the law of nature; for God, who is the author of both, cannot contradict himself. But no positive law, let it be ever so agreeable to the law of nature, can oblige those to whom it is not directed. The ordinances of the Jewish law, in as far as they are the necessary result of reason, and so make part of the preceptive law of nature, must without doubt be binding universally; not because God prescribed them as a rule to the Jews, but because natural law had enjoined their observance antecedently to all enactment. But whatever in that law is adapted specially to the Jewish constitution, or framed with a particular view to the genius of that people, may be disregarded by the legislature of other states, without any want of reverence to its great author. And indeed most of the Jewish laws will be found, on strict examination, to be either wholly or in part of this last kind.

27. Among all the systems of human law which now exist, the Roman so well deserves the first place, on account of the equity of its precepts, and the justness of its reasonings, that where-ever the civil law is mentioned, without the addition of any particular state, the Roman law is always understood by way of excellency, though that epithet is alike applicable to the laws of every state. Great weight therefore is given to it, not only in Scotland, of which afterwards, but in most of the nations in Europe. In England, it is of considerable authority in the courts of chancery, admiralty, and arches; and several axioms of their common law are borrowed from the old Roman juriconsults. This law was from an immense bulk brought down to a moderate size, and reduced into method, by the Emperor Justinian, who, in the year 529, caused compile an institute of it, under the name of the *Pandects* or *Digests*; and immediately after an abridgement or breviary, which he called *Institutions*. In 529, he published the *Code*, or a collection of the constitutions of the Emperors his predecessors,

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from Adrian down to his own time ; and these, joined to such as were afterwards enacted occasionally by himself, and a few of his successors, called the *Novels*, make up the body of the Roman law. Upon the repeated inroads made into Italy soon after Justinian's death, by the Goths, Lombards, and other barbarous nations, the Roman law declined fast in its authority, and the books of it either suffered the fate of war, or lay concealed in private libraries, till towards the middle of the twelfth century, when a copy of the Pandects having been found at Amalphi, that law was again publicly taught by authority in the schools of Italy, and from thence quickly spread over all the nations of Europe.

28. Soon after the recovery of the Pandects at Amalphi, a body of law began to be composed, under the direction of the Bishop of Rome, styled the *Canon law*, from *canon*, a rule, the name given to the ordinances of churchmen assembled in councils or synods, to distinguish them from the constitutions of temporal sovereigns. It was formed to conciliate authority to that extensive jurisdiction which the Pope had usurped over the civil rights as well as the consciences of men ; and it contains rules, not only for informing the conscience, but for the fixing of private property, civil as well as ecclesiastical. It is compounded, on the one hand, of beautiful principles of equity, chiefly borrowed from the Roman law ; and, on the other, of a collection of absurd canons and rescripts, extolling church-authority above the highest secular powers. The body of the Canon law consists, *first*, of the *Decretum*, a collection made by Gratian, a Benedictine monk, after the middle of the twelfth century, drawn from the opinions of the fathers, popes, and church-councils, in imitation of the Roman Pandects, which were gathered from the opinions of their juriconsults ; *2dly*, The *Decretalia*, which were collected by Pope Gregory IX. near a century after, from the decretal rescripts or epistles of the Popes, as Justinian's code was from the Imperial constitutions ; to which decretals new collections were added by several succeeding popes. It may be observed, that when mention is made of the *Common law* in our statutes, the Roman is understood, either by itself, 1540, c. 69. ; 1585, c. 18. ; 1587, c. 31. or in conjunction with the Canon law, 1540, c. 80. ; 1551, c. 22. When the expression is fuller, the *Common laws of the realm*, our ancient usages are meant, whether derived from the Roman law, the feudal customs, or whatever other source, 1503. c. 79. ; 1584. c. 131. &c. The epithet of *common law* is used by English lawyers nearly in this last sense, to denote their most ancient customary law anterior to statute.

29. Positive law may be divided into public and private. The public law is that which hath more immediately in view the public weal, and the preservation and good order of society ; as laws concerning the constitution of the state, the administration of the government, the police of the country, public revenues, trade and manufactures, the punishment of crimes, &c. Private is that which is chiefly intended for ascertaining the civil rights of individuals. The private law of Scotland is to be the proper subject of this treatise ; to which a general sketch of that part of the public law that relates to crimes shall be subjoined in the last title.

30. The municipal law of Scotland may be divided, after the example of the Romans, into written and unwritten. Written or statutory law is enacted by the express authority of the supreme power ; and is always reduced into writing. Unwritten or customary law derives force wholly from the legislature's tacit or presumed consent ; and is generally transmitted from one age to another, by oral tradition and universal usage. Where the customary law of a state is by the sovereign's order collected into one body, to preserve its memory the more incorrupt, and confirmed by him,

it becomes thereby the explicit enactment of the supreme power, and consequently makes part of the written law of that state. Instances of this occur in the customary laws of Normandy, Britany, and some other provinces of France, which, after several alterations and amendments made by commissioners appointed for that purpose by the French King, have been confirmed by the royal authority, and now make up the body of the written law of these provinces.

31. How far back statutes have been enacted in Scotland, cannot now be certainly known, on account of the loss of our public records, the most valuable of which were carried off into England, first by Edward I. and afterwards, by an order of Oliver Cromwell, about the middle of the last century. Those laws which are said by Hector Boece, and other Scottish historians, to have been passed before the reign of Malcolm III. surnamed *Canmore*, are of suspected credit. What appears to be the only genuine remains of the statutory law of this country hath been preserved by Sir John Skene, and published by him in the beginning of the last century, by licence of parliament; *Index to unprinted acts of 1607*, N^o 31. The statutes of Malcolm II. surnamed *Mackenneth*, which stand first in that collection, betray themselves, as the learned Sir H. Spelman observes, to be the product of a later age, by the several vocables, and titles of magistrates and public officers therein mentioned, which were not known in Scotland till after the reign of that king. Thus our antiquary Dempster admits, that we were strangers to the title of *Baro*, till the reign of Malcolm Canmore. Thus also *Seneschallus*, *Balivus*, *Coronator*, *Constabularius*, are all words of Norman original, which were not used in England before the Norman conquest, and which cannot with any probability be supposed to have been sooner imported into Scotland. Spelman therefore conjectures, that the name of Malcolm II. may have been erroneously transcribed by copiers for Malcolm III.

32. The treatise of *Regiam Majestatem*, to which Skene's whole collection owes its title, has given rise to two questions; Whether that composition be of Scottish or of English original? and, Whether it had at any period of time, or now hath, the authority of law? Sir Thomas Craig, in his treatise of Feus, *lib. 1. dieg.* 8. § 11. pronounces positively, though he speaks elsewhere with greater diffidence, that it is but a transcript of Glanville's book of the laws of England, written in the reign of Henry II. which was dressed up by a Scottish lawyer in a new form, and with such alterations as might make it pass for an institute of Scottish law. But it is the more probable opinion, that it was originally a Scottish performance, compiled at the desire of David I. as its preface bears. That a system of the laws of Scotland was compiled by the order of David, is clearly proved by an ordinance of Edward I. of England, preserved by Prynne in his collections of that king's reign, p. 1055, directing his lieutenant of Scotland to assemble the principal persons of that kingdom, to read over to them the laws of David, and to amend such of them as appeared contrary to reason. That the *Regiam Majestatem*, which, together with the *leges Burgorum*, contained the laws of David, was the very treatise referred to in that royal ordinance, appears extremely probable, *first*, From several old manuscripts of it yet extant, one of which, Sir James Dalrymple, *Hist. Coll.* p. 147. concludes, from the hand-writing and other characters, to have been written in the reign of Robert I. which could not be many years posterior to the aforesaid ordinance of Edward. *2dly*, From several references made to the laws of David, in the statutes of William, who began his reign about twelve years after the death of David, and in those of Alexander II. the son of William; which references are found in the books of the Majesty; compare

St. Gul. c. 1. with *Reg. Maj. l. 1. c. 16.* and *Stat. Alex. II. c. 12.* with *Reg. Maj. l. 1. c. 20.* Lastly, It may be observed, that the acknowledged statute-book of Scotland, from its earliest period, mentions the books of the Majesty as of Scottish composition; and sometimes dignifies them with the appellation of *the King's laws*, 1425, *c. 54.*; 1471, *c. 48.*; 1487, *c. 115.* Lord Bankton observes on this last argument, that mention is made in 1429, *c. 114.* of six heads which are by the law of Scotland essential to the execution of briefs, and that these are distinctly recited in *Reg. Maj. l. 1. c. 6. § 8. et seqq.*; and are to be found nowhere else.

33. It has been objected to this opinion, That it draws after it a consequence hardly admissible, that the English law is borrowed from that of Scotland, *Spelm. Gloss. v. Lex.* But the only just consequence deducible from it is, that Glanville, the author of the English institute, happened not to write his book till after the publishing the books of the Majesty; and that that writer extracted much from the last-mentioned treatise, which he transfused into his own. This may be true, without derogating from the antiquity of the laws of England: and considering the strong resemblance between the laws of the two kingdoms at that period, it was natural for Glanville to pick out what he thought proper for his purpose, from a treatise lately published on a similar subject; more especially if a fact be attended to, which is recorded by Hoveden, and several other English historians, that Henry II. in whose reign Glanville composed his abridgement, was educated with David of Scotland, his great-uncle, till his age of sixteen, and instructed by him in matters of government.

34. It has been also objected, That the books of the Majesty, which have been in part formed upon the model of Justinian's Institutions, could not be written so early as the reign of David, who died *anno 1154*, within sixteen years after the recovery of the Pandects at Amalphi. But, *first*, we learn from Giannoni's history of Naples, *lib. 11. c. 2.* that notwithstanding the destruction of the most valuable books, during the invasions into Italy by the barbarous nations after the sixth century, not only copies of the Pandects escaped from the general devastation, as appears by the frequent references made to them by Ivo of Chartres, in his epistles, 46. 69. &c. but that Justinian's Institutions were also preserved in Italy by Abbot Desiderius in his library of Cassino. *2dly*, Theobald Archbishop of Canterbury, who was consecrated, according to the most ancient English historians, *anno 1138*, near sixteen years before the death of David, brought into England the books of the Roman law soon after his consecration, *Jo. Sarisb. Polycrat. l. 8. c. 22.*; and the study of that law was so general in the English schools in 1149, that it was taught in them that year publicly by Rogerius Vacarius, a Lombard lawyer, to a numerous audience both of rich and poor, *Chron. Norm. inter Duchesne. Hist. Norm. script. antiq. p. 983.*

35. A third objection, That the *Regiam Majestatem* hath a strain of English law and phrase running through it, though it were true, would prove no more, than that that treatise had been interpolated by transcribers. But the objection is not grounded on fact. The only two passages in the book brought to support it, are *l. 2. c. 27.* which makes holding by foccage one of the Scottish feudal tenures; and *l. 2. c. 51.* which affirms, That by the law of Scotland, children cannot be legitimated by the subsequent marriage of the parents. As to the first, it appears by *St. 2. Rob. 1. c. 8.* that foccage was a holding then known in Scotland; and there is a charter now in the author's possession, which though it bears no date, hath the appearance of having been written above four centuries ago, of lands holden in *libero foccagio* in favour of Duncan de Strivelyn. As for the second, it is evident that the doctrine of legitimation *per subsequens matrimonium*, was anciently

ciently rejected in Scotland as well as in England, not only from the *Reg. Maj. l. 2. c. 51. § 1. 2.* but from the old law-book *De iudiciis*, c. 24. and a charter of James II. to the Earl of Caithness, preserved in Hay's Vindication of Elif. More, p. 6. This last objection against the Scottish original of the *Regiam Majestatem*, is ingeniously retorted against the objectors, in an argument drawn from the law of deathbed by Lord Bankton, vol. i. p. 30.

36. The second question still remains, What authority the books of the Majesty, and the other tracts in Skene's collection, have had, or now ought to have, in the courts of Scotland? The *Regiam Majestatem* is said, by its preface, to have been written at the command of King David, and with the consent of the people and clergy; and though no confirmation by the legislature now appears, our later statutes have expressly acknowledged it for the ancient law of Scotland, *supr. § 32.* The authenticity of the Borough-laws, and of the *Affisa Regis Davidis*, which are universally agreed to have been enacted by the same David, and of the statutes of William, Alexander II. David II. and the three Roberts, hath never been called in question; so that these must have had, when they were first enacted, the authority of law. The remaining tracts in that collection were either written by private hands, as *Quoniam attachiamenta, Iter camerarii*, &c. or by magistrates of boroughs, as *Statuta gilde*; and therefore have had at no time any proper authority. But the whole of Skene's collection, even that part of it which was originally authoritative, gradually lost its force, because not having been preserved from interpolation by any public record, the copies, in passing through different hands, had been in many places corrupted. The legislature, with a view to give authenticity to such of those remains as should be found to deserve it, directed three several committees to be appointed for revising and correcting them, who were to make their report to parliament, 1425, c. 54.; 1487, c. 115.; 1633, c. 20. But as no such revision or report appears to have been made by any of the three, and far less any ratification by parliament, it may be concluded, that none of these remains ought to be received as of proper authority in the courts of Scotland. Nevertheless they may be produced, not only for illustrating, but even in proof of our ancient customs. They are also of excellent use towards understanding the history and gradual progress of our law; and consequently may furnish a lawyer with proper arguments, where statute-law is silent, and the more modern practice doubtful.

37. Under statute-law therefore, in its proper and strict sense, those acts only are included which passed in the reign of James I. of Scotland, and from thence down to the union of the two kingdoms in 1707; and such of the British statutes, enacted since the Union, as concern this part of the united kingdom. The Scottish acts were, by our most ancient usage, to be proclaimed in all the county-towns and boroughs of the kingdom, and properly notified to barons, and their tenants, at baron-courts, 1425, c. 67.; 1457, c. 89.; but after they were printed in consequence of 1540, c. 127. that custom, which was no longer necessary, fell into disuse by degrees; and at last it was enacted by 1581, c. 128. that the publication of laws at the market-cross of Edinburgh, should be deemed sufficient notification, and that they should be obligatory over the whole kingdom forty days after. British statutes require no formal promulgation to make them known; either because the printing of them is truly a publication, or because every subject is, by a maxim of the English law, a party to them, as being present in parliament either by himself or his representative. But still, before a British statute becomes obligatory, a reasonable time must be allowed for carrying the account of it from the parliament to their several constituents; otherwise such statute, contrary to the common property of laws,

laws, would have a retrospect. In the beginning of the reign of Queen Mary, the acts of the five Jameses, and her own, were, by her authority, printed from a copy subscribed by the clerk-register; and in like manner were those printed which passed in the remaining part of her reign, and in that of James VI. down to about the year 1586 or 1587, all in the black or Saxon character, from which that impression has got the name of the *Black acts*. Several statutes contained in that first edition were left out in all the later ones; most of them because they were private acts, and a few from reasons of state.

38. Sir George Mackenzie hath asserted, both in his *Institutions*, and at greater length in his *Jus Regium*, that this written law of Scotland was truly enacted by the King alone; that the parliament did no more than consent; and that therefore the Kings of Scotland had the sole right of legislation. But, 1st, His admission, that the consent of parliament was required towards the passing of laws, imports an acknowledgement, that the King could not by our constitution enact laws by himself. 2^{dly}, Though no records have been preserved in Scotland, old enough to furnish materials for an account of parliaments upwards to their first institution, it may reasonably be concluded, that ever since the establishment of the Gothic polity in Europe, we have had parliaments or national assemblies, constituted with the same powers that were formerly vested in the estates of France, Poland, Spain, Sweden, and Denmark, and of England under the Saxons. 3^{dly}, As far back as records have been preserved, the style of our statutes, and the forms of their enactment, prove them to have been the joint deeds of the King and the three estates. The statutes ascribed to Malcolm Mackenneth, which are admitted to be the oldest remains of the law of Scotland, appear to have been so many grants by the barons to the King, and accepted by him, *c. 1. § 3.; c. 2. § 1. &c.* The first words of the first statute of William are, *Placuit Regi et concilio suo*; and of the 9th, *Rex statuit per commune concilium*: and whoever takes the pains to turn over the other old statutes published with the books of the Majesty, and even our later acts, will find numbers of them in the same or a stronger style, *St. Alex. II. c. 1. 2. 4.; St. Dav. II. c. 28. 29.; 1424, c. 7. 14. 46.; 1437, c. 2. &c.* When the lesser barons are enjoined to send commissioners to parliament from each county, 1427, *c. 102.* power is given to those commissioners, not barely to consent, but to hear, treat, and finally to determine in all matters to be propounded there; and accordingly bills and overtures were, by the usual forms, debated, amended, and at last resolved in parliament, before the King interposed either by his assent or his negative.

39. Private acts were nothing but grants by the parliament, or parliamentary ratifications of grants made by the crown, in favour of particular persons or corporate bodies. But none of those were proper laws. For, 1st, They required no publication. 2^{dly}, Ratifications, by their nature, carry no new right: they barely confirm that which was formerly granted, without adding any new strength to it by their interposition. 3^{dly}, As, by the forms of parliament, no person was called as a party to the passing of an act, however deeply he might have been interested in it, private acts were carried through *periculo petentum*, and could not hurt third parties who were not heard on their interests, according to the rule, *Res inter alios acta aliis non nocet*. They were therefore open to reduction by the court of session, 1567, *c. 18. N° 1.*; and in almost all the Scottish parliaments holden since 1606, the last act of the sessions, intitled, *Act salvo jure cujuslibet*, appears to have been enacted for the single purpose of securing third parties against the effect of private acts and ratifications.

40. The written law of Scotland consists, 2^{dly}, Of the acts of federunt,
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which are ordinances made by the court of session, for regulating the forms of proceeding to be observed in all actions or matters which may be brought before them. These are not indeed laws in the strict sense of the word, because they are not enacted by the supreme power; but their obligatory force is as strong as if they had the express sanction of parliament; for the court of session have a delegated power from the parliament, to make such statutes as they think proper for the ordering of process and the expediting of justice, 1540, c. 93. The powers committed by this statute to our supreme court are precisely limited to the forms of proceeding, which may be the reason why the parliament hath in several instances ratified acts of federunt, where it might seem that the court had exceeded their powers, 1579, c. 75.; 1584, c. 138. 139.; 1621, c. 18. &c. But it must be acknowledged, that many acts of federunt have been made on matters of right, which, without any aid from the authority of parliament, the nation hath acquiesced in universally. Such acts import no more than a public notification of what the judges apprehend to be the law of Scotland, which therefore they are to observe for the future as a rule of judgement. Where an act of federunt is confirmed by an inveterate custom and acquiescence of the community, such custom constitutes law of itself in the most proper acceptation of the words; *vid. infr.* § 43. Under the same class with the acts of federunt may be ranked the regulations made in the years 1695 and 1696, concerning the forms of proceeding in the session, which are subjoined to the first volume of the printed acts of federunt. These were the ordinances of a commission specially authorised by 1693, c. 34. to make regulations, to be obligatory, after they should be approved by the King, as these were.

41. Sir George Mackenzie, § 7. *b. t.* considers the Roman law as the written law of Scotland: Lord Stair, on the other hand, rejects its authority, *b. i. t. i.* § 12. Without offering any precise opinion upon this point, an observation or two drawn from our statutes may not be improper. *First*, The powers exercised, both by our sovereigns and judges, have been justified by parliament on this single ground, That they were conformable to the Roman law. Thus the revocations by our kings, of deeds granted during their nonage, are expressly founded on the right competent to minors by the Roman law, 1493, c. 51.; 1540, c. 70.; 1587, c. 31. *vers.* 9. Thus also the trying of treason after the death of the traitor was approved by parliament, on account of its conformity to the *Common law*, though there was no special provision of the realm made thereupon, 1540, c. 69. *2dly*, A special statute was judged necessary, soon after the Reformation, for abrogating such of the laws, either Civil or Canon, as were repugnant to the Protestant doctrine, 1567, c. 31.; and the abrogation of a law is generally understood to import, that the law abrogated had formerly been in force. These observations prove at least, that great weight is to be laid on the Roman law in all cases not fixed by statute or custom, and in which the genius of our law will suffer us to apply it: and as we have few statutes in the matter of contracts, transactions, restitutions, servitudes, tutories, and obligations, the knowledge of it must be singularly useful in determining controversies arising from those heads of the law. Yet where any rule of the Roman law appears to have been founded on a subtilty peculiar to their system, it were absurd to pay the smallest regard to it.

42. The Canon law must have been at least of as great authority in Scotland as the Roman before the Reformation. That law had originally no proper authority, in instances regarding civil property, unless where the Pope was temporal sovereign. Therefore all other nations, even those who acknowledged the see of Rome, were at liberty either to reject it entirely, or to receive

receive it with such limitations as they judged expedient. In the course of time, however, it became the law of Scotland in most articles of private right, civil as well as ecclesiastical. This proceeded from the extensive jurisdiction of the clergy; who, to make their court the more effectually to the Roman Pontiff, used that law as the rule of their judgement. The statute last cited, 1567, abundantly proves the regard that had been paid to it in times of Popery; but since the Reformation it has declined fast in its authority, so that it is now little respected, except in questions of tithes, patronages, and a few articles more of ecclesiastical right, where the canons are consistent with Protestant principles.

43. Unwritten law is that which, without any express enactment by the supreme power, derives force from its tacit consent; which consent is presumed from the inveterate or immemorial usage of the community. If the community be in the form of a republic, it can make no difference, whether the will of the people be declared by formal enactment, or by acts of approbation, *l. 32. § 1. De legib.*; and even in absolute monarchies, the sovereign is presumed to acquiesce in what has been long practised in his dominions, if he do not, by some positive declaration, testify his dislike, or put a stop to it. The authority therefore of customary law is not grounded on any presumption, that what has been long observed must be just, as some lawyers chuse to speak; for that presumption is alike applicable to written and unwritten law; but both one and the other derive their coercive force from this, that they are the ordinances, either express or implied, of the supreme power.

44. The most essential articles of our customary law are so interwoven with our constitution, that they are notorious, and so require no evidence to prove them; as, the laws of primogeniture and deathbed, the order of legal succession, the legitim of children, the husband's courtesy, and the widow's terce: but where any later usage, which has been gradually gathering strength, is pleaded upon as law, the antiquity and universality of that usage must be proved to the judge, as any other matter of fact; for all customary law is founded on long usage, which is fact. No precise time or number of facts is requisite for constituting custom; because some things require in their nature longer time, and a greater frequency of acts, to establish them, than others. Neither is it necessary for this purpose, as some writers have affirmed, that the custom be declared by the previous sentence of a judge: for no court of justice can constitute law; and therefore any sentence, declaring the customary law, is of itself a clear proof that the law was constituted before.

45. Custom, as it is equally founded in the will of the lawgiver with written law, hath the same effects. Hence, as one statute may be explained by another, it may be also explained by the uniform practice of the community; for which reason custom is said, *l. 37. De legib.* to be the surest interpreter of law. Hence also, as a posterior statute may repeal or derogate from a prior, so a posterior custom may repeal or derogate from a prior statute, even though that prior statute should contain a clause forbidding all usages that might tend to weaken it: for the contrary immemorial custom sufficiently presumes the will of the community to alter the law in all its clauses, and particularly in that which was intended to secure it against alteration; and this presumed will of the people operates as strongly as their express declaration. No statute can however be repealed by mere non-usage or neglect of the law, though for the greatest length of time; for non-usage is but a negative, which cannot constitute custom: there must be some positive act that may discover the intention of the community to repeal it. Where the usage contrary to a
statute

statute hath not yet acquired strength enough to abrogate it, the King and council may by proclamation prohibit the farther observance of such usage, and thereby restore the statute to its first vigour. This power in custom to derogate from prior statutes has been confined by most writers to those concerning private right; and it hath been adjudged once and again, that laws which regard the public policy cannot fall into disuse by the longest contrary usage, *Jan. 27. 1681. Jack; Feb. 1729. Smollet.* But the last of these decisions, by which the election of a provost had been set aside, because he did not reside in the borough, according to the direction of our old statutes, was reversed upon appeal, *Feb. 19. 1730:* and it now appears to be the opinion of our supreme court, that public laws concerning the elections of magistrates and counsellors of boroughs may fall into disuse; and that the sets of the several boroughs, established and confirmed by the general convention of boroughs, ought to be the rule in determining such questions, unless where the sets are altered by a contrary immemorial custom. See *New Coll. ii. 7.*

46. Our customary law is either universal, which obtains over the whole kingdom, or local, which prevails only in particular counties or boroughs. There is hardly an instance of a local custom in any county, but in the udal right proper to the stewartry of Orkney and Zetland, of which afterwards. Certain usages are practised in particular boroughs, relating to the entry of heirs, resignations, warnings, &c. which make part of the customary law of those boroughs, but have no authority elsewhere.

47. An uniform tract of decisions of the court of session, *i. e.* of their judgements on particular points, either of right or of form, brought before them by litigants, and anciently called *Prædicts*, is by *Mackenzie*, § 10. *b. t.* accounted part of our customary law. Thus far may be admitted, *1st*, That their more ancient decisions, from which it appears that any particular usage had then acquired the force of law, may be properly brought in proof of that custom, if it have not afterwards lost its authority, by an immemorial and universal usage to the contrary; and, *2^{dly}*, That great weight is to be laid on their later decisions, where they continue for a reasonable time uniform, upon points that appear doubtful, *l. 38. De legib.* But they have no proper authority in similar cases; because the tacit consent, on which unwritten law is founded, cannot be inferred from the judicial proceedings of any court of law, however distinguished by dignity or character; and judgements ought not to be pronounced by examples or precedents, *l. 13. C. De sent. et int.* Decisions therefore, though they bind the parties litigating, create no obligation on the judges to follow in the same track, if it shall appear to them contrary to law. It is however certain, that they are frequently the occasion of establishing usages, which, after they have gathered force by a sufficient length of time, must, from the tacit consent of the state, make part of our unwritten law. What has been said of decisions of the court of session is also applicable to the judgements pronounced upon appeal by the house of Lords: for in these that august court acts in the character of judges, not of lawgivers; and consequently their judgements, though they are final as to the parties in the appeal, cannot introduce any general rule which shall be binding either on themselves or inferior courts. Nevertheless, where a similar judgement is repeated in this court of the last resort, it ought to have the strongest influence on the determinations of inferior courts.

48. To conclude this account of the municipal law of Scotland, it must be observed, that, notwithstanding the treaty of union in 1707, by which the kingdoms of England and Scotland were made one nation, under one king and one parliament, all the laws of Scotland concerning private
right,

right, whether statutory or customary, are reserved entire, not to suffer any alteration, but for the evident utility of the subject, 1707, *c. 7. art. 18.*

49. A statute may be divided into the rubric, the preamble, and the statutory part. The rubric, *i. e.* the title, is so called, because it was written anciently in red letters. Where the title of a statute is either framed by the legislature itself, or hath received its tacit approbation in any succeeding enactment, it ought to be accounted part of the statute; and of course an argument may be properly used, in that case, *a rubro ad nigrum*, from the title to the act itself: but as the rubrics of most of the Scottish acts were framed *ex ingenio* of the clerk-register, great caution is to be adhibited in applying this rule to practice, *Mack. Obs. on 1424, c. 23.* The narrative or preamble is that part of an act which recites the inconveniencies that had attended the former law, and the reasons of a new enactment. Though the consideration of these may enable a judge to discover the general intention of the statute, yet if he make use of the preamble for fixing its true latitude and extent, he will probably be misled; for most preambles either fall short of the mark or go beyond it. Sometimes a preamble picks out two or three of the most specious cases for justifying the enactment, though it be meant to comprise under the act others that are not specially mentioned. On the contrary, it may happen, that a law ought to receive a strict interpretation, though the lawgiver hath not thought fit to assign any reason in the preamble for limiting it, *Bacon, De augm. sci. lib. 8. c. 3. aphor. 70.* What therefore is to be chiefly regarded in the interpretation of a statute is the statutory part, or the enacting words.

50. On this head it may be premised, *first*, That statutes can in no case be explained into a sense which infers injustice or absurdity, or which, if admitted, would render them of none effect; for laws enacted by the wisdom of a nation, must be presumed to be agreeable to the immutable laws of nature, consistent in themselves, and made for some salutary purpose, *l. 19. De legib.* *2dly*, That properly there is place for interpretation with regard to those statutes only, the words of which are either obscure, or admit of two different senses, *arg. l. 25. § 1. De legat. 3.* Where the words of a statute are incapable of a double meaning, they must be explained in that only sense which they can bear, whatever hardship this may draw after it, *l. 12. § 1. Qui et a quib.* By the precise words in which the statute is conceived, every interpretation is excluded, other than that which necessarily arises from the words themselves; and a judge who should, under the pretence of equity, explain a law in a sense inconsistent with the words, would assume the character of a lawgiver rather than of a judge.

51. The interpretation of laws ought not to depend on critical learning, or the subtle distinctions of schoolmen: for they are directed to the whole body of the people; and therefore ought to be construed in that sense which the words most obviously suggest to the understanding, *l. 67. De reg. jur.*; otherwise the lower part of mankind would be obliged by laws, which, for want of acquired parts, they are not able to comprehend. As a consequence of this, no statute ought to be explained figuratively, where the proper meaning of the words is as commodious, and equally suited to its subject. This rule holds more especially, where the statute treats of matters concerning which persons do not usually advise with lawyers, but trust to their own judgement; for there the lawgiver is presumed to speak *ad captum vulgi*, in a popular style, *Bacon, ibid. aphor. 68.* But where any term of law which hath a known legal signification, occurs in a statute, it is to be interpreted, not according to the popular use of the word, but in

its legal sense ; for lawgivers, when they make use of technical words, are presumed to enact in the style of law.

52. Where the words of a statute are dark, the obscurity may be removed, and the true meaning of the law discovered, by comparing them with other parts of the same statute, where the lawgiver hath expressed his mind more clearly. It is therefore recommended to judges, *l. 24. De legib.* to have the whole tenor of the law under view, and not to cull out detached words or sentences from it, which may pervert its true meaning. Former statutes also are of considerable use in interpretation ; for posterior laws ought in doubtful articles to be explained most agreeably to former enactments on the same subject, *l. 28. De legib.* If there be none, the usage of our own country, and the laws even of neighbouring kingdoms, may throw light on the difficulty. Lastly, Doubtful laws ought to receive that interpretation which suits best with the intention of the lawgiver, *l. 17. 18. ibid.* Indeed to this every rule of interpretation delivered in systems may be reduced ; for they are all drawn, either more immediately or more remotely, from his presumed will. Where therefore the strict letter seems contrary to the spirit of the law, or to equity, judges ought not to regard the proper or received signification of the words, so much as that meaning which appears most consonant to the design of the law.

53. It may happen, that though the words of a law are plain, yet they are at the same time so general, as to comprehend certain particulars which it was not meant should fall under it. At other times the expression may appear confined to particular persons or things, when yet it was designed that it should reach to others not specially mentioned. Human knowledge being confined within so narrow limits, it is impossible to fix with precision all possible cases to which laws ought or ought not to be applied. The most perfect system of laws therefore must be subject to an equitable interpretation ; sometimes ample, so as to give the words of a statute the whole extent of which they are capable, where extension is not plainly excluded ; and sometimes restrained beyond what the true propriety of them admits. A strict interpretation is to be applied to correctory statutes, which repeal former laws or customs ; for laws, after they have once taken root in a state, become in some degree part of the constitution, *Bacon, aphor. 14.* ; and therefore the wisest lawgivers are extremely backward to abrogate laws which have been in long observance, *l. 2. De const. princ.* Under this head may be reckoned laws which tend to deviate from the general frame and structure of our constitution, or from the general rules of law, though they should not import the repeal of any statute, *l. 14. De legib.* ; yet where a statute, correctory of a former, is itself corrected by a new law, the last ought to be liberally interpreted ; because, though it alters a prior law, it does not derogate from our most ancient laws, but, on the contrary, restores them to us. A statute may be repealed, not only by an express repealing clause, but by any new enactment that is plainly irreconcilable with the former ; for two contradictory laws cannot subsist in force at the same time.

54. A statute which is made on occasion of particular exigencies in a kingdom, ought not to be extended to omitted cases, however similar they may be to those specified in it, after the pressure is over which gave rise to the law. It is enough if such a law can afterwards support itself in the cases that it expressly provides for, *Bacon, aphor. 13.* Laws which establish the necessity of certain solemnities to deeds, must be strictly interpreted ; so that such solemnities may not be supplied by equivalents. Solemnities lose their nature when they are not performed specifically : there is not therefore the least latitude to be allowed in substituting other forms in their place, *Bacon, aphor.*

aphor. 19. Where a statute specially enumerates a certain number of cases to which it is to be applied, we must be careful not to extend it to others : for as an exception made to a law, adds strength to the law in the cases not excepted ; so the enumeration of particular cases in which the law is to obtain, takes off its force as to the cases not enumerated : but where the law is more concise, without descending to particulars, there is the less hazard in extending it to similar cases, *Bacon, aphor.* 17. A law, though expressed in the most general terms, ought not to be extended to any case to which the reason inductive of the law is in no degree applicable, though it should be included in the enacting words ; an instance of which occurs in *l. 1. § 1.* compared with § 6. *De edilit. ed.* But this rule fails, where the law is so expressed, that the lawgiver appears to have intended that it should reach to every case that falls under the natural signification of the words.

55. Laws which carry a dispensation or privilege to particular persons or societies, receive a strict interpretation ; because, though they are profitable to the grantee, they derogate from the general law, and most commonly imply a burden upon the rest of the community ; for which reason they reach no farther than to the person or society privileged, *l. 1. § 2. De const. princ.* But privileges which draw no consequential prejudice after them to others, must be largely interpreted for the grantees, agreeably to that munificence which is natural to the supreme power, *l. 3. De const. princ.* At no rate can a privilege be wrested to the hurt of those in whose behalf it was granted, *arg. l. 25. De legib.* A strict interpretation is also to be applied to laws which enact heavy penalties ; for it is inhuman to wrest or torture laws to the distressing of society, *Bacon, aphor.* 13. and to those which restrain the natural liberty of mankind ; for every restraint upon liberty implies a burden, and so is unfavourable. Lastly, Customary law is strictly interpreted ; for as its only foundation is usage, which consists in fact, it can go no farther than the particular usage has gone.

56. All statutes which carry in them no characters that seem to require a limited interpretation, may be extended to similar and omitted cases ; for as the reason of the law is truly the will of the lawgiver, therefore in every case where the reason is the same, the law ought also to be the same, *l. 12. De legib. ; l. 32. pr. Ad leg. Aquil.* This holds more especially in statutes which are enacted concerning matters specially favoured by the law, *ex. gr.* in acts for the encouragement of trade, or of any undertaking profitable to the country, for making effectual the wills of dying persons, for restraining fraud, and for the security of creditors. Marriage also, and the liberty of the subject, are favourites of the law. All enactments made for these and the like purposes, if they are defective in the expression, ought to be extended by a liberal interpretation, *l. 13. De legib. ;* and they are generally called by doctors favourable laws.

57. In the extension of favourable statutes to similar cases, care must be taken not to give scope to the imagination in discovering remote resemblances. The extension must be limited to the cases immediately similar to those expressed in the law ; for if the liberty be taken of building one consequence on another, cases may be at last included quite dissimilar to those which are specified, *Bacon, aphor.* 16. No statute, let it be ever so favourable, ought to be extended to a case which seems from circumstances to have been industriously omitted by the legislature, however similar that case may be to those mentioned ; agreeably to a rule of the doctors, which, though couched in improper words, has a just meaning, *Casus omissus pro omissis habendus est.* On the other hand, all statutes, however unfavourable, must receive that interpretation which is necessary to give them effect. Hence, where a statute prohibits an act, it implies a prohibition of what-

ever

ever necessarily produces that act ; for every one truly transgresses the law, who does what is plainly intended should not be done, though it be not expressly forbidden, *l. 29. 30. De legib.* But there is no such necessity of extending a statute of strict interpretation to *similar* cases ; for though it should be explained so as to exclude these, it may have its full effect as to the cases expressly provided for. Yet sometimes an unfavourable law may be extended to such *similar* cases as did not exist at the time of passing it ; because it was not in the lawgiver's power, though *he* had designed it, to provide for cases which had not then emerged ; and were so many *non entia* at the time of the enactment, *Bacon, aphor. 20.*

58. Where a statute, without any intention of repealing a former, contains a clause derogating from it, so that in certain articles both laws cannot be observed or complied with in their full extent, the law which is most essential to the commonwealth, ought to be preferred to the other ; the law which forbids or commands, to that which is barely permissive ; the law guarded with a heavier penalty, to that which inflicts a lighter or none ; the law which descends to particulars, to one delivered in general terms, *l. 80. De reg. jur.* ; the law which requires immediate obedience, to that which may be complied with afterwards. These, with many other rules laid down for interpreting laws by Tully, *De invent. lib. 2. § 49.* have been commented on at large by Grotius, Puffendorf, and others. They are frequently, without doubt, misapplied from inattention or prejudice ; but *he* bids the fairest for a just interpretation, who keeps constantly in view the mischiefs or defects in the laws formerly enacted on the same subject, what remedies the statute has provided to cure them, how far these remedies are proper, and what sense appears most congruous to its subject-matter, and most agreeable to equity.

59. This title may be concluded with an observation or two concerning the nature and effects of prohibitory statutes. The Roman law is express, that all bargains and covenants entered into in contradiction to a statute prohibiting them, are null, *l. 5. C. De legib.* But this doctrine, if it be not properly limited, appears not to be founded in the nature or reason of things. To forbid an act, and to destroy its effect when done, are in themselves quite different. A simple prohibition is intended merely to lay a moral obligation upon persons, not to do what is forbidden ; but does not point out the operation of the law in respect of the action prohibited. Thus, though natural law forbids the giving of a subject to one which hath been before promised to another ; yet where it is so given, in breach of the anterior promise, the act is valid ; because the law does not, with the prohibition, take away the power of giving : and this holds also in human or positive prohibitory laws, according to Grotius, *lib. 2. c. 5. § 16.* Some lawyers, though they reject the Roman doctrine in laws which have a penalty annexed to them, admit it in such as have none ; because if acts done in breach of these be not void, such laws must be without a sanction. But it has been observed, *supr. § 5.* that the breach of every law is an offence which subjects the offender to punishment. What words in a law are necessary for annulling acts that are done in breach of it, can hardly be comprehended under precise rules. In general, a statute, where it prohibits, not only the act, but the obligations resulting from, or the effects consequent on it, must be construed to annul : or where the law enacts, that it shall not be in one's power to do a thing, the act, if done, must necessarily be void ; because the very right which the person had to do it, is taken from him.

60. Where a prohibitory law disables a person from acting, the disability, if it be imposed merely in behalf of a third party, may be taken off by the

the consent of that party, since every one has the power of renouncing a benefit introduced in his own favour, *l. 29. C. De pact.* Thus, though a father is disabled by the law from disposing of his personal estate to strangers, with a fraudulent intention to disappoint his children of their legitime; yet the renunciation by the children of that claim after their perfect age, is sufficient to support the father's act, which would otherwise have been of no force. In matters however which regard the public utility of the state, the consent or renunciation of the person immediately interested is void, as contrary to the common interest. In such cases, the authority of the law is stronger than the agreement of the private parties; and therefore public statutes must have their effect, independent of the will or pactions of private men, *l. 38. De pact.; l. 45. § 1. De reg. jur.*

T I T. II.

Of Jurisdiction and Judges in general.

THE objects of law, or the matters of which it treats, are three: *first*, Persons; *2dly*, Things, or rights which persons are capable of enjoying; *3dly*, Actions, by which the persons intitled to those rights make them effectual. It is not the purpose of this treatise to explain such divisions of persons as relate chiefly to the *public* law. The rights competent to private persons cannot be distinctly understood, without a previous explication of the powers of judges, by whom all questions of private right must be decided, and of the just extent and limits of their authority. In order to this, it is necessary to premise some account of the general nature of jurisdiction, with which every judge is invested, either in a higher or in a lower degree.

2. Jurisdiction is a power conferred on a judge or magistrate, to take cognisance of, and determine, debateable questions, according to law, and to carry his sentences into execution. This power in judges of executing their sentences in civil matters, was, by the Roman lawyers, called *imperium mixtum*, *l. 3. De jurisd.* in opposition to the right of executing criminal sentences, which was styled *imperium merum*, or *jus gladii*. And because no jurisdiction could subsist without *imperium mixtum*, it is said by them *inherere jurisdictioni*. The Romans had certain judges whom they styled *judices pedanei*, who were authorized by the Prætor to hear and decide in a variety of causes; but without the right of execution, which was reserved to the Prætor himself. Arbiters had a like power of pronouncing sentences in civil matters referred to them, but not of carrying them into execution. The law of Scotland is the same with that of Rome in regard to arbiters; but there is perhaps no instance in our law of persons named by statute, merely to exercise certain judicial acts, without a power of execution, except bishops, whose powers are now devolved on presbyteries. Those were directed by 1572, *c. 48.* to design or mark out proper manse and glebes for ministers. Their powers go no farther than designation: if the possessor of the ground marked out, refuse to give up the possession to the minister, the execution is committed to the supreme civil court, by whose authority letters issue from the signet for that purpose.

3. Doubtless the supreme power is, in the general case, the fountain of jurisdiction; for he who has the right of enacting laws, ought also to have the right of erecting courts, and appointing magistrates for applying those laws to particular cases, *l. unic. Ad leg. Jul. de amb. pr.* But by the Gothic or feudal plan, which prevailed almost universally in Europe upon the decline

cline of the Roman empire, kings, though they had not the sole right of legislation, became the supreme feudal lords of all the lands within their dominions, and had also the executive power of the state committed to them. Under these two characters, our sovereigns were vested with the sole right of jurisdiction; in consequence of which, they communicated judicial powers to others, sometimes along with a grant of lands, and sometimes without it, in such degree and to such extent as they thought expedient. The tract of ground, or district, within which a judge thus constituted has a right of jurisdiction over the persons and estates of the inhabitants, is called his *territory*. As his whole powers are confined to the precise limits of that district, every act of jurisdiction exercised by him beyond his territory is null; not only his judicial proceedings before, or at giving judgement, but those acts by which his sentence is to be made effectual, *l. 20. De jurisd.* Thus an arrestment executed without the territory of the judge who granted the warrant, was declared null, though he in whose hands the arrestment was used had his residence within the territory, *Dec. 5. 1671, Millar.*

4. Jurisdiction hath suffered various divisions, which have some relation to the usage of Scotland. The Romans divided it into voluntary and contentious. Voluntary was that which was exercised in matters that admitted of no opposition. Contentious had place in all questions truly debatable, which were in their nature capable of receiving a judicial discussion. A decree, therefore, upon a point which might have been the subject of dispute, though in fact pronounced in absence of, or without opposition from the defender, was *jurisdictionis contentiosæ*. The essential differences between the two were, that voluntary jurisdiction might be exercised by any judge, and upon any day, and in any place; whereas acts of contentious jurisdiction must have been performed *pro tribunali*, or in court, and upon a lawful day, and by that judge alone who was competent to the cause. The judicial ratifications of women clothed with husbands may be accounted *voluntariæ jurisdictionis* by the law of Scotland; for they may be proceeded in by any judge, even *extra territorium*, *Fount. Feb. 3. 1688, Cochran.* Brieves of tutory, and general services of heirs, have this character of voluntary jurisdiction, that they may be directed to any judge, even to one within whose territory neither the minor nor the deceased had ever resided. The registration of deeds is, by some writers, considered as an act of jurisdiction; because, though in that step there is neither any real interposition of the judge, nor appearance of the party, every extract in its recital contains both. If it is to be accounted an act of jurisdiction, it seems to partake of the nature of both kinds. It may be accounted voluntary, in so far as the judicial sentence prefixed to the extract is a mere *factio juris*, and the registration admits of no dispute, but passes of course. On the other hand, the prohibition of 1685, *c. 38.* that no clerk of an inferior court shall register any writing, either for conservation or execution, against a party dwelling without the judge's jurisdiction, gives registration a nearer resemblance to the nature of contentious jurisdiction.

5. Jurisdiction is either civil or criminal. By the first, questions of private right are heard and determined; by the other, crimes are tried and punished. It is also divided into superior, inferior, and mixed. That jurisdiction is supreme from which there lies no appeal to an higher court. Though the British house of Lords is, since the union of the two kingdoms, our only supreme court, in the strictest acceptation of that word, in all civil and revenue causes; yet the courts of session and exchequer may be still called supreme with respect to those causes in a larger sense; as their jurisdiction is universal over the whole kingdom; as the sentences of all the inferior

inferior courts of Scotland are subject to the review of one or other of them, unless where special statute interposes; and as their sentences cannot be brought under review by any court proper to Scotland, nor indeed by any *original* court; for the house of Lords have no original jurisdiction in questions of civil right. Whether our supreme criminal court of justiciary be intitled to that epithet in its highest sense, shall be afterwards considered, *t. 3. § 24.*

6. Inferior judges are those whose sentences are subject to the review of one or other of our supreme courts, and whose jurisdiction is confined to a particular county, borough, or other territory, *ex. gr.* sheriffs, justices of the peace, magistrates of boroughs, inferior admirals and commissaries, and barons. Mixed jurisdiction participates of the nature both of the supreme and inferior. Thus the judge of the high court of admiralty, and the commissaries of Edinburgh, have an universal jurisdiction over Scotland, and may review the decrees of inferior admirals and commissaries: but because their own decrees are subject to the review of the court of session or justiciary, they are in that respect inferior courts. Thus also justices of the peace, when sitting in their quarter-sessions, have a power of reviewing the decrees pronounced in civil causes by themselves in their particular or common sessions; but their decrees, even in their quarter-sessions, are, in the general case at least, subject to the review of the court of session. It would seem that by the Roman law none but the *magistratus majores*, or supreme courts, had a power of reviewing their own definitive judgements, *l. 16. § fin. De minor. ; l. 17. eod. t.* And though by our customs several inferior judges, as sheriff-deputes, commissaries of Edinburgh, and bailies of boroughs, may review interlocutory judgements pronounced by themselves, till decree be extracted in the cause; yet no inferior court has an implied right of reviewing any definitive sentence of its own, so as, without special statutory powers, to suspend or set it aside, after it hath, by the clerk's giving forth an extract, become a decree. From that period, the judge's right of cognisance ceaseth, *l. 55. De re jud. ; Gosf. Jan. 26. 1677, Cowan*: whereas our supreme civil court can review, not only the decrees of inferior judges, but their own.

7. Where a new civil jurisdiction is created by statute, with a power to the new-erected court of judging in special matters, it is not understood to be exclusive of the judge formerly competent to that species of causes, unless the statute constituting the court expressly declare, that the causes therein specified shall be discussed by that court, and no other. In like manner, in questions where the cognisance naturally belongs to the ordinary courts, a jurisdiction granted to another court to judge in certain of these, will not easily be presumed privative, but be considered barely as an option given to the party aggrieved to apply for redress to either of the two courts at his pleasure. An instance of this occurs in the late statute conferring a new jurisdiction on the circuit-court, of which below, *t. 3. § 28.* No incroachment on the jurisdiction of the established judges is, *in dubio*, to be presumed: it is therefore a never-failing rule in all new jurisdictions, That the limitation under which the jurisdiction is granted, is to be most amply interpreted, so as to import a denial of every branch of jurisdiction beyond those limits. Hence also such new jurisdiction ought to be accounted subordinate; and consequently its sentences are to be subjected to the review of that court which the law itself hath declared to be supreme in all civil causes. The same general rule holds in criminal jurisdiction: but where a fact, not criminal of its own nature, is declared a crime by statute, and made triable, either by a new-erected court, or by one already known in our law, it may be doubted, whether the court established by statute

statute for such trials has not the sole cognifance of them, exclusive of the court of justiciary, as the crime is merely statutory. See *Hijl. law-tr. tit. Courts*. Yet thus far there can be no doubt, that if in questions of public police, of which the ordinary courts never had the cognifance, judicial powers shall be conferred upon a newly-erected court, no other can interfere with or control them; because the jurisdiction itself being wholly a creature of the law conferring it, can be exercised only by those to whom the law hath made over the grant. It arises from the same legal presumption against the extension of jurisdictions, that British statutes simply declaring any matter *finally* determinable by a special court, are not understood to mean, that the judgement of such court shall be subject to the review of no other, but merely that it shall have the power of pronouncing a definitive sentence on the question brought before it, *New Coll. i. 108*. The law is understood to confer a supreme and sole jurisdiction only when the expression is so explicit as to exclude all doubt, *ex. gr.* that the court shall have power to determine *without appeal*, or that the judgement shall not be subject to the review of any other court.

8. In all grants of jurisdiction, whether civil or criminal, supreme or inferior, every power is understood to be conferred without which the jurisdiction cannot be explicated, *l. 2. De jurisd.* By this rule, a judge may determine incidentally questions which fall not under his original cognifance, where, without that power, he could not pronounce a definitive judgement in the action which is properly insisted in before him. Thus, if in an action brought before the sheriff, to which he is confessedly competent, forgery be alledged, either by way of defence or reply, the sheriff is under no necessity of staying process for want of jurisdiction, but may judge in the forgery *incidenter*, *November 30. 1630, La. Williamson*: yet the effect of his sentence in that incidental question is merely to support his judgement in the original cause carried on before him. Thus also, if the reduction of a service as heir shall be brought before the session upon the head of bastardy, or other ground of illegitimacy, the court itself may try that incidental question, without remitting it to the commissaries, though it be properly consistorial. But where the exception of bastardy was offered to an inquest in bar of a service as heir, the service was by our more ancient practice put off, and the question remitted to the commissary, *July 23. 1630, Lord Pitligo*. Were such a case to occur now, it may be doubted whether the court of session would not, at the suit of any of the parties, advocate the brief to themselves. By the same rule, every judge, however limited his jurisdiction may be, is vested with all the powers necessary, either for supporting his jurisdiction, and maintaining the authority of the court, or for the execution of his decrees. Hence the court of session, though its jurisdiction be merely civil, has an inherent power of punishing those who shall insult any of the judges while the court is sitting, or who shall obstruct the execution of its sentences, with degradation, banishment, a fine, or corporal punishment, according to the demerit of the offence. Hence also, even those courts which are the most limited, are competent to trials for the enforcement of their own officers: and on the death of a defender, they can transfer any action against his representative, if he reside within their territory. In like manner, all judges, even of the very lowest rank, have a power of enforcing the execution of their own decrees, by certain known methods of legal diligence.

9. The division of jurisdiction into cumulative and privative, is much attended to in our practice. Cumulative, or concurrent, is that which may be exercised by any one of two or more courts in the same cause. To prevent

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vent the collision that might happen in the case of two cumulative jurisdictions, by each of the courts claiming the exercise of their right in the same cause, a rule is established by custom, That the judge who first exercises jurisdiction in the cause, acquires a right, *jure preventionis*, to judge in it, exclusive of the other. The judge by whose authority the offender is either first apprehended or first cited, prevents, and so excludes the other from his right of cognisance; because these are the two first acts of jurisdiction that can be exercised by any court. This right of prevention plainly appears to be peculiar to criminal jurisdiction. In civil, it is the private pursuer who has the only right of chusing before which of the courts he shall sue. No citation, therefore, in a cause merely civil, can appear before a judge, which is not given at the suit of the pursuer, can fix the cause in that judge's court, preferably to any other that is competent: whereas in criminal questions, or breaches of the peace, it is not the party injured only, but the procurator-fiscal, or public prosecutor of any competent court, who may bring the delinquent to his trial. If the judge who has thus acquired the exclusive jurisdiction, shall not bring the delinquent to trial, the precluded judge may bring the cause before his own court; for public policy requires, that crimes should not remain unpunished: but no citation by the public prosecutor of one court, can hinder the party injured to bring his action against the delinquent, for reparation and damages, before any other competent court, though no negligence should be alledged in the party preventing. An action of damages is grounded on a civil right, in which the private party alone has interest: he cannot therefore be deprived of it, by a citation given by a public officer of the law, which is intended for a quite different purpose, in *publicam vindictam*; Nov. 9. 1672, Scot; Gosf. July 1. 1673, Fork.

10. Privative jurisdiction, otherwise called peculiar, is that which belongs only to one court, to the exclusion of all others, whether the cause of such exclusion arises from the nature of the action to be brought before the court, (to which some writers have confined it), or from its weight or importance. Thus, the jurisdiction of the session is privative in all actions for declaring property, in provings of the tenor, &c.; as that of the court of exchequer is in all revenue-causes, except in so far as special statute has given the cognisance of them to justices of the peace. Commissaries are the only judges in the first instance, in all questions properly consistorial; and the high court of admiralty, in all maritime causes, whether civil or criminal.

11. Jurisdiction is either personal or patrimonial. Personal jurisdiction is that which is either revocable by the grantor, or which, though no power of revocation be reserved in the grant, falls by the death of the grantee. Patrimonial, or heritable, is that which is truly part of a man's property, and descends as such to his heirs. Jurisdictions were granted originally on account of the fitness of the grantee himself, and consequently were personal: but on the introduction of the feudal plan, the king, when he made any grant of lands for military service, conferred on the grantee a certain degree of jurisdiction within the lands granted, along with the lands themselves, *ex. gr.* of sheriffship, regality, or barony; and as the lands were made over, not only to the grantee, but to his heirs, the jurisdiction annexed to them became also heritable. Because this kind of jurisdiction was incident to, and followed the lands or territory to which it was annexed, not only through the grantee's heirs, but his singular successors, it got the name of territorial. Several jurisdictions, however, after they ceased to be territorial, continued heritable: for though our sovereigns soon found it necessary to resume sheriffships from the proprietors of the territory to which that jurisdiction was originally annexed, *vid. infr. t. 4. § 1.* and to grant them

them to others who had no property in the lands; yet the new grant was frequently bestowed, not barely to the grantee personally, but to his heirs.

12. The power which attended these heritable jurisdictions became at last formidable to the state, and enabled some of our first families to bid open defiance to the law. It was for this reason, that immediately upon the forfeiture of the Earl of Douglas, June 10. 1455, (see *Black acts*, fol. 34.), it was statuted by 1455, c. 43. that no regality should be granted for the future without the authority of parliament; and c. 44. said year, that no office should be given afterwards in fee or heritage. Our sovereigns nevertheless continued to make grants of heritable jurisdictions; most of which were confirmed by parliamentary ratifications; and others were, without such confirmation, strengthened by the immemorial exercise of the jurisdictions, till it became at last the general opinion, that those statutes had lost their authority, *Mackenzie's Obs.* on 1455, c. 43. All heritable offices and jurisdictions, without distinguishing whether they were granted before or after the said two acts in 1455, were by the treaty of Union, art. 20. reserved to the owners as rights of property; but it does not certainly appear, whether these acts were then understood to be in force or not, as the offices and jurisdictions were reserved in the same manner only as they were then enjoyed by the laws of Scotland. Several heritable sheriffships and stewartries having accrued to the crown by the rebellion in 1715, the parliament, from the same reason of state, declared by the inquiry-act, 1° George I. c. 50. that these forfeited jurisdictions should not be alienable by the crown, either heritably or during life; and now, by act 20° George II. c. 43. to be afterwards more fully explained, all heritable jurisdictions, except those of admiralty, and a small pittance reserved to barons, are either abolished, or refused and annexed to the crown. By our present law, therefore, almost all jurisdictions, both supreme and inferior, are again personal, more agreeably to the original nature and condition of jurisdiction.

13. Jurisdiction is either proper or delegated. Proper jurisdiction belongs to a judge or magistrate himself in virtue of his office. Delegated is that which is communicated by the judge to another, who acts in his name, called a *depute*, or *deputy*. One named by a deputy who has himself the power of deputation, is called a *substitute*. No judge has the right of appointing deputies, unless it be contained in his grant; for an office which requires personal qualities, cannot be delegated by the grantee to another without a special power. Such power has been always expressed in the personal grants of sheriffship, stewartry, and admiralty; but justices of the peace, and magistrates of boroughs, have no power of deputation. In heritable jurisdictions, though the first grantee should have possessed every qualification proper for a judge, the heir succeeding to him might have been quite incapable of discharging the office in person; for which reason powers were given by 1424, c. 6. to those who enjoyed patrimonial jurisdictions, to appoint deputies for whom they should be answerable. The deputies thus authorized, had, by the nature of their commission, the whole jurisdiction communicated to them which was before in their constituents; for there is no limitation in the statute relative to the power of the deputies. The opinion therefore, that in deputations by barons, the *potestas gladii* was not delegated to the baron-bailie, appears ill founded, and was certainly contrary to practice. A passage quoted from *Balfour* in support of it, p. 548. is plainly misunderstood; and other delegates, *ex. gr.* sheriff-deputes, have always judged in crimes in virtue of the power of appointing deputies expressed in the sheriff's commission. The sheriffs appointed in pursuance of the late jurisdiction-act are improperly styled deputies in that statute: for they have a proper, not a delegated jurisdiction; they are named, not by the high sheriff of the county, but by the king;

king ; and they are authorised to appoint deputies under them, who are called in the act *substitutes*, to exercise jurisdiction, either over the whole county, or in a particular district.

14. Delegated jurisdiction is not, in the judgement of law, the jurisdiction of the deputy who acts ; for he has no proper jurisdiction ; but of the judge who appoints him, and from whom alone he derives authority. Hence a deputy or substitute acts at the peril of the principal judge, 1424, c. 6. ; 1469, c. 27. near the end ; for the principal judge, who is the only person considered in law, must be accountable for the actions of the deputy, as for his own. This makes a material difference between proper and delegated jurisdiction. In causes which are first brought before a proper jurisdiction, subordinate to another, *ex. gr.* before an inferior commissary, the cause must, or at least may, where any of the parties thinks himself aggrieved by the decree, be carried to the commissaries of Edinburgh, in respect of whom the jurisdiction of the inferior commissary is subordinate, before it comes to the supreme court : whereas in delegated jurisdiction it must be carried from the deputy, not to the principal judge, *vid. sup.* § 6. for no inferior judge can, without express powers, review a decree pronounced by himself, but directly to the court of session. By this rule, the decrees of admiral-deputes ought to be carried from them, in the case of review, not to the high court of admiralty, but to the session, because the judges deputed by the admiral are deputies in the most proper sense of the word ; but the judge of the high court is, by special statute 1681, c. 16. authorised to review the sentences of all the admiral-deputes.

15. Sometimes persons are delegated by a special commission to judge in a particular cause, after which their power ceaseth. This was the case of messengers, who were appointed judges in apprisings, as sheriffs in that part, in virtue of the warrant contained in the letters of apprising ; and it is still the case of macers of the session, when, upon a remit from that court, they judge in the service of heirs ; and of commissioners appointed by a judge to take the oaths of parties, or of witnesses, in any action brought before him. Those judges, who, by the nature of their office, have a fixed and determinate jurisdiction in all actions of the same general nature, are called *judges-ordinary*, whether they be supreme or inferior, 1487, c. 105. ; and they are in that statute opposed to the privy or secret council, who had no stated terms or places of sitting, and whose jurisdiction was confined to certain special and uncommon actions or complaints.

16. Since no judge can pronounce sentence on persons or subjects without his territory, civil jurisdiction cannot be founded, unless the defender either, *first*, reside within the judge's territory, or, *2dly*, be possessed of some estate or subject within it. In the first case, the judge's jurisdiction is said to be founded *ratione domicilii*. A domicil is, the dwelling-place which a man chuses for a fixed abode to himself and his family : a pleasure-house, therefore, to which he goes only by starts, is not a domicil ; and far less a friend's house, or an inn. To prevent disputes upon this point, a rule is received by custom, That where one has resided with his family for forty days immediately preceding his citation, is to be deemed his domicil as to the question of jurisdiction. Where a person has two different houses, in different jurisdictions, which appear equally intitled to this appellation, he is liable to both jurisdictions, *Fount. July 15. 1701, Spottiswood*. And if, on the other hand, one be engaged in such a way of life as to have no fixed residence, *ex. gr.* a soldier, or a travelling-merchant, a personal citation against him is sufficient to establish a jurisdiction over him in the judge of that territory where he was cited, *Fount. Nov. 12. 1709, Lees*. It imports nothing, where the pursuer hath *his* domicil, for
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he must follow that of the defender; since no defender is obliged to appear before a court to which the law hath not subjected him, *l. 2. C. De jurisd.*

17. Civil jurisdiction is founded, *2dly, ratione rei sitæ*, if the subject claimed by the pursuer lies within the territory, whether the defender resides within it, or not, *Nov. 28. 1635, Williamson*. And indeed, if the subject in question be immoveable, the judge of the territory where it is situated is the sole judge competent, in so far as he hath the cognisance of heritable rights; for things that are immoveable, are incapable of shifting places, and must therefore be restored in that place where they lie, and by the warrant of that judge whose jurisdiction reacheth over them. As this reason fails in personal actions founded barely on obligations relative to land, which may be fulfilled any where, a judge's jurisdiction reacheth over a person residing within his territory who is sued for fulfilling an obligation for granting a conveyance or a lease of lands, though the lands contained in the obligation should be situated without the territory. No suit can proceed against a defender till he be lawfully summoned to appear in judgement; neither can a judge issue a warrant to cite one who resides in another territory: where therefore one whose domicile is not within the territory is to be sued before an inferior court *ratione rei sitæ*, the pursuer must apply to the court of session, whose jurisdiction extends over the whole kingdom, for letters of supplement, which are granted of course, containing a warrant to cite the defender to appear before the judge of the territory where the controverted subject lies, *Nov. 28. 1635, Williamson*. This method is also followed, where one resides without the territory, who is to be cited, not as a principal defender, but merely for his interest.

18. Where the party to be sued resides in another kingdom, and hath an estate in this, the session is the only competent court in questions concerning such estate; since that court is the *commune forum* to all who reside abroad. But as no court of Scotland can grant warrant for a personal citation against such as reside without this kingdom, foreigners, if they have a land-estate in Scotland, are considered, in respect of all claims on that estate, to be lawfully summoned as defenders, by what is styled an *edictal citation*, *i. e.* a citation published at the market-crofs of Edinburgh, and pier and shore of Leith: for since the *locus rei sitæ* is the only place where questions of immoveable rights can be tried, the necessity of law supports that only manner of citation which is practicable. Nor can this afford any just ground of complaint to the defender: for whoever enjoys a real estate in a country, has a forum there, or a court where all questions concerning that estate may be discussed and decided; and consequently he ought to employ one in his absence to look after it, and appear for him in all actions which may be brought against him concerning it. But this sort of action cannot be said to be directed against the *person* of the defender, over which the judge hath no jurisdiction, but only against that part of his estate which lies within the territory, *Nov. 15. 1626, Galbraith; Dec. 8. 1626, Lo. Blantyre*.

19. When a foreigner, who is actually abroad, hath no other than moveable effects within this kingdom, he is accounted so little subject to the jurisdiction of its courts, that no action can be brought against him, till those effects be attached by an arrestment, called *arrestum jurisdictionis fundandæ causæ*, *Harc. 487*. This arrestment may be laid on at the suit of the creditor, either by the court of session, or by the admiral-court, or by the judge-ordinary where the goods to be arrested lie. Border-warrants, explained below, § 21. which are frequently granted by the sheriff, are truly of the same nature. All of them have the effect to fix the debtor's goods

goods within the judge's territory, and thereby to subject him to the jurisdiction of the courts of Scotland. And even when they are used on the sheriff's warrant, they found a jurisdiction in our supreme court of session to judge in a personal action against the foreigner, proceeding upon an edictal citation, for constituting the debt due by him to the arrester, in order to pronounce a decree of forthcoming against those in whose hands arrestment was used, *New Coll.* ii. 155. The *nexus* laid on the goods is loosed so soon as the foreigner gives security *judicio sibi*, that is, to appear in court upon the day to which he shall be cited: for though the border-warrants granted for arrestment generally bear, that the goods shall remain under arrestment till the debtor shall also give security *judicatum solvi*, that he shall make payment to the arrester of whatever sum shall be found due, the Lords have adjudged, that security *judicatum solvi* ought not to be exacted, except in maritime causes, *New Coll.* i. 153. This decision was indeed pronounced in the case of setting a foreign debtor free from prison, but seems by a fair analogy to hold equally in the loosing of arrestments. If the debtor be a native of Scotland, it would seem that he is to be deemed a Scotsman, though he should have gone abroad *animo remanendi*; and that therefore action may be pursued directly against him *ratione originis*, even upon moveable subjects, without the aid of a previous arrestment. See the last quoted decisions, *Nov.* 15. 1626, and *Dec.* 8. 1626. The reason of which decisions seems to be, that those who are born within the kingdom, though they should be afterwards settled abroad, without an intention of returning home, cannot shake themselves loose from the obligations naturally due by them, either to the laws or to the courts of their mother-country. Hence, in criminal matters, sentences of outlawry or forfeiture pass against natives, though they should reside in foreign parts *animo remanendi*; and an instance occurs *infr. t. 4. § 34.* of a civil case, in which a *forum* was found to be established *ratione originis*.

20. Civil jurisdiction is also founded *ratione contractus*, if the defender had his domicil within the judge's territory at the time of entering into the contract sued upon, though he should not have his domicil there when the action is brought against him. But it is necessary, in order to establish jurisdiction in this manner, that the defender be actually within the judge's territory, and be cited by a warrant issuing from his court, or at least that he have effects lying there, *l. 19. pr. § 1. 2. De judic.*; for jurisdiction cannot have the least operation, when both the person and the estate of the defender are withdrawn from the judge's power. This manner of founding jurisdiction was however sustained by our supreme court, in an action of declarator of marriage brought by a wife against her husband, a native of England, who, after he had married the pursuer in this country, and gotten issue by her, abandoned his family, and retired into England, though neither his person nor effects were subject to the judge's cognisance. But in this singular case the defender, who was called by an edictal citation merely for the sake of form, was not truly considered as a party; both the pursuer and her child had an obvious interest to get their legal state ascertained in that country to which they belonged originally, and where they were constantly to reside; and though she had known the place of her husband's residence, she could not be compelled to sue him in a kingdom, where perhaps the solemnities essential to marriage differed from those which were received in Scotland, *June 11. 1745, Dodds.*

21. A judge may, in special cases, secure the persons of such as have neither residence nor estate within his territory. Thus, on the border between Scotland and England, warrants are granted of course by the judge-ordinary of either side against debtors who have their domicil on the opposite

fide, for arresting, not only their goods, but their persons, till they give security *judicio ffoli*. This obtains also in every case where the creditor has ground to suspect, that the debtor is *in meditatione fugæ*, that he intends to withdraw suddenly from the kingdom, and so disappoint his creditors, *St. b. 4. t. 47. § 23.*; which suspicion the creditor who applies for the warrant must declare upon oath: and it makes no difference whether the debtor be a foreigner, or a native; or whether he had contracted the debt within this kingdom, or in another country. But as the summary apprehending of strangers may discourage commerce, the creditor at whose suit the debtor is imprisoned, is liable in damages, if the circumstances offered to be proved by him in support of his suspicion appear insufficient to justify the imprisonment, 1738, *Dr Tenant*. Such debtors must be set free from prison, if they give security *judicio ffoli*, though they should not offer also security *judicatum solvi*, *supr. § 19.* and *infr. b. 3. t. 3. § 73.*

22. Boroughs-royal have a special privilege conferred on them by 1672, c. 8. which probably took its rise from *Leg. Burg. c. 34. et seqq.* that where a person residing without the borough is furnished with meat or merchandise by an inhabitant of the borough, who has no security for the debt other than his own book, the creditor may arrest the person of the debtor, if he shall be found afterwards within the borough, till he give security to appear before the court of the borough. This, and the cases mentioned under the preceding section, strike against the rules already explained, and can be justified only from necessity. It appears by the recital of the last quoted act, that the former custom had authorised this summary arresting of debtors apprehended within borough, not only for the price of necessary furnishings, but for all debts, though contracted upon bond for borrowed money, by which persons of the best credit might have been affronted: but this practice, as it was not founded in necessity, was prohibited by the statute.

23. Criminal jurisdiction is founded, *first, ratione domicilii*, if the defender has his residence or domicile within the sheriffdom or other territory of the judge; for every criminal judge must have an inherent power of punishing all offenders who reside within his territory, and so are subject to his jurisdiction. Vagabonds, who have no fixed domicile, may be tried where-ever they are seized. *2dly*, Criminal jurisdiction is founded *ratione delicti*, if the crime was committed within the judge's territory: and this appears to be the most natural and rational course of criminal trials; because those under whose eye the offence was committed, will be most effectually deterred from a wicked course of life, by seeing the criminal also punished, *St. Gul. c. 18.*; and the just resentment of the person injured, and his friends, will be most amply satisfied, *l. 28. § 15. De pæn.*; *l. 3. pr. De re mil.*: for which reason, sentence pronounced against atrocious offenders is frequently directed to be carried into execution on the very spot where the crime was perpetrated. By the Roman law, the judges of the several provinces were directed to send back the persons of criminals who should be laid hold on within their jurisdiction, to that province where they had offended, that they might be also tried and punished there, *l. 7. De custod. et exh. reor.*; *Nov. 134. c. 5.* And in like manner, criminals who were apprehended in another shire were, by several of our old statutes, sent back by the magistrates of that shire to the *locus delicti*, that they might be punished in the place where they had transgressed the law, 1426, c. 90.; 1436, c. 148, &c.; but by the present practice, they are more frequently tried at the circuit-court of the district in which they were apprehended, or brought to Edinburgh, to be tried by the court of justiciary. Where a foreigner, after having committed a crime in this kingdom, retires to his native country, our judges

judges cannot, on pretence that the *locus delicti* is a competent *forum* in the trial of crimes, proceed against the criminal; for the moment he leaves the kingdom, our courts lose that power which they had over him while he was here; and if a citation be necessary to found civil jurisdiction *ratione contractus*, *supr.* § 20. much more must it be essential in trials against criminals, who ought not to be condemned unheard, *l. 1. pr. De req. vel abs.*; yet if such foreigner shall afterwards return to the kingdom, and be laid hold of, or cited by a proper warrant, he may be tried by our supreme criminal court.

24. A judge may be declined, or, in other words, his jurisdiction may be excepted to judicially, on the following grounds: *First, Ratione cause*, on account of his incompetency to the special action brought before him. Thus the court of session may be declined in criminal causes, the justiciary court in civil, inferior judges in declarators of property in heritage, &c. *2dly, Ratione privilegii*, when the party is by special privilege exempted from the jurisdiction of the judge. Thus all members of the college of justice may decline the jurisdiction of inferior courts, 1555, c. 39. *in fine*. Between those two grounds of declinature, there is this difference: in that which proceeds from the judge's incompetency, his proceedings must be null, though the party intitled to the privilege should not appear and move his exception, because the judge had no original jurisdiction in such causes, *vid. infr.* § 27.; whereas all privileges exempting persons from a jurisdiction in itself competent, must by their nature be pleaded upon by the party privileged, before they can operate. Inferior judges, therefore, not only may, but they ought to proceed in every cause to which they are competent, though a member of the college of justice be the defender, if he does not insist in the plea arising from his privilege; so that a decree in absence is effectual against him. This rule, however, suffers an exception in the privilege exempting members of parliament from civil jurisdiction, sitting the parliament; which is so strongly founded, that action cannot proceed against them unless they waive their privilege expressly.

25. Declinature is founded, *3dly, ratione suspecti judicis*, where either the judge himself, or his near kinsman, hath an interest in the suit. It is a rule founded in nature itself, That no man ought to judge in his own cause; and it holds, though the judge have only a partial interest in the cause, *ex. gr.* in a question relating to a copartnership, where he is but one of several partners. Yet where a company is constituted, either by patent or act of parliament, by which a public benefit is intended, rather than the advantage of the private adventurers, a judge cannot be declined in the cause of that company, barely because he is a proprietor, *Voet. Com. tit. De judic.* § 45. Hence the proprietors of any bank-company, established either by statute or royal grant, may judge in the cause of that company.

26. Neither can one judge in the cause of a kinsman, where the propinquity of blood makes a sort of identity between the parties related. Hence, by the Roman law, no person could judge in the cause of his father, or son, or wife, or any of his family, *l. 10. De jurisd.* It would appear that no restraint was laid on our supreme judges, by the ancient practice, from sitting in the causes of their nearest kinsmen, since it required a statute, 1594, c. 212. to disable the Lords of Session from judging in any action where their father or brother or son was a party. But by our present law, one rule is established for all judges, supreme and inferior, That no judge shall sit and vote in the cause of his father, brother, or son, whether by consanguinity or affinity; nor in the cause of his uncle or nephew by consanguinity, 1681, c. 13. By this rule, a judge may vote in the cause of one who is married to his niece; but if the niece be the proper party, and the

the husband only cited for *his interest*, such case falls under the prohibition of the statute, *Fount. Jan. 31. 1712, Calder*. It is a common opinion, that a judge who stands in an equal degree of propinquity to both parties, let it be ever so near, cannot be declined; because there the bias or partial affection must be also presumed equal. But, *first*, admitting this to be a good reason why the law *ought* to stand so, the rule contained in the act 1681 makes no such exception. And, *2dly*, There is the same reason for declining a judge who stands in an equal relation to both parties, as for rejecting the testimony of a witness in the like situation; for which see below, *b. 4. t. 2. § 24*. It would seem, that though the marriage which first created the affinity between the judge and the party should be dissolved, the judge continues disqualified from voting in that party's cause, not only from the words of the act, but from the reason of the thing: for though the affection which works the bias in the judge, had its first rise from the marriage, it is seldom or never taken off by the dissolution of it. In the House of Lords of Great Britain, every member of that sovereign court may judge, not only in any kinsman's cause, but even in his own. That privilege however is seldom if ever used. A judge may likewise be suspected on account of his dependence on a superior. Thus a cause may be carried to the court of session from a deputy, because the principal judge is a party to it, 1555, *c. 39. in fine*. And though Lord Stair limits that act to the case of removing tenants, which is the special subject of it, *b. 4. t. 37. § 20.*; yet it seems to have required an express statute, to authorise deputies to judge in the causes of the principal, 1579, *c. 84*. Where a judge is himself party to a cause so similar to the one brought before him, that both fall to be decided by the same rules, he is said in the Canon law *fovere consimilem causam*, and by that law may be declined, *Decretal. l. 2. t. 1. c. 18*.

27. Prorogated jurisdiction is that which is, by the consent of parties, conferred on a judge, who, without such consent, would be incompetent. The Romans, who were strangers to the word *prorogate*, gave it the name of *jurisdictio in consentientes*. It is authorised by *l. 1. De judic.*; where two things are required as essential to it; the consent of parties, and jurisdiction in the judge. *First*, The parties must consent; for where a judge is incompetent, he can have no authority, till his jurisdiction be rendered competent by the consent of him who is not subject to it. It is not therefore sufficient, that no appearance be made in behalf of the defender; for one is under no necessity to appear before a judge who has no right to call him to judgement, *l. 20. De jurisd.* unless he acquiesce in his authority, either by an express declaration in word or writing, or tacitly, by some act which implies consent. Tacit prorogation is inferred against a pursuer, by bringing his cause before the judge; and against a defender, by his appearing, and offering defences in the cause, either dilatory or peremptory; which the law considers as an acknowledgement of the competency of the court, according to the rule, *Primus actus judicii est judicis approbatorius*. The offering of a declinature is so far from importing an acquiescence in the judge's jurisdiction, that it is an express disowning of it. Where a declinature has been offered by the party, and repelled by the judge, the party is not understood to pass from it, though he should afterwards offer defences *in causa*, *Fount. July 29. 1696, Schaw*; but this is commonly done, under protestation, that his proposing of defences shall not hurt his declinature. As the crown's interest cannot be affected by the undue consent of its officers in the management of processes, 1600, *c. 14*. the King's causes may be carried from that very court before which the crown-officers themselves had brought the action, *Jan. 19. 1711, Eyres*.

Tit. II. Of Jurisdiction and Judges in general.

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28. A clause of registration, though it bear a consent to register the deed in the books of a particular court, does not import prorogation, so as to found that court in a jurisdiction, in questions that may arise afterwards upon its validity or legal effects. The consent is confined to the registration, which is *quodammodo jurisdictionis voluntarie*; though therefore it has the effect to support the diligence which is founded on the registration, it is not to be so stretched by implication, as to confer judicial powers on the judge in acts of contentious jurisdiction. Thus, though a bond for a sum exceeding L. 40 Scots should bear an express consent for registration in the books of any commissariat, the commissary is not thereby authorised to judge of the import of that bond in any subsequent question, without a proper prorogation.

29. The *second* requisite of prorogation is, That the judge have such jurisdiction as may be a proper or habile subject of prorogation, *l. 3. C. De jurisd.* For this reason there is no place for prorogation where the jurisdiction is vacated, or its term expired, which doctors call *prorogatio de tempore in tempus*: for no private consent can create jurisdiction; and a magistrate or judge, after the term of his office is elapsed, or his commission revoked, is no longer a magistrate or judge. Neither can jurisdiction be prorogated *de loco in locum*; *i.e.* parties cannot subject themselves to the jurisdiction of a judge while he is without his territory; for a judge *extra territorium* is no better than a private person. But *prorogatio de loco in locum* has been admitted in our practice, when understood in a different sense: if, for instance, one who resides in the shire of Haddington, shall appear before the sheriff of Edinburgh, and exhibit defences *in causa*, without pleading the *prescriptio fori*, he thereby brings himself within the territory of that sheriff, and so is understood to acquiesce in his jurisdiction, *Feb. 23. 1627, Service*. Yet it still remains a doubt, whether *prorogatio de loco in locum* ought to be extended to the case where the defender's domicile is not within the judge's territory, more than it can be to the case where the judge sits in judgement in a place without it.

30. Jurisdiction is said to be prorogated *de causa in causam*, when parties consent, that a judge, who hath jurisdiction in causes of a particular kind, or to a particular extent, shall have the cognisance of a cause of a different kind, or to an higher extent. By the Roman law, prorogation from civil causes to criminal was rejected, *l. 1. C. Ubi cause ffc.*; because the power of the sword was not included in civil jurisdiction: but a judge appointed to a determinate kind of civil causes might, by the consent of parties, take cognisance of civil causes of a different kind, *l. 1. C. De jurisd. omn. jud.* By our law, the limiting of jurisdiction to a certain sort of civil causes, imports a denial of it in causes of an higher or different nature, *Pr. Falc. 13.*; in which therefore there can be no prorogation, though both parties should acknowledge the judge's jurisdiction in the most express terms. Thus no consent of parties can give force to the sentence of a sheriff in an action for declaring the property of heritage, or in a sale or ranking of a bankrupt estate. Thus also the jurisdiction of the justices of the peace ought not to be prorogated to actions upon common debts. The powers conferred upon them were intended solely for preserving the public peace, and maintaining a well-regulated police over the kingdom: they seem therefore to have no radical jurisdiction in civil causes, which may be the proper subject of prorogation, *New Coll. ii. 170*. But in questions of the same nature with that to which the judge is confessedly competent, though the law may have confined his jurisdiction to causes within a stated sum, parties may prorogate it to causes beyond that sum; as the transition is eas-

fier from a smaller sum to a greater, than from a cause of one kind to one of a quite different kind, *June 25. 1668, Black.*

31. Prorogation of jurisdiction is in special cases excluded by statute. Thus, *first*, No prorogation can, by the late jurisdiction-act, 20^o *Geo. II.* be received in baron-courts; so that baron-bailies are shut out from the cognisance of causes which exceed the sum to which that statute has limited the baron's judicial powers. *2dly*, The ground of declinature arising from the judge's propinquity to one of the parties, is so strongly founded, that no consent of parties can enable or qualify the judge to take cognisance of such causes; for all right of judging in them is expressly denied to him by the following words of the act 1681, c. 13. that *the judge shall not sit, nor vote.* Besides, the statute disables the judge from voting, not only where the party related to him is pursuer, but where he is defender; though it must be evident, that a pursuer who brings before a judge a son or brother of that judge as a defender, does an act which in its own nature infers prorogation, and virtually passes from all grounds of declinature which might have been competent to him against the judge on account of his proximity of blood to the defender.

32. All judges must be just men, that so all who are subject to their jurisdiction may have equal justice done to them, 1449, c. 12. They must have attained to the age of twenty-one years at least; for no person to whom the law denies the unlimited management of his own property, ought to be intrusted with that of others. They must, by 1567, c. 9. maintain the purity of religion; by which is meant the Reformed religion, in opposition to Popery: and by *Conv. Est.* 1689, c. 13. it is declared contrary to law, to employ Papists in places of the greatest trust. *Lastly*, Judges must have a competent estate of their own, out of which they may be punished, if they minister not the law evenly, or be negligent in their offices, 1424, c. 6. & 45.; 1457, c. 76. This last qualification has been borrowed from the Roman law, which provided, that if a judge *litem suam fecerit*, erred either through ignorance or corruption, he was liable in damages to the party hurt, l. 5. § 4. *De obl. et act.* But because few persons would adventure on the office of a judge, if an undesigned error, perhaps *in apicibus juris*, were to subject them to damages, this penalty is, by the usage of Scotland, pointed only against those judges who from wilfulness or a bad heart delay or pervert judgement, *July 19. 1706, Black; New Coll.* i. 111. Yet where the sentence is glaringly illegal, *lata culpa equiparatur dolo*; law, from the grossness of the error, presumes a perverse will, *Br.* 79. All our supreme judges hold their offices *ad vitam aut culpam*, which is the likeliest way to preserve them from undue influence. There is indeed no statute limiting the crown's right in this respect; but it was declared contrary to law, by *Conv. Est.* 1689, c. 13. to change a grant of jurisdiction, once made during life, to a commission during pleasure.

33. The oaths imposed by law on our present judges are, *first*, The oath of allegiance, with the assurance, the tenor of which is inserted in 1693, c. 6. *2dly*, The oath of abjuration, which was first imposed by 6^o *Ann.* c. 14. on all who by the former laws were required to swear the allegiance, and subscribe the assurance; and has been since continued by several British statutes. *3dly*, The oath of supremacy, which was by 1^o *Geo. I.* c. 13. imposed upon all officers, civil and military, in Britain. This oath contains in substance, that no foreign prince or prelate hath any ecclesiastical authority in this realm; but it hath never been imposed in our practice. *4thly*, The oath *de fidei administratione*, that they shall faithfully discharge the duties of their several offices.

T I T.

T I T. III.

Of the Supreme Judges and Courts of Scotland.

THE Sovereign, from whom all jurisdiction is derived, must have had that right in himself in the highest degree, which he alone could confer upon others. Hence, in all grants of jurisdiction, he was understood to reserve a power, either of investing others with the same jurisdiction, or of taking cognisance by himself of those very causes to which he had made the grantees competent, 1469, *c.* 27. A strong instance of the last is given by *Craig, lib. 3. dig. 7. § 12.* in the case of James VI. who having, as heir to Archibald Earl of Angus, laid his claim to the Earl's estate, was declared, by our supreme court, to have a right of pronouncing sentence on the import of his own claim. Charles II. extended this branch of the prerogative so far, as to appoint sheriffs-depute, and even to erect regalities, within the bounds of heritable sheriffships; which extension was expressly justified by act 1681, *c.* 18. declaring that the king, notwithstanding any offices or grants of jurisdiction conferred by him on his subjects, retains a jurisdiction cumulative with the grantees. From this James VII. assumed a power of naming magistrates in several royal boroughs, which by former grants had a right to name their own magistrates. But these steps having been justly looked upon as encroachments on property and patrimonial jurisdiction, were upon the revolution declared contrary to law, *Conv. Est.* 1689, *c.* 13.; and soon after the act itself of Charles II. was formally repealed, by 1690, *c.* 28. It seems now to be agreed, that the several courts on whom the crown hath conferred a stated extent and degree of jurisdiction, have, by the immemorial exercise of it, acquired a power of judging according to that usage, exclusive of the sovereign himself, which cannot be altered without a statute, *Hist. law-tracts, v. 2. p. 7.*

2. It admits of no doubt, that the parliament of Scotland, as a court of appeal, was in use to determine all causes in the last resort, unless where the judgements of any court were by special statute declared final. But it may be doubted, whether it had any original civil jurisdiction; for the decisions in parliament mentioned in act 1587, *c.* 39. are probably to be understood only of decisions upon appeal. Our parliaments consisted at first only of the king's barons or freeholders, *St. Milc. II.* under which appellation it would seem that the dignified clergy were included on account of their freeholds. These last are expressly mentioned in the introduction to the statutes of William; and they are there, and in the title prefixed to the acts of James V. ranked before the temporal barons. It appears, that parliaments were, in the reign of Robert II. made up of three estates, *St. Rob. II. c. 3.* of which that of the boroughs was one, *ibid. c. 17. § 4.* From that period, to the revolution in 1688, the three estates of parliament were, the clergy, barons, and burghesses.

3. The name of *baron* was commonly used in France, for some time before the Norman conquest, to denote persons of the first dignity, *Du Fresne, Glossar. v. Baro.* After that vocable was transplanted into Britain, its signification became more extended, and frequently included all who held their lands immediately of the king. Barons may, according to the usage of Scotland, be distinguished into the greater and the lesser. Though all barons, however small their freeholds might be, had from the beginning a right to sit in parliament; yet the *maiores*, or greater barons, were sufficiently distinguished from the *minores*, by their grants or patents of peerage, in virtue of which they were dignified with the titles of *Duke, Earl, Lord, &c.* and so raised above the rank of common barons. When by the increase of the

the number of the lesser barons it became impracticable to assemble them all in one house, their attendance was dispensed with, upon chusing two or more of their own number in each county to represent them, 1427, c. 102.; from which dispensation however the *barones majores* were expressly excepted. This leave of absence was renewed, first by 1457, c. 75. as to all freeholders under the yearly rent of L. 20 Scots; and afterwards, by 1503, c. 78. to all below 100 merks of new extent, unless they should be called by special writ; and by 1587, c. 113. to all without exception. But still the right of sitting continued with those smaller barons, though they could no longer be fined for absence. As in those days few barons claimed their feat, to avoid the expence and trouble which necessarily attended the service of parliament, it came at last to be understood that they had no right to sit unless they were elected by the freeholders, agreeably to the directions of 1427, c. 102.; but no statute appears to have been ever enacted, expressly disabling them.

4. Though the lesser barons had from that period no hereditary seat in parliament, they still continue capable of electing or being elected members of parliament provided they be infeft in and possessed of lands in property or superiority holding of the crown, and extending either to 40s. Scots of old extent, or to L. 400 Scots valued rent, 1681, c. 21. Proper wadsetters are by that statute accounted proprietors; and under the appellation of *lands*, is included every heritable estate capable of feisin *. Hence fishings, even where they are not connected with lands, if they are valued at L. 400, intitle the proprietor to a vote.

5. A committee, called *the committee of articles*, was elected in the beginning of every parliament, and consisted of a certain number of the three estates. Its constitution appears to be at least as old as the oldest of our proper statutes, *Black acts*, fol. 1. This committee was at first chosen by the three estates, *ibid.* fol. 50. Their business was, to receive all proposals relative to parliamentary matters, and transmit them to parliament; and frequent references are made in our more ancient statutes to the special articles laid before that committee, 1503, c. 64.; 1540, c. 82. 119. 120. &c. Immediately after the election of this committee, the parliament was adjourned, *dabatur ceteris licentia recedendi*, as it is expressed in *Black acts*, fol. 1. and in the mean time this committee prepared overtures, which were afterwards voted in full parliament, generally on the last day of their sitting. Under colour of preventing frivolous debates, it was enacted by 1594, c. 218. that no matter should be brought before the parliament which was not first laid before this committee, and presented by the clerk-register in their name to the three estates. The manner in which they were chosen about a century ago is particularly set forth 1663, c. 1. It having been, after the revolution, accounted inconsistent with the freedom of parliament, that nothing could be there proposed but what had been previously concerted by an inconsiderable number of its members, that committee was declared a grievance by *Conv. Est.* 1689, c. 18. and actually suppressed by 1690, c. 3.

6. When the estates were called by the sovereign, for the particular purpose of imposing a taxation, or upon any special emergency which required immediate deliberation or advice, it got the name of *a convention of estates*. Those meetings consisted of any number of the estates that might be suddenly drawn together by the king, without the necessity of a formal citation against them upon a precise number of days; and their powers were limited to that particular business for which they had been called, *Mack.*

* It was found, that a right to feu-duties payable out of church-lands did not intitle to a vote, *New Coll.* i. 128. 129; and by a late decision, the same was found as to the office of crowner of Renfrew; though both were heritable estates capable of feisin.

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b. t. § 5. But the convention holden in 1689, under the authority of the Prince of Orange, exercised higher powers than that author seems willing to allow to the parliament itself.

7. By the treaty of Union in 1707, the parliaments of Scotland and England are united into one. The Scottish share of representation in the house of Peers is, by *art. 22.* fixed to sixteen Peers, elective. But though none of the Peers of Scotland, except these sixteen, have a seat in parliament, they are, by *art. 23.* declared to have, in all other respects, the privileges of British Peers. In the house of Commons Scotland is represented by forty-five members; of which thirty are elected by the freeholders of counties, and fifteen by the royal boroughs, said *art. 22.* The method of electing the Scottish Peers is set forth in act 1707, *c. 8.*: and the most material British statutes for regulating the election of our Commoners, and declaring the qualifications of the electors and elected, are, 6^o *Ann. c. 6.*; 12^o *Ann. ft. 1. c. 6.*; 2^o *Geo. II. c. 24.*; 7^o *Geo. II. c. 16.*; 16^o *Geo. II. c. 11.*

8. The parliament of Britain have no such restraint on their deliberations as was imposed on that of Scotland by the committee of articles. Officers of state, as such, have no right to a seat in the British parliament. The two houses of Peers and Commons sit separately; and each of them must concur in all bills brought into parliament before they can pass into a law. The house of Lords is, in its judicative capacity, the sovereign court, which determines finally in all appeals from the supreme courts of both parts of the united kingdom; and it never judges in civil questions but upon appeal. In criminal matters, it hath an original jurisdiction, which is exercised either over Peers or Commoners, upon impeachment by the house of Commons, for treason or for high crimes and misdemeanors. In the trial of Peers by indictment, the house of Peers sit, not as a court of parliament, but as a court constituted by special commission from the king, who names the person who is to preside in it as High Steward. Every member of a British parliament, whether Peer or Commoner, enjoys certain privileges to which he is intitled by the usage of parliament. One is, That none of them can be sued upon any action, nor any diligence used either against their person or estate, sitting the parliament, nor for forty days after its rising, or before the day to which it is adjourned or prorogued; and this privilege is not confined to the members themselves, but reaches also to their menial and certain other of their servants. But it hath suffered a restriction by 11^o *Geo. II. c. 24.* which declares, that all suits may be commenced and prosecuted against any person intitled to the privilege of parliament, immediately after the dissolution or prorogation of a parliament, till a new one shall meet, or the same be re-assembled; and immediately after the adjournment of both houses for above fourteen days, till both houses shall re-assemble. It has been always admitted, that it affords no protection against prosecutions upon treason, felony, or breach of the peace; and it was lately resolved by both houses in the noted case of Mr Wilkes, Nov. 1763, that no privilege of parliament extends to the writing and publishing of seditious libels; than which no breach of the peace can be productive of greater mischiefs to a state *.

9. Though

* By stat. 4^o *Geo. III. c. 33. § 1.* it was enacted, That any creditor to a certain value, of a merchant, or other person, falling under the description of the laws relating to bankrupts, having privilege of parliament, may, if the debt be not secured, paid, or compounded, within two months after a summons or bill is issued against him, have the debtor adjudged a bankrupt, and sue out a commission against him as against other bankrupts. And by § 3. That if any merchant, or other person, falling under the statutes relating to bankrupts, should, after the last

9. Though our kings, who seldom exercised their power of judging causes by themselves, did very early commit the regular administration of justice to stated judges, viz. to the justiciar or justice-general, who had an universal supreme jurisdiction over the whole kingdom, and to inferior judges, whose judicial powers were limited, in respect both of territory, and of the special kinds of causes to which they were competent; yet they continued to exercise jurisdiction in a great variety of causes, by the advice and with the concurrence of their council. And even after it had been enacted, that all complaints should be decided by the judges-ordinary, 1424, c. 45. it appears by act 65. of the next year, 1425, that the king and his council judged in such causes as the pursuers chose to bring before them in preference to the judge-ordinary, *St. b. 4. t. 1. § 7*. The judicial powers vested in the council were, by the said act 1425, c. 65. transferred to the session; and soon after, from the session to the judges-ordinary, in the manner to be explained next section; during which last period, the ordinary jurisdiction of the king and council was confined to causes which called upon the special attention of the public, namely, actions pertaining to the king, and to strangers; complaints made by churchmen, orphans, and pupils; and those that were directed against officers of the law, 1487, c. 105.; beside which, they seemed to be vested with the extraordinary powers, not barely of punishing judges-ordinary for their negligence, 1469, c. 27. but of reviewing their sentences in case of iniquity, 1475, c. 63. This council consisted of a number of persons named by the king, to assist him with their advice, chiefly in matters of government; and was afterwards called the *secret*, 1489, c. 12. or *privy council*, 1609, c. 14. in contradistinction to the parliament, which got the name of *the general council*, 1427, c. 102. or *the King's great council*, 1537, c. 40. The privy council came at last, beside their powers in matters of state and public police, to have a fixed supreme jurisdiction in all questions of wrong, for which no redress could be had in the common courts of law, and in all causes where the public peace was concerned. Thus they inquired into and punished violent incroachments upon possession, all acts importing oppression, concussion, or contempt of the laws, or of public authority; they decreed alimony to pupils, and to wives barbarously used by their husbands; and judged in many other questions of that sort, where summary proceeding was necessary. These powers continued in the Scottish privy council, till an act passed soon after the Union, 6° *Ann. c. 6*. whereby that court was abolished, and sunk into the privy council of Britain, which for the future was declared to have no other powers than the English privy council had at the time of the Union. What the powers of a British privy council are, it does not much import a Scottish lawyer to know: it is certain, that they have no judicial powers that can affect Scotsmen; for though they may commit them to custody for crimes against the state, and examine them, they have no right of trial.

10. A new court was erected by said act 1425, c. 65. consisting of the chancellor, and other persons of the three estates of parliament to be named by the king, who were to sit thrice in the year where he should command them, and judge in all causes that were formerly decided by the

day of that session of parliament, commit an act of bankruptcy, a commission might be sued out against him, and proceeded in notwithstanding his privilege.

By stat. 10° Geo. III. c. 50. § 1. and 2. it was enacted, That after the 24th day of June 1770 it should be lawful to sue any action or suit against any Peer or member of the house of Commons, or other person intitled to privilege; and that the suit or action should not be stayed under pretence of privilege; provided that nothing in the act should extend to subject the person of any member of the house of Commons to be arrested or imprisoned upon any such suit or proceedings.

king

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king and his council. This court was called the *session*, because, in place of being, like the council, itinerant, and without any fixed terms of sitting, it was ordained to have a determinate number of sessions annually, at such stated places as the king should appoint. Certain doubts which had arisen upon the jurisdiction of this new-erected court, in relation to spuilzies, were removed by 1457, c. 61. and a superadded jurisdiction seems to have been conferred on them in spoliations committed against tacksmen, and other possessors of land, and in all obligations, contracts, debts, and other civil actions which concern neither fee nor heritage: which last words sufficiently prove, that declarators of property of heritage, or, as they were then called, briefs of right, did not fall within the cognizance of that court. The session appears, by this last act, to have had only a cumulative jurisdiction with the judge-ordinary: but if the pursuer should have once made his election of the session, neither party had the remedy of appealing from their sentence to parliament, 1457, c. 62.; which has probably proceeded from this, that the court of session, being truly a committee of parliament, were accounted to have parliamentary powers.

11. This constitution of a court was soon found inconvenient. The judges who were named out of the estates, served by rotation, and were changed from time to time for others, after having sat forty days, 1457, c. 63. Their turn of officiating was so short, that they could not in that time acquire any tolerable knowledge of the practice of the court; and they were particularly negligent in the causes of the poor. For these reasons, the jurisdiction of this fluctuating committee of parliament was abolished by several acts, 1469, c. 27.; 1475, c. 63. not indeed in express words, but by necessary consequence; for it was enacted by these statutes, That all causes should come first to the judges-ordinary, *i. e.* to the justices, sheriffs, stewards, bailies, and barons, provost and bailies of boroughs; and that if they neglected to do justice, or administered it partially, the party aggrieved should apply to the king and his council, without once mentioning the session, or supposing them invested with any jurisdiction, either in the first or second instance. That the jurisdiction vested in the session was in this manner taken away from them, is affirmed by Stair, b. 4. t. 1. § 11. and still in stronger terms, b. 4. t. 1. § 15.; notwithstanding which, it must be acknowledged, that the act 1503, c. 58. which altered the former establishment, carries an insinuation, that the court of session had not then fallen into total disuse; for these words, *because there has been great confusion of summonses at ilk session*, cannot possibly be applied to any other court then known in Scotland. However that may be, it is certain, that by the said act 1503, c. 58. all the powers that had been formerly in the session were transferred to a council to be named by the king, called the *daily council*; who were to hold their courts continually at Edinburgh, or where the king should appoint, and to decide in civil causes and complaints daily as they should occur. But neither was this court of long continuance: the civil jurisdiction vested in it was extremely limited, and it was perhaps considered as too heavy a burden for the justiciar of Scotland to be charged with the supreme jurisdiction, not only in criminal, but in all civil matters concerning heritable rights; wherefore it was judged proper to erect a new court, which might have an universal and supreme jurisdiction in all civil questions whatever.

12. James V. therefore gave to this court of the daily council a new form, after the model, as Sir George Mackenzie informs us, of the parliament of Paris, 1537, c. 36. He dignified it with the appellation of *the college of justice*, and the judges with that of *senators*, 1540, c. 93. who are numbered among the judges-ordinary, 1584, c. 3. &c. and pass sometimes in our statutes

statutes by the name of *Lords of Council*; and sometimes by that of *Lords of Session*. In all their extracted acts and decrees they are styled *Lords of Council and Session*. It may be worth remarking in this place, that though the parliament which instituted this court, is in all the later editions of our statutes said to have been assembled *anno* 1537, it was truly holden in 1532. For proof of this, the first or black edition of our statutes may be appealed to, which places that parliament in the year 1532; and surely that first edition printed by the special commission of Queen Mary, and copied immediately from the records, is to be accounted of more certain authority than the later ones. *2dly*, It appears from 1537, *c.* 68. as it stands in our later editions, that the King's ratification of the privileges of the new-modelled court was subscribed in the 19th year of his reign. Now James V. began his reign *anno* 1513, from which if nineteen years be reckoned downwards, the year must be 1532, not 1537. *3dly*, It is manifest from the King's revocation made at Rouen, and fully recited 1540, *c.* 70. that he had attained his perfect age of twenty-five on April 3. 1537, a month or two before the date ascribed in our statute-book to the institution of the college of justice; nevertheless it is expressly affirmed, 1540, *c.* 93. that he was still under the age of twenty-five when that court was established, or at least reformed. *Lastly*, Mention is made in 1535, *c.* 32. of the Lords of Session, which is a denomination not applicable to any Scottish court, from the erecting of the daily council, till it was new modelled by James V. This contrariety cannot be otherwise reconciled, than by placing under the year 1532, the statutes which appear in the common editions of our acts of parliament as passed *anno* 1537. The transcribers of our statutes have been doubtless led into this mistake from the near resemblance between the figures 2 and 7, in the ancient way of writing.

13. The judges of this court, by the institution, consisted of seven churchmen and seven laymen, with a president, 1537, *c.* 36. The Abbot of Cambuskenneth was named the first president, *c.* 42. and in his absence, another churchman vice-president, *ibid.* But there is no statute of that year which excludes laymen from the office of president; though it be affirmed, 1579, *c.* 93. that it behoved the president, by the first institution of the court, to be a clergyman, which is for the future dispensed with by that statute. Frequent instances occur in the books of federunt, of parsons, rectors, and other churchmen, who were admitted judges after the Reformation; but parochial ministers were, by 1584, *c.* 133. declared incapable of exercising any office in the college of justice, under the pain of deprivation, that they might not be diverted from their proper functions. By a posterior act during the usurpation, 1640, *c.* 26. which extended this incapacity against all churchmen indiscriminately, the distinction between temporal and spiritual judges was suppressed, and the whole number ordained to consist of laymen: and though this statute was voided by the act rescissory of Charles II. 1661, *c.* 15. no clergyman has been since that period admitted to the bench.

14. The first judges of this court appear to have been chosen by the parliament; but as far back as the books of federunt now extant carry us, viz. January 1554; they have been named by the crown. James VI. transferred to the judges the right of electing their own president, by 1579, *c.* 93.; and in a federunt of the session recorded June 26. 1593, where the king himself was present, he condescended to name three presentees to the Lords, upon every vacancy in the bench, out of which they were to chuse one; and in this form, Preston of Fenton was admitted a judge, March 8. 1596, and Macgill of Cranston, May 23. 1597. The exercise of both rights, however, was soon after resumed by his Majesty, and continued in the crown

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crown till the Ufurpation, when a committee of parliament, named in 1641 to negotiate with Charles I. insisted, that the officers of state, and the judges of the session, should be named by the parliament. This article having been referred by the King to the parliament itself, it was enacted, c. 15. of that year, That the King should name them by the advice of the three estates. Upon the restoration of Charles II. the right of nomination was again declared to be solely in the crown, by 1661, c. 2.; with whom it has ever since remained, without challenge.

15. Though other judges may be named at the age of twenty-one, the judges of the session must be at least twenty-five, on account of the firmness of judgement and resolution which that important office requires, 1592, c. 132. By the treaty of Union, art. 19. no person is to be named a judge of the session, who hath not served as an advocate or principal clerk of session for five years, or as a writer to the signet for ten; and in the case of a writer to the signet, he must undergo the ordinary trials on the Roman law, and be found qualified, two years before he can be named. Upon a vacancy in the bench, the King names a presentee to supply it, in a letter directed to the judges, requiring them to try and admit him. The judges, at the desire of Charles II. fixed the method of trial by act of federunt, July 31. 1674; and the form therein prescribed hath been ever since observed. The judges, in 1723, actually exercised the power of rejecting the presentee, which is implied in trial, and which was expressly given them by 1579, c. 93. But by an act passed 10^o Geo. I. c. 19. that power is taken from the court; and the only remedy left them is to remonstrate to the crown, if a person they think improper be presented; who however must be received if the King insist upon it.

16. Beside the fifteen ordinary Lords, the Sovereign was at liberty, by the first institution, to name three or four Lords of his great council or parliament, who might, as extraordinary members, sit and vote with the other judges, 1537, c. 40. This number was soon exceeded. Six, seven, and sometimes eight extraordinary Lords appear upon the rolls in the same federunt about the beginning of the last century. But upon a complaint of that excess, James VI. in a letter recorded in the books of federunt, March 28. 1617, promised to restrict himself to the statutory number. By the aforesaid act, 10^o Geo. I. no vacancy happening thereafter through the death of any extraordinary Lord, is to be filled by the crown. This clause of the statute was enacted from a suggestion, that the extraordinary Lords, who were not tied down to close attendance, might, by attending on particular occasions, stop the free course of justice. In other respects that branch of the institution was of use. It had a great tendency to qualify those Lords for the public service, and particularly for judging in appeals brought from the court of session to the House of Lords. The quorum, or number of judges whom it behoved to be present before they could proceed as a court, was at first ten, or rather eleven, ten with the president, 1537, c. 57.; but it appears by 1587, c. 44. that the practice prior to that act had restricted the quorum to nine ordinary Lords.

17. The appellation of *the college of justice*, is not confined to the judges, but includes advocates, clerks of session, writers to the signet, and other members of court, as they are enumerated in an act of federunt, Feb. 23. 1687: where therefore the college of justice is intitled to any privilege, it extends to all the members of the college. Beside the privilege explained under the former title, § 24. they are, by 1537, c. 68. exempted in general terms from all taxes and contributions: and it was, no doubt, in consequence of this exemption, that the lands belonging to the members of that college were declared free from the burden of the taxation imposed by the convention of

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estates 1665. But though by a still later act this general immunity from taxes was confirmed in the strongest terms to the ordinary Lords of Session, 1670, *c.* 8. ; yet neither they, nor the other members of the college of justice, have ever claimed an exemption from the land-tax since the Revolution, and it is believed not even since the Restoration. It appears by 1592, *c.* 153. that they were, by a custom anterior to that statute, free from watching, warding, and other services within borough. By the act of federunt 1687, last cited, which proceeded on an action for ascertaining the privileges of the college of justice against the city of Edinburgh, they are discharged from the payment of ministers stipends, and of all customs, causeway-mails, shore-dues, and other impositions laid on goods carried to or from the city. When a subsidy is imposed to which the members of the college are to be subjected in common with the other inhabitants of the city, the faculty of advocates, and the society of writers to the signet, are, in consequence of that act of federunt, in use to name some of their number, to meet with the stent-masters appointed by the magistrates, to take care that the members of the college be not burdened beyond their just proportions.

18. Though all writs relating to actions brought before the session, not only of process but of execution, issue in the name of the sovereign, and not of the court, it is nevertheless certain, that that court hath a proper jurisdiction, and right of execution, in itself; for the signet-office, from whence all these writs issue, is under the sole direction of the session. The jurisdiction of the session in civil matters is, *first*, universal as to extent, and, *2dly*, supreme in degree. As to the first, it is expressly declared to extend to all civil causes, 1537, *c.* 36. And though private right or property is, without doubt, the chief and most proper subject of their jurisdiction, they are also competent to several questions which carry no pecuniary or patrimonial interest, *ex. gr.* to elections of magistrates of boroughs, of commissioners of supply, &c. Tho' the House of Commons alone can judge in the merit of elections and returns of members of parliament, with respect to those who claim a seat in that house, yet the court of session, not as the supreme civil court, but in virtue of special statutes, have the only cognizance of all complaints against sheriffs, or clerks to elections, for making false or undue returns, and of condemning them in the legal penalties; which powers, without such delegation, would not have been competent to them, 7° *Geo. II. c.* 16.; 16° *Geo. II. c.* 11. Though all charters, and gifts granted by the crown, must pass under the authority of the Barons of Exchequer, as the King's commissioners; yet the session is the only competent court in questions concerning their legal effects and preference, and in all causes relating to infeftments of the King's property, 1640, *c.* 22.; 1661, *c.* 59. even though they should be confirmed in parliament, 1567, *c.* 18. N° 1. By a letter from the King directed to that court, and recited in Lord Stair's decisions, June 14. 1665, they were declared the sole judges in declarators of the casualties of superiority, at the suit of the King's donataires, till it should be considered by the King whether the jurisdiction in these questions belonged to them or the Lords of Exchequer; and it does not appear that any inquiry was afterwards made by the King. These branches of jurisdiction are reserved to them in the British statute 6° *Ann. c.* 26. erecting the court of exchequer in Scotland.

19. Actions of uncommon importance or intricacy are peculiar to the court of session, and consequently excluded from the cognizance of inferior judges, *ex. gr.* declarators of property in heritage, and other competitions of heritable rights, restitutions of minors, provings of the tenor, *cessiones bonorum*, reductions of decrees and of deeds, and all other rescissory actions, judicial

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judicial sales of the estates of minors and of bankrupts, &c. In a second class of causes the jurisdiction of the session cannot be exercised but by way of review, after the action is brought from the inferior court; as in causes proceeding on brieves, because brieves must be directed to inferior judges; in maritime or consistorial causes, which must be carried on in the first instance before the admiral or commissary; and in actions for sums not exceeding 200 merks Scots, which, by 1672, c. 16. § 16. *concerning the session*, must be first brought before an inferior court. But this last act contains two exceptions; *first*, Of causes pursued by members of the college of justice; *2dly*, Of actions of debt due to merchants, vintners, and others in borough, for goods sold by them to such as dwell not within the county where the goods are furnished; because if debts of that kind were to be sued for separately, the expence would frequently exhaust the value of the subject in dispute. In all civil matters which fall under neither of the two above-mentioned classes, the judicial powers of the session are concurrent, even in the first instance, with that of the judge-ordinary.

20. The jurisdiction of the session is also supreme as to degree. For, *first*, That court can set aside or suspend the sentences of all inferior courts in civil causes, unless where that power is denied to them by special statute. *2dly*, They can review their own sentences, under the limitation contained in 1672, c. 16. and the others explained below, b. 4. t. 3. § 3.; not only interlocutory sentences upon reclaiming bill by the party aggrieved, but definitive, (after sentence pronounced, and even extracted), by way of suspension or reduction. *3dly*, Their sentences are subject to the review of no court but the House of Lords, that high court of appeal, which is common to both parts of the united kingdom. It was warmly disputed, whether the decrees of the session were, before the union of the two kingdoms, subject to the review of the parliament of Scotland. On the one hand, instances occur in the books of federunt, soon after the institution of the college of justice, of parties protesting for remedy of law; *i. e.* of their appealing from the sentences of the session to the king and parliament, *Jan.* 29. 1555, and *March* 7. 1561-2. On the other, the session disallowed this right of appealing, because their sentences are declared to have the like force as those of the old court of session, 1537, c. 39.; and that old court had a power of judging finally, without appeal to parliament, 1457, c. 62. When therefore an appeal was offered to parliament, in 1674, against a decree of session, the judges ordained the appellant's counsel to confess or deny, whether they had advised their client to that measure? and, upon their declining to answer, the court, after debarring those advocates from the exercise of their offices, applied to the privy council; who banished, not them only, but all the other advocates who would not declare their abhorrence of such appeals, twelve miles from Edinburgh: and under this sentence many of the most eminent lawyers continued for several months, till the court, at the King's desire, restored them upon their disclaiming the right of parties to appeal. The convention of estates in 1689, c. 18. declared, that the banishment of those advocates without a trial, was a grievance; and by c. 13. they asserted it to be the right of every subject to appeal to parliament against the decrees of the session. See this argument, which is now rather of curiosity than use, discussed at large by *Stair*, b. 4. t. 1. § 1. *et seqq.*; and *Dirlet. v. Session*.

21. Though the jurisdiction vested in the session be merely civil, yet several criminal causes fall under their cognizance upon one or other of the following grounds: *first*, From the force of statute. From thence proceeds their jurisdiction in contraventions of lawborrows, 1581, c. 117.; in deforcement, and breach of arrestment, *ibid.* c. 118.; in fraudulent bankruptcy,

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1696, *c.* 5.; and in wrongous imprisonment, 1701, *c.* 6. The statute 1555, *c.* 47. though it seems to declare their jurisdiction in perjury and the subornation of witnesses in general terms, is in practice limited to the case where these crimes are committed during a depending action: and even then the court cannot inflict the pains of law upon the offender, but must restrict their sentence to a slighter corporal punishment. *2dly*, From the necessary connection which the crime hath with a civil question depending in court. Thus, as the session has the sole cognisance in the reduction of deeds, they cannot explicate this point of jurisdiction, without a power of judging in the crimes of falsehood or usury, where either of these happen to be the ground of reduction. As to the crime of falsehood or forgery, there is no doubt, that the session's jurisdiction is exclusive even of the court of justiciary, in the special case where the summary proceedings of the justiciary, whose diets are peremptory, are inconsistent with the evidence which is to be brought in the trial of that crime. But *Macenzie, Crim. Tr. tit. Falsehood*, § 4. goes farther, and affirms, that the sole cognisance of falsehood is in the session in every case; for which he appeals to the books of adjournal, in which he could not find one trial of that crime in the first instance before the criminal court. It is however certain, that by the later usage such prosecutions have been brought directly to the criminal court, where the proof can be finished in so short a time as is consistent with the diets of that court, *ex. gr.* where the crime of forgery is to be proved in the direct manner, by the testimonies of the writer of the deed and the instrumentary witnesses. *3dly*, All actions, even upon crimes or delicts, when pursued *ad civilem effectum*, are within the proper jurisdiction of the session. Hence, as the statutory punishment to be inflicted on those who assault their adversary during the dependence of a suit, is the loss of the cause, 1594, *c.* 219. the court of session are authorised to judge in that crime of battery, in consequence of the general expression in the act, declaring it triable by the justice, or *other judge competent*. Hence also, all actions upon scandal or verbal injuries, for the recovery of a sum, in name of assythment or damage to the private party, being truly of a civil kind, may by the present practice be brought before the session; *vid. infr. t. 5. § 30*. And on the same footing, though no riot or delict, let it be ever so slight, can be judged by the session in the first instance; yet after sentence pronounced by the inferior judge, condemning the delinquent in a pecuniary fine, the matter becomes properly civil, and consequently our supreme civil court may reduce or suspend the sentence of that inferior judge, *Fount. March 4. 1707, Alves; vid. supr. t. 2. § 8*.

22. The session is a court of equity, as well as of law; and as such may and ought to proceed by the rules of conscience, in abating the rigour of the law, and in giving aid, in the actions brought before them, to those who can have no remedy in a court of law. This power, which is called the judges *nobile officium*, is inherent in the supreme judicatory of every state, unless where separate courts are established for law and for equity, as in England, where the court of chancery may be applied to, for correcting or softening the strict proceedings of their courts of law. It arises from this *nobile officium* in the session, that whereas inferior judges never exercise their office but at the suit of the litigants, the judges of the session may, in their inquiries into facts, direct things to be done, or steps to be taken, which neither are nor can be demanded as a point of right. Thus they frequently ordain a party to be examined *ex officio*, though his adversary, who declines referring the matter in issue to his oath, has no title to insist for such examination.

23. The court of session, beside their judicative, have also ministerial powers.

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powers. They have more than once fixed the price of vivres within the city of Edinburgh ; and when the greatest part of the brewers there had, in 1725, entered into a concert to give up their trade, under pretence that they could not continue it with any profit, on account of the impositions chargeable upon malt and ale, the court, at the suit of the King's advocate, committed them to prison ; where they lay, till they became bound to carry on their trade as formerly. They are also in use to appoint persons by special commission to act as officers of the law in completing of feudal rights, where property may be in danger by the death or supervening incapacity of the stated officers. Thus, when the city of Edinburgh was, after Michaelmas 1745, without a magistracy, and so had no bailies to receive resignation, or give seisin, in burgage-tenements, they appointed certain persons bailies for that special purpose, till a new magistracy should be established in the due course of law. And on the death of any sheriff-depute, they appoint an interim deputy, who acts under their authority, not only as an officer of the law, but as a judge. These, and the like extraordinary powers, were proper to the privy council of Scotland, while that court subsisted ; and if they are not now transferred to the court of session, there must be a defect in that part of our constitution, and many wrongs would be without a remedy. For which reason the author of Historical law-tracts reasonably conjectures, that it will be soon considered as part of the province of the session, to redress all wrongs for which a peculiar remedy is not otherwise provided.

24. The justiciar of Scotland, or, as he was afterwards called, the *justice-general*, or simply *the justice*, had in ancient times a supreme jurisdiction, not only in criminal, but in civil matters, even in questions of heritage, *Reg. Maj. l. 1. c. 5. § 3. 4. 5. ; l. 2. c. 16. § 37.* That he retained his civil jurisdiction till 1487, appears by act 105. of that year, in which he is placed at the head of the judges-ordinary : and by a decision observed by *Haddinton, v. Sheriff*, as far down as Dec. 18. 1523, *Dalziel*, actions respecting heritage were adjudged to be cognisable by the justice-general, to the exclusion of the sheriff. After the institution of the college of justice, the justiciar never judged in *civil* matters. He still continued however to be the supreme *criminal* judge ; and in that capacity, not only determined the punishment to be inflicted on the criminal, but condemned him in the damage claimed by the party injured ; in which last he had a cumulative jurisdiction with the session. The question, Whether the jurisdiction of the court of justiciary is supreme in the highest sense, so as to exclude a review, even by the House of Peers ? is of considerable importance ; and the solution of it not without difficulty. Those who maintain the affirmative, appeal to our more ancient laws, *St. Alex. II. c. 2. § 6. ; Balf. 573. c. 37. ; Skene, treat. of judges in crim. causes, t. 14. § 7.* They also alledge, that the same doctrine is agreeable to the claim of right *anno* 1689, which, though it authorises the applying to parliament against the iniquitous sentences of the session, carries not the least insinuation that the same remedy is competent against those of the justiciary ; and they add, that as by art. 19. of the treaty of Union, the court of justiciary is to continue as it was then constituted, there can be no appeal to the British parliament from the sentences of our supreme criminal court, since there was none to the Scottish parliament. If this question were confined to the verdict of juries upon criminal trials, it could hardly admit of a doubt. These verdicts are not the proper subjects of appeal, as their truth, or conformity to the evidence, cannot be properly judged of by those who were not present when the evidence was taken. But if the question includes also the proceedings of the judges, or court, upon any point of relevancy, inhability of witnesses, degree of punishment to be in-

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flicted on the pannel, &c. that may be liable to exception, the opinion that the sentences of the justiciary are reviewable by the British House of Lords is the most probable: for that House, as the sovereign court of appeals, seems to have an inherent right of reviewing the sentences of all other judges, except in so far as they may have been limited by an order of their own, which has never been done: and in fact an appeal was entered and tried in that august House against a justiciary sentence, *anno* 1713, (see *Hist. law-tracts, tit. Courts*), upon which the sentence of the justiciary was reversed.

25. The courts of the justiciar or justice-general were either universal, over the whole kingdom; or particular, for special districts. He was at first ordained to hold yearly two justice-courts, or as they were anciently called *aires*, (from *iter*, because they were itinerant), at Edinburgh or Peebles, where all the freeholders of the kingdom were bound to attend, *2. Attach. c. 79*. But this universal court, from being itinerant, came to be fixed at Edinburgh, 1587, *c. 81.*; and in trials of importance, assessors were frequently named by the privy council, as assistants to the justice, of whom mention is made in several statutes, 1535, *c. 35.* &c. Besides this universal court, special justice-aires or circuit-courts were, for the benefit of that part of the country which lay at a distance from Edinburgh, holden both on the north and south sides of Forth, either by the King in person, or by judges named by him, twice in the year, on the grass and on the corn, *i. e.* in spring and in autumn, *St. Rob. III. c. 30.*; 1440, *c. 5.*; 1491, *c. 29*. These courts, after they had been long discontinued, were again revived by 1587, *c. 81.* which enacted, That the King should, either by himself or the justice-general, name eight deputies, two for every quarter of the kingdom, who should make their circuits in April and October.

26. This supreme criminal court was, by 1672, *c. 16.* modelled after a new form, which subsists to this day. The office of justice-deputes is thereby suppressed; and in place of these, and of the assessors formerly appointed to the justice-general, five judges of the session, specially commissioned by the King, are joined to the justice-general and justice-clerk, who constitute the court of justiciary; the justice-general being constant president, and in his absence the justice-clerk. Four of these commissioners make a court during the sitting of the session, and three in vacation-time. This act divided the kingdom into three districts; and appointed circuit-courts to be holden each spring, by two of the commissioners, at Dumfries and Jedburgh; by two at Stirling, Glasgow, and Ayr; and by two at Perth, Aberdeen, and Inverness, with power to the justice-general to attend at and preside in any of them. These circuit-courts were, soon after the Union, by 6^o *Ann. c. 6.* directed to be kept twice in the year. By 10^o *Ann. c. 33.* they were brought back to the regulation of the year 1672; and now again, by the late jurisdiction-act, 20^o *Geo. II. c. 43.* they are ordained to be holden both in spring and autumn. By the last-mentioned statute the county of Argyle was added to the western circuit, and the circuit-courts for it and the shire of Bute appointed to be held at Inverary. Ayr, which formerly belonged to the western, was afterwards transferred to the southern circuit. By the same statute the judges must continue at least six days at each place where the circuit is to be held; it is made lawful for one judge to proceed on business in his colleague's absence; and power is given to the King, to make a new division of the circuits, and to alter the times and places of their meeting. It is beyond doubt, that the justice-clerk was originally clerk of the criminal court, and that the epithets of *justice-clerk*, and *clerk of justiciary*, were used promiscuously in our old statutes to denote the same person: for the taking up of dittay, and the charge of the porteous-roll, which in some statutes are made

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made part of the office of the justice-clerk, 1436, c. 139.; 1449, c. 27. are in others ascribed to the clerk of justiciary, 1493, c. 43. 45.; and in the last quoted act, the same person who is in the rubric designed *justice-clerk*, gets the name of *clerk of justiciary* in the body of it. This officer soon grew up to considerable power and dignity. He is mentioned as an officer of the crown, jointly with the Treasurer, Justice, Advocate, and Register, in 1587, c. 31. *verf. Therefore*; and was about that time vested with certain judicial powers, 1587, c. 87. The King's justices for the several districts of the kingdom were in the same year directed to be named by the crown, with the advice of the Chancellor, Treasurer, and *Justice-Clerk*, 1587, c. 81. And at last, in 1663, the Justice-Clerk was declared a member, and one of the judges, of the court of justiciary, by an act of privy council, *Mack. Cr. Treat. part 2. tit. 15. § 4.*

27. The jurisdiction of the justiciary has been always confined to crimes; and it extends to all crimes. It was anciently deemed privative in the crimes of robbery, rape, murder, and wilful fire-raising, which were called *the four pleas of the crown*; and doubtless got that name, because they were reserved to the King's own court, *St. Alex. II. c. 14. § 2.* But the only crime in which the jurisdiction of the justiciary became at last exclusive of all inferior jurisdictions was, in Mackenzie's opinion, that of high treason, *Cr. Treat. part 2. tit. 11. § 5.*; of which more hereafter, *b. 4. tit. 4.* The powers of this court, when sitting at Edinburgh, where all the commissioners are constituent members, reach over the whole kingdom: for they are competent to the trial of every criminal brought thither from the remotest corner of Scotland, without regard either to the *locus delicti*, or to the offender's domicile; and they advocate criminal causes from all inferior judges, and suspend their sentences. By the older practice, the session exercised this power of advocating from inferior criminal judges on the head of incompetency, because the competency of a court is a point of civil jurisdiction; but since the reforming of the court of justiciary by the act 1672, the commissioners, who apprehended themselves to be vested with as high a jurisdiction in criminal matters as the session are in civil, have been in use to advocate criminal causes from inferior courts to their own, upon whatever ground, without the interposition of the session.

28. By the aforesaid act, 20^o *Geo. II.* the circuit-courts of justiciary have acquired a new supreme jurisdiction, by way of appeal, from any inferior court which lies within the district of that circuit, not only in such *criminal* causes as infer neither death nor demembration, but in lesser *civil* causes, where the subject does not exceed L. 12 Sterling. Those appeals are to be lodged with the clerk of the inferior court within ten days after pronouncing the decree appealed from; and the adverse party, or his doer, is to be served with a copy, fifteen days before holding the circuit: but no appeal is to lie before a final decree shall be pronounced by the inferior court. The circuit-judges must proceed in these causes in a summary way, and their sentences are declared final: but in cases of difficulty, they are to certify their proceedings, with their reasons of doubting, to the court of session or justiciary *respectively*, as the cause happens to be civil or criminal; which court is in that case to judge and decide. That part of the statute which relates to civil actions, was only temporary; but is now made perpetual, by 31^o *Geo. II. c. ult.*

29. Grants of criminal jurisdiction were anciently made by the crown, in favour of a few considerable families, over particular counties or districts which lay the most inaccessible to the fixed courts of justice; which imported as high a jurisdiction over the territories mentioned in the grants, as was vested in the court of justiciary over the rest of the kingdom. But notwithstanding these separate jurisdictions, the stated court of justiciary might

might have judged within the territory of the special jurisdiction, if the person intitled to that special right had not exercised it, by reclaiming the offender to his own court. By the already cited statute, 20^o Geo. II. all heritable jurisdictions of justiciary are dissolved, and grants of them by the crown prohibited in time to come.

30. The exchequer was the King's revenue-court. It consisted of the Treaſurer, the Treaſurer-depute, and as many of the Lords of Exchequer as the King was pleased to appoint. The ministerial part of the treasurer's office was to receive the casualties arising to the King, either as sovereign, or as feudal superior. Another officer, who had the name of *comptroller*, levied the rents of the crown-lands, borough-rents, and customs, and he examined the treasurer's accounts; but these two offices were united about a century before the union of the kingdoms. The Scottish court of exchequer was, by the treaty of Union, *art.* 19. to continue till a new revenue-court should be established in Scotland by parliament, which was done 6^o Ann. c. 26. The judges of the new-erected court are, by that act, declared to be the High Treasurer of Great Britain, with a Chief Baron, and other four Barons, who must be made either of serjeants at law, or English barristers or Scottish advocates of five years standing. All may plead before this court who can practise in the courts of Westminster, or in the session: and all the privileges belonging to the college of justice are communicated to the Barons, and to the other members of court.

31. The judges of this court have, by the aforesaid act, a peculiar jurisdiction as to all duties of custom and excise, and other revenues pertaining either to the King or Prince of Scotland; and as to all honours and estates, real and personal, forfeitures and penalties of what nature soever, arising to the crown within Scotland; and as to all questions relating to the said matters, which they are authorised to determine, either in law or in equity, by the same forms that have been used in the English exchequer. But under the two following limitations, to preserve the private law of Scotland from innovation: *First*, That no debt due to the crown shall affect the debtor's real estate, in any other manner than such estate might be affected by the law of Scotland; by which is meant, not barely, that lands belonging to the crown's debtor shall not be affected by any personal obligation granted by him to the King, which is the law of England; and that they shall not be attached by a writ of extent according to the English form; but that no higher preference shall be given with respect to heritage in favour of the crown's diligence, even supposing it to have been carried on according to the forms of Scotland, than any other creditor using the same diligence would have been intitled to, *New Coll.* i. 112. *2dly*, That the validity of the crown's titles to any honours, lands, or casualties, shall be tried as formerly by the court of session, *supr.* § 18.

32. All persons employed in collecting the revenue, or accounting for it, are, by the statute, declared to be under the jurisdiction of this court in all revenue-matters: and all sheriffs, and officers appointed by them, are to be obedient to, and attendant on the court, under such penalties for neglect of duty, or contempt, as shall be imposed by them. The Barons have power, by the said act, to pass the accounts of sheriffs, or other officers, who have the execution of any process issuing from or returnable to the court of exchequer; and to receive resignation of lands, and pass signatures, tutories, and other gifts, as the Scottish exchequer formerly did. But this power in the exchequer has been always limited. When the signature contains no more than was contained in the vassal's former charter, the Barons may pass it: but when it imports a conveyance of any new subject not formerly granted by the crown, it must be first superscribed by the King himself; for if it pass of course in exchequer, it is not effectual to the

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the grantee, in so far as relates to such new right. Gifts of escheat, and some other of less importance, may be also passed in exchequer, without a special warrant from the crown; but remissions of crimes, and gifts of forfeiture on high treason, must have the King's sign-manual for their warrant: which was also the case of gifts of recognition, while the casualties incident to a ward-holding subsisted.

33. The jurisdiction of the High Admiral of Scotland has the character of sovereign given to it as early as the act 1609, c. 15. By a later statute, 1681, c. 16. which hath considerably enlarged the Admiral's powers, he may exercise his jurisdiction by a deputy, who is called *the Judge of the High Court of Admiralty*; and he may also name inferior deputies, whose jurisdiction is confined within particular districts, and whose sentences are subject to the review of the high court. The Admiral's jurisdiction, as enlarged by this act, is both civil and criminal. The first extends to all maritime causes; and so comprehends questions of charter-parties, freights, salvages, wrecks, bottomries, policies of insurance; and, in general, all contracts concerning the lading or unlading of ships, or any other matter to be performed within the verge of the Admiral's jurisdiction; and all actions for the delivery of goods sent on shipboard, or for recovering their value, or where the subject of the suit consists of goods transported by sea from one port to another. In all these the Admiral's jurisdiction was of old cumulative with that of the session, *Sinclair, March 9. 1543, Lord Botbwell*: but by the act 1681, all causes which fall under the Admiral's jurisdiction, must be brought before him in the first instance; and the session itself, though it may review his decrees by suspension or reduction, cannot carry a maritime question from him by advocacy. This is however to be understood only of advocations upon the head of iniquity; for the jurisdiction of the session, as the highest civil court, is privative in all questions of competency. Neither is the session barred by this prohibition from advocating causes from inferior admiralties; for the privilege of supreme is given only to the high court, not to its deputies: but as the session cannot judge in maritime causes, except by appeal, they must remit the cause which is thus advocated by them from the deputy, to the judge of the high court, who is declared by the statute sole judge in the first instance, *Fount. June 22. 1700, — contra Bruce*. All bills of suspension of the Admiral's sentences must be passed in time of session in the inner house by the whole Lords, or *in præsentia*; but they may be passed in vacation-time if three Lords be present.

34. Though the Admiral's judicial powers reach only, by 1681, c. 16. to maritime causes, he is commonly said to have acquired by long possession a right of cognifance in bills of exchange, and other mercantile questions, though they should not be in the smallest degree maritime, *Fount. July 19. 1706, Anderson*. Whether a judge who is by his commission limited to a certain sort of causes, may, in contradiction to the tenor of his grant, acquire by prescription a jurisdiction in a different kind of causes, is at best doubtful; for the same reason, that no vassal whose property is specially bounded by his charter, can prescribe a right to lands without the bounds expressed in it; *vid. sup. t. 2. § 30*. But this appears indubitable, that that kind of jurisdiction which derives no degree of force from the will of the Sovereign, who is the alone fountain of jurisdiction, ought to be confined within the narrowest limits. On this ground the acute author of *Historical law-tracts* is of opinion, that the Admiral's right of judging in mercantile causes is not accompanied with any coercive power over persons who are unwilling to submit to it; and that consequently a defender in a mercantile cause which is brought before the court of admiralty, may, if

he pleases, except to the authority of the judge, and carry the suit to the court of session, by advocacy on the head of incompetency, *vol. i. p. 372*. And even where the parties in such cause have acquiesced in the jurisdiction, he affirms, that either of them may carry it to the session by advocacy on the head of iniquity, as he might do from the sheriff or any other inferior judge, notwithstanding the statutory privilege granted to the Admiral, that no cause can be advocated from his court to the session, *ib. p. 328*. as that privilege cannot by any just interpretation be extended beyond the causes to which the statute has declared the admiral-court competent. This appears to be also Lord Fountainhall's opinion in observing a contrary decision, *Jan. 24. 1699, Cairns*. It does not appear, that *Admiral-deputes* have ever laid claim to this prescriptive jurisdiction in causes merely mercantile *. The civil jurisdiction of the High Admiral has this mark of supreme given it by the act 1681, that he may review, not only the decrees of inferior admirals, but his own, *supr. t. 2. § 6*.

35. As to criminal jurisdiction, the High Admiral is, by the said act 1681, declared, in virtue of his being the King's Lieutenant and Justice-General on the seas, and in all harbours and creeks, and upon fresh water within the flood-mark, to have the sole jurisdiction in all maritime and seafaring causes within this realm. Though, therefore, in consequence of this act, he hath the exclusive cognisance of the crimes of piracy, mutiny on ship-board, and others which may with propriety be called *maritime causes*; yet in those of murder, adultery, and, in general, such as offend not against the laws of navigation, his jurisdiction is not exclusive, though they should be committed on shipboard, because the statute hath not declared his judicative powers to reach beyond the crimes which affect the rules of navigation. In support of this opinion, the author of *Historical law-tracts, tit. Courts*, mentions a decision, though without a date, or the names of parties, in which the court of justiciary sustained its own jurisdiction, in the trial of a crime which had not the proper character of maritime, though it was committed within the sea-mark †. The Admiral hath, ever since the aforesaid act, claimed a jurisdiction properly supreme, in all the causes truly falling under his cognisance, so as not to be subject to the review of the justiciary itself; both because the statute constitutes him Justice-General on the seas, and because it declares that no suspension of his decrees shall pass but by the court of session, without giving the like power in criminal matters to the justiciary. This claim was never brought under challenge till the year 1734, when the justiciary actually exercised the power of reviewing sentences pronounced in criminal trials by the court of admiralty, in a noted case, the King's Advocate against Long and Macadam. It is not a clear point, whether the High Admiral of Scotland hath a supreme jurisdiction, exclusive of the session and justiciary, in the first instance, *since the Union*; for the court of admiralty is not, by *art. 19. of that treaty*, continued with all its former powers, as the other supreme courts of Scotland are; and that article expressly declares, that all admiralty-jurisdictions shall be under the Lord High Admiral, or Commissioners for the Admiralty, of Great Britain. This question was moved in a criminal trial before the justiciary *anno 1723*, in which, upon the pannel's objecting to the jurisdiction

* It was found in a late case, that admiral-deputes have no jurisdiction in causes merely mercantile. Haig Daes and Company merchants in Alloa, brought a process against John Campbell writer in Stirling, before the Admiral-substitute of Alloa, for payment of the price of some foreign wood. The Admiral sustained his jurisdiction: but the cause having been advocated, the Lords found he had no jurisdiction, and dismissed the process with costs, *July 1768*.

† In the trial of Mungo Campbell for the murder of the Earl of Eglington, *Dec. 22. 1769*, the court of justiciary sustained its own jurisdiction, though the crime was committed within the sea-mark.

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of that court upon the act 1681, the court, in a point so delicate, put off the decision for some time; and the prosecutor withdrew his suit. The heritable jurisdictions of admiralty are not abolished by the late jurisdiction-act. The jurisdiction of the Commissaries of Edinburgh, which is as truly supreme as that of the High Admiral, is explained below, *tit. 5.*

36. There was no jurisdiction conferred in Scotland before the Union, upon officers of the army, or others, for punishing military offences, except what was constituted during the Usurpation for inflicting the pains of death on runaways and deserters: of which mention is made 1644, *c. 2.* In England, though by the constitution of that kingdom, no person could be subject to any punishment by martial law; yet when it was necessary to keep up a body of regular troops for their security and defence, an act was made, 1^o *Gul. & Mar. c. 5.* intitled, *For punishing mutiny and desertion*, to last only for a year, authorising the King to grant commissions to certain officers to hold courts-martial, for the trial of crimes committed by officers or foldiers in the King's service; which act has been renewed from time to time, almost every year, with little variation, and has since the Union been extended to Scotland. Courts-martial are either regimental or general. No particular regulations are laid down in the act with regard to the first. As to the last, it requires that they should consist of at least thirteen judges, all commission-officers; and that the president be a field-officer. Their jurisdiction is precisely limited to points of military discipline, as mutiny, desertion, neglect of duty, beating an officer or fellow-foldier, &c. In all other matters, both officers and foldiers are amenable to the common courts of law. No capital punishment can be inflicted by a court-martial, unless nine officers present shall concur. Where they do not exceed their proper powers, no appeal lies against their sentences to any other court; the only remedy is in the Sovereign, to whom their sentences are reported: but if they shall pronounce judgement in any matter that falls not within their cognisance, the party injured may complain to the civil judge. An act of the same nature passed in the parliament of England, 13^o *Car. II. c. 9.* authorising the Lord High Admiral to grant commissions to inferior vice-admirals, &c. to call courts-martial for the trial of offences committed at sea by officers, mariners, or others in the King's actual service. This statute was in many points altered by posterior enactments, till at last all the laws, relating to courts-martial for the sea-service, were reduced into one act, which equally affects the whole united kingdom, 22^o *Geo. II. c. 33.*

37. The High Constable of Scotland had no fixed territorial powers of judging, but was invested with a supreme itinerant jurisdiction, jointly with the Marischal, in all crimes committed within *twelve* (or, according to a different reading, *two*) leagues of the court, *Leg. Milc. II. c. 6. § 3.* Upon a commission granted by Charles I. for inquiring into the nature and extent of that jurisdiction, which became in the course of time little known, the commissioners reported, that it extended to all slaughters and riots committed within four miles of the King's person, or of the parliament, or of the privy council. Inferior constables, who all depended on the High Constable, were keepers of the King's castles, and sometimes had not only forts, but boroughs, subject to their jurisdiction, as Dundee, Montrose, Forfar. They had the right of proclaiming in those boroughs such fairs as had been established there, of levying the customs belonging to them, of exercising criminal jurisdiction while the fairs lasted, and of applying the fines of delinquents to their own use, *July 18. 1676, E. Kinghorn.* All heritable constabularies are by 20^o *Geo. II. c. 43.* dissolved, except the office of High Constable: but all the lands, and feu and farm duties, annexed to those dissolved offices, are reserved to the possessors.

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38. The Chamberlain of Scotland, whose office hath been long sunk, was anciently an officer of the highest dignity, and of supreme jurisdiction. He had the inspection of all the royal boroughs, a power of inquiring into the conduct of the magistrates, and of applying the borough-revenues to proper uses. In his chamberlain aires or circuits, he received complaints between burghs and burghs, and against craftsmen for not performing their work, or for charging exorbitant prices for it. He judged also in matters relating to the public police within borough, which is a power now exercised by the dean of guild. The powers of this officer, and the duties incumbent on him, are fully explained in the *Iter camerarii*, and in the statutes of the first four Jameses.

39. All our supreme courts have seals or signets proper to their several jurisdictions, which are used for sealing the writs or warrants issuing from them. Thus the High Admiral and the Commissaries of Edinburgh have each their proper signet. But when the signet is mentioned indefinitely, that of the session is commonly understood; which is also called *the King's signet*, because all the writs issuing from thence are made out in the King's name. In this office are sealed all summonses for citation, all letters of execution or diligence, or for the staying or prohibiting of diligence; and, generally, whatever passes by the warrant, either of the whole Lords, or of the Lord Ordinary, which requires to be executed by the officers of court. It is the signet, when stamped on these, which gives them authority; and all of them must, before sealing, be subscribed by the writers, or, as they are called in ancient statutes, *clerks of the signet*, 1537, c. 59. *et seqq.* except letters of diligence for exhibition of writings or other evidence, which, though they pass by the signet, must be signed by a clerk of session. The clerks of the signet also prepare and subscribe all signatures of charters or other royal grants which pass in exchequer. It appears, by the style of the brief of dittay preserved by *Skene, De v. f. voce Iter*, that the justiciar of Scotland had anciently a seal peculiar to his own court. It is however certain, that criminal indictments, and executorial letters issuing from the justiciary, after they were signed by the clerk of court, passed for a long time by the signet of the session. But that court, soon after it had received its present form by the act 1672, got a new seal proper to itself. The Barons of Exchequer have also, by the act 6^o Ann. constituting that court, a proper seal for all grants, precepts, and other process issued from thence, or which ought to pass under the seal of the court. An account of the different seals under which the crown-grants ought to pass, is to be explained *infr. b. 2. tit. 5. § 82. et seqq.* Hitherto of supreme judges.

T I T. IV.

Of the Inferior Judges and Courts of Scotland.

SIR Thomas Craig, *lib. 1. dig. 12. § 14.* is of opinion, that the sheriff came in place of the ancient *Comes*, who appears, by many charters, in the reigns of Robert and David Bruce, of the earldoms of Moray, Fife, Strathern, &c. to have been a person who had a large tract of land granted to him heritably by the Sovereign, with jurisdiction annexed to it; whereas the word *Comes*, or *Earl*, as it is now understood, is a mere title of dignity. He conjectures, that these *Comites* abused the powers conferred upon them to such a degree, that the Sovereign was glad to reassume the jurisdiction to himself, and in their place to appoint sheriffs for the ordinary administration of justice: And the Latin *vicecomes* and *vicecomitatus*, which

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which signify *sheriff* and *shire*, make this opinion probable. He derives the word *sheriff* from the Saxon *Grave* or *Comes*. But Spelman, with greater probability, *Gl. v. Reve* and *Shira*, fetches it from *reeve*, magistrate or ruler, and *sheer*, to cut or divide; from whence the different districts into which the kingdom is divided are called *shires*: and according to this etymology *sheriff*, or, as it is sometimes pronounced at this day, *shireeve*, denotes the magistrate or judge-ordinary constituted by the crown over a particular shire or county. Yet sometimes the crown erected small tracts of land that made only parts of a shire into a jurisdiction of sheriffship, the grantees of which had a jurisdiction cumulative with the sheriff of the county, in all matters, civil or criminal, within the erected territory.

2. The sheriff's jurisdiction, both civil and criminal, was in ancient times nearly as ample within his own district, as that of the session or justiciary was over the whole kingdom; for he received in his court the four pleas of the crown, when authorized by the justiciar, *St. Gul. c. 2. § 5.*; and he was judge-competent, not only to all personal actions, but to declarators of property in heritage, and other questions of the greatest importance, *Reg. Maj. l. 1. c. 3.—c. 5. § 1.* Even after his jurisdiction became more limited, it retained for some time this character of supreme, that causes might be carried by appeal from baron-courts to the sheriff, 1503, *c. 95.* And indeed, since the courts held by sheriffs were truly the King's baron-courts, at whose head courts, therefore, all the King's immediate vassals were bound to give suit and presence, *St. Gul. c. 2. § 3.*, it was but reasonable, that these should have an higher jurisdiction than the baron-courts of subject-superiors. But upon laying aside the old form of appeals, after which advocations and suspensions were received by the court of session from all inferior courts indiscriminately, the jurisdiction of a baron was no longer considered as subordinate to that of a sheriff.

3. After the institution of the college of justice, fundry civil causes, which formerly fell under the sheriff's cognisance, were gradually appropriated to the court of session, on account either of their importance or their intricacy. But he judges to this day, in all personal actions upon contract, bond, or obligation, to the greatest extent, whether the suit be brought against the debtor himself, or his representatives; in actions of rent and of forthcoming; in poindings of the ground; and even in the adjudication of lands, when it proceeds on the renunciation of the apparent heir; in all possessory actions, as removings, ejections, spuilzies, &c.; in all briefs issuing from the chancery, as of inquest, terce, division, tutory, &c.; and, generally, in all civil matters which are not by special law or custom appropriated to other courts. Sheriffs, and other judges-ordinary, are authorized by 1669, *c. 17.* where a landholder proposes to inclose any part of his grounds, to appoint, at his suit, a visitation of the marches between him and the adjacent proprietors; and, where they are crooked, or otherwise improper for a fence, to adjudge such part of the grounds as occasion the inconveniency, from one proprietor to the other, for grounds of equal value, so that the fence to be made, according to that adjudication, shall be reputed the common march for the future. This power is not limited by the intendment of the statute to small parcels of ground, but reaches to that quantity which produces the inconveniency, though it should amount to several acres, *New Coll. i. 121. N° 2.*

4. The sheriff's criminal jurisdiction long extended to certain capital crimes. Thus, he was competent to the crime of witchcraft, 1563, *c. 73.* till all prosecution upon that crime was prohibited by a British act, 9° *Geo. II. c. 5.* He has to this day the cognisance of theft, upon an action pursued against the thief by the private party; in which crime he may also

judge by way of indictment, though there should be no private prosecutor, if the criminal was taken with the fang, *i. e.* apprehended while he was carrying off the stolen goods, *Mack. Crim. Tr. part 2. tit. 12. § 5.*; and he is also competent to murder, though it be one of the pleas of the crown. Mackenzie, *b. t. § 2.* affirms, that this part of the sheriff's jurisdiction is confined to the case where the murderer is seized red hand, or in the fact: but it is evident from 1426, *c. 90.* of which a posterior act 1491, *c. 28.* appears to be a transcript, that sheriffs might try murderers, (for slaughter committed of forethought felony, which are the words of these statutes, is truly murder), though they should have been laid hold of *ex intervallo*, within another territory; with this only variation between the two cases, that if the murderer was taken *flagranti crimine*, sentence must have been executed against him within that fun, as it is in the before-cited acts, or within nine days, according to a posterior act, 1695, *c. 4.*; whereas if he was apprehended *ex intervallo*, the sheriff might do justice upon him at any time within forty days after his being seized. The sheriff hath also the cognisance of all crimes which offend against the common police of the country; as, shooting of deer, 1551, *c. 9.*; forestalling, 1535, *c. 21.*; destroying of planting, and breaking orchards or dovecotes, 1579, *c. 84. &c.* He is vested, notwithstanding the powers conferred on justices of the peace by special acts, with a cumulative jurisdiction with them, in all riots and breaches of the peace, and particularly in bloodwits; *i. e.* riots where blood is spilt, from *wyte*, a Saxon vocable, which, according to Spelman, signifies a fine, and which is used in our ancient statutes to denote blame or *culpa*, 1426, *c. 75. vers. Gif the bailies.* Mackenzie affirms, that the sheriff cannot fine for blood in an higher sum than L. 50 Scots, *Crim. Tr. part 2. tit. 12. § 3.* But every judge who is made competent to a crime, has an implied power of inflicting that degree of punishment which is adequate to the circumstances attending the offence, where the punishment is not fixed by statute. The sheriff was long the judge-ordinary to whom the preservation of the public peace was committed; and as such was, and is still, authorised to apprehend fugitives, rebels, and notorious offenders against the peace; and, if necessary, to call the *posse comitatus* to his assistance, 1426, *c. 99.*; 1592, *c. 124.*; 1685, *c. 25.*

5. Though by our most ancient law no freeholder was tied to attendance on the ordinary sheriff-courts, unless he was lawfully cited, *2. Attach. c. 33. § 3.*; yet all freeholders were bound to attend the three *head-courts* which were held by the sheriff yearly, *ibid. § 5.* Freeholders, who owed suit and presence, were to be personally present: Those who owed suit only, might appear by their suitors or proxies, if they were men qualified for passing upon an assize, 1540, *c. 71.* These three head-courts were at last reduced to one, called the *Michaelmas head-court*, where the sheriff had generally little other business, till the act 1681, than to call over the roll of the freeholders, and pocket up the fines of the absents. But by the act 20^o *Geo. II. c. 50.* intitled, *for taking away the tenure of ward holding*, proprietors of land, whether holding of the King or Prince, are no longer subjected to a fine for absence from any sheriff-court, unless they be summoned thither to serve as a jurymen, or for some other lawful purpose. All shires have a head borough, where the jurisdiction is to be exercised, and where all letters of inhibition, interdiction, horning, &c. are to be published and registered. Some of the larger shires are, for the convenience of the inhabitants, subdivided into lesser districts, each of which hath a proper head borough. Thus, in the shire of Clydesdale, Lanerk is the head borough of the overward, both for holding courts, and registering diligences; Hamilton is the head borough of the nether ward, for holding courts; and Ruglen,

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Ruglen, for publishing and registering diligences : and immemorial custom hath given a sanction to these divisions, without the authority of statute.

6. Sheriffs have not only judicial powers, but ministerial ; in virtue of which, they were employed in publishing our laws, and sending copies of them to prelates, barons, and boroughs, before the art of printing was known in Scotland. At this day, they return juries for the trial of causes before the justiciary or exchequer which require juries. It is their duty to execute all writs issuing from the court of exchequer, to levy, for the King's use, the escheats of those who are denounced rebels, and the blanch and feu rents, casualties of superiority, and other duties payable to the crown, for which they must account in exchequer, 1663, *c.* 15.; and, in general, to look after every matter which regards the crown's interest within their county. It is another branch of their ministerial duty, to strike the sheriff-fiars yearly in February by a jury ; *i. e.* they fix the prices of grain of the growth of the respective counties for the preceding crop ; which are to be accounted the legal prices in a few cases where they either cannot be, or, *de facto*, are not ascertained by covenant, or where no positive or precise proof can be had of the true values, *Jan.* 1734, *Henderson*. The forms of proceeding in this matter are prescribed by *Act Sed. Dec.* 21. 1723. Since the Union, the writs for electing members of parliament have been directed to the several sheriffs ; which, after they are executed, are returned by the sheriff to the crown-office from whence they issued, with the names of the persons elected annexed to them, 6^o *Ann.* *c.* 6. § 5.

7. Regalities were feudal rights of lands granted by the King in *liberam regalitatem* ; so that regality-jurisdictions, while they subsisted, were properly territorial, and attendant on the lands. The grantees, though commoners, were called *Lords of Regality*, on account of the high and regal jurisdiction implied in these grants. Regalities proceeded upon signatures presented in exchequer, which passed by the great seal. No lands could fall under this jurisdiction, but such as belonged either in property or superiority to the grantee. And on this medium, royal palaces, though locally situated in boroughs of regality, were adjudged to be no part of the regality, but of the royalty, because they belonged not to the lord of regality, but to the King ; and consequently the curators of those who resided in these palaces, could not be legally cited at the head borough of the regality, but of the shire, *Jan.* 11. 1662, *Lo. Carnegie*. Lands subject to the sheriff's jurisdiction are said to be *of the royalty*, because sheriff-courts are in the most proper sense the King's courts, established by him for the regular and ordinary administration of justice in every county ; in opposition to lands subject to the special and extraordinary jurisdiction of regality ; see 1540, *c.* 97. It was singular in this high jurisdiction, that the lord of regality might appoint deputies, called *stewards*, or *bailies*, not only during pleasure, or for life, but heritable, who had, by that deputation, all the profits incident to the jurisdiction made over in *perpetuum* to themselves and their heirs. Mackenzie, in *Crim. Tr. part 2. tit.* 11. § 8. affirms, that lords of regality could not have judged in their own person ; and it is certain, that for above a century before that author's time, they always administered justice by a bailie : but that they might have judged by themselves, is taken for granted, in a decision observed by *Hadd. Feb.* 7. 1610, *E. Bothwell*, adjudging, that where one had been constituted heritable bailie, the lord of regality could not name another bailie, but that still he might judge in his own person. A lord of regality had a chancery proper to his jurisdiction, from whence he might issue breves to his bailie for the service of heirs : and the service proceeding on such brief, when recorded in the books of the regality,

ty, was as effectual as a retour on a brieve iffuing from the King's chancery.

8. The civil jurisdiction of a lord of regality was in all respects equal to that of a sheriff; but his criminal was truly royal; for he might have judged in the four pleas of the crown, whereas the sheriff was competent to none of them but murder. It was even as ample as that of the justiciary as to every crime, except treason, *Mack. Crim. Tr. part 2. tit. 11. § 5.*; and in this one respect it prevailed over it, that where a criminal was amenable to a regality, the lord might have repledged or reclaimed him to his own court, not only from the sheriff, but from the justices themselves. He who had this right, or his procurator, appeared before the court from whom he was to repledge, and demanded judicially, that the person accused, because he resided within his special jurisdiction, might be sent to his court to be tried there; and it behoved him to give security to the court repledged from, that he would minister justice to him within a year, which security was called *culrach*, from the Gaelic *cul*, which signifies, back, and *rach*, cautioner. If the repledger neglected to try the defender in that time, he forfeited his right of holding courts for a year; the first judge might again proceed in the cause; and if the defender did not appear, the cautioner was to answer for him. See *2. Attach. c. 8.* and *Skene's* notes. Notwithstanding this right of repledging, the jurisdiction of the justiciary or sheriff over those who resided within a regality-jurisdiction, was not thereby abolished: the repledger might indeed, in virtue of his privilege, carry the trial from their courts to his own; but if he did not exercise the privilege, it was not only lawful to these other judges, but it behoved them to proceed in the trial.

9. All regalities, whether belonging to the church or to laymen, had originally the same right of repledging from the justices; but it was, soon after the Reformation, taken from church-regalities. The jurisdiction itself of church-regalities fell regularly to have been annexed to the crown, in consequence of the annexation of church-lands, by 1587, *c. 29.* But most of the churchmen in whom that right was vested, having for a sum of money made over the exercise of their jurisdiction, to laics and their heirs, who were by such grants constituted heritable bailies of the regalities, the legislature considered those baileries as rights of property; and therefore, instead of suppressing them, it only declared, that the bailies should not for the future have the right of repledging from the justice-aire: and to take from them all occasion of complaint, they were allowed to sit with the justices, and to continue to levy for their own use all the emoluments arising from those trials. Sir James Steuart makes it a doubt, *Ans. v. Advocation*, whether even a laic regality could repledge from the justiciary after that court was modelled of new by the act 1672.

10. It has been observed, *supr. § 7.* that regality-deputes were sometimes called *stewards*; but steward, in the strict sense, signified a magistrate appointed by the King over special lands belonging to himself, having the same proper jurisdiction with that of a regality. The account given by Mackenzie, *b. t. § 7.* that the lands which had been formerly erected into earldoms and lordships, became stewartries, after accruing to the King by forfeiture, does not want its difficulties, unless he means those earldoms that were granted to the ancient *Comites*: for the erection of lands into an earldom or lordship, imports no higher jurisdiction than barony, *July 9. 1713, D. Montrose*; and it cannot be affirmed, that a jurisdiction is, by escheating to the King, made more ample than it was before. It appears, therefore, more probable, that it was the *regalities* belonging to subjects, which, on their falling to the crown, became stewartries: yet where lands

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were expressly erected by the King into a stewartry, the jurisdiction annexed to them must, without doubt, have been equal to a regality, whatever the former jurisdiction had been. Most stewartries consisted of small parcels of land, which were only parts of a county, as Strathern, Monteth, &c.; but the stewartry of Kirkcudbright, and that of Orkney and Zetland, make counties by themselves, and therefore send each of them a representative to parliament. Where lands fell to the King, which had not been formerly erected into a regality, or which he did not intend should have regality-powers, he appointed a bailie over them; whose jurisdiction, both civil and criminal, was in all respects equal to that of a sheriff.—We may here take occasion, from the identity of the name, to add a few words concerning the office of Steward of Scotland. This officer was in ancient times of the highest dignity and trust; for he had not only the administration of the crown-revenues, but the chief oversight of all the affairs of the household, and the privilege of the first place in the army, next to the King, in the day of battle. Some antiquaries affirm, that he had the hereditary guardianship of the kingdom in the Sovereign's absence; for which reason he was called *steward*, or *stedeward*, from *ward*, guardianship, and *stede*, vice, or place. From this the royal house of Stuart took its surname; but the office was sunk on their advancement to the crown, and has never since been revived.

11. This is the proper place for explaining the alterations which our law has suffered in jurisdictions by the act frequently before cited, 20^o Geo. II. c. 43. All heritable jurisdictions of justiciary, all regalities and heritable baileries, and inferior constabularies, and all stewartries and sheriffships of smaller districts, which were only parts of counties, are by that act dissolved; and the powers formerly vested in them are to be exercised by such of the King's courts as these powers would have belonged to if the jurisdictions had never been granted. All sheriffships and stewartries not dissolved by the statute, *i. e.* those which comprehend whole counties, where they had been granted either heritably or for life, are resumed, and annexed to the crown. For the future, no sheriffship or stewartry (*i. e.* no high sheriffship or high stewartry) is to be granted, either heritably or for life, or for any term exceeding one year; no high sheriff or steward can judge personally in any action civil or criminal; and one sheriff-depute or steward-depute is to be appointed by the King in every shire or stewartry not dissolved; who is to be an advocate of three years standing, and who is declared incapable to act as an advocate in any cause that shall be brought from his county. These deputies are authorised to name each a substitute or substitutes, either over the whole shire, or within such a particular district of it as shall be mentioned in the substitution: and they may not only hold stated courts at their head boroughs, but itinerant ones, when and where they please, or shall be directed by the King, on previous notice to be published at the several churches within the district where the court is to be held. Every deputy must reside personally, for at least four months in the year, within his shire or stewartry; and, upon misbehaviour in his office, may be deprived by the session, at the suit either of the King's Advocate, or of any four freeholders who can vote in electing members of parliament for the county. All sheriff-deputes that then were, or should be appointed, are by that statute to hold their offices *ad vitam aut culpam* after March 1756; till that time a power was given to the crown to appoint them during pleasure, and by later acts that power hath been continued, till a farther term not yet elapsed. Because by art. 20. of the treaty of Union, all heritable offices and jurisdictions were reserved to the grantees as rights of property, the statute provided that compensation should be made, in respect of every dissolved jurisdiction,

diction, to the persons possessed of them, on their entering claims before the court of session, who were to report their opinion of the value of them to the King and council. Claims were accordingly entered; and the court sustained all claims upon grants, though posterior to the acts 1455, c. 43. and 44. prohibiting them, if they were either ratified in parliament, or supported by possession, *Jan. 12. 1748, D. Douglas*. On report of the court of session, the parliament voted about L. 150,000 Sterling to be given to the claimants, as a compensation for the loss of their jurisdictions; see act of federunt, *March 18. 1748*. Though the register-books of hornings, inhibitions, &c. that had been kept in the abolished jurisdictions, were, by the said act abolishing them, directed to be transmitted to the general register at Edinburgh; and though there could be no record kept there for the future; yet letters of diligence were afterwards frequently executed at the head boroughs of those jurisdictions; but all such executions were prohibited by act of federunt, *Feb. 29. 1752*.

12. Sundry lands, mostly in the shires of Ayr, Renfrew, and Ross, were granted by the crown at least as early as the reign of Robert III. for an appanage or patrimony to the King's eldest son, then called the *Prince of Scotland*, and erected into a regality, called the *Principality*. It is evident from the several acts of revocation by our kings, that those lands were as little capable of alienation as the annexed property of the crown. The Prince's vassals are intitled to elect, or be elected, members of parliament equally with those who hold directly of the crown. And indeed, when there is not a Prince to interpose between the sovereign and them, they hold immediately of the crown, and were therefore bound to attend the parliament, and the justice-aires, as the King's freeholders, 1489, c. 16. For the same reason the principality-rents are, during those intervals, levied by the crown's officers, and applied to the King's use. It carries some doubt, whether the regality-powers of the Prince are extinguished by the late jurisdiction-act: for the jurisdiction annexed to the principality is not heritable, but personal to the King's eldest son; upon whose accession to the crown it remains no longer with him, than till the existence of his eldest son; and the statute, both by its rubric and general strain, is pointed only against *heritable* regalities: yet the statutory words, *all regalities*, are unlimited, and so may be construed to include every regality-jurisdiction, heritable and personal. Though the Prince was, for the better supporting his dignity, and collecting his revenue, intitled to name a number of great officers for his service, as advocate, secretary, treasurer, &c.; yet the jurisdiction annexed to the principality is of the inferior kind. The sentences of the Prince's court in civil matters are subject to the review of the session, in the same manner as those of a sheriff; and if he had a supreme criminal jurisdiction, it must have been in virtue of a special grant of justiciary.

13. The Romans had an officer called *Irenarcha*, who is defined, A magistrate constituted for preserving the public peace within the territory to which he is named, *l. unic. C. De iren*. In England, justices of the peace were appointed by the crown as early as the second year of Edward III. We had no such officers in Scotland till 1609, by the 7th act of which year the King was authorised to name commissioners for each county, for binding over disorderly persons to their appearance before the justiciary or privy council; but their powers have been since much enlarged. They are, by 1617, c. 8. and 1661, c. 38. directed to judge in riots, and breaches of the peace; to give order for repairing highways, and punish those who straiten them; and to execute the laws against beggars, vagrants, swearers, drunkards, and other disorderly persons. They have also authority to punish the destroyers of green wood, slayers of fish in forbidden times, and other offenders against sundry penal laws: but they cannot try offences of this last kind

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kind without a special commission from the crown. They may compel servants and day-labourers to serve for a reasonable hire, under the pain of imprisonment, and condemn their masters or employers to pay their wages; upon which debts, not only the debtors, but their representatives, may be sued before them. This is the only point of jurisdiction properly civil that is conferred on them by statute: and even that seems to be granted to them, not so much as a branch of civil jurisdiction, as because it is a power necessary for supporting their characters, as guardians of the public peace; for which reason it would seem that their judicial powers in civil causes ought not to be stretched beyond the letter of the statute, *Dec. 15. 1710, Forsyth; New Coll. ii. 170.* The justices can also fix the rates of harvest-fees and craftsmens work, and appoint overseers in each parish within the county for applying properly the sums destined to the poor. By the last of the before-mentioned acts, 1661, they may appoint collectors for levying the fines imposed by the court, at whose suit letters of horning are authorised to pass on the decrees imposing them. These fines, after deducting the charges of the court, were, by the aforesaid act 1661, to be applied, partly to the informers and prosecutors, and partly to pious uses. But by the present oath *de fidei* to be taken by them, which, since the Union, runs in the same style as the English, all the fines, except those which are to be applied for the use of the court, are to be brought into exchequer.

14. By 1669, *c. 16.*; 1670, *c. 9.*; 1686, *c. 8.* justices of the peace are vested with more ample powers in regulating highways, bridges, and ferries, and in determining questions concerning them. They are authorised to call out the tenants, with their cottars and servants, to perform six days work yearly, with their horses, carts, or sleds, and proper tools, for upholding the highways; which must be twenty feet broad at least, without including the ditch on either side; and they may, in conjunction with the landholders, assess the shire in the sums necessary for that purpose, or for building or repairing bridges, or the passages at public ferries, not exceeding 10 s. upon every L. 100 Scots of valued rent; and where the course of an highway is to be altered, they have power to apply part of the sum so levied, to compensate the loss of the proprietor through whose grounds the new road is to be carried. But the commissioners of supply were joined with the justices in that branch of their jurisdiction, by 1686, *c. 8.*; and it is now enacted, by 5^o *Geo. I. c. 30.* that their joint meeting shall be held yearly on the third Tuesday of May*, for the purposes of the statute, with a power of adjournment; and that the tenants, cottars, &c. within the county, shall be obliged to work upon the roads three days every year before the end of June, seed-time excepted, and three days after harvest. Justices are also authorised, by 1707, *c. 13.* to judge in the laws for preserving the game; which powers are continued with them by a British act, 24^o *Geo. II. c. 34. &c.*

15. To prevent justices of the peace from incroaching on the jurisdiction of other courts, whose powers are all reserved entire by the act 1661, no person can be cited before them till fifteen days are elapsed after committing the offence for which he is to be tried; within which time any judge competent may have an opportunity to exercise his jurisdiction. They are specially directed by that statute to meet four times in the year at the county-town, on the first Tuesdays of May, August, and March, and the last Tuesday of October, with power to continue or adjourn these quarterly

* By 11^o *Geo. III. c. 53.* it is enacted, That instead of the meeting appointed by the act 5^o *Geo. I. c. 30.* there shall be two general meetings yearly of the justices of peace and commissioners of supply, for the business of the highways; the first upon the same day that the commissioners of supply shall be directed by the land-tax act to assemble for the purpose of assessing the land-tax, and the second upon the same day that the freeholders shall assemble at their Michaelmas head court.

meetings to any other day or place they shall judge proper. But they have always held courts upon particular causes at any time and in any place within the county, though not by way of adjournment of the quarter-sessions. In those quarterly meetings they have power, in the general case, of reviewing the sentences pronounced at their intermediate meetings, which are called *special* or *common sessions*. As the judicial powers of justices relate chiefly to offences against the peace, which in their nature require dispatch, their forms of proceeding are more simple and summary than those observed in courts which are vested with a proper civil jurisdiction. Where a county is of great extent, the justices sometimes divide it into smaller districts, for the convenience of the inhabitants; but as that voluntary division cannot cut off any part of the legal jurisdiction vested in the justices, those of one district may judge the inhabitants of another, and hold their courts in any part of the shire, *Br. 8.*

16. Constables are the proper officers for executing the orders of the justices of the peace. They are appointed by them in their quarter-sessions, two at least for every parish; and in royal boroughs the magistrates are to name them every six months, 1661, *c. 38.* under the head *Constable*. It is their duty to apprehend offenders against the peace, vagrants, frequenters of disorderly houses, and such as can give no account of themselves, and carry them to the next justice; to suppress riots, with the assistance of the neighbourhood, and apprehend the rioters; but after the riot is over, no constable is authorised to lay hold of any person concerned in it, unless one has been dangerously wounded in the fray.

17. The powers of the justices are sometimes executed out of court. Thus, by a warrant directed to a constable, a single justice of the peace can order suspected houses to be searched, and suspected persons to be brought before him, in order to their examination, or to bind them to the peace. He can also, out of court, imprison offenders by warrants of commitment, directed to a jailor, for receiving and detaining them in prison, till they be set free by the course of law. And though, for securing personal liberty, there can be no imprisonment in order to trial, without a written warrant proceeding on a signed information, 1701, *c. 6.* inferior magistrates are allowed to imprison for slighter offences without that solemnity; the prisoner having, in all cases, relief by offering bail, or demanding a trial. It is ordinary, in breaches of the peace, for the justices, sheriffs, or other magistrates who are intrusted with the preservation of it, to imprison the offenders *ex incontinenti*, or summarily, not merely for quelling the riot, but for punishment, if any one engaged in it hath been mortally wounded. Yet such summary warrants ought not to be granted *ex intervallo*, where there happened nothing but dry blows, and no body hurt: for summary warrants are extraordinary remedies; and a civil action for damages appears, in this last case, to be sufficient for every good purpose. One ought not to be fined by a justice for refusing to give security for his good behaviour, for that is not always in a person's power, *Nov. 9. 1710, Just. of the shire of Wigtoun*; but he may be imprisoned, for that may be necessary for preserving the peace. All magistrates of boroughs are enjoined to receive into their prisons those who shall be sent to them by a warrant of the justices; but the justices must relieve the magistrates of the expence of maintaining the prisoner; and they are impowered, by the foresaid act 1661, to assess at their quarter-sessions every parish within the shire in the sums necessary for that purpose. Where sheriffs or other magistrates failed in their duty, the justices were, by the same act, required to inform against them to the privy council: and they are, since the Union, directed to make presentments in their quarter-sessions against delinquents, in order to their trial before the circuit-court, 8° *Ann. c. 16.*

18. Justices of the peace, over and above the powers committed to them
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by the laws of Scotland, may, by a British act, 6^o Ann. c. 6. exercise all powers pertaining to the office of a justice by the laws of England, in relation to the peace. From that time, the commissions of the peace by the crown for both parts of the united kingdom have run in the same style. By these, power is given to the justices to determine in all capital crimes, felonies, and several others specially expressed, with this limitation subjoined, *of which the justices of peace may lawfully inquire*. Sir M. Hale, *Plac. Cor. part 2. c. 7.* makes two exceptions from the general rule, that justices of peace are competent to felonies: *first*, That those felonies which are by statute appropriated to other courts, as murder in the King's palace, forgery, embezzling records, &c. fall in no case under their cognisance; *2dly*, That ingrossing, perjury, andundry other crimes, are by special statute to be judged by the justices, only in their *quarter-sessions*. All commissions of the peace have a proviso, That in cases of difficulty the justices shall respite judgement, till one of the King's judges be present; which, when applied to the law of Scotland, must be understood of a Lord of Justiciary: but there have been few instances where Scottish justices have adventured to exercise such extensive jurisdiction. By a clause in the act 6^o Ann. trials before the Scottish justices are still to be proceeded in, according to the forms which had been before observed in Scotland. Upon this head, three justices were found necessary to make a quorum, agreeably to the act 1661, though two are sufficient by the English law, because the number constituting a quorum appeared to be a point of form, *Br. 8.* But it was afterwards adjudged, that we were to be governed in that point by the English law, or rather by the present style of our commissions, by which two or more may sit as a court, *Dec. 1730, Reid.*

19. Scottish justices had no cognisance in revenue-matters; but by the treaty of Union, *art. 18.* it was declared, that the laws of excise should from thenceforth be the same in Scotland as in England. Hence, because by several acts passed in England before the Union, justices were made final judges in many frauds and concealments relating to the excise, the court of session have refused to review such sentences on alledged nullities, *Jan. 25. 1710, Paterfon.* In some British acts relative to the excise, the judgement of any two justices is final, without appeal to any other court, 6^o Geo. I. c. 21. § 20. 21.; but generally an appeal lies from them to the quarter-sessions, whose judgement is declared final, 9^o Ann. c. 11. § 36.; 12^o Ann. *sess. 1. c. 2. § 37. &c.* The more effectually to prevent the frequent frauds committed against the revenue, the justices are authorised, in special cases, to inflict penalties, upon the evidence of one or more credible witnesses, 11^o & 12^o Gul. III. c. 15. § 6. and even in absence of the party, provided he have been summoned, said 9^o Ann. c. 11. § 36. No commissioner of excise, or brewer, can act as a justice in matters of excise, 15^o Car. II. c. 11. § 8. Justices are also authorised since the Union to judge in offences against the rules prescribed to the raisers of hemp and flax, and to the manufacturers and bleachers of linen cloth, 13^o Geo. I. c. 26. &c.; see also 24^o Geo. II. c. 44.

20. A borough may be defined a corporate body, erected by the Sovereign, and made up of the inhabitants of a determinate tract of ground, with jurisdiction annexed to it. Boroughs were erected by the Sovereign, either to be holden of himself, or in favour of subjects who enjoyed the property or superiority of the lands contained in the charter, to be holden of those subjects. From this difference arises the common division of boroughs into boroughs-royal, which in the general case hold immediately of the crown, and have a right to be represented in parliament; and boroughs of regality or barony, holding of the lord of regality or baron; of which last *vid. infr. § 30.* All royal boroughs have power, by their charters of erection,

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to chuse annually such office-bearers or magistrates as are specified in the grant; most frequently a provost, bailies, dean of guild, and treasurer, together with a common council. The manner of this election was regulated by a general law, 1469, *c.* 30.; but for a long time past every borough has had a set or constitution proper to itself, according to which the magistrates and common council are elected.

21. Magistrates of boroughs, though not royal, have the cognisance of debts, and questions of possession, between the inhabitants; and it is the general opinion, that royal boroughs have as extensive a civil jurisdiction within the borough, as the sheriff hath in his territory. By special statute, 1644, *c.* 35. revived by 1663, *c.* 6. the provost and bailies of royal boroughs have power to value and sell ruinous houses to the highest offerer, where the proprietors refuse to rebuild or repair them. In criminal matters they had anciently the same privilege as regalities, of repledging from the justiciary or sheriff, for which see *Leg. Burg. c.* 61.; 1488, *c.* 1.; and they had by special statute, 1426, *c.* 75. the cognisance of raskles or undesigned fire-raising: but their criminal jurisdiction hath been much abridged by our later usage. They are still competent to petty riots; but they never had jurisdiction in bloodwits, unless their grants carried an express right of sheriffship, regality, or barony, *Leg. Burg. c.* 19. and *Skene's notes*; which special right hath been granted to Edinburgh, Stirling, Perth, and some other royal boroughs. And indeed, when a royal borough is intitled to any of these, it continues to enjoy a jurisdiction, not only civil, but criminal, as ample as sheriffs now have, or as barons or lords of regality formerly had; for by the act 20^o *Geo. II.* all jurisdictions and privileges vested in any royal borough are reserved in their full extent. But this jurisdiction is only cumulative with, not exclusive of, that of the sheriff: for sheriffs have also the cognisance of all questions arising within the bounds of the erected lands, except such as are more closely connected with the public order or police of the borough; in which, if the sheriff, who may possibly be a stranger to its condition, were allowed to judge, the administration of the magistrates might be embarrassed, and their plans for the public interest defeated. The magistrates of some boroughs are by their charter constituted justices of peace within the bounds of their erection, in which case they have also a cumulative jurisdiction with the county-justices. Since the Union, the eldest magistrate of every royal borough is named of course in all the commissions of the peace.

22. Though the jurisdiction of royal boroughs may be exercised by the provost as chief magistrate, it is generally a bailie who sits as judge: but in matters of police, or of common concernment to the community, the magistrates and town-council must concur, as the full representatives of the community. In this capacity they make by-laws, not repugnant to the laws of the realm, or set of the borough; chuse persons into offices which are in their gifts, &c.; and they can not only proportion among the inhabitants the burden of taxations imposed by parliament, but they may impose taxations for the utility of the borough by their own authority, (for so the court of session have explained the act 1592, *c.* 153.), provided that not only the consent of the magistrates and council, but of the special corporations burdened, be adhibited to their act, *Jan. 11. 1678, T. of Aberdeen.*

23. The convention of boroughs, which is composed of commissioners, one from each borough, were, as early as 1487, *c.* 111. authorised to sit yearly, with power to make laws and settle rules for promoting trade, and advancing the common weal of the boroughs. Their powers were confirmed and enlarged by many posterior acts; and in pursuance thereof that body have been in use to regulate the manner of election in particular boroughs,

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roughs, where the former sets appeared irrational or inconvenient ; to prohibit undue exactions made by boroughs ; to examine how their yearly revenues have been applied by the magistrates ; to punish the magistrates for mal-administration ; and to proportion among the several boroughs, according to their abilities, that part of the parliamentary subsidies which is payable by the state of the boroughs. From the time that these high powers were vested by law in the convention of boroughs, the chamberlain's jurisdiction, of which so much is said in our old law-books and statutes, fast declined, and has now for upwards of two centuries been quite laid aside. The powers however of this convention were never understood to be final, or uncontrollable ; for royal boroughs have ever been the creatures of the crown. Accordingly the magistrates of boroughs were ordained by 1535, c. 26. long after the first establishment of yearly conventions, to bring annually into exchequer the account of the revenues of their boroughs, that the lords-auditors might judge whether they had been profitably expended. And even since the Revolution the care of the revenues of boroughs is, by 1693, c. 28. declared to belong to the crown. Hence the mal-administration of borough-revenues is to be considered rather as a matter of public government, than the subject of a popular action in a court of law ; and therefore no private burghers, or number of burghesses, seem intitled to such action against their magistrates. Yet where the burghesses have a patrimonial interest, *ex. gr.* of pasturage in any commony granted to the borough, they have a right to sue the magistrates, for declaring that interest which belongs to them as private burghesses ; see *New Coll.* i. 17.

24. The head of the merchant-company, or guild-brethren, is called *the dean of guild*, from *gild*, a Saxon word for fraternity. He was vested, by 1593, c. 180. with a jurisdiction in all causes between merchant and merchant, as it was exercised in the towns of France and Flanders, where burghs are constituted. *Bourse* signifies the exchange or place where merchants assemble in trading towns, for the negotiating and transacting of business. By that act deans of guild had also the cognizance of causes between merchant and mariner ; and under that pretext they took occasion to judge in maritime causes within the borough. But since the act of Charles II. establishing the court of admiralty, they have laid no claim to that branch of jurisdiction : neither have they of a long time exercised the powers conferred on them by this statute, in causes between merchant and merchant, which point of jurisdiction seems naturally to have fallen to those courts to which the cognizance of such causes would have been competent if it had never been granted to the dean of guild. It belongs to the dean of guild to take care that buildings within borough be agreeable to law, neither incroaching on private property, nor on the public streets or passages ; and that houses in danger of falling be thrown down. Though he be a magistrate of a royal borough, his jurisdiction depends not in any measure on the court of the borough, or, as it is commonly called, *the bailie-court*, July 21. 1631, *Adamson*.

25. Though all who hold lands immediately of the crown, to a certain yearly extent, are barons, in respect of their title to elect or be elected into parliament, *b. 1. t. 3. § 4.* ; yet to constitute a baron, in the strict law-sense of the word, one must have his lands either erected, or at least confirmed by the King, *in liberam baroniam*. A baron, in this sense, enjoyed a fixed jurisdiction, both civil and criminal, which, in the general case he might exercise, either by himself, or by his deputy, called a *bailie*. In civil matters, he might have judged in questions of debt within the barony, and in most of the possessory actions ; and though, by a known rule, no person

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ought to judge in his own cause, a baron may judge in all such actions, between himself or his vassals and tenants, as are necessary for making his rents and feu-duties effectual, to prevent the expence which must be incurred, if trifling causes, which happen daily, and seldom admit of difficulty, were to be carried to distant courts. Thus he may ascertain the price of corns due by a tenant, and pronounce sentence against him for arrears of rent; he may, in consequence of his own decree, compel his tenants to perform to him all the services, either contained in their rights or fixed by usage, and to carry their corns to the mill of the barony: he may punish them for abstracting their grain to another mill; and he could anciently have brought actions of removing against them before his own court; but in all the cases where he himself was a party, he could not judge in person. He had also a power of police, by which he might fix reasonable prices upon work wrought within the barony, &c. of which afterwards.

26. According to the laws ascribed to Malcolm Mackenneth, c. 13. his criminal jurisdiction reached to all crimes, except treason, and the four pleas of the crown: and even by our later law, he might have judged, not only in rattleless fire-raising, 1426, c. 75. *in fin.* in processes for breaking of orchards and dove-cotes, destroying of green wood and of planting, &c. provided the offenders were taken in the fact, 1579, c. 84.; Feb. 3. 1674, *L. Strowan*, and in riots and bloodwits, the fines of which he might have appropriated to himself, but, according to the general opinion of our lawyers, in the capital crime of theft, tho' he should not have had the clause *cum fossa et furca* in his charter, *Cr. lib. 1. dieg. 12. § 16.*; *Skene, v. Baro*; *Hope Min. Pr. p. 93.*; yet he could judge in no other capital crime, if he had not been specially infest with that privilege. Some charters of barony had a clause of outfang and infang thief; others were restricted to infang thief; as to the meaning of which terms, the curious may consult *Q. Attach. c. 100.*; *St. b. 2. t. 3. § 62.*; *Skene, v. Infang thief*. A baron can exercise no part of the jurisdiction which properly belongs to him as baron, till he be infest in the barony: for it is a feudal right conferred by the King upon the baron as his vassal, and he is not the King's vassal till seisin.

27. A baron, where he sold part of his barony-lands to be holden of himself, was understood to communicate to the purchaser a certain degree of jurisdiction over that part of the barony which he had sold to him. If the purchaser was infest simply *cum curiis*, he had the cognizance of common riots, and of actions of debt between tenant and tenant; and if the charter had a clause *cum curiis et bloodwitis*, his infestment was, by the later practice, considered as an heritable bailiery from the baron, and so intitled him to fine for blood, *Fount. Dec. 23. 1692, Chessors*. But the jurisdiction thus granted to the vassal, was only cumulative with that of the baron; for the baron was bound, by accepting the jurisdiction from the crown, to do justice to all within the territory. While therefore a baron continues baron, it behoves him to retain the jurisdiction annexed to the barony, as well over the lands disposed to the vassal, as over the part unsold, *March 3. 1630, Lord Lorn*; *Cr. lib. 2. dieg. 8. § 30.*; *St. b. 2. t. 3. § 62.* Any freeholder or King's vassal, though his lands were not erected into a barony, might have held courts for rent, and fined for blood, *Jan. 30. 1622, Stewart of the Merse*.

28. Thus stood the baron's judicial powers till the aforecited act 20^o Geo. II. c. 43. by which his civil jurisdiction is in effect reduced to the right of recovering from his vassals and tenants the feu-duties and rents of his lands, and compelling them to perform the services to which they are bound, either to himself or his mill; for he can judge in no other civil action where the debt and damages exceed 40 s. Sterling; and no prorogation can extend his

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his jurisdiction beyond that sum. He hath no longer the cognifance, as a criminal judge, of any trial upon penal statutes; for his criminal jurisdiction is exprefsly limited to affaults, batteries, and finaller offences, which may be punifhed, either by a fine not exceeding 20 s. Sterling, or by fetting the delinquent in the stocks, in the day-time, not exceeding three hours. The fine is to be levied by pointing the delinquent's goods; and in default of these, by imprisonment for one month at farthest. The baron must enter into a book, to be kept by the sheriff-clerk, the place which he has appropriated for a prison, and must not imprison any where else, under the penalty of L. 20 Sterling, with costs. The sheriff must inspect these prisons, and disallow them if they are not healthy, or have no grates so as to be open to inspection from without. Nor can the baron imprison any person without signing a written order to his officer, expreffing the cause; extracts of which are to be sent every six months to the sheriff. These weights lie so heavy on the baron, that they amount nearly to a prohibition of this branch of his jurisdiction.

29. The former jurisdiction is however reserved to every proprietor of lands within which collieries or salt-works shall be carried on, over the workmen; and to proprietors intitled to fairs, for correcting disorders which may be committed during their continuance; with this restriction, that they shall exercise no jurisdiction inferring death or demembration. No charter to be granted for the future, for erecting lands into a barony, is to convey any higher jurisdiction than for recovering the rents of lands, multures, and mill-services; which in proper speech makes no jurisdiction, but is a right which was always understood by our former law to be inherent in every landholder, though neither baron, nor infeft *cum curiis*; and which he indeed enjoys at this day. The obligation which was long imposed by the law of Scotland on barony-vassals to attend the baron's head courts, is now prohibited by 20^o Geo. II. c. 50.

30. A borough of barony, is a corporation, consisting of the inhabitants of a determinate tract of ground within the barony, erected by the King, and subjected to the government of magistrates. Sometimes the right of electing the magistrates is by the charter vested in the inhabitants themselves, and sometimes in the baron their superior: but whatever jurisdiction belongs to the magistrates of the borough, the superior's jurisdiction is cumulative with it; for the territory granted to the body-corporate, continues as truly parcel of the barony, as if it were the property of a single vassal; differing only in this, that the jurisdiction is in the first case exercised by a community, and in the other by one person, *Dec. 7. 1734, E. Wigtoun*. The same doctrine holds in boroughs of regality, both as to the manner of incorporating them, and as to the superior's cumulative jurisdiction, *Jan. 14. 1668, Regal. of Kirrimuir*. By the jurisdiction-act, all jurisdiction formerly competent to any borough of regality or barony, or to the magistrates of it, which is independent of the lord of regality or baron, is reserved entire; only their power of repledging from the sheriff or steward's courts is taken away.

31. The commissioners of supply are the persons appointed by parliament in their yearly acts of supply, to levy the land-tax within the county to which they are named, according to the proportions settled by law. They ought to be possessed of L. 100 Scots yearly valued rent, in property, superiority, or liferent; and every person acting without that qualification, though he should be named a commissioner, is subjected to the penalty of L. 20 Sterling, and his vote not to be reckoned. Where a proprietor sells parts of his lands to another, the commissioners determine how that sum with which the whole lands had been formerly charged in the cess-books of

the county, is to be proportioned between the purchaser and the seller: but though they have their powers from the parliament by a special commission, their judgements in that matter fall under the review of the session, as the supreme civil court for the ascertaining of property, *Feb. 12. 1751, Sir J. Gordon.*

32. In this list of inferior judges may be also placed the Lyon King of Arms. The name of *lyon* hath been assumed by this officer, from the bearing or armorial of the Scottish kings, a lion rampant, which he carries upon his robes. The officers serving under him are heralds, pursuivants, and messengers, who are all admitted by himself into their respective offices. The first mention made in our statutes of messengers or officers at arms, is in 1587, *c. 46.* which appoints a fixed number to be named by the Lyon for each county, who are to behave according to the injunctions said to be inserted at the end of that statute: and though these injunctions have by inadvertency been left out, the duty of messengers is well known by posterior acts, and inveterate usage. They are subservient to the supreme courts of session and justiciary, and are employed in executing all summonses and letters of diligence, both in civil and criminal matters. At their admission, they receive a silver blazon, on which the King's arms are engraved, as a badge of their office, and a wand or rod, usually called the *wand of peace*; and it appears, that, as early as 1426, *c. 100.* the mairs or serjeants who attended on the sheriffs and other judges-ordinary, were not allowed to travel through the country without a horn and a wand.

33. The extent of the Lyon's jurisdiction is set forth in several statutes, 1587, *c. 46.*; 1592, *c. 125.*; 1672, *c. 21.*; by the two last of which he is authorised to visit the arms and ensigns-armorial of all the noblemen and gentlemen within the kingdom; to distinguish the arms of younger brothers with congruent differences; to give proper arms to virtuous and well-deserving persons; to matriculate them all in his register; and to fine those who use arms which are not matriculated, in L. 100 Scots, besides escheating to the King the moveable goods or furniture on which the arms shall be painted or engraved. He may by the said act 1587 deprive or suspend messengers, heralds, or pursuivants, by the advice of the court of session; but that supreme court is also in use to deprive them by its own authority, act of sederunt, *Nov. 4. 1738.* In the case of misdemeanour, the Lyon can fine messengers to the extent of the sum for which they gave security upon their admission; and in virtue of the powers granted to them in letters-patent under the great seal, and ratified in parliament, he claimed also the right of judging in the damage arising through the messenger's fault to the third party; which claim was sustained, *Dirl. 30.*; but soon after rejected, *June 27. 1673, Heriots.* Executions by a deprived messenger, though the deprivation should be published in the terms of 1587, *c. 46.* are sustained, if he is still held and reputed a messenger, *Nov. 10. 1676, Stewart; Fount. July 11. 1699, Learmont:* but after his deprivation is intimated in the public news-papers, they are null, *Feb. 18. 1732, Hunter.* A great part of the Lyon's office is ministerial. He was anciently employed in carrying public messages to foreign states; and to this day it is his province to denounce war, and proclaim peace, to publish proclamations made by the King and council, and to assist at all public ceremonies in his robes, with his heralds and pursuivants. Mention is made of macers who attend the court of session, as if they had been officers under the Lyon, 1587, *c. 46.* But it is certain that the nomination of the macers hath, for two centuries past, been either in the crown, or in private families in virtue of special grants by the crown. Macers are, by some lawyers, considered as persons having jurisdiction, because they frequently judge in the service of heirs; but

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but this proceeds, not from any jurisdiction inherent in them as macers, but because, in the commissions to them, issuing from the chancery upon a warrant from the court of session, they are specially appointed thereto, as judges in that part.

34. The Conservator's court at Campvere in Zeland may be also reckoned among the inferior jurisdictions. It appears by 1503, c. 81. 82.; 1579, c. 96. 97. that Scotland enjoyed several commercial privileges in the Netherlands, while that country was yet under the dominion of Spain. By our later temporary treaties with the town of Campvere, which have been continued from time to time ever since, sundry staple-goods of the produce of Scotland are allowed to be brought into that port, free from duty. In questions between merchant and merchant residing abroad, the only judge beyond seas before whom action can be brought, is the Conservator of the Scottish privileges in the Netherlands, 1503, c. 81. who is by that statute ordained to chuse at least four merchants for his assessors. His court is constituted by the authority of a Scottish parliament; he is tied down to judge by the rules of the law of Scotland, 1597, c. 259.; and as there is no expression, either in the staple-contracts, or in any of our statutes, excluding the jurisdiction of the session from any cognisance in matters belonging to that court, it has been adjudged, *New Coll.* ii. 225. that a jurisdiction is founded in the session, as our supreme court, cumulative with the Conservator's court, in causes between such Scotsmen as are members of the factory at Campvere, *ratione originis*. It had been formerly decided, *Jan.* 1749, *Couts*, that the sentences pronounced by the Conservator were not subject to the review of the court of session, though a complaint might possibly lie against them to the King and council, as is the case with regard to judicial proceedings in the American colonies; and this decision seems to receive some support from 1503, c. 82. But it would appear, that if our supreme court has truly a cumulative jurisdiction in the first instance, as to the causes cognisable by the Conservator, (which the supreme civil court of England has not, in respect of any actions pursued in the British colonies), it has also a power of reviewing the decrees pronounced in these causes by the Conservator.

35. It was long observed as a rule, that no court of justice could sit in time of parliament, because every subject was bound to answer any summons or call from the parliament: but ever since the Revolution, *anno* 1688, the court of session hath had its ordinary terms of sitting, whether the parliament sat or not; and hence, when the parliament intended that that court should not meet at the same time with themselves, they adjourned it by special acts, several of which passed in the reigns of William and Anne. Inferior courts sat at no period of time during the vacation of the session, that so some interval might remain free from the hurry of all courts of justice, for seed-time and harvest. The benefit of this institution having been little felt, from the frequent dispensations granted by the session to inferior courts to sit in vacation-time, it was resolved, by act of sederunt, *July* 21. 1696, that no such dispensations should be granted for the future, beyond the 20th of August for the harvest-vacation, and the 20th of March for the spring-vacation. But this act is to be understood only of *general* dispensations; for they continue to be granted for sitting after these periods, in special causes, where there may be inconveniency or danger in the delay, or where the action bears a resemblance to voluntary jurisdiction, as the service of tutors, &c.

36. Certain inferior courts may sit during the vacation of the session, without dispensation. 1st, Sheriffs might always have sat after Easter and Michaelmas; because the head-courts held upon these festivals were considered

dered as the beginning of the sheriff's session, and the reason drawn from the necessity of country-affairs generally ceaseth after these terms, *July 2. 1629, L. Bamf; June 30. 1675, Wardlaw.* 2dly, It was necessary for the police of the country, that riots, and other breaches of the peace, might be tried at any time: and hence justices of the peace, whose powers chiefly consist in preserving good order, may sit at all times in matters which concern the public peace; as sheriffs also do in criminal causes: but their sentences pronounced in civil questions in vacation-time are null, *Dalr. 115.* 3dly, Barons may hold courts without dispensation, for the payment of rent, on account of the danger attending the delay, *July 8. 1624, Richardson;* but not in questions between tenant and tenant. 4thly, Borough-courts sit during the whole year without dispensation, not only in breaches of the peace, but in actions merely civil: this at least is the usage in several of our most considerable boroughs. Lastly, Commissaries may judge at all times in matters properly consistorial, because these require dispatch; but not in causes where the commissary has barely a cumulative jurisdiction with other courts, *Feb. 6. 1624, Gordon.* By the jurisdiction-act, 20^o *Geo. II.* all sheriff and steward courts over Scotland may sit in vacation-time, without dispensation, in all causes whatever; but as that statute does not extend to other inferior courts, the law in relation to these continues as formerly. On the late alteration of the kalendar the session resolved, by act of sederunt *Feb. 16. 1753,* to grant no dispensations for the sitting of inferior courts after the 2d of April and the 2d of September.

37. None of our judges, supreme or inferior, had for a long time any other appointments than what arose from the sentences they pronounced. The criminal judges applied to their own use the fines or issues of their several courts, *i. e.* all the sums levied from delinquents as penalties of transgression: and regalities had a right to the single escheat of all persons denounced rebels, who resided within their territory. In the same manner, the judges of the old court of session were, jointly with the clerk-register, intitled to 40 s. Scots upon every decree, by 1457, *c. 63.* which, as appears by that act, was the only consideration then allowed to them. This sentence-money was, by 1587, *c. 43.* raised to the twentieth part of the sums awarded against the defender, where the decrees were for liquid sums, and to L. 5 Scots where they consisted *in facto.* Soon after the institution of the college of justice, the small sum of L. 1412 Scots was allocated to the judges as an annual contribution or tax, payable by prelates out of their benefices, which is mentioned in 1543, *c. 2.* and has been now of a long time assigned by them to their private clerks. We learn from the books of federunt, *April 13. 1564,* that they had a grant from Q. Mary of L. 1600 Scots yearly, out of the quots of testaments; but having, at the desire of James VI. given up this right in favour of the bishops, they obtained a grant of L. 10,000 Scots yearly, out of the customs, by 1609, *c. 11.*; and by a posterior act, 1633, *c. 22.* a taxation of 10 s. Scots for four years was imposed on every pound-land of old extent, and a proportional tax on the boroughs, the produce of which was to be properly secured for the judges of the session. After this last provision was made effectual, the parliament 1641, *c. 55.* prohibited the exacting of sentence-money by that court; and though the act 1641, which was enacted during the Usurpation, was not revived after the Restoration, it appears from 1661, *c. 50.* by which a new addition was made to the salaries of the judges, that their exacting of sentence-money had been before that time laid aside.

38. Sheriffs were also intitled to the twentieth part of the sums contained in every decree, in name of sheriff-fee; and as it was the sheriff's office to carry into execution all sentences which were to be executed within the shire,

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

T I T. V.

Of Ecclesiastical Persons.

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

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

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

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