



INSTITUTES
OF THE
LAW of *SCOTLAND*.

VOLUME II.

Comprehending the
CRIMINAL LAW.

THE Criminal Law of *Scotland* consists of two Parts. The first of these contains every Thing which relates to the Nature of Crimes and Offences of several Kinds, and their Punishments. The second Part sets forth the Manner how Offenders are judicially proceeded against, and brought to condign Punishment.

Vol. II.

A

PART

2 Part I. *Institutes of the* Book I.

P A R T I.

Concerning Crimes and Offences,
and the Punishment thereof.

B O O K I.

Of Crimes and Offences in general.

GOOD Order and Government, Life, Property, Possession, and other sub-
lunary Enjoyments, are fenced and
secured by the Terror of penal Laws,
made against such as presume to destroy, hurt,
invade, or disturb the same by Crimes or Of-
fences: Under which general Terms our Law
comprehends both publick and private Crimes
and Offences; that is, not only those which
have a direct Tendency to the Detriment of
the Common-wealth, but also such as more im-
mediately hurt private Persons.

C H A P. I.

*Of the Nature of a Crime, and what doth
infer it.*

I. **A** Crime is a punishable Act of Injustice,
by committing what is forbidden, or
omitting to do what is commanded by Law.
Which

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Which is not so to be understood, as if any Piece of Injustice did not deserve Punishment proportionable to the Disobedience of the Law; but that many Injustices, which are Crimes in Religion, are not taken notice of by the Civil Government, if they proceed not to such outward Acts as give Disturbance to it.

2. There are three Things that distinguish Crimes, and render them more or less hainous and punishable in the Civil Policy, *viz.* 1. The Character or Quality of each Crime. 2. The Principle or Motive which induced the Offender; one being engaged or moved to commit a Crime or Offence, either out of a premeditate Design, or in the Heat or Transport of Passion, or through Imprudence. 3. The Circumstances, which are the Disposition and Condition of what attends and accompanies the Action, and may have any Relation to it.

3. No Action seems to be criminal, without an evil Intention or wicked Design, which *in dubio* is not to be presumed. But, because this is a secret Act of the Mind, Law infers it, in some Cases from Conjectures, drawn from the Quality and Character of the Person, or the Nature of the Fact, or Circumstances attending it. A gross Fault or inexcusable Negligence, is equivalent to Guile or an evil Design in lesser Crimes, but not in those that infer Loss of Life or Limb.

4. Not only such as actually commit a Crime, but also those who are Accomplices or Accessories, called in our Law *Art and Part*, are involved

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volved in the Guilt of it. Art and Part is inferred, 1. From Deeds previous to the Crime, as Counsel and Perswasion, or Command or inciting or hiring to do it, or to do a Thing unlawful that hath a probable Tendency to produce it. Thus he who orders another to wound a Man, is guilty of Murder, if the Person hurt chance to dy of the Wound given him And the Commander to do a Felony is accessory to it, tho' committed in another Place, Time or Manner than it was ordered. But simple Knowledge of a Felony to be done, will not make a Man accessory to it; tho' he neither hinder nor reveal it. 2. One may be accessory to a Crime by Deeds concomitant, as countenancing, assisting, aiding and abetting, or consenting, at the Time of doing it : So be, the Assistant knew himself to be contributing to the Commission of a Crime. Because, one may happen innocently to assist a Criminal, as when a Thief gets a Person upon the Road to help him to drive away stolen Cattle, as if they were his own. Persons standing armed at the Commission of a Crime, with a Design to assist the Actors, or knowing what was to be done, are reckoned Art and Part thereof, tho' they do not lend any active Assistance. But one accidentally present, who is merely passive, neither encouraging nor offering to hinder the Fact, is not understood to be Art and Part thereof. 3. A Person may be Art and Part of a Crime after it is committed, by knowingly resetting the Malefactor, and skreening

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ning him from Prosecution. There are no Accessories in High Treason, but all concerned in that Crime are, in the Judgment of the Law, principal Offenders.

5. Those who are Art and Part of a Crime are punishable as the principal Offenders (*a*). And Refetters, Suppliers, and Intercommuners with declared Outlaws, or Fugitives from Justice, are liable to the same Pains that the Outlaws or Fugitives might have been subjected to, had they been convicted (*b*): It being highly reasonable that those who enjoy the Protection of the Law, should discountenance all Opposers of it. An ineffectual Endeavour, or abortive Attempt to commit a Crime, is not commonly punishable in the same Way as if it had been actually committed, but in a milder Manner. Which Point may be more fully cleared in the treating of particular Crimes, such Attempts being more severely punishable in some than in others.

6. The discussing principal Offenders, before insisting against such as were but Accessories, is warranted by our old Law (*c*). But now it seems that Accessories may come to be tried, even before the principal Criminals are brought to their Trial. For it is relevant, to libel in general, that Persons are Art and Part of the Crimes charged upon them, without

A 3 Ne-

(*a*) Quon. Attach. Cap. 83. Act 151. Parl. 12. J. VI. (*b*) Act 144. Parl. 12. J. VI. (*c*) Reg. Majest. Lib. 4. Cap. 26. Skeaen Annot. *ibid.* Quon. Attach. Cap. 83. Stat. David II. Cap. 29.

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cessity to specify the Way and Manner they were accessory (*d*); seeing that cannot be well known, till the Witnesses are examined. But because thereby the Jury turn Judges of the Relevancy of the Qualifications of Art and Part, it is advisable to set forth in the Libel the particular Facts and Circumstances, from which the general Conclusion of Art and Part is drawn; that the Justices may determine the Relevancy thereof, and nothing remain to the Cognizance of the Assize, but whether such Facts and Circumstances are proved.

C H A P. II.

*Of the Persons who may commit Crimes,
and are punishable for so doing.*

I. **A**LL Subjects, whether native, or temporary (as Aliens residing here within the King's Protection, and owing local Obedience for the Time) may commit and are punishable for Crimes. A native Subject of our King doth not, by his swearing Allegiance to a foreign Prince or State, in whose Dominion he lives, and serving by Commission under such, transfer his Allegiance and Subjection from his Majesty, to that Prince or State he acts under, so as to excuse him from being a Traitor to his native Sovereign. But serving by such a Commission, makes him to be reckoned

(*d*) Act 15th. Parl. 12. J. VI.

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ned a Subject to the Granter thereof with Respect to all other Princes, or States, against whom he does any Acts of Hostility. An Alien, who was never under the King's Protection, invading the Kingdom in a hostile Manner, ought not to be punished as a Traitor; but is to be dealt with, according to the martial Law, as an Enemy. An Ambassador guilty of high Treason against the King's Life, may be condemned and executed; but for other Treasons or Crimes against the Law of Nations, that may, with Safety to the Common-wealth, be connived at, he may be sent Home with a Demand to punish him, or to send him back to be punished.

2. The Guilt of offending against any Law, necessarily supposing a wilful Disobedience, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it. But Lawyers are not well agreed concerning all the Persons who ought to come under these Exceptions.

[1.] Offenders are excusable, in respect of their Want of Reason, as Children under the Age of Pupillarity, seem not capable to commit, or to be punished for Crimes (*a*). And by the modern Custom, Females, as well as Males, are reckoned in criminal Cases to be under Pupillarity till they are fourteen Years of Age: It being thought hard to shew more Tenderness to Males, than to Females, who ought rather

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to

(*a*) Arg. Act 69. Par. 6. J. IV. junct. Act 20. Par. 1. Sess. 1. Ch. II.

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to be indulged, upon the account of the Frailty of their Sex and Judgment (*b*). Persons altogether furious, who have no Use of their Reason, are, in the Construction of Law, incapable to commit Crimes (*c*): For they are compared to, and put in the same Category with Infants (*d*), Absents (*e*), and such as are dead (*f*), and Mischief done by them is no more considered, than if it were done by a Beast, or the falling of a Tile from a House (*g*). But those who have lucid Intervals, and Tides of Fury, increasing and decreasing as the Moon, upon which it depends, are thought punishable for Crimes committed in their lucid Intervals. When a Man formerly of a sound Judgment, is said to have been furious at the Time a Crime was committed by him, he is presumed to have been then found in his Mind, unless the contrary be made appear. But mad Men having lucid Intervals, are supposed to be in Fury when they commit Crimes; unless it be either proved that they had then lucid Intervals, or the Presumption of Fury be taken off by stronger contrary Presumptions, arising from pregnant Signs of Wit and Contrivance discovered in the Commission of the Crimes, or from Malice which the Offenders, before their Distemper, bore to the Persons injured. A mad Man recovering the Use of his Senses, is not to be punished for a Crime

(*b*) C. 6. X. de homicidio l. 5. § 3. C. ad l. Jul. Majest. (*c*) Stat. 2. Rob. I. Cap. 23. (*d*) L. 3. § 1. ff. de Injur. (*e*) L. 2. § 3. ff. de jure Codicil. (*f*) L. 24. § 1. ff. rat. rem. hab. (*g*) L. 5. § 2. ff. ad l. Aquil.

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Crime committed in his Fury. Nor should one who is turned Mad, be punished bodily for a Crime committed before his Distemper. Those who commit unlawful Acts in their Sleep, are considered as Infants or furious Persons, who know not what they do (*b*); unless they, while awake, were guilty of wilfully omitting to take the necessary Precautions against these sleepy Outrages, or giving Occasion to them. *V. g.* When a Woman knowing her self to be hardly roused out of her Sleep, overlays a tender Infant, she is in some Measure chargeable with the Death of that Child, for putting it in Bed with her; because she ought to know, that such a Thing may happen to those whose Senses are locked up in a dead Sleep. And if one in use to rise and commit such Outrages in his Sleep, should in that State kill a Man, he could not be thought altogether innocent; seeing, in respect of his Condition, he ought to have lain alone, and caused bolt his Chamber-door when he went to Rest. Whatever Distinction the Doctors of the civil Law make in the Case of Crimes committed by drunken Persons, between those who are found seldom overtaken with Drink, and habitual Drunkards: Our Law sustains not Drunkenness, as a Defence against a Crime in any Case, to free the Offender from the ordinary Punishment; Drunkenness it self being criminal and unjustifiable.

[2] Of-

(*b*) L. 1. § 3. ff. de acquir. vel amit. Poss. l. 27. § 9. ff. ad l. Aquil.

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[2.] Offenders are excusable, in respect of their Subjection to the Power of others: As when one is compelled by mortal Threats, and irresistible Force, to commit a Crime, or to be accessory to it. But the simple Authority or Command of a Husband, or Father, or Master, doth not justify a Wife, or Son, or Servant, committing a Crime in obedience to such Command or Authority.

3. An University or Incorporation, which is an aggregate Body existing only in Supposition of Law, cannot properly be in Fault, or guilty of Crimes committed by its Magistrates, Governors, Rulers, or Administrators in their single Capacity of private Men, as Murder, a Riot, Oppression, &c. But Law supposeth a collective Body to be guilty of what the Magistrates or Administrators thereof do amiss in the proper Business of the Corporation, or of what private Persons do by Order or Connivance of the Rulers and Managers in their publick Capacity; and punisheth it in the habile Manner, by Disfranchising, Fining, or Confiscation of some Part of its common Good.

C H A P. III.

Of the Persons against whom Crimes may be committed.

1. **C**RIMES may be committed against those who are not capable to commit them, as Children within the Age of Discretion,

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cretion, or mad Men. Nay, Crimes may in some Sense be committed against the Dead, by railing at their Memory, stopping their Burial, defacing their Statues, raising their Bodies, or taking away the Ornaments from them (a) : By which unlawful Doings the Heirs and Friends of the Dead, are properly understood to be offended, and may sue for Reparation. For a Crime may be committed against a Man either directly in his own Person ; or indirectly in the Persons of those under his Power or Affection, in whom he hath a special Interest, as against a Father, by an Injury done to his Child, or against a Husband, by an Injury offered to his Wife, or against a Master, by an Injury done to his Servant.

2. *Volenti non fit injuria*, where he who suffers what is done, hath Power to dispense with, and pass from it. *v. g.* A Man cannot steal his own Goods ; nor is guilty of Theft, by taking away the Goods of another with the Owner's Consent. But one's giving Way, or consenting to Acts of Violence against his own Life or Body, doth not excuse the Actor : Because no Person has the free Disposal of his Life and Members (b). For the like Reason, Self-murder, and a Man's prostituting his Wife's Chastity with her own Consent, are highly criminal.

3. What would be a Crime, if committed against some Persons, may be lawfully done to others.

(a) L. 1. § 4 & 6. l. 27. ff. de Injur. l. 8. pr. ff. de Religiof.
 (b) L. 13. pr. ff. ad l. Aquil,

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others. Thus Law doth not much notice verbal Injuries done to vile, infamous and profligate Persons (c). And Homicide committed in the Advancement, or Execution of Justice, is lawful in some Cases (d).

C H A P. IV.

Concerning the Punishment of Crimes.

1. **V**ICE is restrained, and People are kept within Bounds, by the Terror of Punishments and Forfeitures. Punishment is the Correction of a Crime committed, or an Evil that one suffers, for the Evil he hath done. Forfeiture is the losing some Right, Privilege, Estate, Honour, Office or Effects, in consequence of a Transgression of the Law. Both are intended, partly, to satisfy for the Contempt of Authority, and Injury done thereby to the Community and to private Persons; partly, to secure against such Offences from others in Time coming, by the Terror of the Offender's Treatment, and from himself, by cutting him off, or obliging him by the Smart of his Sufferings, to future good Behaviour. One or other of which Motives takes Place in the Punishment of every Crime, and sometimes all concur to influence it.

2. Punish-

(c) L. 22. C. ad l. Jul. de Adulter. (d) Act 8. Par. 3. J. V. Act 33. Par. 1. J. VI. Act 22. Par. 1. Sess. 1. Act 6. Par. 1. Sess. 2. Act 4. Par. 2. Sess. 2. Ch. II.

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2. Punishments are inflicted by the temporal Courts, (concerning which only I design here to treat) either upon a Presumption of Guilt, without Trial ; or are the Consequences of a legal Trial

3. Punishments inflicted upon the Presumption of Guilt, are Torture, and Outlawry. Torture is a grievous Pain inflicted on a Person accused, to make him confess the Truth. Which is practised in several Countries, and formerly was in Use in *Scotland* too. But the Claim of Right declares, that the using Torture for ordinary Crimes, or without Evidence for others, is contrary to Law, and no Person accused of any Crime here, can now be subjected to Torture (*a*). Outlawry is the Punishment of him who, being called in Law to answer for a Crime, does contemptuously refuse to appear, and is therefore declared Fugitive, and put to the King's Horn. The Effect whereof is, that the Outlaw is disabled to stand a Trial, and his single Escheat falls to the King. And in some Cases, the liferent Escheat of Persons denounced Fugitives for capital Crimes, falls to his Majesty (*b*).

4. Punishments inflicted after Trial, may be divided into ordinary, and extraordinary, or arbitrary Punishments.

[1.] Ordinary Punishments are those expressly determined by Law. Such are either
corporal,

(*a*) 7 A. Cap. 21. § 5. (*b*) Act 118. Par. 12. Act 219. Par. 14. J. VI.

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corporal, or civil. Corporal capital Punishment (which takes away the Life) is performed either by beheading the Offender on a Scaffold, with an Instrument called *the Maiden*; or by hanging him on a Gibbet by the Neck till he be dead; or by burning his Body at a Stake. Confiscation of the Offender's Moveables to his Majesty, is, by Custom, the undoubted Consequence of any capital Crime: Because *mobilia sequuntur personam*. Corporal Punishments not capital, are Imprisonment, cropping the Offender's Ear, or nailing it to the Trone, branding some Member of the-Body, whipping through the Town, putting the Feet in Stocks, or the Neck in Jogs, and the Discipline of the Correction-house. Under civil Punishment I comprehend Banishment, Confinement to a certain Place, the Pillory, making publick Confession of the Crime, and asking Pardon for it; and a pecuniary Punishment, called a Fine, or Amerciament, or Mult. Where a Fine is determined by Statute, it must be paid whether the Offender be rich or poor; whom Law subjects, if unable to pay, to some corporal Punishment, conform to the Rule, *qui non habet in are, luet in pelle*. Such Fine is to be taken up according to the Rate Money gave when it was imposed, or to be augmented according to the current Value of the Coin (*c*). Unmarried Women are fined according to their own Quality. But Wives are considered and fined according

(c) Act 70. Par. II. J. VI.

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according to their Husbands Quality (*d*). A Husband is not liable for his Wife's Fine, where he is not expressly subjected thereto by Statute: As he is to pay his Wife's Fine for Cursing and Swearing (*e*). All Fines belong to the King, or those claiming under him: Because the Courts of Justice are supported at his Majesty's Charge; and wherever the Law puts the King to any Charge for the Protection of his People, it provides Money for that Purpose.

The ordinary legal Punishments are aggravated, in some Cases, with Circumstances of Pain and Disgrace. As, 1. Where the Crime is very hainous. 2. In respect of the Place where it was committed. So Troublers of the Church, or who raise any Fray (*f*), or commit Slaughter (*g*) there, or in the Church-yard the Time of divine Service; Strikers or Hurters of any Person within the Courts of Session or Justiciary, while the Lords are sitting, or before any inferior Judge (*h*), are more severely punished than those who commit such Offences elsewhere; 3. Punishment is aggravated by the Character and Quality of the Person injured. For the killing a Lord of Session or Justiciary (*i*), attempting to kill, striking or wounding a privy Counsellor in the Execution of his Office (*k*), assaulting or beating any Judge, Magistrate, or
Mi-

(*d*) Act 103. Par. 7. J. VI. Act 38. Par. 1. Sess. 1. Ch. II. (*e*) Ibid.
(*f*) Act 27. Par. 11. J. VI. (*g*) Act 118. Par. 12. J. VI. (*h*) Act
173. Par. 13. J. VI. (*i*) 7 A. Cap. 21. § 8. (*k*) 9 A. Cap. 16.

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Minister of the Gospel (*l*), beating or cursing of Father or Mother (*m*), are more rigorously punished than the like Offences committed against other Persons; and *scandalum magnatum* more than verbal Injuries done to Commoners.

4. Punishment is heightened where the Offender is found to have been often guilty (*n*); because he who frequently commits the same Crime, is reckoned incorrigible. Thus the third Theft, even of inconsiderable Things, is capital. A vagabond, strong, idle Beggar, who hath been once burnt in the Ear, and scourged for his vagrant Way of living, if he fall into it again, is liable to the Pain of Death (*o*). Maintaining or defending advisedly, a second Time, the Authority of the Bishop of *Rome*, within the King's Dominions, is Treason (*p*), tho' that Offence is not Treason of its own Nature. So that, in Crimes, the gentler Method is often tried for the first Offence, which perhaps may prove effectual. But where a Statute makes a second Offence Felony, or subjects to a heavier Punishment than for the first; it is implied, that such second Offence ought to be committed, after a Conviction for the first. From whence it follows, that if it be not so laid in the Indictment, it shall be punished only as a first Offence. 5. Punishment is aggravated by reason of the Time of committing the
Fact.

(*l*) Act 4. Par. 2. Sess. 2. Ch. II. (*m*) Act 20. Par. 1. Sess. 10. Ch. II. (*n*) 3 l. in fin. C. de Episc. audient. l. 28 § 3 & 10. ff. de pœnis. (*o*) Act 74. Par. 6. J. VI. (*p*) 5 Eliz. Cap. 1. § 10.

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Fact. Thus Night Thieves are more severely punished than those who pilfer in the Day-time.

Again, Lawiers allow something of the ordinary Punishment to be remitted and dispensed with in some special Cafes, as 1. Tho' they excuse none upon the Account of Ignorance of the Law of Nature, or who offend deceitfully or clandestinely; Yet they are favourable to Women and Boors or Peasants when found to trip in some Cafes, thro' Ignorance of mere positive Law. 2. Success doth sometimes plead Favour to an unwarrantable Action (*q*): As when a Soldier attacks and beats the Enemy, contrary to the superior Officer's Order; tho' Ill is not to be done that Good may come of it. 3. A spontaneous Confession of a Crime before the Offender is committed to Prison, or at least before he is convicted, is held to be a Ground for mitigating the ordinary Punishment. 4. Tho' the Judgment against Peers for high Treason be the same with that of Commoners; yet, by the King's Favour, it is ordinarily restricted to Beheading.

It would seem, that, by the Law of *Scotland*, where two Punishments of the same Crime are appointed by different Statutes, both cannot be inflicted, unless that be expressly provided in the later Statute; and that if the last penal Law do not extinguish the first Punishment, the Offender should only undergo either of the two.

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So

(*q*) L. 2. § 7. ff. de Orig. jur.

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So because several Punishments successively appointed for one Fault, might be thought prejudicial to one another, it was expressly cautioned in a particular Case, that the one Pain should not stop nor stay the other (r).

[2.] Arbitrary Punishments are those which are left to the Discretion of the Judge to determine, according to the Cause or Nature of the Offence, Time and Place, when and where committed, the Character and Quality of the Persons offending and offended, &c. Where a Statute imposes a Fine at the Will and Pleasure of the King, that is intended of his Judges, who are to impose the Fine. But a Judge cannot, in such arbitrary Capacity, inflict the Pain of Death. And in the imposing an arbitrary Mulct or Fine at the Discretion of the Court, Regard is had to the Poverty or Wealth of the Criminal. The imposing extraordinary Fines, and the disposing of Fines and Forfeitures before Sentence, is contrary to Law (s).

C H A P. V.

How Crimes and Offences are extinguished and abolished.

CRIMES and Offences are extinguished, not only by the natural Death of the Offender before his Trial, or by repealing the Statute against which they were committed,

(r) Act 248. Parl. 15. J. VI. (s) Claim of Right 1689.

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mitted, before he is brought to Trial; but also several other Ways, as 1. By the Offender's undergoing the Punishment of Law, and by his Acquittal or Absolution. 2. By Prescription; or the Course of Time. 3. By a Pardon.

T I T. 1.

The Abolition of Crimes, by the Offender's undergoing the Punishment of Law, and by his Acquittal or Absolution.

1. **I**T is no less unreasonable; that one should be punished twice for the same Fact, than it is unjust to exact twice Payment of the same Debt: If the first Punishment was inflicted by the Sentence of a competent Judge, and fairly proportioned to the Crime, so as both *vindicta publica*, and the private Interest of the Party injured, are satisfied; but no otherwise. Tho' a Person, upon whom Judgment hath passed, cannot be again indicted for the same Crime, at the Suit of the same Pursuer; he may for a greater Offence that is liable to a heavier Punishment; and may be indicted a second Time for the same Crime, where Reparation is to be made to another Party. Anciently, if a Thief hung up, fell down from the Gallows alive, he was to be no farther punished (a); as if he had been saved by a Miracle of Providence. But now, if a Person hanged

B 2 up

(a) Reg. Majest. Lib. 4. Cap. 18.

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up for Felony, falleth down, thro' the Rope's breaking, before he be dead, he may be hung up again : For the Judgment of hanging is not fully executed, till the Criminal be dead.

2. One accused before an incompetent Judge, or against whom an insufficient Indictment is brought, being acquitted, and the Diet against him deserted, for Want of Authority in the Judge, or because of Informality in the Proceeding ; such Acquittal will not hinder him to be indicted *de novo* for the same Crime : Because, the Law had not its End, and the Indictment was not discharged upon the Account of his Innocence, nor was ever in Danger from such a Trial. But one sufficiently or relevantly indicted before any Court that hath Jurisdiction of the Cause, being acquitted upon the Verdict of a Jury finding the Indictment not proved, cannot be put to answer to a new Indictment, for the same Offence, at the Suit of the same Accuser : Because a Man should not be brought in Danger of Life for one and the same Offence, more than once. However an Acquittal from an Indictment commenced by a private Party, is no Bar to an after Indictment in the Sovereign's Name, who cannot be excluded from his Right or Casualties by the Suit of any private Parties injured, or by their Silence or passing from the Offence (b).

T I T.

(b) Act 76, Parl. 11. J. VI.

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T I T. II.

The Extinction of Crimes by Prescription, or the Course of Time.

1. **P**rescription in Matters criminal is no less, if not more, necessary than in civil Cases, that People may not ly under a perpetual Uncertainty as to their Lives and Possessions. All Crimes with us (as by the Civil Law) prescribe in Twenty Years (*a*), except such as are declared to be extinct in a shorter Time.

2. None can be prosecuted for any Crime of Treason that may occasion Corruption of Blood to the Offender or his Heirs, or for Misprision thereof, unless the Indictment be found by a grand Jury within Three Years after the Treason or Offence committed: But any who design or attempt to assassinate the King, may be tried at any Time (*b*). Treasons by maintaining foreign Authority, or the Authority of the See of *Rome*, or by bringing in and executing Bulls or Instruments from *Rome*, or withdrawing any to the *Romish* Religion, or by being reconciled or withdrawn to that Religion, are to be enquired of within Year and Day after such Offence committed (*c*). Treason by making or
 B 3 attempt=

(*a*) L. 12. C. ad. 1. Cornel. de Fals. l. 2 & 3. ff. de requir. vel absent. damn. l. 1. § 3 & 4. ff. de jure fisci. (*b*) 7 W. III. Cap. 3. § 5 & 6. (*c*) 23 Eliz. Cap. 1. § 8.

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attempting to make or mend any coining Tool or Instrument prohibited, or by marking of Money round the Edges with Letters or Grainings, must be prosecuted within Six Months after the Offence (*d*). No Person can be tried for denying the King's Title, or asserting any other pretended Right to the Crown, by advised Speaking, unless sworn Information of such Words be given before a Justice of Peace, within three Days after they were spoken, and the Offence be prosecuted within three Months after the Information (*e*). Ministers of Episcopal Congregations must be prosecuted for not expressly praying for the King and Queen, &c. within two Months after the Offence (*f*). No Person can be prosecuted upon the Statute of 1 Geo. I. Cap. 5. intituled *An Act for preventing Tumults and riotous Assemblies, and the more speedy and effectual punishing the Rioters*, unless such Prosecution be commenced within twelve Months after the Offence (*g*). Action for wrongous Imprisonment prescribes, if not pursued within three Years after the last Day of such Imprisonment; and tho' commenced within that Time, if not insisted in yearly thereafter (*h*).

T I T:

(*d*) 7 A. Cap. 25. § 2. (*e*) 6 A. Cap. 7. § 3. (*f*) 10 A. Cap. 7. § 12. (*g*) 1 G. I. Cap. 5. § 8. (*h*) Act 6. Sess. 8 & 9, Par. K. W.

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T I T. III.

Concerning Pardons of Crimes.

1. **T**He Stroke of Justice against Criminals may be put off, or their Punishment avoided and disappointed, by the Sovereign's Act of Grace, which is either temporary, or perpetual. A temporary Act of Grace called a *Respite* (a), or a *Reprieve*, is a Prolongation of the Time appointed for an Offender's Execution. A perpetual Act of royal Grace or Clemency, termed a *Pardon*, is an absolute Remission of a Crime, or a giving up the Punishment due to it. A Pardon is either general, or particular.

2. A general Pardon forgives all Offences of all the Subjects, not particularly therein excepted. This commonly passes in Parliament, and is called an *Act of Indemnity*. Which is to be taken most beneficially for the Subject, and most strongly against the King. For where such a general Pardon excepts Murders, neither Self-murder, nor presumptive Murder upon the Act 21. Sess. 2. Parl. W. and M. are understood to fall under the Exception. But when Crimes before, and unto a certain Day are pardoned, the Pardon stops when that Day comes, and Crimes committed upon that Day remain unforgiven. Tho' a general Act pardoning all Felonies, &c. done before such a Day, pardons Homicide from a Wound given before the Day,

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whereof

(a) Act 94, Parl. 13. J. III,

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whereof the Party died not till after the Day : Because the Stroke, which was the Cause of the Death, being pardoned, all the Effects of it are consequently pardoned.

3. A particular Pardon is the forgiving a particular Person's Offence, out of some special Regard to him or his Family, or to other Circumstances. Such a particular Pardon, after a Signature under the King's Hand presented in Exchequer, passeth under the great Seal.

[1.] Because ill-conditioned Persons are encouraged to commit Crimes, in hope of easily procuring Pardons, the Sovereign's granting Pardons unadvisedly, and with a careless Hand, hath been restrained by Interpretation. Thus a Pardon obtained by Misrepresentation, where the King was not apprised of the Hainousness of the Crime, or by false Suggestion, is void, and may be stopt at the Exchequer till his Majesty be rightly informed, and his farther Pleasure known. No Man can be pardoned by Implication, but only by exprefs Words. Therefore Sir *Walter Rawleigh* was executed in *England* anno 1618. upon an Attainder of high Treason against him a Matter of 14 Years before, notwithstanding the King's interveening Commission to him (therein called his true and loyal Subject) to go into *Guinea*, with Authority to execute martial Law, and Power over the Lives of other Men ; which Power over the Lives of others, he pleaded as an implied Pardon of his own Life. But the Court rejected this

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this Plea. A Pardon of all Felonies, extends only to common Felonies, and not to high Treason (*b*), or Piracy, which must be expressly mentioned in a Pardon thereof. A general Clause forgiving all Crimes, will not secure from a Prosecution for any Offence greater than those particularly expressed in the Remission: Tho' a Pardon for Slaughter hath, with us, been understood to comprehend Murder as a Kind of it. Our Princes have indeed, at the Desire of their Subjects, consented to the Closing their Hands by temporary Laws and royal Promises, from granting Pardons for Murder, or Slaughter committed by forethought Felony or Malice, except for the publick Good, with Consent of Parliament (*c*). But Pardons of Murder are allowed, and the Power of pardoning all Offences understood to be an inseparable Incident to the Crown, and its royal Prerogative. However no Pardon is pleadable to an Impeachment of the House of Commons (*d*).

[2.] The King may pardon any Offence whatsoever, so far as the Publick is concerned: But such a Pardon doth not foreclose or bar any Right or legal Interest, Benefit or Advantage vested in the Subject, or hinder private Parties to claim Reparation of their Damages sustained by the Crime pardoned, called an *Assistment*. Law requires to the Validity of a Pardon,

(*b*) 13 R. II. St. 2. Cap. 1. (*c*) Stat. Dav. II. Cap. 50. At. 63. Parl. 6. J. IV. Act 136. Parl. 8. J. VI. (*d*) 12 W. III. Cap. 2. § 3. in fin.

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don, that the injured Party consent to it, and freely discharge all Grudge and Revenge, upon account of the Crime (*e*); which Discharge goes under the Name of *Letters of Slains*. But Remissions are ordinarily granted without previous Letters of Slains: For the Providing that a Remission granted before the Party grieved is satisfied, shall be null (*f*), is only so to be understood, that such a Remission is ineffectual, till Satisfaction be given to the injured Party. A Remission may be granted to a Criminal, either before, or after his Trial.

[3.] When one prosecuted for a Crime produces a Remission, with Letters of Slains from the Persons injured to stay his Trial, the Remission is recorded in the Books of Adjournal, and the Diet deserted against him. Upon which he is immediately dismissed and set at Liberty. If such a Person hath not Letters of Slains, but only a Remission past under the great Seal, he is set at Liberty upon finding Surety to assise and satisfy the Parties injured, as the Barons of Exchequer shall modify. If the Remission be only under the King's Hand, and not past the Seals, he must find Surety both to expedite the Remission, and to pay an Assise to be taxed by the Barons. The Acceptance or simple taking of a Pardon is an Argument of Guilt, tho' it do not amount to a Confession of the Crime: Seeing that may perhaps be done for the

(*e*) Act 169. Parl. 13. J. VI. (*f*) Stat. Dav. II. Cap. 44. Act 174. Parl. 13. J. VI.

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the more Security, to let his Mind at Ease. But he who pleads a Pardon for a Crime, tacitely confesseth, and by using the Remission is understood to take Guilt upon him.

CHAP. VI.

The several Kinds of Crimes and Offences.

1. **I**N *Scotland* we do not own the Distinction of the Civil Law, betwixt private and publick Crimes; all Crimes and Offences are here considered as publick, it being the publick Interest that none should pass unpunished.

2. But we have several other distinguishing Classes and Orders of Crimes and Offences: As those that are capital or punished with Death, and such as are not capital; ordinary Crimes whereof the Punishment is expressly determined by Law, and extraordinary or arbitrary Crimes, which are left to the Discretion of the Judge, to be punished more or less severely according to Circumstances; statutory Crimes, which are created and punished by Statute, and those punished by Custom only; the four Pleas of the Crown, *viz.* wilful Fire-raising, Rape, Murder, and Robbery (*a*), so called because the Cognizance of these doth properly belong to the King's Jusficiary Court, tho' that Privilege

(*a*) Leg. Malcolmi II. Cap. 13. Quon. Attach. Cap. 76. Stat. Alex. II. Cap. 14.

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lege is not well observed; and many Crimes have no particular Names, but pass under some very general Denomination, as Leasing-making, and Stellatione.

3. Crimes and Offences may, under divers Views, be variously distinguished, and placed in different Orders, but I shall range them in what I conceive to be the most simple and natural Way, by dividing them, 1. With respect to the Objects they may have Relation to, or the Parties injured, into those more immediately levelled against God, and such as Man is more directly offended by. 2. Many Crimes may be more particularly distinguished into those relating to Offices, Law-suits, and the Execution of Law and Justice. Mean Time it is necessary to observe, that there are some Crimes and Offences of a complex Nature, which consist of double Characters, and have Relation to more than one Kind: These shall be ranked according to what I think to be their most natural Situation.

BOOK II.

Of Crimes levelled more immediately against God.



THESE are Atheism, Blasphemy, Heresy, Apostacy, Witchcraft, Perjury, and other open Impieties, Immoralities, and Profaneness,

CHAPTER