

96 Part I. *Institutes of the* Book IV.

publick Peace of the Kingdom are more immediately struck at ; I come now to consider those which more directly touch private Persons.

B O O K IV.

Of Crimes that directly touch private Persons.

CRIMES that directly touch private Persons, are committed either against their Bodies, or against their Fame and Honour, or against their Estates, Goods and Possessions. Crimes and Offences committed against the Body, concern either the Life, or are those whereby the Body is abused, or is maim'd or dismembred. Crimes against the Life do either take it away, as Homicide ; or put it in imminent Danger, as Duelling, and the giving or accepting a Challenge to fight. The Body is abused by the several Kinds of unlawful Venery, as Sodomy or Buggery, Incest, Bigamy, Adultery, Fornication, Bawdry, and Rape. The Body is maimed or dismembred, by Offences termed Mutilation and Dismembration, of all which I shall treat in Order as they ly thus classed.

CHAP.

Chap. I. *Law of Scotland.* Tit. I. 97

C H A P. I.

Concerning Homicide.

HOMICIDE, (q. d. *hominis cædes*) in general, is the killing a rational Creature. It may be divided into wilful or voluntary, casual and necessary Homicide. Voluntary Homicide may be perpetrated with Deliberation, termed Murder, or without Deliberation, which is called Man-slaughter or culpable Homicide.

T I T. I.

Of Murder and Man-slaughter.

1. **M**URDER or Murther is either of one's self called Suicide, or of another. Suicide or Self-murder may be committed, not only by a Person's putting violent Hands in himself; but also by starving himself to Death; or by taking Guilt upon him of a capital Crime, whereof he is altogether innocent; and in some Cases by killing himself unwillingly, as when he aiming to pistol another, shoots himself by the riving of the Pistol. A Man who voluntarily kills himself, called *Felo de se*, is denied the common Ceremony of Christian Burial; and his single Escheat falls to the King, for

Vol. H. G depri-

98 Part I. *Institutes of the* Book IV.

depriving his Majesty of the Benefit of a Subject.

2. Murder of another, is the killing of him with prepenfed and premeditated or forethought Malice (a). Malice prepenfed in killing, may be either exprefs or implied. It is exprefs, not only when a Person is defignedly flain, but even when one is killed by Miftake for another who was aimed at (b). For wherever a Man intending to commit one Felony, happens to commit another, he is as much guilty, as if he had intended the Felony committed. For he killed from a felonious Intention, tho' he miftook his Aim. It would be no good Plea to one charged with Theft, that he had ftolen the Goods of one Man instead of another; or to a Person accused of Adultery, that he intending to defile one Man's Wife, had lighted upon another's. Thus where a Gentleman extremely drunk, who had received the higheft Provocation from one not only by Words, but by throwing him into a Kennel, getting up drew his Sword, and made a Push at the Provoker, whereby an innocent Nobleman prefent thrusting himself between them was killed: It was not fufained relevant to free the Actor from the Pain of Death, that the fatal Wound was aimed by him at another. Yea, he who kills another upon his Defire or Command, is as much a Murderer, as if he had done it of his own Head, fuch

(a) Leg. Malcolm. II. Cap. 5. Act 51. Parl. 11. Jam. VI. (b) Arg. l. 18. § 3. ff. de injur. l. 45. § 4. ff. ad l. Aquil.

Chap. 1. Law of Scotland. Tit. 1. 99

such Assent being merely void, as contrary to the Laws of God and Man. Where a Man is killed by forethought Malice, and several Persons willingly concurred and lent their Assistance to the accomplishing of the Fact, all are guilty of Murder; tho there was but one Wound given, and it be unknown who gave it; because all had a murderous Design. If a premeditate Design cannot be proved directly, it may be learned from Circumstances, as the Manner of killing, and the Nature of the Act. Thus when one kills another with a mortal Weapon, such as a Sword, or Gun, or Pistol, &c. (c) or by a Thrust or Stroke upon some tender Place of the Head, or by reiterated Strokes, which argues no less Malice than when one deadly Wound is inflicted; or by administering Poison to him (d); or by giving him designedly a Wound that proves deadly, without any Intention against his Life (e); he is understood to have had precogitate Malice to kill. It is Murder, not only to kill a rational Creature directly, but even to expose a helpless Infant, and leave it in a Desert or unfrequented Place, where it dies for Hunger; or to destroy a living Child in the Mother's Belly, by her taking, or by another's giving her a Potion, or using outward Violence to her (f), for Children in the Mothers Womb are

G 2 con-

(c) § 5. Inst de publ. Judic. 1. 9. ff. de vi public. (d) L. 1. C. de Malef & Mathem. (e) L. 15. ff. ad l. Corn. de Sicut. (f) L. 1. § 9. ff. de vent. in poss. mitt.

 100 Part I. *Institutes of the* Book IV.

considered, in whatever concerns themselves, as if they were already born (*g*). But the Time when a Child unborn is understood in Law to be quick, is determined by the Discretion of the Judge; there being no fixed Rule about it, and the Doctors very much divided in their Opinions. Again, one is guilty of Murder who poisons a Well or Fountain, by drinking whereof any Person dies; or who poisons pasture Ground, by feeding whereon Cattle are destroyed, and Men are in Danger by eating the Flesh of such Beasts.

3. There are several Kinds of Murder, as simple Murder, which is that I have just now defined and explained, Parricide, Assassination, and Murder under Trust.

4. Parricide is used in our Law only for the Murder of a Relation in the ascendant Line, as Father, or Mother, Grandfather or Grandmother (*b*); or by Parity of Reason for the Murder of a Relation, in the descendant Line, as Child or Grandchild. Bastards or Children born out of lawful Wedlock, are guilty of Parricide, by killing their natural Parents, and these by killing those. For albeit the Civil and Municipal Laws distinguish betwixt lawful and unlawful Children, the Law of Nature makes no Distinction (*i*).

5. Assassination is, Murder committed by one hired by another to do it.

6. Murder

(*g*) L. 7. ff. de statu hom. (*b*) Act 220, Parl. 14. Jam. VI. (*i*) Cap. 3. Dist. 56.

Chap. 1. *Law of Scotland.* Tit. 1. 101

6. Murder under Trust is, the killing of a Person by one under whose Trust, Credit, Assurance and Protection, he had put himself. *V. g.* When a Person kills in his own House a Guest invited by him; or when two Persons formerly at Variance, having found Lawborrows for mutually keeping the Peace, one of them kills the other; or when one of two under Capitulation for removing some old Ground of Quarrel, slays the other; or when a Physician poisons his Patient; or when a Man kills his Wife, or his Servant under his Power.

7. All Kind of Murder is punished with Death and Confiscation of Moveables (*k*). But very hainous Murtherers, as Parricides, &c. are put to Death with some aggravating Circumstances of Torment in the Execution, as the striking off their Hands, and their Bodies, are, after Death, ignominiously treated by being hung up in Chains; or their Heads or Hands erected as Spectacles of Terror in Places of publick Resort. A Parricide convicted by Verdict of an Assize, and all his Posterity, *in linea recta*, are disinherited, and excluded from succeeding to the Lands, Heritages, Tacks, or Possessions of the Person killed, and the same belongs to the next Collateral, who, by Right of Blood, falls to succeed, failing those in the right Line (*l*). Formerly not only

G 3

Assassins,

(*k*) Stat. Reg. III, Cap. 43. (*l*) Act 220. Parl. 14. Jam. VI.

102 Part I. *Institutes of the Book IV.*

Assassins, but all who assert the Lawfulness of killing any Man upon Difference in Opinion, or because he hath been employed in the Service of the King, or of the Church established by Law (*m*), and Murderers under Trust (*n*), were guilty of high Treason. But now such Offences are punishable only as capital Crimes (*o*).

8. To prevent Murder by Poisoning, the Buying and Importing Poison, whereby any Person may suffer bodily Harm (*i. e.* with a Design to kill) is discharged upon Pain of Death (*p*). But Apothecaries and others are allowed to bring home Poison, as *Materia medica*, or a Drug; not to be sold except to Persons of Probity and Discretion for some good Use, as to destroy Rats or other hurtful Creatures. The administering Poison to one, albeit he die not thereby, seems to be more criminal, than the importing Poison for such a bad Purpose.

9. Manslaughter or culpable Homicide, is the unlawful Killing a Man without premeditated Malice. Which is either done in a present Heat, arising upon a sudden Quarrel, or some Provocation, with a present Intention to kill, or in the Commission of a voluntary unlawful Act, without any killing Design. Manslaughter committed on a sudden Quarrel, or Provocation, is called in our Law, *chaud mella*, or *chaud*

(*m*) Act 15. Parl. 3. Ch. II. (*n*) Act 51, Parl. 11. Jam VI.
 (*o*) 7 A. Cap. 21. § 7. (*p*) Act 30 & 31. Parl. 7. Jam. II,
 Junct. 7 A. Cap. 21. § 7.

Chap. 1. Law of Scotland. Tit. 1. 103

chaud melle (q), from the French *chaud* hot, and *melee* a Fight, Manslaughter may be committed imprudently, without a Design to kill, by the voluntary doing an unlawful A&, that hath a probable Tendency to procure the Death of Persons, as by shooting in the high Way, or in a Market-place, where People usually pass, or resort; or by letting down a Stone, or Piece of Timber from a House, without calling to all Persons to beware of it, &c.

10. By our old Law, Murder was distinguished from Manslaughter, in that the former was tried more summarily, and had not the Privilege of Shelter in the Girth or Sanctuary, allowed to the latter. Which Distinction ceased after the Reformation. But there was no Difference betwixt Murder and Manslaughter, as to the Punishment: For Manslaughter in *Scotland* was always punished with Death (r), and is none of those Kinds of Homicide more lately in the Year 1661, exempted from capital Punishment (f); but far more culpable than any of them.

11. Where one is killed by premeditated or premeditated Malice, and it is not discovered which of several Persons concurring in the Action, gave him the mortal Wound, all of them are punishable as Murderers; because all had

G 4

3

(q) Reg. Maj. Lib. 1. Cap. 3. N. 7. A& 51. Parl. 3. Jam. I.
 (r) Stat. 1. Rob. I. Cap. 3. Stat. Rob. III. Cap. 43. Stat.
 Alex. II. Cap. 2. § 3, 4, 6. Skene, Treatise of Crimes, Tit. 2.
 Cap. 6. pr. (f) A& 22, Parl. 1, Sess. 1. Ch. II.

104 Part I. *Institutes of the* Book IV.

a murderous Design. But where a Man is killed in *rixa*, or upon a sudden Falling out, and it is not known which of the Persons engaged therein did kill him; none of them are to be subjected to the ordinary Pain of Death (t), because of the Uncertainty of the Person by whom the Crime was committed; and the Hardship that more than one should die for one Man except where all are guilty of forethought Felony. But all may be subjected to an arbitrary Punishment. If one be killed in a sudden Scuffle, betwixt many Persons, and it appear who gave the mortal Thrust, he only should die for it, and the rest suffer an arbitrary Punishment.

12. When one kills by Order of another, both are alike guilty of Murder. The Command of a Father or Master doth not warrant a Child or Servant to kill. If a Person having Orders only to wound another with a Sword, or other mortal Weapon, do actually kill him; he who gave such Order is punishable with Death, tho' the Terms of the Commission were not observed; Because, *nihil interest occidat quis, an causam mortis præbeat* (u): And Wounds are not inflicted by Measure. The Furnisher of a Sword to one in order to fight with another, whom he kills, is Art and Part of the Slaughter. Where two being engaged in a Quarrel with drawn Swords, a third Person interposes, and holds

(t) L. 17. ff. ad l. Corn. de sicar. (u) L. 15. ps. ff. ad l. Cornel. de sicar.

Chap. 1. Law of Scotland. Tit. 1. 105.

holds one of them in his Grips, till he see the other run him thro' with his Sword, while he was so withheld from defending himself; such a partial Interposer is Art and Part of the Slaughter. But Interposing in a Quarrel, by holding one of the Parties Hands, while the other gave him a mortal Wound, with an occult Weapon, unseen by the Interposer, was found relevant to infer only an arbitrary Punishment. Simple Prefence at the Commission of Murder, is no relevant Accession thereto. But Persons present having drawn Swords, may at least be subjected to arbitrary Punishment; if not brought in Art and Part of the Crime, which hath been done. But Approbation of Slaughter, after it is committed, doth not make the Approver guilty as Art and Part, if it was not done by his Order.

13. Murder is one of the four Pleas of the Crown (x), whereof the Cognizance properly belongs to the Lords of Justiciary. But yet Commissions use to be granted for Trial of it; And Bailies of Regality are in Use to try it without any special Commission. Sheriffs, and Barons having Power of Pit and Gallows, may judge Murderers taken *red Hand*, *i. e.* in hot Blood, or immediately after committing the Crime, within three Suns (y). But the Sentence cannot be put to Execution till after thirty Days, if pronounced in any Place to the Southward

(x) Leg. Malcolm. II. Cap. 11. (y) Act 90. Par. 6. Jam. I. junct. Act 28; Par. 3. Jam. IV. Act 4. Sess. 5. Par. X. W.

106 Part I. *Institutes of the* Book IV.

ward of the River *Forth*, or forty Days, if pronounced in any Part to the Northward of that River (2). Murderers and Manslayers are tried at the Suit of either the Friends of the Person slain, with the Concurrence of the King's Advocate, or Procurator Fiscal, or at the Instance of the Lord Advocate, or Procurator Fiscal, without the Friends. An Indictment against one, as accessory to, or Art and Part of another's Killing a Man, is allowed to proceed, tho' the principal Party, who killed him, be neither cited, nor denounced Fugitive.

14. To make one guilty of Homicide, by killing with a Stroke or Wound, it must be supposed, that the Stroke was the immediate and necessary, and not the remote and accidental Occasion only of the Death. Therefore it is an ordinary Plea, made by one tried for Slaughter, that the Wound given was not mortal; but that the wounded Person lived so long after, went about his ordinary Business, and died *ex malo regimine*, or by some other accidental Cause. At the same Time, it is not every Degree of Negligence, or Mismanagement in curing and taking Care of a Wound, that sufficeth to conclude, that the wounded Person's Death was thereby procured; but such as did predominate, overpower and master the Na-

ture

(2) 11 Geo. I. Cap. 25. §4

Chap. 1. Law of Scotland. Tit. 1. 107

ture of the Wound. Where a Wound is not expressly libelled to have been mortal, it may be sustained relevant for the Person accused, to offer to prove, that it was not : But where it is libelled to have been deadly, he is not allowed to prove the contrary. Another common Plea in such a Trial, is that the Fact was done in necessary Self-defence, or was casual Homicide, which is received against a Libel for Murder, tho' contrary to this Quality thereof, that the Offence was committed with Malice prepensed, or forethought Felony. Because, albeit such a Quality must necessarily be insert in a Libel for Murder, it needs not be proved by the Pursuer, since Law presumes it to be true; and so no Oaths being taken upon it, the Evidence produced in Defence doth only take off the legal Presumption for it, without any interfering positive Proof. But concerning these Pleas of Self-defence and casual Homicide, there will be Occasion afterwards to speak more fully (aa). A Libel for Murder, bearing that the Party accused caused call a Man out of his House, and immediately when he came out, shot at him with a charged Gun, whereby he died in a few Hours, was sustained relevant, albeit the Person sent to call him out was not named : In respect, it imported Nothing by whom he was called out, if such a one killed him.

15. Ho-

(aa) Vid. infra Tit. 2 & 3.

108 Part I. *Institutes of the* Book IV.

15. Homicide may be proved by judicial Confession of the Pannel, or by Witnesses, or by Presumptions not only of Man and of Law, whereby the Fact is taken for true, till the contrary appear: But also may be proved in one Case by a Presumption of and by the Law, which suffers not a contrary Proof to be admitted. Thus, a Woman who hath brought forth a Child found dead or amissing, is to be condemned as the Murderer of it, upon a Presumption arising from her concealing her Pregnancy, during the whole Space of her being with Child, and not calling for, and making Use of Help in the Birth (*bb*). To a Charge for this presumptive Murder, married, as well as single Women, are liable. The Woman's concealing her Pregnancy, during the whole Time of her going with Child, bringing it forth without calling for Help, and the Child's being found dead or amissing, must jointly concur to infer this presumptive Murder: And the Pannel may exculpate her self from the Pain of Death, either upon her revealing, that she was with Child, or calling for Help at the Birth, or upon the Child's not being ripe and come to the full Time; but will notwithstanding that Plea be liable to an arbitrary Punishment. In such a Case, it is not necessary to prove Revealing of the Pregnancy by concurring Witnesses; but revealing to one Person sufficeth, and satisfies

(*bb*) Act 21. Sess. 2. Par. W. and M.

 Chap. 1. *Law of Scotland.* Tit. 2. 109

fies both the Words and Design of the Law. To clear that one died by Poisoning, or that he did murder himself, or that a Wound was mortal; the Report upon Oath of knowing Physicians and Chirurgeons, who visited, and carefully examined the Body, is to be taken: But that doth not bar other Proof. When a Person mortally wounded dies, it is presumed, that he died of his Wound; altho' the not using proper Remedies in due Time, or disorderly Living, might have hastned his Death. But if the Wound was not mortal, he is presumed to have died thro' Misguiding (cc).

T I T. II.

Of casual Homicide:

1. **C**Asual Homicide (termed in the *English Law Chance-medley*) is the accidental Killing of a Man, without the Killer's Fault, and without any evil Intent in him. As when one is hewing a Tree, the Head of the Hatchet flies off, and kills by Misfortune a Stander by; or when a Person is killed by the Lopping of a Tree, or Flinging Timber or Rubbish from a House, at some Distance from the Way, after due Warning to every Body to take Care, and stand aside; or when a Barber, performing his Office in his own Shop, is made innocent-

(cc) L. 30. § ult. L. 52. pr. ff. ad l. Aquil.

 110 Part I. *Institutes of the Book IV.*

innocently to cut the Man's Throat, he was shaving, by a Stroke upon his Hand that held the Razor, &c.

2. By our Law, casual Homicide is not punishable with Death: But it is lawful to the Lords of Justiciary, to imprison the Slayer, or to fine him in his Means to the Use of the Widow and Children, or nearest of Kin of the Person killed (*a*): Which is called an Affithment or Croy (*b*). But no Affithment is due to the Relations of a Person killed, where the Killer suffers Death for his Crime.

T I T. III.

Of necessary Homicide.

THE Life of Man may be taken away upon a Necessity, either with respect to private Interest, or publick Justice.

1. Necessary Homicide relative to private Interest is, when one, for the Defence of his own Life, or that of some other Person, keeping always within the Bounds of Self-defence, kills the Aggressor. Such a Killer is free from all Punishment by our Law. Because it is a Man's Duty rather to kill, than suffer himself to be killed. But *author rixæ*, or he who began a Quarrel, cannot plead Self-defence for killing his Adversary in such a Quarrel: Because, he,

(*a*) Act 22. Par. 1. Sess. 1. Ch. II. (*b*) Reg. Maj. Lib. 44. Cap. 24 & 36. Act 94, Par. 6, Jam. I.

Chap. I. Law of Scotland. Tit. 3. III

he, being the original Occasion of it, was *faber sua fortune*. Nor does Self-defence excuse a Person who kills another in a Duel, whether the Killer gave or accepted the Challenge to fight: Because Duelling is altogether unlawful.

[1.] He who, exceeding the Bounds of Self-defence, either as to the Cause, or Manner, or Time, kills the Aggressor, is subject to an arbitrary Punishment; as one is for casual Homicide (a). In which Case, it is not properly the Homicide, but the Excess in Defence that is punished: And it is hard for one, whose Life is attacked, to measure and poise, as it were in a Balance, every Step he makes in his own Defence. The Limits of Self-defence are transgressed, as to the Cause, when the Killer was not first unjustly attacked; as to the Manner or Measure, when he might have saved his own Life, without killing the Aggressor, or killed with a Sword one who attacked him with a Stick; as to the Time, when he returns and kills the Aggressor, after he had departed from him.

[2.] When the Pannel acknowledges, that he killed such a Man, but that it was in his own Defence; he must prove that Alledgance. Because, the Presumption of Innocence lies in Favour of the Deceast, that he was deceitfully killed. It sufficeth not to plead Self-defence

in

(a) d. Act 22. Par. 1. Sect. 1. Ch. II.

112 Part I. *Institutes of the* Book IV.

in general, by Way of Exception, and to refer the Qualifications and Circumstances to the Jury. But it must be pleaded thus: *Denying always, or no ways acknowledging the Killing, if he killed it was in his own Defence, in so far as the Pannel was first attacked by the Deceased, with a drawn Sword, &c.* And the Judges will advise the Import of the Qualifications of Self-defence, if relevant, or not. But tho' the Pannel prove not his Exception of necessary Self-defence, he will not be condemned, unless the Pursuer proves his Libel.

2. Necessary Homicide, with respect to publick Justice, is committed either in the Advancement or Execution of Justice.

[1.] It is lawful to kill Thieves and Robbers, breaking Houses in the Night-time. And those who kill the Time of masterful Depredation, or kill such as assist or defend the masterful Depredators by Arms, or forcibly hinder the Pursuit of them, are free even from any arbitrary Punishment (*b*) : Provided the Owner of the Goods stolen or robbed, or some in his Name, immediately after taking them away, acquaint the Sheriff, or any Justice of Peace, or Constable of the Parish out of which the Goods are taken; who, upon such Information, are to require all fencible Men therein, to concur in the Pursuit of the Goods and Thieves; And

(*b*) Act 22, Par. 1. Sess. 1. Ch. II.

Chap. 1. Law of Scotland. Tit. 3. 113

and neither the Owner of the Goods, nor those obliged to rise with him, are to be called in question for slaying, &c. in the Pursuit of any of those Thieves or Robbers, or their Associates (c). The Killer of a Rebel or Outlaw, declared Fugitive for a capital Crime, or of such as defend him, is free from Punishment (d). But it is not lawful to kill such an Outlaw in a single Combat: Because, tho' it be lawful to kill a Rebel, it is unlawful to fight a Duel. Slaughter committed in the apprehending of Persons guilty of assaulting the Lives of Ministers, or robbing their Houses, or attempting the same, is indemnified (e). And if any of twelve or more Persons riotously assembled, and orderly commanded by Proclamation, to disperse themselves, continuing together beyond the Space of an Hour after such Proclamation, or after they knew it was violently hindered, happen to be killed, by reason of their resisting the Persons endeavouring to disperse or seize them; the Killing, &c. is no Way punishable (f).

[2.] A Messenger resisted in the Execution of a Caption, may lawfully kill, if Violence be offered by drawing a Weapon upon him, without Necessity to prove (as private Persons are obliged to do) that he was in Danger of his Life, if he had not killed the Aggressor; because of the violent Invasion of Authority, in the Person of an Officer of Justice. But if a
 Vol. II, H Messenger,

(c) Act 22. Parl. 1. Sess. 1. Ch. II. (d) Ibid. (e) Act 4. Parl. 2. Sess. 2. Ch. II. (f) 1 Geo. I. Cap. 5. § 3.

114 Part I. Institutes of the Book IV.

Messenger, or other Officer of Justice, proceed to kill, simply for his being resisted in the Execution of the King's Laws, without Violence offered to him, he is liable to the ordinary Pain of Death.

C H A P. II.

Of Duelling, and the giving or accepting a Challenge to fight.

I. **D**UELLING is the fighting a Duel, which is a single Combat betwixt two, at a Time and Place appointed, in consequence of a Cartel, Challenge, Defiance or Invitation to fight for Victory, and vindicating of their Interest and Reputation from some Injury or Affront offered. Where a single Combat is fought, both the Provoker and provoked Person are liable to the pain of Death, and the former to the more ignominious Death (a): Because his Guilt is greatest, and that of the provoked Party lessened with a Shadow of Self-defence. And Duellists are thus punishable, tho' neither Party be killed in the Combat.

[1.] A single Combat or Duel, may be not only betwixt two single Persons, but even two Sides, tho more Persons than one be of a Side. It is a Duel where two fight after a Challenge
 GIVEN

(a) Act 12. Pas. 16. Jam. VI.

 Chap. 2. *Law of Scotland.* 115

given by the one and accepted by the other ; whether the Giver or Acceptor, when both come to Field, be the first Aggressor. And fighting following upon one's receiving a Challenge to fight, and declaring that he would be in such a Place, at such a Time, and stand to his Defence, if attacked by the Provoker, is reckoned a Duel. But if a Person, who, in Answer to a Challenge, said, that he would not transgress the Law, but, if assaulted by the Provoker, would defend himself, do, when so attacked, fight in his own Defence; he is not punishable as a Dueller. Law so far abhors all Duelling in cold Blood, that not only the Principals, but also their Seconds, and the Messengers of the Challenge, are Art and Part of the Duel, tho' they fought not; in respect of that Countenance which they give to their Principals, in the Execution of their Purpose.

[2.] When a Person is killed in a Duel, the Indictment may be founded both upon the Laws against Murder, and that against Duelling, or upon either. If founded only upon the Laws against Murder, the Exception of Self-defence is receiveable against it, as not contrary to any Quality therein needful to be proved, of which Nature that of forethought Felony is not : But if founded upon the Statute against Duelling, the Plea of Self-defence is not admitted against it, as being contrary to the Quality of a Challenge or Provocation given, which must be libelled and proved.

H 2

2. Who

 116 Part I. *Institutes of the* Book IV.

2. Whoever gives or accepts a Challenge to combat or fight, whether Principal or Second, or other Person, or who engages therein, is punishable with Banishment and Escheat, tho' no Fighting ensue upon it (b). Which Pains are incurred by one's challenging another to fight, without adding the Words, *a Duel*, or *single Combat*, or mentioning the Weapons to be used, or the Time, or Place; or by a Person who, having missed his Design to kill one he had attacked with a drawn Sword, wrote a Letter of Challenge to him, to meet him next Morning, at a certain publick Change-house; albeit the Receiver of the Challenge was not required to bring Arms or a Second along with him. But were not found incurred by a Man who, being assaulted by another with a Stone or Staff, desired that other to get a Sword, and give him gentlemanny Satisfaction: In respect these Words were uttered in the Heat of Passion, upon a Quarrel, reproaching the other's Fury, and not deliberately, by Way of Cartel.

CHAP. III.

Of Sodomy, or Buggery.

1. **S**ODOMY or Buggery in general (a Crime which ought not to be named) is carnal Knowledge of the Body of Man or Woman, or of Beast, against the Order of Nature.

(b) Act 35. Sess. 6. Par. K. W.

Chap. 3. *Law of Scotland.* 117

ture. When one Man carnally abuseth the Body of another, or exerciseth preposterous Lust with a Woman, or when a Woman yields the carnal Use of her Body to another ; this is specially termed *Sodomy*, from the City of *Sodom*, upon which that and other crying Sins brought Destruction (a) ; and *Buggery*, from the Italian *Bugiara*, *Sodomy* and *Bugerare*, to commit it. A Man or Woman's lying with a Beast, is called *Bestiality*.

2. This Crime is punished with Death of the Agent and Patient, whether Man or Woman, or Bealt ; Tho' Beasts are in such a Case cut off, rather for abolishing the Memory of so horrid a Wickedness, than as Offenders against the Law. But where a Boy or Girl sodomitically abused is within the Age of Discretion, the Agent or Abuser only is put to Death. The ordinary Doom for Sodomy or Buggery, and Bestiality, is to be strangled at a Stake and burnt. Where a Cow or Mare adjudged to be burnt with a Man, for Bestiality he committed with it, doth not belong to himself, the Owner of the Beast gets the Value of it out of the Offender's Escheat.

3. An Indictment for such a Crime is grounded upon *Leviticus* (b), the Civil Law (c), and the Custom of all Nations.

H 3

CHAP.

(a) Gen. xix. 24. (b) xx. 13, 15, 16. (c) § 4. Instit. de public. judic. l. 31. C. ad l. Jul. de adult.

 118 Part I. *Institutes of the* Book IV.

C H A P. IV.

Of Incest.

1. **I**NCEST is carnal Copulation betwixt Man and Woman, whom Law allows not to marry, by reason of Nearness of Blood or Affinity. Such as commit Incest by abusing their Bodies with Persons in Degree expressly forbidden by God's Word contained in the Chapter 18 of *Leviticus*, are punished with Death (a).

2. A Man and Woman so near related to one another, are guilty of Incest, by having carnal Commerce together, either in Marriage, or out of Marriage. For if we must not be joined in Matrimony to those near allied to us, we must far less commit Uncleanness with them. It was sustained relevant to infer the Crime of Incest and Pain of Death, that a Man and his Niece were both for some Time naked in Bed together. But a just and probable Ignorance of the forbidden Relation or Affinity, exempts from the Punishment of Incest, if, upon Discovery, the Parties have no farther carnal Commerce together.

C H A P.

(a) A & 14. Parl. 1. Jam. VI.

C H A P. V.

Of Bigamy, or Polygamy.

1. **T**H O' some distinguish Bigamy from Polygamy, making the former to be one's having two Wives or two Husbands successively, or one after another; and the later to be the having two Wives or two Husbands at one Time: Our Custom uses Bigamy and Polygamy, as synonymous Terms, to signify a Man's marrying two or more Wives, or a Woman's marrying two or more Husbands living at the same Time undivorced.

2. This Crime of a double Marriage, is punished, as Perjury, by Escheat of Moveables, Imprisonment for Year and Day, or longer if the King please, Infamy, and Incapacity of Office, Honour, Dignity or Benefice (a). Because it is a Violation of the promissory Oath of conjugal Chastity made at the first Marriage. The Reason why Bigamists, who may be, and are ordinarily notour Adulterers, are less severely punished than those, is partly, because the Lawgivers had only under Consideration simple Bigamy, contracted by a Husband believing his Wife to be dead, or a Wife who had a probable Apprehension of her Husband's Death; or when there was some Pretext for it;

H 4

part-

(a) Act 19, Parl. 5, Q. M.

 120 Part I. *Institutes of the* Book IV.

partly, for that notour Adulterers were not subjected to capital Punishment, till 12 Years after the Law making Bigamy punishable as Perjury. But farther, Punishment may be inflicted upon Bigamists, whose Marriage is contracted, with a Design to palliate Adultery; or whose Offences are attended with aggravating and odious Circumstances, or include other Crimes, as notour Adultery, or Incest.

3. He or she is guilty of Bigamy, and punishable as a perjured Person, who marries another Wife or Husband, tho' they be never carnally coupled together. Quakers may be punished for Bigamy, tho' they take no Oath at Marriage: Because Marriage implies a Vow of conjugal Fidelity. A Woman, whose Husband is impotent, marrying another before she obtains the first Marriage to be annulled, is guilty of Bigamy. But Man or Wife may, after a lawful Divorce, marry another, without being reckoned a Bigamist (*b*); altho' the Decree of Divorce be thereafter reduced.

C H A P. VI.

Of Adultery, Fornication and Bawdry.

I. **A**DULTERY is, a Breach of the Faith plighted in Matrimony, by violating conjugal Chastity. This Crime is committed not only by a married or unmarried

(*b*) Arg. d. Act 19.

Chap. 6. *Law of Scotland.* 121

ed Man's having carnal Dealing with another's Wife ; but also by a Husband's giving the Use of his Body to a free unmarried Woman (*a*). For the Essence of this Crime consists in a Violation of the sacred mutual Bond of Wedlock, and conjugal Fidelity, whereby the Husband is no less tied to the Wife, than she is appropriated to him ; and each of them owe due Benevolence to the other (*b*). And he who lies with another Man's Wife after she is married, even before her Husband had bedded with her, is guilty of Adultery. Violation of a supposed Marriage, which is null, because of Impotency of either of the Parties, or unjust, as being contracted within the forbidden Degrees, by having carnal Copulation with some other ; is reckoned Adultery. A single Man is guilty of Adultery, by lying with a married Man's who-rish Wife, who is a common Prostitute. For Marriage is not dissolved by a Wife's becoming a Whore, till a Sentence of Divorce proceed upon it. Those also are reputed Adulterers, who order and incite others to commit Adultery (*c*).

[1.] Our Law distinguisheth Adultery, 1. Into single and double Adultery. 2. Into no-tour, and ordinary or simple Adultery.

Single Adultery is, when a Person not married has to do with another that is.

Double Adultery is, the Act of Uncleanness between two married Persons.

No-

(*a*) Mark x. 11. 1 Cor. vii. 4, (*b*) Ibid. Ver. 3. (*c*) L. 14. § 1. ff. ad l. Jul. de Adult.

122 Part I. *Institutes of the* Book IV.

Notour, or open and manifest Adultery is, either, 1. When there are Children, one or more, procreate betwixt the Adulterers, tho' the Parties had never been premonished to cease from haunting together. Or, 2. When the Parties keeping Company and bedding together, with as little Ceremony as Man and Wife, is notoriously known, tho' they do not dwell together openly, nor are excommunicated. Or, 3. When they being suspected of Adultery together, and thereupon duly admonished to abstain from conversing with each other, and to satisfy the Church by Repentance or Purgation, are excommunicated, for refusing to give Obedience (*d*). Notour Adulterers, both the Man and the Woman, are punishable with Death (*e*).

Ordinary or simple Adultery, is every Act of single or double Adultery, that falls not within the Description aforesaid of notour Adultery. Which Crime is punished arbitrarily, by Banishment, Whipping, Fining, Imprisonment, &c. But double Adultery, whereby two marriage Beds are defiled, should be more severely punished than single Adultery by a married Person with one in a single State. There are Instances of punishing Persons with Death for having frequently committed simple Adultery: And it is high Treason to violate and know
car-

(*d*) Act 105. Parl. 7. Jam. VI. Act 11. Sess. 9. Parl. K. W. (*e*) Act 74. Parl. 9. Q. M. junct. Act 105. Parl. 7. Jam. VI. Act 11. Sess. 9. Parl. K. W.

Chap. 6. *Law of Scotland.* 123

carnally the King's Wife, or the Wife of the King's eldest Son (*f*); or for such a Wife to consent or yield to that Abuse.

[2.] Adultery may be punished, either civilly, before the Commissaries of *Edinburgh*, in order to a Divorce, and the legal Effects thereof (*g*); or criminally, in order to capital or arbitrary Punishment. Notour Adultery, in order to the Punishment of Death, can be tried only before the Court of Justiciary:

[3.] A criminal Libel, for notour Adultery, is founded upon the Acts of Parliament aforesaid. But a Libel, for ordinary Adultery, is grounded on the Laws of God and Nature. If both notour and simple Adultery be libelled, the Pursuer may be allowed to insist alternatively upon either. But if notour Adultery only be libelled, and simple Adultery only proved; the Pannel, if he took Instruments upon the Libel as libelled, ought to be absolved, and brought in not guilty by the Jury.

[4.] In a criminal Trial for Adultery, more nice and exact Proof is required, than in the civil Process of Divorce. For it sufficeth not, that one Witness swear as to one unclean Act at one Time, and another Witness as to another such Act at another Time: But the Witnesses must concur in the same individual Act. Women Witnesses are received for proving ordinary Adultery by Copulation; but not to prove
notour

(*f*) 25 Edw. III. St. 5. Cap. 2. (*g*) Vid. Vol. I. Part I. Book 2. Chap. 2. Tit. 1. § 4.

 124 Part I. *Institutes of the* Book IV.

notour Adultery by the Parties dwelling together, concerning which other Witnesses must be had. Again, a Decree of Divorce for Adultery, obtained before the Commissaries of *Edinburgh*, is a sufficient Evidence of ordinary Adultery, but not of notour Adultery. Ordinary Adultery being a clandestine Crime, may be proved by strong and violent Presumptions, as the Parties being found lying naked in Bed together, *solus cum sola*, &c.

2. Fornication is, the Act or Crime of Incontinency between single Persons. Fornicators, both the Man and the Woman, are not only to undergo Church Censure by the Kirk-session, and to stand before the Congregation on the Stool of Repentance: But also to be fined by the Justices of Peace according to their Quality, *viz.* a Nobleman in 400 Pounds, a Gentleman or Burgess in 100 Pounds, and every other Person of inferior Quality in 10 Pounds. Which Penalties are doubled *toties quoties*, according to Relapses, and Degrees of the Offence, and Quality of the Offenders; and to be applied thus, one Half to pious Uses in the Parish where the Offenders live, or the Offence is committed; and the other Moiety goes first to the Informer and Prosecutor, and the Persons employed for bringing the Offenders to Justice; and the Remainder to pious Uses (*b*). But common Whores, when apprehended, are ordina-

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

Chap. 7. *Law of Scotland.* 125

dinarily subjected to the Discipline of the Correction-house.

3. **Bawdry** (whereby Adultery and Fornication is promoted) is the using an unlawful Trade of prostituting Women for Gain, to satisfy the Lusts of wicked Men, either privately, or publickly, in Stews or Bawdy-houses, where Women, of professed Incontinency, proffer their Bodies to all Comers. One guilty of this Crime, is termed a Pimp, or Pander, and is punishable by Fine and Imprisonment, and infamous Correction, as to the Court in Discretion shall seem proper.

C H A P. VII.

Of a Rape.

1. **A R A P E** or Ravishing is, the carnal Knowledge of the Body of a Woman or Man by Force, and against the Person's Will. For by our Law a Woman may commit a Rape upon a Man, as well as a Man may upon a Woman (a). It is a Rape, whether the Person was abused upon the Spot, where first attacked by the Ravisher, or carried from one Place to another for satisfying his Lust. But there is no Rape without carnal Commerce. For violent lying with a Woman, is more considered, than the Circumstance of car-

(a) Reg. Maj. Lib. 4. Cap. 5. N. 1 & 9.

 126 Part I. *Institutes of the* Book IV.

carrying her away, which is only noticed by the by, as a Circumstance to clear her being forced ; and that may be discovered otherwise, by her crying out, struggling and resisting.

2. This Crime is punishable by Death and Confiscation of Moveables (*b*). The subsequent Consent of a ravished Woman, or her Declaration, that she went away of her own free Will, doth exempt from capital Punishment, not only those who were Art and Part of the Rape (*c*) ; but also the principal Offender : Tho' it be proved, that the Fact was at first violently done against the Woman's Will. But such a subsequent Consent of the injured Woman, doth not free the Offenders from an arbitrary Punishment, by Imprisonment, Confiscation of their Goods, or fining as the King shall think fit (*d*).

3. Our old Law allowed not a Woman to be heard for a Rape committed against her, unless she complained of it recently (*e*). But now criminal Letters are raised for this, as for other Crimes. The King's Advocate and nearest of Kin of a ravished Woman, may pursue for the Rape either jointly, or separately, the one without the Concourse of the other, even in order to capital Punishment (*f*) : And may insist for an arbitrary Punishment of the Rape, altho' the Woman injured declare that she was
not

(*b*) Arg. Reg. Maj. Lib. 4. Cap. 8. N. 7. & Act 4. Parl. 21. Jam. VI. (*c*) d. Act 4. (*d*) *ibid.* (*e*) Reg. Maj. Lib. 4. Cap. 10 (*f*) d. Act 4. Parl. 21. Jam. VI.

Chap. 8. *Law of Scotland.* 127

not ravished, or pass from the Injury done to her. But if the next of Kin do not insist, remoter Relations to the Person ravished cannot do it.

C H A P. VIII.

*Of Mayhem, or Mutilation and Dismem-
bration.*

1. **M**UTILATION is, the unlawful hurting, by Violence any Member of one's Body, so as it ceaseth to be useful, or becomes incapable to perform its proper Function, without Separation from the Body.

2. Dismembration is, the unlawful Amputation or cutting off by Violence any Member of one's Body, whereby it ceaseth to be any longer a Part of the Body, from which it is separated.

3. Both these Crimes go by the common Name of *Mayhem*, or *Machem* (from *Mehaigne*, or from *Mancus*) answering to the old *Scottish* Word *Manzie*. For understanding whereof it is necessary to explain what is meant by a Member of the Body. A Member in a proper and strict Sense is, a Part of the Body having its proper and distinct Operation and Office, which can be performed by no other Part. Some are called principal Members, which work by themselves, as the Eye, Tongue, Nose, Ear, Arm, Leg,
Hand,

 128 Part I. *Institutes of the* Book IV.

Hand, Foot, Finger, Toe, a Man's Yard, or Woman's Pap. Some are called only subservient Members, as the Lips, Chin, Beard. It is controverted whether the Teeth be principal, or only subservient Members. Extinguishing the Sight of one's Eye by a Stroke on the Head, which brings a Defluxion on the Eye while the Substance of it remains, is Mutilation: But if thereby the Sight is only impaired, the Dimming of the Eye is considered only as an aggravating Effect of the Stroke. The Tongue is mutilated or maimed by cutting off a Part of it, whereby it is disabled to speak, so as to be understood. Any Act whereby the Ear is deprived of the Faculty of Hearing, is Mutilation; but it cannot be dismembred; tho' the cutting off the whole Lap of the Ear or external Gristle about it, called the Lug, might be reckoned a Dismembration. Mutilation is incurred, by disabling and rendring uselefs, and Dismembration by cutting off, or by breaking and hurting so as it was necessary to cut off, an Arm, Hand, Leg, Foot, or a Finger, or Toe. Mutilation is incurred by dislocating the *vertebrae* of the Back. Cutting off a Man's Yard, or gelding him, and the cutting off a Woman's Pap or Dug whereby she gives Suck are hainous Dismembrations. The cutting off a Member of the Body adhering to it, tho' withered and dead, is reckoned a Dismembration. But the cutting off any Member of a dead Man's Body in order to disgrace it, is not a Crime of this Nature.

Chap. 8. *Law of Scotland.* 129

Nature. Nor yet is the hurting or cutting off the Lips, or Chin, or Beard, esteemed to be Mutilation or Dismembration. Because these are not principal, but only subservient Members and Ornaments of the Body, having no distinct Operation.

4. The Crimes of Mutilation and Dismembration are both punished arbitrarily, or by Confiscation of Moveables, and Afflictment to the Party injured, which ought to be heightened according to the Dignity and Usefulness of the Member disabled or lopped off, which is best known by the Employment and Circumstances of the Party injured ; it being a less Injury to disable or strike off the Hand of an idle Man, having no Occupation, nor Wife or Children, than of an excellent Artificer, as a Painter who maintains a numerous Family with his Handy-work.

5. Mutilation cannot be tried till Year and Day after Commission of the Crime be expired, that it may appear whether there be a perpetual Disability of the Member hurt ; tho' an Indictment for it may be raised within that Time. Upon which Account it is adviseable in an Indictment of Mutilation, to libel the precise Day, when it was committed, or declare it at the Bar. When the Fact is set forth as done upon one or other of the Days of such a Month, or one or other of the Months of such a Year, the Trial cannot proceed, till Year and Day after the last Day of that Year. But a Trial for

Vol. II. I Dif-

 130 Part I. *Institutes of the* Book IV.

Dismembration may proceed without waiting for the Course of Year and Day after the Crime: Because no Recovery is expected.

6. Whatever Defence is good against Homicide, is sustained, *mutatis mutandis*, as a Defence against Mutilation, or Dismembration. It is relevant to absolve from Mutilation, that the Person hurt is perfectly recovered as formerly: But in that Case the Indicttee will be decerned to pay a Sum for the Expence of the Cure. If a wounded Member be thereafter necessarily cut off as incurable, he who gave the Wound, may be tried for Dismembration. That a Member is mutilated or rendred useles, may be proved by the Oath of the Party injured, tho' that may be redargued by Witnesses who saw him use that Member as freely as before. Dismembration will appear to the Judges by ocular Inspection. And the Guilt of these Crimes has been fastned upon Persons by Presumptions.

Having thus explained the Crimes committed against the Body of Man; those touching his Fame or Honour fall next to be considered.

C H A P. IX.

Of Crimes and Offences committed against one's Fame or Honour, called Injuries.

1. **A**Ll Crimes are Injuries in an extensive Sense: But the Offence specially called an Injury, is a malicious exposing one's Re-
pu-

Chap. 9. Law of Scotland.

131

putation or Character in the World to Contempt and Shame.

2. Fools or mad Folk or Children are not capable of doing an Injury in the Eye of the Law (*a*): Because such Persons are understood to have no evil Design; and Injuries are reckoned according to the Offender's Design. But an Injury may be done to those insensible of it, as to Infants, Fools, or furious Persons (*b*). One is understood to suffer an Injury, by what is done to those under his Power or Affection, as to his Wife, Children or Servants (*c*); tho' the Offender knew not or mistook the Husband, Father or Master (*d*). It is also reckoned injurious to a Man, what is done against the Memory of one whom he represents as Heir, or nearest of Kin (*e*). *Volenti non fit injuria* (*f*): Where he who suffers the Wrong had Power to overlook and pass from it. Nor is it understood to be an Injury, what is done to one who did not at the Time resent it, or shew any Dissatisfaction at it, but did put up the Wrong, and pass it by without seeming to know it, or take Notice of it (*g*). But his passing from an Injury, or taking it in good Part, is not to be drawn from his mere Silence, if he do not discover his Unconcernedness about it, by some overt Acts of Jollity, or Satisfaction with the

I 2

Per-

(*a*) L. 3. § 1. ff. de injur. (*b*) d. l. 3. § 1 & 2. ff. eod. (*c*) d. l. 3. § 1 & ult. l. 15. § 34. & seqq. l. 17. § 10 & seqq. ff. eod. (*d*) d. l. 1. § pen. l. 18. § 3 & § pen. & ult. ff. eod. (*e*) L. 1. § 4. & 6. ff. de injur. l. 10. ff. de sepulch. viol. (*f*) L. 1. § 5. in fin. ff. de injur. (*g*) L. 11. § 1. ff. eod. junct. l. 75. ff. de R. J.

 132 Part I. *Institutes of the* Book IV.

Person who offered the Injury. Because one injured may be so circumstanced, as that he dare not presently whisper his Resentment, for fear of more Wrong: Or may be sunk with the Pressure of the Injury, that he cannot speak his Mind; seeing *loquuntur leves curæ, ingentes stupent*. There can be no Injury, *sine animo injuriandi*. So that what is said or done by one to another in Jest or Sport, is not construed an Injury (*b*). Nor yet is it an Injury what is said or done in Self-defence, by him who was first attacked or justly provoked by another (*i*); provided the Retorsion or Retaliation be necessary, and correspond to the Injury, and be presently made, that it may not favour of Revenge. A Litigant is not thought injurious, for objecting against the Reputation of a Witness produced against him, in order to set him, or discredit his Testimony; if he has any probable Ground for the Exception or Challenge. The exhibiting divers Articles of Abuses or Misdemeanours to the Justices of Peace against a Person, to the Intent he may be bound to the good Behaviour; or the making Complaint of him in a legal Way, in a competent Court, is no Ground for an Action of Injury. But if a Prosecution appear to be intirely malicious and groundless, and commenced only to expose the Defendant's Character; such a Mockery of publick Justice doth

ra-

(*b*) L. 3. § 3. l. 15. § 23. ff. de injur. (*i*) Arg. l. 3. ff. de just. & jure. l. 14. § 6. ff. de bon. libert. l. 26. ff. de procur. l. 45. § 4. ff. ad l. Aquil.

 Chap. 9. *Law of Scotland.* 133

rather aggravate the Offence, than make it cease to be one. If a Minister preaching, or a Lawyer pleading, doth innocently and pertinent-ly speak Words, whereby one is charged with a Crime; or a Physician, mistaking his Patient's Disease, say, *He has the French Pox*; or if a Parent, or Master, or Teacher, use moderate Chastisement toward his Child, or Servant, or Scholar; such Words or Chastisement are not esteem-ed to be injurious. But an Injury may be com-mitted even in the Execution of a lawful Of-fice, by transgressing the Limits of it: As when Magistrates or Judges use outrageous and spiteful Reproaches, toward Litigants or Plea-ders, not for maintaining Authority and good Order, but to bring them under Contempt and Disgrace; or when Masters, or Instructors of Youth, do, without Cause, or excessively, cha-stise their Scholars, not in order to reform them, but to satisfy their own vindictive Humour (*k*). That only is reckoned an Injury, which is done in the Presence or Hearing of some Body who may report it to the Prejudice of the Person maltreated or affronted.

3. Action of Injury for lighter Offences, which concern only the Person injured, and for hai-nous Offences, as to his private Reparation, ceaseth by his forgiving them, either expressly (*l*), or tacitely (*m*), by subsequent Acts of

I 3

Fa7

(*k*) L. 13. § 6 l. 32. l. 33. ff de injur. Arg. l. 5. § ult. l. 6. ff. ad l. Aquil. (*l*) L. 17. § 6. in fin. ff de injur. (*m*) L. 11. § 1. ff. cod.

 134 Part I. *Institutes of the* Book IV.

Familiarity and Friendship ; as when the Injured freely eats or drinks, or familiarly converses with the Injurer, or salutes or embraces him kindly. But the *vindicta publica* of grievous or hainous Offences, may, notwithstanding such after Familiarity, be prosecuted.

4. Injuries may be divided into ordinary and extraordinary Injuries, both which are either verbal, or real, or written.

T I T. I.

Of ordinary Injuries.

I. **A** Verbal ordinary Injury, is a Reproach by Words, thrown upon a Person directly, or obliquely. Reproach is thrown upon a Man directly, by calling him a Thief or perjured, or a Murderer or Forger ; or by slandering him in his Office, or Place of Trust, or in his Profession or Trade, whereby he gets his Living : As when a Judge is said to be corrupted, or a Merchant Bankrupt, or an Advocate a Cheat. Such Reproach is thrown upon a Man obliquely, when one says to another, *Did you restore the Horse you stole from such a Man?* which is a charging him with Theft ; or when one looking in another's Face, says, *I am not a Murderer, as some Body is ;* or ironically says, *You are an honest Man,* or, *you are a chaste Woman ;* where the Injury is inferred from the Speaker's presumed Meaning, to up-
braid

Chap. 9. Law of Scotland. Tit. 1. 135

braid the other with the Want of these Virtues;

2. For clearing what Expressions will bear an Action of Slander, it is to be observed, that the Words must be plain and sensible, and not strained by Argument or Construction to support it. Words are taken in that Sense, which they have in the Apprehension of wise Men, or the People of the Place where they were uttered. Whether Words were spoken with a Design to slander, or not, is to be gathered from Circumstances. *V. g.* Words that can allow of no good Meaning, as when one is called a Thief, or a Whore, are presumed to have been spoken with an injurious Intention. Words that admit of a double *Entendre*, are to be taken in the milder Sense (*a*), and the Speaker allowed to purge himself, by declaring his Intention (*b*). But if such ambiguous Words do, in their proper and common Acceptation, import Reproach; they will be so understood, unless the Speaker prove, that he used them in the more innocent Sense. In which Case, a nice Proof of his innocent Meaning is not required, but Presumptions, with his own Oath of Purgation, suffice to bring him off. It doth not serve to excuse a verbal Injury, that the Words were uttered with a Preface of Respect. As if one should call another a Thief or Robber, saving his Honour, or protesting at the same Time, that he had no Design to injure him: Because

I 4

such

(*a*) Arg. 1. 51. ff. pro socio. (*b*) L. 5. § 8. ff. de injur.

 136 Part I. *Institutes of the Book IV.*

such an ironical inconsistent Protestation, doth rather increase, than alleviate the Reproach.

3. The Question whether *veritas convicii excusat injuriantem*? may be resolved thus. If one is reproached with a Thing which publick Justice hath to do with, as a Crime that ought to be punished; the Upbraider cannot suffer for what he is presumed to have done out of a good Intention (c), whether it was before a Judge or not. But it matters not for the Vindication of a Reproacher, that what he charged one with is true, if done out of plain Malice to slander or injure, without any imaginary Regard to publick Justice, that hath no Concern in the Discovery: As where one is upbraided with some Defect in his Person, or with a Crime for which he hath suffered the Pain of Law, or obtained the King's Pardon.

4. A real Injury is a Fact without Words, done by one with Intention to disgrace another: As by painting him in Fools Colours, or with Asses Ears; by fixing a Gallows, Pillory, Horns, or any other shameful Sign at his Door; by using some Indignity to his Person, as the giving him Medicaments to affront him, spitting in his Face, striking him with a Cane, or lifting up a Cane to strike him; by hindring him to use what is his own, as the removing his Sear in the Church, wearing his Coat of Arms; or by following an honest Woman to make her suspected

(c) L. 18. Pr. ff. de injur. l. 3. C. de offic. rectoris provinc.

Chap. 9. *Law of Scotland.* Tit. 1. 137

cted of Harlotry, or the attempting her Chastity, &c.

5. A written Injury, (called a Pasquil or Pasquin, or defamatory Libel) is a Print, or Writing, or Inscription composed and published to expose a Person to publick Hatred, Contempt or Ridicule. He who contrives, or causeth to contrive, or doth publish a Libel, is held to be a Libeller: For where one dictates, another writes, and a Third approves of what is writ, all of these are guilty of it. If one who hath either read a Libel, or heard it read by another, do afterwards maliciously read or repeat any Part of it in the Presence of others, or lend or shew it to another, he is guilty of an unlawful Publication of it. The ordering a Printer to print a scandalous Pamphlet, is sufficient Publication thereof; albeit it was given in to the Printer with this Provision, that he should not vend or expose it to Sale, without a Licence from the chief Magistrate of the Place. Because no Man either prints, or causes to print, but what he designs to publish: And if the Fact were excusable on such a Pretence, every Person meddling that Way would always give a verbal or seeming Caution. But he who barely reads a Libel in the Presence of another, without knowing it before to be a Libel, or who hearing a Libel read by another, laughs at it, or who only says, that such a Libel is made upon such a Person, or who only hath a Libel in his Custody, ought not in respect of any such

A&

138 Part I. *Institutes of the* Book IV.

Act to be adjudged the Publisher of it. Comparison of Hands is no good Evidence, that one wrote a Libel.

6. Ordinary verbal Injuries done to private Persons, are punished by the Commissaries, who inflict pecuniary Mulcts upon the Offenders, and make them do Penance at Church-doors, or cause them submit to a *Palinodia*, or Recantation in the Place where the Offence was committed, and beg Pardon of the Persons injured. In a Libel for Words, as for calling one a Cheat, it is sufficient to mention that the Offender said so, or Words directly to that Purpose: But the Witnesses, when examined, must swear to the *ipsissima verba*, or the precise Words uttered, that the Court may consider, whether these import the Injury libelled or not.

7. Both real Injuries, and those done by Writing, are punishable arbitrarily by the Court of Justiciary.

T I T. II.

Of extraordinary Injuries.

EXtraordinary Injuries are those considered by the Law as such. 1. With respect to the Place where they are committed. 2. In regard of the Persons offended.

S E C T.

Chap. 9. *Law of Scotland*, Tit. 2. § 1. 139

S E C T. I.

Of extraordinary Injuries, with respect to the Place where they are committed.

SUCH an extraordinary Injury is *Hamefucken*, which is a violent entering into another Man's House without Licence, or contrary to the King's Peace, and the seeking and assaulting him there (*a*). This Crime, (so called from the *Dutch* *Halm*, a House, and *Souchen* to seek or pursue) is punished, as the ravishing of Women (*b*), with Death and Confiscation of Moveables. Because a Man at Home in his own House, which is his Sanctuary, doth least expect, and is less guarded against Violence: And by Injuries done to him there, not only the publick Peace, but even the Laws of Hospitality are offended; and it is presumed, that no Person would enter another's House to do him an ill Turn, without being possessed with extraordinary Malice and Prejudice against him.

2. To infer *Hamefucken*, several Circumstances must concur, as, 1. A Man must enter violently another's House, upon an evil Design: For if he come in upon Invitation, or if he, being occasionally there without any evil Design, do, upon some emergent Difference, invade the Master

(*a*) Skene de verb. signif. voce *Hamefucken*. Annot. ad Reg. Maj. Lib. 4. Cap. 9. N. 1. (*b*) Reg. Maj. Lib. 4. Cap. 9. N. 3.

 140 Part I. *Institutes of the* Book IV.

Master of the House, this is not reckoned Hamefucken. 2. The Wrong must be done to a Person in his own House where he dwells, lies and rises Night and Day (c); whether the House be hired, or his own Property (d), or done within the Precinct or Confines of his House, as in the Porch or Court, or Garden, or Office-houses belonging to it, or in his Shop adjoined to his House as a Part of it. The beating an Innkeeper within his own Dwelling-house, tho' it was a publick Inn or Tavern, by Persons who came not to lodge there as Travellers, but were his next Door Neighbours, was sustained to infer the Crime of Hamefucken. The beating a Skipper in his own Ship is also Hamefucken; because that is the ordinary Place of his Residence. Nay, the calling a Man out of his own House, and beating him immediately at the Door of it, without any Provocation there given by him, is relevant to infer the Pain of Hamefucken. But it is not Hamefucken to beat a Man in a Place not inclosed, or not adjoining to his Dwelling-house, as to beat him in his Shop, or in his Play-house, that is separated and at some Distance from his Dwelling-house; or to beat him in one of his several Houses where he resides not.

3. Hamefucken may be pursued either as a distinct Crime, in order to capital Punishment, or pursued only as an Aggravation of another Crime, in order to an arbitrary Punishment.

Hame-

(c) Reg. Maj. Lib. 4. Cap. 9. N. 1, (d) Skene, *ibid.*

Chap. 9. *Law of Scotland.* Tit. 2. § 2. 141

Hamesucken, as a separate Crime, must be tried before the Lords of Justiciary: And the Trial thereof is not now stinted to so short a Time, as it was formerly (e). Hamesucken may be proved by the Pursuer's Servants, or other Witnesses, who might be excepted against in other Trials; it being hardly possible to prove such a Crime by others than those in the Family where it was committed. When Hamesucken is pursued only as an Aggravation of another Crime, it is libelled, that such a Thing was done by Way of Hamesucken. In which Case the Punishment thereof is arbitrary.

4. There are other extraordinary Injuries with respect to the Place where done, as the raising a Fray in the Church or Church-yard the Time of divine Service; the Violation of the Tombs or Sepulchres of the Dead; striking or hurting any Person in the Justice-court or Outer-house of the Session while the Lords are sitting, or before any inferior Judge sitting in Judgment, &c. which are explained in the proper Places.

S E C T. II.

Of extraordinary Injuries with respect to the Persons offended.

THESE are Injuries done to the King, or to his privy Counsellors, Judges, Magistrates and
Offi-

(e) Reg. Majest. Lib. 4. Cap. 9. N. 3.

 142 Part I. *Institutes of the* Book IV.

Officers; or to Parents, Ministers of the Gospel, and Peers, or great Men.

1. The most noted Injuries done to the King, are Leasing-making, and the impugning his Majesty's Title to the Crown; or asserting another's Right to it (a).

2. To assault or wound any privy Counsellor in the Execution of his Office, is Felony, without Benefit of Clergy (b). The Occasion, of which Law was this. *Anthony de Guiscard* (commonly called *Marquis de Guiscard*) a French Papist residing in *England*, being in Custody, and under Examination for High Treason, 8 March, 1710. before a Committee of the privy Council, perceiving his Treason to be fully detected, he, in order to prevent the Pain and Infamy of his approaching Punishment, and to revenge the Discovery of the said Offence, did, with a Penknife, stab the Right Honourable *Robert Harley* Esquire, then Chancellor of the Exchequer, and one of the privy Council, assisting in the Committee. The invading or pursuing any of the King's privy Council, Session, or Officers for doing his Majesty's Service, is punishable with Death (c). And if one of the King's Officers be invaded, while he is actually doing Service to his Majesty, it is presumed that he was attacked upon that Account. And even where a privy Counsellor, not actually in the Exercise of the King's Service, is invaded;
it

(a) Vid. supra, Book III. Chap. 2 & 3. (b) 9 A. Cap. 16
(c) A & 4. Parl. 16. Jam. VI.

Chap. 9. Law of Scotland. Tit. 2. § 2. 143

it may be inferred from **Presumptions**, that he was assaulted, because of **Service** done to his **Majesty** ; unless the **Affailant** instruct a private **Quarrel** or **Grudge**, or some other **Reason** why he did so.

3. Tho' verbal Injuries done to private Persons belong to the **Cognizance** of the **Commisfaries** : Yet such verbal Injuries done to **Magistrates** or **Judges**, are tried in the **Court of Justice** ; and the **Offenders** subjected to an **arbitrary Punishment**.

4. The **Curfing** or **beating** of **Parents** by their **Children** above the **Age** of **16 Years**, not being **distracted**, is **punishable** with **Death** : And **Children** under that **Age**, but **past Pupilarity**, offending in such **Manner**, are put to an **arbitrary Punishment** (*d*). The **undutiful Behaviour** of **Children** towards their **Parents** being a very great **Provocation** to **God** our **common Father**. For those are perfectly lost to all **Virtue**, and abandoned to all **Wickedness**, that have broke thro' the **Bond** of **filial Reverence** and **Duty** to such a **Degree**, as in **Word** or **Action** to abuse their own **Parents**. And many **Offenders** have, at their **ignominious End**, owned, that the **wicked Courses** that brought them to it, began in a **Contempt** of their **Parents Authority**.

5. **Assaulting** the **Lives** of **Ministers**, or **robbing** their **Houses**, or **actually attempting** the same, is **punishable** with **Death**, and **Escheat** of

(*d*) Act 20. Parl. 1. Sess. 1. Ch. II,

 144 Part I. *Institutes of the* Book IV.

of Moveables. Farther, a Reward of 500 Merks is appointed to the Discoverer and the Seizer, or 200 Merks to the Discoverer, and 300 Merks to the Apprehender of the Criminal, to be paid out of the King's Treasury; and Slaughter committed by any Person in endeavouring to apprehend the Offender, is indemnified (e). The invading or putting violent Hands in any Minister of the Gospel (f), or causing Violence to be offered for any Cause whatsoever to one having lawful Warrant to preach and administer the Sacraments (g); is punished with the Loss of Moveables, whereof Half goes to the King, and Half to the Party offended. One's beating a Minister, after he was told, or knew that he was a Minister, is relevant to infer the Pains of Law, without diving into the Reasons of the Offence. Concerning the Rabbling of Ministers, *vide supra* (h). If Injury be done to a Minister in his Person or Goods within his Parish, the Heritors, Liferenters, and others having real Interest in the Parish, are liable to repair his Damage, if they cannot apprehend the Malefactors (i). Injuries done to Ministers may be prosecuted at the Suit of the King's Advocate, Procurator for the Church, or of any other Person (k); without Concurrence of the Minister injured, who cannot discharge or pass from the Injury. Because the Christian forgiving

(e) Act 4. Parl. 2. Sess. 2. Ch. II. (f) Act 27. Parl. 11. Jam. VI. (g) Act 7. Parl. 1. Ch. I. (h) Book III. Chap. 5. Tit. 1. N. 2. Chap. 8. Tit. 2. § 2. N. 1. (i) Act 5. Parl. 2. Sess. 1. Ch. II. (k) d. Act 27.

Chap. 9. Law of Scotland. Tit. 2. § 2. 145

ing Spirit of right apostolical Ministers might be too easily induced to forgive Insults made against them, upon slender, or perhaps mock Acknowledgments.

6. The Grandees of *England* having in old Time been in use to divide themselves into Parties, and every one to draw the Commoners that depended on him to espouse his Interest against all Opposers; and these Factions being kept up by false and scandalous Surmises and Reports of one another, industriously devised and disseminated by their respective Followers and Adherents: Such as thought themselves injured that Way, frequently took Revenge at their own Hands, by reason whereof the whole Kingdom was often in a Flame, and the Government in Danger of being subverted. To oblige the Nobility and great Men to forbear the outrageous Practice of carving out Reparation of their Injuries by their Swords; the Parliament provided a legal and better Remedy against the uttering and venting false and scandalous Stories, that might create Dissention betwixt the King and his People, or the great Men, *viz.* None are to report any false or slanderous News or Tales, whereby Discord may arise betwixt the King and his People, or the great Men of the Realm, on pain of Imprisonment, till he produce his Author of the Tale (1): Nor to devise or tell any false News or Lies of Prelates,

(1) 3 Edw. 1. Cap. 34.

 146 Part I. *Institutes of the Book IV.*

lates, or Lords, or of the Chancellor, Clerk of the privy Seal, Steward of the King's House, Justices of either Bench, or other great Officers of the Realm, whereby any Discord or Scandal to their Persons may arise, on pain aforesaid (*m*). And if one, who hath told such false News or Lies, is imprisoned, and cannot produce the Author, he may be punished by the King's Council (*n*). Which Offence is called *Scandalum Magnatum* ; and incurred, not only by slandering of any of the Nobility of *England*, or Peers of *Great Britain*, created since the Union, or any of the Sixteen elect *Scottish* Peers; but also by slandering any who were Peers of *Scotland* before the Union, or the Successors to their Honours and Dignities. By false News and Lies, only extrajudicial Stories and Slanders are understood. For any Man may bring and prosecute an Action against a Peer, without incurring this Offence of *Scandalum Magnatum*, tho' the Charge be false. Seeing no Person should be deterred from taking Remedy in the due Course of Law. Any such high Personage defamed as aforesaid by Speech or Writing, may bring an Action of *Scandalum Magnatum* upon the Statute of 2 R. II. The King being concerned in the Credit of great Men, who act by his Authority. The Offender is committed to Prison by virtue of the 3 *Edw. I.* upon the King's Account. And upon the Statute of 2 R. II. the Plaintiff recovers Damages for

(*m*) 2 R. II. Cap. 5. (*n*) 12 R. II. Cap. 11.

Chap. 10. *Law of Scotland. Tit. 1.* 147

for the Injury : And great Fines use to be imposed upon the Offenders. Words are, in these Cases, taken in the worst Sense, to preserve the Honour of great Persons.

C H A P. X.

Of Crimes and Offences committed against one's Estate, or his Goods and Possessions.

CRIMES whereby a Man is injured in his Goods or Estate, may be divided into such as are committed by Fraud or Deceit, and forcible Crimes.

Some Crimes committed by Fraud have particular Names, as Theft, Fire-raising, Falshood, fraudulent Bankrupcy, the spoiling or destroying Planting and Policy, and violating the Privileges of Forests ; others go under the general Name of Stellionate.

Forcible Crimes against a Man and his Goods, are Robbery, Oppression and Extortion.

T I T. I.

Of Theft.

1. **T**HEFT is a deceitful taking away or using for Lucre's sake, any moveable Thing belonging to another without his Consent. No Man can properly steal what belongs to himself ;

148 Part I. *Institutes of the Book IV.*

nor is guilty of Theft by taking away that which is another Man's, if he have probable Reasons to think it his own; or took it with the Owner's Consent, whether express, or tacite, presumed from his own good Reputation, and the Owner's Relation and Friendship to him. A Person cannot be charged with Theft, for taking Meat from another, to supply his craving Necessity, when he had no other Way to supply it: For that Necessity has no Law. Which is agreeable to the Law of God (a). In such a Case no Man can be accused of Theft for as much Meat as he can carry on his Back (b); which is termed the Law of *Burdinseck*, or *Ybur-pana seca*, from *pana* in the *Gascoign* Language signifying a Thief, or to steal, and *seca*, a Sack. But if such his Necessity be owing to his Unthriftiness, it is far from being any Excuse. Our Law makes not a Borrower or Hirer of a Thing guilty of Theft, by applying it to another, or farther Use, than that to which it was lent (c); if he had no sinister Design so to misapply it at the Time of the hiring or borrowing. But if a Man borrow a Thing for a certain Use, with a Design to apply it at the Time to some other Use, as when one borrowing Things upon some plausible Pretence, designs to break, and run his Country with them; he is guilty of Theft. Because in such a Case, the Lender is as much wrong'd by Deceit, as if

(a) Prov. vi, 30. (b) Reg. Majest. Lib. 4. Cap. 16. (c) Ibid. Lib. 3. Cap. 9. § 4 & 5.

 Chap. 10. *Law of Scotland*. Tit. 1. 149

if the Goods had been stolen from him : And the first Intention of the Borrower was not to have the simple Use of them, but only, under Colour thereof, to have the better Opportunity of packing away with them. If one of more Partners, who have Right to Things in common, deceitfully abstract or take away for his own Use the Whole, or more than his own Share ; he is guilty of Theft, notwithstanding his partial Interest therein (*d*). A Servant who, having the naked Charge or Custody of his Master's Money or Plate, as Purse-master or Butler, runs away with such Money or Plate, and misemploys or embezzles it to his own Use, without the Owner's Consent, is guilty of Theft. Yea, some Servants are reckoned, and punished as Thieves, for stealing themselves, and their Service from their Masters : As Coal-hewers, Coal-bearers, and Salt-makers receiving Forewages and Fees, who leave their Master, without a Testimonial from him, or an Attestation of a sufficient Excuse of their coming away, from the Magistrate of the Place, and go to serve another Coal or Salt-master for Hire (*e*). Albeit Theft is not properly committed of a Thing which hath no Owner (*f*) : Yet the taking Goods whereof the Owner is unknown, is truly Theft (*g*) ; and the King hath Interest to claim the Goods, and indict the

K 3

Of-

(*d*) L. 45. ff. de furt. l. 45. l. 51. ff. pro socio. (*e*) Act 11. Parl. 18. Jam. VI. (*f*) L. ult. ff. expil. hered. (*g*) L. 43. § 4. ff. de furt.

 150 Part I. *Institutes of the Book IV.*

Offender. If one who finds a Waif or Stray, doth not proclaim it, in order to discover the Owner, he may be charged with Theft. In some Cases the Law doth feign a Property, where, in Strictness, there is none. Thus he who steals Goods belonging to a Parish, may be indicted for stealing Goods of the Parishioners. One who takes off a Shrowd, Rings or other Goods from a dead Corps, is understood to steal from the Executors or other Owners thereof when put on the Corps.

2. It is not commonly reckoned Theft, unless the Goods be taken away, and removed out of their Place (*b*): Because otherwise, the Possession remains still with the true Proprietor. But the removing them out of the Place, where the Owner put them, is Theft, tho they be not taken out of his House, or carried quite away (*i*). And some are guilty of statutory Theft, without carrying any thing away: As the Slayers or Houghers of Horses or Oxen or other Cattle in labouring Time; Cutters or Destroyers of Plough, or Plough Gear in tilling Time; Stickers or Fellers of Horses or Oxen in Time of leading Corns or Fuel; wilful Cutters and Destroyers of green Trees and growing Corns; and Breakers of Mills (*k*).

3. A Thief discovered or taken in the very Act before he brought the stolen Goods to the

(*b*) L. 3. § 18. ff. de acquir. vel amitt. possess. (*i*) L. 7. § 2. ff. de furt. (*k*) Act 10. Parl. 7. junct. Act 82. Parl. 11. Jam. VI.

Chap. 10. Law of Scotland. Tit. I. 1511

the Place he designed to carry them to that Day (*l*), is called *Infang Thief*, or a Thief taken in the *Fang*, *i. e.*, in the Act, or upon the Place. But one not so discovered or taken in the Fact, before he brought the Thing stolen to the designed Place, is termed *outfang Thief*.

4. Theft is variously punished, sometimes with Death, and sometimes with other Pains more or less severe, according as the Offence hath a greater or lesser Tendency and Influence, to disturb the publick Peace and Quiet; which is determined with respect to the Offender, or the Thing stolen, or the Place where and when stolen, or the Way and Manner of committing the Theft. The Punishment is aggravated or mitigated,

[1.] With respect to the Offender. Landed Men convicted of common Theft, or Theft frequently committed, are punishable capitally (*m*). In which Case, those only are understood to be landed Men, who stand infest in Lands, and not such as have only Dispositions and Charters or Resignations in their Favour, or who having been once infest, are divested in favour of others. A Man who hath been thrice guilty of Theft committed at different Times, and hath suffered Punishment, or been pardoned for the first two, is adjudged to die for the third Fault; tho the Thing stolen be inconsiderable. Domestick Theft, as when a

K 4

Ser-

(*l*) L. 3. l. 4. ff. de furt. (*m*) Act 50. Parl. 11. Jam. VI. junct.
7 A. Cap. 21. § 7.

 152 Part I. *Institutes of the Book IV.*

Servant steals his Master's Goods, may be punished with Death : Because such an Offence is less guarded against, and aggravated with the Breach of Trust and Friendship. The Punishment of Theft hath been sometimes mitigated, upon the Offender's frankly confessing his Fault, begging Pardon, and coming in Will for it.

[2.] The Punishment of Theft is aggravated or mitigated with respect to the Thing stolen. Thus sometimes Persons have suffered capital, and sometimes only an arbitrary Punishment, for Sheep-stealing or Horse-stealing, according to Circumstances. The Spiriting away, or Stealing of Men or Children, in order to sell them, or for other base Ends, is punishable with Death (*n*). Which Crime is termed Kidnapping, or *plagium*. Picking and petty Theft is punishable arbitrarily: One who takes a Collar from a Dog's Neck, or a Vervel from a Hawk, with the Master's Name or Stile on it; or who steals a Hawk out of the Nest, is liable to a Fine of 500 Merks (*o*). Stealers, Peelers and Destroyers of green Wood, or hained Broom, Breakers of Yards or Orchards, Dovecoats, Cunningairs, and Parks, without Consent of the Owner, must pay to him, by and attour the Damage, ten Pounds for the first Fault, twenty Pounds for the second, and forty

(*n*) Exod. xxi. 16. Deut. xxiv. 7. l. 1. ff. de leg. Fab. de plag. l. 7 & ult. C. ad l. Fab. de plag. C. 1. X. de furtis.

(*o*) Act 21. Sess. 1. Parl. Jam. VII.

Chap. 10. Law of Scotland. Tit. 1. 153

forty Pounds for the third. Insolvent Offenders are to be put in the Stocks, Prison or Irons eight Days, on Bread and Water for a Month, and then to be scourged. Irresponsible Breakers of Dovecoats, Cunningsairs and Parks, are to be hanged for the third Fault (*p*). Where Children under Age break Yards or Orchards, their Fathers or Masters must either deliver them to the Judge to be scourged, or pay 13 Shill. 4 Penies for each of them (*q*).

[3.] The Punishment of Theft is aggravated, with respect to the Place where, or Time when committed. Thus the Stealing a Thing destined to divine Service, as the Communion Cups or Balons, &c. or any other Thing out of a Church, or the Breaking a Mill (*r*), or a House, or Shop, and stealing Goods forth thereof, may be punished with Death. And not only is the Breaking of a House under Night capitally punished; but also a Thief attempting to do it, may be killed *impune* (*s*). Stealing of Goods in the Case of Shipwrack, or while a House is on Fire; or in Time of an Uprore or Pestilence, should be punished with Death.

[4.] Theft, because of the Way and Manner of accomplishing it, as Stealing by the Means of false Keys, or crooked Irons, is punished capitally.

5. A

(*p*) A& 84. Parl. 6. Jam. VI. (*q*) A& 69. Parl. 6. Jam. IV. (*r*) A& 82. Parl. 11. Jam. VI. (*s*) A& 22. Parl. 1. Scff. 1. Ch. II.

154 Part I. *Institutes of the* Book IV.

5. A Person who is Art and Part of Theft, is punishable as the principal Thief. One may be Art and Part of this Crime, 1. By giving Advice and Assistance in it (*t*). 2. By receiving, harbouring, fortifying, maintaining or assisting Thieves in their going to steal, or returning, or by Intercommuning, or trusting with them for that End (*u*). 3. One is Art and Part of Theft, by committing *Theft-bote* (*x*): Which is an Agreement with a Thief to secure him from Punishment for some private Compensation or Satisfaction given by the Thief. It is derived from *Theft* and *Bote* Compensation, or Amends: Hence it is termed *emenda furti*. A Lord of Regality, Sheriff, Justice or Baron *selling a Thief* (that is, taking a Ransom for dismissing him) or *fining with him of Theftdom* (that is, taking a Share of what he has stolen for setting him at Liberty) is punishable with the Loss of Life and Office (*y*): For the Words of the Statute are only misplaced ; and Lords of Regality are not to be less punished than other Judges who are guilty of *Theft-bote*. The Owner of stolen Goods, if he transact with the Thief, and pass from any Pursuit against him (*z*), or any indifferent Person, if he take Ransom from the Thief, or a Part of the stolen Goods for letting him escape,

(*t*) L. 53. § 2. ff. de V. S. l. 50. § 3. l. 54. § pen. ff. de furt. (*u*) Act 21. Parl. 1. Jam. VI. (*x*) Act 2. Parl. 1. Jam. V. (*y*) Act 137. Parl. 13. Jam. I. (*z*) Act 2. Parl. 1. Jam. V.

Chap. 10. Law of Scotland. Tit. 1. 155

scape, is punishable as the principal Thief (*aa*).
 4. The Master or Sustainer of a Thief is bound, when required, by the Owner of stolen Goods, to deliver him up to Justice, upon pain of being guilty as Art and Part, and of making Restitution (*bb*). 5. One is Art and Part of Theft, by receiving wittingly the Thing stolen (*cc*): That is, the immediate Receiver thereof is punishable as the Thief. For the mediate Sellers of the Goods of Thieves who dare not come to Markets, incur only Banishment and Escheat of Moveables (*dd*). 6. Those are Art and Part of Theft, and punishable with Death, and Escheat of Moveables, who sit under the Assurance of Thieves, or pay them *black Mail* (*ee*), *i. e.* Money, or any Gratuity for their Protection; provided the Payment was voluntary, or long continued. 7. When the Owner of stolen Goods raises the Hue and Cry for Help against Thieves, all desired are obliged to concur, upon pain of being reputed Partakers of the Theft (*ff*). And it is lawful to the Pursuers of common Thieves entering into Houses, to burn such Houses, with Intent to take and slay the Thieves (*gg*).

6. Vo-

(*aa*) L. 1. ff. de receptator. junct. l. 13. pr. ff. de offic. præfid. (*bb*) Act 2. Parl. 1. Jam. V. (*cc*) Stat. Alex. II. Cap. 21. (*dd*) Act 109. Parl. 11. Jam. VI. (*ee*) Act 21. Parl. 1. Act 102. Parl. 21. Jam. VI. (*ff*) Act 21. Parl. 1. Jam. VI. (*gg*) Act 8. Parl. 3. Jam. V. Act 33. Parl. 1. Jam. VI.

156 Part I. *Institutes of the* Book IV.

6. Voluntary Restitution of stolen Goods to the Owner, or his passing over the Wrong done to him, doth not hinder the Thief to be pursued criminally *ad vindictam publicam*.

7. The Resetter of a Thief or of stolen Goods, cannot, by our old Law, be punished or thole an Assize, till the principal Thief be first tried (*hh*). But may now be tried as Art and Part (*ij*).

8. A Person from whom Goods are stolen, pursuing the Thief till he be found guilty and sentenced, will get his own Goods again, wherever they can be had, or the Expence of the Suit out of the readiest of the Thief's Goods; reserving to the Sheriff or other Magistrate, who apprehended the Thief, the Charges he laid out in taking and executing him (*kk*); who is preferred for such Charges to the Owner of the stolen Goods.

T I T. II,

Of Fire-raising.

FIRE is raised either maliciously and voluntarily, or negligently.

SECT.

(*hh*) Stat. David 29. Quon. attach. Cap. 83. (*ii*) A& 1511. Parl. 12. Jam. VI. (*kk*) A& 26. Parl. 1. Sess. 1. Ch. II.

Chap. 10: *Law of Scotland. Tit. 2. § 1. 157*

S E C T. I.

Of Fire raised maliciously and voluntarily.

1. RAISING Fire maliciously, with Intent to burn that which belongs to another, as Houses, Corns, (a), Coal-heughs (b), Wood, Underwood or Coppice, or any Part thereof (c), called wilful Fire-raising, is punished with Death (d). A Crime more hainous in this Respect than any other, that other Crimes are committed with some Prospect of Gain, or Pleasure thereby, and limited to the injuring particular Persons: Whereas wilful Fire-raising affords no Profit or Satisfaction to the Offender, except what ariseth from some hellish Resentment or Envy; and the merciless Element employed as the Instrument of his Revenge against his Enemy, doth often go beyond the Bounds of its Commission, by involving in the same Calamity Persons against whom he had no evil Design, and perhaps Friends to him. And threatening to burn a House, hath been sustained relevant to infer an arbitrary Punishment.

2. This Crime is incurred by kindling the Fire, tho little or no Damage is done, by reason of its being timeously extinguished; in respect

(a) Act 8. Parl. 3. Jam. V. Act. 33. Parl. 1. Jam. VI.
 (b) Act 146. Parl. 12. Jam. VI, (c) 1 Geo. I. Cap. 48.
 (d) 7 A. Cap. 21. § 7.

 158 Part I. *Institutes of the* Book IV.

spect of the Danger of Loss, that might otherwise have happened. If one maliciously burn his own House, with Intent to burn others, he is accounted a wilful Fire-raiser; altho the Fire go not beyond his own House, and no other Person suffer thereby: Partly, because it was not long of him that the adjacent Houses were not consumed; partly, for that a Man's Right to the free Use of his Property, doth not authorize him to abuse it to the Prejudice of others. Where a Person maliciously intending only to burn the House of *A.* happens thereby to burn the House of *B.* he may be indicted, as having maliciously burned the House of *B.* For where a felonious Design against one Man, misses its Aim, and takes Effect upon another, it hath the like Construction, as if it had been levelled against him who suffers by it.

3. Wilful Fire-raising is one of the Pleas of the Crown (*e*), which ought to be tried before the Court of Justiciary. Of which clandestine Crime Persons may be not only convicted upon Presumptions; but also the Pursuer's Domesticks may be received as Witnesses.

S E C T. II.

Of Fire raised negligently.

1. W H E R E a Fire happens within Burgh, thro' Misgovernance (*i. e.* Negligence) of a
 Servant,

(*e*) Leg. Malcolmi II. Cap. 13. Quon. attach, Cap. 76.
 Stat. Alex. II. Cap. 14.

Chap. 10. *Law of Scotland.* Tit. 2. §2. 159

Servant, and not of set Purpose; the Servant is to be punished in his Goods, at the Sight of the Magistrates, who are to give the same to the Person who hath sustained the Loss, and the Offender is also to be banished the Freedom for three Years. If he hath no Goods, he is to be scourged and banished for three Years (*f*).

2. If a Man's House be recklessly (*i. e.* negligently) burnt by himself, or his Wife, or Children, he, or they, tho' no Neighbour suffer Prejudice thereby, ought to be banished the Town for three Years (*g*). But if Children under that Age at which they are punishable by Law, do burn their Father's House, the Father is not answerable for them.

3. A Person, to whom a House is let, or hired for Rent, burning it negligently, must repair the Skaith, and be banished three Years (*h*). A Stranger happening so to burn a House, is to be arrested till he satisfy the Damage: And if unable to do it, must ly in Prison, at the King's Will (*i*).

4. A Master is chargeable with Fire raised by his Servant, thro' Negligence in the proper Business committed to him, as by a Groom's careless keeping of Fire or Candle in the Stable, or a Kitchin-maid in the Kitchin; or a Lawndress in the Washing-house; because he should have chosen more careful Servants. But a Master is not answerable for Fire occasioned by a Ser-

(*f*) Act 75. Parl. 4. Jam. I. (*g*) *Ibid.* (*h*) *Ibid.* (*i*) *Ibid.*

160 Part I. *Institutes of the* Book IV.

Servant acting carelessly beyond the Limits of his Office, as when a Lacquey coming into the Kitchin, after the Fire had been carefully ordered by the Cook, heedlessly scatters it, whereby his Master's House, and that of a Neighbour is burnt; unless the Person who did the Injury, was known to be a careless profligate Fellow, and guilty of such Rashness before he was taken into the Service. Inn-keepers and Hostlers are not accountable for Fire occasioned by Passengers or Travellers lodging or haunting with them.

5. Governors of Burghs are to enquire, how Fire thro' Negligence happened therein, and to punish Offenders; and failing in this Part of their Duty, are to be unawed in ten Pounds to the King. Those, by whose Neglect Fire is raised in husband Towns, are to be punished by the Lords, *i. e.* the Barons, in the same Manner as such Offenders within Burgh are punished by the Magistrates (*k*).

6. One may pull down the House of his Neighbour that is on Fire, to preserve his own; if there was an apparent Necessity for it, or a reasonable Ground of Fear, that his own House would otherwise be destroyed (*l*). Yea, even the next House to that on Fire may be thrown down, to stop the Fire's spreading farther, and devouring more Houses; if that next House was certainly to have been consumed.

7. Where

(*k*) Act 75. Parl. 4. Jam. I. (*l*) L. 49. § 1. ff. ad l. Aquil.

Chap. 10. Law of Scotland. Tit. 3. § 1. 161

7. Where a Burning hath happened, those who claim Reparation of Loss thereby from the Inhabitant of the House, the Fire arose in, should prove that it was occasioned thro' his Default. Because his being the first Sufferer by it, sufficiently takes off the Force of that Maxim, that Fire in a House often happens thro' the Fault of some one therein: And regularly, *actori vel affirmanti incumbit probatio (m)*.

T I T. III.

Of Falshood:

FAlshood in general (whereby the greatest Crimes are often indirectly committed) is a palming and imposing upon the World some Counterfeit instead of a Reality: Or a deceitful Suppression, or Imitation of the Truth, to the Prejudice of another. I shall first explain the different Kinds of Falshood, and then set forth the Trial of it.

S E C T. I.

Of the several Kinds of Falshood.

TH^{O'} Truth is but one, and consists in a Point, Falshood puts on various Shapes, and may be committed, 1. By Words. 2. By Writing.

Vol. II.

L

Writing.

(m) L. 4. C. de Edendo. 1. 2. l. 21. ff. de Probat

162 Part I. Institutes of the Book IV.

Writing. And, 3. By Facts that have no Relation to writing.

1. Falshood is committed by Words, in the Case of Perjury (*a*).

2. Falshood by Writing, properly termed Forgery, is the deceitful making, or altering of a Writ, to the Prejudice of another Man's Right: Or the using false Writs, by one who knows them to be false. Which Crime is punished with Death. Whosoever maketh and useth a false Writ, or is accessory to the making thereof, is liable to the Pains of Falshood: And the Counterfeiter, Falsifier, or Accessory cannot, by declaring in Judgment, that he passeth from the Writ quarrelled, and will not use the same, free himself from the Punishment (*b*).

3. Acts of Falshood, that have no Relation to Writing, are, 1. The counterfeiting Persons. 2. Usurping Offices without a legal Title. 3. The assuming false and fictitious Qualities. 4. Counterfeiting Things.

[1.] Persons are counterfeited by a Midwife's laying and changing a Child, or putting one in place of another, which is punished by Death (*c*): Seeing thereby a righteous Heir is surreptitiously wormed out of his Estate, and an Impostor screwed into it, by an egregious Breach of Trust. Falshood in the Person is also committed by one's assuming the Name of another,

(*a*) Vid. supra Book II. Chap. 4. (*b*) Act 22. Parl. 22. Jam. 1. (*c*) L. 1. C. ad l. Corn. de Fals.

Chap. 10. Law of Scotland. Tit. 3. § 1. 163

another, with Intent to deceive (*d*); as *Jacob* did personate his Brother *Esau* (*e*). A Man was adjudged to be hanged, for making his Confederate represent a third Person, and cause a Notary sign a Bond for him, as if he had been that third Person.

[2.] Another Kind of such Falshood, is the usurping Offices without a legal Title. Men were doomed to die for exercising the Office of ordinary Notaries, without being admitted to the said Office, or having a prothocal Book marked by the Clerk Register or his Deputy.

[3.] The Truth is falsified, by assuming and pretending to false and fictitious Qualities. Thus, if any do unlawfully bear Arms, the Thing whereon the Arms is found is escheat to the King; and the User is liable to pay 100 L. to the Lord Lyon and his Brethren, or to be imprisoned during the Lyon's Pleasure (*f*). Sturdy Beggars who counterfeit Lameness, to procure Charity; or those who feign themselves to be dumb, to draw Money from People; or Soldiers who, upon a feigned Pretext of Sickness, have got themselves listed, and lurk as Invalids in a Hospital, incur an arbitrary Punishment.

[4.] Things are falsified, 1. By counterfeiting the Seals, or Coin (*g*). 2. By adulterating,
L 2 ing,

(*d*) L. 13. pr. ff. ad l. Corn. de Fals. (*e*) Gen. xxvii. 19.
(*f*) A& 125. Parl. 12. Jam. VI. A& 21. Parl. 2. Sess. 3. Ch. II.
(*g*) Concerning which vid. supra, Book III. Chap. 1. Tit. 1. § 1. N. 8 & 9.

 164 Part I. *Institutes of the* Book IV.

ing, or sophisticating and mixing Wines in Taverns, or putting Water therein by the Keepers of Taverns; which is punishable by escheating all the Wines in such a Tavern, and Loss of their Freedom (*b*). 3. The Users of false Weights and Measures are guilty of such Falseness (*i*); and escheat their whole Goods and Gear to the King (*k*). The using of larger Weight or Measure than Law determines, is punishable, tho' the Seller only would thereby seem injured: Because, he may receive as well as give out by it; and no Man is presumed to keep any Weight or Measure to his own Disadvantage. But Merchants were not found culpable, for buying and receiving raw Cloth, conform to a Measure four Inches longer than the ordinary Ell. In respect such Cloth when it is wet, (and till then it can be of no Use) draws so much in, that 25 Ells of dry raw Cloth will not afford 20 Ells of it wet. The Havers of false Weights or Measures are presumed to have used them, or to have had them only for Use; unless the Presumption be taken off, by proving, that they were presently bought or borrowed, or laid aside when found upon Trial to be insufficient.

SECT.

(*b*) Act 17. Parl. 5. Q. M. Act 126. Parl. 7. Jam. VI.
 (*i*) Act 47. Parl. 4. Jam. IV. (*k*) Act 2. Parl. 19. Jam. VI.

 Chap. 10. *Law of Scotland*. Tit. 3. § 2. 165

S E C T. II.

Concerning the Trial of Falshood.

1. FALSHOOD by Words or Facts that have no relation to Writing, fall under the Cognizance of the Lords of Justiciary.

2. The Lords of Session only use to try in the first Instance the Falshood of Writs, touching the civil Rights and Interests of Parties; or where the Falshood is to be explicated in the indirect Manner, by Presumptions arising from the comparing Letters, or from the Circumstances of the Subscriber of the Writ, or Witnesses to it: And when a Forger of Writs improven and found to be false, is remitted to the Court of Justiciary, an Indictment founded on the false Writ, and the Lords Decreet of Improbation is drawn up against him, which is found relevant, and referred to the Assize, who sustain the Decreet as *probatio probata*, and by their Verdict find the Pannel guilty in respect thereof.

3. The Lords of Justiciary use to try and punish the Falshood of Writs in the first Instance, where no Person hath such a civil Interest therein, as to bring the Matter before the Court of Session; or where they don't incline to do it, and the Writ is to be declared false in the easy direct Manner, by the Testimonies of the Writer and instrumentary Witnesses, *Socii criminis*

L 3

are

 166 Part I. *Institutes of the* Book IV.

are received Witnesses in Falshood, which cannot be otherwise proved. Forgery of one's Subscription to a Writ, may be tried at the Suit of the King's Advocate, in order to Punishment, albeit the Person, whose Subscription is forged, should not only refuse to concur, but also own the Writ to have been truly subscribed by him; whose passing from the Forgery, and his Interest wronged thereby, cannot exculpate the Forger, where the instrumentary Witnesses deny the Verity of their Subscriptions. When Sentence is given against a Forger, the Lords ordain the false Writ to be cancelled before them.

T I T. IV.

Of fraudulent Bankrupcy.

LAw doth punish fraudulent Bankrupts by Banishment, or otherwise, (Death excepted) as the Lords of Session shall see Cause (a).

T I T. V.

The spoiling or destroying Planting and Policy; and violating the Privileges of Forests.

1. **T**Hose who cut, break, pull up, or peel the Bark of any Tree within ten Years Growth, are liable to the Pain of ten Pounds, and

(a) Act 5. Sess 6. Parl. K. W.

 Chap. 10. *Law of Scotland.* Tit. 5. 167

and for each Tree of elder Growth, to twenty Pounds. The Haver and Ufer of the Timber, incurs the like Pain, unless he produce the Person he got it from. Insolvent Offenders must work to the Heritor for the Fine, at Half a Merk *per diem*. No Person must break down, or fill Dyke, Hedge, or Ditch, or Leap, or suffer Horse, Nolt, or Sheep to go over them, under the said Pain of ten Pounds *toties quoties*, Half to the Heritor, and Half to the mending of Ways and Bridges. Which Penalties are to be pursued before, and applied at the Sight of the Justices of Peace, or other Judge Ordinary (a). Tenants should preserve the Planting on their Possessions, from Injury by any in their Houses, under the Pain of ten Pounds for each Tree within ten Years old, and twenty Pounds for each Tree of a greater Age, to be exacted only by their Masters (b). Heritors and other Possessors of Lands, are ordained to cause herd their Nolt, Sheep, Swine and Goats, in both Winter and Summer, and to house and inclose them in the Night, so as they may not eat or destroy their Neighbours Ground, Woods, Hedges or Planting, under the pain of Half a Merk *toties quoties* for each Beast found on a Neighbour's Ground, beside the Damage: For which the Beast may be detained (c).

2. A Forest, (from the *Latin Foresta*, q. d. *Feresta, ferarum statio*) is a certain Territory of
 L. 4 woody

(a) Act 39. Sess. 1. Parl. Jam. VII. (b) Act 16, Sess. 7. Parl. K. W. (c) Act 11. Sess. 2. Parl. Jam. VII.

168 Part I. *Institutes of the* Book IV.

woody Ground and Pasture, privileged for the peaceable abiding of wild Beasts, for the Owner's Delight and Pleasure in Hunting. The Keeper of such a Forest is termed the Forester. There are in *Scotland*, the King's Forests, which are large Tracts of open Ground that cannot be inclosed; and private inclosed Forests belonging to Subjects, who have obtained a Forestry or Privilege of a Forest by a Grant from the King (*d*). Seeing the Publick hath an Interest in the Preservation of Forests, from whence Timber for building of Houses, Ships, and other Uses, is taken; great Privileges are indulged, not only to the King's Forests, but also to those pertaining to Subjects. Where Persons put Cattle in the King's Forests, they are to be imprisoned, and the Cattle become escheat, and confiscated, two Thirds to his Majesty, and one Third to the Forester (*e*). Yea, the Keeper or Forester may intromit therewith at his own hand, without Process of Law, the one Half to the King's Use, and the other to himself (*f*). Who cut any Timber within the King's Woods or Parks, or slay Deer or wild Fowl therein, with Gun, Bow, Dog or Hawk, or other Engine, or shoot with any Gun therein, or in the Night within a Mile thereof, or slay any Deer straying in Time of Storm, their Moveables shall be escheat, and their Persons punished at the
King's

(*d*) A& 12. Parl. 4. Jam. V. (*e*) Ibid. (*f*) A& 210. Parl. 14. Jam. VI.

Chap. 10. *Law of Scotland.* Tit. 6. 169

King's Will (g). Which royal Forests were anciently under the Inspection of the Comptroller (h). Any Baron or other landed Man may escheat all *Gudes*, i. e. Cattle, found in their *hained Woods or Forests*, to their own Use (i). Keepers of Forests having Right thereto by Infestments, are impowered to put the Laws of the Forest to Execution against Transgressors, whom they call before them, and try by an Inquest. They may fine Slayers and Shooters of Deer, Roe and wild Fowl, if landed Men, in five hundred Merks, if unlanded responsible Men, in one hundred Merks, and may commit unlanded Men who are not responsible, to Prison, and punish their Persons (k).

T I T. VI.

Of Stellionate.

1. **S**Tellionate is a general Word signifying any Crime committed by Fraud wanting a more particular Name (a). It is so called because of the Variety of its Nature, from *Stellio* a subtil Kind of Lizzard having its Back spotted, as it were with Stars.

2. He is guilty of Stellionate who assigns, sells or mortgages the same Thing, which he had
had

(g) Act 210. Parl. 14. Jam. VI. (h) Act 128. Parl. 12. Jam. VI. (i) Act 12. Parl. 4. Jam. V. (k) Act 18. Parl. 22. Jam. VI.

(a) L. 3, § 1. ff. Stellion.

170 Part I. *Institutes of the* Book IV.

had already assigned, sold or mortgaged to another, and conceals the former Engagement (*b*); or gives in Payment of his Debt, that which doth belong to another (*c*), or who receives Payment of a Debt formerly paid (*d*), or who pawns one Thing of less Value instead of another, as Copper in lieu of Gold (*e*); or who pawns another Man's Thing for his own Debt, without acquainting the Creditor, that it was not his own (*f*); or who takes Money from a Carrier sent by one to pay a Debt owing by him to another, as if the Receiver of the Money had been the Person it was sent to.

3. The Punishment of this Crime is arbitrary (*g*). Particularly he who grants double Alienations of Lands or Annualrents, or double Affedations, or Assignations, or a Superior who wittingly receives double Resignations, is declared infamous, and punishable in his Person and Goods, at the King's Will (*h*).

TIT. VII.

Of Robbery.

Robbery is, the taking away another Man's Goods or Money for Lucre's sake, by

(*b*) d. l. 3. § 1. Act 140. Parl. 12. Jam. VI. (*c*) d. l. 3. § 1. (*d*) L. 29. § 5. ff. Mandat. (*e*) L. 36. pr. ff. de pign. Act. (*f*) d. l. 36. § 1. (*g*) L. 3. § 2. ff. Stellion. l. 4. C. de crim. Stellion. (*h*) Act 105. Parl. 7. Jam. V.

Chap. 10 .Law of Scotland. Tit. 7. § 1. 171

by Force and Violence. The Word is said to have taken its Rise hence, that anciently Robbers only took away the Robes or Clothes from Travellers, all they had then to lose when Money was a scarce Commodity; or because their Money or Goods is taken out of some Part of the Robes about their Persons. Those guilty of this Crime, whom we call Robbers, went formerly in *England*, under the Name of *Robers Men* or *Roberds Men*, from *Robin Hood* who lived by Spoil and Robbery, upon the Borders of *Scotland* and *England* under King *Richard I. of England*. Robbery is committed either on the Land, or on the Seas: Whereof the former goes by the Name of Robbery, and the latter is called Piracy.

SECT. I.

Of Robbery committed on Land.

1: **THERE** must be a Taking away to make one guilty of this violent Theft. But there is a twofold Taking which is considered as Robbery, *viz.* a Taking in Deed, and a Taking in Law. A Taking in Deed is, when one by Force takes from another what Money or Goods he finds about him, or takes in his Presence what belongs to him, as his Horse or Cloke-bag, while he is standing by, not daring to resist him. A Taking in Law is, when a Man out of Fear seeking to escape,

172 Part I. *Institutes of the* Book IV.

escape, casts his Purse into a Bush, and the Thief takes it up; or when he delivers his Purse to a Robber demanding it.

2. A forcible taking away of Things from another, doth not make the Offender guilty of Robbery, unless he did so for the sake of Lucre, or Gain (*a*). Therefore Persons who, out of Resentment against a Gentleman for being instrumental, as they thought, in procuring the Malt-tax, violently invaded or broke into his House, or carried away, or broke and destroyed any of the Goods or Furniture thereof, or were Art and Part of any of these Facts, were found liable only to an arbitrary Punishment.

3. One is guilty of Robbery, for such taking of Money, or Goods of never so small Value (*b*); the Audaciousness of the Fact in open Defiance of Law, and not the Value of the Thing being considered. It is accounted Robbery, to take away forcibly from a Thief, Things he had stolen from another: Because in Rapine, the Damage sustained is not so much considered, as the Disturbance of the publick Quiet. But one's violent taking away from a Robber *de recenti*, that which had been robbed from himself, is justifiable.

4. A Person is considered as Art and Part of Robbery, the same Ways as one is held to be Art and Part of Theft (*c*),

§. Rob-

(*a*) Pr. & § 2. Inst. de vi bon. rapt. (*b*) Pr. Inst. de vi bonor. rapt. (*c*) Vid. supra Tit. 1. N. 5.

Chap. 10. Law of Scotland. Tit. 7. § 1. 173

5. Robbery is one of the four Pleas of the Crown (*d*), and is punishable with Death (*e*), tho' the Thing taken away be inconsiderable, and the Offender was never before charged with Guilt of that Kind. But robbing or seizing the Mail or Pacquet of Letters, going or coming by the common Post, is, by a particular Statute, declared to be Robbery, and punishable with Death (*f*): Which Law is only declaratory of what obtained before by Practice.

6. One may lawfully kill Robbers breaking Houses in the Night, or masterful Depredators (*g*). When the Owner of Goods robbed raises the Hue and Cry for Help against Robbers, all desired, are obliged to concur, upon pain of being held Partakers of the Robbery (*h*). Sheriffs, Justices of Peace and Constables are bound, upon Intimation to them, by the Owner of Goods robbed or stolen, or some in his Name, to raise and go along with all fencible Men, in Pursuit of Goods and Robbers, under the pain of being liable for the Value of such Goods (*i*). In case the Persons whose Goods are so taken away, or those obliged to rise with them, in Manner aforesaid, happen to hurt, mutilate or slay any of the Away-takers, or their Associates, in the Pursuit of them, they cannot be called in question for the same, but are indemnified,

as

(*d*) Leg. Malcolm II. Cap. 11. (*e*) Stat. Rob. III. Cap. 44. § 4. (*f*) Act 3. Sess. 2. Parl. W. and M. (*g*) Act 22. Parl. 1. Sess. 1. Ch. II. (*h*) Act 21. Parl. 1. Jam. VI. (*i*) Act 6. Parl. 1. Sess. 2. Ch. II.

174 Part I. *Institutes of the* Book IV.

as if they had the Sovereign's special Remission. And any who brings a Robber or Thief, after he is outlawed and denounced Fugitive, to the Sheriff, Magistrates or Justices of Peace, is, upon their Receipt of the Offender, entitled to a Reward of 200 Pounds from the Government (k).

7. Indictments of Robbery are sustained, at the King's Advocate's Instance, albeit the private Parties injured be silent, and do not complain. Where a private Person pursues for Robbery, the Person injured, and the Goods robbed require to be libelled, to shew the Interest of the Prosecutor, and the Quantity of Loss he sustained. But in a Prosecution at the Suit of the King, whose Interest it is to keep all his Subjects from Injuries, it sufficeth to libel the Crime, and set forth a proper *corpus delicti*, without naming the Person robbed, or what Goods were violently taken away. And an Indictment at the King's Advocate's Suit, for robbing a Person named, or some other Person, was sustained, notwithstanding that general Alternative, relevant to infer the Pains of Death and Confiscation of Moveables: Seeing the Nature of a Crime determines the Nature of the Evidence, Proof that might be excepted against in other Crimes, is received in a Trial of Robbery: As a Person robbed and his Servant, not being Pursuers, or indemnified Fellow-criminals,

(k) Act 6, Parl. 1. Sess. 2. Ch. II.

Chap. 10. Law of Scotland. Tit. 7. § 2. 175

criminals, were received as Witnesses for proving this Crime: Because it is often privately committed, or by Rogues masked, or whose Faces are disfigured. One robbed of Money or Goods, is entitled, upon the Robbers being found guilty and condemned, to claim Restitution of such Money and Goods, in the same Manner, as if they had been only stolen from him (1).

S E C T. II.

Of Piracy.

1. PIRACY is a Robbery committed at Sea, which is a Crime that destroys all national Commerce. The Offender is termed a Pirate, in Greek Πειρατής, from πειραω to attempt, or πειρω or πειρω to pass over, because Pirates rove on the Sea, or perhaps from πυρ Fire, because they use to burn the Ships, Houses, &c. of the Islands where they make their Descents: Those common Sea Rovers, without any fixed Place of Residence, acknowledge no Sovereign, no Law, and are Enemies to Mankind. For which Reason, no Faith is kept to them, and they are denied Succour by the Law of Nations.

2. It is Piracy to rob Goods out of a Ship riding at Anchor at Sea, tho' no Person was in the Ship at the Time; or only to take some
of

(1) Vid, supra Tit. 1. N. 8.

 176 Part I. *Institutes of the* Book IV.

of a Ship's Crew in order to sell them for Slaves. If any of the King's Subjects commit Robbery against any of his Subjects at Sea, under Colour of a Commission from any foreign Prince; they are to be adjudged Pirates (a): For no Commission from a foreign Power, doth loose a Person's Allegiance or Duty to his native Sovereign. Albeit the acting by such a Commission, would excuse the Actors from the Charge of Piracy at the Instance of all other Princes and States. If any Commander or Master of a Ship, Seaman or Mariner, where the Admiral hath Jurisdiction, betray his Trust, turn Pirate, and run away with the Ship, or any Barge, Boat, Ordnance, Ammunition, Goods, or Merchandize, or voluntarily yield them up to any Pirate, or bring seducing Messages from him; or attempt to corrupt any Commander, Master, Officer or Mariner to yield up, or run away with the Ship or Goods, or turn Pirate, or go over to Pirates; or if any Person lay violent Hands upon his Commander, to hinder him from defending his Ship, or confine his Master, or endeavour to make any Revolt in the Ship; the Offender shall suffer as a Pirate (b). He that upon Land or Sea sets forth a Pirate, or doth aid, assist, maintain, procure, command, counsel or advise any Person to commit Piracy, who doth it accordingly; or that receives, entertains or conceals such a Person, knowing him to have

(a) 11 & 12 W. III. Cap. 7. § 8. junct. 6 Geo. I. Cap. 19. § 3. (b) Ibid.

Chap. 10. *Law of Scotland.* Tit. 7. § 2. 177

have committed Piracy; or that receives or takes into his Custody, any Ship, Vessel, Goods or Chattels piratically and feloniously taken, is to be tried and punished as a Pirate (c). A Person who trades with any Pirate, or furnishes him with Ammunition or Provision, or Stores of any Kind, or fits out any Vessel with Design to trade or correspond with, or consults, combines or corresponds with a Pirate, knowing him to be such, is adjudged guilty of Piracy: And the Ships fitted out to trade with Pirates, and the Goods on Board the same are forfeited, Half to the Crown, Half to the Discoverers (d). Those belonging to any Vessel, forcibly boarding a Merchant Ship, and throwing over Board, or destroying any Part of the Goods, are punished as Pirates (e). But it is lawful to any Persons, in case of Necessity, to take Victuals, Cables, Ropes, Anchors or Sails out of another Ship, that may spare them; so be, they pay or give Security therefore (f).

3. Piracy is in all Nations punished with Death.

4. In the Case of Piracy attempted on the Ocean, if the Pirates are overcome, and no legal Judgment can be obtained; the Takers may, by the marine Law, immediately inflict Punishment by hanging them up at the Main-yard. By the Law of *England*, where any Pi-

Vol. II.

M

racy

(c) 11 & 12 W. III. Cap. 7. § 10. junct. 8 Geo. I. Cap. 24. § 3. (d) 8 Geo. I. Cap. 24. § 1 & 2. (e) Ibid. § 1. (f) 28 H. VIII. Cap. 15.

 178 Part I. *Institutes of the* Book IV.

racy is committed upon the Sea, or in any Part within the Jurisdiction of the Admiralty, a Commission under the great Seal is ordered to be directed to the Lord Admiral and his Deputy, and three or four more, to be named by the Lord Chancellor, for enquiring, trying and determining the Offence, according to the Common Law, in any County of *England* the Sovereign shall appoint, by Juries of the said County, as if the Offence had been done there upon the Land (g). But because it was found a great Trouble and Charge, to send People into *England*, to be tried for Piracies committed in very remote Places, as the *Indies*; all Piracies, Felonies and Robberies committed in any Place where the Admiral hath Jurisdiction, may be tried either at Sea, or upon Land, in any of his Majesty's Plantations, Colonies, Dominions, Forts or Factories, by Commission under the great Seal, or the Seal of Admiralty, directed to the Admiral, Vice or Rere-admirals, Judges of the Admiralty, or Commanders of any of the King's Ships of War, and to such other Persons, as his Majesty shall think fit (h).

5. Pirates in *Scotland* are tried either before the Court of Justiciary, or before the Judge of the High Court of Admiralty there. Some of the Crew of a piratical Ship may be indicted, and tried before their Captain be called upon
to

(g) 28 H. VIII. Cap. 15. 4 Geo. I. Cap. 11. § 7. 8 Geo. I. Cap. 24. § 1. (h) 11 & 12 W. III. Cap. 7. § 1. & sequq. junct. 6 Geo. I. Cap. 19. § 3.

Chap. 10. *Law of Scotland.* Tit. 7. § 2. 179

to answer. Because, *facinus quos inquinat aequat* (i). A Libel for Piracy and Murder, by attacking a Ship upon a certain Coast, in a hostile Manner, boarding her, killing the Men therein, and throwing them over Board into the Sea, carrying off the Goods, and selling the Ship, was sustained relevant, without setting forth the Names of the Ship, or Persons murdered, or the Quantity and Quality of the Goods taken away. Because, whatever the Ship, or Men, or Goods were, it was Piracy and Murder, to attack a Ship hostilely, destroy the Men and rob the Goods: Which being so put out of the Way, or destroyed, could not be particularly known. Persons were convicted of Piracy, upon the Testimony of one Witness, and concurring Presumptions. And those convicted of that Crime are ordinarily adjudged to be hanged on the Sands of *Leith*, within Flood-mark, or within the Wash of the Tide. The piratical Ship and Goods are confiscated. A general Pardon of all Felonies is not extended to Piracy: Because, that being a Crime, which all trading Nations are concerned to have exemplarily punished, it should not escape under the Cloke of a general Clause, without being specially mentioned.

M 2

TIT.

(i) Lucan. lib. 2.

 180 Part I. *Institutes of the* Book IV

T I T. VIII.

Of Oppression and Extortion.

Oppression, in a strict and proper Sense, is the putting a Person under a Necessity to give, or do some Thing, who is obliged to give or do Nothing of what is claimed. And Extortion is properly the taking of Money by any Officer, under Colour of his Office; either when none at all is due, or not so much is due, or where it is not yet due. But Oppression and Extortion are mostly confounded, as equipollent Terms, signifying in general, the doing or taking by Violence or Force, what is not warranted by Law.

Oppression is done either, 1. By Magistrates or Ministers of Justice, or other Persons in Office, under Colour of Law. 2. By private Persons, in manifest Contempt and Defiance of Law and Justice.

S E C T. I.

Of Oppression committed under the Colour of Law or Authority.

1. **F A L S E** or wrongous Arrest or Imprisonment is a notable Instance of Oppression under Colour of Law or Authority: Whereof there are several Kinds, *viz.*

[1.] **The**

Ch. 10. Law of Scotland. Tit. 8. § 1. 181

[1.] The Arrest or Commitment of a privileged Person, as a Peer, or Member of Parliament for civil Debt.

[2.] The imprisoning one by a Person having neither Authority nor Power so to do.

[3.] The putting any Person in Custody in order to Trial, for any Crime or Offence, without a Warrant in Writ, expressing the particular Cause : Except Coal-hewers, Salters, Vagabonds, masterful Beggars, Persons disobedient to Church Censures, or found acting in Tumults, or for Riots, Blood and Battery, or for Drunkenness, Sabbath-breaking, Swearing, Uncleaness, Pickeries and Thieving, or for Indignities done to inferior Magistrates, Judges or Justices of Peace ; or for Thefts, Robberies and Depredations in the Borders and Highlands, or upon Suspicion of Accession to imminent or actual Invasion, Rebellion or Insurrection (*a*).

[4.] The signing of Warrants of Commitment for Crimes except as aforesaid, proceeding on Informations not subscribed, or not expressing the Cause ; or the executing such Warrants, or the detaining the Person so ordered to be imprisoned, or the refusing a Double of the Warrant to the Prisoner ; or the keeping any Person close Prisoner longer than Eight Days (*b*).

M 3

[5.] A

(*a*) A & 6. Scff. 8 & 9. Parl. K. W. (*b*) *Ibid.*

 182 Part I. *Institutes of the* Book IV.

[5.] A Judge competent who refuseth to order the Liberation of a Prisoner for a Crime not capital, upon Offer of sufficient Bail according to his Quality (*c*); or who, upon Application of a Prisoner for any Crime, doth not within Twenty four Hours issue his Precept for intimating to the Pursuer to fix a Diet for the Trial within Sixty Days, or upon his omitting the same, doth not set the Prisoner at Liberty; or who, in case of Process timeously raised, and not insisted in and concluded within the Time limited by Law, doth not, upon the Prisoner's Application, within Twenty four Hours, give out Precepts to set him at Liberty; or the Magistrates or Keeper of the Prison, who do not dismiss him after such a Charge, upon his paying the Dues; or who put or detain one so liberated in Prison, for the same Crime, after Intimation of the Warrant of his Liberation, except upon new criminal Letters raised before the Court of Justiciary duly executed against him; or the Transporters of any Person forth of *Scotland*, except upon Consent given before a Judge, or by legal Sentence; are guilty of wrongous Imprisonment (*d*).

[6.] The Pain of wrongous Imprisonment is 6000 Pounds for a Nobleman, 4000 Pounds for a landed Gentleman, 2000 Pounds for another Gentleman or Burgess, and 400 Pounds for any other Person. The wrongous Detainer of a Pri-

(*c*) Vide infra Part II. Book II. Chap. 2. Tit. 2. Sect. 1. N. 3.
 (*d*) Ibid.

Ch. 10. Law of Scotland. Tit. 8. § 1. 183

Prisoner, after elapsing of the Day appointed for his Liberation, is liable to pay each Day for a Nobleman, 100 Pounds, for a landed Gentleman 100 Merks, for any other Gentleman or Burghers 50 Merks, and for any other Person 10 Merks, besides Loss of Office, and Incapacity of publick Trust. Which Penalties the Party grieved may pursue for before the Court of Session summarily for his own Behoof, and cannot be modified by any Authority (*e*).

[7.] Wrongous Imprisonment is probable by Witnesses. But Action for it prescribes, if not pursued within three Years after the last Day of the wrongous Imprisonment; and tho' raised within that Time, prescribes, if not insisted in yearly thereafter (*f*).

2. There are yet other Oppressors under Colour of Law and Authority, as,

[1.] Officers of the Law taking Fees where nothing is due, or greater Fees than are due to them (*g*).

[2.] Ferry-mens taking more than just Freight from the King's Lieges (*h*).

[3.] Tradesmen exacting Custom from those of their own Craft coming to the weekly Market, shall buy their Life as common Oppressors (*i*); *i. e.* they shall be forced to take a Remission for so doing. It is Oppression for Craftsmen

M 4

men

(*e*) Vide infra Part II. Book II. Chap. 2. Tit. 2. Sect. 1. N. 3. (*f*) Ibid. (*g*) Act 46. Parl. 4. Jam. IV. Act 34. Parl. 5. Jam. III. Act 83. Parl. 11. Jam. VI. (*h*) Act 75. Parl. 10. junct. Act 95. Parl. 13. Jam. III. Act 20. Parl. 5. Q. M. (*i*) Act 42. Parl. 4. Jam. IV.

 184 Part I. *Institutes of the* Book IV.

men to make, or use Statutes among themselves prejudicial to the Common-wealth: As that none end the Work begun by another (*k*).

[4.] It is Oppression to poind Oxen, Horfe, or other Goods belonging to the Plough in Labouring Time, where other Goods may be had to be poinded or apprised; which is prohibited according to the common Law (*l*), *i. e.* the Civil Law; tho' that Law makes no Distinction whether there be other Goods poindable or not (*m*). It is presumed there were other poindable Goods, unless the Messenger's Execution bear, That he searched and found none; which can only be redargued by positive contrary Proof.

S E C T. II.

Of Oppression committed by private Persons in contempt of Law.

THE Acts of this Sort of Oppression are manifold, as Spulzie, Foretalling, Reqrating and Ingrossing, Monopolies, taking black Mail, Usury, private Imprisonment, and others.

I.

Of Spulzie.

1. A Spulzie is the taking away one's Moveables without Order of Law, or Consent of the Owner.

(*k*) Act 43. Parl. 4. Jam. IV. (*l*) Act 98. Parl. 6. Jam. IV.
 (*m*) L. 8. C. quæ res pign. oblig. poss. & auth. seq. agricultores.

Ch. 10. *Law of Scotland.* Tit. 8. § 2. 185

Owner. Who has not only a civil Action for Restitution, or violent Profits, in which the Goods spulzied ought to be libelled and specified; but also may pursue the Injurer criminally for Oppression in order to an arbitrary Punishment.

2. In a criminal Trial for a Spulzie, it sufficeth to libel the oppressive Fact, which falleth under *vindicta publica*. A Defence against an Indictment, that the Goods were meddled with by virtue of a Decree of Poinding, uses to be remitted to the civil Judge, in order to try, whether the poinding proceeded orderly or not. A criminal Pursuit for a Spulzie is not excluded by the triennial Prescription, which bars civil Processes for violent Profits.

II.

Of Forestalling, Regrating and Ingrossing.

I. PROPERLY Forestalling (from the *Saxon* **FORE** a Way, and **Stall** Interception) is, the buying or bargaining for Merchandize, coming to be sold in a Market or Port, by the Way, before it reaches the Place of Sale; with a Design to sell it again, at a more advanced and dear Rate. Regrating is the buying and selling again Victuals in the same Market, or within four Miles thereof. Ingrossing is the buying up any Commodity in the Gros before
the

 186 Part I. *Institutes of the* Book IV.

the Market, to sell again (*a*). But these Crimes are generally confounded by our Custom, and go promiscuously for one and the same: Whereof there are the following several Kinds.

[1.] The buying up Corns or other Commodities to a Dearth (*b*). Which evil Design, being a secret Act of the Mind hard to be proved, may be inferred from Presumptions, as a Person's offering to buy all the Goods of a Kind, and dealing with the Sellers, not to let others have any of them; or from such an universal Buyer's giving extraordinary Prices; or his boasting, that he himself only had such Commodities to sell. It is lawful to buy Barley in order to convert it into Malt, or to buy Oats to make Meal of for Sale. But it is manifest Forestalling and Regrating to buy Victual, and sell it again in the same Kind, without altering it by the Buyer's Industry. Any Person may import Victuals or other Merchandize from abroad, and sell the same in Gros: But the Buyer cannot sell the same again in Great, because the more Hands the Goods pass thro', the Prices are the more enhanced to the Grievance of the People, and every one will make his Profit of them. Nor is it allowed to buy up a whole Commodity in order to Transportation abroad: Because, in that Case our own Country would suffer through being absolutely deprived thereof. To prevent the buying and keep

(*a*) 5 & 6 Edw. VI. Cap. 14 § 1, 2, 3. (*b*) Act 22. Parl. 6. Jam. VI.

Ch. 10. *Law of Scotland.* Tit. 8. § 2. 187

keeping up Victual to a Dearth, the Magistrates of royal Burghs, use in a Time of Scarcity to cause break open the Doors, where such Victual is kept, and sell it at reasonable Prices.

[2.] Another Kind of this Crime is, the buying of Goods coming to a Market before they arrive at it; or the buying in a Market before the Time of Day (*c*), *i. e.* before the Market is proclaimed, with a pernicious Design against the common Good, *v. g.* to hinder Traffick there; albeit such Goods be not sold again by the Buyers in the Market, at higher Prices than they first paid for them. But the buying without any evil Design Goods going to be sold in a publick Market, is no Crime: As when one buys them for his own private Use; or when they are bought by a Merchant, who was obliged to deliver so many of such Goods betwixt and a certain Day; or when the Buyer knew not, that there was a Market at the Place the Seller was carrying them to.

[3.] A third Branch of this Crime is the advising Sellers to heighten the Price, or disswading them to come to any particular Market.

[4.] Buying Commodities industriously to sell them again in the same Market, or in any Market within Four Miles thereof, is another Kind of this Crime.

2. This Crime of Forestalling, &c. is punishable by Forty Pounds of Fine for the first Fault,

(*c*) Act 21. Parl. 4. Jam. V.

 188 Part I. *Institutes of the* Book IV,

Fault, 100 Merks for the second, and Escheat of Moveables to the King's Use for the third (*d*): Which Confiscation of Moveables for the third Fault is inferred, tho' the Offender was not convicted for the first two. Because neither the King should suffer Prejudice thro' the Neglect of his Officers to pursue; nor is the Offender's Guilt purged thereby: And seeing Punishment ought to be commensurate to the Transgression, it were absurd to inflict no heavier Pain on habitual Offenders, than upon such as have been only once guilty.

3. Forestallers, Reqraters, &c. may be tried before the Court of Justiciary, or in the Quarter-sessions of the Justices of Peace (*e*), in Subordination to the Court of Justiciary. A Libel upon common Forestalling and Reqrating in general is relevant (*f*), without setting forth the Names of the Persons from whom the Goods were bought, or the Quantity of the Goods, or the Time and Place when and where bought, But the particular Acts of Forestalling, &c. must be proved. And where such a Crime is inferred from the Speciality of Time and Place, these require to be libelled, as when one is indicted for buying Goods in a Market, and presently selling the same again there, or somewhere within Four Miles of it: Because the Crime in such a Case is drawn from the Speciality.

III. Of

(*d*) Act 148. Parl. 12. Jam. VI. (*e*) 5 & 6 Edw. VI. Cap. 14, junct. 6 A. Cap. 6. (*f*) Act 148. Parl. 12. Jam. VI.

 Ch. 10. *Law of Scotland.* Tit. 8. § 2. 189

III.

Of Monopolies.

1. A Monopoly (from *μονος* alone, and *πωλεω* to sell) is the ingrossing by one or more Persons combined together, the whole Sale of any Kind of Goods, in order to raise the Price of them, and that none may gain but they. Or an Allowance by the King to any Person or Persons of the sole buying, selling, making, working or using of any Thing or known Trade, whereby others are sought to be restrained from any Freedom they had before. Which is disallowed and punishable (g) every where; as contrary to the Freedom of Trade, a Check to Labour and Industry, and a putting it in the Power of particular Persons to set what Prices they please on a Commodity; tho' it be too much connived at in *Holland*.

2. But the King may, for the publick Good, grant to any one the sole Use of any profitable new invented Art, or first brought into the Realm by the Grantee, for a reasonable Time, as for the Term of 14 Years, or under (h): Partly, to reward the Inventor's Merit or Pains; and partly, to encourage others to do the like publick Service. But such a new Invention must be substantially new, and not barely an additional

(g) L. un. C. de monopolis, 21 Jac. I. Cap. 3. § 3 & 4. (h) Ibid. § 6.

190 Part I. *Institutes of the* Book IV.

onal Improvement of an old one. Nor ought a new Invention to do as much Work in a Day by an Engine, as formerly used to employ many Hands, be so encouraged. Because it is inconvenient to turn so many labouring Men to Idleness. And no old Manufacture in Use before, can be prohibited in any Grant of the sole Use of a new Invention. Again, the Sovereign may grant Privileges to particular Persons concerning Printing (*i*); as the sole Privilege of printing the holy Scriptures, and Acts of Parliament, &c. whereof an unrestrained Liberty might be of dangerous Consequence.

IV.

The taking black Mail.

THE taking *black Mail*, *i. e.* Money or other Reward, for Protection from Theft and Robbery, is a Kind of Oppression punishable by Death (*k*):

V.

Of Usury.

1. USURY, in general, is Gain or Profit by Contract or Bargain for the Loan or Use of any Thing, more than Law allows to be taken.

2. Usury

(*i*) 21 Jac. I. Cap 3. § 10. (*k*) Act 21, Parl. I. Act 102, Parl. 11. Jam, VI.

Ch. 10. *Law of Scotland.* Tit. 8. § 2. 191

2. Usury is either proper and direct, called *usura manifesta*, or improper and indirect, called *usura velata*.

[1.] Proper and direct Usury, is unlawful Interest agreed to be given in consideration of the Loan of Money, or for the Forbearance of the Demand of it. Whereof one is guilty, 1. By taking the legal Interest before it is due (1). But the taking of Interest before the Time, when it is in Strictness due, voluntarily paid by the Debtor for his greater Conveniency, or for such other like Consideration, without any Manner of corrupt Practice, or any previous Agreement of this Kind at the making of the first Contract, does not make the Receiver guilty of Usury. 2. One is guilty of such Usury, by taking more than the legal Interest, after it is due; or by taking Bond to pay more than the legal Interest, altho' no more be actually received, and tho' the excessive Interest be made payable if required, and the Request be never made. But Usury being the taking wittingly more Annualrent for one Year or Term than Law doth allow, is not incurred by taking inadvertently, twice Payment of the ordinary Annualrent for one Term. Nor is the Reservation in a Bond of a greater Sum than is allowed by Law for Interest, upon the Nonpayment of the principal Sum at the End of a Year, usurious: Because it is in the Power of the Borrower to avoid Pay-

(1) Act 28. Parl. 23. Jam. VI.

 192 Part I. *Institutes of the* Book IV.

Payment of the Money so reserved, by paying the Principal at the Day appointed.

[2.] Improper and indirect Usury, is that which is committed under the Colour of some lawful Bargain, as a Sale, Exchange, Wadset, or other Contract. Thus Usury is couched under the Pretext of buying and selling, when Victual is sold to be delivered at a certain Day, and, in case of Nonperformance, high Prices agreed to be paid, with Design in the Buyer to recover from the pretended Seller, Money given to him with exorbitant Profit (*m*). It is Usury to take directly, or indirectly, more than the legal Interest for the Loan, or forbearing the Payment of Monies, Wares, Merchandize or other Commodities, by Way or Means of any corrupt Bargain, Loan, Exchange, Chevizance, Shift or Interest of any Thing, or by any Covin, Engine or deceitful Conveyance (*n*); or to take a Bud or Bribe for the Loan of Money, or for delaying the Payment of it when lent. An heritable Bond granted 27 *March* 1720. for 20500 Pounds *Sterl.* payable 28 *March* 1721. as the agreed Price for a Transfer of 5000 Pounds *Sterl.* of *South Sea* capital Stock, at the Rate of 410 Pounds for each 100 Pound's Stock, when the current Price of such Stock was only 320 Pounds in ready Money for each 100 Pound, was found to be usurious: In respect the 90 *per Cent.* of Excess or advanced Price, was much

(*m*) Act 247. Parl. 15. Jam, VI. (*n*) 12 A, Sect. 2. Cap. 16.

Ch. 10. *Law of Scotland.* Tit. 8. § 2. 193

much higher than the common Interest, allowed for the Credit or Forbearance of Payment of 320 Pounds for one Year ; and here a Loan was grafted upon a Sale. It is Usury when a proper Wadset of Lands exceeding in Rent the Interest of the Money lent, is taken with a Provision, that the Creditor shall be liable for the Hazard of the Rents (o) ; or when any Wadsetter sets a back Tack to the Heritor, for Payment of a Duty in Money or Victual, above the Interest of the Sum for which the Wadset was granted (p) ; or when the Reversion of a Wadset is affected with a back Tack for half Mail, or less, in favour of the Wadsetter, to commence after Redemption of the Wadset (q). But taking of simple Tacks, not relating to principal Sums, is not Usury, however small the Tack-duty be. No Contract is usurious by which the Lender runs the Hazard of losing all his Money, both Principal and Interest : As in the Case of Money borrowed upon Bills of Bottomry, where the Lender gets nothing if the Ship do not arrive safe at the designed Port. Grants of liferent Annuities, exceeding the Rate allowed for Interest, in consideration of certain Sums of Money advanced, are allowed, where the Stock is sunk, because of the Uncertainty of the Grantee's Life : But a Bond for a perpetual Annuity above the legal Interest, redeemable by the Debtor, upon Payment of the principal

Vol. II. N Sum

(o) Act 62. Parl. 1. Sess. 1. Ch. 11. (p) Act 247. Parl. 15. Jam. VI. (q) Act 14. Parl. 6. Jam. II.

 194 Part I. *Institutes of the* Book IV.

Sum and bygone Annuities resting at the Time, is usurious.

3. Formerly an usurious Contract, Bond or Obligation might be reduced at the Suit of the Party injured, with the Concurrence of the King's Advocate, or at his Instance, without the Party: And being reduced, the principal Sum, with the ordinary Annualrent unpaid, fell to the King or his Donatary. But the Party, if he concurred with his Majesty's Advocate (and no otherwise) was intitled to recover from the Usurer, the exorbitant Profits, exceeding the ordinary Annualrents paid to him. Which Taker of Usury did also forfeit his Moveables, and was punishable otherwise in his Person (r). Now all Bonds, Contracts and Assurances whatsoever made for Payment of more than the legal Interest for the Loan, or forbearing Payment of Monies, Wares, Merchandize, or other Thing whatsoever, are utterly void (f); whether the Payment of the Principal, and of the usurious Interest be secured by the same, or by different Obligations. Any Person who directly or indirectly takes more than the legal Interest for the Loan, Exchange, &c. or forbearing the Payment of Monies, Wares, Merchandize, or other Thing whatsoever, forfeits the treble Value of the Monies, Wares, Merchandize and other Things so lent, exchanged, &c. Half to the King, and Half to the Person who sues for the

(r) d. Act 247. Parl. 15. Jam. VI. (f) 12 A. Stat. 2. Cap. 16. § 1.

Ch. 10. Law of Scotland. Tit. 8. § 2. 195

the same, in the County where the Offence was committed (*t*). A Contract fairly made conform to Law, is not avoided by the Creditor's taking afterwards more than the legal Interest, but he only forfeits the treble Value. And by an usurious Contract the Security is only voided, and not the treble Value forfeited, unless something be taken above the legal Rate.

4. The Taker or Receiver directly or indirectly of Money or other Reward for Brokage, soliciting, driving or procuring the Loan, or forbearing Payment of Money, over and above the Rate or Value of five Shillings for the Loan or forbearing the Payment of 100 Pounds *Sterl.* for a Year, and so rateably; or more than 12 Pence over and above the Stamp-duties for making or renewing of the Bond or Bill for Loan, or forbearing thereof, or for any counter Bond or Bill concerning the same, shall suffer Imprisonment for half a Year, and forfeit twenty Pounds *Sterl.* with Costs of Suit, for every such Offence: The one Moiety of which Forfeiture goes to the King, and the other to the Person who sues for the same, in the County where the Offence was committed (*u*).

5. Usury may be proved, 1. By Writ (*x*), as by a Discharge under the Creditor's Hand, acknowledging at his lending the Money, that he was satisfied and paid of the Annualrents thereof till a Term several Years after; unless

N 2 he

(*t*) 12 A. Sess. 2. Cap. 16. § 1. (*u*) *Ibid.* § 2. (*x*) Act 7. Parl. 16. Jam. VI.

 196 Part I. *Institutes of the* Book IV.

he could shew, that the Discharge was granted for Love and Favour, without any onerous Cause. 2. By Oath of the Receiver of the unlawful Profits (y), because of the clandestine Nature of this Crime. But the Oath of the Debtor is not allowed to be taken in Evidence of Usury paid by him (z); for avoiding Perjury. 3. Usury may be proved by the Witnesses insert in the usurious Writ (aa); or by any other habile Witnesses present at the Transaction, who assisted in calculating the Annualrents. Any Thing given by a Borrower to the Lender above the legal Interest, is not sufficient to fix the Guilt of Usury upon him; unless it were proved to have been expressly given for inducing him to lend the Money, or forbear Payment; or at least made appear, that a previous Treaty about giving more than the legal Interest upon such Account, had past betwixt the Parties; or that the Receiver is an ordinary Usurer.

VI.

Of private Imprisonment.

I. PRIVATE Imprisonment is, the confining any Person in a private House or Place, without Colour of Law: Which is an Usurpation of Jurisdiction. Those guilty of this Crime in *Scotland*, were, before the 1701. liable to an arbitra-

ry

(y) Act 7. Parl. 16. Jam. VI. (z) Ibid. (aa) Ibid.

Ch. 10. Law of Scotland. Tit. 8. § 2. 197

ry Punishment. But now all Confinements not either consented to by the Party, or inflicted after Trial by Sentence, are punishable as wrongous Imprisonment (*bb*).

2. A Father may warrantably, at his own Hand, confine his untoward disobedient Child, and a Master his stubborn and unruly Servant; and a jealous Husband may lock up his wanton Wife in a Room, without incurring the Pain of private Imprisonment (*cc*): Because, such Confinement is intended only for allowable private Correction and Chastisement. The Friends of a mad Man ought to put him under Restraint, and, if necessary, to clap Fetters and Shackles on him, to prevent his doing Mischief.

VII.

Other Acts of Oppression committed by private Persons in contempt of Law.

SUCH are the exacting greater Prices for Craftsmens Work, than is usual and allowed (*dd*); stopping and obstructing common Highways to or from Burghs (*ee*); doing one's self right by Violence, or extorting from another what he stood obliged in Law to grant, who are punishable arbitrarily; Slayers and Houghers of Horse, Oxen or other Cattle in labouring Time, or their Maintainers and Re-

N 3

fetters;

(*bb*) Act 6. Sess. 8 & 9. Parl. K. W. vid. supra Sect. 1.
 (*cc*) L. 3. § 2. ff. de Liber. hom. exhib. (*dd*) Act 23. Parl. 5. Q. M. (*ee*) Act 53. Parl. 6. Q. M. Act 156. Parl. 12. Jam. VIj

 198 Part I. *Institutes of the* Book V.

fettors; Cutters and Destroyers of Plough and Plough Gear in tilling Time; and the Stickers, Gorers and Fellers of Oxen or Horse in the Time of leading Corns, or Fuel, are punishable with Death (*ff*).


Having treated of Crimes with respect to the Parties more immediately injured; I come now, as I proposed (*gg*), to consider Crimes that relate, 1. To Offices. 2. Those touching Law-suits, and, 3. Such as concern the Execution of Law and Justice.

B O O K V.

Of Crimes relating to Offices, Law-suits, and the Execution of Law and Justice.

C H A P. I.

Of Crimes relating to Offices, viz. Simony, Baratry, Bribery, Partiality, Negligence, Breach of Trust, and Extortion.

1.  **S**IMONY is, the Crime of trading with sacred Things, particularly, of purchasing an ecclesiastical Living with Money. It is so called from *Simon Magus*, who offered to buy the

(*ff*) Act 110. Parl. 7. junct. Act 82, Parl. 11. Jam. VI.
(*gg*) Vid. supra Book 1. Chap. 6,