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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,

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ters and Assessors to Judges, offending in that Manner, are liable to the same Punishment.

Judges are barred from receiving Compliments, even from their Friends who have Causes before them. What is so given to a Judge by a Litigant, is understood to be a Bribe, tho he do not promise to do Unjustice, or make any Capitulation with the Giver. Nay, it is criminal to take Money upon any Terms, even for pronouncing a just Sentence (*k*). But a Judge is not barred from taking remuneratory Gifts for past good Deeds and Services, extrinsick to his Office of a Judge. And when Judges are guilty of Bribery for what is taken by their Wives or Servants, that is understood of such Taking known of, and approved by them. For he, who is absolutely ignorant of what his Wife or Servants do in that Matter, cannot be punished for their Fault. Not only the Receiver, but also the Giver of a Bribe is punishable (*l*). And he who offers to corrupt a Judge with a Bribe, is punishable, tho the Judge do not accept of it, or do nothing but what is just.

4. If a Judge, in any Cause before him, give partial Counsel (*m*), that is, consult with either Party, he is punishable with the Loss of Honour, Fame and Dignity; tho he receive no Reward upon that Account, and abstain from judging in the Cause. And any Lord of Session

(*k*) L. 2. § 2. ff de condic. ob turp. caus. (*l*) L. ult. C. ad l. Jul. repetund. (*m*) Act 104. Parl. 7. Jam. V.

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Session who hath suffered himself to be solici-
ted in favour of either Party, without shew-
ing the same to the Lords in Presence, may be
declined as suspected of Partiality in that Case
(*n*). Upon the whole, the Punishment of
Judges offending in their Offices, is now arbi-
trary, and suited to the Nature of the Offence.

5. An Officer is liable to a Forfeiture of his
Office, not only for doing a Thing directly con-
trary to the Design of it; but also for neglect-
ing to attend his Duty, at all usual, proper
and convenient Times and Places, whereby any
Damage shall accrue to those by, or for whom
he was made an Officer. Because, he who re-
fuses to answer the End for which his Office
was ordained, should give way to others who
are both able and willing to take care of it.

6. It having been thought expedient to per-
mit Officers to take certain Fees in many Cases,
for obliging them to the more Diligence in
their Duty; these are guilty of Extortion, if
they take any thing more than what Law or
Custom hath allotted to them for their Pains.
And a Promise to pay them Money, for the do-
ing of a Thing, which the Law will not suffer
them to take any thing for, is merely void, how-
ever freely and voluntarily it may appear to
have been made. For if once it should be al-
lowed, that such Promises could maintain an
Action, the People would quickly be given to
understand how kindly they would be taken,
and

(*n*) Act of Seder. 6 November, 1677.

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and happy would that Man be, who could have his Business well done without them.

C H A P. II.

Of Crimes touching Law-suits, viz. Maintenance, buying of Pleas, and Battery.

I. **M**AINTENANCE (in Latin *nutenentia*, a Taking by the Hand) is, when one nothing interessed, doth officiously intermeddle in a Suit depending in any Court of Justice, by assisting either Party with Money, Countenance or otherwise, in the Prosecution or Defence of the Suit. Maintenance is of two Sorts, 1. When a Person doth so without any Agreement to have a Share of the Thing in Suit, or Advantage thereby, called simply *Maintenance*. 2. When one bargains with any Party in a Plea, to have Part of the Land or Debt, or any other Thing in Suit carried on at his own proper Cost, if he prevails, or some Part of it. Which Crime is called *Champerty*, from the *French Champ* a Field, and *partti* divided; the Field or Thing contested for, being supposed to be divided between the Champertor or Maintainer, and the Person in whose Right he sues. This is the same with *pactum de quota litis*, betwixt an Advocate and his Client (*a*). All Judges and their Clerks are discharged to maintain Pleas

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(*a*) L. 53. ff. de pacis. l. 5. C. de postul.

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or Complaints in the King's Courts, or to take Land or other Thing to Champerty, for delaying another Man's Right without Order of Law, on pain to be punished at the King's Will, and to lose their Offices during their Lifetime (*b*).

2. Members of the College of Justice or of inferior Courts, or any Person for their Behoof, are prohibited, upon pain of losing their Places, and all the Privileges thereof, to buy depending Pleas (*c*); *i. e.* to purchase for Money, Rights to Things in Controversy before the Courts where they serve. Because such Persons are, by their Quality and Authority there, able to create more Trouble to the other Litigant.

3. Battery (from the *French* *battre*, to strike) is, when the Pursuer or Defender, in any Action before a Court, superior or inferior, slays, wounds, or invades the other Party, so as he may be criminally pursued for it, or is Art and Part by advising to commit such Offence at any Time from serving or executing the Summons, till the final Execution of the Decreet (*d*). Invasion by any Stroke, without Blood, is Battery. But the first Aggressor only is culpable; and not he who strikes in his own Defence. The beating of some of more Persons against whom a common Cause is depending, is reput-

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(*b*) Stat. Rob. I. Cap. 22. (*c*) Act 216. Parl. 14. Jam. VI.
 (*d*) Act 138. Parl. 8, Act 219, Parl. 14. Jam. VI.

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ed Battery only, as to the Interest of those who are beaten.

One guilty of Battery loses the Plea, and Sentence is given in favour of the Party attacked, upon Proof of the Injury done him, without farther dipping in the Cause or Grounds of his Pretensions. Which Decreet is not reducible upon any Ground, without Exception of Minority. Nor is the Offence to be pardoned by the King; and the using a Remission thereof is held as Conviction to the Effect aforesaid. Nay farther, if the Offender suffer himself to be denounced Outlaw for not finding Caution, or for not Appearance to underly the Law, his liferent Escheat falls immediately, without waiting Year and Day (e).

This Crime may be tried before the Lords of Session in the first Instance, or before the Court of Justiciary, or other criminal Judge competent.

C H A P. III.

Of Crimes concerning the Execution of Law and Justice.

TH E S E are Breach of Arrestment, Detourment, resisting and maltreating Officers of the Excise or Customs in the Execution of their Offices; and Prison-breaking.

T I T.

(e) d. Act 138. & d. Act 219.

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T I T. I.

Breach of Arrestment.

Breach of Arrestment is a Delivery of moveable Goods to the Owner, after they had been arrested in the Deliverer's Hand. Whereof the Pain is Confiscation of Moveables, and an arbitrary Punishment. But the Party injured is preferred to the Fisk, for Payment of the Debt and Damages due to him (a); whereof he ought not to be disappointed by his own Diligence.

T I T. II.

Of Deforcement.

1. **D**eforcement (in Latin *deforcatio*) is, a resisting and opposing Heralds, Pursuivants, Messengers, Macers, and other Officers of Court or Justice in the Execution of their Office, and upon Account thereof. For it is no Deforcement to use Violence to an Officer of Justice, who is not discharging his Office at the Time; or to treat him so upon any extrinsick Account, as in a common Scuffle occasioned by his own Indiscretion. Simple opposing or molesting any Officer of Justice in the Discharge of his Office, without shedding of Blood,

(a) Act 118, Parl. 7. Jam. VI.

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Blood, is Deforcement. For these Words, to the Effusion of their Blood (*a*), relate not to deforced in doing the same, or be molested, invaded, but only to the Word pursued, immediately preceeding. This Crime is incurred, not only by the Person against whom the Letters were served, or those hounded out by him (*b*), who is answerable for their Deeds, and the Deeds of any whom he could hinder, as his Wife, Children in familia, and Servants, or of others in his Presence whom he did not require to forbear; But also, it is incurred by any others who use such Opposition to the Officer of Justice (*c*); or by any Magistrate refusing, when required, to assist him.

2. One convicted of Deforcement is liable to an arbitrary Punishment, and forfeits his Moveables, whereof one Moiety goes to the King, and the other to the Person at whose Instance the legal Warrant of the stopped Execution was obtain'd (*d*). Who, if he think it more for his Interest, may, instead of claiming an Half of the Offender's Moveables, insist for Payment of the Debt and Damages due to him out of the first and readiest of the Whole, before the King draw any Share (*e*). Assistants in the Deforcement of a Messenger executing a Caption for civil Debt, were not only adjudged to have forfeited their Moveables, but also de-
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(*a*) Act 150. Parl. 12. Jam. VI. (*b*) Ibid. (*c*) Stat. Wilhelmi Cap. 4. § 1. Act 84. Parl. 11. Jam. VI. (*d*) Act 150. Parl. 12. Jam. VI. (*e*) Act 118. Parl. 7. Jam. VI.

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cerned jointly and severally to pay the Debt. The Deforcer of a Messenger executing Letters of Caption against a Criminal, is guilty as Art and Part of the rescued Person's Crime. A Messenger's Execution disappointed, or hindered by Deforcement, is declared to be lawful and orderly, as if it had been perfected (*f*): Which is to be understood only of Executions of Summons, or Charges of Horning relating to Moveables, and not of Executions of Land-rights.

3. A Messenger, when deforced, uses to break his Wand of Peace, as a Symbol of the Deforcement, and protest for Remedy of Law. This Crime is pursued only before the Court of Justiciary (*g*).

4. The Libel bears always, that the Messenger broke his Wand of Peace: But tho' such a Circumstance be not proved; the Assize ever bring in the Pannel guilty of Deforcement, if resisting and opposing the Messenger is proved. A Messenger deforced does ordinarily give in with the Libel an Execution of Deforcement, narrating how, and by whom, he was deforced: Which is necessary for sustaining the Letters, or Summons as orderly executed; but the Trial of Deforcement may go on without it. For the Messenger may perhaps be killed, and so could give no Execution, or be bribed by the Deforcer, and will give none; in either of which Cases, it were hard that the Crime of Deforcement could not be pursued. And where

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(*f*) d. Act 150. (*g*) Reg. Majest. Lib. 4. Cap. 27.

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a Messenger is deforced in the Execution of legal Diligence, as Horning, Caption or Poinding, such Diligence needs not to be given out with the Libel, in a criminal Trial, because Deforcement might be tried, tho' the Messenger's Warrant were not extant, as when it is violently taken from him and cancell'd.

5. The common Defences, in such a Trial, are, 1. That the Messenger, when resisted or molested, had not a Blazon on his Breast, whereby People might know him to be such an Officer of Justice. 2. That he did not shew his Warrant, when required to do it. But the Messenger's not shewing his Warrant, when it was not called for, doth not exculpate the Pannel. 3. That a Suspension of the Debt, or a written *Supersedere* of Diligence had been intimated to the Creditor or Messenger, before Deforcement, in executing a Caption, is a Ground to assoilzie the Pannel: But his having an unintimated Suspension, or *Supersedere*, is no good Plea for him. 4. It is a good Plea in serving a Poinding, but not in executing a Caption, that the Execution was before Sun-rising, or after Sun-set, or under Cloud and Silence of Night. 5. It is relevant to assoilzie from Deforcement in executing a Poinding, that the Pannel produced a Disposition of the Goods sought to be poinded, with an Instrument of Possession in his Favour, and offered to make Faith thereupon, or to swear that the Goods were his own. It is relevant also to assoilzie

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soilzie an Heritor, for stopping the poinding of his Tenants Goods, that he did it *jure hypothecæ*, till he was paid of a Year's Rent due to him. But the Pannel's Offer to prove that the Goods, whereof the Poinding was stayed, belong to himself, or that the Owner thereof owes him a Year's Rent as his Tenant, doth not purge the Deforcement; if he did not, at his staying the Poinding, offer to make Faith upon his Right to the Goods, or claim his Hypothek. Nor is it a relevant Defence against Deforcement, in executing a Poinding, that the Debt to have been poinded for, was satisfied and discharged; because the Letters were the Messenger's Warrant, who was not bound to dip into the Point of Right, and if a Debt satisfied had been poinded for, the Poinder would have been guilty of a Spulzie. Nor is it relevant to exculpate in a Trial for Deforcement, that a Poinding hindred was for a Debt due to the Messenger himself; or that the poinded Goods taken from him were afterwards restored.

6. Deforcement, as other Crimes, may be proved by Witnesses, even by those carried along with the Messenger, for verifying his Execution: Who will be received as Witnesses, tho' they were beaten in the Deforcement; if they be purged of partial Counsel and Malice, and do not swear as to any Wrong done to themselves. Persons insert by the Messenger as Witnesses in his Execution of Deforcement, were

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admitted as necessary Witnesses in the Trial for the Pursuer, tho' they were his own Servants. And one of such Witnesses was, in a Trial of Deforcement at the Instance of the Messenger and King's Advocate, allowed to bear witness *ad vindictam publicam*; albeit he was within the Degrees defendant to the Creditor in a Caption disappointed by the Deforcement, in respect his Friend did not concur in the Trial. But Witnesses in the Messenger's Execution, to whom any Injury is libelled to have been done, at the Deforcement, will be cast from witnessing at the Trial, tho' they should pass from the Injury done to themselves; because they were once stated as Parties. Neither can a Messenger deforced be admitted as Witness in a Pursuit, at the Instance only of his Employer and his Majesty's Advocate: Nor yet is such an Employer a habile Witness in a Trial at the Suit of the Messenger, tho' the Employer passeth from an Injury done to himself. Again, tho' a Messenger is to be trusted in Things belonging to his Office, as that he cited or denounced any Person fugitive: Yet his Execution of Deforcement doth not, *per se* without other Evidence, prove that he was deforced.

7. Albeit the Interest of the Fisk and Party injured in the Case of Deforcement can be recovered only by Action; nothing hinders the Officer deforced to found on the Deforcement accompanied with Violence offered to him in

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the Execution of his Office, to take off the Guilt of Homicide committed by him therein (*b*).

T I T. III.

Opposing, hindring and molesting Officers of the Customs or Excise, in the Discharge of the Duty of their Offices.

1. **A** Person for opposing, molesting, hindring and obstructing any Officer or Officers of the Excise, in the due Execution of the Powers or Authorities granted by Law to such Officer or Officers, forfeits the Sum of Ten Pounds *Sterling*, whereof one Moiety goes to the King, and the other to the Informer or Pursuer (*a*).

2. Eight or more Persons armed with Club or any Manner of Weapon, tumultuously assembled, forcibly hindring, wounding or beating any Officer of the Customs, in the Execution of his Office, or such as act in their Aid or Assistance, are to be transported to the King's Plantations in *America* for such a Term, as the Court thinks fit, not exceeding seven Years, and returning before the Term expired, suffer as Felons without Benefit of Clergy (*b*).

3. Which Offences relating to the Excise (*c*), or Customs (*d*), may be heard, tried and determined

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(*b*) Vid. *supra*, Book 4. Chap. 1. Tit. 3.

(*a*) 6 Geo. 1. Cap. 21. § 7. (*b*) *Ibid.*, § 34, 35. (*c*) *Ibid.*, § 29, (*d*) *Ibid.*, § 44.

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terminated either in the Court of Exchequer, or in the Court of Justiciary. A Libel for deforcing Officers of the Excise or Customs, needs not to bear, that Notification was made to the Deforcers, that the Persons molested were such Officers, or known by them to be such.

T I T. IV.

Of Prison-breaking.

1. **P**RISON-breaking is, when a Person restrained of his Liberty by lawful Authority, does escape from his Confinement, without being delivered by due Course of Law. For there are not only Prisons in Deed, as a common Goal, but also Prisons in Law, as the Stocks, the Custody of any Officer, that has one under Arrest.

2. The Punishment of this Crime is arbitrary: A Prisoner, whether for civil Debt, or for a Crime, is liable to an arbitrary Punishment, for making his Escape out of Prison, tho' the Prison was broken by others, without his Knowledge or Accession thereto; or tho' he used no Violence in his getting out of Prison; or fled out of it, finding the Doors open: Because, the Essence of this Crime consists in the Contempt of Authority. Not only those who break, or make their Escape out of the King's Prison, but also such as break, or escape out of, the Prison of a Burgh of Barony, or privately withdraw

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draw out of their Confinement in a Magistrate's House, where they were under lawful Arrest and Restraint of their Liberty; are subject to an arbitrary Punishment: Because Imprisonment is nothing but a lawful Restraint of Liberty. Breaking up the Door of a Room within a Prison where Persons were confined for capital Crimes, or setting Fire to the Door of a Prison, with a Design only to force it open and let out the Prisoners, is relevant to infer the Pain of Death. A Person, tho' unjustly committed to, and detained in Prison, cannot *impune* break it, or make his Escape out of it (*a*): Because a private Man is not allowed to repair any Injury done him by Violence, or to judge of the Justice of his own Imprisonment, without seeking Redress from lawful Authority. Nor is one's Guilt of Prison-breaking, or escaping out of Prison, purged and taken away by his instantly returning to Prison. But if a Prison is fired by Lightning or otherwise, without the Privity of the Prisoner, he may lawfully break it to save his Life.

3. Not only those who break or escape out of Prison, but also such as aid them in it, and the Keepers, by whose Contrivance or Connivance, or Negligence they escape, are punishable (*b*). Where a Prisoner for civil Debt escapes, thro' the Keeper's Negligence in his Du-

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(*a*) L. 13. ff. de custod. reor. (*b*) L. 8. l. 10. l. 12. ff. de quaest. reor. l. 4. C. cod.

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ty, the Keeper must answer for the Debt, or for the Debtor's Body (*c*); and must purge himself by Oath, that the Escape was without his Will or Consent (*d*).

4. An Indictment for breaking Prison, and dismissing Prisoners out of it, is relevant without naming the Prisoners. And such an Indictment for breaking the Prison of a Burgh of Barony, and setting the Prisoners at Liberty, was sustained at the King's Advocate's Instance, tho' no private Party injured did joyn in the Prosecution.

(*c*) Stat. 2. Rob. I. Cap. 19. N. 3. (*d*) Stat. David II. Cap. 1. N. 6.



P A R T