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THE
INSTITUTES
OF THE
LAW
OF
SCOTLAND.

VOLUME SECOND.

Comprehending the
CRIMINAL LAW.
In Two PARTS.

I. Concerning Crimes and Offences.

II. Of criminal Jurisdiction: The several Courts, both sovereign and subordinate, wherein Offenders are tried for Crimes: And the Order of judicial Proceedings against them, viz. against Peers before the *Lord High Steward of the Kingdom*; and before the *House of Lords in Parliament*; against Commoners, in Cases of High Treason, and Imprison thereof, before a Commission of Oyer and Terminer; and against them for these and other Crimes, before the *Court of Justiciary*, and the *Circuit-courts*.

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T H E
P R E F A C E.



ALL the particular Laws and Customs regulating the several Affairs and Intercourses between Men, the Manner by which Possession and Property are acquired, and pass from one to another, and the Ways by which civil Controversies, in point of Right and Possession, are determined (of which I have treated in the First Volume) are necessary to the Being of Society; at least contribute to render it more easy and agreeable, or, in a Word, more social. Because, unless

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Rules

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Rules be laid down, and a publick Standard fixt and appointed for ascertaining the Rights and Property of the Members, and People be not left to their own Notions of Things and Judgment, which are too much biased, and ready to determine in their own Favour; that Peace, Order and Quiet, which is the End and Design of Government, can never be attained in any tolerable Measure. Farther, such is the Condition of human Nature, that Men are neither always capable of finding out RIGHT, nor yet sufficiently disposed to follow it when found: Their various Passions, and different Degrees of these Passions, pushing them on to Enterprizes, Violence, and other Excesses, called Crimes and Offences, that not only disturb the Peace of the Society where they live, and even tend to subvert or overturn that Society; but also are highly prejudicial to Mankind in general.

CRIMINAL Laws were made to prevent and put a Stop to these Evils, by curbing Vice, and frightening unruly People

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ple into their Duty. Human Nature having arrived to its present Height of Depravation by Degrees, the Increase of Crimes and Offences, was the just Occasion of multiplying criminal Laws, which are different in different Countries, suited to the Genius of the People, the publick Exigencies, and the Situation of Affairs.

FOREIGN Lawyers, not a few, have, with much Application and Diligence, some more and some less successfully, cleared up the criminal Law of their own Nation, and collected the Decisions of their Courts relating to Crimes and Offences. But none have been at Pains to explain any Part of our criminal Law, except Sir *George Mackenzie* in his Treatise on that Subject, and Sir *Alexander Seton* in his Appendix there-to concerning Mutilation and Dememoration. And notwithstanding the learned Performances of these Gentlemen (to whom Students of the Law are much beholden) that important Matter wants yet to be farther enquired into and laid

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open; if for no other Reason, at least upon the Account of the great Additions to, and Alterations in our Law, since their Time. Nor has any Person as yet been so kind to his Country, as to set forth the Decisions of the Court of Justiciary in criminal Matters: Which obliged me, in order to accomplish the present Work, to peruse all the criminal Records, and to excerp what I found to the Purpose.

THIS Second Volume of my *Institutes of the Law of Scotland*, comprehending the *criminal Law*, or a System of the principal Matters relating to that Subject, digested under their proper Heads, consists of Two Parts.

THE First Part concerns Crimes and Offences, and the Punishments thereof; and is divided into Five Books.

IN the First Book Crimes and Offences in general are considered, *viz.* 1. The Nature of a Crime, and what doth infer it. 2. The Persons who may commit Crimes,

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Crimes, and are punishable for so doing; and those against whom Crimes may be committed. 3. The Punishment of Crimes. 4. How Crimes and Offences may be extinguished by the Offenders undergoing a judicial Sentence condemnatory, or absolvitory; by Prescription, or the Course of Time; and by a Pardon. 5. The several Kinds of Crimes and Offences.

THE Second Book treats of Crimes levelled more immediately against God, as Atheism, Blasphemy, Heresy, Apostacy, Witchcraft, Perjury, and other open Immoralities and Profaneness.

THE Third Book comprehends Matters relating to the royal Authority, Government, Peace and Welfare of the Kingdom, as High Treason, and Mispri-
 fion of High Treason; recognizing the Authority of the Pope, or any foreign Power, and disowning that of the King, or Parliament; Leasing-making; Recusancy, and Nonconformity; Vagrancy; wearing unlawful Weapons; Breaches
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of the publick Peace; and common Nu-
fances.

THE Fourth Book is of Crimes that directly touch private Persons, and are committed either against their Bodies, or against their Fame and Honour, or against their Estates and Possessions. Under Crimes against the Body, are considered, 1. Such as take away the Life, *viz.* Homicide, and the several Kinds of it; or expose the Life to imminent Danger, as Duelling, and the giving or accepting a Challenge to fight. 2. Those whereby the Body is abused to lustful Purposes, as Sodomy or Buggery, Incest, Bigamy, Adultery, Fornication, Bawdry and Rape; or is maimed, or dismembred, as Mutilation, or Mayhem and Dismembration. Crimes and Offences committed against one's Fame or Honour, are examined with Respect, 1. To their Nature, and the Persons who commit them, and against whom they may be committed. 2. In relation to the several Kinds of them, as verbal, real and written Injuries. All which are either ordi-

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ordinary or extraordinary Injuries. Injuries are considered as extraordinary, either with Respect to the Place where committed, as Hamesucken, &c. or to the Persons offended, as Injuries done to the King, or his privy Counsellors, Judges, Magistrates and Officers; or to Parents, Ministers of the Gospel, or to Peers and great Men. Crimes and Offences whereby a Man is injured in his Goods or Estate, are exemplified, 1. In those committed by Fraud or Deceit, whereof some have particular Names, as Theft, Fire-raising, Falshood, fraudulent Bankrupcy; others go under the general Name of Stellationate. 2. In forcible Injuries, as Robbery by Land, Piracy, Oppression and Extortion. Instances of Oppression committed under the Colour of Law or Authority, as false or wrongous Arrest or Imprisonment, &c. are first enquired into; and then such as are committed by private Persons in Contempt of Law, as Spulzie, Forestalling, Regrating and Ingrossing, Monopolies, taking Black-mail, Usury, private Imprisonment, and others, are explained.

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THE Fifth Book contains, 1. Crimes relating to Offices, as Simony, Baratry, Bribery, Partiality, Negligence, Breach of Trust, and Extortion. 2. Crimes touching Law-suits, as Maintenance, Champerty, buying of Pleas, and Battery. 3. Crimes concerning the Execution of Law and Justice, as Breach of Arrestment, Deforcement, resisting and maltreating Officers of the Customs or Excise in the Execution of their Offices, and Prison-breaking.

BUT seeing good Laws for restraining and punishing Crimes serve to little Purpose, without being applied and put to due Execution by Magistrates and Judges, who hold and manage the Balance and Sword of Justice in their Hands: The Second Part hath Relation to the Administration of Justice, and is divided into Two Books.

THE First Book explains and describes criminal Jurisdiction, and the Courts wherein Offenders are tried for Crimes; Which Courts are ordinary or extraordinary.

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dinary. The extraordinary criminal Courts here described, are, 1. Those of the Lord High Steward of the Kingdom, and the House of Lords in Parliament: In either of which Peers must be tried for High Treason or Felony, or Misprision of either. 2. Temporary Commissions of *Oyer* and *Terminer*. The ordinary criminal Courts described are the Justice-court or Court of Justiciary, the Circuit-courts, the Court of Justiciary of the Admiralty, the Courts of Sheriffs, Stewarts, Bailies of Royalty and Regality, Justices of Peace, and Baron Courts.

THE Order of judicial Proceedings against Criminals and Offenders is the Subject of the Second Book. Which takes in, 1. How Bills of Indictment are found against Peers for High Treason and Felony, or Misprision of either committed in *Scotland*; and the Form and Method of their Trial for such Crimes, both before the Lord High Steward of the Kingdom out of Parliament, and before the House of Lords in Parliament. 2. The Order of judicial
Pro-

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Proceedings against Commoners, in Cases of High Treason and Misprision thereof before a Commission of *Oyer* and *Terminer*, both in finding the Bill of Indictment against them, and in the Trial. 3. The Order of judicial Proceedings against criminal Commoners before the Court of Justiciary. Which consist,

1. In the Preliminaries to Trials, as, 1. How Criminals may be apprehended, and committed to Prison. 2. Who may carry on a criminal Prosecution. 3. The Bailing of Criminals, and how they may get themselves brought to a speedy Trial, or dismiss. 4. The Transporting Criminals from one Prison to another; and the Fund appointed for defraying the Charges of apprehending, subsisting and prosecuting them. 5. The raising and serving, or executing of Indictments or criminal Letters, Letters of Exculpation, Letters of Recrimination, and Letters of Advocation. 2. The Order of judicial Proceedings against such Criminals in that Court, contains the Form and Method of their Trial. 4. This Book is winded up and ends with the Order of judi-

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judicial Proceedings against Criminals
before the Circuit-courts.

AFTER all, it is to be noticed, that,
1. The Statutes of *Scotland* are cited
with Respect to the Parliament they were
made in; and the *English* or *British*
Acts of Parliament are quoted by the
Year of the Sovereign's Reign. 2. That
in the Law of *Scotland*, when any Sum
of Money is mentioned, without the Ad-
dition of *Sterling*, *Scots* Money is un-
derstood.

So much I thought fit to preface, and
shall leave the Reader to make the best
Use he can of this Treatise, which is
submitted to his favourable Censure,
without farther troubling him with the
Reasons that induced me to publish it.



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