repugnant to the nature of a reference, but would render decrees-arbitral of little uſe; ſince, where they do not deſtroy the very ſeeds of a law-ſuit, their moſt valuable purpoſe is fruſtrated. Nevertheleſs decrees-arbitral were, by our uſage, ſubject to reduction, on the head of iniquity in the judge, or of enormous leſion of the party, till by *Art. Regul.* 1695, § 25. it was declared, that no decree-arbitral, proceeding on written ſubmiſſions, ſhould, for the future, be reducible on any ground, but thoſe of corruption, bribery, or falſehood.

36. Where the term of a ſubmiſſion hath expired, without any decree pronounced by the arbiter, an oath made by one of the ſubmitters, upon a reference by the other, while the ſubmiſſion was current, may be received as evidence in any ſubſequent proceſs. This ariſes from the tranſaction implied in a reference by one party to the oath of another, which has been already explained. The teſtimony of witneſſes, on points where a proof by witneſſes may be received, is alſo ſuſtained in any after proceſs, with this proviſo, or reſtriction, that the party againſt whom ſuch evidence is brought, may be admitted to offer objections againſt the hability or competency of the witneſſes. But depoſitions taken by arbiters upon points which our law does not allow to be proved by parole-evidence, cannot be received afterwards by any judge; for judges ought to lay no weight whatever upon that kind of proof which the law rejects.

TIT. IV.

Of Crimes.

HITHERTO of the law of Scotland, as it concerns queſtions of private and civil right. This treatiſe ſhall be concluded with a ſummary view of that part of our public law which relates to crimes, after the example of Sir George Mackenzie, the order of whoſe titles has been preciſely followed. All that is propoſed is, *firſt*, To give an account of the nature and properties of a crime in general: 2*dly*, To enumerate the chief facts that are conſidered by our ſtatutes or uſage as criminal; and, in ſome particular inſtances, to compare the puniſhments inflicted by us upon offenders, with thoſe that obtained by the Jewiſh or Roman laws: and, *laſtly*, To make a few obſervations relating to the forms of proceedings in criminal trials, and the different ways of extinguiſhing crimes.

2. *Crime*, in the largeſt acceptation of the word, ſignifies any breach or tranſgreſſion, either of the law of God, or of the poſitive law of our country. It is generally divided into crimes properly ſo called, and delicts. Delicts are commonly underſtood of ſlighter offences, which do not affect the public peace ſo immediately; and therefore may be puniſhed by a ſmall pecuniary fine, or by a ſhort impriſonment, as petty riots, injuries, offences againſt inferior juriſdictions, &c.: whereas crimes are thoſe breaches of the law which have a more direct tendency to ſubvert the government or conſtitution, or looſen the bonds of ſociety; and therefore call for the public juſtice, or the *publica vindicta*, that the tranſgreſſors may be puniſhed by the judge who is inveſted with a proper criminal juriſdiction, for the terror of others, that they may not commit the like in time to come. The more atrocious crimes, if they were declared ſuch by a ſpecial conſtitution, *l.* 1. *De publ. jud.* got the name of *public* by the Roman law, becauſe they might be proſecuted by any member of the commonwealth, in conſideration of their hurtful tendency to the ſtate, § 1. *Inſt. De publ. jud.*; whereas the leſſer or private crimes could not be tried, except at the ſuit of the

the private party injured. But this diviſion of crimes is not received by our practice. It was at no period of time competent by the law of Scotland to any private perſon, other than the party himſelf who had ſuffered damage in his perſon, eſtate, or reputation *, or, in caſe of his death, his next of kin, to proſecute crimes, however atrocious, the crime of high treaſon only excepted, *Reg. Maj. l.* 4. *c.* 2.; and this rule obtains at this day in treaſon itſelf. On the other hand, his Majeſty's Advocate, who repreſents the community in this queſtion, has authority from the ſovereign, who is veſted with the executive power of the ſtate, to ſue every criminal, without the concurrence, or even contrary to the will of the party injured. But his power of proſecuting criminals is extended no farther than the *publica vindicta*, or the ſatisfaction of public juſtice is concerned: the private party has a right of action againſt the offender for reparation of the injury; in which action, however, though it be purſued merely *ad civilem effectum*, the King's Advocate muſt concur, becauſe it ariſes from a criminal cauſe; and a ſum is, by the decree proceeding upon it, awarded to the purſuer in name of damage, as a ſort of compenſation for the wrong done to him, proportioned to the enormity of the offence, though he ſhould have in fact ſuffered no pecuniary loſs.

3. Crimes are to be conſidered in this place, only in ſo far as they are puniſhable by our courts of juſtice. It is not therefore every breach of the law of God, or of nature, that falls under the preſent ſubject. Many tranſgreſſions of the law of nature have been by all ſtates left to the puniſhment of God himſelf; as ingratitude, want of compaſſion to the poor, or the neglect of any of the other ſocial duties: ſuch offences conſiſt more properly in the negation of virtue, than in any poſitive criminal act; and the circumſtances which conſtitute them, lie frequently ſo hid, as to be beyond the cogniſance of human tribunals. The tranſgreſſion of the divine law, where it conſiſts in any poſitive act, hurtful to the peace of ſociety, though there ſhould be no ſtatute forbidding it, is accounted a crime by our practice, and may be puniſhed, even with death, if the nature of the criminal act deſerve it: thus beſtiality and ſodomy are, by our uſage, capital crimes, and ſingle adultery is puniſhed arbitrarily, though none of theſe are declared criminal by ſtatute.

4. Acts, though not of their own nature immoral, if they had been done in breach of an expreſs law to which no penalty was annexed, and which in the Roman law got the name of *crimina extraordinaria*, having been by them deemed criminal, were puniſhed as proper crimes: and indeed it ſeems to be a rule founded in the nature of laws, that every act forbidden by law, though the prohibition ſhould not be guarded by a ſanction, is puniſhable by the judge according to its demerit, as a tranſgreſſion of law, and a contempt of authority, *ſupr. b.* 1. *t.* 1. § 57. otherwiſe all ſuch prohibitory ſtatutes might be tranſgreſſed with impunity. Lawyers, however, are generally of opinion, that the tranſgreſſion in that caſe, though it ought not to eſcape all cenſure, is not puniſhable as a proper crime, unleſs the act be in itſelf criminal, *i. e.* contrary to the law of nature, though there had been no ſuch prohibition. If the law forbid any act to be done, or deed to be granted, under any ſpecial penalty of a civil kind, the tranſgreſſion of it cannot be tried criminally, though the act done in breach of the prohibition ſhould be in its nature criminal; becauſe the law, by annexing a ſpecial civil penalty to the tranſgreſſion of it, appears to have excluded all other puniſhment. Hence a diſpoſition granted by a debtor *in fraudem* of his credi-

* See 1585, *c.* 27.; 1633, *c.* 7.

tors, contrary to the prohibition of the act 1621, cannot in the general caſe be proſecuted as a crime.

5. There can be no proper crime without the ingredient of dole, *i. e.* without a wilful intention in the actor to commit it; for an act, where the will of the agent hath no part, neither deſerves the name of *virtue* nor of *vice*, and ſo is not a juſt object either of rewards or puniſhments. Hence ariſes the rule, *Crimen dolo contrahitur*. When therefore there is no malice in the mind, which invites to, and is productive of the criminal act, the eſſential character of a crime is wanting; and conſequently mere negligence, let it be ever ſo groſs, as it is not equipollent to dole in criminal queſtions, *l.* 7. *Ad leg. Corn. de ſic.* cannot conſtitute a proper crime. Yet ſupine negligence, which ſurely carries ſome degree of blame in it, ought not to eſcape all puniſhment: a perſon, for inſtance, through whoſe groſs neglect or omiſſion his neighbour has been killed, or his houſe burnt down, tho' he cannot be tried as a murderer or a wilful fire-raiſer, is puniſhable arbitrarily, or as the Roman law ſpeaks, *extra ordinem*; ſee *l.* 11. *De incend. ruin. naufr.* If negligence, though highly blameable, does not come up to a proper crime, far leſs can actions which proceed from ignorance, or whoſe conſequences are merely caſual: If, *ex. gr.* a huntſman, who aimed a dart at a roe or a buck, ſhould caſually kill a man who happened to be paſſing by, chance alone is to be blamed, not the huntſman; for, as Tully expreſſes himſelf in his topics, *Jacere telum voluntatis eſt; ferire, quem nolueris, fortunæ*. Neither can ſuch involuntary actions be accounted criminal, the firſt cauſe of which is without the agent, and does not depend upon him; as if one man forcibly impelled by another, ſhould puſh a third over a precipice. But care muſt be taken not to reckon in this claſs the ſudden ſallies which flow from paſſion, drunkenneſs, or the like: for though after one's anger is worked up to a certain height, or after he is intoxicated to a certain degree, he may in ſome ſenſe be ſaid not to be maſter of himſelf, yet the firſt principle of action is truly in the agent; for every man may by due pains check his irregular paſſions in their firſt motions; and therefore what one does under the influence of theſe, is to be accounted his action. This rule, however, does not always hold in civil caſes. An obligation granted by a perſon while he is in a ſtate of abſolute and total drunkenneſs, is ineffectual, becauſe the granter is incapable of conſent; for the law has thought it equitable to protect thoſe who have not the uſe of their reaſon, (even though they ſhould have loſt it by their own folly), from the fraud or circumvention of others; but if it ſhould alſo ſcreen them againſt the conſequences of crimes, the fouleſt enormities might be committed and juſtified under the colour of drunkenneſs.

6. On the ſame principle, infants, or ſuch as are in the confines of infancy, are incapable of a criminal action, dole not being incident to that age, *l.* 12. *Ad leg. Corn. de ſic.* In ſome texts of the Roman law, it is aſſerted in general terms, That crimes are not imputable to pupils. But this rule is hardly to be reckoned a rule in ours; for ſince the preciſe age at which one becomes capable of malicious intentions is fixed neither by nature nor by ſtatute, we have thought it reaſonable to leave it to the judge to diſcover it, as he is beſt able, from the pupil's manners, courſe of life, natural parts, and other circumſtances. Where the guilt of the crime committed by the pupil ariſes chiefly from ſtatute, ſo that its criminal nature is not ſo obvious, he ought not to be puniſhed, *niſi malitia ſuppleat ætatem*, unleſs he appear to have a degree of ſagacity and judgement above his years: but where the deformity of the criminal act is diſcoverable by natural light, the pupil, if he be *proximus pubertati*, may be more eaſily preſumed capable of committing it; yet even in that caſe he is not to be puniſhed *pœna ordinaria*, it being reaſonable to make ſome allowance for the weakneſs and vacillancy

cillancy of nonage. Dole is ſeldom or never inferred againſt a pupil, who is charged, not as principal criminal, but as acceſſory or privy to the crime, by giving counſel or advice how to commit it; becauſe a greater degree of judgement and addreſs is required to be aiding to another in the commiſſion of a crime, than to be himſelf the perpetrator of it; ſuch a degree as is hardly preſumable in that age.

7. Idiots and furious perſons muſt be as incapable as pupils of committing crimes, ſince a malicious intention cannot be charged againſt either of them, *l.* 5. § 2. *Ad leg. Aquil.*; *l.* 12. *Ad leg. Corn. de ſic.*; but leſſer degrees of fatuity, or furioſity, which only darken reaſon, without totally obſcuring it, afford not a total defence to the pannels, but barely ſave from the *pœna ordinaria*. If the madneſs recur regularly at certain ſtated periods, and if the crime be committed in an interval between thoſe periods, the committer is preſumed to have had, at that interval, the exerciſe of his reaſon. After a perſon, however, has fallen under the power of that diſtemper, his puniſhment ought to be mitigated, though the crime ſhould have been committed in a lucid interval; for where madneſs has once diſordered the judgement, eſpecially if it has often recurred, it leaves ſuch a degree of weakneſs in the mind as is apt to betray the perſon affected into acts of a criminal nature.

8. Some doctors have divided dole into true and preſumptive. But it will be perceived on the ſmalleſt attention, that all dole muſt be preſumptive; for it is an act of the mind, which can only be diſcovered by the outward circumſtances from which it is preſumed. In palpable criminal acts, as in blaſphemy, rape, murder, &c. dole is preſumed from the act itſelf; becauſe it cannot poſſibly bear a favourable conſtruction: and in actions which are either innocent or criminal, according to the good or bad intention of the agent, dole muſt alſo in that caſe be either preſumed or not, from the circumſtances previous to, or concomitant with the action.

9. When we ſpeak of a crime, we neceſſarily underſtand ſome outward expreſſion of one's thoughts or intentions, by word, writing, or action. A thought, when it is not put forth into action, however offenſive it may be in the ſight of God, is not cogniſable by any human tribunal as a crime: for though mere thoughts were capable of proof, they are not hurtful to ſociety; and crimes are puniſhed, only in ſo far as they affect ſociety, and the police of the ſtate. It is not ſo clear, how far a bare attempt, or *conatus*, to commit a crime, may be the foundation of a criminal proſecution. Doctors incline generally to the favourable opinion, that it ought not to be puniſhed *pœna ordinaria*, with the ſame puniſhment which the law has inflicted on the crime itſelf: but Mackenzie, *Crim. part* 1. *tit.* 1. § 4. aſſerts, that in atrocious crimes, the attempt, *ſi deventum ſit ad actum maleficio proximum*, ought to be puniſhed as ſeverely as if the crime had been actually committed; both becauſe ſuch attempt is a leſſer degree of that very crime to which it ſo nearly approaches, and becauſe the ſtate cannot be otherwiſe ſecure from the perſon who has diſcovered ſuch a wicked and miſchievous diſpoſition.

10. One may be guilty of a crime, not only by perpetrating it, but by being acceſſory to, or abetting it; which is called in the Roman law, *ope et conſilio*, and in ours, *art and part*. By *art* is underſtood, the mandate, inſtigation, or advice, that may have been given towards committing the crime; *part* expreſſes the ſhare that one takes to himſelf in it, by the aid or aſſiſtance which he gives the criminal in the commiſſion of it. One therefore may become art and part, either, *firſt*, by giving a warrant or mandate to commit the crime; 2*dly*, by giving counſel or advice to the criminal how

how to conduct himſelf in it; or, 3*dly*, by his aſſiſtance in the execution of it.

11. *Firſt*, By giving a mandate to commit it; for one is not the leſs guilty, that he does not himſelf perpetrate the crime, if he employ another to do it. As the mandant is the firſt ſpring of action, he ſeems rather to be more deeply guilty than the inſtrument he uſes in executing it; yet the principal actor's plea, of having gotten orders, which it was his duty to have rejected with indignation, will not be admitted, even to the effect of alleviating the puniſhment. Though the mandant ſhould not give an explicit warrant to the mandatary to commit the crime, yet if he direct him to do what may probably be productive of it, he is guilty art and part. Thus, if he ſhall give a mandate to wound one, who happens to die of the wound, the mandant is, in the general caſe, guilty of murder: yet if the order was given to beat him with a ſmall cane, or other inſtrument not likely to inflict a mortal wound, the mandant might perhaps be found liable only in an arbitrary puniſhment, though the inſtrument ſhould have been ſo indiſcreetly uſed as to draw death after it.

12. Art and part is inferred, 2*dly*, by adviſing the criminal to perpetrate the crime. The Roman law affirms, that a bare advice, though without doubt it deſerves cenſure, infers no proper crime againſt the adviſer, unleſs it be alſo proved, that he has given actual aſſiſtance, *l.* 36. *pr. De furt.* But this doctrine has not been adopted into the law of any other nation. A diſtinction is commonly made by doctors on this head, between the more atrocious crimes, and the ſlighter delinquencies. In the firſt, the adviſer is equally puniſhable with the actor; but in leſſer delicts, his puniſhment ought to be mitigated, according to circumſtances. The adviſer's nonage, the words uttered by him, if they were of a doubtful meaning, the jocular manner in which they were uttered, or his repenting of the advice, and giving the party concerned timely notice of his hazard, are all good pleas for reſtricting the offender's puniſhment in ſlighter delinquencies.

13. Art and part is inferred, 3*dly*, by giving to the criminal aſſiſtance in the commiſſion of the crime. This may be done, either in the time of its actual execution, as by preventing the perſon attacked from making his eſcape; or previouſly to it, by furniſhing the actor with poiſon, arms, or other inſtruments that might be of uſe to the actor in committing it. But in all previous aſſiſtance, the evidence muſt be clear, that the perſon aſſiſting knew, when he gave ſuch aid, that a criminal uſe was intended to be made of theſe inſtruments: it would too much expoſe innocence, if uncertain preſumptions were to be received in proof of this ſpecies of art and part. *That* protection which is given to the criminal after the commiſſion of the crime, *ex. gr.* by favouring his eſcape, knowing his guilt, or concealing him from juſtice, can with no propriety be called *aſſiſtance*. It commonly gets the name of *abetting*; but though it be itſelf a crime, and therefore may in particular caſes be puniſhed arbitrarily, it cannot amount to the character of *art and part*, ſo as to ſubject the abettor to the ſame puniſhment that is due to the principal criminal, except where it is declared otherwiſe by ſtatute; an inſtance of which occurs in the harbouring of thieves, 1567, *c.* 21. Yet if he who has thus favoured the criminal, had, previouſly to the commiſſion of the crime, promiſed him ſuch protection, both are involved in equal guilt; for nothing can be a ſtronger incitement to a crime, than the aſſurance of being ſcreened or protected from juſtice.

14. The commands of a prince or magiſtrate, acting as ſuch, excuſe altogether in leſſer crimes; becauſe what one does under theſe orders, is conſidered as an act, rather of obedience to the prince, than of contempt of the law. But the prince's command to commit more atrocious crimes, exempts

empts the criminal merely from the *pœna ordinaria*; becauſe the duty of obedience to the law of God cannot be diſpenſed with by the higheſt earthly ſovereign. The commands of a father or huſband in the more flagitious crimes, have not the effect ſo much as to alleviate the puniſhment, agreeable to *Stat. Gul. c.* 19. § 8. The orders of a maſter to his ſervant, do not ſecure from puniſhment, even in the ſlighter offences; becauſe a ſervant is more at liberty to judge of the lawfulneſs of his maſter's orders, and to refuſe obedience to them, if they be unlawful, than a ſubject, or ſon, or wife is, with reſpect to thoſe of their ſovereign, or father, or huſband, *Mack. Crim. part* 1. *tit.* 35. § 5. 6.

15. Crimes are puniſhed in a higher or lower degree, as they affect ſociety more or leſs. Thoſe that in their conſequences are more hurtful to ſociety, or that have a more immediate tendency to throw the ſtate into violent convulſions, are puniſhed by death: others leſs heinous eſcape with a gentler puniſhment, ſometimes fixed by ſtatute, and ſometimes arbitrary, *i. e.* left to the diſcretion of the judge, who may exerciſe the power intruſted to him, either by fine, impriſonment, or corporal puniſhment. Where the law declares the puniſhment to be arbitrary, the judge can in no caſe extend it to death; for where it intends to puniſh capitally, it ſays ſo in expreſs words, and leaves no liberty to the judge to modify. In ſeveral of our ancient laws, *Leg. Burg. c.* 132; 1457, *c.* 77. the life of the offender is put in the mercy or will of the King; which expreſſion ſome lawyers have maintained ought never to have been ſtretched into a capital puniſhment, either by the judge before whom he was found guilty, or by the ſovereign himſelf, from the preſumed benignity of the ſupreme power. But it appears more probable, that the judge himſelf had no juriſdiction, in ſuch caſe, to pronounce ſentence againſt the criminal; the parliament having declared, that the aſcertaining the puniſhment to be inflicted on thoſe offenders ſhould be left to the King alone; and that the ſovereign, to whom the judge remitted the cauſe, ſometimes inflicted a capital, and ſometimes a ſlighter puniſhment on the criminal, according to the nature of the crime. In all trials of crimes confeſſedly capital, the ſingle eſcheat of the criminal falls upon conviction, though the ſentence ſhould not expreſs it: for if the bare non-appearance in a criminal proſecution draw this forfeiture after it, *vid. ſupr. b.* 2. *t.* 5. § 57. much more ought the being convicted of a capital crime to infer it; and this is agreeable to the Roman law, *l.* 1. *pr. De bon. damn.*——Some of the characters which diſtinguiſh capital crimes from others, whether they relate to the perſonal liberty of the criminal before trial, or to the diſtance of time between the ſentence and the execution, are to be explained afterwards.

16. Certain crimes are committed more immediately againſt God himſelf, others againſt the ſtate, or the public peace, and a third ſort againſt particular perſons. The chief crime in the firſt claſs, cogniſable by temporal courts, is blaſphemy, which is the crime of treaſon againſt the Deity; and upon this account, it is ſometimes called *divine leſe-majeſty*. Under this crime may be comprehended Atheiſm: and it is cogniſable by the civil magiſtrate; becauſe it has a moſt direct tendency to extinguiſh the natural ſenſe of the eſſential difference between good and evil, the belief of which is the firmeſt foundation and ſupport, and the ſtrongeſt cement of civil ſociety. The puniſhment of blaſphemy was capital, both by the Jewiſh law, which enacted, that the blaſphemer ſhould be dragged out of the city, and ſtoned to death, *Levit.* xxiv. 16. and by the Roman, *Nov.* 77. In blaſphemy, doctors diſtinguiſh between that kind which aſcribes any thing to God inconſiſtent with his perfections, as injuſtice, cruelty, reſentment, &c.; and thoſe oaths and imprecations, which, without any deliberate deſign of

expoſing the divine attributes, tend to throw contempt upon religion. It is the firſt ſort only which is puniſhable by death; the laſt eſcapes with an arbitrary puniſhment proportioned to the circumſtances and aggravations of the crime.

17. Thoſe who rail upon, or curſe God, or any of the perſons of the bleſſed Trinity, are by 1661, *c.* 21. to be puniſhed with death, even for a ſingle act: he who barely denies the exiſtence of God, is not ſubjected to a capital puniſhment, unleſs he perſiſt obſtinately in his denial. The reaſon of the difference lies in this, that railing againſt God muſt be attended with malice; whereas the denying his exiſtence may proceed from ignorance. But as the leaſt inſtruction muſt ſet one right in that point, the law preſumes, that whoever perſiſts in his denial will not be ſet right. The words in the act, *obſtinately perſiſts therein*, ſtrongly imply, that the offender's repentance at any time before trial is to be admitted as a ſufficient ground for abſolving him. A later ſtatute, 1695, *c.* 11. which ratifies the former, extends the crime to the denial of the providence of God, or of the authority of the ſcriptures, either in writing or diſcourſe: For the firſt offence of this ſort, the criminal is to give ſatisfaction in open church in ſackcloth; and this may be tried by any magiſtrate: for the ſecond, he is to be fined in one year's valued rent of his real eſtate, and the twentieth part of his perſonal; which is cogniſable by ſheriffs, and bailies of boroughs: and the third is to be puniſhed capitally by the court of juſticiary.

18. Correſponding with evil ſpirits, and the practiſing of witchcraft by their aid, and under their influence, falls properly under this claſs of crimes: and as our legiſlature in former ages was of opinion, that thoſe diabolical arts did not ceaſe upon our Saviour's death, it was enacted by 1563, *c.* 73. that all who uſed witchcraft, ſorcery, necromancy, or pretended ſkill therein, and all conſulters of witches and ſorcerers, ſhould be puniſhed capitally; upon which ſtatute, numberleſs innocent perſons were tried, and burnt to death, upon evidence which, in place of affording reaſonable conviction to the judge, was fraught with abſurdity and ſuperſtition. It is now unneceſſary to enter into a particular explication of that law; ſince, by a Britiſh ſtatute, 9° *Geo. II. c.* 5. all proſecution upon witchcraft, ſorcery, or conjuration, is prohibited. To diſcourage pretences to ſuch arts as frequently impoſe on the ignorant, all perſons who ſhall pretend to witchcraft, or undertake from their ſkill in any occult ſcience to tell fortunes, or diſcover ſtolen goods, are by the ſame ſtatute to ſuffer impriſonment for a year, to ſtand in the pillory once in every three months of that year, and to give ſureties for their good behaviour, for ſuch time as the court ſhall direct.

19. Of the crimes committed againſt the ſtate, ſome are levelled immediately againſt the ſupreme power, and ſtrike at the conſtitution itſelf, while others merely diſcover ſuch a contempt and diſregard to the law, as may contribute to baffle its authority, or ſlacken the reins of government. Of the firſt ſort is treaſon; which is that crime that is aimed againſt the ſtate itſelf, and ſo has a direct tendency to ſubvert the conſtitution, and ſet the whole nation in a flame. It was in the Roman law ſtyled *crimen majeſtatis*; becauſe it was pointed againſt the majeſty and dignity of the ſtate: and with us it has the name of *treaſon*, from the French *trahiſon*; it being an act of treachery againſt the commonwealth.

20. Treaſon was by the law of Scotland either proper or ſtatutory. Thoſe facts which were treaſonable by the Common law, conſtituted the crime of proper or high treaſon; ſuch as, contriving the death of the ſovereign, or laying him under reſtraint in his perſon, or in the exerciſe of the government; raiſing a fray in the hoſt without a cauſe, (from the Latin *hoſtis*, which, in

in the middle ages, was uſed to ſignify an army or incampment; ſee *Du Cange*, *v. Hoſtis*); levying war againſt him, or inciting others to invade him; the aſſaulting of caſtles where he reſided; the endeavouring to alter the ſucceſſion; impugning the authority of the eſtates of parliament; the making of treaties either with ſubjects or with foreign ſtates, or maintaining any forts without the King's conſent; and the reſetting or concealing of traitors, 1449, *c.* 24.; 1455, *c.* 54.; 1584, *c.* 130.; 1661, *c.* 5.; 1662, *c.* 2. On the other hand, all facts, which, though they do not of their own nature carry in them any of the diſtinguiſhing characters of proper treaſon, were, from their enormous guilt, and miſchievous conſequences, puniſhable by ſtatute with the pains of treaſon, got the name of *ſtatutory treaſon*, viz. theft by landed men, 1587, *c.* 50.; murder under truſt, *ibid. c.* 51.; wilfully ſetting fire to coal-heughs, 1592, *c.* 146.; or to houſes or corns, 1528, *c.* 8.; and aſſaſſination, 1681, *c.* 15. The puniſhment of treaſon, whether proper or ſtatutory, was death, and the forfeiture to the crown of the traitor's eſtate, both real and perſonal; and the extinction of all the heritable dignities, honours, or privileges, that the King had conferred on him. The year immediately enſuing the union of the two kingdoms, *anno* 1707, the Britiſh parliament, judging it reaſonable that the whole united kingdom ſhould be governed by the ſame law in the matter of treaſon, as their obligations of loyalty was the ſame, declared, by 7° *Ann. c.* 21. That the laws of high treaſon that then obtained in England, ſhould alſo take place in Scotland, not only with reſpect to the facts which conſtituted that crime, but in relation to the forms of trial, the corruption of blood, and all the other penalties and forfeitures conſequent on it.——The facts which, by the former law of Scotland inferred ſtatutory treaſon, are by this Britiſh act declared to be ſimply capital crimes.

21. It is declared high treaſon by 25° *Edw. III. ſtat.* 5. *c.* 2. to compaſs or imagine the death of the King, or of the Queen-conſort, or of their eldeſt ſon, the Prince, who is, for the time, heir-apparent to the crown. By the King, is to be underſtood the ſovereign, whether King or Queen: for though a queen who is ſuch in her own right, is not included in the words of the act; yet the ſpirit and intendment of it plainly comprehends every perſon inveſted with the royal dignity: and this hath been ſo little doubted, that neither Q. Mary, Q. Eliſabeth, nor Q. Anne, thought it worth while to get the act extended to Queens-regnant. It was by the ſame ſtatute made treaſon to violate the Queen-conſort, or the wife of the King's eldeſt ſon, or the King's eldeſt daughter unmarried, or to levy war againſt the King, or to adhere to his enemies, or to counterfeit the great or privy ſeal, or to kill the chancellor, treaſurer, or any of the twelve judges, while in their places doing their offices; becauſe judges and magiſtrates of the higheſt rank, while they are in the actual exerciſe of their functions, are conſidered as more immediately repreſenting the ſovereign: and this laſt part of Edward's ſtatute, is, by the aforeſaid act 7° *Ann.* applied to Scotland, in the caſe of ſlaying any lord of ſeſſion or of juſticiary while they are ſitting in judgement. After a period was put to the deſolating civil war between the houſes of York and Lancaſter, it was equitably enacted by 11° *Hen. VII. c.* 1. That no perſon ſhould be accuſed of treaſon, for having adhered to that king who ſhould be in poſſeſſion for the time, though he ſhould be afterwards declared an uſurper. This act, which ſtands unrepealed, affords a juſt ſecurity to well-diſpoſed perſons, in thoſe turbulent times, when the claimant to the crown, who is this day in poſſeſſion, may be turned out of it the next. It is alſo declared treaſon, 13° *Gul. III. c.* 3. to hold correſpondence with the Pretender, (now deceaſed), or any employed by him; and, by 6° *Ann. c.* 7. to affirm adviſedly, by writing or printing, that the then Queen,

Queen, and her ſucceſſors, are not the lawful ſovereigns of theſe realms, or that the Pretender hath any title to the crown, or that the King and parliament cannot limit the ſucceſſion to it.

22. Several treaſon-laws have been from time to time enacted for preſerving the purity of the coin. The before-mentioned ſtatute of Edward III. makes it treaſon to counterfeit the King's coin, or to import falſe money; which is extended by 1° *Mariæ*, *ſeſ.* 2. *c.* 6. to the counterfeiting any foreign coin that ſhall be current in England; and by two ſtatutes, 5° & 18° *Eliſ.* to the waſhing, clipping, or lightening of the proper money of the realm. Whoever ſhall have in his poſſeſſion any preſs for coining, or ſhall convey out of the King's mint any inſtrument of coinage, is declared guilty of treaſon by act 8° & 9° *Gul. III. c.* 26.; but this kind of treaſon does not draw after it the corruption of blood. Soon after the Engliſh reformation from Popery, ſeveral acts were paſſed in the reign of Eliſabeth for the better ſecuring the Proteſtant religion, by which many points which bore not the proper treaſonable character, were declared treaſon; ſuch as maintaining, by reiterated acts, the Pope's juriſdiction, by ſpeaking, writing, or acting, 5° *Eliſ. c.* 1.; the putting to execution any of the Pope's bulls, 13° *Eliſ. c.* 2.; the perverting others, or being perverted to Popery, with a view of withdrawing from the ſovereign's obedience, 23° *Eliſ. c.* 1.; 3 *Jac. I. c.* 4. § 22. 23. &c.

23. The ſtatute of Edward III. requires, that in all trials for treaſon, evidence be brought againſt the pannel of ſome open deed, or ouvert act, manifeſting the crime. Thus, if one be indicted for imagining the King's death, which is an act of the mind, the treaſon muſt appear by ſome outward act done by him, which may indicate an intention to kill. Some Engliſh lawyers have affirmed, that the bare emiſſion of words makes an ouvert act, as words are the moſt natural means of expreſſing the thoughts: but Lord Coke, and moſt of their other writers, maintain the negative; both becauſe the ſtretching of points of treaſon is unfavourable, and becauſe, in common ſpeech, words, and acts or deeds, are oppoſed to one another, and therefore ought not to be explained into each other, ſo as to infer the ſevereſt penalties.——As to the ſecond point, the forms of proceeding in trials upon treaſon, it ſhall be ſhortly explained, after finiſhing the detail of the ſeveral kinds of crimes.

24. The pains and forfeitures conſequent on treaſon, are now alſo the ſame in Scotland as in England, by the aforeſaid act 7° *Ann.* Theſe relate either to the forfeiting perſon himſelf, or to third parties. The perſon convicted of treaſon, forfeits to the crown by the law of England, not only all his heritable eſtate, whether in fee-ſimple or fee-tail, *i. e.* whether he poſſeſs the lands as abſolute proprietor, or be limited by an entail, but alſo his moveable effects, or, in the Engliſh law-ſtyle, *his goods and chattels.* He forfeits alſo all his honours or dignities; for he becomes ignoble, by his conviction or attainder. The corruption which his blood thereby ſuffers, renders him incapable of ſucceeding to any anceſtor; and the eſtate which he himſelf cannot take falls, not to the crown by forfeiture, but to the immediate ſuperior as eſcheat, *ob defectum heredis*, without diſtinguiſhing whether the lands hold of the crown, or of a ſubject, *Coke*, 1. *Inſtit. vol.* 1. *l.* 1. *c.* 1. § 4.; *Hale*, *Plac. Coron. vol.* 1. *c.* 27.

25. Third perſons who may be affected by the conviction of the traitor, are either, *firſt*, claimants under a title preferable to that of the attainted perſon; or, 2*dly*, his heirs at law; or, 3*dly*, his creditors and ſingular ſucceſſors; or, 4*thly*, his heirs of entail. As to the *firſt*, Every eſtate, of which the attainted perſon had been poſſeſſed for five years immediately preceding the attainder, fell by the law of Scotland to the crown, though

evidence

evidence ſhould have been brought that the lands truly belonged to another proprietor; and thus the right owner was ſtripped of his property, upon a preſcription of five years, in place of forty: but that rigorous ſtatute was repealed by 1690, *c.* 33. whereby forfeited eſtates were ſubjected to all real actions and claims againſt them, though ſuch actions had not been raiſed within the five years; after which laſt ſtatute, the five years poſſeſſion of the forfeiting perſon, introduced by the act 1584, *c.* 2. reſolved into a ſimple preſumption, that his right was good, as long as no better appeared.

26. As to the legal heirs of the traitor, ſeeing his whole eſtate falls to the crown, his heirs cannot inherit upon his death; nor can any heir ſucceed to an anceſtor, where the propinquity betwixt the two is neceſſarily connected by the attainted perſon, or where the attainted perſon would have ſucceeded to the eſtate of the deceaſed, had it not been for his attainder. Hence ſpecial ſtatutes have been enacted, to enable perſons to ſucceed in lands or dignities, who could not, without the aid of parliament, have ſucceeded in them, on account of the bar created by the intervention of the forfeiting perſon. Yet it hath lately been adjudged by the Houſe of Lords, upon a reference to them by his Majeſty, that on the deceaſe of the laſt Duke of Athol, whoſe younger brother Lord George Murray had been attainted of treaſon, and had died before him, the peerage deſcended to Mr Murray, ſon to the attainted perſon, though he could not connect his propinquity to the Duke his uncle, otherwiſe than through his father, who was forfeited. This judgement proceeded on principles of the Engliſh law, to which there is nothing analogous in ours; but a ſeparate ground may be offered in ſupport of it, derived from the reaſon of the thing, that before the ſucceſſion to the peerage had opened, the attainted perſon was dead, and by his death the bar removed, which would have interrupted the deſcent of that dignity, if he had ſurvived the Duke his brother.

27. As to the creditors and ſingular ſucceſſors of the attainted perſon, the traitor's eſtate was forfeited to the crown by our moſt ancient law, without being ſubjected to any debts or burdens which had been charged on it previouſly to the forfeiture, other than thoſe which the King himſelf had confirmed; for as the King was, by the feudal plan, the abſolute *dominus* or lord of all the lands within his dominions, *jure coronæ*, the right of property, in ſo far as he had given it by the feudal grant to his vaſſal, revived on the vaſſal's forfeiture; ſo that the ſovereign could not, with propriety, be conſidered as the vaſſal's ſucceſſor, nor conſequently ſubjected to any of his debts which himſelf had not ratified. But the parliament 1690, *c.* 33. upon a recital, that no perſon ought to have a power of confiſcating by his crime what he could not alienate by his conſent, enacted, that the rights of widows, huſbands, tackſmen, creditors, and heirs of entail, ſhould not be hurt by any forfeiture for high treaſon. It was for ſome time doubted, whether this act, which ſecured the private right of perſons who were not involved in the traitor's guilt, was repealed by the act 7° *Ann.* ſubjecting traitors tried in Scotland to the pains and forfeitures of the Engliſh law. It appears, that the Commiſſioners of Inquiry who were named ſoon after the rebellion in 1715, made a doubt of it; for which ſee *Farther report of Commiſſioners of Inquiry*, *p.* 15. 21. 23. &c.; both becauſe the excluding of creditors is not a penalty inflicted on the traitor, but rather a forfeiture of innocent perſons; and becauſe our private rights are, by the articles of Union, *c.* 18. declared unalterable, except for the evident utility of the ſubject; which article, it would ſeem, ought to have the effect of preſerving in force ſo beneficial a ſtatute, till at leaſt it had been expreſsly repealed by a Britiſh ſtatute: but it is now held for an agreed point, that the rights of the traitor's creditors muſt be determined by the law of England, notwithſtanding

ſtanding the foreſaid act 1690. All real creditors upon a forfeited eſtate are, by the Engliſh law, ſecured againſt the conſequences of their debtor's attainder; but perſonal creditors ſeem to have but little ſecurity by that law. By ſpecial ſtatutes, however, paſſed after the two rebellions in 1715 and 1745, the courts to which the parliament referred the determination of the claims on the forfeited eſtates in Scotland, were impowered to ſuſtain the claims of all lawful creditors, whoſe debts were contracted before a certain period, previouſly to which it could not be ſuſpected by the lenders, that the debtors had a view to riſe in arms againſt the King. The conſequences of treaſon, in ſo far as they affect the traitor's ſingular ſucceſſors, and even his heirs, are made temporary by the aforeſaid act 7° *Ann.* which declares, That after the Pretender ſhall be three years dead, no attainder for treaſon ſhall have the effect to diſinherit the heir, or hurt the right of any perſon, other than that of the offender himſelf during his natural life: but the term of this law is, by 17° *Geo. II. c.* 39. prorogated during the lives of any of the Pretender's ſons. Though by the Engliſh law, an eſtate-tail becomes forfeited to the crown, by the attainder of the preſent heir or tenant; yet where the deed of entail contains ſubſtitutions or remainders over, in default of the attainted perſon, and the heirs of his body, ſuch forfeiture is only temporary, limited to the life of the attainted perſon, and of ſuch iſſue of his as would have been inheritable to the eſtate, had he not been attainted. A caſe occurred lately, that the heir to ſuch an eſtate had iſſue born in France after his attainder, and died, leaving that iſſue. The queſtion in debate was, Whether the eſtate or intereſt which was forfeited to the crown, determined by the death of the attainted perſon, ſo that it veſted immediately in him who was ſubſtituted to the attainted perſon, and his iſſue; or whether it continued in the crown during the life of that iſſue? The crown-lawyers argued, that the eſtate continued forfeited, in regard that the iſſue, though born without the liegeance of the ſovereign, were naturalized, and conſequently inheritable to the eſtate by 7° *Ann. c.* 5. by which all the children of natural-born ſubjects, though born out of the kingdom, are naturalized. The ſubſtitute to the attainted perſon's iſſue pleaded a poſterior ſtatute, 4° *Geo. II. c.* 21. which expreſsly excludes the children of perſons attainted of high treaſon from the benefit of the former ſtatute of Anne. The court of ſeſſion pronounced judgement for the crown, *Feb.* 18. 1752; but upon an appeal, the Houſe of Lords, after an unanimous opinion given by the judges, that the crown's right determined in the caſe above ſtated, adjudged, that the ſubſtitute had right to enter into the immediate poſſeſſion of the eſtate, *New Coll.* i. 3.; *ibid. p.* 327.

28. The act 7° *Ann.* makes the Engliſh law ours, not only in treaſon, but in miſpriſon of treaſon; by which is underſtood the overlooking or concealing of treaſon, from *meprendre*, to overlook or neglect. It is inferred from one's bare knowledge of the treaſon, and not diſcovering it to a magiſtrate, or other public perſon who is by his office impowered to take examinations, though he ſhould not in the leaſt degree aſſent to it. The puniſhment of this crime is impriſonment, together with the forfeiture of the offender's moveables, and of the profits of his heritable eſtate during his life; or, in the ſtyle of the law of Scotland, his ſingle and liferent eſcheat, *Hale, Plac. Coron. vol.* 1. *c.* 28.

29. The crime of ſedition conſiſts in raiſing commotions and diſturbances in the ſtate. It is either real or verbal. Real ſedition is inferred from an irregular convocation of a number of people, without lawful authority, tending to obſtruct or trouble the peace of the community. Such commotions as are aimed directly againſt the ſovereign or ſtate, amount to high treaſon; but where they are raiſed merely to redreſs ſome ſuppoſed grievance,

vance, it is the crime which falls properly under the name of *ſedition*. As thoſe convocations were commonly aſſembled within our larger boroughs, where there is the greateſt confluence of people, our old ſtatutes prohibiting them are chiefly levelled againſt convocations within borough. The perſons of the tranſgreſſors are to be at the King's will, and their goods to be confiſcated by 1457, *c.* 77.; 1491, *c.* 34. The puniſhment is by a poſterior act, 1563, *c.* 83. made capital: but by a ſtill later one, 1606, *c.* 17. the perſons guilty are to be puniſhed in their bodies and goods, conformably to the laws of the kingdom; which expreſſion is ſeldom or never ſtretched to a capital puniſhment. Whoever attempts to raiſe bodies of armed men in an hoſtile manner, and under regular pay, without the King's permiſſion, is to ſuffer death, by 1563, *c.* 75. All perſons who ſhall be aſſembled to the number of twelve, and being required by a public proclamation, made by a magiſtrate, conſtable, or other officer of the peace, to ſeparate, ſhall nevertheleſs continue together for an hour after ſuch proclamation, are by a Britiſh act, 1° *Geo. I. St.* 2. *c.* 5. commonly called *the riot-act*, to ſuffer death, and the confiſcation of moveables. Verbal ſedition, which in our ſtatutes gets the name of *leaſing-making*, is inferred from the uttering of words tending to ſedition, or the breeding of hatred and diſcord between the King and his people. This crime was declared capital by 1424, *c.* 43.; 1540, *c.* 83.: but becauſe theſe ſtatutes, from the various gloſſes that might be put upon them by partial affection, or the workings of reſentment, proved extremely inſnaring to the ſubjects, that crime was, by 1703, *c.* 4. declared puniſhable, either by impriſonment, fine, or baniſhment, at the diſcretion of the judge.

30. The wilful perverting of judgement by judges or magiſtrates, whoſe office and duty it is to protect the innocent, and puniſh the guilty, may be claſſed under this head. By the Roman law, all judges and magiſtrates of provinces, who received money which they ought not to have received, were ſaid to be guilty of the *crimen repetundarum*; which term was at laſt applied to every caſe where the judge accepted of a bribe to pervert judgement, *l.* 1. *Ad leg. Jul. repet.* It was puniſhed, either by baniſhment, or more ſeverely, according to the nature of the crime; but where the bribe was received in the trial of a capital crime, the criminal ſuffered death, *l.* 7. § 3. *eod. tit.* This crime of exchanging juſtice for money, was afterwards called by the doctors *baratria*, from the Italian *barattare*, to trock or barter: *Baratriam committit qui propter pecuniam juſtitiam baractat.* This vocable is uſed in 1427, *c.* 107. to denote the crime of clergymen who went abroad to purchaſe benefices from the ſee of Rome with money. No ſpecial puniſhment was by that act inflicted on the offenders: but by an act paſſed ſoon after the Reformation, 1567, *c.* 2. thoſe who apply to the ſee of Rome for benefices, are to be puniſhed with the pains of baratry; which are there deſcribed to be proſcription, baniſhment, and an incapacity to enjoy any honour or dignity. Judges who, through wilfulneſs, corruption, or partial affection, uſe their authority as a cover to injuſtice or oppreſſion, are to be puniſhed with the loſs of honour, fame, and dignity, by 1540, *c.* 104. Theft-bote is a crime of this nature; which comes from *bote*, a Saxon word, which we uſe to this day for compenſation, and conſiſts in taking a gratuity in money or goods from a thief, to ſhelter him from juſtice, and in ſubſtituting *that* in place of the puniſhment. It is ſtyled in 1436, *c.* 137. the ſelling of a thief, or the fining with him; *i. e.* taking a ranſom, or fine, or compoſition from him, for favouring his eſcape, or otherwiſe ſcreening him from puniſhment. By the laſt-quoted ſtatute, lords of regality who ſtood convicted of this crime, were to ſuffer the loſs of their juriſdictions; and ſheriffs, juſtices, and barons, the loſs of life and goods. By a poſterior act,

act, 1515, *c.* 2. private perſons who take theft-bote are to ſuffer the like pains with the principal thief.

31. The crime of wrongous impriſonment, which falls under the ſame claſs, is deſcribed, 1701, *c.* 6. It is inferred, by a judge or magiſtrate granting warrants of commitment in order to trial, without expreſſing the cauſe of commitment, and proceeding in informations not ſubſcribed by the informer; by officers of the law receiving or detaining priſoners on ſuch warrants; by their refuſing to the priſoner a copy of the warrant of commitment; by their detaining him in cloſe confinement above eight days after his commitment; or not releaſing him on bail, where the crime is bailable; or by tranſporting perſons out of the kingdom, without either their own conſent, or a lawful ſentence; ſee below, § 85. Thoſe who are guilty of wrongous impriſonment, are puniſhed with a pecuniary fine, from ſix thouſand down to four hundred pounds Scots, according to the rank of the perſon detained: and the judge, or other perſon acting contrary to the directions of the ſtatute, is, over and above, liable in payment to the perſon detained of a ſum of money *per diem*, proportioned to his rank, and is declared incapable of public truſt. This act hath been applied, not only againſt magiſtrates, and other officers of the law, but againſt private offenders, *Dec.* 14. 1730, *Paterſon*; both becauſe there are ſeveral expreſſions in the ſtatute which favour that extenſion, and becauſe it is not preſumable that the legiſlature, while it was ſecuring the perſonal liberty of the ſubject againſt magiſtrates, ſhould have left it inſecure againſt private men, who, without any colour of title, aſſume the office of magiſtracy, and pervert it to the purpoſes of oppreſſion. All the penalties inflicted by this act may be ſued for by an action before the ſeſſion, who have the ſole cogniſance of that crime, and they are ſubject to no modification.

32. The beating or affronting of judges, or other public officers, while they are employed in the diſcharge of their duties, diſobedience to the ſovereign's commands properly communicated by ſuch officers, or one's aſſuming the powers of a judge, in puniſhing his adverſary in a law-ſuit by his own proper authority, are truly crimes againſt the good government and police of a ſtate. Of this kind are deforcement, breach of arreſtment, and battery *pendente lite*. Deforcement is the oppoſition given, or the reſiſtance made, to meſſengers, or other public officers, while they are actually engaged in the exerciſe of their offices. Its criminal nature conſiſts in the affront thereby aimed againſt the law itſelf, and the ſupreme power, from which all theſe officers derive their authority. Different puniſhments have been from time to time inflicted upon offences of this kind: By a ſtatute of William the Lion, the criminals were to be impriſoned, *c.* 4. § 5.; afterwards, by 1581, *c.* 118. their perſons were to be puniſhed at the King's will, and their moveables to be eſcheated, with the burden of the debt due to the perſon injured, and of a farther ſum to be paid to him in name of damages; by a ſtill poſterior ſtatute, the lives and goods of deforcers were declared to be in the King's will; and at laſt, by 1592, *c.* 150. their moveables were forfeited, the one half to the King, and the other to the party at whoſe ſuit the diligence was uſed. The benefit of this laſt ſtatute is not confined to meſſengers, but expreſsly includes the officers of inferior courts; for it mentions all perſons whomſoever, who are executing any ſummons, letters, or precept, directed by any judge within the realm.

33. In the trial of deforcement of a meſſenger, the libel will be caſt, if it do not expreſsly mention, that the meſſenger, previouſly to the deforcement, diſplayed his blazon, which is the badge of his office: for as meſſengers are diſtinguiſhed by a particular badge, the lieges are in *bona fide*, till the badge be ſhewed, to treat them as if they were no meſſengers. A meſ-

ſenger

ſenger muſt alſo ſhew to the party, againſt whom the diligence is directed, the warrant againſt him, if he deſire to ſee it: for as the blazon authoriſes the uſer of it to act as a meſſenger, the warrant gives him authority to execute that particular diligence. A meſſenger may be reſiſted without a crime, not only when he acts without a warrant, but when he evidently exceeds the bounds of it: for in either caſe, he is not ſo properly an executor of the law, as a perverter of it, by making it a cover to oppreſſion. Hence a landholder was abſolved from a charge of deforcement, who had, in the right of hypotheck, ſtopped a meſſenger *via facti* from poinding, Nov. 18. 1667, *Mack. Crim. part* 1. *tit.* 26. § 4. This deciſion is cenſured by that author: and it muſt be allowed, that where the proceedings of a meſſenger are not glaringly illegal and oppreſſive, it might be of bad example to leave debtors at liberty to judge in their own cauſe, whether a meſſenger, whom the law hath intruſted with the execution of lawful diligence, has truly put the diligence to execution according to law.

34. The ſtatute 1592 requires blood to be ſpilt in the deforcement, in order to found an action againſt the deforcer: and without doubt, where that action is penal, concluding the eſcheat of moveables, the defender, who ought, in a criminal trial, to have the full benefit of every legal defence, falls to be abſolved, if effuſion of blood be not libelled and proved. But if the action be carried on merely *ad civilem effectum*, for payment to the purſuer of his debt and damages, the ſtatute is to be more amply interpreted, and the action will be ſuſtained, if the meſſenger be any how hindered in executing the diligence, though no blood ſhould have been drawn in the deforcement. Upon the ſame ground, though the words of the act are levelled againſt the debtor, or ſuch as ſhall be hounded out, or commanded by him; yet where the concluſion of the libel is barely civil, our practice has extended the act againſt all thoſe who ſhall have officiouſly interpoſed to ſave their friend from diligence, though they have not been deſired by the debtor.

35. Deforcement of the officers of the cuſtoms, by perſons to the number of eight or upwards, was puniſhed by tranſportation to America, for a term of years not exceeding ſeven, by 6° *Geo. I. c.* 21. § 34.: but now by act 19° *Geo. II. c.* 34. armed perſons to the number of three or more, aſſiſting in the illegal running, landing, or exporting, of prohibited or uncuſtomed goods, or any perſon who ſhall forcibly reſiſt or wound any officer of the cuſtoms or exciſe in the execution of their office, are puniſhable with death, and the confiſcation of moveables.

36. Breach of arreſtment is a crime of the ſame nature as deforcement, ſeeing it imports a contempt of the law, and of the authority of our courts of juſtice. It is joined with the crime of deforcement, and the offenders are ſubjected to the ſame pains that were inflicted on that crime by 1581, *c.* 118. viz. an arbitrary corporal puniſhment, and the eſcheat of moveables, with a preference to the arreſter for his debt, and for ſuch farther ſum as ſhall be modified to him for damages. The cogniſance of this crime, as well as of the laſt, is given to the court of ſeſſion; but that does not exclude the juriſdiction of the juſticiary, which is the proper criminal court.

37. The crime of battery *pendente lite* is committed by any party to a law-ſuit, who ſhall ſlay, wound, or otherwiſe invade his adverſary, in any period of time between the execution of the ſummons, and the full execution of the decree, or who ſhall be acceſſory to ſuch invaſion. The puniſhment of this crime is, the loſs of the cauſe, 1584, *c.* 138.; 1594, *c.* 219. The proof of the invaſion is, by theſe ſtatutes, directed to be taken, either by the juſtice, or by any other *competent* judge; and upon this ground, the

ſeſſion ſuſtain themſelves judges; for that court is competent to all cauſes which are carried on merely *ad civilem effectum*. The ſentence which is pronounced upon this trial againſt him who committed the battery, is declared by the aforeſaid acts not ſubject to reduction, either on the head of minority, or any other ground: and if the perſon to be tried ſhall be denounced for not appearing to anſwer, his liferent, as well as ſingle eſcheat, falls immediately after ſuch denunciation.

38. Offences againſt the laws enacted for the police or good government of a country, are truly crimes againſt the ſtate. The chief of thoſe laws are calculated for the providing all the members of the community with a ſufficient quantity of the neceſſaries of life at reaſonable rates, and for the preventing of dearth. The perſons offending in this way were, by the Romans, ſtyled *Dardanarii*, from Dardanus, whom Apuleius, and ſome other Roman authors, affirm to have been a noted magician, who uſed magical arts in the buying and ſelling of corns. This crime was committed, either by landholders who refuſed to ſell the produce of their land at a juſt price; or by merchants who bought up great quantities of corn, in the view of again ſelling it at a higher price, when the crop ſhould be more ſcanty. The richer ſort of theſe offenders were puniſhed *relegatione*; and the poorer were condemned to the public works, *l.* 6. *pr. De extraord. crim.* It gets the name of *foreſtalling* or *regrating* in our law, and ſeveral ſtatutes have been made to puniſh it, 1535, *c.* 21.; 1540, *c.* 98. and 113.; 1579, *c.* 88.: but as theſe acts did neither ſufficiently deſcribe the facts from which that crime was to be inferred, nor impoſed any higher puniſhment on it, than the eſcheat of the goods that were bought or ſold contrary to the directions of the law, it was enacted, by 1592, *c.* 148. That whoever bought any corn or merchandiſe that was coming to any market or fair to be there ſold, or made any contract for it, before the ſaid merchandiſe ſhould be in that market, or ſhould attempt to raiſe the price thereof, or diſſuade any perſon from bringing ſuch merchandiſe to the market, ſhould be adjudged a foreſtaller; and that whoever got into his poſſeſſion in a market, corns, fleſh, fiſh, or other vivres, brought thither to be ſold, and ſold the ſame at any market, either holden in the ſame place, or within four miles of it, or who got into his poſſeſſion the growing corn on the field, by ſale, contract, or promiſe, ſhould be reputed a regrater. The ſtatute declares, that a general indictment againſt the pannel, that he is guilty of foreſtalling or regrating, ſhall be held ſufficient, without any ſpecial adjection of time or place, when or where the crime was committed; and that the offender ſhall, for the firſt offence, be fined in forty pounds Scots; for the ſecond, in one hundred merks; and for the third, ſhall ſuffer the eſcheat of his moveables. Mackenzie, *Crim. part* 1. *t.* 23. § 7. obſerves, that though two or three inſtances appear in the books of adjournal, of perſons convicted of this crime, yet no puniſhment followed upon it, and thence concludes for a puniſhment gentler than the ſtatutory: but few who have duly reflected on the enormity of this crime, and its miſchievous conſequences to the commonwealth, will be forward to condemn the legiſlature for the ſeverity of the penalties inflicted on it by this ſtatute. Where one buys goods that are carrying for ſale to a public market for his own private uſe, he commits no crime: for the ſale of goods to a private buyer can have no tendency to enhance the price of them, and the buyer can have no ſiniſter intention to hurt the community, which yet is eſſential towards conſtituting the crime.

39. Several acts have been paſſed for reſtraining idleneſs, and puniſhing ſturdy beggars and vagabonds. All between the ages of fourteen and ſeventy, who begged without a badge or teſtimonial given them by the magiſtrate, were, by 1424, *c.* 42. to be burnt on the cheek, and baniſhed: and

and by 1535, *c.* 22. none were permitted to beg in any other pariſh than that of their birth, under the pains of the act 1424. Vagabonds who ſhall be found begging contrary to the proviſions in the foreſaid acts, are to be impriſoned by the judge-ordinary, and put in the ſtocks or irons till their trial: upon conviction, they are to be ſcourged, and burnt on the ear; and upon a repetition of the crime, to ſuffer death, by 1579, *c.* 74. Under the deſcription of vagabonds in this act, are expreſsly included all who go about pretending to foretell fortunes, and playing at ſubtle and unlawful plays, as jugglery, &c.; all who give no good account how they can lawfully earn their bread, or who, though they be able-bodied, are idle, ſhunning labour; all minſtrels, not in the ſervice of ſome lord of parliament, or borough; all who uſe forged licences to beg, or who, without ſufficient teſtimonials, alledge that they have been ſhipwrecked, burnt out of their houſes, or herried. The execution of the laſt-cited act is, by two poſterior ſtatutes, 1592, *c.* 147. and 1597, *c.* 268. intruſted to magiſtrates of boroughs, and ſheriffs: and if they ſhould be remiſs, power is given to the kirk-ſeſſion of every pariſh to appoint commiſſioners, who may hold courts within their bounds, and try the offenders. Theſe, and many other acts againſt vagrants and ſturdy beggars, are ratified by 1698, *c.* 21.

39. There are many ſlighter offences againſt the penal laws, relating to the peace of the country, which being rather treſpaſſes than crimes, and generally puniſhed by the judge-ordinary with a ſmall pecuniary fine, are ſeldom or never proſecuted by the intervention of juries, according to the forms of a proper criminal trial. Of this ſort are the breaking down or endamaging incloſures, either by one's ſelf or his cattle, 1661, *c.* 41.; 1685, *c.* 39.; 1686, *c.* 11.; the deſtroying or ſpoiling of growing timber, 1698, *c.* 16.; 1° *Geo. I. St.* 2. *c.* 48.; offences againſt the acts for preſerving the game, *ſupr. b.* 2. *t.* 6. § 6.; ſlaying ſalmon in forbidden time, 1503, *c.* 72.; deſtroying plough-graith in time of tillage, and ſlaying or houghing of oxen in time of harveſt, 1587, *c.* 82.; ſteeping lint in lochs or burns, 1606, *c.* 13.; 1685, *c.* 20.; or in moſs-holes, 13° *Geo. I. c.* 26. with ſeveral others of the like ſort.

40. Crimes againſt particular perſons may be directed, either againſt life, limb, chaſtity, goods, or character. Of the firſt kind, the chief is murder, which may be defined, The taking away of one's life deliberately and wilfully, without a neceſſary cauſe. Our moſt ancient laws diſtinguiſhed between ſlaughter committed in conſequence of a previous deſign, which was ſtyled *forethought felony*, and that which was executed on a ſudden, or *chaud mella*. The 9th ſtatute of Robert II. allowed the privilege of girth and ſanctuary to the laſt, but no indulgence was given to murderers on a premeditated deſign. This diſtinction continued in force down to the reign of Q. Mary, 1425, *c.* 51.; 1535, *c.* 23.; 1555, *c.* 31.: but it was taken away, firſt, by an act during the uſurpation, *Feb.* 1649, *c.* 19.; and afterwards by 1661, *c.* 22. which takes for granted, or aſſumes, that intended homicide is, in the general caſe, a capital crime, without diſtinguiſhing whether the intention to kill was formed antecedently to the encounter, or not conceived till the inſtant before ſtriking the blow. This appears to be conſiſtent with the law of Moſes, which appointed cities of refuge for him who killed his neighbour, where he did not lie in wait for him, but where God delivered him into his hands; *i. e.* where, without any criminal intention in the ſlayer, either previous to or concomitant with the ſlaughter, the providence of God made uſe of him as the inſtrument of the other's death, *Exod.* xxi. 13.

41. The act 1661 ſtatutes, That neither caſual homicide, nor homicide in ſelf-defence, ſhall be puniſhed capitally, but barely by an arbitrary puniſhment.

ment. It is certain, that homicide, if it be merely caſual, and committed without any degree of blame on the part of the agent, deſerves not the leaſt animadverſion: and, in the ſame manner, one who kills another in ſelf-defence, without carrying the meaſure of his defence beyond juſt bounds, or, in the Roman ſtyle, without exceeding the *moderamen inculpatæ tutelæ*, is in no reſpect the object of puniſhment. Where therefore the legiſlature intruſts the judge with a power of inflicting an arbitrary puniſhment on caſual homicide, and on homicide in ſelf-defence, that ſort muſt be underſtood where the agent was in ſome degree blameable. The ſlaughter of night-thieves and houſe-breakers, being a neceſſary act done in ſelf-defence, is accounted lawful by the ſtatute; and that likewiſe which is committed againſt ſuch as aſſiſt in, or defend maſterful depredations, or in purſuit of rebels denounced for capital crimes. But this laſt clauſe is not to be ſo explained, as if private perſons were thereby impowered to purſue and put to death declared rebels by their own authority; it is to be confined to ſuch officers of the law as purſue them upon a proper warrant.

42. Dole is preſumed merely from the act of killing, otherwiſe no perſon could be convicted of murder; yet this preſumption may be excluded by ſpecial circumſtances. Thus a blow ſtruck by a weapon which is not likely to draw death after it, takes off the preſumption of deadly malice, and conſequently has the effect of mitigating or reſtricting the puniſhment; agreeably to the Moſaical law, *Numb.* xxxv. 16. 17. 18. which pronounces him to be a murderer, who ſmites his neighbour with an inſtrument of iron, or with a ſtone, or an hand-weapon of wood, wherewith he may die, *i. e.* who ſtrikes with an inſtrument which may probably inflict a mortal wound. This defence, from the want of dole, becomes ſtronger in the ſpecial caſe of *homicidium in rixa*, or of ſlaughter committed in an accidental fray or ſudden tumult, where there is hardly room to ſuppoſe a malicious deſign previous to the fray. Yet where the blows or wounds have been given with a mortal weapon, or aimed even with a ſlighter one at the more tender parts, and repeated over and over by the ſtriker, law preſumes an intention in him, taken up at the time he ſtruck the blows, though the ſcuffle ſhould have been only caſual. Where a number of perſons have been engaged in the *homicidium in rixa*, and mortal wounds given, they who are proved to have given the wounds, are all of them liable to the pains of death, according to the known rule in crimes, that every one of many offenders is ſubject to the ſame puniſhment, as if there had been but one. But if no proof can be fixed againſt any one of them, they are all puniſhable at the diſcretion of the judge. It admits of no doubt, that where the homicide was committed, not *in rixa*, but upon malice prepenſe, or a preconceived intention, all of them are puniſhable as murderers, though no evidence ſhould be brought which of them gave the mortal wound.

43. It has been debated, whether it be truly murder, where the ſlayer appears to have had an intention to kill one perſon, but has killed another? The queſtion may perhaps be ſolved by the following diſtinction. If killing the perſon aimed at would have been no murder, the miſtake of killing another inſtead of him, cannot infer that crime, and muſt be conſidered as caſual homicide, being done without a criminal intention. But if it would have been murder to kill the perſon aimed at, it cannot even alleviate the pannel's guilt, that he murdered one perſon, when he truly intended to murder another.

44. Though an intention to kill ſhould appear, yet if the perſon wounded ſhall recover, the offender, though he has committed a crime which renders him obnoxious to puniſhment, is not a murderer; for towards conſtituting that crime, there muſt concur both an intention to kill, and the actual

tual fulfilling or executing of it. It is therefore a uſual defence in the trial of murder, that the wound given was not mortal; and that the death which afterwards enſued ought to be aſcribed to ſome other cauſe, ſuch as a ſupervening fever, or the bad management of the cure, ariſing either from the want of care in the patient, or unſkilfulneſs of the ſurgeon. That arbitrary deciſions on ſo important a point might be prevented, Mackenzie, in his *Crim. part* 1. *tit.* 11. § 10. approves of a general rule laid down by ſome doctors, *Gomeſ. Var. Reſ. l.* 3. *c.* 3. and *Zach. Queſt. Med. leg.* That wounds ought not to be preſumed mortal, if he who received them has lived forty days after. But this rule would in moſt caſes be too favourable for the pannel: the uſage of England ſeems better founded, by which one is preſumed to die of the wound, if he die within a year after receiving it, *Coke, p.* 53.

45. Aſſaſſination is an aggravated ſpecies of murder; which is committed, where the murderer or aſſaſſin kills, or ſo much as attempts to kill, for a hire in money, without the leaſt provocation, or cauſe of reſentment, given him by the perſon againſt whom the crime is directed. The capital puniſhment which is annexed to the bare endeavour or attempt to aſſaſſinate, though death ſhould not follow, was introduced by the Canon law, 6*to Decretal. l.* 5. *t.* 4. *c.* 1. § 2.: and the privilege of ſanctuary was refuſed to aſſaſſins, even in Popiſh countries, though it was indulged to common murderers, *Caball. h. t. num.* 501. 515. 526.

46. Self-murder, or ſuicide, though it was, in particular caſes, not only juſtified, but applauded by the Stoic philoſophers, is as truly criminal as the murder of one's neighbour. It is an high act of diſobedience to God, and of inſolent reſiſtance to his providence, to deſert the ſtation in which he hath placed us, either from impatience, or whatever other motive, till he himſelf ſhall think fit to call us off from it. Though the offender, by the commiſſion of this crime, withdraws himſelf from trial, and is no longer the object of puniſhment in his own perſon, the other legal penalties of murder take place by our uſage. As the ſingle eſcheat falls, upon a conviction that one has murdered his neighbour; ſo muſt the ſingle eſcheat of a ſelf-murderer fall, whereby his whole moveable eſtate that would otherwiſe have gone to his next of kin, accrues as eſcheat to the King, or his donatary. In order to aſcertain this right, the donatary muſt bring an action of declarator, to which the next of kin of the deceaſed muſt be made a party, for having the ſelf-murder declared. In this action the court of ſeſſion, not of juſticiary, are the proper judges; becauſe it is only purſued *ad civilem effectum*, to procure a confiſcation of moveables: and a proof of every fact material in the cauſe, though of its nature criminal, may be brought before them, *ratione incidentiæ*, becauſe ſuch proof is neceſſary for explicating their juriſdiction. The admitting this action of declarator into our law, has been cenſured by ſome lawyers, as being truly the authoriſing of a crime to be tried after the death of the criminal, to the detriment of his innocent next of kin. Mackenzie, *Crim. part* 1. *tit.* 13. § 3. gives his opinion, That one who hath attempted to put himſelf to death, though without effect, ought to be tried as a murderer. But this doctrine is not only rigorous, but appears ill-founded; for a ſimple attempt to kill is not accounted murder, except in the particular caſes of aſſaſſination, *ſupr.* § 45. and haimeſucken, *infr.* § 51.; and ſuicide, which is a ſpecies of murder, ought to be governed by the common rules of murder. Furioſity, when it amounts to a total alienation of mind, is a good defence againſt this action of declarator; for the perſon labouring under it hath no will, which nevertheleſs is a requiſite eſſential to all crimes.

47. Parricide, in the ſenſe of the law of Scotland, is the murder of any

parent in the direct line of aſcendants, male or female, however remote. Not only the perſon himſelf who is guilty of this crime, is, by 1594, *c.* 220. diſinherited, and declared incapable of ſucceeding to the parent's eſtate, but all his poſterity in the right line; and the ſucceſſion is declared to devolve on the next collateral heir. The motive to this extenſion againſt the innocent iſſue of the murderer, probably was an apprehenſion, leſt it might have proved an incentive to the commiſſion of the crime, if any of his deſcendents might have received benefit from it, by entering immediately upon a ſucceſſion, which perhaps would not otherwiſe have opened to them for many years. Tho' by the Roman law natural parents ſeemed to be included, in ſo far as they could be known with certainty, and even the murder of children by their parents, *l.* 1. *pr. Ad leg. Pomp. de par.*; *l. un. C. De his qui par. vel lib.* it is obvious, that in neither of theſe caſes is there place for the puniſhment inflicted by this ſtatute, of diſabling the poſterity of the parricide from inheriting the eſtate of the perſon murdered. Upon this head it may be obſerved, that our law hath inforced the duties of children to their parents ſo ſtrongly, that the curſing or beating of a parent infers death, if the guilty child be above ſixteen years of age; and an arbitrary puniſhment, if he be under it, 1661, *c.* 20.

48. Where certain facts which do not of their own nature conſtitute murder, are by ſtatute declared to be murder, the crime thence ariſing may be called *preſumptive* or *ſtatutory murder*. The importers of any kind of poiſon, by which bodily harm may be taken, are, over and above the pains of death, to forfeit lands and goods, by 1450, *c.* 30. & 31.: but theſe acts have been long quite in diſuſe; for poiſons of ſundry kinds have been for above a century imported without challenge, as drugs or medicines, by thoſe whoſe buſineſs it is to diſpenſe them. Another ſpecies of ſtatutory murder is conſtituted by 1690, *c.* 21. which enacts, That any woman who ſhall conceal her being with child during the whole time of her pregnancy, and ſhall not call for, or make uſe of help in the birth, is to be reputed the murderer, if the child be found dead or amiſſing. This act was intended, though with ſmall ſucceſs, to prevent, or at leaſt diſcourage, the unnatural practice of women making away with their children begotten in fornication, in order to avoid church-cenſures. The mother's concealment of her being with child, and her not calling for aſſiſtance in the birth, being negative propoſitions, prove themſelves, unleſs the pannel ſhall bring poſitive evidence that ſhe diſcovered her pregnancy, and called for help.

49. Duelling, *bellum inter duos*, is juſtly accounted a ſpecies of murder; and is the crime of fighting in ſingle combat, upon a previous challenge given by the one party, and accepted by the other. The firſt ſtatute making the ſingle combat a crime, is 1600, *c.* 12. in which may be perceived the laſt remains of our ancient law, explained above, *t.* 2. § 2. admitting the ſingular combat or duel as a method of proof, both in civil actions and criminal proſecutions; for in that ſtatute a power is reſerved to the ſovereign to authoriſe duels; which power was, without queſtion, intended to be exerciſed in thoſe doubtful accuſations, where it was thought that providence never failed to interpoſe in bringing the truth to light, and vindicating innocence. The crime of duelling is, by this ſtatute, made to conſiſt in the actual fighting with mortal weapons, though no ſlaughter ſhould enſue; for where the fighting is attended with ſlaughter, the crime is puniſhable capitally as murder, without borrowing aid from this ſtatute. The duel muſt be fought in conſequence of a previous challenge, either written or verbal, given and accepted, by which the preconceived purpoſe in both parties to fight may appear, otherwiſe the crime falls under the character of a rencounter, which is not puniſhed capitally, without actual ſlaughter.

Both

Both he who challenges, and he who is challenged to fight, are to ſuffer death by the ſtatute; but the provoker is to ſuffer a more ignominious one, at the pleaſure of the King. It is no good defence againſt a libel upon this act, that the pannel, though he went to the place appointed, refuſed to fight till he was attacked; for his going thither is to be conſidered as an acceptance of the challenge, and his refuſing to fight, only as a colour or pretext for a defence in the caſe of a trial. This act is ratified by 1696, *c.* 35. which provides farther, That what perſon ſoever, principal or ſecond, or other interpoſed perſon, gives a challenge to fight a duel or ſingle combat, or whoever accepts one, or engages therein, ſhall be puniſhed with baniſhment, and eſcheat of moveables, though there ſhould be no fighting in conſequence of the challenge. Every perſon falls within this act who carries a challenge, either by a letter or verbal meſſage; and ſuch as are barely preſent at a duel, appear to be comprehended under it, if their preſence has not been accidental; for thoſe who countenance the crime, though it ſhould be merely by their preſence, may be ſaid to be in ſome degree engaged therein, in the terms of the ſtatute.

50. The crimes directed againſt a man's limbs, or the other members of his body, without any intention of killing, are chiefly mutilation, demembration, and haimeſucken. Demembration, or the cutting off a member, ſeems to be declared a capital crime, by 1491, *c.* 28.; but its puniſhment has in practice been reſtricted to the forfeiture of moveables, and to an aſſythment, *i. e.* an indemnification to the party maimed for his damages: and Lord Pitmedden, in his treatiſe of demembration, § *ult.* mentions a letter from the King to his privy council, recorded in the Journal-book, *Sept.* 14. 1608, recommending to them to puniſh one guilty of demembration with baniſhment, in regard it was not uſual to inflict capital puniſhment upon the committers of that crime. Mutilation, or the diſabling of a member, is alſo, in the opinion of Mackenzie, a capital crime; but neither our ſtatute-law, nor practice, have made it ſo. By *Stat. Rob. II. c.* 11. he who mutilates or wounds another, was indeed to be puniſhed by the ſame form of proceſs that was uſed againſt a manſlayer: but his puniſhment was not to be capital; he was to redeem his life from the judge, and ſatisfy the party damnified; *i. e.* he was to purchaſe to himſelf an indemnity, by the payment of ſuch a ſum as the judge ſhould modify in name of damages.

51. Haimeſucken, from *haime*, home, and *ſoecken*, to purſue, is the crime of beating or aſſaulting a perſon within his own houſe. A man's houſe is conſidered as his ſanctuary; and for that reaſon the violence that is committed there, is deemed an aggravation of the crime, both by the Jewiſh law, 2 *Sam.* iv. 11. and by the Romans, *l.* 23. *De injur.* On this ground, the puniſhment of haimeſucken is, by the books of the Majeſty, declared to be the ſame as that of a rape, *l.* 4. *c.* 9. 10.; and the pains of death have been by our conſtant practice inflicted on the committers of it. To conſtitute this crime, the attack or aſſault upon the perſon injured, muſt be made in his own houſe where he reſides day and night, *Reg. Maj. l.* 4. *c.* 9. § 1. A public houſe, therefore, where one lodges as a paſſenger, or even a private houſe, where one is merely for a viſit, falls not under the appellation of a *houſe*, in the meaning of this law; nor a *ſhop*, unleſs it be part of the dwelling-houſe. But as a ſhip is the place of the maſter's proper reſidence, the beating of the maſter, or any of the crew in that ſhip, infers the crime of haimeſucken. This deſcription anſwers alſo to let rooms, where the lodger hath his conſtant reſidence for a certain period, though no part of the houſe ſhould be his property. Not only what is within the walls of a houſe, but what is within its precincts, is conſidered as part of the houſe,

or

or as an acceſſory; *ex. gr.* the garden, or the court before the houſe. The bare aiming a blow, or offering to ſtrike, though no blow be actually given, has been found ſufficient to infer this crime.

52. The crimes which are directed againſt our neighbour's chaſtity are chiefly four, adultery, bigamy, rape, and inceſt. Adultery is that crime by which the marriage-bed is polluted or corrupted. This crime could not be committed by the Roman law, except with a wife or married woman, *l.* 6. § 1. *Ad leg. Jul. de adult.*: for a married man, who is guilty with an unmarried woman, though he indeed violates his marriage-vows, does not adulterate any conjugal bed, which can only be done by the wife's admitting a ſtranger to it, and thereby obtruding a ſuppoſititious iſſue upon the huſband. Upon this ground, a difference is alſo made by the law of Moſes between the two, *Deut.* xxii. 22.; *Levit.* xx. 10.; where death is pronounced againſt him who pollutes the wife of another, without the leaſt mention of huſbands who ſhould violate unmarried women. Adultery is with reaſon extended, both by the Jewiſh law, *Deut.* xxii. 23. 24. and the Roman, *l.* 13. § 3. 8. *Ad leg. Jul. de adult.* to the violating of a bride, or eſpouſed virgin: becauſe, by the violation of the hope of a future marriage, a falſe heir may be as effectually impoſed on the huſband's family, as if ſhe had been actually married. By our law, adultery may be committed, if any of the two perſons guilty be married, either the man or the woman. The lying with a woman of an abandoned character was not accounted adultery by the Roman law, *l.* 22. *C. Ad leg. Jul. de adult.* as if ſuch a one were beneath the conſideration of the law: but the doctrine received with us, that criminal commerce with a married woman, though ſhe ſhould be a common proſtitute, infers that crime, ſeems more conſonant to principles; for a woman, till ſhe be divorced from her huſband on the head of adultery, continues a married perſon; and conſequently, whoever is guilty with her, adulterates the marriage-bed. A ſingle perſon who violates a married woman, not knowing, or having acceſs to know, of her marriage, commits without queſtion a crime, but not that of adultery; for his ignorance of her ſtate excludes dole.

53. We diſtinguiſh between ſimple and notour adultery. Notorious or open adulterers, who continue incorrigible, notwithſtanding the cenſures of the church, were puniſhed by 1551, *c.* 20. with the eſcheat of their moveables: but ſoon after, the puniſhment of notorious adultery was declared capital, by 1563, *c.* 74. The crime of adultery thus aggravated, is, by a poſterior ſtatute, 1581, *c.* 105. diſtinguiſhed by one or other of the following characters, viz. where iſſue is procreated between the adulterers; or where they keep bed and board together notoriouſly known; or where they give ſcandal to the church, and notwithſtanding its admonition, refuſe to abſtain, and are excommunicated for their obſtinacy. Mackenzie is of opinion, that this act does not exclude capital puniſhment, even in caſes not expreſſed in it, if they ſhall appear to the judge to be of as enormous a nature as thoſe that are mentioned: but this is rather to amend a law than to explain it. The puniſhment of ſimple adultery is no where defined by ſtatute, and is therefore left to the diſcretion of the judge; but uſage hath made the falling of the ſingle eſcheat to be one of its penalties, *arg. Jan.* 9. 1662, *Baird.*

54. The crime of bigamy conſiſts in one's entering into the engagements of a ſecond marriage, in violation of the duties he owes to his firſt wife, whoſe marriage is ſtill ſubſiſting: and it is not only an offence againſt chaſtity, but a ſpecies of perjury; for he who takes on him the ſecond marriage-vows, while under the impreſſions of an oath, counteracts his firſt engagement, and pretends to oblige himſelf by oath to duties, which by a former oath he had been rendered incapable of performing. Bigamy

is of two kinds; on the part of the man, and of the woman. When a woman marries, while a former marriage ſubſiſts, it is doubtleſs the moſt criminal of the two: for where the uſe of the ſame woman is common to two men, the iſſue of that promiſcuous conjunction cannot know their proper father, nor the father his child: this ſort has therefore been reprobated by the laws of all nations. The other kind, which is the relation of two or more wives to the ſame huſband, has been tolerated, both by the Jews and the Romans: but all bigamy is prohibited by the precepts of the goſpel; and it is puniſhed by our law, whether on the part of the man or of the woman, with the pains of perjury, by 1551, *c.* 19.

55. Rape, or the raviſhing of a woman, is a capital crime by the Roman law, *l. unic. C. De rapt. virg.*; but the ſpecial facts which conſtitute it are not there deſcribed. The text indeed ſeems to ſuppoſe, that the woman's body muſt be abuſed by the raviſher, in theſe words, *cum virginitas vel caſtitas corrupta reſtitui non poſſit:* but by the general opinion of civilians, founded perhaps on the proper ſignification of the word *raptus*, the crime conſiſts in the forcible carrying off or abduction of the woman's perſon, with a view to violate it, though there ſhould be no actual violation. In the books of the Majeſty, *l.* 4. *c.* 8. § 1. it is deſcribed to be the violent oppreſſion of a woman by a man, contrary to the King's peace; (the gloſs would have the reading to be *ſuppreſſion*, but the true reading appears to be *compreſſion*, the proper Latin term for deflowering); and § 9. of the aforeſaid paſſage of the Majeſty ſeems to require, that the woman be *fœdata*, or *polluta:* Mackenzie is therefore of opinion, *Crim. part* 1. *tit.* 16. § 4. that by the law of Scotland, the puniſhment of rape ought not to be inflicted, unleſs where the abduction hath had its full effect. There is no explicit ſtatute making this crime capital: but it is plainly ſuppoſed by 1612, *c.* 4. by which the only defence competent to the raviſher, ſufficient to exempt him from the pains of death, is declared to be, the woman's giving her ſubſequent conſent, or granting a declaration that ſhe went off with him of her own free will; and even in that caſe he is ſubject to an arbitrary puniſhment, either by impriſonment, confiſcation of goods, or a pecuniary fine. The aggravating circumſtance, which raiſes up the violence attending this crime to a capital puniſhment, is, that a woman is thereby robbed of that which of all things ſhe is preſumed to value moſt, her chaſtity and reputation. Rape therefore cannot be committed on common proſtitutes, who have already loſt both, conformably to the Roman law, *d. l. unic. C.*; by which no rape was puniſhed with death, except upon maids of a fair character, and widows.

56. Inceſt, from *incaſtus*, impure, may be defined, An unnatural commixtion of the bodies of man and woman, contrary to the reverence due to blood. Inceſt could not be committed by the law of Moſes, but by thoſe who ſtood within the degrees either of conſanguinity or affinity, in which marriage was forbidden, *Lev.* xviii. 7.—16.; and it was puniſhed capitally, *ibid. verſ.* 29. This law hath been adopted by us in all reſpects, by 1567, *c.* 14. And though an act was paſſed during the Uſurpation, *July* 1649, *c.* 16. which extended the former to certain degrees more remote, it was repealed by the act reſciſſory of Charles II. and never revived. It hath been maintained, that the commixtion of brothers with ſiſters cannot be adverſary to any law of nature; for that God would not, in the firſt propagation of mankind, have made any conjunction neceſſary which implied a crime: but though Providence impoſed this neceſſity upon the immediate deſcendents of our firſt parents, by creating only one man and one woman, perhaps with a view to unite the more firmly together in affection and good-will all the poſterity of Adam, as ſpringing from the ſame common ſtock; yet after that conjunction became no longer neceſſary for the propagation of mankind,

kind, we find an univerſal abhorrence of it in the minds of men; not philoſophers only, but orators, poets, and lawyers; and in the ſacred writings it is repreſented as a groſs wickedneſs, *Levit.* xx. 17.; *Deut.* xxvii. 22.; and as one of the abominations for which the Canaanites were to be driven out of their land. As this crime is repugnant to nature itſelf, it appears to be an ill-founded opinion, that it cannot be committed but between perſons born in lawful marriage; for though natural children are not intitled to the legal advantages which poſitive inſtitutions have conferred on lawful children, yet in queſtions of the law of nature, all children, whether born in wedlock, or out of it, ſtand on an equal footing: *Civilis ratio civilia jura corrumpere poteſt, naturalia vero non utique.* It is indeed hard to prove any propinquity otherwiſe than by marriage; and where that cannot be proved, there can be no conviction of the crime. But, *firſt*, Natural propinquity admits the cleareſt of evidence when it is connected by the mother; *2dly*, Where a perſon has acknowledged one for his natural daughter, and is proved to have had criminal converſation with her afterwards, it would be no ſtretch to convict him of inceſt upon ſuch antecedent acknowledgement, to the effect at leaſt of inflicting on him a ſevere arbitrary puniſhment. The bare attempt to commit this crime is not puniſhable by our law as inceſt; for the words of the act 1567, *abuſes his body*, require the actual commiſſion of the crime.

57. As we have no ſtatute aſcertaining the puniſhment of the ſin of Sodom, or of beſtiality, the libel or indictment laid upon theſe crimes muſt be founded on the divine law, as it is declared in *Levit.* xx. The ordinary puniſhment of both is burning; and the ſentence generally expreſſes, that it ſhall be executed early in the morning.

58. Many are the crimes which are levelled againſt the property or goods of another. The moſt noted are, theft, falſehood, ſtellionate, uſury, and fraudulent bankruptcy. Theft is either committed in a hidden or concealed manner, which may be called *proper theft*, or is attended with violence. The firſt kind is defined by the Romans, A fraudulent and clandeſtine intermeddling with another man's property, without the conſent of the owner, with a view to make profit by it. This crime is confined to moveables; for immoveable ſubjects cannot be properly *contrectatæ*, or intermeddled with. One therefore who *mala fide* ſeizes the poſſeſſion of heritage belonging to another, is not a thief, but a predoneous poſſeſſor. The law of Moſes puniſhed ſundry kinds of aggravated theft capitally, as the ſtealing of men, *Deut.* xxiv. 7.; and of things ſacred, *Joſh.* vii. But in common theft the thief was only bound to reſtore at moſt five times the value, and in many caſes leſs, *Exod.* xxii. 1. *et ſeqq.* In like manner, the puniſhment of theft went no higher by the Roman law than the reſtitution either of the double, or the quadruple of the thing ſtolen, according as the *furtum* was *manifeſtum*, or *nec manifeſtum:* but the ſtealing of men, the embezzling of the public money, the driving away of cattle, and theft attended with any degree of violence, were puniſhed with death.

59. Our ancient law, *Leg. Burg. c.* 121. proportioned the degrees of puniſhment for theft to the value of the thing ſtolen, riſing gradually, from ſcourging to the loſs of an ear, from that to the loſs of both ears, till at laſt the crime was made capital, in caſe the goods ſtolen amounted in value to thirty-two pennies Scots, which, in the reign of David I. when the borough-laws were enacted, and the books of the Majeſty compoſed, was equal to the price of two ſheep, *Reg. Maj. l.* 4. *c.* 16. § 3. Agreeably to this doctrine, the ſtealing of trifles, which in our law-language is ſtyled *pickery*, has never been puniſhed by the uſage of Scotland, but with impriſonment, ſcourging, or other corporal puniſhment, unleſs where it was attended

attended with aggravating circumſtances. The breaking of yards and orchards, and the ſtealing of green wood, are puniſhable barely by a pecuniary fine, which riſes in proportion as the crime is repeated; but where the ſubject ſtolen is more valuable, many of our ſtatutes have aſſumed it for the law of Scotland, that the theft is to be puniſhed capitally, 1579, *c.* 74.; 1587, *c.* 82.; 1606, *c.* 5. It muſt be admitted, that the loſs of life is much too ſevere a puniſhment for the loſs of our goods; but that crime, from its frequency and impunity, wrought ſuch miſchief and diſorders in the ſtate, and rendered property ſo precarious, that the heavieſt penalties were found neceſſary to ſuppreſs it.

60. The taking of meat, or other neceſſaries, without conſent of the proprietor, to ſatisfy hunger or preſerve life, is not in any degree criminal, according to Grotius, *De jur. bell. l.* 2. *c.* 2. § 6. *verſ.* 2.; becauſe every indigent perſon hath, from the law of neceſſity, a perfect right to uſe whatever is requiſite for the ſubſiſtence of life, as if it were common. Puffendorf admits only, in that caſe, of an imperfect right founded in humanity, *l.* 2. *c.* 6. § 5. *et ſeqq.* And this laſt opinion nearly coincides, not only with the Roman law, *arg. l.* 39. *De furt.* but with the laws of the Majeſty, *l.* 4. *c.* 16. § 1. where it is affirmed, that the carrying off as much meat as one can carry on his back, is not triable as theft.

61. Theft, even of ſmaller things, may be ſo aggravated as to render the puniſhment capital. Thoſe aggravations ariſe, *firſt*, From the frequent repetition of the crime. Thus a thief who had been twice convicted before, ſuffered by our ancient law a more ſevere puniſhment than was inflicted on ſimple theft, *Leg. Burg. c.* 21.; and is, by our preſent practice, puniſhable with death for the third theft. *2dly*, From the offender's condition or ſtation in life. Thus theft committed by a landed man was by our old law puniſhed as treaſon, *ſupr.* § 20. and ſtill continues, by 7° *Ann. c.* 21. to be puniſhed with death. This circumſtance aggravates the theft; becauſe men of eſtates are farther removed from ſuſpicion, and their greater fortune and intereſt flatter them more with the hopes of eſcaping from juſtice. *3dly*, Theft is aggravated from the nature of the thing ſtolen, or the place from which it was carried off. Upon this head, Mackenzie affirms, *Crim. part* 1. *tit.* 19. § 11. that not only ſacrilege, *i. e.* the theft of things ſet apart for ſacred or public uſes, but the ſtealing any thing, even of common uſe, out of a church, is puniſhed capitally. *4thly*, Theft may be aggravated from the time of committing it. Thus the maſter of an houſe may, by our law, put a thief to death who ſteals in the night, even *brevi manu*; for this is plainly taken for granted in 1661, *c.* 22. The inſtruments uſed in perpetrating the theft may be alſo conſidered as an aggravation of it, as if it was committed by the means of falſe keys, *Mack. ibid.* § 13.

62. Certain facts, though they fall not under the deſcription of proper theft, are by ſtatute declared to be puniſhable as theft, and are therefore ſometimes ſtyled *ſtatutory theft*. Thus, houghers of oxen or of horſes in the time of carrying the corns to the barn-yard, deſtroyers of ploughs or plough-graith in the time of tillage, the cutters of growing trees and of corns, 1587, *c.* 82. and the ſlayers of ſalmon in forbidden time, are to underlie the pains of theft and death, 1606, *c.* 5. Colliers who deſert their maſters ſervice, are alſo to be held and reputed as thieves, by 1606, *c.* 11.; but by the words of the act immediately following, the puniſhment of theſe laſt is declared to be ſimply corporal.

63. The crime of reſet of theft conſiſts either in harbouring the perſon of the thief after the goods are ſtolen, or in receiving or diſpoſing of the goods. They who barely conceal or harbour the criminal, (who are properly the *receptatores* of the Roman law), cannot be ſaid to be partakers of the

the crime itſelf, more than the concealer of a murderer can be ſaid to be art and part of the murder: but as the crime of theft, which was formerly committed with great licentiouſneſs and frequency in the more remote parts of Scotland, received too much encouragement from the criminal's hopes of being concealed or ſcreened from juſtice, it was enacted, by 1567, *c.* 21. that whoever harboured or maintained a thief, within forty-eight hours either before or after committing the theft, ſhould be tried as partaker of the crime. Thoſe who receive the ſtolen goods, knowing them to be ſuch, are in a proper ſenſe acceſſory to the crime, and therefore were to ſuffer as thieves, by *Stat. Alex. II. c.* 21. Such as ſell goods belonging either to thieves, or to other lawleſs perſons who dare not themſelves appear at a public market, may be juſtly conſidered, not only as reſetters of the goods, if they were ſtolen, but as concealers of the thieves or other offenders from juſtice, and are therefore puniſhed with baniſhment, and the eſcheat of moveables, 1587, *c.* 109. In aggravated theft, *ex. gr.* in theft committed by a landed man, or by any man who had been twice before convicted of that crime, which two kinds are puniſhable by death, the reſetter's puniſhment does not riſe with that of the principal offender, becauſe theſe aggravations are perſonal to the thief himſelf. On the contrary, if the reſetter ſhould be a landed man, or if he ſhould have been before found twice guilty of theft, or of the reſet of theft, the reſetter would ſuffer death, tho' the principal thief ſhould have no land-eſtate, or ſhould have committed no former theft; for ſince theſe circumſtances affect the reſetter, it is againſt him whoſe crime is thus aggravated, and him alone, that they ought to have any operation.

64. Robbery is truly a ſpecies of theft; for both are committed on the property of another, and with the ſame view of getting gain: but robbery is aggravated by the violence with which it is attended. It is in our old ſtatutes called *rief*, 1477, *c.* 78. or *ſtouth-rief*, 1515, *c.* 2. from *ſtouth*, or *ſtealth*, and *rief*, the carrying off by force; and it is in all caſes puniſhed capitally. The crime became at laſt ſo frequent, and was committed ſo audaciouſly by whole bands of men aſſociated together, that it was judged neceſſary at that time to veſt all the freeholders of the kingdom with a power of holding courts for their trial, and executing them to the death, 1594, *c.* 227. Nay, the law puniſhed with death ſuch as, under the pretence of ſecuring their lands againſt the rievers, paid to them a yearly contribution in money, which got the name of *black-mail*, 1567, *c.* 21.; 1587, *c.* 102.; the reaſon of which ſevere enactment was probably the obſerving, that a great addition was made to the weight and authority of thoſe public ſpoilers, by exacting and receiving tribute-money from ſo many perſons of influence, and perhaps a ſuſpicion that ſeveral of the gentlemen who ſubjected themſelves to that tax, were ſecret abettors of the depredations, and ſharers in the unlawful ſpoils. Under this kind of theft may be comprehended herſhip, or the maſterful driving off of cattle from the proprietor's grounds; and ſorning, which is the taking meat or drink from others by force or menaces, without paying for it. An act was paſſed, 1609, *c.* 13. commanding to baniſhment ſuch ſorners as were known by the name of *Egyptians*, or *gypſies*, and adjudging to death all who ſhould be habite and reputed Egyptians, if they ſhould be afterwards found within the kingdom. It appears by ſome ordinances made about the middle of the 16th century, preſerved in our public records, that thoſe gypſies were originally from Egypt, a band of whom applied to our ſovereign for licence to come to this kingdom, probably under the colour of introducing ſome art which might tend to the public intereſt, and that for ſome time after their arrival they lived peaceably, under the protection of our laws; but having at laſt become notorious robbers

robbers, and public nuiſances, it was thought neceſſary to expel them from this country. That act is ſtill in force; but the pannels are allowed to bring witneſſes to their character, that the jury may be the better able to judge whether they fall under the deſcription of the ſtatute.

65. Piracy is that particular kind of robbery which is committed on the ſeas. It is declared by 18° *Geo. II. c.* 30. to be piracy for a natural-born ſubject to commit any act of hoſtility againſt his Majeſty's ſubjects, under the colour of a commiſſion from any of his enemies; and by 8° *Geo. I. c.* 24. made perpetual by 2° *Geo. II. c.* 28. § 7. any perſon who ſhall trade with a pirate, or furniſh him with proviſions, or ſhall fit out a ſhip knowingly for that purpoſe, or any perſon belonging to a ſhip, who ſhall, upon meeting with a merchant-ſhip, either on the ſeas, or in port, forcibly enter her, or ſhall throw overboard or deſtroy any of the goods, ſhall be puniſhed as a pirate. This crime is capital, and is triable before the high court of admiralty; and the ſentences pronounced by the judge in ſuch trials, are generally executed within the flood-mark.

66. The crime of falſehood may be defined with Mackenzie, *Crim. tr. part* 1. *tit.* 27. *pr.* A fraudulent imitation or ſuppreſſion of truth, to the prejudice of another. In order to conſtitute this crime, ſomething that is falſe muſt be ſubſtituted in the place of ſomething true, to make it paſs for true. The groſſer kinds of falſehood were by the Roman law puniſhed with the loſs of life, *l.* 1. 22. *C. Ad leg. Corn. de falſis*; the leſs heinous were puniſhed *extra ordinem*, at the diſcretion of the judge, *l.* 31. *ff. eod. tit.* Nay, the ſame ſpecific crime, the uſing of falſe weights, which was frequently practiſed by the Dardanarii, is declared puniſhable in one text of the Pandects arbitrarily; and in another, the offender is ſubjected to the pains of the *lex Cornelia*, *l.* 6. § 1. *De extr. crim. i. e.* to the loſs of citizenſhip, which the Romans accounted a capital puniſhment. By our ancient law, the lives and goods of thoſe who were convicted of uſing falſe weights and meaſures, were put in the King's mercy, *Leg. Burg. c.* 74. and their heirs could not inherit, except upon a remiſſion, *ibid. c.* 132.; but the act 1607, *c.* 2. after eſtabliſhing an uniformity of weights and meaſures over the whole kingdom, declares the penalty of the crime to be the confiſcation of moveables.

67. Falſehood is moſt uſually committed by the imitating of the ſubſcription of another, and ſetting that falſe name or ſubſcription to a writing; which ſpecies of falſehood is, in our law, diſtinguiſhed by the name of *forgery*. Our ſtatutes have varied much with regard to the puniſhment to be inflicted on forgery, and have after all left it uncertain. The forging of a charter was by *Stat. Alex. II. c.* 19. puniſhed with the amputation of an hand. The act 1540, *c.* 80. does no more than refer the puniſhment of falſe notaries, and the uſers of falſe inſtruments, to the diſpoſition of the Civil and Canon laws, and of our own ſtatutes. Falſe notaries, and the falſifiers of writings, are, by 1551, *c.* 22. to be puniſhed with proſcription, baniſhment, diſmembering of the hand or tongue, joined with the other pains inflicted by the Common law: and our lateſt ſtatute relative to this head, 1621, *c.* 22. leaves the puniſhment indefinite, mentioning only in general terms the pains due to the committers of falſehood. Our uſage ſince that ſtatute hath been conformable to the Roman law; for groſs forgeries are puniſhed capitally, in conſideration of their miſchievous conſequences to ſociety. But where either the forgery is of writings of leſſer importance, *ex. gr.* of executions, *Act of ſederunt, Feb.* 23. 1739, or where the evidence of the crime, though it afford a moral conviction to the judge, is not ſo pregnant as to be the foundation of a capital puniſhment, the criminal eſcapes with an arbitrary one.

68. The reaſons have been already aſſigned, why the court of ſeſſion, though its juriſdiction be not properly criminal, is competent to the trial

of forgery, *ſupr. b.* 1. *t.* 3. § 21. Where improbation is moved againſt a deed by way of exception, even in an inferior court, the judge, before whom the action lies, has the cogniſance of the grounds of falſehood moved by the defender *ad civilem effectum*, in order to determine the legal effect of the deed, *arg.* 1557, *c.* 62.; but no inferior court is competent to a criminal trial for forgery. The method of proceeding in an action of improbation or forgery before the ſeſſion, is either ſummary, *per modum ſimplicis querelæ*, without any ſummons, or by a formal ſummons of improbation. The ſummary method is uſed, either, *firſt*, where the forgery hath been committed by a member of the college of juſtice: or, *2dly*, where the ſeal of the ſignet, or any part of a proceſs, is falſified *de recenti:* or, *3dly*, where the forger is already in cuſtody; but where he is not in cuſtody, an action of improbation muſt be brought, in which two terms are indulged to the defender, as in an action of reduction-improbation, of which *ſupr. t.* 1. § 21. By our more ancient practice, he who pleaded falſehood againſt a deed, whether by way of action or exception, was, by 1557, *c.* 62. ordained to give ſecurity for the payment of a ſum, to be fixed at the diſcretion of the judge, in caſe he ſhould be caſt in his plea; and by a poſterior act of ſederunt, *Jan.* 8. 1583-4, in place of giving ſecurity for the ſum modified, it behoved him to conſign it. Theſe acts appear to be now in diſuſe, where the improbation is purſued by way of action; but when it is moved by a defender *per modum exceptionis*, the judge, by our preſent uſage, decrees him to conſign the preciſe ſum of forty pound Scots, which he forfeits to his adverſary, if his allegation ſhall appear calumnious.

69. It is not the bare fabricating of a writing, or the being acceſſory to it, that conſtitutes forgery: if the writing be not alſo put to uſe, one of the eſſential characters of the crime is wanting, the bringing damage to another, or prejudicing his eſtate. A writing may be put to uſe, in any way which diſcovers an intention in the forger of drawing from thence ſome advantage to himſelf; as by producing it in judgement, either as a title to ſue, or as a defence for eliding the purſuer's libel, or by making it over to another. A party who, in any proceſs, founds upon a writing ſuſpected of forgery, may be compelled by the adverſe party to declare in judgement, whether he is willing to abide by it as a true deed. If he decline to abide by it, the deed is declared improbative or falſe; but he himſelf, notwithſtanding his paſſing from it, continues ſubject to the pains of falſehood, if poſitive evidence be brought of his acceſſion to the crime, *l.* 8. *C. Ad leg. Corn. de falſ.*; 1621, *c.* 22. If he in whoſe favour the falſe deed is granted, ſhall abide by it as genuine, he will be made liable as a forger, though there ſhould be no evidence brought that he knew the deed to be falſe. As it would be hard to fix this preſumption againſt an heir or ſingular ſucceſſor, as to deeds found in the charter-cheſt of his anceſtor, or which were aſſigned by himſelf to others, and thereby to reduce him to the ſevere alternative, either of loſing the benefit of thoſe deeds, or of being accounted the forger; if they ſhould be declared falſe, he was by our former practice allowed to abide by deeds *qualificatè*, or under proteſtation, that they came fairly into his hands, and that if they ſhould be pronounced falſe, he had no acceſſion to the crime; which quality had the effect of ſcreening him in all events from the penalties due to falſehood, unleſs a poſitive proof was brought that he was acceſſory to it: but as this indulgence gave too great encouragement to forgery, therefore, though the party be to this day allowed to adject to his declaration a proteſtation of his own innocence, the court need give no more weight to it than they ſhall judge proper.

70. The proof in trials of forgery, is either direct or indirect. The direct proof ariſes from the teſtimony of the writer, (where the deed was written

written by a third party), and of the inſtrumentary witneſſes. A proof after the indirect manner, is gathered from circumſtances and extrinſic arguments. As the direct manner affords a full and ſtrictly legal evidence, whereas in the indirect the proof is merely preſumptive, a rule has thence ariſen, which however is not always obſerved, That there is no place for the indirect, ſo long as the direct is in our power. In the direct manner of proof, if one of the two ſubſcribing witneſſes depoſe that the deed is true, and the other, that he did not atteſt it, the deed is to be declared void, being ſupported only by the teſtimony of a ſingle witneſs; but the uſer of the deed is not ſubjected to the pains of forgery, becauſe he is juſtified by the oath of that witneſs. Dead witneſſes, as Lord Stair expreſſes it, *b.* 4. *t.* 20. § 23. are preſumed to prove, *i. e.* the atteſtation of witneſſes to the granter's ſubſcription is, even after their death, admitted as preſumptive evidence in ſupport of the deed; from whence he infers, that two dead witneſſes are ſufficient to ſupport a writing, though there ſhould be a concurring teſtimony of living witneſſes who deny their ſubſcriptions. This, however, may be doubted: for the evidence ariſing from the dead witneſſes is only preſumptive; and conſequently where two witneſſes yet alive affirm peremptorily, that their ſubſcriptions were fabricated, ſuch poſitive teſtimony muſt prevail over the contrary preſumption.

71. The circumſtances by which forgeries are moſt frequently detected in the indirect manner, are a falſe date, *alibi*, and *comparatio literarum*. An error in the day, month, or year of ſigning, may proceed from mere inadvertency; and therefore hath little effect by itſelf, without the concurrence of other ſuſpicious circumſtances. In like manner, a proof of *alibi*, *i. e.* that the alledged granter was not, at ſigning of the deed, in the place where he is ſaid to have ſigned it, can infer no more with certainty, than that the date is erroneous; yet an *alibi* may be ſo connected with other circumſtances appearing in proof, as to afford evidence of the falſehood, not only of the date, but of the deed; *ex. gr.* if it be proved, that he who is ſaid to have ſubſcribed the deed, was out of the kingdom for that whole period of time that any of the inſtrumentary witneſſes were in a capacity to atteſt it. In a proof of improbation *comparatione literarum*, *i. e.* by comparing the hand-writing of the ſubſcriber, or of the writer of the deed, as it ſtands in other papers confeſſedly genuine, with that which appears in the deed under challenge, a diſtinction is juſtly made, whether the compariſon be made uſe of to prove, that the deed is of the hand-writing of a perſon, or only for negative evidence, that it is not of his hand-writing. The firſt ſort is extremely uncertain; for the hand-writing of two different perſons may, either from chance or ſtudied imitation, reſemble one another ſo nearly, that the one cannot, by the moſt accurate diſcerner, be diſtinguiſhed from the other. And hence it has been cenſured with too great reaſon, as a ſtretch in ſome former reigns, that perſons have been convicted of a traiterous correſpondence, upon no better evidence, than that treaſonable papers were preſumed to have been written by the pannel, *comparatione literarum*. But where this compariſon is made uſe of, merely as evidence that a deed is not of the hand-writing of this or the other particular perſon, it is held to be one of the ſtrongeſt proofs in the indirect way; for it ſeldom or never happens, that the ſame perſon's hand-writing ſhall at one time appear to have one particular turn or caſt, and at another time a quite different one, unleſs where he has before the laſt period been ſeized with ſome intervening infirmity. The ſtamp and contexture of the paper on which the deed is written, the manner of ſpelling, and the ſtyle of it, compared with thoſe of the age in which it is ſaid to have been executed, are alſo circumſtances of conſiderable weight in the trial of forgery.

72. Where

72. Where the puniſhment of forgery is to be carried no higher than an arbitrary one, the ſeſſion inflict it by their own authority. But where the crime deſerves death, the judges of that court, becauſe they cannot themſelves inflict a capital puniſhment, do no more than find the perſon accuſed guilty of falſehood, and thereupon remit him to the court of juſticiary. There an indictment is exhibited againſt him, a jury ſworn, and the decree of the ſeſſion produced in place of all other evidence. After this is read, the jury pronounce, by their verdict, the pannel guilty, *in reſpect of the decree of ſeſſion.* Theſe laſt words are inſerted in the verdict; becauſe, as the proof of the crime was taken in another court, the jury could not declare the pannel ſimply guilty, but only that he ſtands convicted by the ſentence of another court; and as that ſentence was pronounced by a court unqueſtionably competent, it is therefore conſidered as full evidence, not to be traverſed; or, in the ſtyle of the bar, as *probatio probata.*

73. It is, by 1681, *c.* 5. declared to be falſehood for a perſon to atteſt a deed, without either knowing the granter, and ſeeing him ſubſcribe, or at leaſt hearing him acknowledge his ſubſcription. The bad conſequences attending the practice condemned by this ſtatute, may perhaps juſtify the ſeverity of the enactment; but as the ſpecies of falſehood therein deſcribed is purely ſtatutory, and as its penalties are not fixed by that ſtatute, the court would doubtleſs reſtrict it to an arbitrary puniſhment, conformably both to the Roman law and ours, which puniſh falſehood, either more ſeverely, or more gently, according to the different aggravating or alleviating circumſtances of the caſe.

74. Perjury, which is the judicial affirmation of a falſehood upon oath, if we conſider its general nature, falls under the deſcription of *crimen falſi*; for he who is guilty of it does in the moſt ſolemn manner ſubſtitute falſehood in the place of truth. In order to conſtitute this crime, the violation of truth muſt be deliberately intended by the ſwearer; and therefore a reaſonable indulgence muſt be given to forgetfulneſs or miſapprehenſion, according to his age, health, or judgement, or according to the diſtance of time between the facts ſworn to and making oath. Yet where theſe facts appear evidently to fall under the deponent's knowledge, he cannot ſcreen himſelf from the pains of perjury, though he ſhould mince the matter, by ſwearing barely that he believes them to be true, if afterwards it ſhall appear they were falſe: and, on the other hand, when the points of the oath do not conſiſt *in facto proprio* of the ſwearer, the ſtrongeſt terms of affirmation, that the facts ſworn to are true, will not infer perjury, though they ſhould come out afterwards to be falſe; ſince all oaths concerning things of which we have no certain knowledge, are truly no more than oaths of credulity, in whatever form of words they may be conceived. One cannot be guilty of perjury, unleſs the falſehood be affirmed under the immediate impreſſions of an oath. Hence the breach of promiſſory oaths does not infer that crime; for the promiſer may have ſincerely intended performance when he depoſed, and, for that reaſon, cannot be ſaid to have called upon God to atteſt a falſehood; his crime ariſes from facts happening afterwards. Though an oath, however falſe, if made upon reference by the adverſe party in a civil action, puts an end to the ſuit; yet the perſon who hath forſworn himſelf is liable in a criminal proſecution: for the effect of the reference cannot reach beyond the private rights of the parties. As the law hath given to the concurring teſtimony of two unexceptionable witneſſes the ſame force as to that of twenty, the teſtimony of the greateſt number of witneſſes cannot be admitted for convicting two perſons of perjury, who in their oaths have agreed on the ſame facts: but a ſingle witneſs may be convicted

convicted of perjury by the teſtimony of two, becauſe a ſingle teſtimony makes no legal evidence.

75. As this crime implies, not only a daring defiance of the vengeance of Heaven, but a violation and diſſolving of the ſtrongeſt bond of human ſociety; and as our lives, fortunes, or reputations, depend on the reverence due to an oath, one might expect, that this aggravated falſehood would be puniſhed by the laws of all ſtates with the greateſt ſeverity. The Romans however contented themſelves with the ſlight puniſhment of a whipping for it, *l.* 13. *C. De teſtib.* Nor was it capital by the laws of any other country but the Jewiſh; which was governed, as to this crime, by the *lex talionis*, *i. e.* by inflicting the ſame penalties on the falſe ſwearer that his oath, had it been true, would have drawn upon his neighbour againſt whom he ſwore. If one therefore ſwore falſely that another was guilty of a capital crime, the ſwearer was himſelf puniſhed capitally, *Deut.* xix. 16. *et ſeqq.* By our ſtatutes, perjury is neither puniſhed capitally, nor quite arbitrarily, but by fixed ſtatutory pains. The lateſt ſtatute is 1555, *c.* 47. which declares it puniſhable, by the confiſcation of moveables, piercing the tongue, and infamy; to which the judge may add any other penalty that he ſhall think proper to inflict. This puniſhment agrees in its moſt material articles with the pains inflicted by our moſt ancient law upon thoſe who ſwore falſely upon an aſſize, *Reg. Maj. l.* 1. *c.* 14.; *i. e.* confiſcation of moveables and infamy. The court of ſeſſion is competent to perjury *incidenter*, when in any examination upon oath, taken in the courſe of a depending action, one appears to have ſworn falſely; but in every other caſe, the court of juſticiary have the ſole cogniſance of it. Subornation of perjury conſiſts in tampering with thoſe who are to ſwear in judgement, by ſoliciting or directing them how they are to depoſe, without regard to truth; and it is, by the aforeſaid act 1555, puniſhed with the pains of perjury.

76. Uſury, or, as it is called in our old ſtatutes, *oker*, a Saxon term of the ſame ſignification, retained in Holland to this day, is the taking of intereſt for the uſe of money contrary to law. This crime conſiſted, before the Reformation, in taking any intereſt for money; but now, in taking a higher rate of intereſt than is authoriſed by law. It is commonly divided into *uſura manifeſta*, or direct, and *uſura velata*, or covered. One may be guilty of direct uſury, not only where he ſtipulates to himſelf, by a clauſe in an obligation, a ſum above the lawful intereſt, but even where he takes intereſt before it becomes due, though it ſhould be no higher than that which the law warrants; *ex. gr.* where he accepts of a full year's intereſt before the year be elapſed; for in that caſe he takes more than he ought, becauſe he takes it ſooner; he receives a conſideration for the uſe of money before the debtor has got that uſe of it. To infer this ſpecies of uſury, it is enough that the creditor hath received the intereſt before the term, 1621, *c.* 28. It would afford no defence therefore that it had been voluntarily paid without any demand on the part of the creditor. Indeed the ſtatute was ſo conceived, on purpoſe to obviate the pretence of voluntary payment; ſee a deciſion, *Nov.* 28. 1668, obſerved by Mackenzie, *Crim. tr. part* 1. *tit.* 24. § 3. If however there was no uſurious intention in the receiver, *ubi aberat animus fœnerandi*, he ought not to be liable in the pains of uſury. Where a creditor's right to intereſt is clogged with an uncertain condition, by which he runs the hazard of loſing his whole debt, if the condition ſhould never exiſt, he may ſtipulate for himſelf an higher rate of intereſt than the legal, without the crime of uſury. In ſuch caſe, the intereſt is not given merely in conſideration of the uſe of the money, but of the riſk alſo which is undertaken by the creditor. Hence a lender of money upon bottomry, explained above, *b.* 3. *t.* 3. § 17. the repayment whereof depends on the ſafe return

of the ſhip on which it is lent, may lawfully take a rate of intereſt proportioned to the riſk, called in the Roman law *fœnus nauticum*.

77. Covered uſury is that which is committed under the appearance, not of a loan, but of ſome other lawful contract, *ex. gr.* a ſale, or an improper wadſet, in order to diſguiſe the criminal nature of the bargain. Thus a back-tack, which is given by a wadſetter to the reverſer for a yearly tack-duty exceeding the legal intereſt of the ſum lent, is declared uſurious, by 1597, *c.* 247.: becauſe though the bargain be covered under the maſk of a contract of wadſet, and of a leaſe of the wadſet-lands, yet it is truly the contract of loan; for the tack-duty payable by the reverſer can have no onerous cauſe, other than that it comes in place of the intereſt of the money borrowed, which, ſince it exceeds the legal intereſt, is uſurious. But this doctrine has no room in proper wadſets, where the wadſetter takes his hazard of the fruits, though the lands wadſet ſhould yield a rent higher than the intereſt of the wadſet-ſum; becauſe the wadſetter, in a proper wadſet, undertakes the hazard of the accidents which may diminiſh the rent; and the ſurplus rent, which exceeds that intereſt, is conſidered merely as an equivalent for the hazard which is run by the wadſetter. The aforeſaid act declares in general, that all obligations entered into with an intention of getting more than the legal intereſt for money, under whatever diſguiſe it may be concealed, ſhall be uſurious. It is in the ſame manner declared uſury, by 12° *Ann. ſeſſ.* 2. *c.* 16. to take more than the legal intereſt for the loan, or forbearance of payment of money, merchandiſe, or other commodities by way of loan, exchange, or any deceitful contrivance whatever, or to take any bribe for the loan of money, or for the delaying its payment when lent. On this laſt ſtatute, the ſeſſion declared void, as uſurious, the ſale of a South-ſea ſubſcription, whereof the current market-price was preciſely known every day in Exchange-alley, becauſe a price had been taken for it payable in a year, higher than a year's intereſt above what the ſubſcription was worth at the time of the ſale, *July* 1723, *Charteris* *; for what exceeded the year's intereſt, or the five *per cent.* was deemed to be exacted for the forbearance of payment. But it would be hard to extend this reaſoning to ſuch kinds of merchandiſe as differ widely in quality from one another, and ſo can have no known determinate value, as ſilks, cloths, &c.; for in theſe it is impoſſible to judge preciſely whether any thing, or how much, was intended to be taken for the forbearance of payment.

78. The puniſhment of uſury was, by 1597, *c.* 247. declared to be the eſcheat of moveables, the annulling of the uſurious contract, and forfeiture of the principal ſum lent, with the intereſt remaining due upon it, to the King, or his donatary, ſubject to the burden of reſtoring to the private party, in caſe he ſhould concur in the proſecution, the ſums paid by him exceeding the lawful intereſt; ſo that though the uſurious obligation was declared null, it was the King, not the private debtor, who availed himſelf of it. But by the above-quoted act of Q. Anne, it would ſeem that the nullity is declared in favour of the debtor; and the creditor, if he has received any unlawful profits, forfeits the treble value of the money or other ſubject lent. The penalties inflicted by the Britiſh ſtatute take place in all uſurious contracts poſterior to the date of that ſtatute; but where the contract had been entered into previouſly to the act of Q. Anne, the crime muſt be judged of by our former law. Uſury, where it is to be purſued criminally, muſt be tried by the juſticiary; but where the concluſion of the libel goes no farther than the annulling of the debt, and the reſtitution to the debtor of the unlawful profits paid by him to the creditor, the court of ſeſſion have a juriſdiction cumulative or concurrent with the juſticiary.

* This deciſion was reverſed upon appeal.

79. Stellionate,

79. Stellionate, from *ſtellio*, a ſerpent of the moſt crafty kind, *Plin. Hiſt. nat. l.* 30. *c.* 10. is a term uſed in the Roman law, to denote all ſuch crimes, where fraud or craft is an ingredient, as have no ſpecial name to diſtinguiſh them by. It is chiefly applied, both by the Roman law and that of Scotland, to conveyances of the ſame right granted by the proprietor to different diſponees, *l.* 3. § 1. *Stellion.*; 1592, *c.* 140. The puniſhment of ſtellionate, in the large acceptation of the word, muſt of neceſſity be arbitrary, in order to adapt it to the various natures and different aggravations of the fraudulent acts, *l.* 3. § 2. *ibid.* Thoſe who are guilty of that particular ſpecies of it which conſiſts in granting double conveyances, are by our ſtatutes declared infamous, and to be puniſhed in their perſons and goods at the King's pleaſure, 1540, *c.* 105. Fraudulent bankruptcy may be accounted a particular kind of ſtellionate, the cogniſance of which is, by ſpecial ſtatute, 1696, *c.* 5. appropriated to the ſeſſion, who may inflict any puniſhment on the offender that ſhall to them appear proportioned to his guilt, death excepted.

80. It has been ſaid, that crimes may be alſo aimed againſt one's good name and character. Though every wrong may in ſome ſenſe get the appellation of *injury*, yet the crime of injury, in a ſtrict acceptation, conſiſts in the reproaching or affronting our neighbour. Injuries are either verbal or real. A verbal injury, when directed againſt the King, is truly leaſing-making, of which *ſupr.* § 29. A verbal injury, when it is pointed againſt a private perſon, conſiſts in the uttering of contumelious words, which tend to vilify his character, or render it little or contemptible. As one may be ſenſibly hurt by reproachful words, though they ſhould have no tendency to blacken his moral character, ſarcaſtical nicknames and epithets, or other ſuch ſtrokes of ſatire, are accounted injurious: and even twitting one with the deformity of his perſon, or other natural defect, where it is accompanied with any ill-natured expreſſion that may place him in a ridiculous light; though it is agreed by all, that infirmities of that ſort imply no real reproach, either in themſelves, or in the juſt opinion of mankind. The *animus injuriandi*, which is of the eſſence of this crime, being an act of the mind, muſt be inferred from preſumptions; and, in general, it is preſumed from the injurious words themſelves, eſpecially where they are made uſe of to hurt one in his moral character, or to fix ſome particular guilt upon him; as if one ſhould give his neighbour the name of *thief*, *cheat*, *liar*, &c. This preſumption, however, may be either weakened or elided by ſpecial circumſtances. If, for inſtance, one in a paſſion ſhould utter ſome intemperate expreſſions againſt a perſon of whom he was never before heard to ſpeak diſreſpectfully, in his own preſence, and without repetition after the paſſion is over, a malicious intention to defame is hardly to be preſumed. In ſuch circumſtances the malice may be ſuppoſed to have ceaſed with the paſſion, and therefore either no puniſhment, or a leſſer degree of it, is inflicted. But where the injurious reflections are frequently repeated in private companies, or bandied about in whiſpers to confidents, the offence grows up to the crime of ſlander and defamation, agreeably to the text of the Roman law, *l.* 15. § 12. *De injur. Quod non in cœtu nec vociferatione dicitur, id infamandi cauſa dictum.* Where the words ſaid to be injurious are uttered in judgement, and appear to have had ſome foundation in fact, an intention to defame is not preſumed; for pleas urged in a court of law againſt the adverſe party, however ſeverely they may ſtrike againſt his good name, if they are not calumnious, are preſumed to be made in ſupport of one's cauſe. Thus alſo one's informing againſt his neighbour as a thief or diſorderly perſon, is preſumed to be done, not *animo defamandi*, but from an honeſt indignation againſt vice, and a juſt concern to preſerve the peace and

and order of the ſociety. Becauſe the intention of the defender cannot be always known with certainty, in the trial of this crime, doctors are generally of opinion, that his oath in ſupplement may, in doubtful caſes, be admitted towards his exculpation.

81. As to the judges who have the cogniſance of this crime, ſee *ſupr. b.* 1. *t.* 5. § 30. Verbal injuries are generally puniſhed by a pecuniary fine, to be aſcertained according to the different conditions of the injuring and injured, and the circumſtances of time and place, *l.* 7. § 8. *De injur.* If the offender be poor, the commiſſaries uſually ordain him to do penance, by making a public recantation in the church, or at the church-door; and ſometimes theſe two penalties of fine and penance are conjoined. One may call his neighbour a *bankrupt*, without reflecting either on his honour or moral character; for men of the greateſt honour and ſtricteſt honeſty may become bankrupts by unavoidable misfortunes: yet as ſuch an imputation may have the effect of ruining one's credit, and of courſe loſing the means of his ſubſiſtence, it founds him in an action of damages, which muſt be purſued, not before the commiſſary, but before the ſheriff, or other judge-ordinary. Real injuries are committed, by doing whatever may either hurt one's perſon, as giving him a blow; or may affect his honour or dignity, as the bare aiming of a blow without ſtriking; aſſuming a coat of arms, or any mark of diſtinction proper to another, ſpitting in his face, &c. This offence is alſo puniſhed arbitrarily by the judge-ordinary, according to the circumſtances attending it, either by fine or impriſonment. Scandal, reduced into writing, and publiſhed, may be conſidered rather as a real than a verbal injury; and becauſe it is of all others the moſt public and permanent, it ought to be puniſhed by the judge with greater ſeverity than the ſlighter injuries.

82. After having given a ſhort account of the different crimes puniſhable by our law, this treatiſe may be concluded with a few obſervations relating, *firſt*, to the perſons againſt whom a criminal accuſation can or cannot be brought; *2dly*, to the forms of proceeding in criminal trials; and, *3dly*, to the various methods by which crimes may be extinguiſhed. As to the *firſt*, Foreigners, who are reſiding here occaſionally, may be proſecuted criminally, on ſuch facts as reaſon itſelf may diſcover to be criminal; but it were hard to ſubject them to the ſtatutory puniſhment inflicted on offenders in points which are made criminal barely by ſtatute, unleſs they relate to trade, or to other articles which foreign merchants ought to be fully appriſed of before their entering into this kingdom, or ſending their goods hither. No criminal trial can proceed againſt thoſe who are incapable of making their defence. Hence, where a crime was committed by a minor, the proſecution of it was put off by the law of the Majeſty, *l.* 3. *c.* 32. § 15. upon his giving ſecurity to anſwer to the charge after majority, *l.* 2. *c.* 42. § 11.: but this indulgence to nonage was limited by the Roman law to ſuch minors as had no curators, *l.* 4. *C. De auct. præſt.* leſt the minor ſhould, from the forwardneſs or heat of youth, either ſpeak out, or conceal unſeaſonably, that which, if it had not been ſpoken or concealed, might have turned to his advantage. By our preſent practice, all minors, if they be old enough to be capable of dole, and conſequently of committing a crime, are alſo deemed qualified to defend themſelves in a criminal trial; which doctrine appears not only to be juſt in itſelf, but removes an inconveniency which attended our ancient law, that by waiting for the criminal's majority, the mean of proof frequently periſhed by the intermediate death of the witneſſes. One who hath committed a crime while in his ſenſes, cannot, if he ſhall afterwards become furious, be tried for it during his furioſity. The reaſons appear to be, *firſt*, That one who is either void of reaſon,

ſon, or does not enjoy the uſe of it, is incapable of correction, which is one of the great purpoſes of puniſhment: *2dly*, That ſuch perſon cannot poſſibly defend himſelf in a criminal trial, or even anſwer with judgement to that firſt queſtion which is put to all pannels, *Whether guilty, or not guilty?*

83. On the ſame ground, abſents, becauſe they are incapable of making a defence, cannot be proſecuted criminally. It was a rule long obſerved by the Romans, That neither criminal nor civil cauſes could be tried in abſence; and hence, when a defender would not voluntarily appear in judgement, the only remedy left to the purſuer was, to drag him by open force to the court, *obtorto collo*. With regard to crimes, their law continued the ſame to the laſt; for they thought it contrary to equity to bereave a perſon of his life unheard, even though he ſhould through wilfulneſs decline to appear. But in that caſe the judge might puniſh the contumacy by fine, *l.* 5. *pr. De pœn.*; *l.* 1. *pr. De req. vel abſ.* By the Engliſh law alſo, no trial of a criminal queſtion can be proſecuted in the defender's abſence; but if one accuſed of high treaſon ſhall not appear, after he has been called by a proper writ of exigent, he may be outlawed for contumacy; which outlawry ſubjects the party to the ſame puniſhment which is due to the crime itſelf, corruption of blood excepted. This rule of the Engliſh law in the caſe of treaſon, is alſo received in Scotland, with a ſmall variation, as a rule for all criminal trials: for if a criminal do not obey the citation given him to anſwer, the court cannot proceed againſt him upon the cauſe; they do no more than pronounce ſentence of fugitation, by which all his moveable eſtate falls as eſcheat to the crown. In the ſpecial crime of treaſon, the perſon accuſed might have been by our law, 1669, *c.* 11. tried and convicted of the crime, though he ſhould not have appeared. But that act was repealed by 1690, *c.* 31.: and now our law in that point is made the ſame with the Engliſh, by the foreſaid act 7° *Ann. c.* 21.

84. In explaining the forms of proceeding in the trial of crimes, we may begin with the crime of treaſon, in which the forms obſerved in England and in Scotland are now the ſame. Peers accuſed of treaſon, muſt be tried, either in parliament by the Houſe of Peers, or by a ſpecial court made up of the whole body of the Peers, of which one is named by the King for High Stewart, who is the judge, the reſt are conſidered as the jury. The court before whom commoners are to be tried in Scotland, is either the court of juſticiary, or a ſpecial court created by the King for that purpoſe, called, of *Oyer and Terminer*, that is, to hear and determine. In every commiſſion of Oyer and Terminer, three Lords of juſticiary muſt be named, one of whom muſt be of the quorum, ſaid act 7° *Ann.* The ſheriff ſummons to this court twenty-four men, of whom ſeventeen, nineteen, or twenty-one are ſworn, who are ſtyled, *the grand jury*. Before them all the bills of indictment muſt be exhibited which are laid againſt any perſon for treaſon. The jury take under conſideration the evidence offered in ſupport of the indictment: and if twelve or a greater number of them concur, in judging the evidence laid before them to be a ſufficient ground for a trial, the bill is returned to the court, with the words *billa vera* indorſed upon it; on which a warrant is directed to the ſheriff, to ſeize and impriſon the perſon preſented, in order to his trial: but if the jury be of opinion, that the evidence does not amount to a charge of high treaſon, they write on the back of the bill, *ignoramus*; upon which the court diſcharges the perſon charged without farther proceeding, and tears the bill, as not being a ſufficient foundation for a trial. In adopting this part of the Engliſh law, we have made a profitable exchange; for before the act 7° *Ann.* the King's Advocate might, by himſelf, have brought any perſon to a trial for treaſon.

He indeed took a previous precognition of the facts with which the party was charged, *i. e.* he examined thoſe who were preſent at the treaſonable act, on the ſpecial circumſtances attending it; and the Advocate was the ſole judge, whether theſe facts or circumſtances were truly ſufficient for ſupporting a criminal proſecution; whereas by the inſtitution of grand juries, the previous point, Whether the party preſented ought to be put to a trial? is not left to the diſcretion of a ſingle perſon, and of one too who is an officer of the crown, but muſt be determined by a jury of one's own countrymen. He againſt whom a bill of indictment is found, muſt, five days before his trial, be furniſhed with a liſt of the jury which is to be impannelled upon him, called *the petty jury*, or, *the jury of life and death*; and though twelve only are ſworn to be of the jury, the ſheriff returns ſixty or ſeventy, becauſe the priſoner has the privilege of challenging thirty-five of them, without aſſigning any ſpecial ground of challenge. After the witneſſes on both ſides are examined, and charges given to the jury, the jury are carried into a room by themſelves, where they are ſhut up, without meat, drink, or fire, till they be unanimouſly agreed in one verdict. Treaſon is triable in that county alone where it is committed; but, by 19° *Geo. II. c.* 9. all treaſon committed in the year 1745 might be tried in any county the King ſhould appoint; and by another temporary ſtatute, now expired, 21° *Geo. II. c.* 19. treaſon committed within certain counties of Scotland, might be tried by the court of juſticiary, where-ever it ſhould ſit. A particular account of the forms obſerved in trials upon treaſon, is given in a ſmall treatiſe publiſhed by the order of the Houſe of Peers in 1709. We now proceed to the forms of proceeding obſerved by the law of Scotland in the trial of other crimes.

85. No perſon can be impriſoned, in order to trial for any crime, without a warrant in writing, expreſſing the cauſe, and proceeding upon a ſigned information, 1701, *c.* 6. unleſs in the caſe of indignities done to judges, riots, and ſome other offences ſpecially mentioned in the ſtatute. Every priſoner committed to gaol in order to trial, if the crimes of which he is accuſed be not capital, is intitled to a releaſe upon bail, the extent of which is to be fixed by the judge. By the above act, it could not exceed ſix thouſand merks Scots for a nobleman, three thouſand for a landed gentleman, one thouſand for any other gentleman or burgeſs, and three hundred for any other perſon of inferior rank; but, by 11° *Geo. I. c.* 26. § 11. the judge may extend the bail to the double of thoſe ſums. That ſuch as, either from the nature of the crime with which they are charged, or from their low circumſtances, cannot procure bail, may not lie for ever in priſon untried, it is made lawful, by the foreſaid act 1701, to every ſuch priſoner to apply to the criminal judge, that his trial may be brought on without unneceſſary delays. Within twenty-four hours after ſuch application, that judge muſt iſſue letters directed to meſſengers, for intimating to the proſecutor, that he may fix a diet for the priſoner's trial within ſixty days after the intimation, under the pains of wrongous impriſonment. If the proſecutor do not inſiſt within that time, or if the trial be not finiſhed in forty days more, when proſecuted before the juſticiary, or in thirty, if carried on before any other judge, the priſoner is, upon a ſecond application, ſetting forth that the ſtatutory time is elapſed, intitled to his freedom, under the ſame penalty. This act, ſo favourable to perſonal liberty, in ſo far as it requires the carrying on and finiſhing the priſoner's trial within a preciſe time, is not applicable to trials upon forgery, when proſecuted before the ſeſſion by the indirect manner of proof, according to the rule, *Nunquam concluditur in falſo*; for the variety of circumſtances and facts that are frequently brought in evidence *hinc inde*, makes it impoſſible to limit ſuch trials in point

point of time, eſpecially in a court where the diets are not peremptory, and may in ſome caſes lengthen it out for months, or even years, beyond the time limited by the ſtatute, *New Coll.* i. 115.

86. Upon a perſon's committing any of the groſſer crimes, it is uſual for a juſtice of the peace, ſheriff, or other judge, to take a precognition of the facts explained *ſupr.* § 84. in order to know whether theſe facts be truly criminal, and to ſerve as a direction to the proſecutor how to lay his libel or indictment conformably to them; but thoſe who are examined in the precognition may inſiſt to have their declarations cancelled before they give teſtimony at the trial. Juſtices of the peace, magiſtrates of boroughs, and ſheriffs, are alſo authoriſed to receive informations concerning crimes to be tried before the circuit-courts; which informations are to be by them tranſmitted to the Juſtice-Clerk forty days before the ſitting of the reſpective courts. This method of taking up of dittay or indictments is ſubſtituted, by 8° *Ann. c.* 16. § 3. 4. in place of the old one, by the ſtreſs (*traiſtis*) and porteous rolls mentioned in 1487, *c.* 99.; ſee *Skene*, *De verb. ſign. v. Traiſtis.*

87. The form of trial in criminal queſtions differ much from thoſe which are obſerved in civil actions, if we except ſuch crimes as the court of ſeſſion is competent to, and the leſſer offences purſued before inferior courts. The trial of proper crimes by the court of juſticiary proceeds either on indictment, which method is generally obſerved where the accuſed perſon to be tried is in priſon, or upon criminal letters iſſuing from the ſignet of the court. In either caſe, the defender is intitled, when he is cited, to a full copy of the indictment or letters, together with a liſt of the witneſſes to be produced againſt him, and of the perſons who are to paſs upon the inqueſt, 1672, *c.* 16. § 11. *of that branch of the ſtatute which relates to the juſtice-court*; and fifteen days muſt intervene between the defender's being thus cited and the day of appearance. When the trial proceeds on criminal letters, the defender, if he be not already in priſon, is, by the letters, required to give ſecurity, that he ſhall make his appearance in court upon the day fixed for his trial; and if he gives none within the days of the charge, he may be denounced rebel, which infers the forfeiture of moveables. To ſecure perſons from groundleſs criminal proſecutions, where there is no real intention to inſiſt againſt them, the proſecutor muſt, at the iſſuing of the criminal letters, give ſecurity, according to his degree and quality, that he will report them to the court duly executed, 1535, *c.* 35. This obligation extended farther by our old law, *Mod. ten. cur. c.* 74.; *St. Rob. III. c.* 29. which laid the proſecutor under a neceſſity to make good his accuſation; and was at once more agreeable to the Roman law, and better adapted for preventing calumnious accuſations. As a farther diſcouragement to theſe, all proſecutors, where the pannel was abſolved, were condemned in coſts, modified by the judge, 1587, *c.* 87. and were, over and above, amerced in a fine of ten pound Scots, to be divided between the fiſk and the defender: and where the King's Advocate was the only proſecutor, his informer was burdened with the payment of it, 1579, *c.* 78. Theſe ſtatutes are juſtly conſidered as a ſufficient warrant for the preſent practice of condemning vexatious proſecutors in fines far exceeding the ſtatutory ſum.

88. Formerly accomplices in crimes, or aſſociates, were not cited in virtue of any ſpecial warrant contained in the criminal letters; their names were only inſerted in a bill or writing to which the letters referred; ſo that they might have been ſtruck out at the meſſenger's pleaſure. As meſſengers were frequently corrupted by money to abuſe the truſt thus committed to them, and ſuffer criminals to eſcape, all perſons to be cited muſt, by 1579, *c.* 76. be ſpecially mentioned in the body of the criminal letters.

89. That

89. That part of the indictment, or of the letters, which contains the ground of the charge againſt the defender, and the nature and degree of the puniſhment that he ought to ſuffer, is called *the libel*. All criminal libels muſt be ſpecial, ſetting forth the particular facts inferring the guilt, and the particular place where they were done or committed. The time of perpetrating the delict may be libelled in more general terms, with an alternative as to the day or the month, in the following words, *upon one or other of the days of one or other of the months ſpecially libelled:* but that the perſon accuſed may not be cut off from the defence of *alibi*, he will be allowed to prove, that upon ſuch particular days of the time libelled, he was not in that place where the crime is ſaid in the libel to have been committed; and ſuch proof will elide the force of the libel againſt him as to theſe ſpecial days. When one was accuſed, not as principal actor, but as guilty art and part of a crime, the ſpecial circumſtances inferring that concluſion ought alſo, by our former law, to have been libelled: but this opened a door to the eſcape of many acceſſories; for in moſt caſes it was impoſſible to know, before examining the witneſſes, the preciſe facts that were to come out upon the proof; and though the cleareſt evidence of circumſtances ſufficient to infer art and part ſhould have been brought, yet the acceſſory fell to be abſolved, if that evidence did not preciſely tally with the facts laid in the libel. It was therefore declared ſufficient, if the libel mentioned in general, that the perſons libelled were guilty art and part, 1592, *c.* 151. By our moſt ancient uſage, *Reg. Maj. l.* 4. *c.* 26. § 4.; *St. Dav. II. c.* 29. the principal criminal was to be tried before the acceſſories; both becauſe it is in the nature of that which is acceſſory to follow after that which is principal, and becauſe, if accomplices could have been tried firſt, it might happen that defences known only to the actor could be neither pleaded nor proved. It may therefore be concluded, that this continues to be our law, notwithſtanding the ſtatute 1592; for though that act has declared all libels relevant which bear art and part, without the neceſſity of ſetting forth ſpecial facts, yet it does not repeal, either in words or intendment, our former law, as to the order of time required in the trial of acceſſories *. The acceſſory is ſuppoſed by the ſtatute to be brought to his trial agreeably to our former cuſtoms: all that it enacts is, that in ſuch caſe it is not neceſſary to libel the ſpecial circumſtances of acceſſion.

90. In civil actions, as the ſummons bears continuation of days, the judge may continue his courts from the day of appearance to a more diſtant one. In the criminal court of juſticiary, the diets of appearance are peremptory; ſo that if the criminal letters be not called on the very day to which the defender is cited, their effect is loſt, *inſtantia perit*, 1587, *c.* 79. But as the right itſelf of proſecuting continues, the proſecutor may inſtantly raiſe new criminal letters, or a new indictment. If the proſecutor ſhall either not appear on that day, or not inſiſt, or if any of the executions appear informal, the court deſerts the diet, by which the inſtance alſo periſhes: but if he ſhall move for a delay upon the abſence of a neceſſary witneſs, or other reaſonable cauſe, the court may continue the diet to another day. It has been already obſerved, that a defender, in default of his appearance on the day to which he is cited, is declared a fugitive from the law, *ſupr.* § 83. The defender is, after his appearance, ſtyled *the pannel*. Letters of exculpation are granted of courſe, at the ſuit of the defender in a criminal trial, for citing witneſſes, in proof either of his defences againſt the libel, or of his objections againſt any of the jury or witneſſes, or of whatever elſe may tend to the clearing of his innocence; which letters muſt be executed to the ſame day of appearance as that in the indictment or criminal letters. Mackenzie, *Crim. tr. part* 2. *tit.* 22. § 2. affirms, that the de-

* See a contrary deciſion obſerved in *Mack. Crim. tr. part* 1. *tit.* 35. § 9.

fender

fender ought not to be admitted to prove defences grounded on facts directly contrary to the libel; becauſe the allowing a proof of facts inconſiſtent with one another, might prove a great occaſion of perjury. But it is a juſt rule, eſpecially in criminal trials, that *partes rei ſunt favorabiliores*; the pannel's right therefore to prove his defences ought to be at leaſt as ample as that of the proſecutor to prove his libel. Agreeably to this, exculpation is not by our preſent practice refuſed on any relevant defence, though it ſhould import a flat contradiction to the libel; and if the law ſtood otherwiſe, libels might be ſo laid as to deprive the pannel of every article of exculpation, let it be ever ſo ſufficient.

91. The two things to be chiefly regarded in a criminal libel are the relevancy of the facts libelled, *i. e.* their ſufficiency to infer the concluſion; and, *2dly*, their truth. The conſideration of the firſt belongs to the judges of the court; that of the other, to the inqueſt, otherwiſe called the jury or aſſize. In trials before the juſticiary, informations *hinc inde* on the relevancy, after hearing counſel on both ſides, were, by 1695, *c.* 4. directed to be exhibited to the court in writing: but by the late juriſdiction-act, 20° *Geo II. c.* 43. the pannnel is directed, the day before the trial, to exhibit in writing a ſtate of the facts, and ſubjoin thereto the heads of his defences; and after pleadings on the relevancy *viva voce*, and minutes thereof made up by the clerk, the court may forthwith pronounce their interlocutor; reſerving however a power to them, in caſes of difficulty, to direct informations, either on the relevancy of the libel, the import of a ſpecial verdict, the degree of puniſhment, or any other matter that may be alledged for the pannel in arreſt of judgement. The court, if they find the facts libelled not relevant to infer the crime, diſmiſs the pannel from the bar; if they judge them relevant, they remit the pannel to the knowledge of an inqueſt, in whoſe preſence the witneſſes produced on both ſides are examined by the court. By the ancient forms of the juſticiary, all criminal trials were adviſed with ſhut doors, as civil cauſes were by the court of ſeſſion; but by 1693, *c.* 27. they muſt be decided with open doors, except in adultery, rape, and the like crimes; as to which, the court have a power to continue the former practice: and it is obvious, that the method preſcribed by that act affords a greater ſecurity to the pannels againſt the malice of calumnious proſecutors than the former, as they were no longer precluded from an opportunity of ſetting the judges right in points of fact where they happened to be miſled by falſe informations.

92. The inqueſt have got that name, from their being appointed to inquire into the truth of the facts libelled; and they are ſtyled, *the jury*, *juratores*, becauſe they are ſworn to give their verdict according to truth. The word *aſſize*, from *aſſis*, ſettled or eſtabliſhed, hath different ſignifications. It ſometimes denotes the ſittings of a court, and ſometimes its regulations or ordinances, eſpecially thoſe which fix the ſtandard of weights and meaſures; but it is moſt frequently made uſe of to ſignify a jury, either becauſe juries conſiſted of a fixed determinate number, or becauſe it behoved them to continue ſitting, after they were once ſhut up, till they pronounced their verdict; ſee *Skene*, *v. Aſſiſa*; and hence a jury is commonly ſaid to ſit upon the pannel. A jury or aſſize conſiſts of fifteen ſworn men, picked out by the court from a greater number, not exceeding forty-five, 1579, *c.* 76.; 1587, *c.* 88. who have been ſummoned for that purpoſe by the ſheriff, and given in liſt to the defender, when a copy of the libel is ſerved upon him.

93. In the earlieſt feudal ages, all queſtions, civil as well as criminal, were decided by juries, conſiſting of the *pares curiæ:* but after the law had, by the daily emerging of new caſes, formed itſelf into an intricate ſcience, too

hard for perſons who had no acquired parts, judges were appointed for determining the greateſt part of civil cauſes, without the intervention of juries. In the courſe of time, the deciſion of ſlighter offences, or delicts by jury, was found burdenſome to the country, both in point of expence, and by the conſtant attendance of numbers of people at all ſeaſons, upon criminal courts, either as parties, witneſſes, or jurors, to the great detriment of agriculture and manufactures. Juſtices of the peace, therefore, were, by their firſt conſtitution, 1617, *c.* 8. § 6. impowered to try ſmaller breaches of the peace *de plano:* but it continued for ſome time a doubt, whether trials, even for leſſer offences, could be inſiſted in before other judges without a jury, in regard that the act conferred that power upon none but juſtices of the peace; ſee *Jan.* 30. 1622, *Stewart of the Merſe*; *Feb.* 13. 1634, *Baillie of Melroſs*. By our later practice on this head, all the *leviora delicta*, ſuch as injuries, petty riots, &c. which are proveable by the oath of the party, may be tried ſummarily by any inferior court; but to this day, all proſecutions upon crimes of a more miſchievous nature, whether tried by the ſupreme or by inferior criminal courts, muſt proceed by jury, in whoſe opinion, if the pannel ſtands clear, no ſtretches of law, or prepared evidence, can hurt him. And even where a ſlighter offence, if it were but a riot, is proſecuted before the juſticiary, where the forms of criminal trials are preſerved in their firſt purity, the pannel is remitted to the knowledge of an inqueſt. In the trial of crimes cogniſable by the ſeſſion, the judges may be properly enough conſidered in the characters both of court and of jury. Mackenzie, *Crim. tr. part* 2. *tit.* 23. § 4. diſapproves of this inſtitution of juries, becauſe it is hardly poſſible in many caſes to ſeparate the proof of facts from their relevancy, the laſt of which is frequently of too high a diſquiſition for ſuch as are not learned in the law: but no man's life or fortune ought to depend upon too refined reaſoning; and if diſcerning the nature of crimes be beyond the reach of juries, which are preſumed to conſiſt of men of common underſtanding; how can our criminal law be accounted a rule by which every artificer and farmer ought to ſquare his conduct?

94. Crimes cannot, like civil debts, be proved by the defender's oath; both becauſe the law ought to compel no perſon to condemn himſelf, and becauſe the ſevere penalties conſequent on one's being convicted of a crime, lays him under the ſtrongeſt temptations to perjury. This rule, *Nemo tenetur jurare in ſuam turpitudinem*, is not, however, applicable in ſlight offences, which are puniſhed only by a moderate fine, or a ſhort impriſonment; but is limited to the more flagitious crimes, where the life, limb, liberty, or eſtate of the criminal lies at ſtake, and to thoſe which infer infamy; becauſe a perſon's good name or character is, in right eſtimation, as valuable to him as his life. Sir George Mackenzie, after putting the caſe, that a criminal judge ſhall examine the pannel upon the proſecutor's reference to oath, and on his denying the crime, abſolve him, affirms, that that ſentence has not the effect of extinguiſhing the crime; becauſe a power in the proſecutor of referring a crime to the pannel's oath, imports a power of remitting it, which is a prerogative inſeparable from the crown. This aſſertion may perhaps be founded in law: but the caſe is not to be put; for the judge ought not to examine the pannel, even upon a reference by the proſecutor to his oath, otherwiſe the worſt of criminals, though the cleareſt evidence ſhould be brought of their guilt, might eſcape all puniſhment by ſuch colluſive reference.

95. Crimes, therefore, are in the general caſe proveable, either by writings, or by the defender's confeſſion, or by witneſſes. Proof by writing is ſeldom uſed, but in uſury, perjury, and forgery. As to this manner of proof, it is received as a rule, That *nemo tenetur edere inſtrumenta contra ſe*; no

no perſon can be compelled to exhibit in judgement, in any criminal trial which may affect his life, eſtate, or good name, any writings againſt himſelf. But it muſt be obſerved, that in uſury the law is forced to depart from ſome of its common rules to bring that ſhameful crime to light. Where therefore the uſury is grounded on a written obligation in the hands of the defender, the purſuer may, by an exhibition, compel him to produce it in court in evidence of his own guilt, contrary to the rule laſt mentioned; and where it is not grounded on a written deed, the crime may be proved by the uſurer's own oath, notwithſtanding the other rule, *Nemo tenetur jurare in ſuam turpitudinem*, 1600, *c.* 7. The obligation laid by this ſtatute on the uſurer himſelf to ſwear in this trial, has, from the parity of reaſon and analogy, been extended againſt the importers of Iriſh victual, *Jan.* 24. 1712, *Juſt. of Peace of Airſhire*. Though the written execution of a meſſenger who has been deforced, if it be not declared forged, is ſufficient evidence of the deforcement in all civil queſtions relating to the validity of the diligence; yet in a criminal trial proſecuted againſt the deforcers, the meſſenger's aſſertion is not received as evidence.

96. No extrajudicial confeſſion, unleſs it be adhered to by the pannel in preſence of the inqueſt, can be admitted as evidence. *Firſt*, Becauſe a party may be raſh in expreſſing inaccurately an acknowledgement made in a private way, not ſuſpecting that it is to be made uſe of to his prejudice: 2*dly*, Becauſe, by 1587, *c.* 90. all probation muſt be led in open court, in preſence of the inqueſt, which cannot be affirmed of private extrajudicial confeſſions. All qualities adjected by the pannel to his judicial confeſſion, ought to be received as part of it; ſo that the proſecutor who pleads upon one part, muſt admit the whole to be true; for the proof of crimes ought to carry the moſt forcible conviction with it, and it may be preſumed, that he who is ſo ingenuous as to confeſs any part of the facts libelled, would have confeſſed the whole, if they had been true. Torture was formerly accounted by us, as it is to this day by many other ſtates, a juſtifiable, as well as effectual, method of drawing truth from the pannel by his own confeſſion; but its effect depends almoſt entirely on the pannel's natural conſtitution. If he have an uncommon reſolution and firmneſs of mind, he will ſtand the torture, and perſiſt in his denial, though he be guilty; but if he be not poſſeſſed of a degree of fortitude beyond the common run of mankind, he will, though innocent, be ſoon brought to take upon himſelf the guilt he is charged with. Torture was therefore declared contrary to law by the claim of right in 1689; and by the aforeſaid 7° *Ann. c.* 21. § 5. no perſon accuſed of any crime can be put to torture.

97. All objections relevant againſt the competency of a witneſs in civil cauſes, are alſo relevant in criminal. No witneſs ought to be admitted who may gain or loſe by the event of the trial. Hence, in the crime of uſury, the teſtimony of the debtor who hath given the unlawful or uſurious profits, is rejected, becauſe he becomes a gainer by the conviction of the uſurer, 1600, *c.* 7. *Socii criminis*, or aſſociates in the ſame crime, are not admitted to bear teſtimony againſt one another; not ſo much becauſe they are accounted infamous, as becauſe they have an obvious intereſt in the event of the ſuit; for if the pannel be condemned, the other aſſociates may be afterwards proſecuted as guilty art and part of the ſame crime. But from this rule we muſt except, *firſt*, crimes committed againſt the ſtate, as treaſon: 2*dly*, occult crimes, where there is a penury of witneſſes, as forgery: 3*dly*, ſpecial crimes, which are made an exception from the rule by ſtatute or cuſtom. Thus *ſocii criminis* are, by 21° *Geo. II. c.* 34. admitted in the trial of thefts and depredations committed in the highlands of Scotland. An aſſociate, after he has got a remiſſion, ceaſes to have any intereſt in

in the event of the trial; for his pardon ſcreens him from proſecution: as therefore he lies no longer under a bias to ſwear falſely, his teſtimony is received. Neither ought the perſon againſt whom the crime or wrong was committed to be admitted as a witneſs againſt the pannel, unleſs in the ſpecial caſe, where the King's Advocate is the only proſecutor, and where, from the nature of the crime, there muſt be a *penuria teſtium*, as in rape, robbery, &c. In the crime of deforcement, the perſons employed by the meſſenger, or other officer, to atteſt the execution of the diligence, have the beſt opportunities of knowing the facts by which the deforcement may be proved; but theſe are in ſome ſort parties, violence being commonly uſed againſt them, as well as againſt the meſſenger. Nevertheleſs, as the proof of that crime would be frequently rendered impracticable if their evidence were rejected, the law conſiders the meſſenger as the alone party againſt whom the violence was intended, and upon that ſuppoſition receives the teſtimonies of thoſe who were employed by him, though they alſo ſhould happen to have been beaten by the deforcers. As indigent perſons lie under ſtronger temptations to perjury than others, it was by our ancient practice a ſufficient objection to the competency of a witneſs, both in civil and criminal cauſes, that he was not worth the King's unlaw, *i. e.* that his whole ſtock did not amount in value to ten pound Scots. This objection hath been long repelled in civil queſtions; and even in criminal, it can admit of no other proof than the witneſs's own oath, as the extent of one's free eſtate can be known only to himſelf.

98. Where a crime is to be proved by a number of circumſtances connected together, each of which makes part of the ſame criminal act, a ſingle witneſs to each circumſtance is accounted ſufficient evidence. Our ſupreme criminal court, in a proſecution againſt Mr Hogg miniſter at Caputh, extended this rule to crimes of a generic nature, which are capable of being reiterated by different criminal acts, every one of which make a ſeparate crime; for they found him guilty of ſubornation of perjury, becauſe ſeveral witneſſes concurred in depoſing, that he was guilty of that crime in general, though each of the ſpecial acts of ſuborning was proved only by a ſingle witneſs. But this doctrine may prove to be of dangerous example; for if a ſingle witneſs is to be deemed ſufficient for the proof of each ſeparate criminal act, it muſt deſtroy one of the ſtrongeſt checks againſt falſe witneſſes, viz. the comparing their teſtimonies with one another; ſee on this head an Engliſh ſtatute, 7° *Gul. III. c.* 3. § 4.

99. In occult crimes, where criminals ſtudy the greateſt privacy, and which hardly admit of a direct proof by witneſſes, as adultery, inceſt, forgery, preſumptions are ſuſtained as evidence, from the neceſſity of the caſe. But becauſe of the ſeverity of the concluſion in criminal trials, the circumſtances which conſtitute the preſumptions, ought, in the ſtyle of the doctors, to be *luce meridiana clariores*, ſo ſtrong and violent as to carry full conviction to every unprejudiced mind. Yet where a crime is to be purſued only *ad civilem effectum*, *ex. gr.* where a proceſs of adultery is brought merely for obtaining a divorce, more ſlender preſumptions will be received; ſo that the ſame evidence which would be judged ſufficient to procure a ſentence of divorce before the commiſſaries, may be caſt, ſhould the crime be afterwards tried criminally. Mackenzie, *Crim. tr. part* 2. *tit.* 25. quotes ſundry inſtances in which the court of juſticiary pronounced ſentence of death upon thieves and forgers, where the evidence was barely preſumptive; but he concludes that title, with giving his opinion, that ſuch proof ought to be admitted, to the ſingle effect of inflicting an arbitrary puniſhment, unleſs where the trial was carried on before our Scottiſh privy council, who were in ſuch extraordinary caſes fettered by no rules.

100. Witneſſes

100. Witneſſes may be received for the pannel's exculpation, though they ſhould have got no formal citation upon the criminal letters. If, *ex. gr.* a pannel, on his trial for murder, ſaw one in court who could ſwear that what he did was in ſelf-defence, forms muſt in that extraordinary emergency give way to juſtice, in order to ſave an innocent life, and the pannel may from the bar call on ſuch witneſs to make good his defence, without a previous ſummons. Formerly the depoſitions of witneſſes in criminal trials were all reduced into writing; but by the preſent practice, writing is not uſed, unleſs the libel conclude for either death or demembration againſt the pannel, 21° *Geo. II. c.* 19.

101. After all the witneſſes have been examined in court, the jury are ſhut up in a room by themſelves, where they muſt continue, excluded from all correſpondence, till their verdict be ſigned by the foreman or chancellor, and the clerk, 1587, *c.* 91.; 1672, *c.* 16. § 8. *concerning the juſtice-court*; and according to this verdict, the court pronounces ſentence, either abſolving or condemning. It is not neceſſary by the law of Scotland, that a jury ſhould be unanimous in finding a pannel guilty; the narroweſt majority operates as ſtrongly againſt the pannel as for him. Though the proper buſineſs of a jury be to inquire into the truth of facts, it is certain that in many caſes they judge in matters alſo of law or relevancy. Thus, tho' an objection againſt a witneſs ſhould be repelled by the court, the jury are under no neceſſity of laying greater ſtreſs on his teſtimony than they think juſt: and in all trials of art and part, where ſpecial facts need not be libelled, the jury, if they return a general verdict, thereby make themſelves truly judges of the relevancy, as well as of the truth of the facts depoſed upon by the witneſſes. A general verdict is that which, without deſcending to particular facts, finds in general terms, that the pannel is guilty, or not guilty; or that the libel or defences are proved, or not proved. In a ſpecial verdict, the jury find ſome ſpecial facts contained in the libel proved, without determining their effect againſt the pannel; the import of which verdict is to be afterwards conſidered and judged of by the court. Juries could not, by our old law, be called to account for finding a pannel guilty, (and this continues to be our law to this day); but they might be puniſhed for abſolving a pannel againſt clear evidence; upon this ground, that though no jury is to be preſumed capable of fixing guilt upon one who is truly innocent, from any motive, yet they may, from an ill-judged and criminal compaſſion, ſtrain a point to ſave a perſon's life or fortune, who ought to be condemned. When a jury was brought to anſwer for wilful error in abſolving a criminal, they were remitted to the knowledge of a ſecond or grand aſſize, conſiſting of twenty-five noble perſons, 1475, *c.* 64.; *i. e.* as it was explained by act of ſederunt, *June* 1. 1591, mentioned by Skene, *v. Aſſiſa*, landed gentlemen; and if found guilty, were puniſhed with infamy, and the forfeiture of moveables, and impriſonment for a year at leaſt, *Reg. Maj. l.* 1. *c.* 14. § 2. *et ſeqq.*; 1475, *c.* 64. But as no judge ought to lie under any reſtraint that may cramp his judgement, aſſizes of error were ſeldom ſummoned, even when they were authoriſed by law, *Skene, ibid.*; *Fount.* i. *p.* 143. They were by *Conv. Eſt.* 1689, *c.* 18. declared a grievance; and though no ſtatute was afterwards enacted for redreſſing it, no aſſize has been ſince that time remitted to the knowledge of another for an erroneous verdict.

102. It has been obſerved *ſupr. b.* 1. *t.* 4. § 4. that ſheriffs were in ſpecial caſes confined to a preciſe time, within which it behoved them to exerciſe their juriſdiction upon criminals, not only by pronouncing ſentence, but by carrying it into execution againſt them. On the contrary, ſentence of death was not permitted by the Roman law to be executed upon any cri-

minal till the elapſing of thirty days after pronouncing ſentence, *l.* 20. *C. De pœnis*; *l.* 13. *C. Theod. eod. tit.* that ſo condemned criminals, whoſe caſes deſerved favour, might have an opportunity of applying to the Emperor for mercy. Upon this ground, it was alſo enacted by a Britiſh ſtatute, 11° *Geo. I. c.* 26. § 10. that no ſentence of any court of judicature, ſouth of the river Forth, importing either capital or corporal puniſhment, ſhould be put to execution in leſs than thirty days; and if north of it, in leſs than forty, after ſentence pronounced. This act, in ſo far as it relates to corporal puniſhments, leſs than death or diſmembring, *ex. gr.* whipping, pillory, &c. is altered; ſo that theſe may be now inflicted by the judge eight days after the date of the ſentence, if pronounced on the ſouth ſide of the Forth, and twelve days after ſentences which are pronounced on the north of it, 3° *Geo. II. c.* 32.

103. It ſtill remains to be explained how crimes may be extinguiſhed And upon this head, *firſt*, It is a received rule, *Crimina morte extinguuntur*; crimes are extinguiſhed by the death of the criminal. From this rule, the crime of treaſon was excepted, which might be tried after the death of the traitor, not only by the Roman law, *l.* 8. *pr. C. Ad leg. Jul. maj.*; *l.* 4. § 4. *C. De hæret.* but by ours, 1540, *c.* 69. It is true, that by an unprinted act in 1542, (for which ſee *Hiſt. law-tracts, tit. Proceſs in abſence*), it was, upon a recital that the act 1540 was too general, enacted, that it ſhould have no place for the future, except againſt the heirs of ſuch as ſhould notoriouſly commit treaſon; which heirs it behoved the crown to proſecute within five years after the traitor's death. But the rule, even when it is thus limited, is not reconcileable to any rule, either of law or equity: For, *firſt*, A dead perſon can make no defence; ſo that his trial is truly a judging the cauſe upon hearing only one ſide; *2dly*, Though the traitor's guilt ſhould be notoriouſly known, he is after death carried beyond the reach of human penalties, and conſequently continues no longer an object of correction, which is one of the great purpoſes of puniſhment; and, *3dly*, If the criminal himſelf cannot be puniſhed, what can juſtify the abſurd trial of a dead traitor, with no other view than to forfeit his innocent children or heirs, contrary to that never-failing rule of equity, *Culpa tenet ſuos auctores?* By the law of England, which is now become ours in matters of treaſon, there can be no criminal trial, even of treaſon, after the death of the offender: for, as hath been obſerved *ſupr.* § 83. that law warrants no proceeding againſt ſuch as do not appear upon an accuſation of treaſon, farther than to outlaw them for contumacy; and after death there can be no contumacy.

104. *2dly*, Crimes are extinguiſhed by the criminal's undergoing the puniſhment inflicted by law, in the ſame manner that civil obligations are extinguiſhed by the debtor's payment of the debt. But though the diet againſt the pannel ſhould be deſerted through any informality in the libel, the crime ſtill ſubſiſts againſt him, and he may be tried *de novo*; for the ſame reaſon that a debtor in a civil debt continues bound, though his creditor ſhould be caſt in an action for payment, upon ſome dilatory defence, or no-proceſs. A ſentence abſolving the pannel after trial, has, without all doubt, the effect to ſecure him againſt all the penalties impoſed by law upon the crime; but it cannot be ſo properly called the extinction of a crime, as a declaration by the judge, that the perſon accuſed was never guilty of it.

105. Crimes are extinguiſhed, *3dly*, by pardons or remiſſions. A pardon may be either ſpecial; which is for the moſt part granted by the ſovereign himſelf, without the interpoſition of parliament; or general, by an act of indemnity paſſed in parliament. The King, though he may, by a

ſpecial

ſpecial pardon, ſecure the offender from public juſtice, the exerciſe of which is a right of the crown, cannot diſcharge any private intereſt ariſing to the party hurt againſt the criminal, or cut him off from his claim of damages. For this reaſon it was not competent to any one charged with a crime to plead a remiſſion, till he had given ſecurity to indemnify the private party, 1457, *c.* 74.; 1528, *c.* 7.; and in the caſe of ſlaughter, it behoved the wife or executors of the deceaſed, who were intitled to that indemnification, or, as it is called in the ſtyle of our ſtatutes, *aſſythment*, to ſubſcribe letters of ſlains, acknowledging that they had received ſatisfaction, or otherwiſe to concur in ſoliciting for the pardon, before it could be obtained, 1592, *c.* 155. N° 1. And by a poſterior act, 1593, *c.* 174. all remiſſions granted for ſlaughter, robbery, theft, oppreſſion, &c. are declared void, if granted before the party injured be ſatisfied: which act is ſo ſoftened by practice, that ſuch pardons are not conſidered as abſolutely null, but barely that they cannot be pleaded by the criminal, till ſatisfaction be made to the party wronged. Whoever therefore founds on a ſpecial remiſſion, takes guilt to himſelf, and is liable in damages to the private proſecutor, as if he had been actually tried and found guilty. It may be obſerved, that aſſythment is not due to the next of kin of a perſon ſlain, where the offender hath, by the exertion of public juſtice, ſuffered the puniſhment due to his crime; but whether it can be demanded from the King's donatary, where the criminal hath fled from juſtice, and forfeited his moveable eſtate upon a ſentence of fugitation, may be doubted *. No inſtances are to be found upon record of recovering an aſſythment in a judicial way, but in the ſpecial caſe where the offender hath obtained and founded upon a remiſſion to ſcreen himſelf from trial †.

106. Though acts of indemnity paſſed in parliament, even general ones, ſecure offenders againſt ſuch penalties as the law inflicts on them *per modum pœnæ*, *July* 1. 1713, *Stuart*; yet as the only view of the legiſlature in general indemnities is to protect them againſt trials where the concluſion is criminal, it ſeems hard to ſtretch them, ſo as to weaken or incroach upon the civil right of third parties; and for that reaſon, they ought not to ſcreen criminals from the payment of any pecuniary fine, to which the party injured is legally intitled, *Feb.* 22. 1712, *Robertſon*; nor conſequently from the demand of any claim competent to him in name of damages. But as a general indemnity is a public law not made to ſcreen this or the other perſon from puniſhment, but calculated for the common benefit of all the King's ſubjects, one may offer that plea, without taking any particular guilt on himſelf; and of courſe, the perſon founding on it, before he can be condemned in damages, muſt be tried and convicted of the facts from which the damage is ſaid to ariſe. A general indemnity, paſſed after a rebellion, ſince it ſecures the rebels themſelves from the pains and forfeitures inflicted on treaſon, where they are not ſpecially excepted, muſt by ſtronger reaſon ſecure thoſe employed in the ſervice of the government, who have

* Abernethy of Mayen having been purſued before the circuit-court for the murder of Leith of Leith-hall, was fugitated for non-compearance; and the Earl Fife obtained a gift of his ſingle and liferent eſcheat, for behoof of his wife and children. Mr Leith's widow and children brought a proceſs againſt Mr Abernethy for an aſſythment, where compearance was made for the donatar. The court ſuſtained action for an aſſythment, *Feb.* 1768, *Mrs Leith againſt Earl Fife.*

† Colonel Campbell of Kilberry was tried by a court-martial for the murder of Captain Macharg in the iſland of Martinico, and was found guilty; but there not being a ſufficient majority of voices to puniſh with death, the court adjudged him to be caſhiered. The Captain's father and brother purſued Colonel Campbell for an aſſythment. The court of ſeſſion found the defender liable to the purſuers in an aſſythment, *June* 1767, *Machargs againſt Campbell.*

committed

committed acts of violence or wrong, againſt any action at the ſuit of the party ſuffering, which has a concluſion properly criminal; but whether it ought to ſave them alſo from a civil action of damages at his ſuit, upon pretence, that irregular practices are unavoidable in times of public commotions, may well be doubted, unleſs it ſhall appear that what they did was neceſſary for the ſervice of the government *.

107. By the Engliſh law, which now governs us in matters of treaſon, a ſimple pardon granted by the King does not take off all the conſequences of the attainder or conviction: it may indeed reſtore the perſon attainted to his eſtate, and give him a capacity of acquiring other lands; but nothing can reſtore him againſt the corruption of blood, and ſo intitle him to his former rights and dignities, but an act of parliament reſtoring him againſt the forfeiture. One who is reſtored to his eſtate *per modum juſtitiæ* againſt an attainder, either on account of its injuſtice, or of ſome legal nullity in the proceedings, recovers his whole eſtate, though the King ſhould have made a grant of all or part of it over to a donatary, after the forfeiture; for the attainder itſelf being reſcinded, all ſuch grants, as conſequential rights, fall of courſe: but for the ſame reaſon, the eſtate to which he is reſtored is ſubjected to all its former debts and burdens; for by the voiding of the forfeiture, the perſon reſtored is put in the ſame condition as if there had been no attainder; and conſequently a ſon who is thus reſtored againſt his father's forfeiture, muſt, if he enter into the poſſeſſion of his father's eſtate, be, by the common rules of law, liable in the payment of his debts. On the other hand, where one is reſtored to his eſtate *per modum gratiæ*, merely in the way of favour, the attainder is preſumed to have been legal, and is accounted ſuch in law; for which reaſon, all grants of the forfeited eſtate made in conſequence thereof by the crown, in the intermediate period between the attainder and the reſtitution, muſt ſtand good; ſee 1606, *c.* 4. But an heir who is thus reſtored againſt his anceſtor's forfeiture, recovers the whole eſtate that was in the anceſtor at the time of the attainder, in ſo far as it remained in the crown not diſpoſed of to donataries, without being ſubjected to ſuch of his debts as the King was not bound to pay to the creditors; for the King, who by the attainder got the eſtate free from the payment of ſuch debts, can transfer that right entire to any donatary.

108. Leſſer injuries, which cannot be ſaid to affect the public peace, may be totally extinguiſhed, ſo as to bar any proſecution by the procurator-fiſcal, either by the party injured expreſsly forgiving them, or by his being reconciled to the offender after the injury, according to the rule, *Diſſimulatione tollitur injuria*; but where the offence is of a deeper dye, the party injured, though he may paſs from the proſecution in ſo far as his private intereſt goes, cannot preclude the King's Advocate, or procurator-fiſcal, from inſiſting *ad vindictam publicam*, 1587, *c.* 76.

109. Crimes are alſo extinguiſhed by preſcription, which operates by the bare running of time, without any act, either of the ſovereign pardoning, or of the private ſufferer forgiving. This manner of extinction is indeed cenſured by ſome writers, *firſt*, As being deſtitute of any ſupport from our ſtatutes or uſage; *2dly*, As incroaching on the right which accrues to our ſovereigns on the commiſſion of crimes; and, *3dly*, As contrary to juſtice and good policy, which ought not to ſuffer flagitious men to paſs altogether without puniſhment, merely becauſe they have not been called to account for their crimes for a certain tract of time after committing them, perhaps through the neglect or connivance of thoſe whoſe duty it was to have proſecuted them ſooner. Nevertheleſs the preſcription of crimes ſeems to be eſtabliſhed upon a ſolid foundation: for not only is the

* See *New Coll.* i. 8.

deterring

deterring of others from following wicked courſes, which is one of the ends of puniſhment, in a great degree loſt, when the penalty of the crime is inflicted ſo long after its commiſſion, that there hardly remains the leaſt memory of it; but, *2dly*, by delaying the trial for many years together, the pannel may be quite deprived of the benefit of exculpation, by the intermediate death of witneſſes who might have proved his innocence. Upon theſe grounds crimes preſcribe, both by the Roman law, *l.* 12. *C. Ad leg. Corn. de falſ.* and by the uſage of Scotland, in twenty years; ſee *Mack. Cr. part* 2. *tit.* 29.

110. In particular crimes, this vicennial preſcription is reduced and limited by our ſtatutes to a ſhorter period. No perſon can be proſecuted upon the act for wrongous impriſonment after three years, 1701, *c.* 6.; nor upon the riot-act after one year, 1° *Geo. I. c.* 5. § 8. That particular ſpecies of treaſon that is inferred from making inſtruments of coinage, is limited to ſix months, by 7° *Ann. c.* 25. § 2. The maintaining by adviſed ſpeaking, that the Pretender hath any right to the crown of theſe realms, preſcribes in three months, by 6° *Ann. c.* 7. § 3. High treaſon committed within his Majeſty's dominions ſuffers a triennial preſcription, if indictment be not found againſt the offender by a grand jury within that time, 7° *Gul. III. c.* 3. § 5. All actions brought upon any penal ſtatute, made or to be made, where the penalty is appropriated to the crown, expire in two years after committing the offence; and where the penalty goes to the crown, or other proſecutor, the proſecutor muſt ſue within one year, and the crown within two years from the end of that one, 31° *Eliſ. c.* 5. § 5.; for though this be a ſtatute enacted by the parliament of England before the Union, yet it affects Scotland, as it limits all the Britiſh ſtatutes paſſed ſince the Union, which concern this part of the united kingdom. Certain crimes are, without the aid of any ſtatute, extinguiſhed by a ſhorter preſcription than twenty years. By our old law of the Majeſty, *l.* 4. *c.* 10. the party hurt or ſuffering by the crimes of rape, robbery, or haimeſucken, was not heard after a ſilence of twenty-four hours, from a preſumption, that no perſon could be ſo grievouſly injured without immediately complaining; and it is probable, that a proſecution upon thoſe crimes, if delayed for any conſiderable time, would be caſt even at this day, or at leaſt the puniſhment reſtricted. It would ſeem, that petty riots, and other ſlighter delinquencies, ought alſo to ſuffer a ſhort preſcription, without either any expreſs forgiveneſs by the party injured, or a reconciliation; law preſuming forgiveneſs from the nature of the offence, and the ſilence of the party. The preciſe ſpace of time ſufficient for eſtabliſhing this preſumption, muſt vary according to the nature of the crime, and the circumſtances attending it, and is to be fixed at the diſcretion of the judge.