

li. *Pro publico iudicio.* And by our laws, no person had right to bring on a Criminal prosecution, and to sue for the punishment of a Crime, except the party who is injured, and the public officer to whom that Charge is committed, viz. the Kings procurator, who is the Kings Advocate, or his Deputie in that Court of his Treasury or in the Circuit courts, and the procurator Fiscal in inferior Courts. All the steps made by the private party are only to obtain a sentence of Condemnation for Damages or a full Reparation of the loss, which the Crime may have occasioned to him, which is called *Vindicta privata*, or the Civil Interest. But it is properly the business of the Kings procurator to demand that the party who is punished should be condemned to undergo the punishment which the Crime may deserve with regard to the publick, for breaching his Majesties peace and laws, and injuring his subjects, called *Vindicta publica*. Which is agreeable to the Custom of other Nations. *Ant. Mattheo de Criminibus lib. 4. §. 6. tit. 2. Cap. 4 n. 1. So. Noel Commento ad Tit. de priv. Solit. n. 2. Groenavegh ad Rubr. de priv. Solit.*

Chap. 1.
The Nature of a Crime, and what doth constitute it.

A Crime is a punishable Act of Injustice, by Commission, what is forbidden, or omitting to do, what is Commanded by Law. Which is not to be understood, as if any piece of Injustice did not deserve punishment proportionable to the Disobedience of the Law, which it transgresseth. But many Injustices, which are Crimes in Religion, such as Injuries betwixt, Envy and others of the like Nature, are not laden with Notice of by the Civil Government, if they proceed not to such outward Acts as give Disturbance to it, the Theft if not forgiven by God in this world, will not go unpunished in the life to come.

Some Crimes with us are judged by the Law of God the first foundation of our Criminal Law, as Murder and Manslaughter, against which there is no other Express Law punishing it with death. Others are punished by our own Municipal Law, Consisting of the Statutes of Parliament and ancient Customs, and the Words of Regiam Majestatem, Conform to which a Thief is liable to be punished, as the Theft, and also in many other Cases. Other Crimes are punished both by

the Divine Law, and by our own Municipal Law jointly, as Murder &c. Where our own Law is silent or defective, the Civil Law is the Rule of trying Crimes with us, as the 6. §. 4. tit. 69. Part 6. §. 5. tit. 22. Part 5. 2. M. Upon which our Criminal Law is more founded, than any other part of our Law is.

The Statutes or Acts of Parliament of Scotland may, by Ancient Historians and Universal Neglect Run in it's sleep, as they cannot be the foundation of a Criminal prosecution, because people who know not Law so much from Reading, as from Common practice, should not be Quined or Infamed by its obsolete forgotten Laws: Which therefore our Custom requires to be abrogated by Proclamation before they can be understood to bind the Lawyers. But about Disuse be a ground to Reculcate from bygone transgressions; it cannot work Impunity for the future. *M. Correccion part 1. tit. 1. §. 2.* seeing the Parliament only can Rescind their own Laws, and it seems absurd, to allow people to shake themselves loose from the tie of Laws, by frequent repetition of Offences that these Laws were made to curb. And also *Confutatioinis usus q. longavi. not. Vitis Auditoris, non. Vitis ados. fide. Valitura Momento, et. aut. rationum. Vinct. aut. legam. h. 2. §. que. pl. longa. Confutatio.* Mr. Stairs prescription Run against Acts of Parliament prohibiting Crimes punishable by the Civil Law. And the Brocard, *quod leges tacite consensu abrogantur*, l. 32. §. 1. *Pro. de. legib.* is to be understood of being by contrary Custom in force contrary Dictoria, 20 Decemb. 1634 John Lord Balmerino. *Vide Vol. 1. pag.*

Seeing all Crimes are not equal, as the Greeks falsely imagined, nor even the Crimes of the same kind: there are three things that distinguish Crimes, and render them more or less heinous and punishable in the Civil policy. *Viz. 1. of the Character or quality of each Crime: 2. of the principle or motive, which induced and moved the offender to do it, one being Engaged or Moved to Commit a Crime, or offend, either out of a premeditated Design, or in the heat or transport of passion, or thro' Impudence: 3. of the Circumstances, which are the Disposition and Condition of what attend and accompany the Action, are*