7. The Meanness of a Crime in the Commission whereof Fraud and Contrivance appears does not Influence the degree of punishment: but the Meanness of a Crime whereof the punishment is very Severe, or which it is not probable the Grand-jury would Wilfully Commit for so Small a Matter should Excuse him: because Minimum non Attendit in Dolentis Dolosis Travel Fol. 46. V. G. A Creditor taking full Annualrent some few days before the term, should not be sustained to suffer the punishment of Usury: it not being presumable that he took so Inconsiderable a Matter, out of Avarice, but rather Inadvertently, looking upon it as no breach of the law, or upon some other Funeral Account as because the Debtor was going out of the Country, and the Creditor was to adjust Accounts with him. 8. The Custom of the place is a Reason to Lessen the punishment of a Crime not Evolled against the law of God or Nature, but only against the positive law of the Country Prosp. Farin. de pœnis Tempor. Quæst. 95 n. 28 prima n. 35. 36. 37. And Sir George McKenzie in one place (Crim. part. Tit. 30 §6) tells us, that the Privy Council of Scotland ordinarly sustained the Highlanders defence upon the Custom of their Country when prosecuted for travelling with Guns and other prohibited arms: because laws by Custom go in desuetudine and non-usu in Malet Prudentem qui facit quod omnes faciunt. But Yet that Author in another place (Crim. part. Tit. 32 §2) says, that in a Criminal pursuit against John M'naughton for Carrying forbidden Arms, the defence upon the Custom of his Highland country was Repelled Vid. Infra pag. Nor was this plea sustained by the Parliament of Scotland 1661 to Excuse the Marquiss of Argyle Complyance with the Usurpers, that all the Nation did the like, and what he did that way was only to preserve himself and his Family, and was not done out of Design to oppose the Kings Interest, who Service suffered nothing by what he did: albeit it was Clear from the Scottish History, that the Men who had Merited the most of the Crown in all its Shakings were persons who got Credit by Complayance with the Side that prevailed, and by that Means had brought things about again. Which plea for the Marquiss was Rejected, in Respect it appeared from some Letters Hearty and Zealous on the Usurpers side writ by him to General Monk, that his Compliance was not Feigned or Colorded Prom-

Him. 9. ~~Compliance~~ A Crime Committed by one Accidentally drunk, who used not to be over taken with Drink, is some what Excusable in the opinion of the Doctors Prosp. Farinacius pœnis Tempor. Quæst. 93. n. 18 Leg. Carpzov. Crim. part 3. Quæst. 146 n. 32. 33 Leg. junct. n. 55. Ant. Matth. de Crimin. Prolegom. Cap. 2 n. 14 Because it is presumed he Understood not what he was doing: tho they think that an habitual Drunkard or one that Industriously Fuddled himself offending in his Drunken fit, merits no favour. But in Scotland it is not sustained as a Defence or Excuse for a Crime; that the offender was drunk when he Committed it. 10. Some will have it in the power of a Criminal Judge, to Complement a Young Woman, Especially if she be a Whore with the life of a condemned Malefactor upon her Intercession and desire to Marry him Gul. Clar. Institut. lib. 5 §5 Fine Quæst. 98 n. 6. As the Most Effectual Mean to Reclaim her from a Lewd life and save her soul. But others Contend that such an opinion is both Unwarrantable and Unreasonable Gondes. 3 Car. Rol. cap. 13. n. 37 Ant. Matth. de Crim. lib. 48 Tit. 18 cap. 5 n. 17 J. Voet. Comm. in Tit. ff. de pœnis n. 7. Seeing there is no positive law for it, and at that rate any Rogue might be Tempted to Commit Capital Crimes, when he knew of such an Easie Method of Escaping Condign punishment as the marrying a Whore who could easily be had to put in for him. Nor is there any Foundation for this in our Law: Et Erubescit Furis Consultus sine Lege Loqui.

Upon the whole, Seeing Statutes could not Express all the Qualities and Circumstances of Crimes, it must be Referred to the Conscience and Discretion of a Judge to Determine Concerning the Favourableness or odiousness of these Circumstances l. 12 ff. de Legibus. And to aggravate or Mitigate the ordinary punishment as he shall see cause; who should neither court applause for Severity or Money but pro ponso Judicio statuere prout quæque res Exposuerit l. ii ff. de pœnis, pondering Diligently and Accurately every Crime with Respect to the cause or occasion, person, place, time, quality and Event, l. i 6 ff. de pœnis, Carpzov. Crim. part 1. Quæst. 24 n. 15.

As the old Romans sometimes pardoned Criminals upon the Repeating of, tu polis et nigrum Aethiopem Lavare Theta. Pers. Satyr. 4 Vers. 13. so in England, some Capital Crimes become not Capital by the offender Getting