

heir; yet an Apparent heir and not have an heir. Nor is this privilege indulged to heritors in lands not Erected in a Barony. *McKenzie v. Drum.* part 2. *Tit. 2. 57.* And in a trial for Apprehension 16 November 1674 *Erskine of Pittodrie* and others or for any other Crime *ubi non agitur de vita aut sanguine hominis*, where the punishment is only arbitrary, and neither life nor limb; a Baron may be tried by a Common Jury.

## Book 2.

The order of Judicial proceedings against Criminals and offenders.

Before I set forth the present order of Judicial proceedings against Criminals and offenders, an account how Crimes were tried in the times of Ignorance and Superstition, may perhaps not be Ungrateful to the Reader.

In the trial of Crimes, of old, a superstitious way of appealing as it were to God himself for the Decision by battel or by fire or water obtained in Britain, France and Germany &c. It being Imagined, that God himself Interrogated, would not fail to Declare himself in favour of the Innocent. This trial was called *Ordeal* which some derive from the Saxon *Or* Great, and *Dæl* Judgement; others from *Or*, a privative particle & *Dæl* part or portion, because the person that suffered Underwent it, was Estimated either Criminal or not guilty.

*Or* or *Dæl*, or *ferri Pandantis Judicium* (with which the better sort of people were tried) was a Making the party Accused pass blind fold with his bare feet over Red hot plough shares, or take in his hand a piece of Red hot iron of one pound Weight called *Simple Ordeal*. Or two or three pound Weight called *Double or triple Ordeal* who was Concluded

guilty if burnt thereby, and Innocent if he suffered no harm. The first kind of this Ordeal Edward the Confessor made his Mother Emma to Undergo, in Vindication of her Innocency of the scandal of Incontinency with Alwyne Bishop of Winchester. And Runigund the wife of the Emperor Henry the second, upon the like Imputation, suffered purgation by holding red hot iron in her hand. Such trial by fire, perhaps was borrowed from the Super Natural preservation of Sadrach, Meshach and Abednego, who being wrongfully Condemned walked Unhurt in the midst of Nebuchadnezzar's over heated fiery furnace, tho' the Men that threw them in were slain by the flame *San. 3.22.25.* Vide *Martin Bolorio Disquis. Magic. lib. 4 cap. 4 qu. 4 sect. 3.*

Water Ordeal (with which the Minor sort of folks were tried) was either a thrusting ones hands or feet into freezing water, out of a presumption that he, if innocent, would receive no harm, or Red hot water Ordeal; or by plunging the person Accused into a pond or River (as they use to do with witches) who was held Innocent, if he sunk to the bottom without any hurt, and guilty, if he swam, which was termed *cold Ordeal*. Vide *Martin Bolorio ibid. sect. 4 qu. 5.*

The order of trial by battel, introduced by the Lombards, *Paul Voel de Duellis cap. 6* is at large Described by *Bracton* (lib. 3 cap. 21) *Stamford* (pl. Cor. lib. 3 chap. 14 & seqq.) and *Pulton* (de pace 185. b. & seqq.) and *Hawkins* (pl. Cr. lib. 2 chap. 45 & Chap. 24 § 24). It was in short thus. When one man Appalled or Accused another of felony *Or* for the Death of his father, and had no Evidence to produce against him; the Appaller or Defensant pleaded not guilty, and Declared himself ready to Defend his Innocency by his body in order to which he did cast or fling down his Gauntlet or Glove into the court. Which the plaintiff or Appellant if willing to join battel, took up and replied that he was Ready