

Arbitrary, but not the ordinary punishment: because, as the Actual Commission of a Crime is punishable per se, and in a way: so the giving scandal by a thing that looks like it, Merits some kind of punishment. Which opinion Sir George Mackenzie (Crim. part 1, tit. 13 § 5. tit. 19 § 16, part 2 tit. 28 § 4 infir) goes into as well founded, holding that presumptions are not sufficient to prove a Capital Crime, but may be sustained to infer confiscation of Moveables. Glud presumptions of a Capital Crime were sustained to infer an Arbitrary punishment only 19 March 1690 Mr John Montgomery 28 July 1711 Eupham Clark 22 March 1714 James Macab 18 & 19 August 1691 Mr of Garbol & others 28 & 5 August 1695 Emonstoun New Lou. 25 July 1692 John Bartolman. A Woman for being found lying Naked in Bed with two Brothers, was put only to an Arbitrary punishment 2 Feb. 1692 Margat Paterson. But upon ones being in Bed some time with his Niece and him that was sustained Relevant to infer the Crime of Incest and pain of Death 18 June 1705 George & Janet Robertsons. And not only are some presumptions made of actual proof of some Capital Crimes by Acts of Parliament: as when the tower of adultery is concluded, from the presumption arising from Cohabitation after it was discharged Act 74 Parl. L. M. And a woman having brought forth a Child, which found dead or Amising, is condemned as having Murdered it, upon a presumption arising from her Concealing being with Child, and not calling for help in the Birth Act 21 Sept. 2 Parl. L. M. But also other Violent and strong Concurring presumptions have been sustained to infer the Guilt of Capital Crimes, as Murder 12 April 1637 And M. math 2 June 1676 Janet Lyons 10 July 1682. William Mirrie 6 Feb. 1688 Philip Stanfield 19 August 1691 Mr of Garbol & others 21 March 1694 Sergeant Park 6 Feb. 1719 Sheward Abercromby 16 Feb. 1719 William Ross 23 Feb. 1719 Niel Corrie 14 Feb. 1725 Archibald Walker. Willfull for raising 10 August 1633 John McCrim Robbery 10 Sept.

1723 James Beaumont. The Lord of Scots found would to be forged and false upon presumptions 14 July 1682 London of Lam bertoun contra E. & Vin & Kennedy. And the person found guilty art and part Accessory and is for thereof by Decree of the said Lord was condemned by the Justices to be hanged. By the law of England Also, the light presumptions are not regarded, but a probable presumption is of some weight, and a Violent presumption from plain Circumstances, it in some cases taken for full proof, Stamp. p. l. Cor. 179 a. Bode i Just. 6. b. Hawkins p. l. Cr. l. b. 2 chap. 46 § 42.

When the pursuer produces witnesses to prove his Case, they are examined in presence of the pannel and Officers: partly that the sight of the pannel, with whom they are Confronted, may overawe and keep them from Lying; partly, that the Judges may judge by their Countenance, behaviour and Assurance, how far they deserve to be trusted; partly Again, that the vocales may upon Emergencies suggest Interrogatories. And herein we agree with the Civil law l. 12 ff de public. Judic. But this privilege of having the proof taken in presence of the pannel and Officers, may be dispensed with and kept from by the pannel in whose favour it is introduced. Glud the Lord declared in respect of a pannel Consent, that the Deposition of an Absent witness founded on by the pursuer and former by taken by them, should be received as legal proof to the Advice as if the oath had been emitted in their presence, 9 March 1671 Rutherford & Erskin contra Robertson. Yea, a Man was found guilty of a Rape and condemned to be beheaded for it upon Oaths of Witnesses examined before a shirk session, and the examined Examined judicially before the Justices Deputes and others 20 & 21 Feb. 1680 William William McRae. The witnesses are called in and sworn one by one, from a Room, wherein they were put at the sitting down of the court and kept till called, without any body Allowed to speak